

# In The Wake of *Ake*: The Ethics of Expert Testimony in an Advocate's World

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The decision of the U.S. Supreme Court in *Ake v. Oklahoma* redefined the role of psychiatrists as experts in criminal cases. In addition to the expert's serving as evaluator and witness, the Court stressed the importance of the defense having a psychiatrist available to act as a consultant in the preparation and presentation of its case. This broader conception of the expert's role has raised ethical questions among psychiatrists, many of whom are concerned that their impartiality may be compromised. A careful analysis of *Ake*, however, demonstrates that substantial differences remain between the roles of consultant and advocate. Subtle pressures on impartial functioning will be increased, but they will not differ in kind from those operative before the decision. Several ethical issues related to the consultative role are considered and possible means of dealing with them addressed.

The front pages of newspapers and magazines once again trumpeted a "battle of the experts." In a case that many saw as potentially precedent setting, two distinguished expert witnesses, each a well-respected scholar, disagreed in public over the evidence that ought to be considered in the case and the conclusions that could be drawn. One witness testified that the other was "ignorant" of her field, whereas the second pointed to contradictions between her counterpart's testimony and previously published work. Some colleagues attacked one expert for allowing her biases to influence her conclusions, whereas a much larger

and more vocal group of colleagues condemned the other witness for ignoring the social implications of her testimony, even if she believed she was testifying to the truth.

Was this another embarrassing episode of psychiatrists confronting each other on the witness stand, revealing the gaps in our knowledge of mental illness and the uncertainties of our field? Actually, this recent case involved a highly publicized courtroom dispute between two feminist historians over charges that a major corporation's promotion practices, rather than broader social forces, had limited advancement of women employees within the corporation's ranks.<sup>1</sup>

If the description of the controversy raised by the two expert witnesses in this case sounds uncomfortably familiar to forensic psychiatrists, that should be

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taken less as a reflection on the field than as an indication of the problems that are likely to arise whenever experts of any sort—even forensic historians—testify in court. In particular, this case, like so many others, provoked questions about the proper model for expert testimony: Are witnesses objective reporters of facts, regardless of the implications of their conclusions, or should they be more conscious of their potential role as advocates, allowing their participation to be influenced by the effect they are likely to have on the outcome of the case and on society as a whole?

For psychiatrists, this and related questions have been reevoked by the recent decision of the U.S. Supreme Court in *Ake v. Oklahoma*.<sup>2</sup> In addressing the role of psychiatrists as expert witnesses in criminal cases, the court to a considerable extent redefined the expert's role, creating concern among forensic clinicians over their ethical responsibilities. This report will review the *Ake* decision, explore its theoretical and practical implications, and consider its likely impact on criminal forensic practice.

### The Decision in *Ake*

Glen Burton Ake, charged with the murder of an Oklahoma couple, had planned to rely at his trial on a defense of not guilty by reason of insanity. Because Ake was indigent, his attorney was forced to ask the Oklahoma trial court to authorize the funds for a psychiatric evaluation of his mental state at the time of the offense. Oklahoma, however, was one of only 10 states at the time without explicit provision for psychiatric evalu-

ation of indigent defendants. Despite an initial finding of incompetency to stand trial, a history of psychiatric treatment subsequent to the offense, and a diagnosis of chronic paranoid schizophrenia, Ake's request was denied. After his conviction and sentence of death, Ake appealed the court's finding on the basis, in principle part, that this denial of a psychiatric evaluation had stripped him of the ability to mount an effective defense.

The Oklahoma Court of Criminal Appeals rejected Ake's argument, which was grounded in the principles of due process, but at the U.S. Supreme Court, eight justices proved sympathetic to his contention; seven of them joined Justice Marshall's opinion for the court. Marshall held that the assistance of a psychiatrist was so essential to the presentation of a defense of insanity that, without psychiatric assistance, the defendant was deprived of a fair opportunity to present his defense. Marshall described those crucial aspects of the psychiatrist's role in this way: "By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that states rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so."

Had Justice Marshall stopped here, the impact of the ruling in *Ake* might

have been limited only to those few states that had previously failed to make provision for the psychiatric evaluation of indigents. They would have adopted, in response, some procedures for evaluations to be performed, perhaps by state-employed psychiatrists or other experts who would render a report for use by both the prosecution and the defense. For reasons that are difficult to ascertain from the record, however, and were certainly not compelled by the facts of the case, Justice Marshall went a good deal further.

Not only did Justice Marshall recognize the need for a psychiatrist "to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, [and] to present testimony," but he also felt "inexorably" led to the conclusion that a psychiatrist was essential "to assist in preparing the cross-examination of a State's psychiatric witnesses. . . ." More broadly, he wrote, when sanity is at issue, "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Thus, the defendant must be given access not simply to a psychiatric evaluation but to a psychiatrist who can act, in effect, as a consultant to the defense team.

### Models of the Expert's Role

To understand the implications of the *Ake* decision, one must consider the competing views of the role of psychiatric experts (and, of course, of expert witnesses in general). Many psychiatrists

and other commentators, particularly those who tend to look askance on experts' participation in court proceedings, favor appointment of expert witnesses by the court to provide an "impartial" assessment of the question at hand.<sup>3</sup> This removes the expert, in their eyes, from the unseemly situation of being employed by one of the parties and thus being susceptible to becoming an advocate for the position of that side. Although accepting cross-examination as inevitable, many of the adherents to this approach favor the appointment of only a single expert, so that the "battle of the experts," which casts the professions in disrepute, can be avoided.

There is little question that the decision in *Ake* rejects this approach, at least in the criminal setting. Implicit in Justice Marshall's opinion is the belief that, unless an expert is assigned specifically to the defense and is therefore charged with developing evidence that might support the defendant's position, the likelihood is that possible defenses will be inadequately explored. Marshall also pointed to the frequent differences of opinion among psychiatric experts as indicative of the uncertainties in the mental health field leading to the need to subject experts' opinions to confrontation with differing points of view. Although the "impartial expert" may survive in situations requiring evaluation of competency to stand trial and may even flourish in civil cases, such as those involving child custody disputes,<sup>4</sup> the death knell has been sounded for this approach at the criminal trial.

A second conceptualization of the role of the psychiatric expert also falls victim

to *Ake*. Even many psychiatrists who accept the necessity for experts to be recruited by or appointed on behalf of one party or the other in the criminal setting see their role as embodying strictly objective functions.<sup>5</sup> That is, although they are working on behalf of one party and therefore sensitive to the need to explore all possibilities that might be of assistance to that side, they envision their role as limited to the development and assessment of evidence and the formulation of an opinion. The opinion might be favorable or unfavorable to "their side" of the case, the attorney can "take it or leave it," as the client's interests direct, but the expert's obligation goes no further.

The issues raised by *Ake*, as Justice Rehnquist noted in his dissent, could have been settled by adopting this point of view. "Even if I were to agree with the Court that some right to a state-appointed psychiatrist should be recognized here," Rehnquist wrote, "I would not grant the broad right to 'access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense*' [emphasis in the original]. A psychiatrist is not an attorney, whose job it is to advocate . . . all the defendant should be entitled to is one competent opinion—whatever the witness' conclusion—from a psychiatrist who acts independently of the prosecutor's office . . . I see no reason why the defendant should be entitled to an opposing view, or to a 'defense' advocate."

The majority of justices, however, felt that this narrower conceptualization of the expert's functions was inadequate to

protect defendants' rights. Unfortunately, there is little analysis in the majority opinion to explicate this point of view and no attention whatever to consideration of the possible advantages and disadvantages of the varying approaches. Rather, Justice Marshall blurred the issues involved in selecting between the "objective expert" and the "consultant" models, resting his support for the latter primarily on the basis that assistance with cross-examination is of equal importance to the expert's more objective functions.

Much as one might regret the lack of analysis that accompanied the Court's endorsement of the consultant model, there is little question that the broader role for experts is now constitutionally mandated. All defendants in cases in which the insanity defense is legitimately at issue (Chief Justice Burger's concurrence suggests that the impact of *Ake* should be limited to defendants in capital cases—where *Ake* also requires that expert assistance be afforded at the sentencing stage—but the majority opinion seems to support its application to all criminal trials) who cannot afford to pay for experts of their own choosing are now entitled to the appointment of an expert who will participate in their examination, formulation of defense strategy, preparation for cross-examination, and, if called on to do so, will testify at their trial.

### Advocacy and Impartiality

Forensic psychiatrists have expressed two related sets of concerns about the impact of *Ake* on their daily practice. Does *Ake* mean that psychiatric experts

must now function as advocates for the defense? And, even if that question is answered in the negative, does *Ake* undermine the impartiality of the psychiatric expert?

The first question, whether *Ake* places experts in the role of advocates for the defense (and thus presumably casts prosecution experts as advocates for their side, as well), was prefigured by Justice Rehnquist's dissent in the case. "I see no reason," Rehnquist wrote, in characterizing the majority opinion, "why the defendant should be entitled to . . . a 'defense' advocate." Yet, there is considerable doubt whether *Ake* can legitimately be read to require such an outcome.

If by "advocate" Justice Rehnquist meant an expert who felt compelled to support the defense position, to "advocate" it before the court—as his phrase "A psychiatrist is not an attorney, whose job it is to advocate" suggests—this seems to be a misreading of the majority opinion. The Court, in fact, offered quite a different picture of the experts' role *on the witness stand*: "By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them." Thus, the majority opinion envisions expert testimony in some form of the traditional objective role that most mental health professionals embrace,<sup>6-8</sup> involving an accurate presentation of findings and conclusions as

well as the analytic basis for those conclusions. There is no suggestion—indeed it is almost inconceivable that there would be—that the witness is obliged to present data or conclusions that are biased in favor of the defendant's position. Some witnesses may choose to do so anyway, of course, just as they always have, but Justice Rehnquist's fears that such an occurrence would inevitably flow from the decision in *Ake* appear to be misplaced at least as far as testimony is concerned.

What then of the other activities described in the majority opinion: pretrial consultation on strategy and assistance before or during trial with cross-examination? Do these obligate the expert to assume an advocacy role? The post-*Ake* expert is certainly expected to do more than simply fulfill the objective functions outlined above, but these new functions need not constitute advocacy—at least not in the usual sense of the single-minded pursuit of a particular outcome. Although one cannot rule out the possibility that a psychiatrist will so identify with the defendant's case as to embrace an advocate's identity, *Ake's* requirements are quite different. *Ake* calls for the psychiatric expert to function as a *consultant*, not as an advocate. The functions described by Justice Marshall—"to help determine whether the insanity defense is viable . . . and to assist in preparing the cross-examination of a state's psychiatric witnesses"—do not, as will be discussed in more detail below, require a single-minded dedication to the defendant's cause; rather, they call for the expert to impart that information of which the defense attorney should be

aware in preparing and presenting his case. Just as is true of expert testimony in court, the information communicated by the psychiatrist will sometimes favor the defendant's case and sometimes be adverse to it. But the expert consultant—not advocate—offers it to the attorney for whatever use the latter chooses to make of it. In sum, therefore, I believe the fear that *Ake* will transform psychiatrists who testify at criminal trials into advocates for the defense is overblown.

Even short of the expert becoming an advocate, however, is *Ake* likely to lead to more subtle effects on the impartiality—that is, the dedication to seeking truth, regardless of its impact on the case—of the psychiatrist? Will fulfilling the role of consultant, sharing strategy sessions with the defense team, and plotting avenues for cross-examination not induce in the expert so strong, if unconscious, an identification with the defense position that some impact on the expert's testimony is inevitable? The answer is less clear here, although there are reasons to believe that if *Ake* has an effect of this sort it is unlikely to be a substantial one. Unfortunately, the basis for that conclusion rests on the already significant pressures on experts' impartiality, against which *Ake's* contribution must be measured.

Judges<sup>9</sup> and other observers of the forensic scene<sup>10</sup> have long lamented the effect of the personal biases of psychiatrists on the opinions they provide in court. Regardless of the model under which expert testimony is structured, experts will bring to court deeply held beliefs about the nature of human behav-

ior, and especially in criminal cases, about the role of punishment in modern society. It has been suggested that psychiatrists with a psychodynamic orientation are inherently more sympathetic to the position of the defense in criminal cases<sup>11</sup> and of the plaintiffs in civil damage cases,<sup>12</sup> whereas the opposite is true for experts with a biologic approach. Some experts are well aware of the influence of their beliefs on the opinions they reach; others deny that they are being anything but completely objective. Responses to an awareness of such effects range from trying as best as possible to examine one's conclusions to minimize the effect of preexisting biases, to allowing one's prejudices free rein and only accepting assignments (e.g., testifying for the defense in capital cases) in which they can be expressed. It is difficult to question the existence of these effects; the most important variable governing the relative objectivity of testimony is how successful mental health professionals are in dealing with them.

In addition to the ubiquitous influence of preexisting biases, expert testimony (in all but the "court-appointed expert" model) is inevitably affected by the delicate courtship that goes on between experts and the attorneys with whom they work. Experienced attorneys begin every encounter with a new expert, whether by letter, by telephone, or in person, with an effort to present the case from the point of view most favorable to their client. This initial contact has a tendency to imprint in the expert's mind a particular approach to the case. Of course, experienced forensic clinicians are aware of this technique and train

themselves to a certain degree of skepticism when dealing with new cases. Nonetheless, at the very least, this introduction provides a perspective that must be overcome if the expert is to reach a conclusion adverse to the attorney with whom he works.

This subtle process of identification continues as a personal relationship builds between the expert and the attorney or team of attorneys. Frequently, expert and attorney come to like each other; sometimes they become friends. These interpersonal bonds, naturally enough, lead the expert to want to please the people with whom he is working and whom he has come to like. That is not to say that these tendencies cannot be overcome; they frequently are. However, it does indicate considerable pressure on the expert to focus unconsciously on those aspects of the case most favorable to "his side" and perhaps even to present favorable conclusions more strongly and with fewer qualifications than he or she ordinarily would. I believe these phenomena account, in part, for the frequency with which highly respected experts arrive at conclusions favorable to the side for which they are working or to which they have been assigned.<sup>12</sup>

What does all this have to do with the impact of *Ake* on the impartiality of forensic clinicians? Given the existence of such substantial pressures already, the additional contribution of *Ake*, although real, is likely to be small. Throwing experts and attorneys into more closely collaborative relationships that did not previously exist may, in fact, strengthen those subtle interpersonal influences

that tend to warp clinicians' findings. However, the major issue will continue to be not whether such pressures exist, but how effectively forensic clinicians can learn to deal with them.

### Living in the Post-*Ake* World

Although the forensic world after *Ake* is not necessarily one in which clinicians become advocates or see their impartiality affected in more subtle ways, certainly some accommodations to *Ake*'s requirements will have to be made. The following reflections, based on an approach to the ethics of forensic practice that I have outlined elsewhere,<sup>6</sup> may help to stimulate that process.

The basic ground rule that forensic experts must establish with the attorneys with whom they work—consistent with current thinking on the ethics of forensic practice—is that, although they are available to provide information that may be of assistance to the defense, they do not share an identity of interests with the attorney. Whereas the attorney owes loyalty almost exclusively to his client (there are limits, of course, as attorneys cannot, for example, lie in pursuit of their clients' interests), the forensic expert provides assistance within the constraints of an overriding ethical framework. Efforts to define that framework are at an unfortunately early stage, given the substantial period of time that psychiatrists have participated in courtroom proceedings. Yet, one can outline some aspects of a rough consensus on certain issues.

The terms chosen by various commentators differ, but there appears to be general agreement that the psychiatrist's

participation (particularly testimony) is subject to being measured against an external standard other than its effectiveness in winning the case for the side that has retained the expert.<sup>6-8</sup> I<sup>6</sup> have talked in the past about a standard of truthfulness: "The primary task of the psychiatrist in the courtroom . . . is to present the truth, insofar as that goal can be approached, from both a subjective and an objective point of view" (p. 225). Loren Roth<sup>8</sup> speaks of a standard of scientific validity; Andrew Watson<sup>7</sup> writes of adhering to the standards of "good clinical practice," which involves application of the state of the art in psychiatry.

The similarity among all of these approaches is the recognition of a discrete body of knowledge generated by psychiatry that forms the basis on which testimony and other forms of forensic participation must rest. Forensic experts cannot legitimately exceed the limits of existing knowledge, whether by ignoring them in favor of their own idiosyncratic approaches or by distorting them to advance a point of view favorable to the side that has retained them. Certainly, this position needs to be communicated early in the course of a relationship with an attorney or defense team, particularly if there appears to be some confusion about the role of the expert. The words may vary, but the attitude to be conveyed is, "I am here to be of help by sharing my expertise with you, but I cannot go beyond the bounds of that expertise, even if doing so might be useful to your case." This is, in other words, the posture of an outside consultant, not of a member of the team.

In the world according to *Ake*, the differences with preexisting practice will begin to arise after the expert has become familiar with the case and conducted an initial evaluation of the defendant. At this point, the attorney may want to begin to explore strategic options, for example, whether to plead not guilty by reason of insanity, to plead (where permitted) diminished capacity, or (particularly in capital cases) to reserve the expert's testimony for the sentencing phase. Questions may arise as to the likelihood of success in challenging an existing confession on grounds of coercion or arguing the validity of the defendant's waiver of rights (was it knowing and voluntary?) at some earlier point in the investigation process. The decisions as to these matters, to be sure, are in the attorney's hands, but the input of the expert may be useful in helping the attorney to assess the reasonableness of a given approach.

The crucial task for the expert at this stage is to make clear to the attorney the difference between "brainstorming" or speculation and the kind of opinion that the expert would be willing to support on the stand. It is legitimate to "think aloud" with the defense team as to possibilities that might exist if other data, not yet obtained, prove to be confirmatory. Experts can play out with attorneys hypothetical lines of questioning, indicating the kinds of data they might need to support answers favorable to the defense. They can even share their gut feelings about what they believe to be true but lack the data to confirm. But the forensic clinician who fails to draw a clear line between that which he or she



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believes to be true (or under given conditions would believe to be true) and therefore can support on the stand, and freewheeling speculation that must remain in the attorney's consulting room runs the risk of misleading the attorney as to the chances of a particular strategy and the expert's own willingness to mold testimony to the needs of the defense (and thus as to the distinction between the roles of consultant and team member).

In addition to consulting about overall strategic issues, the psychiatric expert may also be asked to provide information that would assist in developing plans for cross-examination of the witnesses for the other side. This may involve reviewing written reports, when they are available, or anticipating the testimony that is likely to be presented. Pointing out flaws in the reasoning of experts who will be testifying for the opposing side is, in many respects, merely the other side of the coin from preparing one's own testimony: In order to be able to defend a given point of view, an expert witness must be able to conceptualize why competing viewpoints are incorrect.

Nonetheless, there are three concerns that may make this process problematic. First, the expert must beware of offering suggestions for cross-examination based on information that he or she believes to be untrue but that might be difficult for an opposing expert to refute. For example, the forensic expert may be aware of a set of studies reporting data that purportedly challenge an argument being offered by the witness for the opposing side. The studies, however, are

sufficiently flawed in their methods and/or data analysis that the expert himself does not believe the conclusions to be accurate. Of course, an expert guided by the rules of providing testimony that is both subjectively (i.e., as far as the expert can tell) and objectively (i.e., as generally understood by the profession) accurate would not offer testimony that relied on these data. As a corollary of that rule, the expert should not suggest to an attorney that the data might be raised in cross-examination of an expert for the other party in the hope that the opposing side's expert will be unaware of the defects in the data and thus that expert's testimony will be discredited. Presenting data of this sort during cross-examination might be effective as a technique for advancing the interests of a particular side, but it would not be acceptable in the testimony of a psychiatrist because it subordinates a devotion to external standards of truth to the demands of advocacy.

The second issue that arises in the context of preparing for cross-examination concerns the provision of information that may lead to *ad hominem* attacks on the expert for the opposing side. Attorneys are often interested in the reputations of opposing experts. Insofar as their questions relate to the genuine qualifications of the expert to offer testimony about the issue at hand, that is, about the accuracy of the characterization of the expertise of the opposing witness, it would seem legitimate for forensic experts to comment on general qualifications. The absence of training in a particular area (e.g., the interpretation of neuropsychologic tests) or of

experience with the situation under discussion (e.g., the voluntariness of a confession) may constitute a realistic limitation on the ability of an expert to draw valid conclusions. Similar concerns are routinely raised in the peer review that accompanies grant submissions or the appraisal of papers submitted for publication in refereed journals. As long as the concerns are genuine and not frivolous or self-serving (e.g., suggesting that a capable, experienced expert be challenged on the basis that he or she is not certified by a particular forensic board) there should be no difficulty in sharing them with an attorney. On the other hand, information about a witness' private life ("He's going through a divorce and might be little shaky now") or professional reputation unrelated to the opinion being offered in the current case ("I understand he's a hired gun for sale to the highest bidder") does not serve to advance the interests of ascertaining truth in the courtroom. An aggressive attorney might well like to know such information and might find it of use in attacking an opposing witness, but it should not be the role of the forensic expert to provide it.

Finally, with regard to assistance with cross-examination, is the question of whether the psychiatric expert should participate *at trial* in preparing the questions for cross-examination. This is a more difficult issue. Some experts sit at the table with the defense team or immediately behind it so they can confer verbally or pass notes to the attorney with whom they are working as opposing testimony is being provided. As long as the information provided is subjectively

and objectively truthful (or meets one of the similar standards discussed above), one cannot object to the substance of the assistance being offered. There is some question, however, as to whether sitting with the defense (or prosecution) team at trial does not evoke in the expert so close an identity with the interests of the team as to affect the expert's ability to testify objectively in the same case. Concerns about this are based both on the team identity that is likely to evolve ("*We can beat those guys*") and about the effects of being publicly identified as part of a particular team. One wonders whether someone sitting with the defense team at trial can easily shed that identification to take his or her place on the stand as an impartial witness. It would seem preferable, if assistance of this sort is needed, for an expert to be selected for this task who will not be called upon to testify at trial. On the other hand, the reality of available resources, with *Ake* requiring the appointment of only a single expert, may preclude this approach. If so, the expert will need to be doubly aware of the likely biasing effects of this sort of participation at trial.

### Conclusion

The decision of the U.S. Supreme Court in *Ake* has settled, for practical purposes, many of the disputes about the model to be adopted for expert participation in criminal trials. Its effects on the availability of psychiatric experts to indigent defendants are likely to be substantial in states in which such a right had not previously been granted. Even in states that had offered psychiatric evaluations to criminal defendants, *Ake*

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will change the scope of the services offered, expanding them beyond evaluation and testimony to include strategic consultation and assistance with preparations for trial.

From the perspective of forensic psychiatrists, the additional roles prescribed by *Ake* complicate the process of striving for objectivity and impartiality, but not dramatically so. The same principles that have governed the ethics of forensic practice to date—a recognition that advocacy must be subordinated to objective standards of truth, science, or good clinical practice—continue to provide guidance through the maze of problems that may occur. *Ake* should not materially interfere with the ethical practice of forensic psychiatry.

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