

# Commentary: Behavioral Health Professionals in Class Action Litigation—Some Thoughts on the Lawyer’s Perspective

Joel A. Dvoskin, PhD, and John Petrila, JD, LLM

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As the article by Professor Hoge and his colleagues observes, behavioral health professionals play a number of key roles in class action litigation brought on behalf of people with disabilities. Such litigation has been an anchor of mental disability law for nearly 40 years.<sup>1</sup> Yet, despite the importance of such litigation, there has been comparatively little discussion in the literature about the roles of behavioral health professionals in class action litigation. This lucid, well-conceived article makes a significant contribution to the literature and will be of value both to behavioral health professionals and attorneys.

At the same time, as any individual who serves as an expert in litigation would agree, one’s performance as an expert in such litigation is not entirely dependent on the wishes or the behavior of the expert. Indeed, to a large extent, the expert is guided, assisted, and to some extent controlled by the attorneys on either side of the case. To cite one obvious example, the expert’s testimony is his own, but its scope is controlled by the lawyers who pose questions, either on direct examination or on cross-examination.

In this commentary, we attempt to share our views about the relationship between attorneys and mental health experts in class action litigation. In doing so,

we discuss attorney expectations, as well as expert role issues. We have both served as either clinical or legal consultants in numerous class actions, and have also served as defendant, counsel, expert witness, monitor, and teacher.

## Thoughts on a Lawyer’s Perspective

Hoge and his colleagues discuss the role of the behavioral health professional as expert for one or another party. This is the most common role in this type of litigation. A lawyer preparing to handle a class action lawsuit considers a variety of issues in determining what type(s) of experts to employ.

Some of these decisions depend on whether litigation has commenced. As Hoge *et al.* observe, an attorney may retain someone as a consulting expert before or during the litigation. For example, one of the authors (JP) when serving as litigation counsel to a state mental health agency would retain an expert in anticipation of litigation or immediately after a lawsuit was filed against the agency, to identify any issue of import to the litigation itself. The strategy was to employ a person who was critical and searching by nature, thus minimizing the possibility of surprise during the litigation and providing the agency the opportunity and motivation to take corrective action as the litigation proceeded. In addition, the consulting expert, who was asked by counsel to be critical in his approach, would desensitize defendants to the weaknesses of their own defense. At times, the expert retained in this role would not be the expert used by

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Dr. Dvoskin is Assistant Clinical Professor, University of Arizona College of Medicine, Tucson, AZ. Mr. Petrila is Chair of the Department of Mental Health Law and Policy, Louis de la Parte Florida Mental Health Institute, University of South Florida, Tampa, FL. Address correspondence to: Joel A. Dvoskin, PhD, University of Arizona College of Medicine, 5174 N. Via de la Lanza, Tucson, AZ 85750. E-mail: joelthed@aol.com

the defense at trial; rather, this particular type of expert played an “early-warning” role that helped shape the agency’s response to the litigation.

A lawyer handling such litigation considers temperament as well as philosophy before selecting an expert. Class action litigation may last years; it is helpful to both attorney and expert if they get along personally. The expert’s temperament can also become relevant legally. In the type of litigation discussed by Hoge *et al.*, some experts tend to view problems developmentally, seeing defendants working to fix them as they evolve, whereas others tend to view each situation cross-sectionally, as they find it. The first expert may view a system of care as constitutional based on evidence of remedial effort and improvement, focusing on the journey, whereas the second may view that same system as constitutionally deficient, because the defendants had not yet arrived at the destination, the standard of care. This question is especially difficult, given that the litigation may involve practices across a system of care. We have observed over the years that an expert opinion on such a question may turn, at least in small part, on the temperament of the expert. The facts may be the same; it is the interpretation that varies, interpretation that may depend largely on the expert’s attitudes.

The question of philosophy is also substantively important. For example, if the litigation involves a state hospital, both plaintiff and defense counsel consider the philosophy of the behavioral health professional regarding such hospitals in deciding whether to retain the individual as expert. For example, some professionals believe state hospitals are archaic institutions that presumptively should be closed. It is unlikely a defense attorney would hire such an individual. Similarly, a plaintiff’s attorney may hesitate before doing so, as well, in light of the U.S. Supreme Court’s refusal to find such institutions unconstitutional as a matter of law, even when overcrowded and understaffed.<sup>2</sup>

It is also important, from an attorney’s perspective, that the behavioral health professional serving as expert (or as monitor or playing any of the other roles discussed by Hoge and his colleagues) have a basic understanding of the legal principles that govern the litigation in question. This is not to suggest that the expert understand the law in fine detail, but some grounding in applicable law is important, for at least

two reasons. First, the expert’s opinion will be filtered and measured against applicable standards. If the expert in class action litigation in an institutional setting does not understand that safety of residents is a core constitutional concern, the expert may miss important information when gathering material that will inform her opinion. Second, such basic understanding prevents the expert from asserting what are essentially personal biases as standards of care or legal conclusions. Even when such biases are otherwise valuable and may be based on solid experience, if they are not germane to the legal issues at the core of the litigation, they may interfere with the expert’s requisite objectivity. As an example, we observed an expert who believed strongly that a hospital psychology department should be organized in a particular way and pushed this view strongly through the litigation. The difficulty, however, was that the expert was unable to tie the particular organizational model to any issues germane to the case. There was no evidence that the model was necessary as a matter of law to assure that constitutional standards (which governed the case) would be observed. This does not suggest that the advocate role described by Hoge *et al.* is an inappropriate one, only that it must be grounded in some appreciation for applicable legal principles. Further, responsible experts must be clear at all times in communicating to attorneys whether their recommendations are essential to maintaining constitutional standards or simply consultative suggestions, however valuable to improved organizational functioning.

It is also worth observing that class action litigation, like much litigation, involves two parties presenting what are often dramatically different pictures of “the facts.” For plaintiff’s expert, it is important to keep in mind that the plaintiff typically must prove a “pattern and practice” of illegal behavior on the part of the defendant to obtain relief in a class action case.<sup>3</sup> Therefore, isolated incidents in which a plaintiff’s rights have been violated may not meet minimum evidentiary standards in a case that goes to trial. On the other hand, defendant’s expert (and counsel) must keep in mind that the strength of the plaintiff’s case may lie in what the defendant views as “outlier” cases. The defendant may argue that the majority of individuals are well cared for and that the examples presented by the plaintiff are not representative. However, such cases (individuals receiving multiple

medications; individuals living in substandard community settings) may illustrate to the court that the defendant is unable to identify and respond to problems that cause harm to individuals or impede their progress therapeutically. An expert unable to describe credibly how the defendant identifies and responds to specific problems runs the risk of a finding that the defendant cannot be trusted more generally to assure the well-being of individuals in the defendant's care, a finding that may lay the foundation for a judicial conclusion that important rights have been compromised. Equally important, if the expert cannot honestly and effectively portray the defendant as trustworthy in regard to the plaintiffs' rights, there is the risk of a court ruling that a monitor must be appointed to oversee implementation of an ensuing decree.

The attorney also owes it to the expert to be clear about a number of points. First, and perhaps most important, the attorney must clarify the fundamental questions that the expert is expected to address. Without such clarity, the information-gathering phase may prove inadequate or wasteful and ultimately of little value. The attorney should provide an overview of the legal principles that govern the case from the attorney's perspective; in addition, the attorney should discuss in advance with the expert the type of information the expert will require in forming her opinion. Further, the attorney should refrain from "pushing" the expert in a particular direction in terms of the conclusions reached by the expert.

As Hoge *et al.* observe, expert reimbursement may be quite lucrative, running the danger of leading the expert to a predisposition regarding issues in the case. The attorney should encourage the expert to be objective in reaching her conclusions, although certainly it is appropriate for the attorney to discuss those conclusions with the expert in an effort to determine why the expert has reached those conclusions and to offer alternative or supplemental factual material (if available) that may change or modify an unfavorable opinion.

Finally, attorneys must avoid the temptation of selecting and presenting to the expert only that information that supports one side of the case. To mislead the expert by overmanaging the case file runs the risk of surprising and embarrassing the attorney's own expert—or worse, giving the court the impression that the expert is dishonest or incompetent.

## A Question of Attitude

Although the legal system is adversarial by definition, it is, in our view, a mistake for behavioral health professionals involved in class action litigation to assume that the parties necessarily have opposing goals and values. Many hospital directors and prison wardens are deeply offended by the implication that they care less about the well-being of their patients or prisoners than do the plaintiffs' attorneys. There may be serious and fundamental differences of opinion about how best to serve those needs, and defendants may at times be limited by inadequate staffing, poorly conceived legislative mandates, or even their own incompetence in the results that they are able to achieve. Bad faith, although occasionally demonstrated by one side or the other, is far more often incorrectly assumed. Such assumptions, in our experience, can dramatically exacerbate the negative consequences of litigation and reduce the likelihood of a mutually acceptable resolution of the case.

## Objectivity

It is possible for an expert to be objective without being impartial. That is to say, one can advocate for the well-being of patients and prisoners on either side of a class action. There is no reason, in our view, to hide one's firmly held beliefs, or to offer the pretense that one has no preconceived notions about institutional life. For an expert to be truly a "blank slate," the expert would have to know virtually nothing about the subject of his or her supposed expertise. This is exactly contrary to the reason the expert is of value to the court. Experts are presumed to have long years of relevant experience, which will undoubtedly and inevitably lead to strong opinions about how best to do the job that is under court scrutiny. Thus, in our view, it may be unrealistic to ask experts to be completely objective, in the sense of shedding all pre-existing notions regarding the subject at hand. A more realistic and valuable goal is to be forthright about one's beliefs and, above all, to be fair and honorable in reporting one's observations. At the same time, as noted earlier, it is important for the expert to recognize that a set of legal principles govern the litigation and that closely held beliefs must have some relevance to those principles and be grounded in something more than personal bias masquerading as impartial, expert opinion.

In any legal context, the expert should reveal the bases of his or her opinion. Although the legal process is designed to assure that this happens, it may not occur for a variety of reasons, including counsel's lack of familiarity with the substantive issues at the core of the case.<sup>4</sup> It is easier to ascertain the thinking of experts who have published on the issues in question—for example, in scholarly articles espousing standards of care—long before they are called as experts. This allows both sides easy access to any biases or preconceived notions held by the expert. Further, it helps to establish the expert's credibility, because it tends to “fix” the expert's views as to what constitutes the appropriate standard of care in a particular area of practice.<sup>5</sup>

Objectivity on the part of the expert is not limited to court. It is important for experts, at the earliest possible point in the litigation, to inform fully the attorneys who retained them of the apparent strengths and weaknesses of their case. From the plaintiffs' perspective, this can help to create a list of demands that is more appropriately targeted to the needs of the plaintiffs and that is reasonable enough to be considered by the defendants. It thus increases the chances of a settlement, which often presents huge financial advantages to both plaintiffs and defendants.

From the defendant's perspective, early full disclosure of the strengths and weaknesses of the defendant's case allows the facility to begin repairs quickly enough to render the institution or system constitutional by the time of trial. This strategy has always been useful, but in the aftermath of the U. S. Supreme Court's ruling in *Buckhannon Board and Care Home, Inc. v. West Virginia*,<sup>6</sup> such a practice has become even more useful for defendants. In this case, the Court decided that defendants no longer were required to pay legal fees in constitutional litigation, even if changes rendering the facility constitutional were made as a direct result of the filing of a lawsuit; rather, plaintiffs could be awarded fees only if they either prevailed in a trial on the merits or the case resulted in a court-ordered consent decree. Although this decision may make it more difficult for patients and prisoners to find attorneys to file class actions,<sup>7</sup> it will certainly be more attractive to institutions to protect themselves before the day of trial by making facility improvements suggested by their own expert.

## Credibility

It is axiomatic that the single most important characteristic of any expert witness is credibility. It is, therefore, important for attorneys not only to allow their experts to behave in a credible manner, but indeed to insist on it. It is, in our experience, far more effective for one's own expert to acknowledge the weaknesses of one's case than to have it exposed on cross-examination. An expert who embraces data on both sides of a question, considers such data, and reaches an apparently fair conclusion is far more believable to the jury or judge than an advocate who never appears to consider the possibility that the other side is right. Acknowledging both sides of an issue may effectively serve as a “preemptive strike,” thus lessening the opportunity to discredit the expert.

For example, in class action litigation such as that discussed herein, a strategy that might be adopted in a deposition (questioning of an expert as a matter of routine by opposing counsel as part of pretrial discovery) is to have the expert tell a complete story about the circumstances he observed on both sides of the question, and why he reached his conclusion. This “story-telling” deposition strategy has several important advantages. First, depositions are often stipulated as evidence in a variety of motions in class action litigation. When this happens, the trier of fact, who may be a judge or magistrate, will develop an opinion about the credibility of the expert based on this complete story of the issue in litigation. It is in the attorney's interest to create and foster an image of a credible, even-handed expert at the earliest possible moment in the litigation.

An expert who is viewed as credible, honorable, and even-handed may also serve to improve dramatically the likelihood of an early settlement in class action litigation. In many cases, when both sides have such experts, their portraits of the institution in question may be relatively similar. This tends to convince both sides of the strengths and weaknesses of both the plaintiffs' allegations and the defense's response. In fostering settlement, it may not particularly matter how strong the plaintiff's case would be if presented at trial, as long as both sides share a similar assessment of its merits. If the plaintiff's case is especially strong, then the settlement is likely to favor the plaintiff, because the defendant is aware early of the likelihood of defeat if the case goes to trial. Similarly,

if the plaintiff's case is viewed by both sides as relatively weak, it encourages the plaintiff to accept a relatively modest settlement to avoid defeat in court.

The value of settlement is difficult to overestimate. The costs of class action litigation are often exorbitant. As Hoge *et al.* note, legal fees, expert witness fees, and the costs of promulgating, duplicating, and circulating massive amounts of paper and information often exceed millions of dollars in large class actions. Such expenditure is cruelly ironic when the reason for the litigation itself is often a lack of adequate resources in the institution in question. Simply put, to spend millions of dollars on unnecessary litigation, money that might otherwise be spent on patient care or inmate services, can be an inexcusable waste of scarce public resources.

### The Use of an Expert Team

We are strong believers in the use of expert teams when attempting large class action litigation. Because of the multidisciplinary nature of most institutions, it is inevitably true that more than one person will be required to provide all the different kinds of information that is relevant to the case. In hospital litigation, for example, it is necessary to provide expert opinion on diverse issues, such as medication prescription (psychiatrists), medication administration (nursing), behavioral programming (psychologists), personnel and purchasing (administrators), and so on. In community-based litigation, it may be critical to retain an expert with knowledge of housing and an expert in the financing of community care.

Equally important, however, is the inclusion of more than one point of view to inform the respective attorney and party in forming the case. It may be strategically problematic to rely on one expert witness for several reasons: First, each expert brings some preconceived notions, and relying on one expert may mislead the attorney on the merits of the case. Second, one point of view may hide potential common ground that could form the basis for a mutually acceptable settlement of the case. A team of experts can cover not only the substantive issues class action litigation presents (issues that invariably fall beyond the scope of any one expert's competence), but can also provide a number of valid perspectives on a particular issue.

### The Expert as Monitor

Hoge and his colleagues provide particularly useful commentary on the variety of monitoring roles that a behavioral health expert may play in class action litigation. The use of experts in the monitoring or remedial phase of class action litigation may be pursuant to settlement or court decision. It has been our experience that every good expert working as a monitor makes two very different types of recommendations. Some recommendations are directly pursuant and relevant to the court's order or consent decree or settlement agreement. These can be called mandatory findings.

Well-intentioned experts in a monitoring role also make numerous suggestions that are simply designed to help one or both sides get what they want more efficiently. These are made in the spirit of helpfulness and can be called consultative findings. Both types of observations are important and useful in the remedial phase of class actions, but it is imperative that they be appropriately labeled. Often, experts discover new topics of concern at each visit that are not specifically listed in the settlement agreement. In those cases, most experts feel ethically bound to share their observations in the interest of improving patient care or inmate services. When such consultative findings are not labeled as such, it may create the impression that there is a constantly moving target of compliance, which may lead to perceptions that the monitor is unfair and arbitrary and to collateral confrontations with other relevant parties (for example, state legislators) who often must provide new resources to implement the court decree in question.

This suggests that the single most important goal for any monitor to achieve is clarity, not only in making findings, but also in emphasizing the basis for the findings and whether those findings fall within the mandatory or consultative categories noted earlier.

### The Core Issue of "Role"

Professor Hoge and his colleagues stress the importance of avoiding multiple roles in class action litigation. We take a different view: Multiple roles are not only difficult to avoid but may be desirable in some cases. For example, there is no reason that a defendant should not be allowed to testify (as JD did in several cases in New York) as an expert witness

regarding the reasons that a particular policy was adopted or the limitations that have resulted in the level of care or service currently provided. At the same time, the caution expressed by Hoge *et al.*, that it is important to be clear about which role one has adopted, is important.

Hoge and his colleagues also discuss the role that a behavioral health professional may play as an advocate. We noted earlier herein that defendants often consider themselves to be advocates for the well-being of the patients or inmates in their care. In their discussion, Hoge *et al.* mentioned the concept of “sweetheart suits,” in which public employees surreptitiously invite plaintiffs’ attorneys to sue them as a way of gaining additional resources beyond those that the legislature has seen fit to provide. Such suits have become less common in the past decade because of shrinking state resources and increasing reluctance on the part of legislatures and state executive branches to approve settlements reached in such cases. In addition, in our view, this scenario truly presents conflicting roles and should be avoided. This is not to say, however, that a public official is prevented from providing the plaintiff with ammunition—merely that there is a right way to do it. When questioned by expert witnesses and especially when deposed or examined under oath, every participant in a lawsuit is obligated simply to tell the truth. This is quite a different phenomenon from “snitching,” and allows the clinician to defend efforts that may have been made to do things correctly, while

simultaneously admitting the system’s inability to succeed.

### Summary

Hoge and his colleagues have provided an excellent overview of the various roles behavioral health professionals may play in class action litigation and, in doing so, have filled an important gap in the literature. As we have suggested in this commentary, there are a variety of factors that may affect the relationship between attorney and expert in such litigation. Although class action litigation may have less effectiveness as a tool to achieve systemic change than it did in the early years of mental disability law, it still is important, and the behavioral health professional, in the conduct of such litigation, plays a critical and indispensable part.

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