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## PRESENTATION OF THE DEFENSE

THOMAS P. SULLIVAN\*

Cross-examination to discredit the prosecution's case will often narrow the field of uncertainties in the mind of the trier of fact. Whatever belief of guilt that remains in the wake of a successful series of cross-examinations can be entirely extinguished by the proper presentation of the defense. The accused is, of course, constitutionally permitted to refrain from any action whatsoever in his own behalf. But in the average case defense counsel obtains an acquittal verdict by going beyond discrediting the prosecution and presenting a case on behalf of the defendant.

This article will concentrate on four significant aspects of the defendant's case: (1) testimony of the defendant; (2) alibi witnesses; (3) character witnesses; and (4) scientific and demonstrative evidence. Testimony in any of the four areas may be sufficient to achieve acquittal; but, given a particular set of facts, it is incumbent upon defense counsel to strive for a proper balance of testimony that, carefully presented to the trier of fact, compels a not guilty verdict.

### TESTIMONY OF THE DEFENDANT

In many cases, the most difficult question facing defense counsel is whether he should advise his client to take the stand. Counsel must carefully evaluate the likely impact of both alternatives upon the trier of fact, for this evaluation may well be determinative of the outcome of the case.

When the client has confessed guilt to his attorney, it seems universally agreed that the attorney must encourage his client not to perjure himself.<sup>1</sup> However, if the client insists on testifying

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<sup>1</sup> See, e.g., Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1478 (1966), where the

for strategic reasons or out of sheer callousness, the attorney must decide if he will participate by eliciting false testimony from his client<sup>2</sup> and referring to it in the closing argument.<sup>3</sup>

One thesis proposes that the attorney proceed with direct examination as if he had no knowledge of his client's perjury because his withdrawal, at the point of learning of the intended perjury, would merely shift the problem to another counsel who may never learn the truth of the matter.<sup>4</sup> If counsel learns of the intended perjury during the trial, his ability to withdraw or restrain his questioning and

author notes that perjury may be tactically unwise as well as morally improper.

<sup>2</sup> For an observation that the problem of the client's perjury surfaces fairly often, see Reichstein, *The Criminal Law Practitioner's Dilemma: What Should the Lawyer Do When His Client Intends to Testify Falsely?*, 61 J. CRIM. L.C. & P.S. 1, 9 (1970).

At the present time, a fierce debate rages over the ethical duty of the lawyer in this situation. An analysis of the arguments on either side of the debate is presented in Griffiths, *Ideology in Criminal Procedure*, 79 YALE L. J. 359 (1970). Compare Freedman, *supra* note 1, at 1475-78 with Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966). See also Bowman, *Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpoint*, 5 AM. CRIM. L. Q. 28 (1966); Bress, *Standards of Conduct of the Prosecution and Defense Function: An Attorney's Viewpoint*, 5 AM. CRIM. L. Q. 23 (1966); Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L. Q. 11 (1966); Starrs, *Professional Responsibility: Three Basic Propositions*, 5 AM. CRIM. L. Q. 17 (1966).

<sup>3</sup> In *Johns v. Smyth*, 176 F.Supp. 949 (E.D.Va. 1959), defendant was convicted of murdering a fellow prison inmate. On petition for habeas corpus, the court held that defendant had not been accorded a fair trial because his representation by appointed counsel was inadequate. Counsel was convinced at the trial of defendant's guilt and failed to submit proposed jury instructions (which might have reduced the crime to manslaughter) or to make a closing argument to the jury. The court said that complaints about trial tactics usually have no merit, but in this case the attorney's decisions were not tactical but were prompted by his conscience. The court found the distinction critical:

The failure to argue the case before the jury, while ordinarily only a trial tactic not subject to review, manifestly enters the field of incompetency when the reason assigned is the attorney's conscience. *Id.* at 953. Starrs, *supra* note 2, at 19, feels that *Johns* "establishes that where constitutional and ethical values collide, the lawyer owes his first allegiance to the Constitution."

<sup>4</sup> Freedman, *supra* note 1, at 1476.

argument without damage to the case is disputed.<sup>5</sup> The argument sanctioning counsel's continued participation in such situations is predicated on the theory that defendant's failure to testify will increase the likelihood of his conviction.<sup>6</sup> Therefore, if counsel prevents his client from testifying merely because defendant has confided his guilt, counsel is violating a confidence by acting upon it to his client's detriment. From these premises the argument concludes with the admonition that an attorney must put his client on the stand without revealing guilt to the fact finder.<sup>7</sup>

A contrary view cautions that it is a violation of professional ethics for a lawyer to knowingly present false testimony in court.<sup>8</sup> Consequently, if defendant insists upon taking the stand, his attorney may not conduct a direct examination in the usual sense. Chief Justice Warren Burger outlined his view of defense counsel's obligation on direct examination thusly:

He should confine himself to asking the witness to identify himself and to make a statement, but he cannot participate in the fraud by conventional direct examination. Since this informal procedure is not uncommon with witnesses, there is no basis for saying that this tells the jury the witness is lying. A judge may infer that such is the case but lay jurors will not.<sup>9</sup>

Defense counsel is offered no easy solution to this dilemma when he knows the defendant intends to commit perjury. Withdrawal in mid-trial, even if permitted, may only assure a finding of guilty. There is no pat answer to these delicate problems. Fortunately, they do not frequently arise.

In the average case, the client insists upon his innocence so that no direct admission from the defendant is present to create ethical and moral

<sup>5</sup> *Id.* at 1477-78. One solution mentioned by Freedman would have defendant take the stand and testify without assistance of his attorney. Bowman, *supra* note 2, at 30, agrees with Freedman that this solution is unsatisfactory because it may prejudice the judge or jury:

I would be inclined to present his testimony in the same fashion I would any other witness. . . . I do not believe it is proper for defense counsel to present the defendant's testimony in a fashion that may lead the jury to conclude that counsel does not believe his client.

<sup>6</sup> Freedman, *supra* note 1, at 1475. See generally A. AMSTERDAM, B. SEGAL & M. MILLER, 2 TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 390 (1967) [hereinafter cited as AMSTERDAM].

<sup>7</sup> Freedman, *supra* note 1, at 1477.

<sup>8</sup> Burger, *supra* note 2, at 12. The added gloss on this position is occasioned by the fact that the view advanced is that of the Chief Justice of the United States.

<sup>9</sup> *Id.* at 13.

problems for the lawyer. The defense attorney must then engage in a delicate weighing of the considerations, including, especially, the adverse effect upon the trier of fact of the defendant's not testifying, whether or not the defendant will make a sympathetic and believable witness, and whether the defendant has a provable prior record.

While it is axiomatic that a defendant must be proven guilty beyond a reasonable doubt without coercion to speak in his own behalf, a practical question remains regarding the inference to be drawn by the trier of fact from the defendant's failure to take the stand. It is generally agreed that if defendant does not testify, both judge and jury, consciously or subconsciously and despite law<sup>10</sup> and instructions<sup>11</sup> to the contrary, draw inferences adverse to the defendant.<sup>12</sup> But the weight of this adverse inference can be easily overestimated because defendant is entitled to jury instructions regarding the burden of proof on the prosecution, the presumption of defendant's innocence, and that no inference can be drawn from the accused's failure to testify.<sup>13</sup> Judges are familiar with these principles and attempt to apply them in reaching their decisions.

In many cases, juries have acquitted defendants

<sup>10</sup> See *Griffith v. California*, 380 U.S. 609 (1965), where the Supreme Court reversed a state conviction because of comment in the prosecutor's closing argument on defendant's failure to testify. Mr. Justice Douglas, writing for the Court, said that to allow comment on the failure to testify would cut down the scope of the fifth amendment privilege against self-incrimination by making its assertion costly. *Id.* at 614. For a discussion of comment on failure to testify, see B. GEORGE, DEFENDING CRIMINAL CASES 75 (1969).

<sup>11</sup> See, e.g., ILLINOIS PATTERN JURY INSTRUCTIONS 2.04 (1968):

The fact that [a] [the] defendant [s] did not testify should not be considered by you in any way in arriving at your verdict.

The committee note to the instruction declares it should be given only at defendant's request and then it must be given.

<sup>12</sup> See, e.g., AMSTERDAM § 390, Freedman, *supra* note 1, at 1475; C. MCCORMICK, EVIDENCE § 43 (1954) [hereinafter cited as MCCORMICK]; 8 J. WIGMORE, EVIDENCE § 2272 (McNaughton ed. 1961) [hereinafter cited as WIGMORE].

<sup>13</sup> See, e.g., ILLINOIS PATTERN JURY INSTRUCTIONS 2.03, 2.04 (1968). But cf. 8 WIGMORE § 2272, where it is suggested that the layman might view an exercise of the privilege as an admission of guilt, but the silence of the accused logically implies other things:

fear of exposure of matters related only remotely to the charges, fear of impeachment by proof of bad character evidence (especially prior convictions), or fear that his demeanor on the witness stand will do his innocence a fatal disservice.

For an early application of the rule that no inference may be drawn from the failure to testify, see *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900).

who did not take the stand. But it is difficult to determine what inference, if any, the jury in a particular case will draw from the failure to testify, or the effect that inference will have upon the jury's verdict.<sup>14</sup>

There are a number of factors which bear on counsel's decision as to whether to advise the defendant to take the stand. First, if an adequate defense can be conducted without the defendant's testimony because he has nothing to add to what other witnesses have stated, the advantage in putting the defendant on the stand is merely to erase the possible adverse inference arising from his failure to testify. In a strong case for the defense or a very weak case for the prosecution, the adverse inference may not be substantial enough to warrant the risk of subjecting defendant to a cross-examination.<sup>15</sup>

Second, the risk that defendant may falter on the stand, particularly under cross-examination, must be carefully considered. If defendant's testimony is weak, there is a good chance he will be convicted even though the prosecution's case is not strong. The risk is not only that what defendant says is not believable, but also that he may say it poorly or he may simply exhibit a distasteful personality to the fact finder. Defense counsel's task is to consider defendant's personality and intelligence as well as his story in determining how his client will react when he takes the stand and is subjected to cross-examination.<sup>16</sup>

<sup>14</sup> The jury may be swayed by the prosecutor who, despite his inability to comment on the defendant's failure to testify, may be permitted to make general comments to the effect that "no one has denied" prosecution testimony. *See, e.g.,* United States v. Broadherd, 413 F.2d 1361, 1363 (7th Cir. 1970); *People v. Sibley*, 93 Ill.App.2d 38, 236 N.E.2d 8 (1968); *Tilford v. State*, 437 P.2d 261 (Okla. Crim. 1968). *But see* Doty v. United States, 416 F.2d 887 (10th Cir. 1968); *Commonwealth v. Reichard*, 211 Pa. Super. 88, 233 A.2d 603 (1967) (holding flagrant abuses of the no comment rule improper).

<sup>15</sup> Although the usual rule is that the accused may be cross-examined only as to the subjects dealt with on direct, many courts allow the cross-examination to cover the entire fact of guilt or innocence. 8 WIGMORE § 2276. When the accused takes the stand, his status as an accused is replaced by his status as a witness and as a witness, his character may be impeached in various ways. 8 WIGMORE § 2277.

<sup>16</sup> *See generally* AMSTERDAM § 390. Occasionally a convicted defendant seeks post-conviction relief on the ground that his counsel was incompetent in not advising him to testify. However, most courts treat the decision as a trial tactic and deny relief. *See, e.g.,* Waltz, *Inadequacy of Trial Defense Representation As A Ground for Post-Conviction Relief*, 59 NW. U.L. REV. 289, 319 (1964); Comment, *Quality of Counsel in Criminal Cases*, 8 ARK. L. REV. 484, 487 (1954); Polk

Third, if defendant has an admissible prior criminal conviction, his credibility as a witness may be impeached;<sup>17</sup> if he does not take the stand, prior convictions are not admissible.<sup>18</sup> The reason for allowing evidence of prior convictions appears to be to acquaint the jury with the witness' general character and with his propensity to lie.<sup>19</sup> Further, allowing evidence of prior convictions may prejudice the defendant because the fact finder might infer that one who has committed a crime in the past is likely to do so again. This inference is particularly strong where defendant has previously been convicted of the same type of crime as he is currently charged with.<sup>20</sup> Because evidence of prior

v. Bonnar, 336 F.2d 330, 332 (6th Cir. 1964); *Newsom v. Smyth*, 261 F.2d 452, 454 (4th Cir. 1958); *Application of Atchley*, 169 F.Supp. 313, 317 (N.D.Cal. 1958).

<sup>17</sup> 8 WIGMORE § 2277; McCORMICK § 43. *See generally* Comment, *Impeachment of Defendant-Witnesses by Prior Convictions*, 12 ST. LOUIS U. L. J. 277 (1967).

<sup>18</sup> There are many well recognized exceptions to the general rule that evidence of prior convictions is inadmissible unless the defendant takes the stand:

Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial. When the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value.

*Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964). *See also* *McBride v. United States*, 409 F.2d 1046, 1048 (10th Cir. 1969) (the general rule excludes evidence tending to show defendant committed a crime wholly separate from, independent of, and without any relation to the case on trial); *United States v. Harman*, 349 F.2d 316, 321 (4th Cir. 1965) (since defendant did not testify or put his character in issue, evidence of a prior conviction was inadmissible); *Peoples v. United States*, 341 F.2d 60, 65 (5th Cir. 1965) (recognizing exceptions to the general rule of nonadmissibility of prior criminal acts when such evidence goes to issues of identity, knowledge, or intent); *Holt v. United States*, 342 F.2d 163 (5th Cir. 1965) (stating the general rule that evidence of separate crimes is inadmissible, with the exception that such evidence of closely connected crimes is admissible to show a common scheme or plan or to identify defendant); *United States v. White*, 255 F.2d 909 (7th Cir. 1966) (admission of prior conviction on offense unrelated to charge being tried, held, reversible error). The exceptions may well swallow the general rule of non-admissibility.

<sup>19</sup> *See* Comment, *supra* note 18, at 277-78. The reason for the rule is also given in *Brown v. United States*, 370 F.2d 242, 244 (D.C. Cir. 1967):

The reason for exposing the defendant's prior record is to attack his character, to call into question his reliability for truth telling by showing his prior, relevant antisocial conduct.

<sup>20</sup> In *Brown v. United States*, 370 F.2d 242 (D.C. Cir. 1967), defendant, charged with assault, had a prior conviction for the same offense. The court held the prior

convictions may be prejudicial and may work injustice if fear of impeachment keeps defendant from telling his story, there is a trend in certain federal courts to allow as evidence only those prior convictions which are probative of defendant's credibility.<sup>21</sup>

The leading case in this current trend is *Luck v. United States*<sup>22</sup> where the court recognized the trial judge's discretion to admit or withhold evidence of certain convictions where justice would be advanced by having the defendant testify rather than remain silent for fear of impeachment and where the "prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility."<sup>23</sup>

*Luck's* progeny<sup>24</sup> culminated in the significant decision in *Gordon v. United States*.<sup>25</sup> In *Gordon*, Circuit Judge, now Chief Justice, Burger, reviewed the *Luck* rationale and clarified the boundaries of the trial court's discretion in admitting evidence of convictions. Judge Burger distinguished convictions which bear on a man's honesty and integrity from convictions based on acts having no relation to veracity, and suggested that evidence of the latter should not be admitted. He also advised trial judges to decide on admissibility in a non-jury hearing before defendant takes the stand.<sup>26</sup>

conviction should have been ruled inadmissible because its prejudicial nature outweighed its relevance to defendant's credibility, and also because it was better to rule out the conviction and have defendant take the stand than to admit the conviction and force defendant to remain silent. See also *Gordon v. United States*, 383 F.2d 936, 940-41 (D.C. Cir. 1967).

<sup>21</sup> But see an example of the traditional view on admissibility of convictions in *State v. Hawthorne*, 49 N.J. 130, 228 A.2d 682 (1967). The New Jersey Supreme Court reversed the trial judge who had refused to admit evidence of certain prior convictions because he thought they were too remote and prejudicial. The court construed the relevant statute to mean that the trial judge must admit all previous convictions, although the judge might call attention to the convictions' remoteness when charging the jury.

<sup>22</sup> 348 F.2d 763 (D.C. Cir. 1965).

<sup>23</sup> *Id.* at 768. The court also listed a number of factors which might bear on the judge's discretion. Those included the nature of prior crimes, the length of defendant's criminal record, defendant's age and circumstances, and the extent to which it is more important to the search for truth in a particular case for the jury to hear defendant's story than to know of his prior conviction.

<sup>24</sup> See, e.g., *Barber v. United States*, 392 F.2d 517 (D.C. Cir. 1968); *United States v. Hildreth*, 387 F.2d 328 (4th Cir. 1967); *Gordon v. United States*, 383 F.2d 936 (D.C. Cir. 1967); *Brown v. United States*, 370 F.2d 242 (D.C. Cir. 1966).

<sup>25</sup> 383 F.2d 936 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968).

<sup>26</sup> *Id.* at 941.

*Gordon* illustrates the enlightened view regarding the admissibility of prior convictions for impeachment purposes. While few state laws permit judicial discretion in this regard, it is hoped that the federal court decisions will initiate a sensible trend toward exclusion of those convictions which are not probative of defendant's credibility.<sup>27</sup> At this point, however, confusion reigns.<sup>28</sup>

A final limitation posed upon the advisability of having the defendant take the stand is the risk of removing the lid of Pandora's box in regard to suppressed evidence. If illegally seized evidence or inadmissible statements have been successfully suppressed, there is a risk that this evidence may be used to impeach defendant's testimony. The rule of *Walder v. United States*<sup>29</sup> governed the use of illegal evidence for impeachment purposes until expanded in *Harris v. New York*.<sup>30</sup> In *Walder*, de-

<sup>27</sup> There are some indications that change in this area may be constitutionally compelled. Professors Kalven and Zeisel report that 17% fewer defendants with provable records take the stand than those who have no "provables." H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 146 (1966). Further, the rate of convictions rises sharply if the jury knows or suspects defendant has a criminal record. *Id.* at 160. Therefore it appears that the defendant with a prior conviction is discouraged from testifying, thus raising issues as to his right to testify on his own behalf, to a fair trial, and to equal protection. See note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness*, 37 U. CINN. L. REV. 168 (1968); Ashcraft, *Evidence of Former Convictions*, 41 CHI. B. REC. 303 (1960). But cf. *Spencer v. Texas*, 385 U.S. 554, 564-65 (1967), where the Supreme Court showed some reluctance to strike down state rules on constitutional grounds.

The preliminary draft of the *Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161 (1969), reject the *Luck* test and provides that any witness, including the defendant, may be impeached by proof that he was convicted of a crime punishable by imprisonment for more than one year. Evidence of a conviction is inadmissible if more than ten years has elapsed since the witness was released from confinement, or the expiration of parole, whichever is later.

<sup>28</sup> See, e.g., the split decisions that have produced inter-circuit division on the *Luck-Gordon* issue: *United States v. Escobedo*, 430 F.2d 14, 18-19 (7th Cir. 1970) (finding impeachment limitation to be contrary to established law of circuit over opposition expressed by Kiley, J., concurring); *Bendelow v. United States*, 413 F.2d 42 (5th Cir. 1969) (split court permitting impeachment with prior conviction for same offense although conviction for another previous offense was available for same purpose). See also *United States v. Bailey*, 426 F.2d 1236, 1243 (D.C. Cir. 1970) (MacKinnon, J., concurring & dissenting) ("Congress is seriously considering the modification or outright repeal of the *Luck* doctrine.")

<sup>29</sup> 347 U.S. 62 (1954).

<sup>30</sup> — U.S. — (1971).

fendant had been indicted for purchasing and possessing narcotics but the charge was dropped when the evidence was suppressed. Two years later, Walder was again indicted on a narcotics charge. At his trial, he testified on direct examination that he had never sold or possessed narcotics. When the testimony was repeated on cross-examination, the prosecution called on rebuttal one of the officers who made the previous seizure from Walder to, theoretically, impeach the defendant's credibility. The United States' Supreme Court upheld the admissibility of the testimony, noting that defendant testified on direct as to matters collateral to the issue of his own guilt or innocence. The Court also appeared to distinguish the situation where illegally obtained evidence is used to rebut defendant's denial of guilt as opposed to his denial of collateral matters.<sup>31</sup> Therefore, the *Walder* rule appeared to protect defendants from impeachment by illegally obtained evidence unless he testified to collateral matters on direct examination.<sup>32</sup>

In *Harris*, the Supreme Court extended the *Walder* rationale by holding that trustworthy statements suppressed under the technical ramifications of *Miranda v. Arizona*<sup>33</sup> may be used to impeach defendant's testimony on matters directly related, not merely collateral, to defendant's guilt. *Harris* took the stand to testify in his own defense and on cross-examination was asked if he had made certain statements to the police. The questions and answers were recited by the prosecutor even though the statements were inadmissible under *Miranda*. The Court agreed that *Walder* could be distinguished, but was of the opinion that:

The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility. . . .<sup>34</sup>

Thus, *Harris* further complicates defense counsel's

<sup>31</sup> 347 U.S. at 65-66. Mr. Justice Frankfurter, for the majority, stated:

He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief.

*Id.* at 65.

<sup>32</sup> See *AMSTERDAM* § 390.

<sup>33</sup> 384 U.S. 436 (1966). *Miranda*, one of the most famous decisions of the Warren Court in the area of criminal justice, held inadmissible confessions made without prior warning of constitutional rights.

<sup>34</sup> — U.S. — (1971). See *Cole, Impeachment with Unconstitutionally Obtained Evidence: Coming to Grips with the Perjurious Defendant*, 62 J. CRIM. L.C. & P.S. 1 (1971).

decision to allow the defendant to testify. If the defendant has made any statements to the authorities, even though illegally obtained, they may now be used on cross-examination to impeach defendant's testimony.<sup>35</sup>

The limitations circumscribing the advisability of permitting the criminal defendant to take the stand in his own behalf are plentiful. They are highlighted and emphasized here to illustrate that defense counsel should think long and hard about the alternatives before permitting his client to take the stand.

Usually, the decision as to whether to advise the defendant to testify cannot be made with finality until after the prosecution has closed its case, and often not until after other defense witnesses have testified. This must be borne in mind by defense counsel when conducting *voir dire* examination and in making his opening statement, because if he commits the defendant to taking the stand before proof begins, he may find himself seriously embarrassed if he later decides to advise the defendant against testifying.

It is the author's personal view that more cases are lost because the defendant *does* testify than are lost because he *does not* testify. This view, of course, is subject to Justice Holmes' famous dictum that "To generalize is to omit."<sup>36</sup>

#### ALIBI WITNESSES

An alibi in the context of criminal law is the defendant's claim that he was elsewhere than at the scene of the crime.<sup>37</sup> The theory of the claim is rooted in the essential inconsistency between the defendant's asserted whereabouts and the prosecution's allegations that the defendant was present at the crime.<sup>38</sup> One of the most frequent defenses

<sup>35</sup> Justice Brennan, speaking for three of four dissenters in *Harris*, pointed out that the new rule will likely color defendant's choice as to whether he should testify. Since he will be encouraged not to testify if he has made a statement, his free choice in the matter is impaired. If he does not testify, he of course risks the adverse inference customarily drawn by the trier of fact when defendant fails to take the stand.

<sup>36</sup> *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273 (1908).

<sup>37</sup> "Alibi" is a Latin term meaning elsewhere. See *State v. Baldwin*, 47 N.J. 379, 388, 221 A.2d 199, 204 (1966); *State v. Mucci*, 25 N.J. 423, 431, 136 A.2d 761, 765 (1957).

<sup>38</sup> A significant ramification of the theory underlying an alibi defense concerns its admissibility at trial. It has been held that for the alibi to be admissible it must be such "as absolutely to preclude the possibility of presence at the alleged time and place of the act." 1 WIGMORE §136. Compare *People v. Gasior*, 359 Ill. 517, 195

in criminal cases, though perhaps the easiest to manufacture,<sup>39</sup> a strong alibi presents the prosecution with a formidable task of refutation.<sup>40</sup>

In light of the frequency and abuse of the alibi defense and the procedural obstacles which prevent the prosecution from effectively meeting the evidentiary effect of suddenly introduced alibi testimony,<sup>41</sup> many states have enacted alibi-notice statutes requiring, at minimum, notice prior to trial that the defense proposes to present an alibi defense.<sup>42</sup> In addition to notice most statutes require

N.E. 10 (1935) with *People v. Russell*, 266 N.Y. 147, 194 N.E. 65 (1934).

<sup>39</sup> See *Williams v. Florida*, 399 U.S. 78, 81 (1970) (state interest in protecting itself against easily fabricated, eleventh hour alibi defense was both obvious and legitimate); Epstein, *Advance Notice of Alibi*, 55 J. CRIM. L.C. & P.S. 29, 31 (1969).

<sup>40</sup> A strong alibi may theoretically be distinguished from other types of alibi as erecting an absolute defense to the allegations of a prosecution in a manner which would preclude the logical or physical possibility of both the alibi's circumstances and the allegation's circumstances being true. See 1 WIGMORE §136. More practically, the absolute, "airtight" or "ironclad" alibi defense differs from other alibis in weight or degree, deriving its potency from the effect of its proof on the jury. There are, however, many instances of so-called ironclad alibi defenses which have suffered total destruction as a result of a cross-examination which exposed a circumstantial loophole in the alibi's argument, thus rendering possible the accused's presence at the scene of the crime. See generally, C. FRICKE, *CRIMINAL INVESTIGATION* 24 (1949).

Note that an alibi defense is not conclusive if the charge is that the defendant committed the crime through an agent. See *Tomlinson v. United States*, 93 F.2d 652, 655 (D.C. Cir. 1937); *State v. Ross*, 92 Idaho 709, 449 P.2d 369 (1968); H. C. UNDERHILL, *CRIMINAL EVIDENCE* §410 (5th ed. 1956). See generally T. HOUSEL & G. WALSER, *DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES* §455 (2d ed. 1946).

<sup>41</sup> For example, the effect of surprise on the prosecution when alibi testimony is introduced may require a continuance to permit the prosecution to prepare a rebuttal. One state supreme court expressed a purpose of its alibi-notice statute as avoiding "surprise at trial by the sudden introduction of a factual claim which cannot be investigated unless the trial is recessed to that end." *State v. Garvis*, 44 N.J. 268, 272-73, 208 A.2d 402, 404 (1965). Furthermore, the fact that the prosecution may obtain a continuance subsequent to surprise defense testimony will not correspondingly assure that it can in fact adequately investigate the elements of the alibi in order to attack the defense.

This difficulty ordinarily exists where the defense of alibi is first disclosed when the defense puts on its evidence at the trial, when it is generally too late to check on the alibi and secure evidence which will disprove it. FRICKE, *supra* note 40, at 24.

<sup>42</sup> See e.g. ARIZ. R. CRIM. P. 192 (B); FLA. R. CRIM. P. 1.200; ILL. REV. STAT. ch. 38, §114-14 (1969); IND. ANN. STAT. §§9-1631 9-1633 (1956); IOWA CODE ANN. §777-18 (1962); KAN. GEN. STAT. ANN. §62-1341 (1964); MICH. STAT. ANN. ch. 28 §1043 (1956); MINN. STAT. ANN. §630-14 (1947); N. J. R. CRIM. P. 3:5-9 (1958); OHIO REV. CODE ANN. §2945.58. (1964); N. Y.

the location and circumstances of the alibi and the names and addresses of the witnesses upon whom the defendant will rely in adducing his alibi.<sup>43</sup> In *Williams v. Florida*<sup>44</sup> the Supreme Court preserved the constitutionality of this rudimentary criminal discovery procedure<sup>45</sup> in the face of strong charges of fifth and fourteenth amendment violations.<sup>46</sup>

CODE CRIM. PROC. §295-L (McKinney 1958); OKLA. STAT. ANN. ch. 22, §585 (1969); PA. R. CRIM. PRAC. 312 (Supp. 1970); S. D. COMP. LAWS §23-37-5 (1969); UTAH CODE ANN. §7-22-17 (1953); VT. STAT. ANN. tit. 13, §§6561-6562 (1959); WIS. STAT. ANN. §955.07 (West 1958).

<sup>43</sup> See generally Epstein, *supra* note 39, at 35. Seven states require that the prosecution be apprised of the names and addresses of the witnesses upon whom the defendant will rely in proving his alibi: Ariz., Iowa, Kan., Mich., N.J., N.Y., Wis. See note 42 *supra*. Note that the general requirement of notice to the prosecution of an alibi defense together with information of any particulars does not require the defense in fact to present an alibi defense at trial.

In general, the failure to call a potential alibi witness may subject defendant to the risk of prosecutorial comment on the failure at trial. Where the witness is equally available to both defense and prosecution, there is a split of authority in regard to the permissible inferences that can be drawn by the jury from the failure to produce the witness. See *United States v. Dibrizzi*, 393 F.2d 642 (2d Cir. 1968), for recent authority permitting a jury to infer that testimony would have been unfavorable to one of the parties. See generally Comment, *Permissible Inference from the Non-Production of Equally Available Witnesses*, 73 DICK. L.R. 337 (1969). Supporting the view that a prosecutor may not comment on the failure of the defense to introduce testimony supporting an alibi after statutory notice of an alibi defense, see *People v. Mancini*, 6 N.Y.2d 853, 188 N.Y.S.2d 559, 160 N.E.2d 91 (1959); *State v. Cocco*, 730 Ohio App. 182, 55 N.E.2d 430 (1943).

Jurisdictions which have enacted alibi-notice statutes differ in the sanctions they prescribe for failure to observe the notice requirements. In most, the trial judge is permitted the discretion to exclude alibi testimony altogether. For the converse situation where the defendant complies with the requirements of the alibi-notice statute but the state does not, see *State v. Baldwin*, 47 N.J. 379, 221 A.2d 199 (1966).

<sup>44</sup> 399 U.S. 78 (1970).

<sup>45</sup> For a general commentary on *Williams*, see *Supreme Court Review*, 84 HARV. L. REV. 1, 170-71 (1970) (examining the case's impact on the validity of rule 16(c) of the Federal Rules of Criminal Procedure); *Supreme Court Review: Jury Trial*, 61 J. CRIM. L.C. & P.S. 526 (1970). For an indepth examination of the effectiveness of alibi-notice statutes and an argument for their employment, see Epstein, *supra* note 39, at 31. Reasons favoring the adoption of an alibi rule as a discovery device include the fact that it prevents surprise to the prosecution, it deters the use of a fabricated alibi defense, it saves time and money by avoiding the need of a costly continuance and halting the prosecution of cases where the state, through a timely investigation, discovers the legitimacy of the alibi defense. Significantly, the statute promotes respect for the alibi defense actually used at trial.

<sup>46</sup> See 399 U.S. at 106 (Black & Douglas, J. J., dissenting). The Court rejected the fifth amendment

It is a common misconception that the strength of the alibi defense is directly related to the number of witnesses called. In most cases the *quantity* of witnesses testifying for the defense is of minor importance; it is rather the *quality* of the witness that is vital to the successful alibi defense. A long series of witnesses testifying to events in support of a defendant's alibi, where their interest in the outcome of the cause is apparent, may not discharge the defendant's burden of proving the alibi.<sup>47</sup> Moreover, unconvincing alibi testimony,

charge of violation of self-incrimination by holding that the notice requirement did not compel testimony at trial, that the state could achieve the same ends in any event through a continuance, and that the notice requirement can only serve to jeopardize the fabricated alibi. 399 U.S. at 82-86. The Court also noted that the fifth amendment privilege was historically related to the facts of a crime and not to the strategy at trial. 399 U.S. at 86 n. 17.

Confronted with the question whether the Florida statute violated the defendant's right to due process under the fourteenth amendment, the Court held that the state had a compelling and legitimate interest in preventing the introduction of fabricated defenses at the "eleventh hour". 399 U.S. at 81. Furthermore, the defendant was accorded the reciprocal right under the Florida law of acquiring upon demand a list of the names and addresses of witnesses the state proposed to offer to discredit defendant's alibi on rebuttal. The Court expressly emphasized that it was not confronted with the question whether the absence of a provision granting the defendant reciprocal discovery against the state would affect the Court's disposition of the due process issue. 399 U.S. at 82 n. 11. In light of the fact that most of the jurisdictions that have enacted alibi-notice statutes have no such reciprocal discovery provisions, one may anticipate further challenges to the validity of the statutes.

See *People v. Eubank*, 46 Ill.2d 383, 393-94, 263 N.E.2d 869, 875-76 (1970), upholding the Illinois alibi statute in reliance upon *Williams*.

<sup>47</sup> 9 WIGMORE §2512; UNDERHILL, *supra* note 40, at §441. It is generally conceded that the accused does not have the ultimate burden of proving an alibi. *Thomas v. United States*, 213 F.2d 30, 33 (9th Cir. 1954) (no burden of proof on the accused regarding alibi defense); *People v. Pearson*, 19 Ill.2d 609, 169 N.E.2d 252 (1960) (disapproving jury instruction erecting burden of proof such that alibi must make it "impossible or highly improbable" that defendant committed crime); *State v. Spencer*, 256 N.C. 487, 124 S.E.2d 175, 177 (1962) (reversing and finding defendant entitled to instruction that reliance on an alibi does not raise the burden of proving it); *Mullins v. Commonwealth*, 174 Va. 472, 5 S.E.2d 499 (1939) (defendant does not have to prove any fact beyond a reasonable doubt or by a preponderance of the evidence). But see *State v. Stump*, 454 Iowa 1181, 119 N.W.2d 210 (1963) (issue of alibi is affirmative defense requiring the defendant to bear the burden of the preponderance of the evidence). While the true purpose of an alibi defense is to demonstrate the impossibility of defendant's presence at the scene of the crime, the failure to establish it does not preclude the jury from considering the evidence without regard to the alibi and determining whether it raises a reasonable doubt

revealed through cross-examination<sup>48</sup> or on the state's rebuttal,<sup>49</sup> can taint or even be fatal to an

of defendant's guilt. See *McCool v. United States*, 263 F. 55, 57 (6th Cir. 1920). Compare *Doyle v. State*, 166 Ark. 505, 266 S.W. 459 (1924) (defendant must sustain alibi by evidence which raises reasonable doubt); *People v. Mercer*, 103 Cal.App.2d 782, 230 P.2d 4 (1951) (burden on defendant to prove alibi to such a degree of certainty as would raise a reasonable doubt); *Ingram v. State*, 144 Fla. 714, 198 So. 464 (1940) (not essential to prove alibi conclusively, but sufficient to raise reasonable doubt); *Commonwealth v. Gates*, 392 Pa. 557, 141 A.2d 219 (1958) (upholding jury instruction placing upon defendant the burden of proving his alibi to the satisfaction of the jury). See also *Commonwealth v. Narnak*, 357 Pa. 391, 406, 54 A.2d 865, 872 (1947) (disapproving anomalous alibi instruction charging jury that if defendant is to avail himself of alibi defense he must prove it by fair preponderance of evidence, but failing this, the jury must nonetheless acquit him if the evidence raises reasonable doubt of guilt).

Where the evidence of the prosecution makes a clear case against the defendant, proof of an alibi must be clear and satisfactory. I. MOORE, CRIMINAL LAW AND PROCEDURE, §1352 (3d ed. 1932).

<sup>48</sup> See *Fitzpatrick v. United States*, 178 U.S. 304 (1900), where the Court affirmed the trial court's overruling of defense counsel's objections to the scope of defendant's cross-examination and held that where a defendant waives his privilege of silence and makes a statement on his own behalf, the prosecution "has a right to cross-examine him upon such statement with the same latitude as would be exercised in the case of an ordinary witness". *Id.* at 315. See also *Bram v. United States*, 226 F.2d 858 (8th Cir. 1955) (approving cross-examination for discovery of bias, prejudice, sympathy, or interest in favor of defendant); *People v. Brazil*, 53 Cal. App.2d 596, 128 P.2d 204 (1942); *State v. Latham*, 131 La. 533, 59 So. 981 (1912) (permitting cross-examination of alibi witness as to his knowledge of defendant's whereabouts before and after the commission of the crime); *State v. Cooper*, 26 Wash.2d 405, 174 P.2d 545 (1947) (holding no abuse of discretion in permitting cross-examination of alibi witness for purpose of showing hostility toward prosecuting attorney).

<sup>49</sup> The state has generally been permitted a wide scope of possible rebuttal to alibi testimony. Compare *People v. Thomas*, 7 Ill.2d 278, 131 N.E.2d 35 (1956) (permitting introduction of state's evidence in rebuttal though such evidence could have been admitted "in chief") with *People v. Williams*, 164 Cal.App. 285, 330 P.2d (1958) (disapproving prosecution practice of withholding part of its case for rebuttal, but holding that prosecution had made clear case before rebuttal). See also *Goldsby v. United States*, 160 U.S. 70 (1895) (where alibi testimony asserted that defendant was many miles away on a public road during the commission of the crime, and that the country was covered with wire fences, it was competent to offer rebuttal that the accused possessed wire cutter); *United States v. Guido*, 251 F.2d 1 (7th Cir. 1958) (approving rebuttal); *State v. Jackson*, 336 Mo. 1069, 83 S.W.2d 87 (1935) (permitting prosecution to denounce alibi witness's testimony as perjured in argument subsequent to state's witness's rebuttal testimony); *Commonwealth v. Ricci*, 161 Pa.Super. 193, 54 A.2d 51 (1947) (approving weak rebuttal testimony to issue collateral to alibi defense); *Miller v. State*, 140 Tex. Crim. 640, 146 S.W.2d 392 (1941) (in robbery prosecution, approving,



otherwise convincing defense.<sup>50</sup> It is thus incumbent upon defense counsel to exercise extreme caution when choosing the witnesses upon whom he will rely to establish the alibi defense. Through early investigation and interviewing, counsel must take pains to assure that the prospective trial testimony of each alibi witness will correspond to the accounts he expects to elicit from other defense witnesses.<sup>51</sup> Ultimately, it is up to defense counsel to make a judgment as to whether or not an alibi defense should be presented.<sup>52</sup>

Once the decision to go forward with the alibi has been made, defense counsel must decide which witnesses to call in an effort to sustain the alibi.

Alibi witnesses may be classed in two general categories: those who are relatives or friends of the accused or otherwise apparently interested in the outcome of the case,<sup>53</sup> and those who are not. Wit-

rebuttal that another robbery had taken place the same night where property taken from other robbery was circumstantially traced to defendant's possession); *State v. Anderson*, 46 Wash.2d 864, 285 P.2d 879 (1955) (permitting rebuttal attacking collateral issue).<sup>50</sup> See, e.g., *Keys v. Dunbar*, 229 F.Supp. 703, 705 (E.D.Pa. 1964) (counsel's discretion in determining whether to attempt an alibi defense upheld).<sup>51</sup> See AMSTERDAM §402:

A defensive case that appears beautiful in prospect may be crippled by unexpected testimony of a defense witness. The best safeguard against this is careful preparation and the taking of signed statements from the witnesses.

<sup>52</sup> Defense counsel's failure to raise an alibi defense has occasioned charges of counsel's incompetency and ineffectiveness violating the defendant's sixth amendment right to the assistance of counsel. However, courts seem unwilling to give such charges vindication. See, e.g., *Curtis v. State*, 450 S.W.2d 634 (Tex. Crim. 1970). The rationale for refusing such claims is well articulated in *Keys v. Dunbar*, 229 F.Supp. 703, 705 (E.D.Pa. 1964):

There are so many things for a trial lawyer to evaluate, many of which are never available in any record, that it is impossible for a court to determine the validity of the reasons for his judgment. In many instances, merely talking to a witness for a short time will disclose that the witness' attitude, demeanor, or manner is such that if called it might well cause the loss of the case. For example, a witness may have been convicted of several felonies or have been involved so closely with the defendant that a most cursory cross-examination would not only destroy the witness but injure the defendant's case. Furthermore, one or several interviews with the defendant himself may disclose to the trial counsel that, if the defendant were called as a witness, he would convict himself. . . . There appears good reason for the rule that an attorney's conduct must be so incompetent as to make the trial farce.

<sup>53</sup> As bearing on credibility, the relations of a witness with, or his feelings toward, another party may be shown on cross-examination. See, e.g., *United States v. Nuccio*, 373 F.2d 168 (2d Cir.), cert. denied, 387 U.S. 906 (1967) (repulsed homosexual advances made on defendant permissible to show witness's bias); *Maples*

nesses falling within the second category are both rarer than the related or outcome-interested witnesses and usually more valuable. Since the alibi testimony of friends or relatives of the defendant precipitates immediate suspicion in the trier of fact,<sup>54</sup> the determination to use such testimony should follow a thorough and critical interview of the prospective witnesses.<sup>55</sup> The witnesses should be presented only after defense counsel is persuaded that they are believable and can weather cross-examination.<sup>56</sup>

Another critical index of the quality of an alibi defense concerns the extent of contact between the alibi witness and the defendant during the time of the commission of the crime. If the witness and the defendant were together for the duration of time covering the circumstances of the crime, or alternatively, if a number of disinterested persons are available to testify to the defendant's participation in or conspicuous presence at another place, acquittal should result, for the "most determined prosecutor could hardly hope to obtain or sustain a conviction in the face of such testimony."<sup>57</sup> More problematical is the casual encounter between the prospective alibi witness and the defendant; evidence of this nature is subject to various deficiencies

*v. State*, 44 Ala.App. 491, 214 So.2d 700 (1968) (holding reversible error to deny cross-examination attempting to ascertain interest, bias, prejudice or partiality on matters testified to); *People v. Chacon*, 69 Cal.2d 765, 73 Cal.Rptr. 10, 447 P.2d 106 (1968) (testimony showing the bias of another witness admissible); *People v. Rainford*, 58 Ill.App.2d 312, 208 N.E.2d 314 (1965) (holding error to cut off all inquiry into bias in cross-examination); *Commonwealth v. Douglas*, 354 Mass. 212, 236 N.E.2d 865 (1968) (upholding propriety of cross-examination attempting to ascertain witness's credibility by showing fear of another); *People v. Moore*, 23 App.Div. 2d 854, 259 N.Y.S.2d 180 (1965) (holding reversible error to instruct jury to disregard testimony elicited from complaining witness regarding past hostility towards defendant).

<sup>54</sup> "In the case of testimony involving almost any issue, the fact that a witness is interested in the outcome of the case weakens its probative force." 10 PROOF OF FACTS 33 (1961).

<sup>55</sup> See generally J. APPLEMAN, PREPARATION AND TRIAL 65-155 (1967); W. PIERSON, THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS §74-98 (1956) (exhaustive treatment of the considerations and practice of interviewing witnesses before trial).

<sup>56</sup> For interesting samples of trial cross-examination illustrating the destructive force upon alibi testimony, see 3 F. BUSCH, LAW AND TACTICS IN JURY TRIALS §410 (1960) [hereinafter cited as BUSCH]. For demonstration materials on alibi testimony, see PRACTICING LAW INSTITUTE, SECOND ANNUAL CRIMINAL ADVOCACY INSTITUTE 63-138 (B. George ed. 1969).

<sup>57</sup> 3 BUSCH §410. The relevance of evidence sought to support such an alibi defense is outlined in UNDERHILL, *supra* note 40, at §443.

requiring a particularly sensitive assessment of the prospective witness' ability and reason to recall the encounter.<sup>58</sup> The key to establishing credible alibi testimony of this nature is to "have the witness relate *why* he remembers being with the defendant"<sup>59</sup> at the specific time and place of the encounter.<sup>60</sup>

Alibi witnesses are often honest, but simply mistaken as to the time or nature of their meeting with the defendant because the circumstances are such that the meeting was only a casual encounter occurring months before trial. Consequently, counsel must elicit some collateral event which would help certify the time and place of the encounter and the reason for the witness' recollection of it in an attempt to overcome the incredibility of the testimony resulting from the temporal remoteness of the encounter.<sup>61</sup> This problem can often be reduced by investigation promptly after the date of the crime. To insure that the alibi witness

<sup>58</sup> See A. CORNELIUS, CROSS-EXAMINATION OF WITNESSES 150 (1929) [hereinafter cited as CORNELIUS].

Why is it that this witness remembers meeting this particular individual on the day in question and why is it that the witness remembers that he saw the accused on any certain day of the month so long a time ago? It is wholly unnatural for any individual to think back say to any definite Sunday or any other given day of the week, months previous, and remember whom he saw on that date, unless there was a special set of circumstances to have impressed his mind.

<sup>59</sup> See AMSTERDAM §407.

<sup>60</sup> It has been suggested as a practical matter that defense counsel:

should lead up to the date of the alibi by developing the relationship between the defendant and the witness, and when during the course of a month (or within the appropriate pattern of their relationship) they see one another. Counsel may then move to the month of the crime; pinpoint something unusual or significant that happened during that month; then focus on the day of the crime, relating the date and time to the significant happening just described and to the pattern of the witness's daily routine and/or relationship with the defendant.

*Id.* at §409.

<sup>61</sup> It is generally held that the jury may not be instructed to carefully scrutinize evidence of alibi because of the prevalence of fabrication and mistake in alibi testimony. See, e.g., *Johnson v. State*, 24 Ala.App. 291, 135 So. 592 (1931) (error to instruct jury that alibis are easily manufactured); *People v. Costello*, 21 Cal.2d 760, 135 P.2d 164 (1943) (suggestion may not be made that jury must give less credit or more careful scrutiny to testimony of alibi witnesses, or less weight than to other evidence in case); *People v. Robins*, 242 App.Div. 516, 275 N.Y.S. 940 (1934) (holding prejudicial error to charge jury that alibi defense should be looked on with suspicion). Compare *State v. Wren*, 194 Iowa 552, 188 N.W. 697 (1922), *aff'd. per curiam*, 263 U.S. 688 (1923); *Bolin v. State*, 219 Tenn. 4, 405 S.W.2d 768 (1966).

will be able to recollect the original circumstances and stand by his testimony under the pressure of cross-examination, counsel must thoroughly and critically interview his witness prior to trial. Should counsel detect retraction or incredulity, he is advised to refrain from calling the witness.

Because of these risks of unreliable and changed testimony, and particularly in jurisdictions where alibi-notice statutes have been enacted,<sup>62</sup> defense counsel is well advised to conduct interviews of prospective alibi witnesses in the presence of a third person and a court reporter and to secure signed statements whenever possible.<sup>63</sup>

Theoretically a sound alibi defense does more than cast doubt on the prosecution's case; it affirmatively establishes the defendant's innocence. To this extent the function of the character witness is similar. However, while the alibi witness demonstrates that given the time of the crime, the defendant was not at the place where the crime was committed, the character witness demonstrates that, given the nature of the crime, the defendant was neither of the temperament nor the station to commit it.

#### CHARACTER WITNESSES

In too many instances, the testimony of so-called character witnesses is treated perfunctorily<sup>64</sup> and is not properly emphasized by the defense counsel. Carefully selected, properly prepared and

<sup>62</sup> This caution follows, of course, because of the likelihood that the prosecutor or his agent will interview the prospective alibi witness subsequent to the defense counsel's initial investigation. The subtle pressures that the subsequent interview may bring to bear on the witness may disturb the certainty of the witness's recollections and engender changed testimony at trial.

<sup>63</sup> In legal theory, the failure to sufficiently prove a defense of alibi does not jeopardize the defendant's case. Thus, the mere failure to substantiate the defense of alibi may not be used to discredit the presumed innocence of the defendant. See, e.g., *Asher v. State*, 201 Ind. 353, 168 N.E. 456 (1929) (holding error to instruct jury that alibi defense found false could be considered a discrediting circumstance in determining defendant's guilt); *People v. Rabinowitz*, 290 N.Y. 386, 49 N.E.2d 495 (1943) (holding prejudicial error to instruct that if jury rejected alibi it would logically accept testimony of state's witnesses); *State v. Marasco*, 81 Utah 325, 17 P.2d 919 (1933) (discredited alibi claim may not be transformed into affirmative proof connecting accused with the commission of the crime).

<sup>64</sup> The witness is placed on the stand, asked a few questions about himself, whether he knows the defendant and his reputation concerning the characteristics involved in the case and, finally, to relate his knowledge of the defendant's reputation.

presented, character witnesses can be a highlight of the defense testimony.<sup>65</sup>

*Character* consists of those qualities which make up an individual; it describes *what a person is*. *Reputation* is the sum of the opinions entertained concerning an individual; it describes *what people think he is*.<sup>66</sup> In order to prove character, when circumstantially relevant,<sup>67</sup> the testimony must

<sup>65</sup> This is especially true when coupled with a jury instruction such as that found in Illinois:

The defendant has introduced evidence of his reputation for (e.g., truth and veracity—morality—chastity—honesty and integrity—being a peaceful and law-abiding citizen, etc.). This evidence may be sufficient when considered with the other evidence in the case to raise a reasonable doubt of the defendant's guilt. However, if from all the evidence in the case you are satisfied beyond a reasonable doubt of the defendant's guilt, then it is your duty to find him guilty, even though he may have a good reputation for —

ILLINOIS PATTERN JURY INSTRUCTIONS §3.16 (1968). The comment to this instruction states that unless granted express recognition by the court, reputation testimony would be largely ignored by the jury. See *People v. Hrdlicka*, 344 Ill. 211, 220-21, 176 N.E. 308, 312-13 (1931).

Generally, the defendant has the legal right to have the jury instructed to consider all the evidence in the case, including evidence of good character, in determining his guilt or innocence. Two commentators, however, see the better rule as allowing an instruction to the effect that evidence of the defendant's good character, standing alone, is sufficient to create a reasonable doubt. See F. L. BAILEY & H. ROTHBLATT, *DEFENDING BUSINESS AND WHITE COLLAR CRIMES* §§212, 447 (1969) [hereinafter cited as BAILEY].

<sup>66</sup> See generally *Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 227-32 (1969):

Rule 4-04. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character Evidence Generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of his character or a trait of his character offered by an accused, and similar evidence offered by the prosecution to rebut the same;

\* \* \*

Rule 4-05. Methods of Proving Character

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or in the form of an opinion.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

<sup>67</sup> Character is circumstantially relevant when it is used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. Examples include evidence of a nonviolent disposition to prove that the person was not the aggressor in an affray, or evidence of honesty to disprove a charge of theft. Character is not circum-

relate to defendant's general reputation in the community<sup>68</sup> or, when proper, in his place of business.<sup>69</sup> The witness is not ordinarily permitted to testify concerning his own opinion of the defendant, nor about any specific deeds or acts that exemplify the character traits under consideration.<sup>70</sup>

Since "character evidence" is essentially reputation evidence, it is necessary to prepare the character witness to insure the admissibility of his testimony; the witness must comprehend that he is not being asked for his own personal evaluation or opinion of the defendant,<sup>71</sup> but rather for that of the community.

After the defendant has placed his character in issue the prosecution may rebut by cross-examination or reputation evidence to the contrary.<sup>72</sup> Thus,

stantially relevant if the character itself is an element of a crime, claim, or defense. Rather, this type of character is referred to as "character in issue." Illustrative of this category is the chastity of the victim under a statute requiring her chastity as an element of the crime of seduction. See *McCORMICK* §§154, 155.

<sup>68</sup> See, e.g., *Henson v. State*, 239 Ark. 727, 731, 393 S.W.2d 856, 859 (1965) (community or neighborhood); *People v. DeMario*, 112 Ill.App.2d 175, 189, 251 N.E.2d 267, 274 (1969) (association with neighbors and friends); *State v. Oliver*, 247 La. 729, 745, 174 So.2d 509, 514 (1965) (among his neighbors).

<sup>69</sup> See, e.g., *United States v. White*, 225 F.Supp. 515, 522 (D.D.C. 1963) (community includes where a man works, worships, shops, relaxes, and lives); *Cosler v. Norwood*, 97 Cal.App.2d 665, 667, 218 P.2d 800, 801 (1950) (reputation evidence may be confined to the vicinity of one's place of business or among the members of a restricted group of persons). But see *Arterburn v. State*, 216 Tenn. 240, 253, 391 S.W.2d 648, 654 (1965) (within trial court's discretion to refuse testimony of defendant's reputation among his fellow workers where eleven witnesses had already testified of his reputation in the community).

<sup>70</sup> See S. GARD, *ILLINOIS EVIDENCE MANUAL* 118 (1963):

Evidence of specific acts is not permissible because of the risk of unfair surprise, undue prejudice, confusion of issues, and undue consumption of time involved in proving character by collateral events, when character is not, under the pleadings, an issue in the case.

See also 1 WIGMORE §57.

<sup>71</sup> See *AMSTERDAM* §405:

The response of the inadequately prepared character witness—"Have I heard? I know the defendant. He's as honest . . ."—is usually good for some courtroom humor, but does the defendant no good. The witness simply gets into a wrangle with the judge, and the value of the exercise is lost.

<sup>72</sup> See, e.g., *Michelson v. United States*, 335 U.S. 469, 479 (1948); *Gross v. United States*, 394 F.2d 216, 219 (8th Cir. 1968); *United States v. Reed*, 376 F.2d 226, 228 (7th Cir. 1967); *United States v. Harris*, 331 F.2d 185, 188 (4th Cir. 1964); *People v. Lewis*, 25 Ill. 2d 442, 444, 185 N.E.2d 254, 256 (1962). The general rule is that it is improper for counsel for the prosecution in his argument to the jury to comment on the

if a defendant has exhibited overwhelmingly poor character, counsel should avoid offering character evidence; but moderately undesirable character should not automatically dismiss consideration of the issue.<sup>73</sup>

In the federal practice as well as in many states the permissible scope of cross-examination of the character witnesses is extremely broad, often encompassing inquiry into prior convictions and specific incidents such as arrests, adverse newspaper reports, fights, complaints to the police, and unsavory comments or rumors.<sup>74</sup> In other states, the permissible scope of cross-examination is much more limited.<sup>75</sup> Because a character witness must be made aware of the type of cross-examination he will receive, counsel should prepare him for cross-examination as well as for direct examination, particularly as to whether he "has heard" of certain bad character attributable to the defendant, and whether he would be able to maintain his positive testimony in the face of such bad character as the prosecutor will raise.

Counsel must recognize that the prosecutor can

failure of the accused to produce evidence of his good character. See, e.g., *Middleton v. United States*, 49 F.2d 538, 540-41 (8th Cir. 1951); *Dee v. State*, 388 S.W.2d 946, 947 (Tex. Crim. 1965).

<sup>73</sup> See *BAILEY* §210:

The fact that a defendant's character may not be desirable should not deter counsel from humanizing him. There is some good in all people. Find that good and display it to the jury.

However, the defendant's character should not be whitewashed. Defects must be faced, but the jury should be told that they must do justice without regard to background, race or past record. Evidence of the defendant's good character is a vital part of the defense. Therefore, such evidence should be stressed in summation.

It is particularly noteworthy in White Collar cases that a good reputation is enough to create a reasonable doubt where otherwise a reasonable doubt might not exist.

<sup>74</sup> See, e.g., *Michelson v. United States*, 335 U.S. 469 (1948) (rumors; arrests); *United States v. Longfellow*, 406 F.2d 415 (4th Cir. 1969) (rumors); *United States v. Wolfson*, 405 F.2d 779, 785-86 (2d Cir. 1968) (pending prosecution); *United States v. Stringi*, 378 F.2d 896, 897 (3d Cir. 1967) (testimony at earlier trial); *United States v. Blane*, 375 F.2d 249, 251 (6th Cir. 1967) (newspaper articles); *State v. Earley*, 192 Kan. 144, 148, 386 P.2d 221, 224-25 (1963) (criminal offenses); *McGowan v. State*, 221 Tenn. 442, 451, 427 S.W.2d 555, 559 (1968) (forfeiture of bond).

<sup>75</sup> See, e.g., *United States v. Wooden*, 420 F.2d 251, 253 (D.C. Cir. 1969) (convictions unrelated to reputation in question); *Aaron v. United States*, 397 F.2d 584, 585 (5th Cir. 1968) (illicit affairs); *Travis v. United States*, 347 F.2d 130, 133 (10th Cir. 1957) (plea of the fifth amendment); *People v. Myers*, 94 Ill. App. 2d 340, 350, 236 N.E.2d 786, 791 (1968) (particular acts of bad conduct); *People v. Eli*, 66 Cal. 2d 63, 78, 56 Cal. Rptr. 916, 926, 424 P.2d 356, 366 (1967) (rumor).

become a de facto witness on cross-examination by leading the character witness with "have you heard" questions. In the event that there is a specific conviction or other incident which defense counsel anticipates will be raised upon cross-examination of his character witness, he may seek a ruling prior to trial which would exclude such cross-examination in the event that character witnesses are called to testify.<sup>76</sup> Counsel should also realize that the character witness who is informed of defendant's previous criminal conviction in the course of trial preparation does not risk perjury for answering a "have you heard" question negatively, for "have you heard" means "have you heard in the community."<sup>77</sup>

In preparing the witness, counsel must be assured that the witness is able to define such words as "veracity," "integrity" and "character,"<sup>78</sup> for the prosecution's cross-examination may attempt to discredit the testimony by showing that the witness does not know the meaning of the words to which he is testifying.<sup>79</sup>

<sup>76</sup> See *AMSTERDAM* § 405:

Where counsel thinks that the prosecutor may use this approach, he may ask the prosecutor his intentions at sidebar, before he puts on character witnesses; and may ask the court to rule on the question whether a given arrest or conviction identified by the prosecutor may be inquired about on cross, if the character witness testifies to the trait of x. Since the witness' testimony will be in the standard form, the courts should have no trouble in giving an advance advisory ruling. The cross-examination must be disallowed if (a) the arrest or conviction does not relate to the character trait in question, or (b) the prosecutor has no sound basis in fact for asserting that there was an arrest or conviction. In his discretion, the trial judge may also disallow it as incommensurately prejudicial.

See generally *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965) (judicial discretion based upon the nature of prior convictions, the length of criminal record, and the age and circumstances of the defendant).

<sup>77</sup> See *AMSTERDAM* § 405.

<sup>78</sup> I. GOLDSTEIN & F. LANE, 3 *GOLDSTEIN TRIAL TECHNIQUES* § 20.71 (1969) [hereinafter cited as *GOLDSTEIN*].

<sup>79</sup> *CORNELIUS*, at 103-04, illustrates the dramatic effect of a cross-examination as to simple definitions of words such as "veracity" and "character." This tactic is especially successful where the witness is not of sufficient intelligence to comprehend basic definitions or inarticulate. The consequences of the following example used by *Cornelius* could have been avoided by adequate preparation by defense counsel:

Q. "You have stated that the reputation of this witness for truth and veracity is bad?"

A. "Yes." (With much emphasis.)

Q. "Will you please define for the benefit of the jury, the word 'veracity'?"

A. (Here the witness shuffled uneasily in his seat and hesitated.) "I answered that I knew his reputa-

The properly prepared character witness can be examined in four basic steps. First, the witness' credibility and competence should be established through questions concerning his personal background. The witness should recount in detail his personal education and work background, his marital status and number of children, positions of honor and trust in the community, and the like. This opening portion of the testimony is designed to establish the witness in the eyes of the jury as a responsible and respected member of the community. Further, it permits the witness to overcome the initial trauma of testifying, and allows him to be more at ease, and therefore more convincing, in responding to the pertinent questions which follow.

Secondly, counsel should establish the witness' contact with and knowledge of the defendant. While the character witness does not testify regarding his own personal opinion of the defendant, it is nevertheless necessary to show that the witness has known the defendant for a sufficient length of time. This portion of the testimony should describe the witness' first meeting with defendant, the circumstances of that encounter, the frequency and occasions for their contact, the witness' knowledge of the defendant's family, visits to one another's home, their business dealings, and the like. It may be desirable to show the proximity of habitation between the defendant and the witness; the jury will anticipate that a person hears more discussion concerning a neighbor than he does of a party living across town.

To embellish the witness' acquaintance with the defendant's reputation, it should be shown, if possible, that both resided in the same community for

a reasonable length of time,<sup>80</sup> or, where applicable, that the defendant has been employed or carried on his business or profession for a length of time sufficient to indicate an established reputation. Furthermore, the witness should establish that his conception of the defendant's reputation is not based on the remote past, for character testimony is inadmissible if pertaining to a period of time too remote from the event in question.<sup>81</sup>

During this portion of the testimony, the impartiality of the witness should be expressly shown and not left for the prosecution to shape on cross examination. For this reason, relatives, business associates, and persons with an interest in the outcome of the litigation are not persuasive character witnesses.

The third area of concentration concerns questioning regarding the witness' knowledge of the defendant's reputation. This testimony depends upon the witness' having discussed the defendant's reputation with others in the community. Frequent contact between the witness and parties knowing the defendant establishes the basis for testimony as to reputation and transcends personal opinion. The number of such discussions is a focal point of the testimony. The witness should be prepared to relate, on cross-examination, several specific instances in which the defendant's reputation for the characteristics at issue was actually discussed with other members of the community. Positive answers under cross-examination cannot be secured without adequate preparation, for it is seldom that a witness called to the stand unprepared can recall the names of more than one or two persons with whom he has discussed defendant's reputation. The dangers in failing to prepare a character witness are apparent from the following:

tion for truth was bad, but I am not sure that I know what veracity means."

Q. "But you swore that his reputation was bad both for truth and veracity, did you not?"

A. "Yes, sir."

Q. "And you swore that his reputation was bad for veracity without knowing the meaning of the word?"

A. (Witness very uneasy, by this time, and considerably flushed, did not answer.)

Q. "And, therefore, not knowing the meaning of the word, you could not know whether or not you were telling the truth?"

A. "I guess that's so."

Q. "And so you do not know whether or not you told the truth when you said his reputation was bad for truth and veracity?"

A. "In so far as veracity is concerned."

Of course, when the prosecution calls witnesses to rebut character, this tactic may be employed by defense counsel.

The prosecutor will ask the character witness, first, to limit himself to the precise character trait he is speaking about—"honesty"—and to tell the court the names of some people with whom he has discussed the trait of the defendant, and how it came to be discussed. This will not be easy for the unprepared witness because, thinking under pres-

<sup>80</sup> See *Michelson v. United States*, 335 U.S. 469, 478 (1948).

<sup>81</sup> *Awkard v. United States*, 352 F.2d 641, 644 (D.C. Cir. 1965) (reputation in a different town three years prior to time of alleged crime too remote); *People v. Gonzales*, 66 Cal. 2d 482, 500, 58 Cal.Rptr. 361, 373, 426 P.2d 929, 941 (1967) (reputation seven years before acts in question too remote); *State v. May*, 93 Idaho 343, 461 P.2d 126, 129 (1969) (reputation three years before crime not too remote).

sure, he is likely to give narrow range to the concept of "honesty" and also to be trying to remember specific occasions on which *explicit* conversational reference was made to this trait—which will have been precious rare. The witness will therefore falter somewhat. The prosecutor will then move in with the question on how many occasions the witness has discussed this specific trait of the defendant, that he can specifically recall. Thinking literally and once stung, the witness will estimate conservatively. Not aware that he is likely to be disqualified if he answers that he has discussed the trait less than a dozen times, or with a considerable number of persons, the witness will say "five or six times, maybe" and be out of court. There is no need for this problem to arise.<sup>82</sup>

Once the witness has positively demonstrated that he is cognizant of defendant's reputation, counsel can move to the fourth and final step in the examination of a character witness—testimony concerning the defendant's reputation. In preparation for this stage of the testimony the character witness should be told that his most important moment on the witness stand will come when he is asked to state the defendant's reputation for relevant character traits. He should be urged to give a spontaneous, emphatic and enthusiastic response and should be advised that if he gets an opportunity, he should, without appearing over-anxious, relate one or two sentences in support of his general complimentary conclusions about the defendant's reputation. For example, when the witness is asked to testify to the defendant's reputation for honesty and integrity, he can say: "It is excellent. He is one of the most highly respected men in our town," or, "It is of the highest. He is known to be a man of honesty in all his business dealings."

<sup>82</sup> AMSTERDAM § 405. Continuing, Professor Amsterdam explains counsel's burden in ameliorating the consequences of destructive cross-examination by proper preparation:

Counsel must make the witness understand that people are talking about "honesty" under a lot of other names when they talk about the defendant, and also when they act toward the defendant in ways that express confidence and trust in him. Counsel should elicit specific instances from the witness and give him confidence that he is on sound ground in recalling that the general sense of the community is that the defendant is honest. If the witness is left with the recollection of a half-dozen names with which to respond to the prosecutor's question to name names, he will be all right. The important thing is that he does not fluster, and that he continues to assert with confidence that he has discussed the defendant's honesty often.

This testimony best comes spontaneously from the witness rather than from the suggestion of counsel. Counsel's role is to suggest to the witness that such an extra sentence or two be added if the opportunity arises, and that the witness should be urged to reflect upon what he will say when the time arrives.

Many jurisdictions allow the reception of reputation testimony based upon the absence of report of bad reputation rather than upon knowledge of affirmative good reputation. It must be shown, however, that any misconduct on the part of the defendant, if existent, would have been known in the community, and that the witness would have heard expressions of bad character had they been circulated.<sup>83</sup> The doctrine admitting such evidence is predicated on the theory that good reputation is unlikely to excite discussion. Consequently, there exists a presumption that a defendant's reputation is good for lack of bad qualities to discuss.

Since the number of witnesses who have not heard of bad reputation is ordinarily plentiful, counsel should prepare a limited number of the better qualified witnesses. However, in the small class of cases where a number of viewpoints are necessary to establish character from different perspectives, counsel must be prepared to combat the court's discretionary limitation of the number of character witnesses.<sup>84</sup> Objection to the court's limitation should be made when the number of allowable witnesses is announced rather than after the examination of a few witnesses.<sup>85</sup> Objection

<sup>83</sup> See, e.g., *Michelson v. United States*, 335 U.S. 469, 478 (1948); *Gravitt v. State*, 220 Ga. 781, 787, 141 S.E.2d 893, 898 (1965); *State v. Cavener*, 356 Mo. 602, 612, 202 S.W.2d 869, 875 (1947); *State v. Peterson*, 100 Utah 413, 421-22, 174 P.2d 843, 847 (1946). Some courts have even held this type of evidence to be the very best that could possibly be shown. See, e.g., *People v. Stennett*, 51 Cal.App. 370, 197 P. 372 (1921).

<sup>84</sup> *United States v. Baysek*, 212 F.2d 446, 447 (3d Cir. 1954) (limitation of seven character witnesses in an extortion case not an abuse of discretion); *State v. Stewart*, 179 Kan. 445, 453, 296 P.2d 1071, 1076 (1956) (limitation of four character witnesses in a murder case not an abuse of discretion); *Woods v. Commonwealth*, 305 S.W.2d 935, 937 (Ky. 1957) (no abuse of discretion in refusing to limit the number of character witnesses introduced by the prosecution, and permitting eight to testify); *Carr v. State*, 208 So. 2d 886, 889-90 (Miss. 1968) (defendant accused of rape limited to eleven character witnesses where the prosecution did not challenge the defendant's character); *State v. Demaree*, 362 S.W.2d 500, 505-06 (Mo. 1962) (defendant charged with murder limited to four character witnesses where the prosecution did not vigorously cross-examine them).

<sup>85</sup> See, e.g., *Holliston Mills of Tennessee v. McGuffin*, 177 Tenn. 1, 20, 146 S.W.2d 357, 359 (1941).

may be grounded upon the theory that character evidence is of such overwhelming materiality that the imposition of a limitation would under the circumstances of the case, be an abuse of discretion.<sup>86</sup> Appellate reversal for an abuse of discretion in the limitation of character witnesses is highly circumscribed and will be achieved only where appellant can demonstrate substantial prejudice.<sup>87</sup>

In light of possible limitations on the number of character witnesses to be presented, the selection process takes on increased importance. In choosing the better witnesses, counsel should select those who are most articulate and are neither related to the defendant nor interested in the outcome of the litigation. It is better to obtain a cross-section rather than have witnesses of the same profession or social interest. While the witness' position in the community must be of sufficient eminence to command the respect and confidence of the jury, the display attributes of the witness should not be given more weight in the selection process than his knowledge of the defendant's reputation. That is not to say, however, that the witness' personal characteristics and station in life are of no importance. Character witnesses should be expressive, sympathetic to the jury, and likable. Individuality of character is desirable if the jury is not to be bored in the course of examination.<sup>88</sup>

A discussion of character witnesses would be incomplete without a discussion of the methods of attacking the credibility of the prosecution's attempt to establish the character to fit the crime. It

is not uncommon for a prosecution witness to be friendly with the defendant, but compelled by circumstances to testify against him. When this occurs, defense counsel may on cross-examination or, where applicable, by subpoena as part of the defense case, use this same witness to establish good reputation. This will not only nullify the adverse testimony but also have a powerful psychological effect on the jury.<sup>89</sup>

Typically, people are hesitant to take the stand and attack the character of another unless actuated by enmity. If the defense counsel concludes that such is the case with regard to a character witness for the prosecution, he should attempt to bring out any previous trouble or conflict that the witness may have had with the defendant. If the jury discerns personal animosity, it will tend to disregard the testimony.<sup>90</sup>

That character evidence is a significant aspect of an acquittal verdict was recognized by American novelist James Gould Cozzens who, observing the reactions of juries, noted that if the defendant's "reputation and presence were good, he was presumed to be innocent; if they were bad, he was presumed to be guilty. If the law presumed differently,

<sup>89</sup> See GOLDSTEIN § 20.74.

<sup>90</sup> CORNELIUS, at 104, notes that almost invariably such a witness will at first deny any ill feeling toward the defendant. Upon competent questioning, however, he will probably admit some friction or trouble with the defendant, but will attempt to minimize it. Cornelius demonstrates how this individual could be successfully cross-examined:

On direct examination, he had testified that the reputation of X was bad for truth and veracity. The cross-examination then proceeded as follows:

Q. "You are a bitter enemy of X are you not?"  
(The question was made as extreme as possible to draw a denial.)

A. "No, sir."

Q. "But you are an enemy of his just the same?"

A. "No, sir, I am not."

Q. "Are you on friendly terms with him?"

A. "I have nothing against him."

Q. "That was not the question. I asked you are you on friendly terms with X?"

A. "Yes, sir."

Q. "Then, am I to understand that you are a friend of X?"

A. "Well, yes."

Q. "Were you subpoenaed to come here and testify against X?"

A. "No."

Q. (Sarcastically.) "You came as a friend?"

A. "I came because Y asked me to come."

Q. "But you came voluntarily?"

A. "Yes, sir."

Q. "You came voluntarily to blacken the name of your friend?"

A. (No answer.)

*Id.* at 105.

<sup>86</sup> *Michelson v. United States*, 335 U.S. 469, 480 (1948). See, e.g., *Petersen v. United States*, 268 F.2d 87, 88 (1959) (abuse of discretion to restrict defendant charged with income tax evasion to one character witness when the sole defense is lack of wilful intent); *Commonwealth v. Streuber*, 185 Pa.Super. 369, 373, 137 A.2d 825, 827 (1958) (limitation of only one character witness is an abuse of discretion); *Commonwealth ex rel. Davis v. Malbon*, 195 Va. 368, 376-77, 78 S.E.2d 683, 688 (1953) (allowing forty-three character witnesses is unreasonable exercise of discretion).

<sup>87</sup> *Cope v. State*, 23 Okla.Crim. 161, 166-67, 213 P. 753, 754-55 (1923) (a fixed rule which arbitrarily limited the number of character witnesses that could testify to a particular issue precluded the exercise of discretion); *Campbell v. Campbell*, 30 R.I. 63, 73-74, 73 A. 354, 358-59 (1909). (As a condition to adjournment, the trial court required counsel to state the names of witnesses to be called the next morning, which would be pretty rigidly followed. Refusal of the court to permit a material witness who had not been expressly named to be called was an abuse of discretion, and reversible error.) The reviewing court seldom finds the discretionary limitation of the trial court to be erroneous, and if error is found, it usually is not reversible error when considered alone. See cases cited in note 86, *supra*.

<sup>88</sup> See AMSTERDAM § 405.

the law presumed alone."<sup>91</sup> Character evidence presses upon the juror's humanistic sensitivity. Equally effective evidence, pressing upon their intellectual sophistication rather than their sentiment, can be generated by the use of scientific and demonstrative evidence.

#### SCIENTIFIC AND DEMONSTRATIVE EVIDENCE

There are many cases in which the defense can make profitable and imaginative use of demonstrative and scientific evidence. Counsel may find it helpful to use demonstrative evidence such as diagrams, charts, blackboards, photographs, maps or similar physical objects to illustrate and elucidate testimony on the defense theory. However, if the theory requires scientific evidence in the form of testimony of pathologists, psychiatrists,<sup>92</sup> ballistics experts, accountants and the like, an effective, comprehensible presentation often requires that the testimony of the expert witness be explained with visual aids.

Although much of the testimony of an expert increases the factual premises from which the jury can make inferences, the expert's services are most forcefully utilized when counsel elicits from him a statement of opinion or series of conclusions resulting from a clear course of reasoning.<sup>93</sup> The reasoning process should be most clearly developed, for those on the jury are not swayed by mere assertions of factual conclusions but are anxious to understand; and frequently, to understand is to be convinced.<sup>94</sup>

Because of the strong impression that the proper use of expert testimony will have upon the jury, counsel will often find it necessary to argue for the admission or exclusion of testimony, so that some knowledge of the pertinent rules of evidence is required.<sup>95</sup> Rules of evidence were developed to protect the jury from being misled and to keep

their consideration within the matters at issue.<sup>96</sup> An elementary exclusionary principle is the opinion rule. According to Professor Wigmore the true theory of this rule is not that there is any fault or insufficiency in the witness' impression, but simply that his testimony is superfluous. The rule simply endeavors to save time and avoid confusing testimony by telling the witness: "The tribunal is on this subject in possession of the same materials for judgment as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary, and merely cumber the proceedings."<sup>97</sup>

However, the opinion rule does not operate to exclude the conclusions drawn by the expert,<sup>98</sup> who is by hypothesis speaking from experience or education<sup>99</sup> because his opinion is helpful to the jury. On the other hand, if the inferences can be made by the jury without assistance, an expert's opinion thereon should also be excluded. A practical test has been aptly stated:

... [T]here is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. Whenever the triers of fact are confronted with issues which cannot be determined intelligently on the basis of ordinary judgment and practical experience gained through the usual affairs of life, the benefit of scientific or specialized knowledge or experience may be provided.<sup>100</sup>

testimony. For a case reversing because of the constant trivial objections, see *Venuto v. Lizzo*, 148 App. Div. 164, 132 N.Y.S. 1066 (1911).

<sup>96</sup> For an excellent summary of the development of the rules of evidence pertaining to the use of expert testimony, see Rosenthal, *The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROB. 403 (1935). See also 7 WIGMORE § 1917.

<sup>97</sup> *Id.* at § 1918.

<sup>98</sup> An expert has been defined as "one who is skilled in any particular art, trade or profession, being in possession of peculiar knowledge concerning the same." H. ROGERS, *EXPERT TESTIMONY* 2 (3rd ed. 1941).

<sup>99</sup> McCormick states that to warrant the use of expert's inferences two elements are required: 1) "the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the ken of the average layman, and 2) the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth." McCormick, *Some Observations Upon the Opinion Rule and Expert Testimony*, 23 TEXAS L. REV. 109, 121 (1944).

<sup>100</sup> Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952).

<sup>91</sup> J. COZZENS, *THE JUST AND THE UNJUST* 57 (1942).

<sup>92</sup> For illustrations of the direct and cross examinations of psychologists and psychiatrists in a case in which the defense of insanity at the time of the crime was successfully interposed, see Sullivan & Winger, *The Insanity Defense Psychological and Psychiatric Testimony*, 7 TRIAL LAWYERS' GUIDE, Nov., 1963 at 53.

<sup>93</sup> Cf. *People v. Martin*, 87 Cal. App. 2d 581, 584, 197 P.2d 379, 380 (1948) ("Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions. The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion").

<sup>94</sup> See Osborn, *Reasons and Reasoning in Expert Testimony*, 2 LAW & CONTEMP. PROB. 488 (1935); 4 BUSH § 477.

<sup>95</sup> Sometimes defense attorneys make objections simply to break the continuity of a cogently reasoned



In addition, courts generally limit the scope of an expert's testimony by sustaining objections to questions attempting to elicit opinions on facts determinative of the "ultimate issue" in order to prevent the witness from usurping the jury's function.<sup>101</sup> Wigmore attacked this line of reasoning by contending that the jury is at all times free to reject the expert's opinion.<sup>102</sup> He felt that the exclusion of expert testimony at the point when the jury was most in need of assistance unfairly obstructed the presentation of the case and left the jury an incompetent trier.<sup>103</sup>

In *People v. Wilson*,<sup>104</sup> a California abortion prosecution, complainant's personal physician was permitted to testify that he found his patient's cervix effaced and that, in his opinion, an abortion was induced by outside causes. Further expert opinion by the doctor, advising that his patient's past history indicated no necessity for a therapeutic abortion, rebutted the defendant's only defense. Affirming the ensuing conviction, Justice Traynor rejected appellant's "ultimate issue" contention:

There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case, "We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved. . . . Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in." [citations omitted] In the present case there was no other practicable way of framing the questions if they were to serve the purpose of obtaining the

benefit of the witness's expert knowledge as to matters on which enlightenment of the jury by the expert was proper.<sup>105</sup>

Notwithstanding limited acceptance of the ultimate issue doctrine, a question couched in terms of a legal standard or conclusion calling for an opinion beyond an ultimate fact in issue will not be allowed.<sup>106</sup>

Faced with a related issue concerning the proper means of eliciting expert testimony, the *Wilson* court stated: "The method of obtaining opinion evidence from an expert by hypothetical questions is unsatisfactory, but it is at present the least objectionable known to the law."<sup>107</sup> The hypothetical question has been criticized because it often creates more confusion than understanding for both the witness and the jury.<sup>108</sup> Its use, however, is necessary to elicit an opinion from an expert who has no personal knowledge of the facts.<sup>109</sup> Since his opinion necessarily involves the consideration of premises, it follows that if the expert is not aware of the

<sup>105</sup> *People v. Wilson*, 25 Cal.2d 341, 346, 153 P.2d 720, 725 (1944). In *People v. Martinez*, 38 Cal.2d 556, 241 P.2d 224 (1952), Justice Traynor again stated: "Defendant's argument is based upon the erroneous assumption that an expert cannot be asked a question that coincides with the ultimate issue."

<sup>106</sup> *Koester v. Commonwealth*, 449 S.W.2d 213 (Ky. 1969) (psychiatrist's opinion as to defendant's specific intent to detain two girls with intent to have sexual intercourse was inadmissible); *State v. Augustine*, 252 La. 983, 215 So.2d 634 (1968) (doctor's testimony that defendant met the "legal standard for present sanity" was an invasion of the jury's province). *But cf.* *State v. Miller*, 254 Iowa 545, 117 N.W.2d 447 (1962) (doctor's opinion that prosecutrix had been "forcibly raped" was sustained, the court holding that "rape" was not used in its legal context).

<sup>107</sup> *People v. Wilson*, 25 Cal.2d 341, 345, 153 P.2d 720, 724 (1944).

<sup>108</sup> See Hulbert, *Psychiatric Testimony in Probate Proceedings*, 2 LAW & CONTEMP. PROB. 448, 455 (1935) ("But the present practice of misusing the hypothetical question as restatement of the case to reimpres the jury is bad strategy, though good tactics; bad strategy because it is so unfair, confusing and degrading that it does not clarify the issue nor help achieve justice"); 2 WIGMORE § 686 ("The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to an intolerable obstruction of truth. . . . [I]t has artificially clamped the mouth of the expert, so that the answer to a complex question may not express his actual opinion on the actual case. . .").

<sup>109</sup> The hypothetical question may also be used as a summary question directed toward an expert who has personally examined the subject in question, but this is merely a technique which is not necessitated by the rules of evidence. *State v. Boiardo*, 111 N.J. Super. 219, 268 A.2d 55 (1970) (long hypothetical question was sustained over attack that it permitted the state to summarize its entire case). See also 2 WIGMORE § 675; 4 BUSH § 477; Sullivan & Winger, *supra* note 92, at 158.

<sup>101</sup> Evidence is composed of fact and opinion, and their relationship varies with relevancy. As irrelevance is approached opinions may be very general, but as the issues become more relevant courts demand details rather than opinion. Thus "the admissibility of any opinion depends upon two factors: 1) its degree of generality and 2) its decisiveness of the case. A witness may make a very general statement (an opinion) and have it called a statement of fact if it is not decisive of the case or does not approach decisiveness of the case. He may not make a very specific statement if such statement is capable of being made more specific and is decisive of the case or approaches such decisiveness." W. KING & D. PILLINGER, *OPINION EVIDENCE IN ILLINOIS*, 10-12 (1942). See also McCormick, *supra* note 99, at 115; Note, *Opinion Testimony and Ultimate Issue*, 51 KY. L.J. 540 (1963).

<sup>102</sup> 7 WIGMORE § 1920.

<sup>103</sup> *Id.* at § 1921.

<sup>104</sup> 25 Cal.2d 341, 153 P.2d 720 (1944).

premises from his own observation, they must be presented to him hypothetically.<sup>110</sup>

The practitioner's art in presenting the hypothetical question involves the arrangement of the premises; the evidentiary rules focus on the scope of their manipulation. Theoretically, the hypothetical is an attempt to furnish the jury with an account of the premises upon which the conclusion is based. In order to avoid misleading the jury, the premises must not include data which does not countenance a fair possibility of jury acceptance,<sup>111</sup> but an opinion on any combination of favorable facts is permissible.<sup>112</sup> It is the jury's task to examine the truth of the premises as well as the validity of the conclusions.

The effect of a hypothetical question can, however, be derogated by its vulnerability to cross examination because it allows the opposing counsel to introduce doubt into the premises as well as the conclusions.<sup>113</sup> By culling certain facts and partially

stating previous testimony, opposing counsel can confuse the jury and spoil a forceful argument. In short, the hypothetical question lacks a fortified unity. If the advocate has the opportunity to consult and to prepare his witness, the hypothetical question should be subordinated to tactics which more effectively amplify and protect the reasoning process. By drawing the premises, conclusions and rationale from the expert, the jury is presented with one complete thought that can only be attacked from the forefront.

Courtroom accomplishments of this type are predicated upon effective out of court preparation. In preparing the expert witness, it is essential that counsel fully and fairly explain to the expert all relevant facts, review with the expert his evidentiary conclusions, and ask for assistance in formulating a scientific theory which will be the basis of direct examination. Imperatively, counsel must anticipate prejudicial facts that may be disclosed during cross-examination. Thus, counsel is advised to become familiar with the literature in the particular field and to have carefully studied all books and articles that may have been written by the expert. If any possible inconsistencies should appear between the expert's publications and the contemplated theory of the case, the matters should be fully discussed. If they cannot be harmonized, another expert should be chosen. Counsel should also determine whether the expert is familiar with the authorities in his profession, for it is likely that his qualification will be tested on cross examination by his knowledge of the authorities.<sup>114</sup>

Satisfied that the expert is qualified, counsel should discuss the substance of the direct examination with his witness. Again, counsel should fully relate the facts, his theory, and its relation to the determination of the case. If the expert is made aware of the exact facts and issues he may be able to conduct experiments to supplement his testimony with physical proof<sup>115</sup> or, significantly, be in

bed. Sustaining the conviction, the reviewing court held that on cross examination opposing counsel can reframe the hypothetical or ask the expert whether his opinion would change if one or more of the material facts assumed conformed to the cross examiner's version of what the true facts are.

<sup>114</sup> See 4 BUSH § 471; Stichter, *A Practitioner's Guide to the Use of Exhibits and Expert Testimony*, 8 OHIO SR. U.L.J. 295, 309 (1942).

<sup>115</sup> The admissibility of a particular experiment or scientific technique is based upon its general acceptance. In *Frye v. United States* 293 F. 1013 (D.C. Cir. 1910), the court held that the lie detector test was not admissible and stated:

Just when a scientific principle or discovery crosses

<sup>110</sup> See 2 WIGMORE § 676. Some courts allow the expert to draw conclusions from the facts that have been previously introduced, leaving it to the cross examiner to elicit the exact premises which the witness had in mind. In such a jurisdiction it is effective trial practice to have, for instance, the family doctor testify as to findings and then ask the "super-expert" for his conclusion. See Ladd, *supra* note 100, at 422; McCormick, *supra* note 99, at 125. But cf. Allen v. State, 234 Md. 366, 199 A.2d 237, where a question propounded by the trial court asking whether, based on all examinations and what he heard in court that day, the doctor was able to say if defendant could distinguish between right and wrong, was excluded by reviewing court because the failure to state premises with reasonable particularity was confusing to the jury.

<sup>111</sup> 2 WIGMORE § 682. See, e.g., State v. Tyler, 77 Wash.2d —, 466 P.2d 120 (1970), where a doctor was not permitted to testify hypothetically as to the effect drugs had on the defendant because the facts in the record concerning the kinds, quantities, strength and intervals of taking the drugs was vague and uncertain. Cf. People v. Muniz, 31 Ill.2d 130, 198 N.E.2d 855 (1964), where an objection to a hypothetical question was properly sustained even though the fact embraced within the question eventually appeared in evidence because, at the time the question was asked, no evidentiary support existed for facts assumed.

<sup>112</sup> See, e.g., People v. Yonder, 44 Ill.2d 376, 256 N.E.2d 321 (1969), where the prosecution, while attempting to prove defendant's sanity, included in its hypothetical the facts attending the offense but omitted defendant's history and other symptoms of insanity. The court held that although a party may include only proved facts, the prosecution was not bound to include all of the evidence upon the issue.

<sup>113</sup> In State v. Bertone, 39 N.J. 356, 188 A.2d 599 (1963), a doctor responded favorably to the defense's hypothetical asking whether defendant's past history of schizophrenic paranoia could be activated by the discovery, upon returning from the army, of a man under his wife's bed. However, this testimony was vitiated when prosecutor introduced the possibility that defendant was deluding the presence of the man under the

a position to furnish a more appropriate scientific theory. Counsel's omissions in this regard can be disastrous.

The Canadian murder trial of Steven Truscott is illustrative of the dangers inherent in failing to discuss the scientific defense aspects of a case with the expert witness.<sup>116</sup> In *Truscott* the determining issue was whether the victim had died where she was found. The defense, attempting to cast doubt on the place of death, introduced a complicated lividity theory to illustrate that the position of the deceased body had changed after she had died. This momentarily confused the prosecution and lead it into an even more complicated scientific refutation involving the process of blood clotting. However, throughout the testimony of the expert witnesses neither side had informed the witness that a pool of blood was found beside the body. After the prosecution had an opportunity to review all the evidence, he recalled one of the experts and asked if blood oozes after death. The answer was that, in fact, blood does not ooze after the heart stops beating; thus there was convincing direct evidence that the victim died where she was found. Because the defense counsel had not informed his expert of this simple fact, the entire defense was destroyed.

Once the theory is established and the expert witness adequately prepared, counsel must serve as the conduit between the expert's untoward knowledge and the lay jury. A preliminary essential to the testimony of an expert witness is, of course, qualifying him as an expert.<sup>117</sup> After the threshold

the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

However in *United States v. Stifel*, 433 F.2d 431 (6th Cir. 1970), the court, citing extensively the support of the United States Atomic Energy Commission, held that the "neutron activation analysis" met the test of "general acceptance in the particular field."

<sup>116</sup> See generally Clendenning, *Expert Testimony*, 9 CRIM. L. Q. 415 (1967), reviewing the use of expert testimony in the Truscott murder trial.

<sup>117</sup> The qualification of a witness is important in gaining the confidence of the jury. The witness should be advised to state his qualifications without appearing to be boasting. See *Stichter*, *supra* note 114, at 313. If opposing counsel is aware of the distinguished qualifications of the witness, it is a wise tactic to attempt to waive the qualifications in hopes of minimizing the weight the jury will give to the witness' testimony. 4 BUSH § 472.

qualifications are established, counsel must assure that the jury comprehends each step in the ratiocination leading to the expert's conclusion. Assistance may be gleaned from the use of diagrams<sup>118</sup> and photographs<sup>119</sup> to illustrate the testimony. Inconsistencies in the state's evidences can be dramatically demonstrated through the use of enlargements.<sup>120</sup>

While generally effective, the use of expert witnesses is not without its drawbacks. Should the expert be informed of any incriminating facts or become aware of any detrimental information during his investigations, it may be wise to refrain

<sup>118</sup> When making diagrams it is best to use prepared charts or large drawing pads, rather than blackboards. See Henshaw, *Use and Abuse of Demonstrative Evidence: The Art of Jury Persuasion* 40 A.B.A.J. 479 (1954). Ladd, *Demonstrative Evidence and Expert Opinion* 1956 WASH. U.L.Q. 1, 18. Anatomical charts afford an accurate and easily accessible aid to the explanation of medical testimony. Cf. *Lackey v. State*, 215 Miss. 57, 60 So.2d 503 (1952).

<sup>119</sup> To be admissible a photograph must accurately represent what it purports. There must be no artificial distortions nor inaccuracy due to the lapse of time. Although it may be good practice to have the photographer testify, trial judges ordinarily require only that a person with personal knowledge verify the accuracy of the representation. See Ladd, *supra* note 118, at 11; 3 BUSH § 330. Although enlarged photographs are quite convenient, counsel should also consider the use of slides and advanced techniques like infra-red photography. See Lay, *The Use of Real Evidence*, 37 NEB. L. REV. 501, 506 (1958); Henshaw, *supra* note 118, at 481. Also, it is improper to introduce gruesome pictures which contribute nothing towards solution of evidentiary problems. See, e.g., *People v. Jackson*, 9 Ill.2d 484, 138 N.E.2d 528 (1956) (trial court abused its discretion in admitting a photograph taken after the autopsy where the only use of the photograph was to arouse the emotions of the jury so that they would administer a more severe penalty).

<sup>120</sup> In fingerprint cases the expert using enlarged photographs can point out differences in the whorls, dots and papillary ridges between those of the defendant and those found at the scene of the crime. With the aid of photographs a ballistic's expert can show that in fact variation in each gun barrel do leave characteristic grooves in the softer metal of the bullet. By comparing photos of the markings on a bullet found at the scene of the crime with a photo of another bullet shot from the gun in evidence, the jury will understand the reasons for believing that the particular gun is not the criminal's weapon. See *Underhill*, *supra* note 40, § 870-73; Ladd, *supra* note 118, at 10.

It should, however, be noted that fingerprint and ballistic's experts are more often employed by the prosecution than the defense. Where the prosecution's physical evidence is strong, defense counsel should attempt to show that the chain of evidence between investigating officer and expert was broken in order to create a belief in the possibility of tampering. Also as a prerequisite to introducing testimony, the prosecution has the burden of showing that there has been no possibility of substitution. See, e.g., *State v. Myers*, 82 Ohio L. Abs. 216, 164 N.E.2d 585 (1959).

from using his testimony. For, once the expert is called to testify, communications that have been privileged may become accessible on cross examination.<sup>121</sup> On the other hand, if the expert is used merely as a consultant, counsel must be careful to protect the privileged status of any incriminating information.

Although some state statutory protections exist,<sup>122</sup> they are strictly construed and often will not be sufficient protection against disclosure.<sup>123</sup> Many privileges recognized by the states have no like provision in federal proceedings<sup>124</sup> and the *Proposed Rules of Evidence for the United States Courts and Magistrates*<sup>125</sup> recognize only three privileges relating to psychotherapists, trade secrets and the attorney-client relationship.<sup>126</sup>

To attempt to avoid these problems, the attorney should retain the expert as his agent. Wigmore states that the communications of the at-

torney's agent are within the attorney-client privilege because the attorney's agent is also the client's subagent and is acting as such for the client.<sup>127</sup> Courts have likewise extended this privilege, but more perspective opinions have avoided the agency basis and emphasized both the need for the expert's consultations and the necessity for confidentiality if the communications are to be effective. Thus in *State v. Kociolek*<sup>128</sup> the Supreme Court of New Jersey held that communications between an attorney and a scientific expert were privileged. There the accused's attorney had hired a psychiatrist to examine the accused and make a report. When knowledge of this examination came to the state, the state demanded and received the report of the expert. It then called the psychiatrist to the stand, where his testimony touched on various disclosures made to him by the accused. The court held that the admission of this testimony was error, saying, "The lawyer-client privilege is vain if it does not secure freedom of professional consultation."<sup>129</sup>

In *United States v. Kovel*,<sup>130</sup> the Second Circuit, by Judge Friendly, ruled that communications to an accountant employed by a law-firm were privileged. The court analogized the position of the expert to that of an interpreter, stating that the accountant is thus necessary for effective counseling.<sup>131</sup> However, Judge Friendly stated that it was

<sup>127</sup> 8 WIGMORE § 2318. Cf. *La Lance and Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. 563 (S.D.N.Y. 1898), a patent case in which the court held that a scientific expert can be viewed as an associated counsel and thus the expert should have the same privilege as the attorney. The court concluded: "It would seem, however, that in such a case the privilege should be lost when the expert ceases to act as counsel, and allows himself to be made a witness; at least, to the extent to which he testifies." *Id.* at 564.

<sup>128</sup> 23 N.J. 400, 129 A.2d 417 (1957).

<sup>129</sup> *Id.* at 23 N.J. 415, 129 A.2d 425. Cf. *People v. Speck*, 41 Ill.2d 171, 242 N.E.2d 208 (1968), where the court held the attorney-client privilege inapplicable because the expert testimony was limited to opinions as to fingerprints and there was no testimony as to any conversation between the witness and the defendant or defendant's attorney. The court distinguished *Kociolek* and said that the privilege is based on the confidential nature of the communication.

<sup>130</sup> 296 F.2d 918 (2d Cir. 1961).

<sup>131</sup> *But cf. Himmelfarb v. United States*, 175 F.2d 924 (9th Cir. 1949), where the court held that the attorney-client privilege can be extended to include an attorney's agent only when that agent is indispensably necessary in order for the communication to be made to the attorney and found that the accountant's presence was not indispensable but merely convenient. However, in a later case in this same court, citing *Kovel*, held that an accountant was hired to advise the attorney and thus was within the privilege. *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963).

<sup>121</sup> See, e.g., *People v. Givans*, 83 Ill. App. 2d 423, 228 N.E.2d 123 (1963) (physician-patient privilege waived where the defendant, in support of an insanity defense, called his own doctor who had examined him before the offense); *Dani v. United States*, 173 A.2d 736 (Mun.Ct. App.D.C.1961) (defendant's psychiatrist waived privilege by testifying as to the defendant's inability to cross examine to explore the underlying basis for the opinion).

<sup>122</sup> The physician-patient privilege is recognized by statute in every state, and many states also include a separate psychiatrist-patient privilege. For a listing of all such statutes, see 8 WIGMORE § 2380. The accountant-client privilege is recognized by statute in sixteen states. For a listing and an analysis of these statutes, see Note, *Privileged Communications—Accountants and Accounting—A Critical Analysis of Accountant-Client Privilege Statutes*, 66 MICH. L. REV. 1264 (1968).

<sup>123</sup> See, e.g., *Dorfman v. Rombs*, 218 F.Supp. 905 (D.D.C. 1963) (accountant's privilege was held to be available only when invoked by the accountant). *Lindsay v. Lipson*, 367 Mich. 1, 116 N.W.2d 60 (1962) (physician's privilege was held inapplicable where the physician was not consulted for "treatment").

<sup>124</sup> See *United States v. Balistreri*, 403 F.2d 472 (7th Cir. 1968), cert. denied, 394 U.S. 985 (1969); *Falson v. United States*, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953) (no accountant-client provision exists in the federal system).

<sup>125</sup> 46 F.R.D. 161 (1969).

<sup>126</sup> Rule 5-04, *Psychotherapist-Patient Privilege* (covers a patient who is interviewed for purposes of diagnosis or treatment, and the provision may be invoked by patient or psychotherapist on behalf of patient).

Rule 5-08, *Trade Secrets* ("A person has a privilege, which may be claimed by him or his agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. . .").

Rule 5-03, *Lawyer-Client Privilege* (includes a "representative of the lawyer," and, according to the Advisory Committee's Note, an accountant may well fall in this category).

vital to the privilege that the communication be made in confidence for the purpose of obtaining legal advice from a lawyer. Consequently, the court drew a rather arbitrary line and stated that if the client communicated with an accountant before retaining an attorney, the accountant's testimony would not be privileged.<sup>132</sup>

On the basis of these cases it is suggested that the expert's testimony will most likely be privileged as long as he is retained to assist counsel and provided all interviews are held in the attorney's presence.<sup>133</sup>

<sup>132</sup> Cf. *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963), where the court held the attorney-client privilege applicable to an accountant who was retained by the client upon the advice of the attorney.

<sup>133</sup> To avoid some of the problems occasioned by the use of experts, counsel should retain the expert pursuant to a written retainer agreement. The following example used to retain an accountant is illustrative:

We have retained your firm to assist us in preparing for [the trial of—anticipated litigation on behalf of] our client X. We have retained you to examine Mr. X's books and records for the years 1970-71, and to report and consult with us concerning your findings. It is to be understood that you are being retained by our firm and not by Mr. X, and that our firm will have title to and possession of all work papers, reports, and other documents related to the above examination.

All information received by you in this connection will be kept strictly confidential and will be disclosed to no one without our express written consent.

Your charges for the examination herein referred to are to be made at your regular per diem rates plus out-of-pocket expenses. All bills will be directed to our firm.

A similar form of written retainer should be prepared for any expert who may uncover incriminating facts during the course of his investigation. The expert's signature accepting the agreement should be obtained

## CONCLUSION

Skillful presentation of the defendant's case cannot be achieved without significant preparation and analysis by counsel. It is axiomatic that preparation is the quintessence of effective trial work. Because the process of change in the constitutional criminal area is constantly developing,<sup>134</sup> counsel must keep abreast of recent trends in criminal law as well as in the tactical art of trial strategy.

Once counsel has elicited a proper balance of testimony consistent with his defense theory, he has established a foundation upon which to weave the isolated fragments of evidence into a convincing closing argument.<sup>135</sup> While recognizing that "the jury has the power to bring a verdict in the teeth of both law and facts,"<sup>136</sup> adroit counsel can feel secure that skillful presentation of the defendant's case will not only effectively discharge his function as an advocate, but will also consistently result in the foreman's voice filling the quiet courtroom with the words—"not guilty."

before he is given access to the records or the client. It is preferable that all interviews with the client be held in the attorney's presence. Should the investigation disclose incriminating or troublesome matters, wisdom may dictate that the attorney exercise his right to assume and retain possession of all of the expert's material.

<sup>134</sup> See Schaefer, *The Fourteenth Amendment and the Sanctity of the Person*, 64 NW. U. L. REV. 1, 17 (1969) ("While the fourteenth amendment is 100 years old, the major developments under it which concern the sanctity of the person are almost current events").

<sup>135</sup> See generally Martin, *Closing Arguments to the Jury for the Defense of Criminal Cases*, 58 J. CRIM. L. C. & P.S. 2 (1967).

<sup>136</sup> *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.).