Getting Started

A Structured Approach to Managing Mental Health Testimony

How do you know what you say you know? This key question—the theme of my first book, Confronting Mental Health Evidence: A Practical Guide to Reliability and Experts in Family Law—is crucial to analyzing and addressing mental health experts, their work, and their testimony. This book advances the theme. Designed as a quick-reference guide, this book helps lawyers spot, analyze, and address the array of mental health expert issues they will encounter in their cases. Each issue—set in one of four steps of the case law–based PLAN Model—is examined through the dual prism of Daubert-Frye principles (the legal perspective) and of professional psychology’s expertise and literature (the psychological perspective). This structured approach provides lawyers with tools to develop clear direct examinations, sharpen cross-examinations, and compose effective, compelling arguments to the court. In this opening chapter, we will briefly look at the problem of mental health testimony that raises our key question. Then I will present the PLAN Model as a practical framework with which to manage the problem. Finally, I will show how this book’s structure helps lawyers spot, analyze, and address issues that mental health experts present as a case unfolds.

The Problem

How do you know what you say you know? Although the question appears simple, posing it effectively can be difficult: experts don’t always respond clearly or competently, and lawyers and judges may not understand the strengths and weaknesses of mental health experts’
methods or the nuances of experts’ reasoning. Nevertheless, the question “How do you know what you say you know?” is a sharp critical-thinking tool, based in case law and professional psychology, to help lawyers analyze and challenge the work and assertions of mental health experts as a case unfolds. To begin, let’s put our question in context by exploring concerns that mental health experts present in family law cases.

Family courts often rely on information from mental health professionals (MHPs) to sort through the difficult problems that stir bitter conflicts and prevent cases from settling. As a result, MHPs influence many family court decisions. And why shouldn’t they?

MHPs bring valuable expertise to families dealing with divorce and to the courts handling their cases. As therapists, many MHPs navigate families through the emotional difficulties of divorce and help them negotiate post-divorce relationships. As court-appointed evaluators, many MHPs provide information from competent, impartial family assessments to judges who will decide what post-divorce living arrangements and conditions will serve the children’s best interests.1

MHPs also influence family courts when they offer opinions on various legal standards—for example, the child’s best interest; termination of parental rights criteria; and sexual, physical, or emotional abuse definitions in family and criminal law statutes. Here the benefits of MHPs’ influence are murkier, particularly when terminology and goals combine legal standards with psychology-related language. For example, the child’s best interest standard is a legal construct established in legislatures and refined in case law; the standard was not derived from social science research or defined by any mental health discipline. Yet “the child’s best interest” is freighted with social science concepts and general, abstract terms.2 For example, Michigan’s Child Custody Act of 1970, while identifying ten factors to consider for child custody determination, does not define “love,” “affection,” “other emotional ties,” or “moral fitness,” among other terms.3 The Uniform Marriage and Divorce Act (UMDA)4 includes the following as factors

---

for a judge to consider when determining child custody arrangements: the child’s interactions and relationships with each parent and other relevant significant persons who may significantly affect the child’s best interest, the mental and physical health of all relevant individuals, and any other criterion that may discern the child’s best interest. Even the American Psychological Association’s (APA) Guidelines for Child Custody Evaluations in Family Law Proceedings recommends that “[P]sychologists strive to base their recommendations, if any, upon the psychological best interests of the child”\(^5\); the “psychological best interests of the child,” however, remains undefined in professional psychology. If statutes, case law, and psychology’s literature do not clearly define these legal standards, how can mental health experts reliably assess those standards? Because of these concerns, some forensic psychologists debate whether mental health experts should offer opinions on legal standards. Nevertheless, courts routinely accept, if not expect, such opinions. Some of those opinions are properly based on reliable methods and reasoning. Unfortunately, other opinions are based merely on experts’ personal, unproven impressions and biases.

One divorce case, involving two MHPs, illustrates the problem. Dad and Mom were embroiled in a high-conflict dispute over the custody of their two young daughters. The court, concerned over the parents’ inability to agree on child-related issues, appointed a licensed counselor to conduct “co-parent counseling.” In the ensuing few weeks, the counselor met with the girls several times and became Mom’s individual therapist—which was not part of her court-appointed tasks—and met with Dad only once. In other words, co-parent counseling never happened. After these initial meetings, the counselor reported to the Child Protection Agency that Dad had sexually abused the girls and that, as a result, the girls’ contact with Dad should be restricted. The counselor’s testimony revealed that the girls’ statements and behaviors that she claimed signaled abuse were elicited by questionable methods unsupported by psychology’s professional literature: the counselor focused solely on the children’s vague statements without considering those statements in the larger contexts of time, motivations, and social influences. The counselor testified that it was her “job” to believe the girls. The counselor also acknowledged unfamiliarity with the professional

---

literature that offers research-informed protocols on proper interview
techniques to increase the probability of obtaining reliable statements
from young children. After a motion by the lawyers, the court removed
the counselor from the case.

The court then appointed a psychologist to evaluate the family,
clarify the abuse allegations that had engulfed the case, and make child
custody recommendations based on the best interests of the children.
Though in a different role than the dismissed counselor, the psycholo-
gist likewise did not acquit herself well: she misunderstood the extent
of her court-appointed task, she addressed the referral issues with inad-
equate evaluation methods, and she lacked sufficient knowledge of the
research and psychological literature in the evaluation of sexual abuse
allegations.

Unfortunately, the ineptitude of these MHPs dragged the case
on—increasing tensions, costs, and, more significantly, compromising
parent-child relationships.

**Addressing the Problem**
The above case shows that “How do you know what you say you know?”
is no mere slogan. It is key to addressing problems that mental health
testimony presents. *Confronting Mental Health Evidence* introduced
and developed two approaches, highlighted in this book, to address
these problems. First, lawyers should analyze mental health evidence
issues from the legal and the psychological perspectives, separately
and jointly. Second, lawyers should apply the practical, four-step, case
law–based model—the PLAN (PsychologyLaw ANalysis) Model—to
organize, critique, and use mental health materials and evidence effec-
tive in their cases.6 Let’s summarize each approach.

**The Legal and Psychological Perspectives: Separately and Jointly**
Asking, “How do you know what you say you know?” seems straight-
forward. Sometimes it is. But lawyers who adopt this approach still
struggle with experts’ answers or too readily accept experts’ answers
without further inquiry. For example, mental health experts often pep-
per their testimony with commonly used, yet abstract, psychological
terms—attachment, self-esteem, emotional trauma—that are measured

6. Zervopoulos, *supra* note 2, at 28–34 (the model’s name in *Confronting Mental
Health Evidence* was the *Frye-Daubert Analysis Model*).
by tests of varying quality. But though these terms seem to explain much about a litigant, they also convey little specific meaning—for example, what experiences qualify as emotional trauma? How is emotional trauma different than merely being upset? In addition, applying Daubert or Frye legal principles to gauge the quality, if not admissibility, of the expert testimony may further confuse the lawyer’s problem. Error rates? Testability? Peer review? General acceptance?

To cut through these problems, the “How do you know what you say you know?” challenge requires attention to two perspectives: the legal perspective and the psychological perspective. These perspectives, two distinct sides of the same evidentiary coin, are best considered separately and jointly. Separately, each perspective addresses key elements of expert testimony: the legal perspective applies guides from Daubert and Frye case law to gauge the admissibility and quality of expert testimony; the psychological perspective draws on psychology’s professional ethics, practice guidelines, and literature to test the subject matter of expert testimony. Jointly, these two perspectives—the legal as skeleton; the psychological as meat on the bones—help lawyers construct skilled direct and cross-examinations and structure clear legal arguments based on that testimony.

Failing to invoke the legal and psychological perspectives, separately and jointly, when examining mental health experts on direct or cross dilutes the effectiveness of those examinations. For example, questioning experts from just the legal perspective—merely using Daubert-related factors as a reliability checklist—results in shallow cross- or direct examinations that provide courts with little substantive psychology-related information with which to assess the testimony’s quality and admissibility. Conversely, questioning experts from just the psychological perspective results in confusing examinations, mired in minutiae of psychology data and methods, that offer courts little legal direction about how to understand experts’ testimony. In short, courts, when assessing the reliability and quality of expert testimony, do not apply legal principles in a vacuum. Rather, they apply legal principles...
(the legal perspective) to the methodology and reasoning (the psychological perspective) that support testifying experts’ opinions.9

Despite their different approaches to admitting expert evidence, Daubert- and Frye-case law illustrate the point. Rules 702 and 703 of the Federal Rules of Evidence permit experts, unlike ordinary witnesses, wide latitude to offer opinions “premised on an assumption that the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline”10 (the psychological perspective). In addition, the court is not required to admit an expert’s opinion that the expert claims is connected to existing data just because the expert says, without proof, that there is a connection11 (the legal perspective). The court must make certain that an expert “employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field”12 (the two perspectives jointly).

The PLAN (PsychologyLaw ANalysis) Model—4 Steps

In Confronting Mental Health Evidence, I developed and described a practical, four-step legal analysis model (now known as the PLAN Model) to help lawyers make sense of and apply Daubert and Frye principles to mental health testimony, even after the court has admitted the testimony into evidence.13 Specifically, the PLAN Model guides lawyers in three key tasks throughout a case: (1) to organize and analyze mental health materials and testimony; (2) to focus direct and cross-examinations of experts; (3) to sharpen legal arguments to the court. The model, drawing on both the legal and psychological perspectives of mental health expert testimony, highlights two shared features of Daubert and Frye case law: that an expert’s qualifications should be judged separately from the quality of the expert’s methods and reason-

---

9. Id.
10. Daubert, 509 U.S. at 592 (Frye depends on general acceptance of the methods in the expert’s field to gauge the admissibility of the expert’s testimony. General acceptance is also a Daubert factor that the trial judge may consider to gauge the testimony’s reliability.).
13. Zervopoulos, supra note 2, at 28–34 (the model’s name in Confronting Mental Health Evidence was the Frye-Daubert Analysis Model).
ing; and that expert testimony should have a reliable, trustworthy basis in the knowledge and experience of the expert’s discipline.\textsuperscript{14}

The best way to use the four-step PLAN Model to examine experts, their work, and their testimony is to apply each step sequentially.

\textbf{Step One}: Determine the expert’s qualifications to testify.  
\textbf{Step Two}: Determine whether the expert’s methods conform to relevant professional standards.  
\textbf{Step Three}: Evaluate the empirical and logical connections between the data arising from the expert’s methods and the expert’s conclusions.  
\textbf{Step Four}: Gauge the connection between the expert’s conclusions and the proffered expert opinion.

Problems at any one step of the model will allow lawyers to focus their critiques and direct or cross-examinations of experts on specific legal and professional psychology issues associated with that respective step. Problems at any one step will also allow lawyers to structure pointed legal arguments—a roadmap for the court—that reflect the testimony’s strengths and weaknesses.\textsuperscript{15}

Let’s summarize the PLAN Model’s four steps and preview several issues that this book addresses.

\textbf{Step One: Determine the expert’s qualifications to testify.}

Several qualifications issues impact whether the court should admit an expert’s testimony. One key issue relates to whether the expert actually has the expertise to testify on the topics about which he or she is offering opinions—a matter of evidentiary relevance.\textsuperscript{16} An expert must be qualified “by knowledge, skill, experience, training, or education.”\textsuperscript{17} This requirement raises two important questions: How strictly should any of these elements apply to admit the testimony into evidence? How

\begin{itemize}
  \item 14. \textit{Id.} at 28.
  \item 15. \textit{See In re Paoli Railroad Yard PCB Litigation}, 35 F.3d 717 (3rd Cir. 1994) (Conclusions must be supported by good grounds for each step in the analysis. Any step that renders the analysis unreliable under the \textit{Daubert} factors renders the expert’s testimony inadmissible.).
  \item 16. \textit{See Daubert}, 509 U.S. at 591.
  \item 17. Fed. R. Evid. 702.
\end{itemize}
qualified is qualified? Exploring these questions during direct examination can bolster the expert’s credibility; on cross, the questions can sharply critique the testimony.

Yet too often, lawyers slide by experts’ qualifications—if an expert has a PhD or a good reputation or is court-appointed, the expert must be qualified. Case law, interpreting Fed. R. Evid. 702, highlights the issue. The U.S. Supreme Court in Kumho Tire Co. v. Carmichael notes that “there are many different kinds of experts, and many different kinds of expertise.” A Texas Supreme Court case more sharply defines the principle: “Trial courts must ensure that those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion” (emphasis added).

Step One also addresses different aspects of an expert’s roles in a case vis-à-vis the expert’s relationships with the lawyer and with the litigant. These aspects present problems that may compromise the quality of the expert’s testimony. Should the lawyer interact differently with retained testifying versus consulting experts? What kind of relationship between the expert and the litigant (examiner/examinee? therapist/patient?) may raise legitimate questions about whether the court may trust the expert’s testimony about the litigant?

**Step Two: Determine whether the expert’s methods conform to relevant professional standards.**

It is critical to examine the methods—interviews, psychological testing, reviews of collateral records and other materials—upon which experts base their conclusions and opinions. U.S. Supreme Court case law emphasizes that “conclusions and methodology are not entirely distinct from one another.” Good data is a product of reliable methods. If the methods are inadequate, the data’s quality is, at best, compromised. Compromised data cannot support reliable expert conclusions and opinions.

---

20. Gammill, 972 S.W.2d at 719 (quoting Broders v. Heise, 924 S.W.2d 148, 152 (Tex. 1996)).
22. See Havner v. Merrell Dow Pharmaceuticals, 953 S.W.2d 06, 712 (Tex. 1997).
How should courts determine the reliability of methods experts use to reach their opinions? Case law directs courts to “. . . ensure that the opinion comports with applicable professional standards outside the courtroom . . . .”23 From the psychological perspective, applicable professional standards may be identified from three sources: the profession’s ethics and licensing codes, professional practice guidelines, protocols or generally accepted procedures in the professional literature. Merely following applicable professional standards does not ensure the reliability of resulting opinions. But not following these standards is powerful evidence that the opinion’s reasoning and supporting methodology may be invalid.24

**Step Three: Evaluate the empirical and logical connections between the data arising from the expert’s methods and the expert’s conclusions.**

Although case law does not readily distinguish experts’ conclusions from their opinions, noting the difference sharpens analyses of experts’ work and focuses direct and cross-examinations. Conclusions are psychology-based inferences that experts choose to explain their evaluation data and case facts; opinions apply those conclusions to legal standards addressed in the case. For example, a father is depressed (conclusion), based on social science-based inferences derived from psychological testing, interviews with Dad and other relevant sources, and a review of Dad’s counseling records. The seriousness of Dad’s depression may affect the expert’s opinion about what custody arrangements are in the child’s best interest (legal standard).

The strength of the inferences—in our example above, test results, interview statements, entries in the records—that make up experts’ conclusions determine how much we can trust the conclusions. Nassim Taleb’s assertion that “science lies in the rigor of the inference” nicely captures the idea.25 Joiner defines the flexible legal test: “A court may conclude that there is simply too great an analytical gap between the data (for example, interpretations of a child’s drawings) and the

23. *Gammill*, 972 S.W.2d at 725-726, quoting *Watkins v. Telsmith*, 121 F.3d 984, 991 (5th Cir. 1997).
A difficult but important Step Three task is to determine whether experts are hiding—purposely or unwittingly—wide gaps in the inferences or reasoning that they claim support their conclusions. If so, the testimony will seem stronger than it really is. Mental health experts hide reasoning deficiencies in several ways. For example, experts may allow judgment biases to infect their conclusions, may misapply or misrepresent research to support their conclusions, may rely on overly abstract but commonly accepted psychology-related terms—for example, self-esteem or emotional trauma—to describe their conclusions, or may improperly invoke general acceptance to legitimize questionable methodology and reasoning.

**Step Four: Gauge the connection between the expert’s conclusions and the proffered expert opinion.**

As noted in Step Three, conclusions differ from opinions. Opinions refer to the application of social science-based conclusions to the legal standard being addressed, such as the best interest of the child or the termination of parental rights. For example, if father’s parenting is compromised by his depression (conclusion), what living and access arrangements are in the child’s best interests (opinion)? Like conclusions, the strength of the opinion is measured by Joiner’s analytical gap test—“A court may conclude that there is simply too great an analytical gap between the data and the [conclusion or] opinion proffered.”

Step Four addresses two opinion-related concerns. First, is the expert improperly defining the legal standard by his or her personal beliefs? For instance, the best interest of the child standard is particularly susceptible to personal definitions. Second, does the expert understand reasons for debate among forensic psychologists about whether psychologists should venture beyond their conclusions and offer opin-

27. Id.
28. Id.
ions in their testimonies? The debate highlights ethical limitations of psychologists’ expert testimony.

Because experts offer their opinions in writing as well as orally, Step Four also addresses report-related issues. Such issues include the length of a report, what the report should contain, the quality and clarity of the report’s content, and the timing of the report’s submission to the court.

In sum, the two key approaches described above—(1) Analyze mental health evidence from the legal and psychological perspectives; (2) Use the PLAN Model to organize and critique mental health evidence—provide the framework with which we will analyze and address mental health expert issues and testimony in this book.

**Confronting Mental Health Evidence**

*Confronting Mental Health Evidence (CMHE)*, having introduced and developed our framework summarized above, is this book’s foundation. Some material in some of the Analyze the Issue sections of this book’s chapters are adapted and recast from CMHE. But CMHE also reviewed several important issues not addressed in this book that often complicate cases and stymie case resolution, including:

- How is domestic violence defined? How does domestic violence play out in family law cases? Can the disparate yet generally accepted domestic violence literature be reconciled? How should domestic violence allegations be managed in a case?29
- How should sexual abuse allegations of young children be assessed? What key cognitive psychology principles must be understood to address such allegations appropriately? What elements define research-based protocols for conducting forensic interviews of young children alleged to have been sexually abused?30
- Why is attending to the emotional perspective of a divorce important for understanding the arc of a case and ways to settle the case? What are some long-term effects of divorce on children? What three keys help understand the emotional aspects of problem divorces?31

30. *Id.* at 147–178.
31. *Id.* at 11–19.
Although this book does not specifically address these important issues, their treatment in CMHE offers relevant, useful information that family or criminal lawyers can apply in cases in which those issues play a part.

**Using This Book**

This book, organized as a quick-reference guide, uses the practical, four-step PLAN Model to organize specific issues related to mental health experts, their work, and their testimony as a case unfolds. Structurally, each of the PLAN Model’s four steps represents one of the book’s four main sections. Each section comprises several, concise topic-driven chapters; each chapter addresses a specific issue that lawyers often encounter during a case.

Each chapter addresses three aspects of its particular issue to help lawyers understand and manage the issue effectively:

- **Spot the Issue:** What is the mental health expert issue, and how can lawyers spot the issue in a case?
- **Analyze the Issue:** What substantive information will help lawyers analyze the issue from two aspects: relevant case law–based principles (the legal perspective); psychology’s professional literature and ethical standards (the psychological perspective)?
- **Address the Issue:** How can lawyers address the issue effectively in an expert’s deposition or court testimony and in their oral and written arguments to the court?

For a conceptual view of this book, turn back briefly to the *Table of Contents* to see how the chapters/issues fit into the four-step PLAN Model.

Mental health testimony in family law cases presents significant challenges. Courts rely on mental health experts to provide insight into difficult family issues that impact best interest of the child decisions. Yet gauging the reliability of mental health testimony is often difficult. As a result, lawyers who present or challenge mental health evidence in their cases must ensure that courts will be able to distinguish wheat from chaff—trustworthy expert testimony from unreliable assertions. Asking “How do you know what you say you know?” and skillfully applying the supporting case law and professional psychology princi-
ples in this book will help lawyers and courts deal with mental health evidence more effectively and, thus, reach better decisions for the families we serve.