

Take a Lawyer's Approach

Introduction

Taking a lawyer's approach to managing mental health experts seems self-evident: the court is your home base; by contrast, experts are invited guests, allowed to offer relevant and reliable testimony only if they are qualified under the rules of evidence. The distinction is real. But during a case, the distinction sometimes blurs—in the minds of both lawyers and experts. Many experts in their demeanor and tone, particularly court-appointed evaluators, adopt an entitled mindset about their role, forgetting that they are on the stand only because a judge or a lawyer asked them to appear. Lawyers, faced with experts' academic degrees and claims of specialized knowledge, may feel uncomfortable challenging experts' assertions—when experts describe parents with abstract psychological terms, misinterpret personality test results to confirm their views of the parents, or invoke “research” to lend authority to their recommendations. Add to the mix terms that experts often traffic in: *borderline personality disorder*, *narcissistic*

personality disorder, attachment, trauma, alienation. Lost in these weeds, lawyers may easily forget the lawyer versus expert distinction. We'll talk about how to navigate the weeds in this book.

Dealing with mental health experts starts with asserting a lawyer's approach during your interactions with them and their work. Your posture? The court is your home base; the expert is a guest. Don't forget the distinction. And don't let the expert forget it either. Your mindset? *Think like a lawyer*. This phrase, demanded from our first day in law school, should orient your approach to critiquing and controlling the expert—before and during trial.

In Part 1, we'll address three aspects of the lawyer's approach. The first two aspects focus on content: understanding the importance of "story" in a case, and applying our key question—*How do you know what you say you know?*—when critiquing experts and their work. The third aspect highlights tactics for controlling the expert throughout the case, but particularly during depositions and at trial.

Let's begin with the importance of "story" in a case.

What's Your Story?

Behind every court case is a story, with real people and real emotion and real conflict.¹

What's your story? is more than a catchy question. It's key to presenting your case effectively. Your case has a story or theme, the narrative you choose to frame your client's problems and proposed solutions to those problems. How you develop and tell your story is crucial to your success at trial. And just like other evidence that you present, your examinations of experts, on cross or direct, should seek to develop your story.

But people's stories are not simple. They often incorporate or nest within other stories. For example, as a family has a story, often extending several generations, each family member has a personal story within the broader family narrative, one that may be absorbed in others' stories.

This idea plays out in a family law case where "actors" in the litigation drama will create a story of the case from their own points of view. Opposing counsel will craft a story to organize their impressions and

1. JILL BARTON, *SO ORDERED! THE WRITER'S GUIDE FOR ASPIRING JUDGES, JUDICIAL CLERKS, AND INTERNS* 130 (2017).

the evidence. Experts will as well. Most important, the judge will also frame the evidence to develop a story of the case with which to consider the issues. Your concerns? Will you present your story clearly—intentionally and organized—or thoughtlessly, merely stringing together seemingly compelling facts, trusting that the judge or jury will connect the dots? Will the court find your story sufficiently compelling when it decides the case?

How might you structure a compelling case “story” that will help the judge or jury understand your client’s assertions, experiences, and hopes? A story uses events to develop a narrative in which the main character must deal with a conflict or solve a problem. Use the same approach as you develop your case. Family law litigation centers on conflict. Your client, your story’s main character, is in court because the family’s conflict, evolved over time, needs a resolution. When and how did the conflict begin? How did it build? Breaking point? Divorce filing? Subsequent issues? How to resolve the conflict? Your case story progresses through these “plot points,” each of which offers opportunities to create scenes through witness testimony and other evidence that will flesh out the narrative.

A story has a “narrative arc” from beginning to middle to end. But like a writer, you have the liberty—as a lawyer, an obligation—to organize a case story in ways most favorable to your client. Your story may start at the beginning, the middle, or the end, as long as you touch each point in the arc. For example, one lawyer decided to begin her case story from the middle—the “breaking point,” detailing the troubling events just before her client decided to file for divorce. Then she went back in time to relate how her client’s concerns began and developed to the breaking point. Finally, she stressed the significant problems since the breaking point and divorce filing, noting how her client’s spouse’s ongoing disruptive behaviors and uncooperative co-parenting style hadn’t changed, even under the litigation’s microscope. Instead of merely stringing facts together, this lawyer creatively organized her case facts into a case story that helped the court to understand her client and his struggles and concerns.

Your case story should also guide your examinations of mental health experts. Consider cross- and direct-exam questions as opportunities to highlight where the expert’s report statements or testimony support or inaccurately reflect your case story. Don’t just focus on cherry-picked statements from the report or on arcane arguments about

the meanings of personality test scale elevations. Think about stories and themes—the bigger picture, rather than “gotcha” moments that will fade soon after the expert leaves the stand.

So what should you focus on with experts? Keep in mind that experts tell their own story of the case through their reports and testimony. Mathematician Jordan Ellenberg captures this notion nicely: “We are presented with observations and asked to build theories.”² Ellenberg’s “theories” are experts’ stories: how experts organize and interpret their data (“observations”) becomes their story (“theories”) of the family. Many experts, taught to be “*Daubert* savvy,” would quarrel with this notion, protesting that characterizing their opinions as “stories” improperly depicts their testimony as unscientific, not based in research and professional literature.

Your challenge? Examine how an expert’s story of the case holds up and how it taps into your case story. Drill down. How did the expert develop the information that was considered (methods reliability)? What was the quality of the reasoning that the expert used to tie her data to the story she built (reasoning reliability)?

How experts develop their stories may reveal fault lines in several places, including an expert’s qualifications; an expert’s approach and methodology—interviews, testing, collateral sources reviews; an expert’s reasoning from data considered; an expert’s opinions and recommendations. On cross, highlight features of the expert’s story that you can incorporate into your case story, and then drill deep into the fault lines to show how the rest of the expert’s story falls apart. On direct, adopt elements of the expert’s story that fit your case story, and then highlight how the expert successfully managed the fault lines while developing her story, looking also to soften weaknesses of the expert’s story that opposing counsel may exploit. Throughout this book, we’ll flesh out these ideas.

A final point. To examine an expert’s story effectively, you must understand the story’s backdrop and the professional writings that support the story—time-honored advice for examining experts at depositions or at trial. Domestic violence? Parental alienation? Specific child problems (e.g., ADHD, learning differences, autism spectrum) that call for more sensitive parenting? With certain case facts, experts may use

2. JORDAN ELLENBERG, *HOW NOT TO BE WRONG: THE POWER OF MATHEMATICAL THINKING* 109 (2014).

any of these backdrops to frame the various data they consider. Experts' stories may be strengthened or weakened by whether they properly use the backdrop that they choose. If you don't know the subject matter of the expert's testimony and the underlying issues that support the testimony, you'll fail to control the examination. Retain a consulting expert to advise you if you can't learn the basics on your own.

In sum, adopting the idea of "story" provides you the flexibility to creatively present your case, offers you a window into how opposing counsel frames her case, and gives you a framework to examine experts—all toward the goal of shaping the story of the case that you want the judge to develop. Remember, we naturally use stories to organize life's events. The issues at trial are whether you can intentionally develop your story and present it effectively to the court. And regarding experts, how you can critique their story of the family while adopting elements that fit your case story.

Let's turn now to the second of three aspects of the lawyer's approach to examining mental health experts: *your key question*.