

# The Roles of Behavioral Health Professionals in Class Action Litigation

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Class action suits frequently have been used as a strategy for improving the quality of mental health care. Psychiatrists, psychologists, and professionals from related disciplines have been involved in these suits in different roles. This article presents and discusses case examples of these roles, which include the expert witness, court-appointed expert, consulting expert, monitor, special master, receiver, advocate, *amicus curiae*, plaintiff, and defendant. The authors caution against assuming dual roles and argue that professionals, before beginning to participate in this complex arena, should clarify their functional responsibilities, the legal basis of their involvement, and the ethics principles that will guide their actions.

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Many different strategies have been used to improve the quality of mental health care, including conducting research, creating model demonstration programs, educating the public about mental illness and its treatment, and engaging in advocacy for individual clients and groups of clients.<sup>1</sup> However, these strategies are sometimes considered inadequate, and thus, on occasion, those seeking to improve care in a particular treatment facility or service system have turned to the courts and sought judicial mandates for change.<sup>2–4</sup> The class action suit is the most visible form of such litigation.

A class action suit is a complex, lengthy, adversarial, and expensive approach to improving the care of persons with mental illness. Such suits have, therefore, usually been undertaken only when other routes of change have been exhausted. Nonetheless, it is conservatively estimated that up to a quarter million individuals with mental disorders are represented in such suits each year.<sup>5</sup> Thus, class action suits must be considered an important and highly visible vehicle for attempting to effect change in mental health care.

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No matter who initiates such suits, behavioral health professionals inevitably become involved, assuming a variety of roles.<sup>6</sup>

The purpose of this article is to explicate the key roles that psychiatrists, psychologists, and members of related disciplines have assumed in these class actions. This analysis of roles is of value for two reasons. First, class action litigation has significantly influenced mental health service development in many states during the past several decades. Second, there is scant literature describing either the opportunities for constructive participation in these actions or the potential pitfalls and complexities of engaging in this work. In our opinion, if behavioral health professionals are to participate in these suits meaningfully, they must conceptualize more sharply their roles and activities in such litigation.

To provide a context for the discussion, we begin with a brief overview of class action litigation. We then outline and discuss the various roles of behavioral health professionals and provide case examples. We end with a series of conclusions and recommendations regarding the involvement of professionals in this arena.

## An Overview of Class Action Litigation

Class action litigation was designed, in large part, to provide a practical legal strategy for persons who individually would have insufficient

strength to pursue their causes in court.<sup>7</sup> Under the Federal Rules of Civil Procedure, one or more individuals may sue as “representatives” of a larger group or a “class” if the class is so large that involving all individuals is impractical; there are questions of law or fact common to all members of the class; the claims being made regarding injury or harm to representatives of the class are typical of the claims for all members; and these representatives demonstrate adequate resources and expertise to represent the class fairly.<sup>8</sup>

Much of the class action litigation regarding behavioral health services has focused on individuals who are relatively powerless by virtue of being hospitalized<sup>9</sup> or incarcerated.<sup>10</sup> Suits regarding the care of those outside of hospitals and prisons have drawn heavily on the legal principles, case law, and legislation resulting from litigation regarding institutionalized persons.

Each class action suit brought on behalf of individuals with mental illness has alleged a violation of the group’s constitutional, statutory, or regulatory rights, either at a federal or state level. These suits have challenged the acts or omissions of those responsible for funding, managing, or delivering services. The alleged acts include abuse, unnecessary restriction or restraint, and forced treatment. The alleged omissions involve the failure to provide adequate or appropriate care. These are, in fact, the major types of complaints that are lodged against mental health facilities or systems, as cataloged by the federally funded protection and advocacy programs operated in each state.<sup>5</sup>

In general, class action litigation goes through four stages. There is a trigger phase in which the circumstances giving rise to a suit occur; a liability phase in which the nature and extent to which rights have been violated is determined; a remedy phase in which solutions are negotiated and codified; and a postdecree phase in which the remedies are implemented and their effect is evaluated.<sup>11,12</sup> A class action suit on behalf of individuals with mental illness may be unsuccessful if the court fails to certify the group as a class or if the suit is lost on the merits of the case. Alternatively, the plaintiffs may prevail by achieving a court decree or a negotiated settlement, such as a consent decree. Each type of decree specifies the remedy for the alleged acts and omissions.

## The Roles of Behavioral Health Professionals

Psychiatrists, psychologists, and other behavioral health professionals can assume many different roles in class action litigation, including that of expert witness, court-appointed expert, consulting expert, monitor, special master, receiver, advocate, *amicus curiae*, plaintiff, and defendant. We describe each of these in the following sections and provide examples of cases in which behavioral health professionals assumed such roles.

### Expert Witness

One highly visible role for professionals in class action litigation is that of expert witness. According to the Federal Rules of Evidence,

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact [a judge or jury] to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.<sup>13</sup>

Expert witnesses are also commonly referred to as testifying experts.

The rule clarifies several key issues regarding professionals’ functioning in this role. First, the criteria for defining individuals as experts are very broad, so that the courts generally have been reluctant to exclude the testimony of expert witnesses proposed by the plaintiffs or defendants. Second, although expert witnesses are typically asked to render opinions about facts, such as whether care meets minimum professional standards, they may alternatively be asked simply to help the judge or jury understand the evidence in a case.<sup>14</sup> Thus, instead of rendering an opinion about the facts, experts may provide specialized knowledge about the evidence, or about the field more generally, which the judge or jury can then use in reaching an opinion about the factual issues.

Expert witnesses may be retained by the plaintiffs or the defendants. The Federal Rule of Civil Procedure that addresses the process of discovery and the duty of disclosure, Rule 26, requires each party to reveal the identity of any witness retained to provide expert testimony.<sup>15</sup> Under this rule, each expert witness must submit a signed report containing a complete statement of all opinions to be expressed, the basis for those opinions, and the data used in forming the opinions. The expert witness must also disclose qualifications, the compensation to be received for the preparation and testimony, and a list of all cases

in which the witness has testified during the past four years.

Professionals retained as expert witnesses are expected to use their scientific or other specialized knowledge in an unbiased fashion when they evaluate the services at issue in the case or when they offer their specialized knowledge to the court. Although an expert is often retained by one party in a class action, that party cannot preclude the expert from expressing opinions that may adversely affect the party, nor can the expert withhold those opinions when the opposing party inquires as to the expert's findings. As one district court explained:

Expert witnesses, as all other witnesses, are bound to testify truthfully. An expert witness should never become one party's expert advocate. An expert witness should be an advocate of the truth with testimony to help the court and jury reach the ultimate truth in a case. . . (Ref. 14, p 156).

There has been increased attention to the expert witness role since the U.S. Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>16</sup> In that case, it was held that trial judges are responsible for excluding "unreliable" expert testimony. The Court suggested that judges should examine a number of factors before deciding to admit an expert's testimony, including whether the expert's theories and techniques have been tested, have been subjected to peer review and publication, and are generally accepted in the scientific community.<sup>16</sup> In the subsequent case of *Kumho Tire Co. v. Carmichael*<sup>17</sup> the Supreme Court clarified that this gatekeeping function of trial courts applies to all expert testimony, not just that which is considered scientific.

Functioning as expert witnesses, behavioral health professionals have played a central role in almost every class action suit regarding psychiatric services. This has included suits focused on hospital and community systems of care,<sup>1,18</sup> inpatient psychiatric hospitals,<sup>19</sup> prisons,<sup>6,20</sup> and community services.<sup>21</sup>

The tasks assigned to these experts and the issues they have addressed have varied considerably. Some experts have been asked to conduct broad evaluations of the adequacy of a system of care or the adequacy of services within a system's facilities.<sup>20,22,23</sup> Other experts examined narrower questions, such as the appropriateness of restraint and seclusion practices or the adequacy with which patients' safety is maintained.<sup>24</sup> The methods used by these experts to gather information and render their opinions have

varied as well. Typically, however, experts review relevant documentation and records, interview individuals with knowledge bearing on the services in question, and observe the facilities and treatment programs.<sup>6,20</sup>

### **Court-Appointed Expert**

A second role for professionals in class action litigation is that of court-appointed expert. Rule 706 of the Federal Rules of Evidence<sup>25</sup> gives the judge the authority to appoint an expert who is expected to testify. Under the Federal Rules, the judge may request that the plaintiffs and defendants submit nominations of individuals to serve in this role. Alternatively, the judge may appoint an expert unilaterally.

The concept of court-appointed experts evolved, in part, in response to the tendency of both plaintiffs and defendants to "shop" for expert witnesses who would then provide opinions in their reports and testimony that supported whichever party had hired them.<sup>26</sup> In theory, court-appointed experts are less prone to the bias that might result from being retained by one of the adversaries in a case. Court-appointed experts have also been retained to assist judges in understanding the technical aspects of highly complex cases.

However, courts have appointed such experts infrequently, because of several concerns. Because the parties to the litigation must pay the fees of court-appointed experts, judges may fear that these costs may create a court-imposed barrier to the legal system for one or more parties. With respect to the question of bias, there is, in fact, no evidence that court appointed experts are "neutral."<sup>27</sup> This has led judges to be concerned that the very selection of a court-appointed expert may unduly influence the outcome of a case. Rather than take these risks, courts generally prefer to honor the adversarial tradition of the U.S. justice system in which each party retains expert witnesses independently.<sup>28</sup>

There are examples, however, of class action suits regarding mental health care in which court-appointed experts played a role. In the case of *K. L. v. Edgar*,<sup>29</sup> for example, the plaintiffs alleged that the hospitals operated by the state of Illinois failed to meet minimum professional standards. The plaintiffs, represented by the American Civil Liberties Union, and the defendant, the state of Illinois, consented to the selection of Robert Okin, MD, and Martha Knisely, MSW, as court-appointed experts.

These professionals formed an evaluation team, which conducted an intensive review of the Illinois system of state hospitals and generated a report of their findings.<sup>30</sup> However, as the events described in the Discussion section will show, the use of court-appointed experts in this litigation was dramatically unsuccessful, and an appellate court eventually removed the experts from the case.<sup>31</sup>

### Consulting Expert

Professionals in class action suits may also consult with a party and its lawyers without testifying. Consulting experts may thus be distinguished from expert witnesses or testifying experts. Unlike expert witnesses, who are, at least theoretically, expected to conduct an impartial evaluation, consulting experts are not burdened by an expectation of impartiality. In this type of consulting role, professionals can help plaintiffs or defendants understand the complexities of mental health service delivery and the relevant standards of care and can advise them on strategies for building and arguing their case. The consulting expert can help integrate available data, draft legal complaints, select other experts, review the reports of expert witnesses, and prepare questions for depositions, direct examinations, and cross-examinations.<sup>32</sup>

The identity and opinions of consulting experts, unlike that of expert witnesses, need not be disclosed to the opposing party. According to the Federal Rules of Civil Procedure, the identity, opinions, and contributions of a consulting expert “who has been retained or specially employed. . .in anticipation of litigation or preparation for trial and who is not expected to be called as a witness” need not be disclosed, except in rare circumstances.<sup>15</sup> For experts who are informally consulted about a case, without entering into an employment relationship or receiving compensation, there is no requirement under any circumstance that their identities or opinions be disclosed.

Although the identities and opinions of professionals retained in this role can be kept confidential, the work of some consulting experts may be highly visible. For example, behavioral health professionals may be retained by the plaintiffs or defendants to help draft a consent decree once the parties have agreed in principle to a settlement. Professionals may be asked to design plans of change that are mandated

by court decrees. Consulting experts may also be retained to implement changes in the postdecree phase.

Jose Santiago is an example of a consulting expert whose work played a role in the resolution of a class action suit. Santiago is a psychiatrist who devised many pilot programs at the request of the Arizona legislature as part of the settlement of a class action suit against the state in the case of *Arnold v. Arizona Department of Health Services*.<sup>1,22</sup> The pilot programs were designed to test a proposed system of care based on regional administrative authorities, team approaches to treatment, and prepaid funding of services with money reserved for specific patients and controlled by the patients’ treatment teams.

A second example is drawn from the case of *K. L. v. Edgar*,<sup>29</sup> in which faculty members at the University of Illinois at Chicago played a key role as consulting experts in the settlement of a class action suit against the state of Illinois. With the consent of both the plaintiffs and defendants, the consulting experts worked to strengthen the state’s system of inpatient facilities by devising and implementing a series of interventions involving staff education and staff consultation in that system.<sup>33,34</sup>

### Monitor

In the majority of class action cases that are settled by the parties or the court, some mechanism is established for assessing compliance with agreed on or mandated changes. Often this is accomplished through the appointment of an individual as a monitor or a group of individuals as a monitoring panel. Panels are sometimes favored, because both plaintiffs and defendants can recommend and place members on the panel. However, there is some concern that the resultant diversity of views among panel members is a compromise that causes panels to be less effective in performing their monitoring functions than an individual monitor might be.<sup>35</sup>

Although this is an important role in many class action suits, the law does not define it as clearly as it does the other roles discussed herein. The actual functions of a monitor are specified either in the agreement between the parties or in the orders issued by the court. Usually, however, a monitoring role involves fact-finding regarding the progress made by a defendant in achieving specified goals. It is also common for monitors to make specific recommendations to the parties and the court about the goals and the process of change.



The case of *Dixon v. Weinberger*<sup>3</sup> is an example of a class action suit in which a panel of monitors was used. The ruling in this case ordered the managers of the mental health system of the District of Columbia to abide by the District's law requiring the active treatment of hospitalized patients, to discharge these patients to less restrictive community treatment settings as soon as possible, and to provide the community services these patients needed.<sup>18</sup> The Dixon Implementation Monitoring Committee, composed of community leaders and nationally recognized mental health professionals, was created in 1980 to monitor changes. The committee was empowered to gather information about the District's activities regarding mental health care, interview mental health consumers, investigate complaints, and issue progress reports to the court.

### **Special Master**

In class action litigation in which a judge's time or expertise is limited, a judge may choose to delegate certain tasks to a special master. Rule 53 of the Federal Rules of Civil Procedure allows judges extraordinary latitude in delegating functions, although such delegation is clearly to occur only in exceptional circumstances.<sup>36</sup> When a court does decide to delegate some of its responsibilities, it issues an "order of reference," which specifies the special master's responsibilities and powers and the limits of those powers.

In class action suits regarding psychiatric care, special masters are typically either lawyers or behavioral health professionals. Common functions of special masters in these cases include designing plans to implement the changes mandated by court decrees, approving plans submitted by the parties, monitoring compliance with such plans, creating enforcement mechanisms, and conducting dispute resolution. Thus, the powers of the special master are typically much broader than the oversight functions performed by court-appointed monitors. Courts have found that the appointment of a special master is especially appropriate when defendants have failed over an extended period to comply with court-ordered changes,<sup>37</sup> when the remedies required are lengthy and complex,<sup>38</sup> or when the class is particularly large.<sup>39</sup>

The special master is typically given many of the court's powers. To determine whether parties have complied with a decree, for example, the special mas-

ter may require the parties to produce evidence, call witnesses, and put those witnesses under oath. The findings of the special master must be made in writing and shared with the parties in draft form. Once the special master submits final findings, the court is expected to accept those findings without further review, unless these are clearly erroneous or the parties petition the court to reconsider.<sup>36</sup>

A special master may also be used in a case when monitoring has been insufficient, as in the case of *Dixon v. Weinberger*<sup>3</sup> described earlier. By 1992, it was clear that 17 years of oversight by the Dixon Implementation Monitoring Committee had failed to produce many of the changes the court had mandated. As a consequence, the court appointed Dana Mauch, PhD, to be the special master in the case.

Dr. Mauch was the former head of behavioral health services for the state of Rhode Island. In her role as special master in Washington, D.C., she was granted the power to advise the District on needed changes, convene hearings, make findings of fact, and issue recommendations that were binding, unless either party challenged the recommendations by appealing to the court. The Dixon Implementation Monitoring Committee continued to function in its oversight role after the appointment of the special master.

### **Receiver**

A sixth potential role for professionals is that of a receiver, who is given management authority over a psychiatric system by the court. The concept of receivership has its roots in corporate law, where it is used to protect the interests of creditors during bankruptcies when the court believes that the corporation's management cannot be trusted with the assets of the company. In the 1960s and 1970s, the courts began to expand the use of receivers into the area of institutional reform litigation, involving prisons, public housing, and mental health systems.<sup>40</sup>

In contrast to monitors and special masters, who may help formulate plans for change and oversee the defendant's compliance with those plans, the receiver actually replaces the defendant in managing the services or the system of care. Given the severity of this action, receivership tends to be used as a last resort by courts, after less-intrusive interventions have failed.<sup>12</sup> Whereas the courts may use monitors and special masters early in litigation, receivers tend to be appointed after years of oversight, during which time

the defendants have failed to comply with numerous court decrees and have been found in contempt of court orders.<sup>40</sup>

As agents of the court, receivers are given day-to-day control over budgeting, operations, contracting, and personnel functions. However, receivers do not control the level of funding for services, which places an obvious constraint on their ability to effect change. Funding levels are determined either by the courts or by the executive and legislative branches of government responsible for public mental health services.

In *Dixon v. Weinberger*,<sup>3</sup> the special master eventually notified the court that she was unable to effect necessary changes to the Washington, D.C., mental health system with the powers that had been granted to her. At her recommendation, the court appointed a receiver. Scott Nelson, MD, the former commissioner of mental health in Pennsylvania, assumed the role and was given management control of the District's mental health system. In 2000, amid considerable dissatisfaction with the receivership, the parties entered into an agreement to replace it with a "transitional receivership," designed both to impose additional requirements on the mental health system and to end all receivership within the next few years, returning management control to the District.<sup>41</sup>

### Advocate

A common role for behavioral health professionals in class action suits is that of an advocate. In this role, professionals work to improve services and to guarantee protections for those with mental disorders. More specifically, professionals can be instrumental in initiating suits by gathering information about alleged violations, bringing the allegations to public attention, recruiting legal counsel, and identifying class members.

Federally funded protection and advocacy programs have been organized in each state and have assumed formal advocacy functions for individuals with mental disorders. These programs play a major role in initiating and facilitating class action suits.<sup>5</sup> Behavioral health professionals have collaborated with these programs in their advocacy efforts, are employed as staff by these programs, and serve on protection and advocacy advisory councils. The federal government requires that mental health professionals have input on the advisory councils, which

provide guidance on program policies, priorities, and initiatives.<sup>5</sup>

The case of *Caroline C. v. Johnson*<sup>19,42</sup> illustrates the involvement of behavioral health professionals in an advocacy role. This class action was brought by Nebraska Advocacy Services (NAS), the state's protection and advocacy organization. The class was composed of women who had been sexually assaulted while patients at the Hastings Regional Center, a state psychiatric hospital, and also included women who would be hospitalized at the facility in the future. NAS employed a psychologist as a staff member and had another psychologist on its advisory council. Both of these professionals were involved in drafting the legal complaint and proposing remedies. These professionals had a strong interest in psychiatric rehabilitation, and they thus used their role in this case to press for enhanced rehabilitation services at Hastings.<sup>43</sup>

### Amicus Curiae

Professionals, acting primarily through their national organizations, may also play a formal role in class action litigation as an *amicus curiae*.<sup>44</sup> An *amicus curiae* (friend of the court) is an individual or organization that is not a named party to the litigation, but nonetheless submits a brief—known as an *amicus* brief—containing opinions about the case.<sup>45</sup>

Historically, under Roman and English law, *amici curiae* functioned as neutral advisors to the court, educating judges and juries on key issues and helping them to avoid error. However, in the U.S. system of justice, *amici curiae* have been transformed from neutral advisors into "adversarial weapons," supporting one party in a case and, at times, pressing their own agendas.<sup>46</sup>

In the role of *amici curiae*, behavioral health professionals have routinely supported plaintiffs, filing briefs that argue for enhanced protection of patients' rights and further improvements in behavioral health services. For example, in the landmark case of *Wyatt v. Stickney*,<sup>2</sup> the American Psychological Association, the American Orthopsychiatric Association, and the American Association on Mental Deficiency all served as *amici curiae*.<sup>47</sup> This case against the state of Alabama involved allegations that patients involuntarily committed to the state's hospitals were subjected to inhumane conditions and deprived of their right to treatment.

At the court's request, the professional organizations functioning as *amici* in this case proposed standards for constitutionally adequate services. These recommendations heavily influenced the set of detailed, minimum standards ultimately issued by the court and imposed on the state.<sup>48</sup> These professional organizations subsequently became very active "litigating *amici*," reviewing and criticizing progress reports issued by the state and requesting specific forms of additional intervention, such as the establishment of human rights committees within state hospitals and the appointment of special masters to oversee implementation of the court orders.<sup>46,48</sup> In the U.S. system of justice, the role of *amicus curiae* clearly has been a vehicle for advocacy.

### Plaintiff

When the case of *Wyatt v. Stickney*<sup>2</sup> was initially brought against the state of Alabama, the plaintiffs included not only the guardians of committed patients, but also a group of mental health professionals who had been dismissed by the State Department of Mental Health due to budget cuts. These professionals alleged that their layoffs denied patients the right to treatment in the state's understaffed psychiatric hospitals. However, the complaints of the professionals regarding their dismissal were later dropped, and the central issue in the litigation became the patients' right to treatment.<sup>49</sup> It has been unusual, in subsequent class actions, for professionals to function in the role of plaintiff.

### Defendant

In many class actions, a behavioral health professional serves as a named defendant. Behavioral health professionals are usually named the defendant in their official state capacity as commissioner of health or mental health services or as the director of a facility that is the subject of the suit. Such was the role, for example, of Stonewall B. Stickney, MD, Commissioner of Mental Health in Alabama, and one of the named defendants in *Wyatt v. Stickney*.<sup>2</sup> Dr. Stickney eventually lost his job because of the litigation.

Little has been written about this role for professionals. Few of those who have been in this role have openly discussed it. It is an uncomfortable position, fraught with ethical dilemmas because of the professional's dual responsibility: to the patients whom the professional is to protect and treat and to the employer (usually a state) that the professional repre-

sents. Placed in this position, some professionals appear vigorously to defend their institution and employer, whereas others appear actively to encourage the litigation and court intervention to increase the resources allocated to meet the needs of patients.

Professionals who are employed within a facility or system that is the subject of a suit may face similar ethical dilemmas, even if they are not actually named defendants in the case. Placed in this role, some professionals choose to serve as informants for the plaintiffs, feeding information to the plaintiffs about incidents or practices for use in the litigation. Others choose staunchly to defend the services their employer provides. A situation encountered in our work in Illinois highlighted this quandary.<sup>23</sup> As expert witnesses for the plaintiffs, we interviewed at length an inpatient unit manager employed by the defendants. He was clearly concerned about quality of care and was interested in replying honestly to our questions. However, the interview had to be conducted in the presence of two attorneys for the defendants, and these attorneys took copious notes on the manager's statements. The employee was confused about how to respond and was visibly shaken by this experience.

### Discussion

There are three reasons that the roles of behavioral health professionals in class action suits are so diverse. First, the legal system allows for the participation of professionals in such litigation in varied capacities. Second, individual courts have wide latitude in defining the specific function of a professional who is asked to serve in a specific role. Thus, there is considerable variability in function among those serving in the same type of role, and a professional's responsibilities in any given case cannot be determined without actually examining the charge to the professional from the parties or the courts. Third, statutes and case law often leave key issues ambiguous. For example, the legal system does not offer a precise definition for the role of *amicus curiae*.<sup>46</sup> There also remains considerable ambiguity about the extent to which expert witnesses could or should play an advocacy role.

A consequence of the diversity of potential roles is that the actual roles of professionals engaged in class actions often have been poorly defined or blurred. Optimally, each role would be conceptualized as involving a specific set of tasks that is approached from a corresponding ethics framework. Unfortunately,

professionals may participate in such litigation without a clearly defined role, or they may gradually shift roles during a suit, obscuring key issues about their function, their “client,” and the principles of ethics on which their work is based.

Role confusion of professionals has been a major issue in some high profile cases. In *Dixon v. Weinberger*,<sup>3</sup> the Washington, D.C., class action, the Dixon Implementation Monitoring Committee initially attempted to serve both as a monitor of change and as a consultant regarding the optimal form of change. According to Warren and Moon,<sup>18</sup> these roles were often in conflict, particularly because the defendant did not comply with court-mandated changes. The conflict was resolved by the appointment of a special master who assumed the consulting functions, leaving the Committee in its intended monitoring role.

An even more graphic illustration of the peril of role confusion comes from the case of *K. L. v. Edgar*.<sup>29</sup> The district court had appointed a team of expert witnesses to conduct an impartial evaluation of the Illinois system of state-operated inpatient facilities.<sup>30</sup> But the U.S. Seventh Circuit Court of Appeals subsequently removed the team from the case, holding that the experts had abandoned their neutrality and inappropriately had advocated for the plaintiffs. The court concluded that:

[T]he panel has been influenced by secret submissions from advocacy groups and counsel supporting plaintiffs in other litigation against Illinois. One of the two remaining experts. . . has shed any pretense that he is playing a scientific role. . . . [He] asked the judge to release the panel’s report so that it could serve as a “flag for advocacy groups to rally around. . .” (Ref. 31, p 261).

The landmark case of *Ake v. Oklahoma* highlighted the fine line between impartiality and advocacy in professionals’ roles.<sup>50</sup> In that case, the U.S. Supreme Court held that states must give indigent defendants in capital cases access to a competent psychiatrist. Notably, however, this psychiatrist is to be retained on the defendant’s behalf, rather than relying on one court-appointed psychiatrist to conduct a single psychiatric evaluation for both the defense and prosecution. The court stated that psychiatry is not “an exact science,” and that psychiatric evidence is routinely presented by opposing parties in the U.S. adversarial system of justice. The court therefore held that the psychiatrist provided to the defendant should “conduct an appropriate examination, and

assist in evaluation, preparation, and presentation of the defense.” In a dissenting opinion, then-Justice (now Chief Justice) Rehnquist claimed that the majority opinion inappropriately blurred the professional and presumably neutral role of an expert witness and the biased role of an advocate. Rehnquist stated, “A psychiatrist is not an attorney, whose job it is to advocate. His opinion is sought on a question of fact.”<sup>50</sup>

In practice, many forces conspire against a professional’s attempt to function as an objective third party in any litigation. Harris<sup>46</sup> argues that the adversarial nature of the legal system in the United States is at variance with the notion of involving neutral parties, and he argues that professionals are thus frequently co-opted into adversarial roles.

Easton<sup>28</sup> offers an incisive analysis of the many ways in which attorneys influence expert witnesses and their resultant testimony. First, Easton argues, experts may be retained precisely because they espouse a certain philosophy or perspective about psychiatric care. He suggests that attorneys seldom retain experts who are likely to reach an opinion that is unhelpful to their party’s case. The question thus arises as to whether these hired experts actually conduct an impartial evaluation of services and apply commonly accepted standards, or whether, in contrast, they simply reach foregone conclusions.<sup>44</sup> Of most concern is the allegation that some experts function as “hired guns,” willing to reach any conclusion that is requested.<sup>51</sup>

Easton<sup>28</sup> identifies compensation as a second way in which attorneys may influence expert witnesses. Attorneys usually determine how much compensation an expert receives and, at various points during a case, whether the expert’s work—and thus the expert’s compensation—will continue. The fees paid to experts for work on class actions suits are often substantial. For example, expert witness fees were conservatively estimated in *K. L. v. Edgar*<sup>29</sup> to have exceeded a million dollars. This level of compensation may blur professionals’ objectivity and make them excessively responsive to the requests and concerns of counsel.

Attorneys may also exert influence on professionals by selectively directing the flow of information to them, by implicitly or explicitly shaping or altering the professional’s assessments and conclusions, and by deciding whether the professional will testify. The professional may also be subtly but powerfully influ-



enced if he is made an informal member of the trial team. This heightens group pressure for the professional to identify with and support the team for which he is working and to view the other side as the adversary who is to be defeated.<sup>28</sup>

Although psychiatrists, psychologists, and other behavioral health professionals can make a significant contribution through any number of roles in class action litigation, it is our strong recommendation that they carefully define the role they are playing and function in only one role at a time in any given class action suit. This is consistent with recommendations that have been made to professionals over the past three decades to avoid dual roles in both clinical and forensic arenas.<sup>52</sup> Dual roles or blurred roles almost inevitably lead to conflicts of interest and to a compromise of professional ethics.<sup>53</sup>

To avoid such problems, a professional should strive to clarify and negotiate three key issues: the functional responsibilities of the role, the legal basis and legal parameters for this role, and the ethical principles that should guide his or her behavior in the role.<sup>54</sup> Most centrally, the professional should identify precisely the client and should declare whether the professional enters these activities as an advocate for a particular party or position or is intent on impartiality. Once involved in a suit, the professional should continually reexamine whether actual activities are congruent with the assigned role and the corresponding set of ethics principles.

It is sometimes appropriate for professionals to change roles during a class action. For example, Santiago<sup>1</sup> moved from the role of expert witness against the state to a consulting expert for the state in the matter of *Arnold v. Arizona Department of Health Services*.<sup>22</sup> It may also be possible ethically to move among roles as an expert witness, monitor, special master, or receiver. However, any change in a professional's role and function should be explicit and should occur only if prior activities do not present insurmountable conflicts of interest for subsequent responsibilities.

Although class action litigation has traditionally been a significant force of change regarding the mental health care of institutionalized persons, the Americans with Disabilities Act (ADA) of 1990<sup>55</sup> created an increased focus on the rights of the disabled to community care. This focus was heightened by the release of ADA-related regulations, which require services for individuals with disabilities to be pro-

vided in the most integrated setting appropriate,<sup>56</sup> and by court decisions such as *Olmstead v. L. C.*,<sup>57</sup> that seek to clarify state responsibilities under the ADA.<sup>58-60</sup>

Given these recent developments, opportunities to participate in class action litigation regarding mental health care are likely to continue. Behavioral health professionals should sharpen their roles in these important civil actions, striving to better define the parameters of their participation. By maintaining clarity about the roles they assume, psychiatrists, psychologists, and others trained in this field can contribute to class action litigation as it continues to shape the debate about patients' rights and minimum standards of care.

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