Psychiatric Assistance for Indigent Defendants Pleading Insanity: The Michigan Experience

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In *Ake v. Oklahoma*, the Supreme Court ruled that due process requires the state to make psychiatric expert assistance available to indigent criminal defendants when insanity will be a significant factor at trial.¹ Despite the directive of *Ake*, the Court did not provide the states with implementation instructions. The opinion left several critical issues regarding delivery of services unsettled or open to conflicting interpretation. Additionally, the Court did not preclude implementation approaches that could seriously impair the utility of access to psychiatric assistance for indigent defendants pleading insanity.² Problems remain regarding the standards for adequate expert service and sufficient financial support, the use of a threshold test to deter-

1. 470 U.S. 68, 83 (1985). In *Ake*, the Court held:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at the trial, 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.

*Id.* at 83.


mine the need for assistance, limits on a defendant’s choice of expert, and the nature of the expert’s role.³

The federal government and many states already provide psychiatric assistance to indigent defendants pleading insanity.⁴ Michigan’s statutory scheme for delivering this service⁵ presents an opportunity to evaluate an approach that generally favors defendant interests in areas left unresolved by Ake. This Note undertakes that evaluation. Part I summarizes the Ake decision, key problem areas, and the research methodology. Part II describes the Michigan statutory system. Part III evaluates that system using data from interviews with legal and psychiatric practitioners and considers the consequences of Michigan’s approach to the issues posed by Ake. The evaluation shows that Michigan’s system places few impediments to an indigent defendant’s access to psychiatric expert assistance, yet still avoids the program and adjudicatory ill effects that might lead a jurisdiction to impose the restrictions apparently permitted under Ake. Structural features of the Michigan system, such as the use of the state-supported Center for Forensic Psychiatry to evaluate all defendants declaring an intent to plead insanity, and the informal analytic and evaluation processes used by practitioners, together focus public resources on a small set of cases and limit the adjudicative impact of generally unrestrained access to psychiatric assistance.

I. ISSUES AND RESEARCH PROGRAM

Although the Supreme Court’s decision in Ake v. Oklahoma expanded the package of defense services available to indigent defendants,⁶ the decision did not resolve all delivery of service

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3. See authorities cited supra note 2.
4. 470 U.S. 68, 78 n.4 (1985); Note, Right to Assistance, supra note 1, at 965-67 & nn.71, 74-83 (summarizing cases and statutes).
5. MICH. COMP. LAWS ANN. § 768.20a (West Supp. 1987).
issues with regard to psychiatric assistance in insanity cases. The following discussion reviews the key areas that pose uncertainty for implementation of the right established by *Ake*. It then describes the research methodology used to develop data about Michigan's system for providing psychiatric assistance.

**A. Ake v. Oklahoma**

The Supreme Court in deciding *Ake v. Oklahoma* found in the Constitution a requirement to provide to indigent defendants a service—psychiatric expert assistance when pleading insanity—that many states and the federal government already made available through statute and case law. The Court's implementation instructions did not extend the constitutional right as far as possible. Furthermore, the Court's language left uncertainty in several areas. The adequacy of service, the use of threshold tests to determine whether a case presents sufficient insanity issues to warrant expert assistance, the defendant's right to select the expert, and the role of the expert in assisting the defense present problems after the *Ake* decision and will serve as the framework for analyzing the data collected for this study.

1. *The decision*—In 1979, Glen Burton Ake and an accomplice entered an occupied home, bound and gagged the father, mother, and son, and attempted to rape the twelve-year-old daughter. Ake shot and killed the father and mother and wounded the children. Captured after an ensuing crime spree, Ake confessed to the shootings. His behavior at the arraignment prompted the judge to have him examined for competency. Less than six months after the crime, a state hospital forensic psychiatrist testified that Ake was psychotic and that his mental illness may have begun years previously. The trial court denied the defense request for an examination for sanity at the time of the crime or for funds to secure an examination. The jury then found Ake guilty on two counts of first degree murder and two counts of shooting with intent to kill and sentenced him to death on the murder counts and to 500 years' im-

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8. *Id.*
9. *Id.* at 71.
10. *Id.* at 71, 86.
11. *Id.* at 72.
prisonment on each of the other two counts. On appeal, the Oklahoma Court of Criminal Appeals rejected Ake's claim that as an indigent he had a constitutional right to the services of a court-appointed psychiatrist. In 1985, the Supreme Court reversed, ruling that Oklahoma should have provided Ake with access to psychiatric assistance.

The Court determined that the trial court's reliance on its decision in United States ex rel. Smith v. Baldi, ostensibly denying indigent defendants access to state-paid psychiatric assistance, was misplaced. Decisions since Baldi had expanded defendant rights to defense services, and Baldi had not in fact limited defendant access to psychiatric services to the extent supposed by the Oklahoma courts. Fundamental fairness now required a different result.

To decide whether the state must provide psychiatric assistance, the Court applied the three part Mathews v. Eldridge due process test for evaluating the need for additional procedural safeguards. The Mathews test considers the private interest at stake, the burden to the government of providing the additional safeguard, and the risk of error without the safeguard. The Court declared "compelling" the private interest of accuracy in a proceeding threatening the defendant's life and liberty. Noting that more than forty states and the federal government were able to provide psychiatric assistance to indigent defendants pleading insanity, the Court dismissed the financial burden and loss of strategic advantage to the state as not substantial. Finally, the lack of psychiatric assistance for the de-

12. Id. at 73.
14. See supra note 1. At a new trial more than six years after the crime, psychiatrists testified regarding Ake's mental state at the time of the crime. The jury found Ake legally sane and imposed a sentence of life imprisonment. High Court Appellant Found Guilty in 2d Trial, N.Y. Times, Feb. 14, 1986, at A15, col. 1 (late ed.).
15. 344 U.S. 561 (1953). In Ake, the Court rejected Oklahoma's contention that Baldi supported the proposition that the defendant does not have a constitutional right to a psychiatric examination to determine his sanity at the time of the offense. Instead, the Court interpreted Baldi to require no more assistance than the defendant actually received in that case where two psychiatrists called by the defense and one called by the court all testified. 470 U.S. at 85.
17. Id. at 76-77, 84-85.
18. 424 U.S. 319 (1976); see Ake, 470 U.S. at 86-87.
19. Mathews, 424 U.S. at 335; see Ake, 470 U.S. at 77; The Supreme Court, 1984 Term, supra note 1, at 132-33; Note, Expert Services, supra note 1, at 1332-33 & nn.41-51; Note, Due Process and Psychiatric Assistance, supra note 1, at 127-29.
20. Ake, 470 U.S. at 78.
21. Id. at 78-79 & n.4 (citing cases and statutes of 41 states).
fendant in cases where insanity is likely to be an issue at trial could lead to inaccurate results.22 The Court thus decided that, in appropriate cases, the state is constitutionally required to provide psychiatric assistance to indigent defendants pleading insanity.23 Ake easily qualified for the required assistance.24 The Court limited its holding to cases like Ake's, which presented a genuine insanity issue, because only those cases raised a risk of erroneous adjudication if the state denied psychiatric assistance.25

2. Implementation issues—Ake v. Oklahoma leaves implementation to the states and does not resolve several important delivery of service issues.26 Policy choices in these areas can determine the extent to which indigent defendants meaningfully participate in the judicial proceeding and realize the benefit of the right announced in Ake.

a. Adequacy of expert service—The Court did not suggest standards for assessing the adequacy of psychiatric assistance, nor did the Court consider the links between the quality of service and program structure and funding.27 Studies of public defender and appointed counsel programs have shown that underfunding, inexperience, lack of resources for investigation and research, and excessive case loads can lead to legal services for indigents so inferior as to raise questions of minimum adequacy.28 Similar problems could plague the delivery of psychiatric services.

22. Id. at 78-83.
23. Id. at 74, 83.
24. Id. at 86-87.
25. Id. at 82.
26. Id. at 83; see supra note 2 and infra notes 27-59 and accompanying text.
28. N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 7-24, 56-59 (1982). The decision to furnish counsel to the accused in criminal and juvenile cases is a matter of federal constitutional right, not simply of grace. Yet, as documented in this report, meaningful compliance with the Constitution is often absent due to inadequate funding. Indeed, public defender and assigned counsel programs experience virtually every imaginable kind of financial deficiency. There are neither enough lawyers to represent the poor, nor are all the available attorneys trained, supervised, assisted by ample support staffs, or sufficiently compensated.

Id. at 56; see Mounts & Wilson, Systems for Providing Indigent Defense: An Introduction, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 193-201 (1986).

[T]he government creates and maintains defense systems which place restraints on two crucial ingredients of competent representation: the time to handle each case competently and the extrinsic resources for an adequate defense. As a result of these systemic defects, many indigent defendants are being denied their right to effective assistance of counsel.

Id. at 195; see also Note, Identifying and Remedyng Ineffective Assistance of Criminal
Courts already evaluate claims of ineffective assistance of counsel, and they might consider applying a parallel analysis to psychiatric services. When courts assess defense counsel performance, they determine whether the incompetent performance of counsel prejudiced the defendant by creating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." If the courts applied this standard to state provision of psychiatric assistance, then, in all but egregious cases of state interference, the defendant would face the difficult task of proving that better expert performance would have probably made a difference to the result. Furthermore, case-by-case analysis often fails to confront broad issues of financial support, organization, and overall quality. Coupled with the lack of clear performance standards, problems such as insufficient funding could prevent state-paid psychiatric assistance from satisfying the promise of Ake.

b. Threshold need test for psychiatric expert assistance—Under Ake, the defendant must convince the trial court that sanity at the time of the crime is "likely to be a significant factor" in the trial before the state must provide access to psychiatric expert assistance for presenting an insanity defense. Unfortunately, imposing a threshold test to establish the need for psychiatric assistance presents interpretation and application problems that can result in a court's failure to provide the assistance necessary to present an insanity defense effectively at trial.


29. Strickland v. Washington, 466 U.S. 668, 694 (1984). In Strickland, the Court said that by reasonable probability it meant that the errors had to "be sufficient to undermine confidence in the result." Id. at 694.

30. Id. at 710 (Marshall, J., dissenting); Blake v. Kemp, 758 F.2d 523, 530-33 (11th Cir. 1985) (evaluating prejudicial effect of the state not turning over to a psychiatric expert evidence that the expert needed to complete an evaluation consistent with the requirements of Ake); Note, supra note 28, at 776-78, 781.


32. Ake v. Oklahoma, 470 U.S. 68, 83 (1985). The Court stated: "When the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense, the need for the assistance of a psychiatrist is readily apparent." Id. at 82-83. Elsewhere, the Court stated the test as "when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue." Id. at 74.

Tests similar to the one endorsed in *Ake*, such as those employed by federal courts under the Criminal Justice Act of 1964, have led to inconsistent results.\(^\text{34}\) *Ake’s* extreme behavior in court, and the testimony of the state experts clearly indicating that *Ake* was mentally ill prior to the crime, made the case a relatively easy one for applying the threshold test. Thus, *Ake* does not provide clear precedent that might resolve difficulties in this area.\(^\text{35}\) The uncertain nature of these preliminary determinations creates a risk of misjudgment and invites appeals.\(^\text{36}\) These appeals can add cost and delay without affecting the final outcome of the trial on the insanity issue—the result in *Ake*.\(^\text{37}\) Ultimately, a threshold need test prevents some defendants from obtaining resources necessary to assess and prepare an insanity test. Sometimes the defense has to argue that the defendant has a credible insanity plea just to obtain the resources necessary to investigate the legitimacy of the plea. The defense might need expert assistance just to complete that task.\(^\text{38}\) In a close case, the expert is especially critical in evaluating and presenting the defense. Yet, in that kind of case, the factual uncertainty of the defendant’s insanity claim increases the likelihood for error in applying the threshold test.\(^\text{39}\)

The courts and states may impose the threshold test to try to keep defense counsel from wasting time and public funds on fishing expeditions for favorable evidence.\(^\text{40}\) Threshold need tests can indeed save time and money, but they also create a risk of trial court misjudgment that is difficult to overturn on ap-

\(^{34}\) Decker, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 U.CIN.L.REV. 574, 600, 604, 608-14 (1982). At one point, the Court used language similar to that of the Criminal Justice Act of 1964, requiring provision of expert services to indigents when those services are “necessary for an adequate defense.” 18 U.S.C. § 3006A(e)(1) (1982), quoted in *Ake*, 470 U.S. at 80. Although the Court may have drawn its test more narrowly than that used in the Criminal Justice Act of 1964, the Court’s language will not avoid the difficulties experienced under the Act, nor the problems created by requiring a threshold showing of need for assistance. Note, *Expert Services*, supra note 1, at 1357-58.

\(^{35}\) See 470 U.S. at 86; Note, *Due Process and Psychiatric Assistance*, supra note 1, at 142.

\(^{36}\) See authorities cited supra note 33.

\(^{37}\) See supra notes 7-14 and accompanying text.


\(^{40}\) See W. LaFave & J. Israel, *Criminal Procedure* § 11.2(d), at 488 n.38 (1985). “Both courts and legislatures fear that, lacking this fiscal restraint, appointed counsel, if given automatic access to experts, would use them for speculative inquiries based on the slim hope that helpful evidence might somehow be uncovered.” Id.; see Margolin & Wagner, supra note 38, at 663-64 & n.54.
Such misjudgments could have grievous consequences for the defendant.

c. Selection of the expert—Ake follows many existing programs and the case law by declining to hold that the indigent defendant has a constitutional right to select any expert the defendant wants. This limitation may be based on a fear of expert-shopping and of the use of blatantly biased defense experts. Nevertheless, by not granting the defendant the right to pick any qualified expert, the Ake decision allows states to structure service delivery systems inimical to the defendant’s interests.

A state could select the expert for the defendant or limit the defendant’s choice to a group of experts who might be hostile to the insanity defense, or to the defendant’s case, or inferior as forensic specialists. Without clear standards for expert performance, saddling the defendant with this kind of expert would seriously damage the defendant’s ability to present an effective insanity defense. This constraint may not raise constitutional issues, but it conflicts with Ake’s emphasis on enhancing adjudicatory accuracy by providing the defendant with the resources needed to participate meaningfully in the adjudicatory process.

d. The role of the expert—The Ake majority described the psychiatric expert as a defense consultant who would assist with the evaluation, preparation and presentation of the defense—a role that fits with that of a partisan expert. The opinion may,

41. Decker, supra note 34, at 604.
43. Note, Expert Services, supra note 1, at 1366 & nn.185-86 (citing Williams v. Martin, 618 F.2d 1021, 1025 (4th Cir. 1980)); Note, Due Process and Psychiatric Assistance, supra note 1, at 152-53.
44. Note, Expert Services, supra note 1, at 1356-57; Note, supra note 42, at 501 & nn.139-45.
45. In Palmer v. State, 486 N.E.2d 477, 481-82 (Ind. 1985), a case decided after Ake, the Indiana Supreme Court rejected the defendant’s argument that court-appointed psychiatrists did not understand Indiana’s statutory scheme relating to the insanity defense, and that this lack of understanding caused prejudice that could have been avoided if the trial court had provided the defendant with funds to hire his own expert. The court-appointed psychiatrists evaluated the defendant as legally sane. The Indiana court implied that the defendant’s problem with the experts was based on their conclusions and not on their competence. Under Indiana Code § 35-36-2-2, the experts testify after presentation of prosecution and defense evidence. Ind. Code Ann. 35-36-2-2 (West 1987). The court in the Palmer case viewed this system as providing “a more reliable fact-finding basis than would a system in which both sides show up for trial with their own ‘hired guns.’” 486 N.E.2d at 482.
46. See supra notes 27-31 and accompanying text.
however, tolerate a reading that permits limiting the expert's role to that of a neutral party directly serving the court.\footnote{48} Limiting the expert to a presumably neutral role is inconsistent with the \textit{Ake} opinion and can hurt the defendant.\footnote{49}

\textit{Ake} appears to envision a strong defense role for the expert.\footnote{50} This approach raises bias problems regardless of the expert's integrity and honesty.\footnote{51} If the prosecution has its own expert, then the lay fact finders, who possess no special medical or scientific knowledge, must sort through competing expert testimony orchestrated by the adversaries—the so-called battle of the experts. The persuasive skills of the rival experts could dominate the fact-finding process.\footnote{52}

The neutral expert model attempts to solve adequacy problems, but is inconsistent with the adversary approach contemplated in \textit{Ake}.\footnote{53} As the Supreme Court noted in \textit{Ake}, psychiatric evaluation and diagnosis are prone to professional disagreement.\footnote{54} Scientific and extra-scientific factors can lead to subtle biasing that undermines reliability and validity.\footnote{55} Systems that use only allegedly neutral experts present to the fact finder an illusion of intellectual neutrality, encourage excessive deference to expertise, and place unwarranted power in the experts' hands.\footnote{56} In closely contested cases, putting an expert with a hostile view of the insanity defense in a structurally neutral role could devastate the defense. If that expert testifies that the defendant was legally sane at the time of the offense, the defense faces a practically insurmountable hurdle.\footnote{57} At best the defense could undermine the testimony of the neutral expert, a difficult task without expert assistance.\footnote{58} In jurisdictions that require the

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48. Palmer v. State, 486 N.E.2d 477 (Ind. 1985) (discussed supra note 45); Note, Expert Services, supra note 1, at 1347 & n.146 (citing cases); Note, Due Process and Psychiatric Assistance, supra note 1, at 144.


51. \textit{The Supreme Court, 1984 Term, supra} note 1, at 136 & nn.35-39; Note, Due Process and Psychiatric Assistance, supra note 1, at 144 & n.164.


53. \textit{See supra} text accompanying note 47.


55. Note, Expert Services, supra note 1, at 1351 n.162; Note, Due Process and Psychiatric Assistance, supra note 1, at 152-54 & nn.192-204.


58. Note, Expert Services, supra note 1, at 1354 & n.178.
defendant to prove legal insanity, the burden would be particularly onerous. In jurisdictions that place the burden of proof of sanity on the prosecution, the defendant would still have to dispel a presumption of sanity.\(^69\)

**B. Research Issues and Methodology**

The implementation issues presented by *Ake* form the framework for examining Michigan’s system of providing psychiatric experts to indigent defendants.\(^60\) Interviews with Michigan defense attorneys, prosecutors, and psychiatric experts active in insanity cases provide the data for evaluating Michigan’s approach to these issues.\(^61\)

The interviewees are recognized by fellow practitioners as leaders in the field.\(^62\) The interviews concentrated on a core set of issues pertaining to delivery of service.\(^63\) During the study, questions were modified to allow interviewees to comment on initial findings. This procedure facilitated cross-checking of results and enabled the research to respond to the insights of those most familiar with the subject matter.\(^64\) The data does not

60. See supra notes 27-59 and accompanying text.
61. In-person interviews took place in Washtenaw and Wayne Counties in Southeastern Michigan. Defense attorneys from other parts of Michigan were interviewed by phone. Thirteen attorneys, six clinicians specializing in forensic issues, and six court and forensic services personnel were interviewed for this study. References to field notes from these interviews use a letter code to identify the individuals with a page citation to relevant materials in the field notes. The interview notes are on file with the *Journal of Law Reform*.
62. Each interviewee was asked to identify attorneys and clinicians who had participated in insanity defense cases or were considered knowledgeable in the field. Several authors of articles on the insanity defense that appeared in Michigan legal publications were also interviewed. A list of interviewees is on file with the *Journal of Law Reform*.
63. The interviews focused on the following issues: the process for securing criminal responsibility evaluations and independent expert assistance; the selection of cases for insanity defenses; the cost of service and the availability of funding; the amount of expert time involved in various kinds of cases; expert witness competency, persuasiveness, credibility, and bias; attorney use and abuse of the system; the role of the expert; the selection of the expert; the use of threshold tests; trial court discretion in the approval of fees; the effect of witness testimony on adjudicatory results; and the effect of the Guilty But Mentally Ill verdict as an alternative to the Not Guilty by Reason of Insanity verdict.
64. See J. **KATZ**, *POOR PEOPLE'S LAWYER'S IN TRANSITION* app. at 197-218 (1982). The methodology section describes a similar process used for analyzing data from open-ended interviews and observational field data in a social science study of poverty lawyers in Chicago. The flexible research agenda used in this study helps capture the intellectual approaches of those who participate in the social process under study and who create the
lend itself to quantitative summaries nor definitive assessments of the system’s overall effectiveness. Rather, it reflects practitioners’ views of the psychiatric assistance program. These views are critical to behavior within the system and to delivery of service to indigent defendants.

II. MICHIGAN’S STATUTORY SYSTEM

This section reviews the performance of Michigan’s system for providing psychiatric expert assistance to indigent defendants pleading insanity. First, it outlines the relevant substantive criminal law. Then, it describes the statutory system for public funding of psychiatric assistance in indigent defendant cases. Finally, it reports on the overall use and cost of psychiatric services.

A. The Insanity Defense

In 1975, the Michigan Legislature adopted the Guilty But Mentally Ill (GBMI) verdict in response to a highly publicized murder committed by a released criminal, who previously had been judged legally insane. Under the statute, when a defendant raises an insanity defense, the fact finder must determine whether the defendant was mentally ill at the time of the offense and whether the mentally ill defendant was criminally responsible. A defendant is not criminally responsible if, at the time of the offense, due to mental illness or mental retardation that person “lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the require-
ments of law." A defendant found mentally ill and not criminally responsible receives a Not Guilty by Reason of Insanity (NGRI) verdict. A defendant found mentally ill but criminally responsible receives a GBMI verdict. When found NGRI, the defendant is committed to a state mental institution and is to be released when he does not meet the standards for civil commitment. The GBMI defendant is to receive psychiatric treatment and serve the normal sentence for the offense.

B. Publicly Paid Psychiatric Assistance

The Michigan statute also established a process for evaluating criminal defendants for mental illness and criminal responsibility and for providing publicly paid psychiatric assistance to indigent felony defendants pleading insanity. To have the defendant evaluated for criminal insanity, defense counsel must submit to the court and the prosecuting attorney, not fewer than thirty days before the date set for trial, a written notice of intent to assert legal insanity. Upon receipt of the notice, the court is to order the Center for Forensic Psychiatry (Forensic Center) or other qualified person to examine the defendant with regard to the insanity claim. Indigent defendants can then secure a county-paid independent evaluation “by a clinician of his or her choice,” and that clinician “shall be entitled to receive a reason-

67. MICH. COMP. LAWS § 768.21a (1979). The statute defines mental illness as a “substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.” Id. § 330.1400a.
68. Id. §§ 768.21a, 768.36(3).
69. Project, supra note 65, at 81-82 & nn.22-23.
70. See MICH. COMP. LAWS § 768.36(3) (1979); Project, supra note 65, at 88-90 & nn.48-50.
71. See MICH. COMP. LAWS ANN. § 768.20a (West Supp. 1987).
72. Id. § 768.20a(1).
73. Id. § 768.20a(2). The Forensic Center, an organizational unit of the Michigan Department of Mental Health, is a maximum security facility located in Ypsilanti. It was established in 1966 to conduct pretrial competency hearings and to process persons found Not Guilty by Reason of Insanity. MICH. COMP. LAWS § 330.1128 (1979); Boyle & Baughman, supra note 66, at 78 & n.7; Project, supra note 65, at 86 n.43. The psychiatric clinic of the Recorder’s Court of the City of Detroit also performs criminal responsibility evaluations. MICH. COMP. LAWS ANN. § 768.20a(9)(a)-(b) (West Supp. 1987); DEPARTMENT OF MENTAL HEALTH, STATE OF MICH., FORENSIC CENTER YEAR-BY-YEAR SERVICE DEMAND SUMMARY (J. Romans ed. 1987) [hereinafter FORENSIC CENTER SERVICE DEMAND SUMMARY]. Michigan law defines qualified personnel to include personnel of the psychiatric clinic of the Recorder’s Court of Detroit and those meeting the standards determined by the Department of Mental Health. MICH. COMP. LAWS ANN. § 768.20a(9)(a) (West Supp. 1987).
The prosecution may also obtain an independent evaluation. The statute requires the Forensic Center and the independent clinician to submit written reports to defense counsel and the prosecutor. These reports must state the clinical findings, the facts upon which those findings are based and an opinion "on the issue of the defendant's insanity at the time the alleged offense was committed and whether the defendant was mentally ill or mentally retarded at the time the alleged offense was committed." Michigan does not employ a threshold need test for psychiatric assistance, the defendant can select any qualified clinician to serve as the independent expert, and the expert can act as a defense consultant.

C. Overall Program Use and Cost

Few Michigan defendants raise the insanity defense. Even fewer receive the NGRI verdict. After the 1975 statutory creation of the GBMI verdict, the annual number of NGRI verdicts dropped from fifty-six in 1975 to thirty-two in 1976 and has not gone above eighty-two since. These numbers are small compared to the annual number of arrests and the number of criminal responsibility evaluations completed each year.

74. Mich. Comp. Laws Ann. § 768.20a(3) (West Supp. 1987). Although poverty lines provide guidance, no formal income standards for determining indigency exist, and the trial court must use its discretion to decide whether a defendant qualifies for publicly paid defense services, such as appointed counsel. Interview with Mr. Lloyd Powell, Public Defender, Washtenaw County, Mich. (Jan. 22, 1987) [hereinafter Powell interview]. Interview notes are on file with the Journal of Law Reform. Neuhard, Free Counsel: A Right, Not a Charity, 14 N.Y.U. Rev. L. & Soc. Change 109, 109 n.3 (1986) (citing articles "detailing the virtual impossibility of establishing uniform and simple indigency guidelines."). "[C]urrent eligibility criteria are so arbitrary and unworkable that determination of the availability of free counsel is either pro forma, or, when meaningfully pursued, too costly." Id. at 109. Various estimates indicate that about two-thirds of all felony defendants will be classified as indigent. Note, Expert Services, supra note 1, at 1326 n.3. Public defenders are "the primary defense service providers for about 68% of the Nation's population." Washtenaw County Office of the Public Defender, 1985-86 Annual Report 30 (1986).


76. Id. § 768.20a(6)(c).

77. Id. § 768.20a(3).

78. Forensic Center Service Demand Summary, supra note 73. The annual number of GBMI verdicts has remained below 51. Id.

79. The annual number of criminal responsibility evaluations for the entire State rose from 401 in 1976 to 1102 in 1980. From 1981 to 1986, the annual number has ranged from a low of 1067 in 1982 to a high of 1389 in 1985. Id. Between 1975 and 1982, the number of males arrested ranged from 191,857 to 263,513 annually. Project, supra note
In the overwhelming majority of cases resulting in the NGRI verdict, the Forensic Center evaluated the defendant as not criminally responsible, and, at a bench trial, the prosecution did not contest that conclusion.\textsuperscript{80} The Forensic Center evaluates the defendant as not criminally responsible in about ten percent of its criminal responsibility evaluations.\textsuperscript{81} Rarely does the defendant secure the NGRI verdict when he argues the issue at trial after the Forensic Center has evaluated the defendant as criminally responsible.\textsuperscript{82}

Excluding overhead costs, the Forensic Center spends $1,080,000 annually for criminal responsibility evaluation—at an average cost of $1,100 per evaluation.\textsuperscript{83} Complex or contested cases require additional effort and public resources.\textsuperscript{84} The Forensic Center does not budget on a per case or per hour basis, so the cost of these cases is not readily available.\textsuperscript{85}

Statewide data on the number of indigent defendants relying on public funds to obtain an independent evaluation of legal insanity is not available.\textsuperscript{86} Forensic Center clinicians testify for the prosecution on the insanity issue in about fifty trials annually.\textsuperscript{87} In these cases, they will usually face an independent expert. Not all such cases involve indigents; thus, the public will not have

\textsuperscript{65} at \textsuperscript{107} app. A, Table A, \textsuperscript{90} n.\textsuperscript{53}, \textsuperscript{92}-\textsuperscript{93} & nn.\textsuperscript{67}-\textsuperscript{70}. \textsuperscript{See} Caplan, \textit{Annals of Law: The Insanity Defense}, \textit{The New Yorker}, July 2, 1984, at 45, 51, 69.

\textsuperscript{80} Project, \textit{supra} note \textsuperscript{65}, at \textsuperscript{94}-\textsuperscript{95}, \textsuperscript{108} app. A, Tables C & D.

\textsuperscript{81} Interview with Dr. Charles Clark, Director of Clinical Services, Forensic Center (Feb. 18, 1986) [hereinafter Clark interview]. Not all Forensic Center NGRI recommendations result in NGRI verdicts. In 1979, only 50% of the NGRI recommendations led to NGRI verdicts. Since then, the number has been closer to 70%. \textit{Id.} Interview notes are on file with the \textit{Journal of Law Reform}.

\textsuperscript{82} Project, \textit{supra} note \textsuperscript{65}, at \textsuperscript{97} & nn.\textsuperscript{110}-\textsuperscript{11}, \textsuperscript{113} app. A, Table L.

\textsuperscript{83} Interview with Mr. Dan Jeromin, Administrative Officer, Forensic Center (Feb. 13, 1986) [hereinafter Jeromin interview]. Interview notes are on file with the \textit{Journal of Law Reform}.

\textsuperscript{84} Clark interview, \textit{supra} note \textsuperscript{81}.

\textsuperscript{85} Jeromin interview, \textit{supra} note \textsuperscript{83}.

\textsuperscript{86} Interview with Ms. Marilyn Hall, State Court Administrator’s Office (Jan. 22, 1986) [hereinafter Hall interview]. Interview notes are on file with the \textit{Journal of Law Reform}.

\textsuperscript{87} Clark interview, \textit{supra} note \textsuperscript{81}.
paid for the expert in all fifty cases.\textsuperscript{88} No data are available indicating how often the defense will receive funds for an independent evaluation and then not pursue the insanity issue at trial.\textsuperscript{89}

As required by statute, Michigan counties provide funds for hiring independent psychiatric experts.\textsuperscript{90} In Washtenaw County, funds are allocated to the Public Defender, who maintains a budget line for expert services.\textsuperscript{91} In other counties, defense counsel asks the court to reimburse the doctor.\textsuperscript{92} Usually, the court authorizes a funding level that conforms to a standard fee schedule for expert services. The court then considers additional funds as the expert's time commitment increases.\textsuperscript{93} The willingness of trial courts to grant additional funds varies and can create funding problems for defense services.\textsuperscript{94}

In 1986, the Michigan Supreme Court submitted to the Governor a budget request for state funding of the trial courts.\textsuperscript{95} The proposal called for $806,056 for witness fees, to include psychiatric experts for indigent defendants. This figure represents the total amount spent by all Michigan counties for all defense expert services, including psychiatric assistance. The dollar

\textsuperscript{88} See supra note 74. Although only 36.2\% of the GBMI defendants, 23.8\% of the NGRI defendants, and 27.9\% of those evaluated by the Forensic Center and found guilty were employed at the time of arrest, one cannot assume that all defendants pleading insanity were indigent. Project, supra note 65, at 95 n.90, 110 app. A, Table G. When the defense used an independent expert only, the prosecution matched the independent expert with Forensic Center testimony. When the Forensic Center found the defendant not criminally responsible, the defense would use that testimony. If the defense did not use Forensic Center testimony, the Forensic Center had probably evaluated the defendant as criminally responsible. Id. at 108 app. A, Table D.

\textsuperscript{89} See infra text accompanying notes 121-26.

\textsuperscript{90} See MICH. COMP. LAWS ANN. § 768.20a(3) (West Supp. 1987); infra text accompanying notes 97-98.

\textsuperscript{91} Powell interview, supra note 74. The Public Defender has approximately $8,000 annually available for psychiatric experts. These funds have been adequate in recent years.

\textsuperscript{92} Attorney J at 1; Attorney K at 2; Clinician F at 5.

\textsuperscript{93} Attorney E at 1; Attorney F at 2-4; Attorney H at 1, 3; Attorney K at 2; Clinician A at 11; Clinician E at 1-2; Clinician F at 1, 4-5.

\textsuperscript{94} See infra notes 162-80 and accompanying text.

\textsuperscript{95} In 1980, the State Legislature passed 1980 Mich. Pub. Acts 438 (codified at MICH. COMP. LAWS ANN. § 600.9947 (West 1987)), providing for state funding of Michigan's trial courts and allowing for state funding of expert witness fees, including the costs of evaluations and trial testimony by independent psychiatric experts participating in insanity defense cases. The Legislature has not, however, appropriated funds to implement this program of state support for the trial courts. Hall interview, supra note 86; Interview with Ms. Barbara Levine, Office of Michigan Assigned Appellate Counsel (Feb. 17, 1986) [hereinafter Levine interview]. The Michigan Attorney General has opined that the statute does not bind the Legislature as far as funding and that the failure to fund the trial courts does not compel termination of funding for other courts, such as the 36th Judicial District, which is funded by the State. 1983 Op. Att'y Gen. 38.
amount certainly exceeds the amount the counties spend for psychiatric experts used by indigent defendants pleading insanity.  

III. EVALUATION OF THE MICHIGAN SYSTEM

Michigan generally takes an expansive approach to publicly paid psychiatric assistance for the indigent defendant. The interview data indicate few problems in securing assistance, but the requirement of Forensic Center evaluation, jury skepticism toward the insanity defense, the availability of the GBMI verdict, funding limitations, and the professional concerns of practitioners constrain the impact of the service. The data did not show that Michigan’s lack of restraint in the issue areas presented by \textit{Ake v. Oklahoma} has resulted in the kinds of problems that might cause a state to take a more cautious approach.

A. Availability and Adequacy of Service

The evaluation looks at the process for making service available and considers the adequacy of the service delivered. Both are crucial for determining program effectiveness.

1. Availability— The interview data indicate that Michigan courts comply with the statutory requirements of referring defendants to the Forensic Center and providing for independent expert assistance at public expense. Services are more readily available than before the enactment of the federal system under the Criminal Justice Act of 1964 when service was only sporadically available.

Defendants may use the expert services system by simply declaring an intent to plead insanity, yet only a small percentage of those arrested ever enters this system. A screening process

96. Hall interview, \textit{supra} note 86. The Recorder’s Court of the City of Detroit spent $12,600 for psychiatric expert services in 1985 for all purposes, including, but not limited to, insanity defense cases. In 1985, psychiatrists appeared in 38 Recorder’s Court cases. Interview with Mr. George Gish, Court Administrator (Mar. 1986) [hereinafter Gish interview]. Interview notes are on file with the \textit{Journal of Law Reform}.
97. Attorney B at 1; Attorney H at 1; Attorney K at 2; Attorney M at 1; see \textit{supra} notes 83-93.
99. See \textit{supra} note 79.
eliminates cases from the expert services system. This process reduces the likelihood that indigent defendants will take advantage of the psychiatric expert assistance program and pointlessly increase costs while distorting the fact-finding process.

a. Defense counsel—Defense counsel faces substantive and strategic issues when deciding, in consultation with the defendant, whether to secure expert assistance and pursue an insanity defense. Counsel’s view of the key factors in this decisionmaking helps determine the extent to which indigent defendants use the psychiatric expert assistance system and the influence of expert assistance on adjudication.

Defense counsel will not use independent psychiatrists and the insanity defense simply because the state makes these tools available. The difficult task of winning an NGRI verdict inhibits pursuit of insanity pleas. Usually, the defense argues insanity only when the prosecution already has a strong case that the defendant committed the criminal act. The adverse effects of negative Forensic Center evaluations, the availability of the GBMI verdict, and negative jury attitudes toward legal insanity, especially given the often violent nature of the crimes involved, tend to work against the defendant. Furthermore, an insanity plea complicates the work of the defense attorney. Although some public defenders and appointed counsel try these cases effectively, others are not effective, and the added difficulty and time commitment combined with the low probability of success further deter the use of insanity pleas. Presentation of groundless insanity defenses can jeopardize credibility with trial judges, a valuable commodity for effective advocacy, particularly for defense attorneys who appear regularly before a par-

100. Attorney D at 4; Attorney G at 10. The decision to plead not guilty is personal to the defendant, W. LaFave & J. Israel, supra note 40, § 11.6, but the use of insanity as an affirmative defense may fall within the scope of defense counsel’s control of strategy. In Jones v. Barnes, 463 U.S. 745 (1983), the Court held that appellate counsel may use his professional judgment to decide which claims are strong enough to present on appeal despite the defendant’s desire to pursue other nonfrivolous claims.

101. Attorney C at 3, 6; Attorney D at 4; Attorney E at 1; Attorney F at 5; Attorney G at 7-10; Attorney I at 8-9; Attorney J at 1; Attorney K at 1.

102. Attorney E at 2; Attorney I at 9.

103. See infra notes 147-49 and accompanying text.

104. See infra notes 157-60 and accompanying text.

105. See infra notes 178-83 and accompanying text.

106. See infra notes 116-18 and accompanying text.

107. Attorney F at 5; Clinician F at 5.


109. Attorney F at 4 (stating that there is no money in it for counsel); Clinician E at 3; Clinician F at 1-2, 5.
ticular court. Consequently, attorney self-interest often discourages insanity pleas.

Before having a psychiatrist evaluate the defendant, defense counsel assesses the case for a potential insanity defense. Defense attorneys say they evaluate the defendant’s character, mental history and involvement with the mental health community, behavior at the time of the crime, and the crime itself, before supporting an insanity plea and requesting a Forensic Center criminal responsibility evaluation. These attorneys view themselves as reasonably expert at recognizing the defendant’s faking mental disturbances. Although the defense attorneys do not view their appraisals as ultimately valid, they rely on them for the initial decision to explore an insanity defense. Defense attorneys recognize their limitations in this area, and, when they have sufficient resources available, they seek expert evaluation even before referral to the Forensic Center.

The type of crime and the way it was committed also affect the decision to pursue the insanity defense. Usually the defense raises insanity in the most serious cases—those involving major felonies, major sentencing ramifications, and acts against people. The perceived irrationality of the crime—in terms of its impulsiveness, emotionally charged character, and the apparent lack of defendant motivation—correlates with NGRI verdicts in cases where the Forensic Center has evaluated the defendant as criminally responsible. Defense attorneys and the psychiatric community understand the linkage between NGRI verdicts, the character of the crime, and the defendant’s prior behavior. They

110. Attorney B at 1; Attorney F at 2-3; Attorney G at 9; Attorney I at 7 (reporting that courts will decline assigning counsel additional cases).
111. Attorney C at 3; Attorney D at 4; Attorney G at 1, 7-10; Attorney K at 1; Clinician B at 5.
112. See authorities cited supra note 111.
113. Attorney G at 8, 10.
114. See authorities cited supra note 111.
115. Attorney B at 1, 6; Attorney C at 1-2; Attorney D at 3; Attorney G at 12-13; Attorney H at 6; Attorney K at 1, 4; Clinician E at 6; see infra text accompanying notes 144-46.
116. Attorney B at 3; Attorney D at 4; Attorney E at 1. Two-thirds of the cases submitted for Forensic Center evaluation to determine criminal responsibility involve crimes against persons. Project, supra note 65, at 112 app. A, Table K. Experience in other jurisdictions indicates a different result. “[I]n some jurisdictions offenses like forgery, shoplifting, car theft, and other forms of larceny represent the vast majority of crimes of which defendants were found not guilty by reason of insanity.” Caplan, supra note 79, at 69.
may take this linkage into account when selecting cases for insanity defenses, helping to limit the group of cases in which insanity is argued and expert services are used.

Forensic Center clinicians and other observers do not believe that all defense requests for criminal responsibility evaluations originate in a sincere desire to explore insanity. They suggest that defense attorneys often obtain Forensic Center evaluations just to delay the trial or frustrate the prosecution. Nevertheless, at least one Forensic Center clinician concedes that about three-fourths of the criminal responsibility evaluations raise legitimate issues.

When the Forensic Center evaluates the defendant as criminally responsible, defense counsel can advise the defendant to abandon the insanity plea, or may request funds for an independent evaluation, despite its heavy burden of neutralizing the Forensic Center to gain an NGRI verdict. The data do not disclose how often the defense drops the insanity plea at this stage, but it happens. When the defense continues with the insanity plea, an independent expert sometimes finds the defendant criminally responsible. Under the statute, the prosecution receives the expert's report. If counsel goes ahead with an insanity defense, the defendant's own expert can become an adverse witness. The probability of successfully countering a Forensic Center clinician's testimony for the prosecution then becomes strikingly low, effectively discouraging further consideration of an insanity defense.

Practitioners understand that deciding not to pursue an insanity defense poses issues regarding effective assistance of counsel and professional responsibility. Courts have declared mistrials due to ineffective assistance of counsel upon failure to plead or adequately prepare an insanity defense when the defendant's behavior—such as attempted suicide—a finding of incompetence to stand trial, or evidence of a history of mental ill-

118. Clinician C at 3; see infra note 214.
119. Attorney G at 9, 11; Attorney I at 9; Clinician A at 1, 9; Clinician B at 5; Clinician D at 2, 6; Judge A at 1.
120. Clinician B at 5.
122. See supra text accompanying note 82.
123. See infra note 129.
126. See infra note 149.
127. Attorney A at 5; Attorney E at 2; Attorney I at 7; Attorney M at 4.
ness suggested a possibility of legal insanity. Defense counsel does not have an absolute duty to investigate and pursue an insanity defense in every possible case, and defense attorneys correctly believe that they can use their professional judgment to assess the facts and make a reasoned decision whether to pursue the defense. A Forensic Center evaluation of the defendant as criminally responsible, for example, supports not taking any further action in pursuit of an insanity defense.

Without an absolute duty to have defendants evaluated for criminal responsibility, or to pursue the defense beyond a negative Forensic Center evaluation, counsel can give full weight to the factors that argue against pleading insanity. By applying these factors, defense counsel plays a central role in removing defendants from the expert services system and reserving services for a small subset of the defendant population.

b. Trial courts— The state statute directs the trial court to grant a defendant’s request for Forensic Center evaluation and appointment of an independent expert. Interviewees did not report any cases where the trial judge denied these requests.

128. See People v. McDonnell, 91 Mich. App. 458, 460-61, 283 N.W.2d 773, 774 (1979) (finding ineffective assistance of counsel when defense counsel was aware of the defendant’s psychiatric history, including hospitalization, and its bearing on charged offense, but failed to investigate and consider seriously the possibility of an insanity defense); People v. Bryant, 77 Mich. App. 108, 110, 258 N.W.2d 162, 163-64 (1977) (concluding that counsel’s failure to arrange for criminal responsibility evaluation was inexplicable in light of the defendant’s mental history, attempts to commit suicide, and initial declaration that the defendant was incompetent to stand trial); People v. Tumpkin, 49 Mich. App. 262, 265-67, 212 N.W.2d 38, 39-40 (1973) (finding facts that warranted the entry of an insanity plea based on defense counsel’s knowledge of the defendant’s history of instability, attempted suicide, Forensic Center diagnosis of the defendant as psychotic, and trial testimony that the defendant was psychotic, had a fragile hold on reality, heard voices, and suffered religious delusions).

129. People v. Parker, 133 Mich. App. 358, 262-63, 349 N.W.2d 514, 517 (1984) (declining to hold that defense counsel failed to properly prepare an insanity defense when the defendant had no history of mental problems, potential lay witnesses testified as to the defendant’s mental state even though they were not listed in notice of insanity defense, and an expert witness for the defense testified that the defendant was responsible for his behavior); People v. Blue, 114 Mich. App. 137, 142-44, 318 N.W.2d 498, 500-01 (1982) (holding that defense counsel’s tactical decision not to assert an insanity defense was reasonable based on psychiatric testimony available to the prosecution, including Forensic Center reports that the defendant had no substantial mental deficiency after he had initially been found incompetent to stand trial); People v. Anderson, 112 Mich. App. 640, 645-46, 317 N.W.2d 205, 208 (1981) (deciding that defense counsel’s decision not to pursue an insanity defense was not ineffective assistance of counsel where the Forensic Center examination found no past or present signs of mental illness and counsel could have concluded “that an insanity defense was not the best tactical choice”).


132. One judge felt he had discretion in this area, but he took the position that fairness to the defendant and defense counsel required him to honor requests for Forensic
The State Appellate Defender's Office is unaware of any appeals based on judicial unwillingness to approve evaluation at the Forensic Center or appointment of an independent expert. An appellate court has, however, considered the issue of whether a particular type of expert fits within the statutory description, and a trial court has denied funds needed to retain a clinician with specialized knowledge about a particular syndrome. Certain individuals have been excluded from testifying based on the trial court's judgment that they lacked the necessary expertise in evaluating people for criminal responsibility. Otherwise, the appointment of a psychiatric expert is automatic.

The trial court has the power to approve the award of a reasonable fee to the independent expert. Coupled with funding problems faced by some county court systems, judicial discretion regarding the size of the expert's fee affects the quality of service. Low fees reduce experts' expenditure of time on a case and discourage participation by some top quality experts.

c. The Forensic Center and the evaluation process—The Forensic Center evaluates all defendants pleading insanity. Usually, the Forensic Center finds the defendant criminally responsible. In most indigent insanity cases, the Forensic Center evaluates the defendant before the defense obtains any evaluation and authorization of independent experts. Judge A at 2-3. Even the one defense attorney who suggested that courts rely on attorney good faith when they know the attorney has a decent reputation and apply a higher standard when they do not know the attorney did not report any cases where access to the expert was explicitly denied. Attorney B at 1.

133. Attorney I at 1-3.
134. Attorney L at 1-2. In People v. Dumont, 97 Mich. App. 50, 294 N.W.2d 234 (1980), the court determined that a neurological examination satisfied the statutory requirement that the public pay for an expert to examine the defendant as to the underlying medical basis for an insanity defense. See Mich. Comp. Laws Ann. § 768.20a(3) (West Supp. 1987). The court accepted the prosecution's argument that the decision to appoint a neurologist was within the discretion of the trial court, but concluded that the trial court had abused that discretion.

135. Attorney K at 2 (complaining that a trial court would not approve additional money to bring in an out-of-state expert on Post-Vietnam Stress Syndrome); Attorney L at 2 (observing that courts are reluctant to appoint an expert when the defense advances a legal theory that is not well recognized in the law).

137. Attorney L at 1-3.
139. Gish interview, supra note 96. County court systems generally establish a standard fee schedule for various kinds of expert services. These standard fee schedules can act as limits on the expert's fees. Clinician A at 3.

140. See infra notes 163-76 and accompanying text.
142. See supra notes 81-82 and accompanying text.
tion by an independent expert.\textsuperscript{143} Defense attorneys with adequate resources follow a different procedure. They obtain an independent evaluation before referral to the Forensic Center.\textsuperscript{144} Then, the defense receives expert psychiatric advice early in the process and can make strategic decisions without declaring an intent to enter an insanity plea. In these cases, the Forensic Center does not perform the initial evaluation and start a process of building a professional consensus that the defendant is criminally responsible.\textsuperscript{145} Immediate independent evaluation shortens the time between the offense and the evaluation of the defendant’s state of mind at the time of the offense, reducing the possibility that the defendant’s behavior will stabilize and become less demonstrative of the state of mind needed for an insanity defense.\textsuperscript{146}

Defendants will rarely receive an NGRI verdict when the Forensic Center has found the defendant criminally responsible—its typical finding\textsuperscript{147}—even when the independent expert finds the defendant not criminally responsible.\textsuperscript{148} When the independent expert concurs with the Forensic Center finding, as sometimes occurs, the defendant faces an almost fatal problem. The prosecution has access to the expert’s report, leaving the defense with an extremely weak substantive and strategic basis for arguing insanity.\textsuperscript{149} Indeed, once the Forensic Center enters

\textsuperscript{143} Attorney D at 2; Attorney F at 5; Attorney J at 1; Attorney K at 1; Attorney M at 1.

\textsuperscript{144} Attorney B at 1, 6; Attorney C at 3; Attorney D at 3; Attorney G at 12-13; Attorney H at 6; Attorney K at 1; Clinician E at 6.

\textsuperscript{145} Attorney B at 1-2; Attorney C at 3; Attorney D at 3-4; Attorney H at 6.


\textsuperscript{147} See supra note 81 and accompanying text.

\textsuperscript{148} Clinician A at 2; Clinician B at 2; Clinician F at 3; Blunt & Stock, Guilty But Mentally Ill: An Alternative Verdict, 3 BEHAVIORAL SCI. & L. 49, 61-62 (1985); Project, supra note 65, at 103-04; see Clark & Howard, supra note 117, at 394. In 1979, the Forensic Center evaluated 864 defendants as criminally responsible. Only 14, or 1.63\%, of these defendants were adjudicated NGRI. Id. at 386. An evaluation of cases in which the Center’s recommendations varied from adjudicatory results showed that defendants evaluated as criminally responsible but adjudicated NGRI “committed offenses which were likely to be impulsive, emotionally charged, or without apparent motivation.” Id. at 394. These defendants differed from defendants adjudicated culpable “both in their history of psychiatric treatment and in the frequency of prior findings of incompetency to stand trial.” Id. The study did not assess the effect of attorney skill or of defense experts. Id. These factors surely affect the outcome, but not wholly independently of the character of the crime and the defendant’s background. Attorney B at 2-3; Project, supra note 65, at 97-98.

\textsuperscript{149} The defense could use a lay witness, Attorney D at 6, but would still have to contend with an adverse evaluation by a clinician initially selected by the defense. Attorney B at 1-2; Clinician E at 5; see MICH. COMP. LAWS ANN. § 768.20a(6) (West Supp.
its usual finding of criminal responsibility, the small prospect for eventual defense success discourages the defense from seeking public funds for an independent expert, particularly in marginal cases. The Forensic Center serves as a constant check against potential defense exploitation of the insanity defense in questionable cases.

d. Jury attitudes—Jury attitudes also disfavor insanity defenses. Jury hostility toward the insanity defense depresses the number of NGRI verdicts, the use of the insanity defense, and the retention of publicly paid psychiatric experts regardless of the lack of statutory impediments to the use of these experts.

Jury skepticism regarding expert witnesses may encourage jury members to disregard expert witness testimony. If the jury disregards the experts, the defense has a weak case. Technically, the prosecution has the burden of persuasion on the issue of legal sanity, but in most insanity cases, the defense has conceded that the defendant committed the criminal act, and jury attitudes may force the defense to do more than simply offer evidence contrary to that presented by the prosecution. The defense may have to get the jury to see the case the way the defense expert sees it, and not simply raise a doubt about the defendant’s criminal responsibility. Thus, the jury presents a formidable hurdle for the defendant and operates as a check on the expert witness. This difficulty presents one more obstacle

1987); People v. Parker, 133 Mich. App. 358, 349 N.W.2d 514 (1984); supra note 129; see also supra notes 124-26 and accompanying text.

150. Clinician E at 4; Clinician F at 5.
151. Clinician E at 4; Clinician F at 3-4.
152. Attorney B at 2; Attorney E at 1; Attorney F at 5; Attorney G at 5, 11; Attorney H at 3; Attorney I at 5, 9; Attorney K at 3-4; Clinician C at 3; Clinician E at 4; Clinician F at 3-4.
153. Attorney A at 3-4; Attorney B at 2; Attorney E at 1-2; Clinician C at 2.
155. Attorney G at 5; Attorney K at 3-4; Clinician F at 4; see supra note 152. But see Boyle & Baughman, supra note 66, at 85-86. They argue that in People v. Murphy, 416 Mich. 453, 331 N.W.2d 152, appeal denied, 418 Mich. 956, 344 N.W.2d 6 (1983), the court undermined the jury's freedom to disregard expert testimony of insanity when the court held that under a sufficiency of the evidence standard, appellate courts can weigh the evidence, determine credibility, and find the defendant NGRI when all the experts testify that the defendant is not criminally responsible. They object to this alleged usurpation of the jury's fact-finding function given the "highly questionable competence" of experts to make these determinations. Boyle & Baughman, supra note 66, at 86; see also People v. John, 129 Mich. App. 664, 667, 341 N.W.2d 861, 863 (1983) (substituting an NGRI verdict for a GBMI verdict where the only two psychiatric experts who participated testified that the defendant was not legally sane).
156. Judge A at 1; see also supra notes 151-53.
to the objective of obtaining an independent clinician and arguing insanity.

e. The GBMI verdict—The Michigan Legislature’s enactment of the GBMI verdict may have diminished the perceived usefulness of the insanity defense.\(^{157}\) Although the GBMI verdict is not a compromise verdict on the effect of mental illness on criminal responsibility, fact finders use it that way,\(^{158}\) possibly to satisfy the desire to keep dangerous criminals off the streets.\(^{159}\) The GBMI verdict further discourages insanity defenses because the GBMI sentencing regime sometimes provides no real advantage over a guilty sentence and may even harm the defendant because of greater reluctance to release the defendant.\(^{160}\) If the GBMI verdict reduces the potential benefit of arguing insanity at trial, then it may also inhibit the use of independent experts because the expert has even less of a chance of persuading the fact finder to find the defendant NGRI than when the GBMI verdict is not available.

f. Summary—Even though in some cases defense counsel has a clear duty to pursue the insanity defense, counsel retains and frequently uses substantial discretion not to refer cases to the Forensic Center. When the Center returns a finding of criminal responsibility, the pressures to continue pursuing the insanity defense diminish. The difficulties faced in presenting and winning an insanity defense come into play as defense counsel decides whether to prepare and argue an insanity defense. The

\(^{157}\) Attorney H at 3. Michigan’s GBMI verdict has been criticized as ineffective because it has not accomplished the legislative goals of reducing the number of NGRI verdicts and providing treatment for mentally ill defendants found criminally responsible. Project, supra note 65, at 104. Adjudication of the defendant as NGRI has not led to the expected medical treatment. Petrella, Benedek, Bank & Packer, Examining the Application of the Guilty But Mentally Ill Verdict in Michigan, 36 HOSP. & COMMUNITY PSYCHIATRY 254, 258 (1985). In contrast, some commentators believe that at least some defendants who are not mentally ill and who might have been erroneously found NGRI, have received GBMI verdicts, preventing their premature discharge based on their having been found not mentally ill shortly after conviction. Boyle & Baughman, supra note 66, at 85. Despite this controversy, the GBMI verdict presents the fact finder with an alternative to the NGRI verdict in particular cases.

\(^{158}\) Attorney G at 6; Attorney I at 2; Clinician A at 2, 7; Clinician E at 5. But see Project, supra note 65, at 84 n.33. Commentators and at least two appellate cases have raised the issue of abuse of the GBMI verdict by juries that compromise between guilty and NGRI by finding the defendant GBMI, but such abuse has not been shown. Id.

\(^{159}\) Attorney H at 3; Attorney I at 2; Clinician F at 3.

\(^{160}\) Attorney B at 3; see Blunt & Stock, supra note 148, at 66: “[B]eing found GBMI may actually be detrimental since it can interfere with the prisoner’s chances of being accepted into ancillary programs because of the label of ‘mental illness.’” The former Executive Director of Michigan Forensic Services reported that many defendants do not want mental illness on their records because parole boards may be hesitant to release them. Project, supra note 65, at 102 n.134.
effect is a radical reduction from the number of cases that could enter the system for preparing an insanity defense to the number that actually enter and fully use the system, and then again to the number that result in NGRI verdicts. The reduction process eases the demand for public payment for psychiatric expert assistance, despite the relatively few restrictions the enacting statute places on access to the system.

2. Adequacy of service—Michigan does not have formal standards for assessing the quality and adequacy of psychiatric expert service. Although the data do not point to specific cases where inferior service resulted in a clearly erroneous determination of legal sanity, the data do indicate that limited financial support sometimes undermines the utility of the service. Problems arise when counties do not allocate sufficient funds and when trial courts limit fees, under the "reasonable fee" language of the statute, to amounts too low to attract effective experts or to secure appropriate expert time.

The amount paid the independent expert varies by county, court, and case. Some counties rely on a standard fee and allow the trial court to authorize additional payments. Some courts readily grant additional fees on request; others do not. In one major urban county, the courts will not authorize payments greater than those provided under a standard fee schedule unless the case requires extraordinary effort. Not surprisingly, court personnel and psychiatric experts disagree over the application of that standard.

The psychiatric experts take a variety of approaches to setting fees in indigent insanity defense cases. They may work for a reduced fee, use a fixed fee system instead of their usual practice of billing by the hour, or complete the work they think is necessary and then petition for extra money, not knowing whether they will receive it.

The standard fee established in several counties—$300 for preparation and $150 per day for trial time in Wayne County,

161. The State Appellate Defender's Office, which assists indigent defendants appealing trial court decisions, has not handled cases raising this issue. Attorney L at 5.
163. Attorney E at 1; Attorney F at 2-4; Attorney H at 1; Attorney J at 1; Attorney K at 2; Attorney L at 5; Clinician A at 3; Clinician E at 1-2; Clinician F at 1, 4-5.
164. Gish interview, supra note 96.
165. Attorney F at 2-3; Clinician E at 1-2;
166. Attorney B at 4; Attorney H at 2; Attorney M at 3; Clinician C at 5; Clinician E at 2; Clinician F at 1, 6.
for example—is too low to pay for the number of independent expert hours often required to prepare adequately an insanity defense. When the defense is unable to get the trial court to approve additional fees, the defendant receives inferior services unless the expert adjusts only his charges and not his time commitment.

Based on its review of Michigan cases, the Forensic Center confirms the view expressed in *Ake* that a defense expert's assistance can be critical to an insanity defense. The Forensic Center found that expert testimony is essential for the defendant to secure an NGRI verdict when the Forensic Center has found the defendant criminally responsible. An expert's persuasiveness influences the outcome and depends on such factors as competence, general expertise, prior experience, and the extent and quality of evaluation and preparation for the case. Limited fees tempt the expert to restrict the preparation of the case to the point of impairing the presentation of the insanity defense.

Attorneys and clinicians did not describe established standards for expert time, but they did estimate ranges based on the relative difficulty and complexity of the cases' legal insanity issues. The simplest cases might require a total of three hours

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167. Interview with Mr. Dan Rutger, Deputy Court Administrator, City of Detroit Recorder's Court (Apr. 14, 1987). Interview notes are on file with the *Journal of Law Reform*.

168. *See infra* notes 173-75 and accompanying text.

169. *See Clark & Howard, supra* note 117; *see also* Bank & Poythress, *supra* note 52.

170. Bank & Poythress, *supra* note 52, at 174. Jurors interviewed after a highly publicized murder trial where the only defense was insanity indicated that the case rested on the experts, but that they found the defense doctor unconvincing, if not offensive. Forensic Center clinicians testified for the prosecution. The jury rejected the insanity defense. Cain & Smith, *Bailey Faces Life in Prison*, Ann Arbor News, Oct. 2, 1986, at A1, col. 4, A4, col. 1. Shortly thereafter, the same expert testified for the same defendant at a bench trial for a second murder. The trial judge found the defendant guilty of second degree murder and then chastised the expert as a publicity seeker. The court called the expert's testimony "more theatre than substance." As many as twenty other experts refused to take the case. Gave, *Bailey Guilty of 2d Murder*, Det. News, Nov. 21, 1986, at 1B, col. 5.

171. Attorney B at 4, 6; Attorney C at 3; Attorney G at 3-4; Attorney H at 1; Attorney K at 2; Clinician A at 6, 9-10; Clinician B at 4; Clinician D at 5.

172. Attorney G at 1-2, 8; Clinician A at 3, 6; Clinician B at 5-7; Clinician D at 6; Clinician F at 5.

173. The time spent by the expert to prepare and present his evaluation of the defendant will vary with the complexity of the case and the resources available to pay the expert. Attorneys and experts provided estimates of the time they would like to have for psychiatric assistance and the amount usually needed based on previous experience. They had the following comments. Although Attorney B has cases that require as little as one hour for evaluation, contested cases can use at least 10 hours of expert time for pretrial preparation. Trial testimony can take a full day. Attorney B at 3-4. According to Attorney C, in some cases the
for investigation, report preparation, and consultation with counsel. Trial testimony requires additional time. Assuming no unanticipated procedural or substantive difficulties, in major, complex cases, estimates for time spent outside of court ranged from six to twelve hours for evaluation, report preparation, and consultation. Some cases require more time. Using eight hours as a crude measure of the amount of pretrial time required for expert services, and a typical fee of $100 per hour,暂 the defense would need at least $800 just for preparation. Restricting the ex-

expert will require up to 20 interview sessions with the defendant. Attorney C at 1-2. Attorney D believes that pretrial preparation requires at least six to 10 hours, and trial testimony can extend up to five hours. Sometimes the expert needs to spend even more time getting ready for trial. Initial interviews just to establish whether the insanity defense has any potential in a particular case will use one hour in addition to the expert's travel time incurred when the defendant is incarcerated and the government does not allow the expert to interview the defendant at the expert's office. Attorney D at 1, 3-4. In a 1986 murder case involving an indigent defendant, Attorney G used 12 hours of expert time, but would have preferred 25 or more hours. Attorney G at 1-2. Clinician A noted that some cases require only two hours of preparation, whereas others require six. Clinician A at 10. The Forensic Center may put in as little as three hours on some cases, but six to eight hours is closer to normal. At least one case required 36-48 hours of Forensic Center clinician time. Clinician B at 4-7. Clinician C usually spends six hours preparing a case and additional time testifying. Clinician C at 5-6. According to Clinician F, two to three hours of work is inadequate. At the time of the interview, he had already put 13 hours into a vexing murder case and anticipated at least 16 more hours for pretrial preparation. Clinician F at 6. Judge A expects the expert to put at least three to four hours into evaluating the defendant.

174. Psychiatrists typically charge $100-$150 per hour and psychologists $65-$100 per hour. Attorney B at 4; Attorney D at 1; Clinician A at 10; Clinician F at 1. There are a few forensic psychiatrists who may charge twice the average hourly rate. Clinician F at 1. A few experts use a flat fee of $1000 to $1500 when they spend an entire day working on an insanity defense case, such as when they must travel to a distant part of the state. Attorney D at 2; Clinician F at 1. Some experts reduce their fees for indigent clients. Attorney B at 4; Attorney M at 3; Clinician C at 5-6; Clinician E at 1-3. For cases raising the insanity defense, some experts charge a fixed fee, even if the defendant is not indigent. Attorney F at 1-2; Clinician C at 5-6.

According to Attorney B, insanity defense cases typically cost $500-$1000 for the expert's evaluation and preparation time and $500-$1000 for the expert's time to testify at trial. Attorney B at 3-4. Five-figure fees are not uncommon in retained cases. Attorney C at 1-2. During the interview, Clinician F estimated that his fee for a pending murder case might reach $10,000. Clinician F at 6. Attorney K believes that an expert will need about $2000 to do a good job. He recently had a court turn down a request for $1200 to retain a psychiatrist with expertise in Post-Vietnam Stress Syndrome. An indigent in Ingham County recently received $2500 to pay for psychiatric assistance. Clinician B at 4. Alternatively, Judge A thinks that an insanity case can be adequately handled for $500. Judge A at 2. Attorney M concurs in this judgment, and argues that the $300 for preparation and $150 per day for testimony paid by Wayne County is sufficient, possibly because he expects experts to adjust their fees downward for indigent clients. Attorney M at 1, 3. Others disagree, directly stating that $300 will not pay for enough time for the expert to do an adequate job. Attorney K at 2-3; Clinician B at 5; Clinician C at 5-6; Clinician F at 5. The examples of the fees charged in particular cases, and consideration of the number of hours required by these cases in light of the typical hourly fee charged by experts, confirm that assessment.
pert to a standard fee of $300, for example, will not pay for an adequate amount of service unless the expert drastically modifies his normal billing rates. Some cases will require trial court generosity when calculating a reasonable fee.\(^{\text{175}}\)

Low fees and uneven reimbursement practices reinforce other factors that limit the available pool of experts.\(^{\text{176}}\) Some psychiatrists do not want to get involved because of their discomfort with the courtroom role and the contentious, and sometimes humiliating, character of cross-examination.\(^{\text{177}}\) In some regions of Michigan, defense attorneys have trouble finding doctors experienced enough to present a credible case to the jury.\(^{\text{178}}\) Using experts from the small group of well-known and generally respected defense experts may not solve the problem because those experts' reputations as defense doctors are sometimes used to discredit them.\(^{\text{179}}\)

The occasional inability to secure the services of competent specialists and funding inadequate to support sufficient preparation can impair the quality of the defense presentation. Certain experts, often those with the most experience in forensic psychiatry, are more persuasive and skilled at presenting the case to the jury. Additionally, preparation is crucial to an effective presentation.\(^{\text{180}}\) The quality of the expert's participation and presentation of the insanity defense can influence the outcome of the case.\(^{\text{181}}\) Impediments to expert performance can diminish the probability of obtaining an NGRI verdict, although deficiencies may not reach the level of incompetence necessary to implicate the prejudice standard used to assess claims of ineffective assistance of counsel.\(^{\text{182}}\) Even in Michigan's liberal system, the defendant faces built-in financial impediments and judicial restrictions that can seriously reduce the quality of service.

\(^{\text{175. See supra notes 90-93 and accompanying text.}}\)

\(^{\text{176.}}\) Attorney A at 5; Attorney D at 1; Attorney E at 4-5; Attorney F at 1-2; Attorney H at 2; Attorney I at 3, 8; Attorney K at 2; Attorney L at 5; Clinician A at 1; Clinician B at 5, 7; Clinician C at 6; Clinician D at 5; Clinician E at 1-3; Clinician F at 2. \(\text{But see}\) Attorney M at 1 (having no problems getting the expert he wants for indigent cases).

\(^{\text{177.}}\) Attorney E at 4; Clinician E at 1-2; Clinician F at 2.

\(^{\text{178.}}\) Attorney K at 2.

\(^{\text{179.}}\) Attorney A at 5; Attorney B at 6; Attorney E at 3; Attorney I at 3-4; Attorney K at 6. \(\text{But cf.}\) Attorney C at 3 (finding reputation as defense doctor of little concern).

\(^{\text{180.}}\) Attorney B at 4, 6; Attorney C at 2-3; Attorney D at 1, 5; Attorney E at 4; Attorney F at 2; Attorney G at 3-4; Attorney H at 1, 2; Attorney I at 8; Attorney K at 2; Clinician A at 8; Clinician B at 4-5; Clinician F at 2; \text{see supra notes 169-72 and accompanying text.}

\(^{\text{181.}}\) Attorney G at 3-4; Attorney K at 2; Clinician B at 4-5; Clinician E at 4; Clinician F at 3-4; Banks & Poythress, \text{supra} note 52; \text{see supra} text accompanying notes 169-72.

\(^{\text{182.}}\) Attorney F at 4; \text{see supra} notes 28-31 and accompanying text.
B. Threshold Need Test for Psychiatric Expert Assistance

Michigan grants the indigent defendant access to independent psychiatric assistance without applying a threshold need test to establish that legal sanity is likely to be a legitimate issue at trial.\textsuperscript{183} The absence of such a test eliminates the possibility of appeals based on judicial misapplication.\textsuperscript{184} The defendant avoids the denial of access to psychiatric assistance, and the state avoids the costs and delays of appeals, which may not change the adjudicative result.\textsuperscript{185}

Without a need test, the defense has substantial discretion in securing Forensic Center evaluation and the services of an independent psychiatric expert. The factors that discourage use of the insanity defense and independent experts screen out cases just as a threshold need test might\textsuperscript{186} and do not require direct trial court intervention.\textsuperscript{187} The screening process protects the public from unwarranted use of the service and wasteful expenditure of public funds. In Washtenaw County, the Public Defender's Office uses its own expert witness budget for psychiatric assistance without court involvement,\textsuperscript{188} assuming responsibility for honest use of the money.\textsuperscript{189} Once again, the defendant does not risk an erroneous judicial determination of need, and the public does not face the additional cost and delay of appeals based on \textit{Ake}.

Michigan's system may allow some defendants to use the Forensic Center and an independent expert where a court would not allow access to publicly paid assistance.\textsuperscript{190} But the financial costs must be weighed against the potential litigation costs of an appeal and the cost to a defendant of an erroneous need test decision.\textsuperscript{191} These costs are especially high in cases where the psychiatric evaluations might have enabled the defendant to obtain an NGRI verdict or a prosecutorial compromise.\textsuperscript{192} Forensic Center data and information from several counties suggest that the costs of providing the service without employing a need test

\textsuperscript{184} See supra notes 131-37 and accompanying text.
\textsuperscript{185} Attorney E at 5-8; Attorney F at 4; Attorney I at 8; Judge A at 3; see supra notes 36-41 and accompanying text.
\textsuperscript{186} See supra notes 102-26, 143-44, 147-49 & 152-60 and accompanying text.
\textsuperscript{187} Attorney B at 4; Attorney C at 2; Clinician A at 7; Judge A at 3-4.
\textsuperscript{188} Attorney D at 2, 6.
\textsuperscript{189} Judge A at 6-7.
\textsuperscript{190} See supra text accompanying notes 119-20.
\textsuperscript{191} Attorney I at 5; Judge A at 3-4.
\textsuperscript{192} See supra notes 80-82 and accompanying text.
have not overwhelmed the public treasury and pale in comparison with the nonmonetary interests of the defendant. 193

Liberal access to expert services has little chance of leading to NGRI verdicts in fundamentally meritless cases. 194 The factors that discourage using the expert service system in weak cases prevent an NGRI verdict in fabricated insanity defense cases. 195 Michigan's experience seems to be that NGRI verdicts result either when the experts agree or have a good faith disagreement. 196 A need test to keep cases away from a jury because of fear that defense experts might persuade the jury wrongly to find the defendant NGRI embodies an attack on the insanity defense itself and an unwillingness to accept the outcomes of the fact-finding process. 197

When the defense requests funds beyond the standard fee schedules to pursue evaluation and preparation, the trial court can subject the request to careful review or rely on the expert's and defense counsel's good faith. Some courts appear to use a good faith test at this point, a practice that roughly conforms to the recommendations of critics of the threshold need test approach. 198 The indigent defendant has had the benefit of at least one completely independent psychiatric evaluation, something that Ake does not always require. The trial court controls further use of public funds, without the danger of completely and erroneously depriving the defendant of constitutionally mandated access to psychiatric assistance.

C. Choice of Expert

Ake permits states to limit the defendant's choice of psychiatric expert, 199 whereas Michigan allows the defendant to supplement the required Forensic Center examination with evaluation by any qualified expert at public expense. 200 The free choice of

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193. See supra notes 86-96 and accompanying text.
194. Attorney A at 6; Attorney B at 1; Attorney C at 6; Attorney E at 2-3; Attorney G at 7-9; Attorney H at 3; Attorney I at 5, 9; Clinician A at 7-9; Clinician C at 3; Clinician E at 4-5; Clinician F at 3, 5-6; see supra notes 102-26, 143-44, 147-49 & 152-60 and accompanying text.
195. See supra note 194.
196. Clinician A at 7; Clinician B at 7.
197. L. Coleman, supra note 52, at 1-21, 45, 52-64.
198. Attorney B at 1, 5; Attorney C at 2; Clinician A at 8; Decker, supra note 34, at 615; Note, Expert Services, supra note 1, at 1360.
expert balances the influence of the Forensic Center and protects the defendant in situations where the attitude and skill of the defense expert can influence the success of the insanity plea.201

All defendants pleading insanity must undergo Forensic Center evaluation, and the Center has the reputation of being prosecution oriented.202 Defense attorneys attribute this perspective, and possibly the Center's high rate of findings of criminal responsibility, to such factors as conscious hostility toward the defense position, the subtle biasing effects of state employment, the institutional work environment, or honest scientific disposition and perspective.203 Forensic Center supporters argue that Center clinicians are well-experienced in forensic psychiatry and careful in their evaluations. They contend that low incidence of not criminally responsible evaluations results from the rarity of mental illness in the population and the rigors of the insanity test, not from bias.204 They also point out that Forensic Center clinicians are employed by the State Department of Mental Health, which is not a prosecuting agency, and that state employees, such as the Appellate Defenders, can be strong defense advocates.205

After Forensic Center evaluation, the defense can select any qualified experts, including those with reputations as defense-oriented experts, to complete an independent evaluation.206 Experts are not equally capable, a potentially significant factor when presenting the insanity defense.207 Michigan's program does not force a defendant to select the independent expert from a set of generally inferior forensic psychiatrists, although funding limitations might have that effect.208 Judicial hostility toward some psychiatric experts, sometimes manifested through

201. Attorney B at 6; Attorney C at 2-3; Attorney F at 2; Attorney G at 3-4; Attorney H at 1; Attorney I at 8; Attorney K at 2; Clinician A at 6-7; Clinician B at 4; Clinician D at 5; Clinician E at 1; Clinician F at 1-2; Judge A at 1; see supra text accompanying notes 180-82.

202. Attorney B at 2, 6; Attorney C at 3; Attorney D at 5; Attorney E at 4; Attorney K at 1; Attorney M at 2; Clinician A at 2; Clinician C at 1; Clinician D at 4; Judge A at 2.


204. Attorney E at 3-4; Attorney I at 3-4; Clinician A at 2; Clinician C at 1.

205. Attorney E at 3-4.

206. Attorney B at 6; Attorney C at 3; Attorney D at 5; Attorney E at 3-4; Attorney I at 3-4; Attorney K at 1-2; Clinician A at 8; Clinician B at 2; Clinician C at 1; Clinician E at 5; Judge A at 2; see MICH. COMP. LAWS ANN. § 768.20a(3) (West Supp. 1987); see also supra text accompanying notes 204-05.

207. See supra text accompanying notes 20-21.

208. See supra text accompanying notes 180-82.
reluctance to honor fee requests, however, conflicts with the statutory preference for free choice of expert.

The generosity of Michigan's system raises an alternative concern. Does the defendant's ability to seek out a defense-oriented expert distort the adjudicatory process by encouraging unfounded pro-defense evaluations and contributing to patently erroneous NGRI acquittals? Not surprisingly, defense attorneys and experts deny that they distort either the facts of the case or the fact-finding process. Prosecution interests adopt a less generous view of the behavior of defense experts, although they admit that the leading defense experts are honest in their recommendations and that the defense community generally plays things straight.

Several factors constrain expert behavior and protect the fact-finding process. Defense-oriented experts have recommended against an insanity defense because of the results of their evaluations of defendants in addition to strategic grounds. Raising the insanity defense may link the nature of the crime to the defendant's psychiatric history, inflaming jury worries about a "maniac" walking the streets. Advocacy of marginal cases jeopardizes an expert's credibility, resulting in judicial distrust and fee approval problems. Winning becomes an even more remote possibility than usual, hurting the expert's track record and making defense attorneys wary of using that expert. Supporting weak cases opens the expert to attacks for his pro-de-

210. Attorney I at 4; Clinician F at 3; see supra note 52 and accompanying text; see also Boyle & Baughman, supra note 66, at 81 n.32 (citing a 1978 report claiming that 80% of those found NGRI are not mentally ill).
211. Attorney C at 6; Attorney D at 4, 6; Attorney G at 8-11; Clinician E at 4-5; Clinician F at 3-4.
212. Attorney E at 4; Attorney I at 3; Clinician A at 6, 8; Clinician B at 4; Clinician C at 4; Clinician D at 3.
213. Attorney D at 2; Clinician E at 1, 4.
214. Clinician E at 4-5. This expert considered Ake's case an unlikely one for a successful insanity defense based on the nature of the crime. See supra text accompanying notes 7-8; see also Clinician F at 3-4. This expert said that in some notorious cases the fact finder will want some retribution regardless of the defendant's apparent mental problems. With regard to a highly publicized southeastern Michigan case that was in progress on the date of the interview—involving the abduction, sexual abuse, and killing of a 13-year-old boy by a young man with a history of mental health problems, treatment, and at least one similar offense—this expert viewed the defendant as not having a chance of obtaining an NGRI verdict. The defendant was found legally sane. See supra note 170.
215. Attorney B at 1; Attorney I at 7; see supra note 170.
216. Attorney C at 3; Attorney D at 4; Attorney G at 9; Clinician C at 3-4; Clinician E at 5, 6; Clinician F at 3.
defense orientation and poor prior performance, adding to the discomfort of testifying. Finally, generally limited fees stifle any financial incentive to promote weak cases.

Jury hostility to the insanity defense also constrains the freely chosen expert from subverting the fact-finding process. A blatantly pro-defense expert has a small chance of convincing the jury to find the defendant not criminally responsible in a weak case, especially when opposed by the Forensic Center. Although an occasional meritless NGRI verdict may slip through, prosecutors, defense attorneys, and clinicians all tend to see this risk as minimal. Instead, they maintain that the insanity defense will only succeed when there is some legitimate substantive basis for the defense.

In close cases, the independent expert's pro-defense orientation works in favor of an NGRI verdict. The prosecution may consider an NGRI verdict wrong in some of these cases. Yet, an NGRI verdict requires the defense to overcome adverse Forensic Center testimony and convince a skeptical fact finder. That result demands a credible basis for arguing the defense. These NGRI verdicts hardly amount to gross distortions of the fact-finding process, especially in an adversary system.

D. Role of the Expert

The Michigan system permits expert partisanship and only restricts the expert's role by requiring a written evaluation and recommendation. Despite fears that partisan experts distort the fact-finding process, formal and informal elements of the

217. Attorney A at 5; Attorney D at 1, 5-6; Attorney E at 3-4; Attorney I at 2.
218. See supra note 177 and accompanying text.
219. Clinician E at 5; see supra notes 162-68 & 173-75 and accompanying text.
220. See supra notes 151-56 and accompanying text.
221. See supra notes 82 & 151-56 and accompanying text.
222. Attorney I at 4-5; Clinician A at 8; Clinician C at 4; see supra notes 210-11 and accompanying text.
223. Attorney I at 3; Attorney G at 11-12; Attorney H at 3; Attorney I at 4-5; Clinician A at 7; Clinician B at 6; Clinician C at 2-3; Clinician E at 4; Clinician F at 3-5.
224. Attorney K at 1; Clinician A at 7-9; Clinician E at 4; Clinician F at 4-5.
225. Attorney D at 5; Clinician B at 3; see supra note 148.
226. Attorney I at 8; Clinician A at 8.
227. Clinician C at 3; see supra notes 82 & 151-56 and accompanying text.
228. See supra note 224 and accompanying text.
229. Clinician A at 8; Clinician B at 8; Clinician C at 1-2; see W. LaFave & J. Israel, supra note 40, § 1.6(a)-(c).
231. See supra text accompanying notes 51-52.
Michigan system suppress the influence of expert partisanship and prevent experts from leading juries to NGRI verdicts in groundless cases. The processes that minimize the impact of free choice of expert on adjudicatory result also limit the effects of expert partisanship.\(^{232}\)

The Forensic Center, which many consider prosecution oriented,\(^{233}\) evaluates all defendants pleading insanity.\(^{234}\) When the Center evaluates the defendant as not criminally responsible, the prosecutor rarely contests that conclusion, and the issue of expert partisanship becomes irrelevant. This covers the vast majority of NGRI verdicts in Michigan.\(^{235}\)

In contested cases, the partisan defense expert usually faces a Forensic Center clinician. The Center's credibility with judges and juries and potential image as a disinterested party,\(^{236}\) balances the partisanship of the independent expert. In indigent cases, limited funding prevents massive battles of the experts that might overwhelm the jury.\(^{237}\) A partisan expert has a great deal of trouble overcoming jury skepticism even when the facts make the insanity defense highly plausible.\(^{238}\) Although partisan experts have probably influenced verdicts favorably for the defendant, outlandish results appear rare.\(^{239}\)

Participation by partisan experts may add time and cost to the trial. Their participation may force the fact finder to sort through conflicting testimony from the independent expert and the presumably neutral Forensic Center. The Michigan system presumes that no single psychiatric expert will necessarily describe ultimate truth and that the fact-finding process in in-

\(^{232}\) See supra notes 213-21 and accompanying text.

\(^{233}\) See supra note 202 and accompanying text.


\(^{235}\) See supra note 80 and accompanying text.

\(^{236}\) See supra note 148.

\(^{237}\) Caplan, supra note 79, at 51-52. The doctors who testified for the government in its case against John Hinckley charged over $300,000. Hinckley's doctors charged about one-half of that amount. Id. at 59. "To quiet the popular concern, among psychiatrists as much as among others, that doctors have too much sway in insanity trials," bills introduced in the House and Senate after the Hinckley case "proposed to prevent [doctors] from testifying about the ultimate question before the jury." Id. at 75; Attorney D at 4 (noting that attorneys in Washtenaw County Public Defender's Office might use two experts in a capital case).

Although Fed. R. Evid. 704(b) has been recently amended to reduce the influence of experts over juries, there is still a problem in most insanity cases. The majority of these cases are tried at the state level, and there is no indication that Michigan will adopt this amended version. Furthermore, expert testimony will remain influential because the expert can provide evidence that leads to only one ultimate conclusion.

\(^{238}\) Attorney G at 5; Clinician F at 3; see supra note 153 and accompanying text.

\(^{239}\) See supra notes 222-24 and accompanying text.
sanity cases is best served by exposing the fact finder to competing versions of truth. Apparently, open contests to determine that truth have not made judges and juries so vulnerable to expert manipulation that these contests jeopardize the integrity of the adjudicatory process.

CONCLUSION

Michigan provides indigent defendants with publicly paid psychiatric assistance without imposing the limitations permitted by the Supreme Court’s decision in Ake v. Oklahoma. Defendants have access to the system without having to satisfy a threshold need test, they can hire any qualified expert they want, and the expert may serve as a defense consultant. Several factors, however, channel services to appropriate cases and limit the adjudicatory impact of Michigan’s policy choices. Defense attorneys play a critical role in determining whether to use the system at all and whether to pursue the insanity defense all the way to trial. These attorneys take into account in their decision-making the multiple factors that make a successful insanity defense unlikely. Additionally, the Forensic Center evaluates every defendant who indicates an intent to plead insanity. The Center typically finds the defendant criminally responsible, and that finding discourages both further defense pursuit of an insanity argument and decisions for the defendant by the judge or jury when the defendant does challenge the Forensic Center’s findings. The screening process engaged in by defense attorneys, the Forensic Center, and the fact finder discourage use of all the elements of support made available by the psychiatric assistance system. When a defendant persists with an insanity defense, despite the relative lack of merit of that defense, the chances for adjudicatory vindication for the defendant appear quite slim. Fear of disruption of the adjudicatory process seems unfounded.

In some situations, funding difficulties prevent the psychiatric assistance program from fully satisfying the needs of the indigent defendant. The bulk of the State’s money goes to supporting the Forensic Center. Although the Center evaluates each defendant, the Center does not directly serve defendant interests. Instead, the funding for defense experts that comes through county governments is inconsistent. Adequate psychiatric expert service simply costs more than some counties and courts provide in some cases. Michigan has already passed legislation approving state funding of trial courts and support services, such as psychi-
Psychiatric experts. Unfortunately, the Legislature has never funded this program. Affirmative steps in that direction, providing for adequate state funding and administrative controls, would set the stage for rectifying implementation problems in Michigan's generally successful program for providing psychiatric expert assistance to indigent defendants pleading insanity.

—Paul Zisla