Chapter 33

Presenting the Case for the Defense

Part A. General Aspects of the Defense Case

§ 33.01 THE DECISION WHETHER TO PRESENT DEFENSE EVIDENCE

In most trials it is not until the conclusion of the prosecution's case-in-chief and the court's denial of respondent's motion for acquittal (see Chapter 32 *supra*) that counsel makes the final decision whether to present defense evidence. Of course, a tentative plan of the defense case has to be thoroughly worked out before trial; this is necessary for the adequate preparation of potential defense witnesses; the proposed defense testimony will also guide counsel's opening statement, if any, and counsel's cross-examination and objections during the prosecution's case-in-chief. But, except in a case in which it is plain from the outset that defense testimony is inevitable, counsel should design any opening statement and any other proceedings that s/he conducts before the end of the prosecution's case in such a way as to leave open the question whether the defense will present evidence.

That question has to be decided at last when the court overrules the motion for acquittal following the prosecution's case-in-chief. There are few generalities of any use to a defense lawyer at this point. Obviously, the weaker the prosecution's case, the more difficult is the choice, since defense testimony may supply deficiencies in the prosecution's evidence and bolster unconvincing aspects. How much it will tend to do so must be appraised by counsel. (In an assault case in which the identification testimony is flimsy, for example, an effective alibi would probably tip the scales in favor of acquittal; conversely, the presentation of a self-defense claim would fill the gap in the prosecution's case by conceding that the respondent was the perpetrator.) In this regard counsel must remember that the prosecutor is going to have the opportunity to cross-examine the defense witnesses; that the prosecutor can lead them and hence push them around somewhat; and that – particularly in jurisdictions where "wide-open" cross-examination is permitted (that is, cross-examination going beyond the subject matter of the direct and touching anything pertinent to the case) – counsel may have a good deal to worry about from his or her own erstwhile supporters.

In making the decision, counsel also needs to evaluate the possible impact of the presentation of defensive evidence on the disposition of the case if the respondent is convicted. Defensive evidence that is favorable on the guilt question must nevertheless be scrutinized for its potential impact on punishment. Counsel must assess the risk that if the respondent takes the stand and denies guilt, the judge may view this testimony as perjurious and may impose a harsher sentence on that account.

Another factor to consider is the rule of practice in some localities that gives the prosecutor an opportunity for rebuttal closing argument if, but only if, the defense presents

evidence. See § 36.10 *infra.*

Beyond this, the only broad principle that is of much use is that generally no defensive evidence is better than unconvincing defensive evidence – from the point of view *both* of verdict and of sentence.

§ 33.02 PLANNING AND PRESENTING THE TESTIMONY OF DEFENSE WITNESSES

§ 33.02(a) Order of Defense Witnesses

If the respondent testifies and other defense testimony is also presented, it is usually wise to have the respondent testify last. In this way the respondent has the opportunity to observe the whole proceeding, to reconcile any inconsistencies in the testimony, to avoid the pitfalls of other witnesses, and to fill in any gaps in the defense case. See § 10.10 *supra.*

The principle is not inflexible, of course, and particular reasons may be found to deviate from it. Because the Supreme Court has held that a prosecutor can, in closing argument, "call the jury's attention to the fact that . . . [an accused who testifies last] had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly," *Portuondo v. Agard*, 529 U.S. 61, 63 (2000), it may be advisable to avert such an argument by calling the respondent earlier in the defense case in situations in which counsel has reason to fear that the factfinder may be swayed by a claim of tailoring. But see § 10.10 *supra* (citing caselaw that rejects the rule of *Portuondo v. Agard* on state constitutional grounds). Another scenario in which counsel may prefer to diverge from the general practice of calling the respondent last is when the defense presents expert testimony and the expert's opinion will be based in part on facts to be established at trial by the respondent. In such a case, the respondent should ordinarily precede the expert. On request, the court will release an expert from the ban of the rule on witnesses. See § 27.11 *supra.* Sometimes a savvy defense expert will do a better job of connecting the pieces of the defense case into a coherently organized logical demonstration or a dramatic human story than the respondent could do. See § 12.08(a) concluding paragraph *supra*. A mental health expert, for example, can construct an affecting picture of the respondent's emotional difficulties out of details about the respondent's life experiences and feelings which, if recounted by the respondent, would come across as maudlin or melodramatic.

Other witnesses should testify in the order most conducive to logical presentation of the facts. Of course, their convenience also must be considered if the trial is protracted and if one day is better for them than another. But orderly presentation of the defense has to take priority over witness convenience except in cases of exceptional hardship or when the quality of the witness's testimony will be affected by forcing him or her to testify at the desirable moment in the trial rather than at a time s/he prefers. Interspersing one type of witness with another destroys the continuity of the defense and may so confuse the factfinder that the factfinder will give up any attempt to follow or understand the proceedings.

Trial judges have considerable discretion to control the order of testimony. *See, e.g.*, *Taylor v. Illinois*, 484 U.S. 400, 410-11 (1988) (dictum). However, this discretion is not unlimited, and attempts by the trial judge to force counsel to present the defense case in an ineffective fashion (for example, by calling witnesses to suit the judge's convenience rather than in the order chosen by counsel) should be resisted, citing the respondent's rights under the Compulsory Process Clause of the Sixth Amendment (see *Taylor*, 484 U.S. at 407-09), and under the Due Process Clause of the Fifth or Fourteenth Amendment (see § 9.09(b)(4) *supra*). "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). See § 33.04 *infra*. And the Supreme Court has specifically held (on self-incrimination and right-to-counsel grounds) that the accused cannot constitutionally be required to testify before his or her other witnesses. *Brooks v. Tennessee*, 406 U.S. 605 (1972), discussed in §§ 9.12 penultimate paragraph, 10.10 *supra*.

§ 33.02(b) Determining and Distributing the Content of Witnesses' Testimony

The principal facts that counsel will want to establish through the testimony of any particular defense witness are dictated by counsel's overall theory of defense and by counsel's tactical decisions about which points to make by eliciting testimony (and from which witnesses) and which to make by means of arguments and/or jury instructions. Evidence, argument and instructions are distinct means for presenting defense contentions; in some cases, they provide alternative ways to make the identical point; and when this is the case, defense counsel must consider which of the means – or which combination of them – will be most effective. For example, defense counsel challenging a cross-racial identification might choose to present expert testimony regarding the unreliability of such identifications (see §§ 11.01(a), subdivision 13, 11.01(b) penultimate paragraph *supra*), or to make the point in closing argument (*see Smith v. State*, 388 Md. 468, 880 A.2d 288 (2005)), or to request a jury instruction on the subject (*see, e.g.*, *Commonwealth v. Bastaldo*, 472 Mass. 16, 18, 32 N.E.3d 873, 877 (2015)), or all of the above. *And see*, *e.g.*, *People v. Love*, 56 Cal. 2d 720, 730, 366 P.2d 33, 38, 16 Cal. Rptr. 777, 782 (1961) (collecting authorities to document the proposition that lawyers in closing argument "may state matters not in evidence that are common knowledge, or are illustrations drawn from common experience, history, or literature"). Each means has its own benefits and drawbacks to be taken into account in counsel's case planning.

Some matters, of course – including, crucially, the events and circumstances surrounding the criminal incident being tried – can only be presented through evidence: the testimony of witnesses; documentary evidence; exhibits of physical objects or electronic data. Within this constraint, counsel may or may not have options about how to present the defense case – whether to rely on a record or to present live testimony (or both) to prove fact *X*; whether to call one witness or another (or both) to recount event *Y*. See, *e.g.*, §§ 10.01, 10.13 *supra*. These are crucial choices, to be made within the framework of the defense theory of the case (see § 6.02 *supra*) and the narrative which counsel has constructed to make that theory persuasive (see § 6.06 *supra*).

Additional planning is required to shape the examination of each individual witness. That planning is the subject of the following sections.

§ 33.02(b)(1) The Level of Detail of the Testimony

Counsel must consider how much detail s/he wants to elicit from the witness. The rules requiring personal knowledge and forbidding conclusionary testimony must be taken into account. Nonetheless, those rules will ordinarily leave substantial leeway for any given witness to testify in terms of greater generalization on the one hand or greater concreteness on the other. Some stories, and some storytellers, are more powerful and less vulnerable to cross-examination if they are kept at a high level of generality. Others gain strength from particularization. The trick is to find the most persuasive degree of specificity for each witness.

Tradeoffs are usually involved in this decision. Details can be vivid, dramatic, compelling, where abstractions are not. But details can also be boring and can divert the trier of fact (whether a jury or a judge in a bench trial) from the important points in one's case. They can appear sensationalistic and arouse resentment instead of sympathy. A visibly exhaustive recitation of details can convey to the trier of fact the favorable impression that it is getting the whole story, not a version edited and manicured by counsel. But visible exhaustiveness also aids the prosecutor to cross-examine more effectively: It gives the prosecutor more specifics to work with, and it relieves the prosecutor of the inhibiting fear that, by probing, s/he may bring out additional details hurtful to his or her position.

§ 33.02(b)(2) Saving Favorable Material for Cross and Redirect

Another important tactical decision is whether the direct examination of the witness should elicit all of the information in the witness's possession that counsel would like the trier of fact to hear. Sometimes, it may be preferable to hold back a portion of this favorable material for development on cross or redirect.

Occasionally, counsel may even choose to present a manifestly unsupported statement by the witness on direct, in the expectation that the prosecutor will be lured into demanding support for it during cross-examination. If the prosecutor falls for the lure, and the witness comes forth with strong material on cross to back up the statement, the result is to bolster the witness's testimony on the specific point more dramatically than if the supportive material had been developed at the outset. In addition, the prosecutor, once burned, may be scared away from probing into other potential weaknesses of the direct (including some real ones), and the trier of fact may be left with the impression that the witness is similarly capable of backing up everything s/he has said on direct.

The risks of this mousetrap tactic are obvious. If the prosecutor does not take the bait, the supportive material cannot later be brought out on redirect, which is confined to the scope of the cross. The trier of fact may disbelieve the witness's unsupported statement, and the prosecutor

can harp upon its apparent baselessness in closing argument, perhaps even urging that this statement demonstrates premature or poor judgment on the part of the witness generally. Also, if the prosecutor takes the bait but the material first elicited on cross strikes the trier of fact as something which a forthright witness would naturally have included in his or her story on direct, the trier of fact may view it as defensive rationalization, a dubious afterthought, or even a complete fabrication, and may tag the witness as a partisan or a perjurer.

The milder version of the mousetrap tactic – presenting a solidly documented story on direct but holding back some additional corroborating matter for cross or redirect – is less risky. Nevertheless, it does entail some risks. If the prosecutor does not get into the area of the reserved matter, it will never come out, and counsel may have overestimated the persuasiveness of his or her case without it. Even if the reserved matter does come out on cross or redirect, it may be less convincing there than if it had been massed and integrated with the rest of the witness's testimony concerning the same subject on direct. Still and all, saving at least some material for backup on cross is often wise (assuming, of course, that the witness can present the necessary critical mass on direct without it), so as to convey to both the trier of fact and the prosecutor that counsel has not completely drained the reservoir, but has substantial unused power in reserve.

§ 33.02(b)(3) Bringing out Unfavorable Material on Direct

Where a witness possesses information unfavorable to the defense case, or information that undercuts to some extent the thrust or credibility of the witness's favorable testimony, should this material be brought out on direct or left to the prosecutor's cross-examination? Again, complex judgments are involved.

Eliciting the unfavorable matter on direct can sometimes take a part of the sting out of it. At the least, counsel avoids the appearance that s/he or the witness tried to cover it up, to present a misleadingly incomplete story. (Broaching the subject on direct may also make the trier of fact impatient with the prosecutor for harping on it: Since defense counsel's direct examination fronted right up with it, why is the prosecution's cross-examination belaboring the point?) If the witness can provide some explanation or rebuttal of the unfavorable matter, it may be better to present the explanation or rebuttal simultaneously with the matter itself in a comprehensive direct examination, rather than to let the unfavorable matter be brought out alone on cross, with the explanation or rebuttal delayed until redirect. (If the witness volunteers the explanation or rebuttal on cross, it may sound particularly defensive.) Even where there is no explanation or rebuttal, counsel's direct examination may manage to confine the significance of the unfavorable matter by setting it within the framework of the witness's entire story, so that the trier of fact and the prosecutor are less likely to inflate it out of proportion than if it appeared in isolation on cross. On direct, counsel controls the context, and the witness controls the language, in which the unfavorable matter is revealed. On cross, the prosecutor controls both, and, by making effective use of the cross-examiner's right to ask leading questions, s/he may cast the matter in the most damaging form possible.

Conversely, if counsel does not elicit the matter on direct, it may never come out: The prosecutor may overlook it. By bringing it out on direct, counsel invites and legitimates the prosecutor's reliance on it in cross; by seeming sensitive on the subject, counsel may appear to concede its harmfulness to the defense case. The unfavorable matter and the explanations or rebuttals of it may break up the flow of the direct, and may prevent the trier of fact from forming favorable first impressions. Also it is important to keep in mind that the explanations and rebuttals will themselves be subject to cross. If the whole unfavorable topic is omitted from the direct, the prosecutor may remain uncertain whether and what explanations and rebuttals are lurking; this uncertainty may cause him or her to cross-examine more gingerly or less advisedly than if the explanations and rebuttals were advanced on direct – or even to forgo cross-examination on the topic entirely. And if s/he does cross-examine on the topic, the explanations and rebuttals may be more memorable and less vulnerable coming on re-direct, particularly in courts where the judge is grudging about allowing any or much re-cross-examination.

Generalizations are hazardous here. No single factor compels or precludes the tactical decision to bring out unfavorable material on direct, but the following considerations do militate toward bringing it out: (i) counsel knows that the prosecutor is aware of the material; or the material is such that it is very likely to come out on cross even if the witness's direct examination is pared to the minimum essential content; (ii) the material is important, so that it will not be plausible for counsel to dismiss it summarily on redirect or in closing; (iii) the available explanations and rebuttals of the material are not logically compelling; and (iv) the prosecutor is probably aware of their nature and limitations.

§ 33.02(b)(4) Rounding Out the Testimony

Beyond the core of factual information which counsel needs to elicit from the witness and the detailing and preemptive matters just discussed, counsel should consider whether additional admissible information would help to make the witness's testimony hang together. Such material may be:

(1) *Material that gives the witness's testimony internal coherence.* Counsel will ordinarily want the testimony of each witness, like the case as a whole, to be intelligible, credible, and free of distracting loose ends. S/he may therefore want to elicit on direct examination facts that (a) situate the witness's observations and actions within the frame of a logical cause-and-effect sequence, a pattern of events that will resonate with the trier of fact's expectations about everyday life, or a recognizable stock story (see § 6.06 *supra*); (b) provide enough specifics about the time-and-place of the witness's observations and actions to fit them clearly into the larger picture of what-happened that will emerge from the prosecution and defense evidence as a whole; and (c) paint the witness's experience of the key happenings with the colors of life.

(2) *Facts that personalize and humanize the witness.* Counsel should consider whether and what biographical facts about the witness may assist the trier of fact to empathize with him or her as a human being, and will convey the impression of this human being that counsel wants

the trier of fact to form. Making the witness likeable is, of course, more important when the witness is the respondent himself or herself or a person closely connected with him or her, but it helps in the case of any witness. The evidentiary rule against bolstering the credibility of an unimpeached witness restricts the amount of background material that counsel can present (*see, e.g.*, *People v. Valdez*, 53 A.D.3d 172, 173-76, 861 N.Y.S.2d 288, 289-91 (N.Y. App. Div., 1st Dep't 2008)), but such matters as the witness's address and how long s/he has lived there; his or her age and family status; and brief sketches of his or her educational history and work history are usually permitted. Counsel can select from these areas whatever biographical data is likely to resonate favorably with the trier of fact and can present it by a brief series of "introductory" questions immediately after the witness has stated his or her name. Counsel should not overdo it – or do it with every witness – lest this kind of testimony grow tedious. It is important to size up each witness and his or her role in the case, and to be selective in the choice of biographical facts.

(3) *Facts that resolve dissonances between the testimony of the witness and other aspects of the defense case, or meet any contradictory evidence which the prosecution (or a co-respondent) has offered or is likely to offer.* If the witness will testify to facts that may appear inconsistent with other facts in counsel's case, counsel should consider whether and how to attempt to reconcile the inconsistencies. The stories of all of the defense witnesses need not fit together perfectly – indeed, they may appear to be too pat if they do – but significant discrepancies should be explained to the extent possible. If the prosecutor's evidence (or that of a jointly-tried co-respondent) will be inconsistent with the witness's testimony on any point, counsel must decide whether to attempt reconciliation or attempt to win a credibility fight. Either approach may require the eliciting of additional facts.

§ 33.02(c) Structuring the Flow of the Witness's Testimony

The problem of designing a sequence for the examination of any individual witness involves some of the same concerns mentioned in § 33.02(a) *supra* in connection with the overall order of witnesses. Organization of the testimony along lines that make it easy for the trier of fact to follow, understand, and remember is particularly important. Counsel should view the direct examination as the unfolding of a logically compelling narrative or exposition – the telling of a good story – and experiment with the various ways in which the story might be told.

Tracing what happened in chronological order is often easiest for both the witness and the trier of fact, because that is the order in which events are normally experienced. But other forms of organization should be considered, such as the flashback sequence (presenting major happenings first, then developing the background which explains them), the mystery sequence (presenting the story with a missing piece, then filling in the missing piece), deductive or illustrative sequences (moving from specifics to generalizations or *vice versa*), and topical sequences (taking first everything that relates to one subject, then everything that relates to another). Particularly where the witness's testimony does not consist of a series of events of a sort that the trier of fact might experience in real life, one of the latter sequences may be preferable to straightforward chronology.

Where possible, the order of direct examination should encourage the trier of fact to *think ahead* down the lines of logic of the witness's story, instead of being dragged along behind the witness. If the direct examination first establishes all of the premises of a syllogism (and the mode of reasoning, when it is not obvious) and *then* elicits the conclusion, the trier of fact is likely to think that the conclusion makes sense because it jibes with the trier's expectations. A jury or judge will be more willing to accept counsel's reasoning because they have performed it themselves, and their predictions from it have panned out.

§ 33.02(d) Drafting Direct Examination Questions

Composing direct examination questions is a fine art. There are no recipes. But there are some general considerations that are useful to keep in mind.

(1) Questions should be as short and straightforward as possible. Subordinate clauses and other convolutions of sentence structure should be avoided. They often lose the witness or the jury, and they may make questions sound objectionably compound. Unnecessary negative constructions should be avoided. They smell leading, and a "yes" answer is ambiguous.

(2) Brevity should not, however, be purchased at the cost of clarity. "When did *X* happen in relation to *Y*?" is clearer than "When did *X* happen?" Cryptic references should be avoided.

(3) Simple interrogative sentences are the basic tool of direct examination ("Who . . . ?" "What . . . ?" "Where . . .?" "When . . . ?" "How . . . ?" "Did s/he . . . ?" "Is there . . . ?"). But other forms of inquiry are often appropriate, and counsel should develop a repertory of these to use from time to time. Varying the form of one's direct examination questions avoids monotony and makes the examination more conversational and less inquisitorial. Indirect forms of questioning are often a useful way to focus the witness on the specific answer that is wanted, without triggering a "leading" objection. They can also help counsel project a no-nonsense, matter-of-fact image that is often the best posture in the courtroom: the image of a lawyer who knows the facts and whose questions are designed simply to assist the witness to present those facts. Jurors may distrust an attorney who invariably asks questions which seem to imply that s/he does not know the answers, when it is obvious that s/he does. Thus, questions in forms like "Please tell the jury what you saw first when you turned the corner" or "Please describe the clothing of the man you saw [running from the body on the ground]" can be alternated with simple interrogative forms like "How far were you from the man when you first saw him?"

(4) Questions should be framed so that they will flow logically from the witness's preceding answers. Examinations quickly become stilted and uninteresting, and may become confusing, if the attorney's questions proceed doggedly along their own tack, ignoring the witness's answers.

(5) Simple words should be used whenever possible. Counsel should never forget that s/he is not only thoroughly familiar with the facts of the case but has heard this witness's story

before. The trier of fact is way behind on both counts. Counsel should therefore keep things simple without, of course, appearing to talk down to jurors.

(6) Counsel should not lead the witness any more than is absolutely necessary, even when leading questions are not technically objectionable. Except where there are strong affirmative reasons for leading, counsel should frame the direct examination questions so that they define the *boundaries* of the information wanted, but not the *content* of the information that lies within those boundaries. The witness should tell the story in his or her own words. Counsel should be sure to include questions that call for answers which are more than just a few words. However, at the very beginning of the examination, it is usually best to have a set of questions which can be answered with very few words and almost no thought. This gives the witness a chance to settle down and overcome his or her initial nervousness. Biographical information is usually a good subject for these questions, since the witness hardly needs to think at all to say where s/he is employed, his or her job title or line of work, how long s/he has worked in his or her current position, what employment s/he had before this one, etc.

(7) Questions that present the witness with imprecise instructions should be scrupulously avoided. For example, counsel would not want to ask questions like: "What are your duties *generally*?" "Tell us *in detail* what s/he did next." "Please describe that procedure *briefly*." These instructions are seldom effective instruments of witness control. (How brief is "briefly"?) Worse, they subject the witness to a test that it is almost impossible to pass. *No* description is brief enough to meet every one of the twelve jurors' conceptions of "briefly." And if the witness does pass the test, s/he has thereby won the dubious distinction of being regarded as obedient to the directions of the lawyer who called him or her to the witness stand. The effective way to regulate the amount of detail in an answer is to go over the question and the answer with the witness during pretrial interviewing, and work out what the answer should contain. Then counsel can ask the question in court without the "briefly," "generally," or other prompter's cues.

(8) Counsel should avoid framing questions so as to invite answers which will make the witness vulnerable on cross. "Tell us *exactly* what that procedure involves." "How long did that take, *precisely*?" "Tell us *everything you remember* that s/he said." "What does that operation *consist of*?" Such questions set the witness up for an ostensible profession of exactitude or exhaustiveness that any good cross-examiner can puncture. Counsel's job on direct is to *expose the witness as little as possible* while getting out the information needed.

(9) In addition to drafting a complete direct examination, counsel should give some thought to drafting sequences of questions covering subjects for redirect. After counsel has put the witness through a dry run of cross examination, it should be possible to identify potential areas of redirect. These include not only rehabilitation but retaliation. When there is testimony that counsel would like to elicit from a witness but can find no way to make admissible on direct, counsel should consider the various ways in which a cross-examiner might open the door to the admission of the testimony on redirect; prepare lines of redirect examination designed to fit through these openings; then, at trial, listen for the openings during cross, and go through them

on redirect.

§ 33.02(e) Conducting Direct Examination

The most difficult thing for direct examiners to learn to do well is to *listen to the witness's answers*. Many lawyers are so concerned with asking good questions that, as soon as one question is out of their mouths, they turn their full attention to formulating the next, and they tune out the witness's answer. But good questions do not win cases; good answers do. Counsel should attend carefully to what the witness is saying, and make sure the witness answers the question, and answers it as fully as counsel intends. If s/he does not, counsel should ask the necessary follow-up question or questions.

In determining whether to ask a follow-up question, counsel should, however, be reasonable in his or her expectations. If the witness has given substantially everything that counsel is after, counsel should not ask follow-up questions seeking to remedy unimportant omissions. The more minor an omission, the more difficult it will be to frame a non-leading follow-up question to correct it, and the more likely it will be that the witness will not understand what the follow-up question is asking *unless* it is leading. Follow-up questions in this situation – particularly a series of "anything else" questions or slightly varying versions of the same question asked with increasingly apparent frustration – will merely confuse the witness and leave the trier of fact thinking that whatever counsel is unsuccessfully trying to pry out of the witness is more important than it is. Counsel should avoid a narrow-minded fixation upon getting the exact words s/he expected; it is sufficient if the witness has given their practical equivalents.

When the witness *does* provide precisely the words that counsel was hoping to get, counsel should not use the T.V. lawyer's gimmick of repeating them for emphasis. This is an obvious cheap trick that turns off juries. Counsel should not say "thank you," nod at the witness, or breathe an audible sigh of relief. Counsel should not do anything that might cause the trier of fact to believe there was ever any *doubt* that the witness would give that good answer.

With rare exceptions, counsel should do nothing during the examination of a witness other than to ask questions and listen hard to the answers. In an unusual pinch, counsel can make short statements to the witness which are not questions, so long as they do not assert facts. (For example, if a witness is visibly shaky, counsel might say: "Please take as much time as you want before answering, Mr. Jones. There's no rush. We all understand that being a witness isn't easy." Or, if the witness is talking too fast, counsel can say: "Please take it a little more slowly, Mr. Jones. We want to make sure that the jury hears everything you are saying.") And of course counsel can make appropriate statements for the record, for example noting that counsel is handing the witness an exhibit. But it is best that counsel keep his or her own activity level down as much as possible, so as not to distract the jury from paying full attention to the witness.

§ 33.03 DISCLOSURE TO THE PROSECUTION OF PRETRIAL STATEMENTS OF DEFENSE WITNESSES

As discussed in § 27.12(a)(1) *supra,* many jurisdictions permit the defense to obtain from the prosecution, either at the commencement of the trial or at the conclusion of the prosecutor's direct examination of each witness, copies of prior statements made by prosecution witnesses relating to the subject matter of their testimony. Some jurisdictions also give the prosecutor the right to obtain from defense counsel copies of prior statements of a defense witness relating to the witness's testimony. *See, e.g.,* N.Y. FAM. CT. ACT § 331.4(2)(a) (2016). The timing of the defense disclosure obligation ordinarily parallels that of the prosecutor: In jurisdictions that require the prosecutor to turn over prosecution witnesses' statements at the commencement of the trial, the defense is required to produce defense witnesses' statements at the commencement of the defense case, *see, e.g., id.;* in jurisdictions that call for prosecutorial disclosure at the conclusion of each witness's direct examination, the same practice governs defense disclosure.

In *United States v. Nobles,* 422 U.S. 225 (1975), the Supreme Court sustained the power of a federal trial judge, in the judge's discretion, to require disclosure to the prosecution of portions of a pretrial statement given to defense counsel by a witness (a defense investigator, in the *Nobles* case itself) who has testified for the defense. *See also Corbitt v. New Jersey,* 439 U.S. 212, 219 n.8 (1978) (dictum); *Taylor v. Illinois,* 484 U.S. 400 (1988) (by implication). The *Nobles* Court's discussion of the Fifth and Sixth Amendment implications of this kind of disclosure suggests that it is subject to a number of constitutional limitations.

First, in concluding that the disclosure in *Nobles* did not violate the Fifth Amendment Privilege Against Self-Incrimination (see § 9.12 *supra*), the Court emphasized that the statements which were ordered to be disclosed were not statements of the accused and did not contain any information conveyed by the accused to defense counsel or to the defense investigator. *See* 422 U.S. at 234. Thus, as is generally recognized by jurisdictions that provide for disclosure of defense witnesses' statements, the respondent's own statements are exempt from disclosure requirements. *See, e.g.,* N.Y. FAM. CT. ACT § 331.4(2)(a) (2016).

Second, in concluding that the compelled disclosure in *Nobles* did not violate any defense privilege under the "work product" doctrine or the Sixth Amendment (see § 9.13 *supra*), the Court stressed Nobles' waiver of those privileges "by electing to present the investigator as a witness." 422 U.S. at 239. The Court recognized that defense "[c]ounsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining witnesses. When so used, there normally is no waiver. [With regard to the broad "work product" protection extended to counsel's own notes of oral statements of witnesses, see the subsequent decision in *Upjohn Co. v. United States,* 449 U.S. 383, 399-402 (1981).] But where, as here, counsel attempts to make a testimonial use of these materials," they are subject to discovery in the trial court's discretion. *Nobles,* 422 U.S. at 239 n.14. That discretion was not abused in *Nobles* because the "court authorized no general 'fishing expedition' into the defense files or indeed even into the defense investigator's report. *Cf. United States v. Wright, . . .* 489 F.2d 1181 ([D.C. Cir.] 1973). Rather, its considered ruling was quite limited in scope, opening to prosecution scrutiny only the portion

of the statement that related to the testimony the defense witness would offer. The court further afforded [the defendant] . . . the maximum opportunity to assist in avoiding unwarranted disclosure or to exercise an informed choice to call for the investigator's testimony and thereby open his report to examination." 422 U.S. at 240-41.

In jurisdictions which have not enacted legislation providing for disclosure of defense witnesses' prior statements to the prosecution, counsel can argue that procedural innovations of this sort should not be made judicially, without legislative authorization. See § 9.11 *supra.* (That argument was not made, and therefore not passed upon, in *Nobles*.) If the argument is unavailable or fails, the "limited and conditional nature" of the discovery allowed in *Nobles,* 422 U.S. at 240 n.15, should be emphasized in resisting prosecutorial requests for any broader disclosure. See § 9.12 *supra.* In jurisdictions where statutes or court rules do require defense disclosure, the breadth or timing of the requirement may be assailable under the Fifth Amendment (see *id.*) or the Sixth (*see Brooks v. Tennessee*, 406 U.S. 605 (1972), discussed in §§ 9.12, 10.10 *supra*).

§ 33.04 CHALLENGING RULES AND PRACTICES THAT INHIBIT THE PRESENTATION OF DEFENSE EVIDENCE; THE CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants [and juvenile respondents] 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky,* 476 U.S. 683, 690 (1986). As the Court made clear in *Crane,* the constitutional right to present a defense operates as a limitation upon state evidentiary rules and courtroom practices that unduly restrict the presentation of defensive proof. Although "the Constitution leaves to . . . [trial] judges . . . 'wide latitude' to exclude evidence that is 'repetitive . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues' [and the Court has] . . . never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability, . . . an essential component of procedural fairness is an opportunity to be heard [and] . . . [t]hat opportunity would be an empty one if the state were permitted to exclude competent, reliable evidence . . . when such evidence is central to the [accused's] . . . claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives [the accused] . . . of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 689-91.

The federal constitutional right to present a defense has been held to forbid the exclusion of important defense evidence through the application of state evidentiary rules that are "arbitrary or disproportionate to the purposes they are designed to serve," *Rock v. Arkansas,* 483 U.S. 44, 56 (1987) (invalidating a State's categorical ban of hypnotically refreshed testimony as applied to a criminal defendant); *Holmes v. South Carolina*, 547 U.S. 319, 321, 325-26 (2006) (invalidating "an evidence rule under which the defendant may not introduce proof of third-party guilt if the

prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict"), or are "applied mechanistically to defeat the ends of justice," *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973) (reversing a criminal conviction because the state courts had applied a combination of standard hearsay principles and rules against impeaching one's own witness to curtail the defendant's efforts to prove that another man had confessed to the crime with which the defendant was charged); *accord, Green v. Georgia,* 442 U.S. 95 (1979) (per curiam). *See also Cudjo v. Ayers*, 698 F.3d 752, 754-55, 762-68 (9th Cir. 2012); *United States v. White*, 692 F.3d 235, 246-48 (2d Cir. 2012); *Lunbery v. Hornbeak*, 605 F.3d 754, 760-62 (9th Cir. 2010); *Commonwealth v. Drayton*, 473 Mass. 23, 33-40, 38 N.E.2d 247, 256-61 (2015). The right may also override state procedural rules purporting to foreclose an accused's proof of facts that would seriously undermine the force of the prosecution's evidence of guilt, *Crane v. Kentucky*, 476 U.S. at 689-91 (invalidating a state practice that forbade a defendant whose confession had been held voluntary on a pretrial suppression motion from presenting evidence of involuntariness to the jury in an effort to discredit the confession), and it may restrict even the ordinary discretion of trial judges (see § 30.03(c) *supra*) to exclude evidence that they find substantially more prejudicial than probative, *cf. Olden v. Kentucky,* 488 U.S. 227 (1988) (per curiam) (holding that a rape defendant's Sixth Amendment right to confrontation was violated when his attorney was forbidden to show by cross-examining the complainant that she was cohabiting with the prosecution witness to whom she had made her first complaint of the rape; this evidence would have bolstered the defendant's "theory of the case . . . that . . . [the complainant] concocted the rape story to protect her relationship with . . . [the witness], who would have grown suspicious upon seeing her disembark from . . . [a] car [in which she was riding with the defendant]," *id.* at 230, and the state courts were constitutionally obliged to admit it despite their finding that its prejudicial impact outweighed its probative value.). In addition, the right may provide a basis for challenging various practices by which judges and prosecutors harass or intimidate defense witnesses, *see Webb v. Texas,* 409 U.S. 95 (1972) (reversing a criminal conviction because the trial judge had frightened off a proffered defense witness by singling him out for threatening reminders that lying under oath would subject him to a perjury prosecution), and practices that inappropriately depreciate the consideration to be given to defense evidence, *see Cool v. United States,* 409 U.S. 100 (1972) (condemning an "accomplice" instruction that told the jury that a defense witness was not to be credited unless found believable beyond a reasonable doubt). *See also, e.g.*, *United States v. Murray*, 736 F.3d 652, 653-54 (2d Cir. 2013) (the trial judge's denial of defense counsel's request to present "surrebuttal evidence to counter evidence introduced by the government on rebuttal" violated the defendant's "right to present a meaningful defense"); *People v. Oddone*, 22 N.Y.3d 369, 377, 3 N.E.3d 1160, 1164-65, 980 N.Y.S.2d 912, 916-17 (2013) (the trial judge committed reversible error by refusing to allow defense counsel to refresh the recollection of a defense witness with a prior statement: even if the trial judge had been right to view this as impeaching one's own witness in violation of a local rule of evidence, "technical limitations on the impeachment of witnesses must sometimes give way, in a criminal case, to a defendant's right to a fair trial." (citing *Chambers v. Mississippi*, *supra*)).

Doubtless, a respondent's federal constitutional right to present defensive evidence is limited to evidence of demonstrable materiality. *See Nevada v. Jackson*, 133 S. Ct. 1990 (2013)

("Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence" (*id*. at 1992); ". . . this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes" (*id*. at 1994)). Counsel who invokes the right must be prepared to make an appropriate proffer demonstrating that the evidence s/he seeks to introduce is important to the defense. *See Crane v. Kentucky,* 476 U.S. at 690-91; *cf. United States v. Scheffer*, 523 U.S. 303, 316-17 (1998); *United States v. Valenzuela-Bernal,* 458 U.S. 858, 866-72 (1982). *See also, e.g.*, *People v. DiPippo*, 27 N.Y.3d 127, 50 N.E.3d 888, 31 N.Y.S.3d 421 (2016). But whenever this can be done, counsel should not hesitate to rely upon *Crane* and the other Supreme Court cases cited in the preceding paragraph to argue (1) that the trial judge should exercise his or her state-law discretion in favor of the admissibility of evidence proffered by the defense if the question of admissibility is at all close because "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," *Chambers v. Mississippi,* 410 U.S. at 302, and a right of this importance should not be jeopardized on doubtful grounds; and (2) that if the judge does exclude the respondent's proffered evidence, s/he will be violating the respondent's federally guaranteed "'right to put before a jury evidence that might influence the determination of guilt,"' *Taylor v. Illinois,* 484 U.S. 400, 408 (1988) (dictum), quoting *Pennsylvania v. Ritchie,* 480 U.S. 39, 56 (1987) (dictum). *See Washington v. Texas*, 388 U.S. 14, 19 (1967).

Part B. Testimony by the Respondent

§ 33.05 THE RESPONDENT'S RIGHT NOT TO TESTIFY

The respondent has a right not to take the stand, whether or not s/he presents other evidence in his or her defense. This is the effect of the Fifth Amendment Privilege Against Self-Incrimination, *Brooks v. Tennessee,* 406 U.S. 605 (1972); *Carter v. Kentucky,* 450 U.S. 288 (1981), which is "applicable in the case of juveniles as it is with respect to adults." *In re Gault,* 387 U.S. 1, 55 (1967).

If the respondent fails to testify, the prosecutor may not comment on the failure (nor may the judge make such a comment to the jury in a jury trial), other than to state that the respondent has the right not to testify and that no inferences can be drawn from the respondent's failure to take the stand. *Griffin v. California,* 380 U.S. 609 (1965); *Lakeside v. Oregon,* 435 U.S. 333, 336-39 (1978); *Carter v. Kentucky,* 450 U.S. at 297-301 (dictum); *United States v. Robinson,* 485 U.S. 25, 32-33 (1988) (dictum); *and see White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (dictum); *Gongora v. Thaler*, 710 F.3d 267 (5th Cir. 2013). In many courts the prosecutor will, however, be permitted to get away with asserting during closing argument that the prosecution's case is "unrebutted" or that "no one has denied" the testimony of prosecution witnesses or that "the respondent has not challenged" key features of the prosecution's evidence. This sort of "general" comment is ordinarily held not to infringe the privilege, although some cases can be cited for the proposition that it is unconstitutional, at least when the accused is the only person who could rebut the prosecution's evidence or deny its accusations, *see Desmond v. United*

States, 345 F.2d 225 (1st Cir. 1965); *United States v. Flannery,* 451 F.2d 880 (1st Cir. 1971); *United States v. Handman,* 447 F.2d 853 (7th Cir. 1971); *Lent v. Wells*, 861 F.2d 972 (6th Cir. 1988). The Supreme Court of the United States has not spoken authoritatively on the issue. *Compare United States v. Hasting,* 461 U.S. 499, 512-16 (1983) (concurring opinion of Justice Stevens, upholding such a prosecutorial comment), *with id.* at 506 n.4 (majority opinion, leaving the question undecided); *and see Lockett v. Ohio,* 438 U.S. 586, 594-95 (1978) (sustaining a "prosecutor's repeated references in his closing remarks to the State's evidence as 'unrefuted' and 'uncontradicted' because defense counsel had "clearly focused the jury's attention on [the defendant's] . . . silence" and "the prosecutor's closing remarks added nothing to the impression that had already been created by Lockett's refusal to testify after the jury had been promised a defense by her lawyer and told that Lockett would take the stand").

In a jury trial, most judges will give defense counsel the option whether or not the jury should be instructed expressly concerning the respondent's right not to testify and the impermissibility of adverse inferences. (The Supreme Court has acknowledged that this practice "may be wise," *Lakeside v. Oregon,* 435 U.S. at 340, while declining to hold that the Constitution forbids a trial judge to give the cautionary instruction over defense objection, *id.* at 340-41. If defense counsel requests the instruction, it is required by the Fifth Amendment. *Carter v. Kentucky*, 450 U.S. at 295-305; *James v. Kentucky*, 466 U.S. 341 (1984).) In most cases it is probably best for counsel to ask for the instruction.

§ 33.06 CONSIDERATIONS AFFECTING THE DECISION WHETHER THE RESPONDENT SHOULD TESTIFY

The decision whether to put the respondent on the stand is a crucial one. Generalities are largely illusory, but the following factors might be considered:

(A) *The desirability of having the respondent appear to "come clean."* It is widely agreed among criminal lawyers of experience that an accused's failure to take the stand is often construed by the trier of fact as an indication that the respondent is hiding something – hence that s/he has something to hide. This is perhaps more inevitable with juries than with judges, but it is true of both. Therefore, in most cases in which a respondent can tell a plausible exculpatory story, the respondent probably ought to testify unless there are strong affirmative reasons why s/he should not.

(B) *Whether the respondent has something to say that is legally and factually supportive of the theory of the defense.*

(C) *Whether what s/he has to say can be shown by other witnesses.*

(D) *Whether what s/he has to say and the way s/he says it are credible.* Both the inherent plausibility of the respondent's story and the respondent's demeanor are important. Demeanor includes not only the respondent's apparent honesty and sincerity (or their opposites) but also

intelligence and articulateness. The prosecutor will be up for cross-examination of the respondent and may confuse a respondent who is not quick-witted and able to express himself or herself well. It is vital that the respondent not be disbelieved. More is involved than the obvious proposition that disbelieved testimony does no good. Many judges impose a harsher sentence (some even ordering incarceration when they otherwise would have granted probation) to penalize a respondent for what the judge concludes was perjurious testimony. (Doubts about the constitutionality of this practice were laid to rest in *United States v. Grayson,* 438 U.S. 41 (1978).)

(E) *Whether the respondent is likeable or distasteful, sympathetic or obnoxious.* Defense counsel should try to step out of role and take a fresh look at the respondent as the respondent has appeared to the factfinder throughout the trial up to this point. Does s/he make a better impression if s/he keeps quiet or if s/he talks?

(F) *Whether the respondent has a prior record that can be brought out for impeachment if s/he testifies.* As explained in § 30.07(b) *supra,* the large majority of States prohibit the prosecutor from impeaching the respondent with evidence that s/he has been adjudicated a delinquent in the past, but some States permit such impeachment, and some others permit the prosecutor to impeach the respondent with the "prior [bad] acts" underlying the adjudications. (Since the form of the prosecutor's cross-examination question in the latter jurisdictions is not "were you adjudicated a delinquent for having done [the act]?" but rather "did you do [the act]?" the respondent is free to say "no" if that is the truth, even if s/he was wrongfully convicted of the prior offense. The prosecutor then is barred from introducing extrinsic evidence to the contrary. See § 30.07(b) *supra.* However, if the offense is one to which the respondent pleaded guilty, it is ordinarily advisable for the respondent to admit commission of the act because some judges might view a denial as "opening the door" to proof of the respondent's previous inconsistent admission and, in any event, the prosecutor certainly could bring up at disposition what appears to be a perjurious change of position.) In jurisdictions that permit such impeachment, counsel should carefully review the respondent's record with him or her to ensure that s/he does not respond to a question about prior adjudications or bad acts by saying "I don't remember" – an answer which, although it may be true, will brand the respondent as either a liar or a habitual criminal in the eyes of the judge or jury.

(G) *Whether the respondent has made a prior statement that the prosecutor has and with which the respondent can be impeached.* Prior inconsistent statements of a respondent are admissible to impeach his or her trial testimony. *E.g., Anderson v. Charles,* 447 U.S. 404 (1980) (per curiam). The prosecutor will not invariably use in the prosecution's case-in-chief every incriminating admission that s/he has. Particularly if the respondent has made some sort of admission followed by a full confession, the prosecutor may hold back the admission. Then, if the respondent testifies, the prosecutor can confront the respondent with the admission on cross-examination – thus introducing additional incriminating evidence in the midst of the defense case – and can also end the trial on a strong note by calling an officer to recount the admission in rebuttal. See § 10.10 *supra;* § 33.09(a) *infra.* A respondent's prior admissions cannot be used for

impeachment if they were involuntary [§ 24.03 *supra*] (*see Mincey v. Arizona,* 437 U.S. 385 (1978)), or if they were compelled under an immunity grant (*see New Jersey v. Portash,* 440 U.S. 450 (1979)), but they can be used for impeachment if they were voluntary even though they may have been obtained in violation of the rules of *Miranda v. Arizona,* 384 U.S. 436 (1966) [§ 24.07 *supra*] (*see Harris v. New York,* 401 U.S. 222 (1971); *Oregon v. Hass,* 420 U.S. 714 (1975)) or the Sixth Amendment [§ 24.13 *supra*] (*see Kansas v. Ventris*, 556 U.S. 586 (2009)) or the Fourth Amendment [§ 24.19 *supra*] (*see United States v. Havens,* 446 U.S. 620 (1980)). See also § 24.23 *supra.* And although the prosecution is not permitted to present in its case-in-chief the transcribed testimony of the respondent on a motion to suppress, *see Simmons v. United States,* 390 U.S. 377 (1968), the question has been pointedly reserved by the Supreme Court whether the accused's suppression-hearing testimony can be used to impeach his or her trial testimony to the extent that the two are inconsistent. *United States v. Salvucci,* 448 U.S. 83, 93-94 (1980). The likelihood is that the ultimate authoritative disposition of this issue will be in favor of allowing the prosecution to use the suppression-hearing transcript to impeach. *See id.* at 94 n.9. *But cf. Harrison v. United States*, 392 U.S. 219 (1968), and *Lujan v. Garcia*, 734 F.3d 917, 924-30 (9th Cir. 2013), summarized in § 24.20(b) penultimate paragraph *supra*.

(H) *Whether there is some other incriminating evidence, inadmissible in the prosecution's case-in-chief because illegally obtained, that may be used in rebuttal if the respondent testifies.* Evidence obtained in violation of the Fourth Amendment may be used to impeach or rebut the testimony of a juvenile respondent who elects to take the stand at trial if the illegally obtained evidence is inconsistent with any of the respondent's "statements on direct examination [or] . . . his answers to questions put to him on cross-examination that are plainly within the scope of the [respondent's] . . . direct examination." *United States v. Havens,* 446 U.S. 620, 627 (1980). The only limitations on the prosecutor's right to use unconstitutionally seized evidence for impeachment are that the evidence must be "reliable," *id.* (dictum), see § 33.09(a) *infra,* and that the prosecutor may not use it to impeach a respondent's testimony given in response to cross-examination "having too tenuous a connection with any subject opened upon direct examination . . .," 446 U.S. at 625, explaining *Agnello v. United States,* 269 U.S. 20, 35 (1925). The test of cross-examination that is not "too tenuous" is variously described in the *Havens* opinion as "proper cross-examination reasonably suggested by the [accused's] . . . direct examination," 446 U.S. at 627, and as "questions [that] would have been suggested to a reasonably competent cross-examiner by [the accused's] . . . direct testimony," *id.* at 626. *Cf. United States v. Nobles,* 422 U.S. 225, 240 (1975) (defining the scope of proper cross-examination, in another context, as extending to "matters reasonably related to those brought out in direct examination").

(I) *Whether evidence of the respondent's pretrial silence in the face of accusation is available and admissible to impeach the respondent.* In some cases, the prosecution can use the respondent's pretrial silence against him or her. For example, the prosecution may seek to impeach the respondent with his or her failure to report to the police what s/he now claims was a justifiable homicide or assault, or with his or her failure to volunteer an exculpatory story when questioned by the police or others about events surrounding the offense, or with his or her failure

to respond by denials when accused by the police or others. As § 24.24 explains, *Doyle v. Ohio,* 426 U.S. 610 (1976), prohibits the prosecution from using an accused's silence following arrest and the administration of *Miranda* warnings to impeach a testifying defendant or juvenile respondent, but the United States Supreme Court's post-*Doyle* decisions have found this rule to be inapplicable when the prosecution seeks to impeach a testifying defendant or respondent with pre-arrest silence (*Jenkins v. Anderson*, 447 U.S. 231, 239-40 (1980)) or with post-arrest silence when no *Miranda* warnings were given (*Fletcher v. Weir,* 455 U.S. 603, 606-07 (1982) (*per curiam*)). The concluding paragraph of § 24.24 cites state-court decisions rejecting *Jenkins* and *Fletcher* as a matter of state constitutional or evidentiary law; counsel must research the subject locally. In cases in which the federal constitutional and state-law rules discussed in § 24.24 would bar the prosecution from introducing evidence of an accused's silence in its case-in-chief (a question complicated by *Salinas v. Texas*, 133 S. Ct. 2174 (2013), discussed in the seventh and eighth paragraphs of § 24.24) but would allow the prosecution to use such silence to impeach an accused who takes the witness stand, the decision whether to put the respondent on the stand must take into account the risk of opening the door to harmful evidence that the prosecutor could not otherwise introduce at trial.

(J) *Whether there is other potentially damaging impeaching matter available to the prosecutor and whether prejudicial matters in the respondent's background are likely to be brought out on cross-examination.* Like other witnesses, a respondent may be impeached by showing his or her bad reputation for truth and veracity. See § 31.12 *supra.* This does not mean that the respondent's general bad character can be shown, and counsel should object if the prosecutor sets out to examine the respondent on various assorted misdeeds and so forth. Counsel must be especially alert while the prosecutor is cross-examining the respondent. Some apparently innocuous questions can be damaging: For example, the normally uncontroversial question "what grade are you in?" is problematic when the respondent's answer is so inconsistent with his or her age that it makes it obvious s/he has been repeatedly left back, presumably because of truancy or lengthy periods of suspension from school. The difficulty of objecting to these questions without prejudice will create problems if a respondent with a disreputable life style testifies.

(K) *Whether cross-examination of the respondent is likely to supply deficiencies or bolster weaknesses in the prosecution's case-in-chief.* See § 33.01 *supra.* The breadth of allowable cross-examination should be considered. See § 33.09(a) *infra.*

§ 33.07 EFFECT OF THE RESPONDENT'S CHOICE

Counsel should weigh these considerations and decide in the first instance whether s/he thinks that the respondent ought to testify. That decision, with its reasons, should be explained to the respondent. *See, e.g.*, *Casiano-Jiménez v. United States*, 817 F.3d 816, 821 (1st Cir. 2016) (defense counsel violated the guarantee of effective assistance of counsel by failing to tell the defendant, "in words or substance, that he had a right to testify" and failing "to obtain his informed consent to remaining silent" at trial; "There must be a focused discussion between lawyer and client, and that discussion must – at a bare minimum – enable the defendant to make

an informed decision about whether to take the stand."). Counsel may properly urge the respondent that it is unwise or dangerous for the respondent to take the stand. When the unwisdom or the danger appears strong, counsel's urging may and should be strenuous. Counsel should always outline clearly to the respondent the hazards of testifying (whether or not counsel wants to put the respondent on). Counsel may properly urge the respondent that it is unwise or dangerous for the respondent to take the stand. When the unwisdom or the danger appears strong, counsel's urging may and should be strenuous. Counsel should always outline clearly to the respondent the hazards of testifying (whether or not counsel wants to put the respondent on). But if this fails to daunt the respondent and if counsel's advice against testifying fails to persuade the respondent, then counsel has little choice but to put the respondent on the stand. *See Jones v. Barnes,* 463 U.S. 745, 751, 753 n.6 (1983) (dictum); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (dictum). *See also United States v. Gillenwater*, 717 F.3d 1070, 1077-79 (9th Cir. 2013). In these unhappy situations, counsel should (1) prepare the respondent's testimony thoroughly (see § 10.10 *supra*) for maximum damage control; (2) reserve the defense opening statement (see § 29.03(a) paragraph 3 *supra*) and avoid any other indication, prior to the close of the prosecution's case, that the defense will call the respondent as a witness (see, *e.g.,* § 27.13 *supra*), and (3) re-raise with the respondent, after the prosecution rests, whether s/he remains hell-bent to testify.

§ 33.08 PRESENTING DIRECT TESTIMONY OF THE RESPONDENT

Direct examination of the respondent should be concise and orderly but should not abbreviate the respondent's testimony or give short shrift to details that are of any real consequence. The respondent's testimony is a central event at the trial, and it ordinarily ought not be rushed or made to seem less than full.

As a general matter, questions should call for discursive or explanatory answers rather than mere "yes" and "no" responses and should give the respondent apparent freedom to do the talking. It is important that the respondent appear to want to tell his or her story and that the story appear to be the respondent's, not counsel's. The respondent should not be tightly restricted by short-answer questions that make him or her look like s/he is saying only what counsel wants to present. The more articulate, personable, and sympathetic s/he is, the more leeway s/he should be given to project his or her own image.

On the other hand, the scope of direct examination must be limited so as to avoid opening up areas in which damaging cross-examination can be pursued. Counsel should anticipate likely points of prejudicial cross-examination (see § 33.06 *supra*; § 33.09(a) *infra*) and should advise the respondent, and structure the direct examination, to keep away from matters that will open the door to them. In particular, the respondent should be warned that, both on direct and cross-examination, s/he must avoid broad protestations of innocence – "I've never been in trouble in my life," "I don't even know what marijuana smells like," "I would never do anything like that" – since these protestations may be treated by the court as raising the issue of character and opening the door to prosecutorial proof of bad character (see § 33.17 *infra*).

When counsel's theory of defense is misidentification or some other ground for doubting that the respondent was involved in any way in the criminal episode, counsel should ask the respondent point-blank, at some point in the direct examination, whether s/he committed the crime(s) with which s/he is charged. The formal denial has become such a standard part of the direct examination of adult defendants in criminal trials and juvenile respondents in delinquency trials that a judge sitting as trier of fact in a bench trial may view its omission as peculiar and possibly even suspicious. In jury trials, even though the jurors have no similar knowledge of courtroom conventions, they will probably have a common-sense expectation that any innocent person who is haled into court on a criminal or delinquency charge and who testifies in his or her own behalf would explicitly deny guilt.

Defense lawyers differ about whether the formal denial is more effective at the beginning of a direct examination or at the end. The rationale for placing it at the beginning is that it enables the respondent to make a good impression by coming on strong and clear, and it also helps to structure the respondent's testimony by announcing the defense theory of the case up front and thereby assisting the trier of fact to appreciate the significance of the respondent's factual story when the respondent goes on to relate it in detail. The rationale for placing it last is that in a bench trial, the judge may view himself or herself as so sophisticated a factfinder that s/he will resent the attorney's commencing with formal denials rather than going directly to the hard facts; and in both bench and jury trials, a formal denial can provide a very strong conclusion to the respondent's testimony.

The formal denial would usually be framed along the following lines:

Q. Now, Richard, you have heard the testimony of the prosecution witnesses, and you know what you are charged with. I want you to look at [His] [Her] Honor [and the ladies and gentlemen of the jury] and tell [him] [her] [them] whether you are guilty of this crime that you are charged with here today?

A. No.

Q. Did you [*summarizing the key facts of the crime, such as* "rob Mr. John Jones on September 19, 2016, and steal $ 350.00 from him"]?

A. No, I did not.

In cases where the defense theory is that the actions charged as criminal were innocent or justifiable, modified versions of the classic denial are appropriate. On a claim of mistake, for example:

Q. Please tell the jury this, Alex: When you picked up the cell phone, did you intend to steal it?

A. No.

Q. Why did you pick it up?

A. I thought it was mine. It looked like mine.

Or on a self-defense claim:

Q. Please tell the jury this, Alex: In the fight between you and Mr. Jones, did you throw the first punch?

A. No. He did.

Q. Why did you hit him?

A. He started slugging me and I tried to make him stop.

§ 33.09 CROSS-EXAMINATION AND IMPEACHMENT OF THE RESPONDENT

§ 33.09(a) The Basic Rules Governing the Prosecution's Cross-examination and Impeachment of the Respondent

The prosecutor is usually given rather broad latitude to cross-examine the respondent and is frequently allowed to go somewhat beyond the scope of the direct examination even in jurisdictions that would forbid cross-examination of this breadth in the case of other witnesses. Although counsel should object to any potentially damaging cross-examination that falls outside the scope of the direct (*see*, *e.g.*, FED. RULE EVID. 611(b) ("Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility")), s/he should not be surprised to see the objection overruled in the exercise of the trial judge's discretion.

On the other hand, attempts by the prosecutor to open up the respondent's background generally or to expose particularly prejudicial matters – gang associations, drug use, and so forth – are blatantly impermissible and should be vigorously opposed. *See*, *e.g.*, *United States v. Romo*, 669 F.2d 285 (5th Cir. 1982); *United States v. Dickens*, 775 F.2d 1056 (9th Cir. 1985); *Hosford v. State*, 525 So. 2d 789, 790-92 (Miss. 1988). Counsel should point out to the court that what is at issue here is not merely the scope of cross-examination but the fundamental principle that the prosecution may not present evidence of the respondent's character unless the respondent opens the character issue, and then only according to tightly restricted modes of proof. See § 30.07(a), (b) *supra;* § 33.17 *infra.* Counsel should invoke the respondent's federal and state constitutional privileges against self-incrimination in objecting to any cross-examination that is not "reasonably related to those [matters] brought out in direct examination" (*United States v. Nobles,* 422 U.S. 225, 240 (1975) (dictum)), because the privileges are not waived concerning this material (*see* §

9.12 second paragraph *supra*), and the very fact that the prosecutor is seeking to elicit it before the trier of fact establishes its incriminating character. *See also Blanks v. State*, 406 Md. 526, 540-41, 544, 959 A.2d 1180, 1188, 1190 (2008) (the prosecutor violated the attorney-client privilege by cross-examining the defendant about "when and what [he] . . . had discussed with his attorney about his relationship with the murder victim," purportedly in response to defendant's statement on direct examination that he had told only his father about his relationship with the victim). In a jury trial, counsel's objections to the prosecution's cross-examination of the respondent – together with counsel's explanation of the grounds for those objections – should be made at sidebar. See §§ 30.02(a)(2) *supra*, 34.03 *infra*.

Although the range allowed in cross-examination of a respondent may be broader than ordinary, the ordinary rule prevails that the respondent may not be impeached by extrinsic evidence on collateral matters – that is, those which the prosecution could not prove in its case-in-chief (see § 31.10 penultimate paragraph *supra*).

Section 30.07(b) *supra* describes the general rule prohibiting the prosecutor from using a respondent's prior juvenile adjudications to impeach the respondent, and the exceptions to this general rule that are recognized in some jurisdictions.

A respondent's prior inconsistent statements are subject to the general bar against impeachment with extrinsic evidence on collateral matters. The prosecutor may ask the respondent on cross-examination whether s/he did or did not say *X* or *Y* on a specified previous occasion, if *X* or *Y* is inconsistent with the respondent's testimony on direct examination; but statements *X* or *Y* may not be proved extrinsically unless their contents are noncollateral. See generally § 31.10 *supra*.

There are some additional restrictions on both cross-examination and extrinsic evidence relating to a respondent's prior inconsistent statements:

(1) Neither is permissible, in the event of a defense objection, unless the prosecutor satisfies the court that there is a basis in fact for believing that the respondent did make each statement asked about. *See*, *e.g.*, *People v. Williams*, 204 Ill. 2d 191, 208-14, 788 N.E.2d 1126, 1137-41, 273 Ill. Dec. 250, 261-65 (2003); *cf. Flowers v. State*, 842 So. 2d 531, 550-53 (Miss. 2003).

(2) Neither is permissible unless the testimony that the prosecution is proposing to impeach was given by the respondent on direct examination or on cross-examination that is *within the scope of the direct.* The prosecutor cannot invoke the prior-inconsistent-statement rationale to justify impeaching the respondent's answers to questions that the prosecutor has "'smuggled in'" by broader cross-examination (*United States v. Havens,* 446 U.S. at 625, 626 (dictum)).

(3) A respondent's prior inconsistent statements may not be used for impeachment if they

were involuntary under the standards summarized in § 24.03 *supra* (*see Mincey v. Arizona,* 437 U.S. 385, 397-98, 402 (1978)) or obtained in violation of the respondent's constitutional privilege against self-incrimination (*New Jersey v. Portash,* 440 U.S. 450, 458-60 (1979); *People v. Pokovich*, 39 Cal. 4th 1240, 141 P.3d 267, 48 Cal. Rptr.3d 158 (2006)) or made pursuant to procedures that invested them with a privilege against disclosure (*State v. Hook*, 356 S.C. 421, 590 S.E.2d 25 (2003)).

(4) It can be argued that a respondent's prior inconsistent statements may not be used for impeachment if they are lacking in reliability or trustworthiness. The argument rests on negative language in *United States v. Havens,* 446 U.S. 620 (1980), and in *Harris v. New York,* 401 U.S. 222 (1971), and *Oregon v. Hass,* 420 U.S. 714 (1975), that may or may not be pregnant. (The axiom that pregnancy is an either/or proposition does not apply to Supreme Court opinions.) As indicated in § 33.06 subdivision (H) *supra*, the *Havens* case holds that matters which would be inadmissible in the prosecution's case-in-chief because they are the tainted fruits of a Fourth Amendment violation may nonetheless be used to impeach the accused's trial testimony. In announcing this ruling, the Court says that a defendant's "prior inconsistent utterances [and] . . . other reliable evidence" may be used for impeachment (446 U.S. at 627). As indicated in § 33.06 subdivision (G) *supra*, the *Harris* and *Hass* cases hold that a defendant's prior inconsistent statements taken in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966), may be used for impeachment. In announcing these rulings, *Harris* says – and *Hass* repeats – that "[i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, *provided of course that the trustworthiness of the evidence satisfies legal standards*" (*Harris*, 401 U.S. at 224; *Hass*, 420 U.S. at 722; emphasis added). The *Hass* opinion goes on to say that "[i]f, in a given case, the officer's conduct amounts to an abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness" (*id*. at 723). The meaning of the "reliable evidence" language in *Havens* and the "trustworthiness" language in *Harris* and *Hass* is conspicuously obscure. It cannot plausibly be read as meaning nothing more than that an inconsistent statement used for impeachment must be voluntary (the holding of *Mincey*, *supra*) because (a) it is hornbook law that the federal standard of involuntariness is not equivalent to "reliability" or "trustworthiness" (*see Rogers v. Richmond,* 365 U.S. 534, 544-45 (1961); *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964)), and (b) the *Harris* and *Hass* language repeatedly casts "voluntariness" and "trustworthiness" in the conjunctive. Defense counsel therefore has a degree of leeway at present to argue that "trustworthiness" and "reliability" mean whatever they need to mean in order to take the factual scenario of counsel's case outside the ambit of *Havens, Harris*, and *Hass*. A strong argument could be made, for example, that the kind of trickery-induced statements discussed by Judge Posner in *Aleman v. Village of Hanover Park*, 662 F.3d 897, 906-07 (7th Cir. 2011) [§ 24.04(d) penultimate paragraph *supra*] should be inadmissible for impeachment. It is true that *Kansas v. Ventris*, 556 U.S. 586 (2009) (holding statements obtained in violation of the Sixth Amendment rule of *Massiah v. United States*, 377 U.S. 201 (1964) [§ 24.13 *supra*] admissible for impeachment) declares broadly that "the game of excluding tainted evidence for impeachment purposes is not worth the candle [because the] . . . interests safeguarded by such exclusion are 'outweighed by the need to prevent perjury and to

assure the integrity of the trial process'" (*id*. at 593). But reading *Ventris* as a ruling that anti-perjury concerns trump all others and license impeachment even with materials of seriously questionable probative value would be inconsistent with the square holding of *Doyle v. Ohio,* 426 U.S. 610 (1976), noted in the following subparagraph.

(5) Impeachment by instances of silence in the face of arrest or out-of-court accusation is discussed in §§ 24.24 and 33.06 subdivision (I) *supra.* Essentially, a respondent's postarrest silence after receiving *Miranda* warnings is inadmissible to impeach his or her trial testimony (*Doyle v. Ohio,* 426 U.S. 610 (1976)), but other instances of prearrest or postarrest silence may be admissible so far as the federal Constitution is concerned. Counsel can and should invoke state constitutional guarantees and state-law evidentiary principles as grounds for prohibiting the latter kinds of impeachment. See §§ 7.09 and 24.24 *supra.*

(6) The extent to which the prosecution is permitted to impeach a respondent with his or her prior inconsistent testimony given at a suppression hearing or similar *voir dire* proceeding is presently unsettled. See § 33.06 subdivision (G) *supra.*

§ 33.09(b) Orders Barring Counsel's Consultation with the Respondent in Contemplation of Cross-examination

Some judges will instruct counsel not to confer with their witnesses during recesses between direct and cross-examination or during recesses called while the witness is testifying on cross-examination. The constitutionality of these prohibitions as applied to the respondent depends on the length of the recess and on whether the recess falls at a time when the respondent and counsel have any trial-related matters to discuss *other than the respondent's ongoing testimony.* "[T]he testifying . . . [respondent] does not have a constitutional right to advice" concerning the subject of his or her testimony (*Perry v. Leeke,* 488 U.S. 272, 284 (1989)), but s/he does have a "right to unrestricted access to his lawyer for advice on a variety of trial-related matters . . . in the context of a long recess," even though the recess occurs while s/he is on the witness stand (*id*., explaining *Geders v. United States,* 425 U.S. 80 (1976)). See § 27.02 concluding paragraph *supra.* If a recess exceeds 15 or 20 minutes, an order forbidding communication between the respondent and his or her attorney is problematic under the *Geders* and *Perry* cases, and counsel should object to it as an infringement of the respondent's state and federal constitutional rights to the effective assistance of counsel.

§ 33.10 CORROBORATION OF THE RESPONDENT

It is vital to corroborate the respondent on every point on which corroboration is possible. Nothing should be left to rest on the respondent's unsupported testimony if there is any extrinsic proof of substance to support it. In particular, when the physical characteristics of sites or things are of any significance to the respondent's testimony and can be proved by such relatively incontrovertible proof as photographs or demonstrative evidence, this should be done. The time when the respondent left school should be corroborated by attendance sheets; the time when s/he

left work by his or her timecard; the weather, by Weather Bureau records. Every matter in which the respondent is supported by proof which the trier of fact will find believable has a capacity to spread and envelop the respondent's testimony with an atmosphere of veracity. The respondent needs this badly, since any respondent's testimony is suspect for obvious self-interest.

The necessary qualification of this principle is that if no corroboration can be made of significant aspects of the respondent's story that would be corroborable if true, no corroboration should be offered of less significant items. It had better appear to the trier that counsel is slipshod than that counsel is diligent but does not have a case.

Part C. Expert Witnesses

§ 33.11 RULES GOVERNING EXPERT TESTIMONY

In States in which the admissibility of evidence is regulated by statutes or a set of rules, there is often a section or group of sections that governs expert testimony. In States that have not codified this aspect of the law of evidence or adopted a set of rules of evidence, local caselaw commonly prescribes the standards for presenting expert testimony.

Until the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the standard for admission of expert testimony in the federal courts and in the vast majority of States was the so-called "*Frye* test," drawn from *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). Under the *Frye* test, scientific evidence (or, more precisely, scientific evidence of a novel type) was admissible only if the scientific technique was "sufficiently established in the particular field in which it belongs." *Id*. at 1014. *See Daubert*, 509 U.S. at 585-86 & n.4 (discussing the *Frye* test). In *Daubert*, the Court established a new standard for the federal courts, interpreting the Federal Rules of Evidence to provide that the admission of "novel scientific evidence at trial" (*id*. at 585) turns upon a trial judge's finding that the "scientific knowledge" to which "the expert is proposing to testify . . . will assist the trier of fact to understand or determine a fact in issue" (*id*. at 592). The Court explained that the question to be addressed by the trial judge "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id*. at 593. Emphasizing that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test" (*id*.), the Court made the following "general observations" (*id*.):

> "Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. . . . ¶ Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. . . . ¶ Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, . . . and the existence and maintenance of standards controlling the technique's operation . . . . ¶ Finally,

> 'general acceptance' can yet have a bearing on the inquiry. A 'reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.' ¶ The inquiry envisioned by [Federal] Rule [of Evidence] 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." (*Id*. at 593-95.)

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court held that "*Daubert*'s general holding – setting forth the trial judge's general 'gatekeeping' obligation [under the Federal Rules of Evidence] – applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Id*. at 141. The Court reiterated in *Kumho* that "the test of reliability is 'flexible,' and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Id*.

Although the *Daubert* decision was concerned only with standards of admissibility prescribed by the Federal Rules of Evidence for federal trials, many state courts have replaced their former tests for admissibility of some or all kinds of expert testimony with standards modeled on *Daubert*. Accordingly, in state-court cases in many States (and, of course, in federal-court cases), counsel will need to be familiar with the intricacies of the *Daubert* doctrine. For general sources on this topic, see, *e.g.*, DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, THE NEW WIGMORE: A TREATISE ON EVIDENCE – EXPERT EVIDENCE (2d ed. 2011); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE: COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS, Chapter 702 (2d ed., Joseph M. McLaughlin, ed., 2007 & Supp.); RICHARD O. LEMPERT, SAMUEL R. GROSS, JAMES S. LIEBMAN, JOHN H. BLUME, STEPHAN LANDSMAN & FREDRIC I. LEDERER, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 1088-1107 (4th ed. 2011); 1 KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, D.H. KAYE, ROBERT P. MOSTELLER, E.F. ROBERTS & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 203 (7th ed. 2013); ANDRE A. MOENSSENS, BETTY LAYNE DESPORTES & CARL N. EDWARDS, SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES (6th ed. 2013).

When preparing to present an expert witness for the defense or to cross-examine a prosecution expert, counsel should critically review any potentially applicable evidentiary requirements in the jurisdiction's statutes, rules or caselaw. Even when local practice treats certain rules of expert evidence as well-accepted, counsel should consider the possibility that a novel challenge could produce a different rule. *Daubert* not only changed the basic doctrinal principles in the expert-evidence sector; it inaugurated a new regime of judicial receptivity to rethinking old principles. *And see*, *e.g.*, *People v. Goldstein*, 6 N.Y.3d 119, 126-29, 843 N.E.2d 727, 731-34, 810 N.Y.S.2d 100, 104-07 (2005) (questioning the parties' assumption at trial and on appeal that the established evidence doctrines which authorize a prosecution psychiatrist to

render an opinion based on hearsay also permit the psychiatrist to testify to the underlying hearsay statements on which the opinion was based; noting that "[w]e have found no New York case addressing the question of when a party offering a psychiatrist's opinion . . . may present, through the expert, otherwise inadmissible information on which the expert relied"; observing that the federal rule of evidence on this subject was amended in 2000, and that, because the parties did not raise the issue, "[w]e are not called upon to decide here, and do not decide, whether the New York rule is the same as, or less or more restrictive than, this federal rule"; and ultimately holding that the underlying hearsay statements were inadmissible under a wholly distinct and adequately preserved claim that they violated the defendant's Confrontation Clause rights under the doctrines set forth in § 30.04 *supra*.).

§ 33.12 QUALIFICATION OF THE EXPERT

§ 33.12(a) Subjects to Cover in Qualifying an Expert

Before an expert witness is competent to give an opinion, s/he must be qualified to the satisfaction of the court. There are no categorical standards of qualification; the matter is left essentially to the trial judge's discretion. If the expert's profession is licensed by the state, it is obviously desirable that s/he meet state standards for licensing. Most judges are not very exacting about the qualifications they demand. Counsel's examination of a defense expert to establish his or her qualifications to testify is therefore usually less a matter of boosting the witness over a preliminary barrier than a matter of using the barrier as a justification for demonstrating how high the witness can jump – that is, of making him or her look impressive or endearing from the get-go. Eminence in the field will often impress the trier of fact, but many juries (and even many judges) prefer hometown experts and find Marcus Welby look-alikes more persuasive than Nobel Laureates. Counsel should talk with practitioners in the field to get a sense of the credentials that are generally regarded as prestigious within the particular specialty: handwriting experts, for example, usually become such by experience more than by formal training. A present or prior position with a law enforcement agency enhances the appearance of dispassion of the expert. In the same vein, counsel is ordinarily permitted to bring out, where applicable, the fact that an expert who has testified in other delinquency or criminal cases has predominately testified for the prosecution.

To qualify an expert, the following questions may be asked:

(1) Please state your name for the record.
(2) What is your profession [employment]?
(3) Would you tell the court, please, what is the subject matter of that profession [work]? [*Counsel and the expert should have rehearsed a short, general, nontechnical description.*]
[(4) Do you specialize within the field?]
[(5) What is your specialty?]
[(6) And what is that concerned with?] [*Again, only a brief description is wanted.*]

(7) Where are you employed? [*or:* Do you hold any particular job or position in your field? What is that job [position]?]
(8) With respect to your formal education, would you state what colleges and universities you attended, if any, and what degrees you may have received?
(9) Was that degree in any specialized field?
(10) And what field was that?
[(11) Are you licensed as a . . . in the State of . . . ?]
[(12) How long have you been licensed?]
[(13) Have you been in practice all that time?]
[(14) Are you also certified as a specialist in the field of . . . ?]
[(15) What does certification of that kind involve?]
[(16) And how long have you been so certified?]
(17) Would you tell us, please, what positions you have held since the completion of your formal education and the number of years in each?
(18) What are the duties and functions of your present position, please?
(19) How long have you held that position?
(20) [*With respect to any particularly relevant work experiences:*] Now, you said that for . . . years you were at . . . . Would you tell us what you did there, and what professional experience you had?
(21) In the course of your work, have you had occasion to conduct examinations of . . . [*stating the kind of examination involved in this case*]?
(22) How many such examinations would you say you have conducted?
[(23) And have you also done any teaching in the field of . . . ?]
[(24) When and where was that done?]
[(25) Have you published any works [that appeared in professional journals] in the field of . . . ?]
[(26) Would you state the titles of a few of those works, please?] [*The witness should be instructed to respond with a few titles that are the most pertinent to the subject matter of his or her testimony in the case.*]
[(27) Are you a member of any professional associations? Do you hold any special positions in those associations? What are the positions that you hold?]
[(28) Have you received any prizes and awards in the field? (*The witness should be instructed to answer this question with a simple "yes" rather than going on to rattle off his or her prizes and awards. Modesty is becoming and is cost-free here, since counsel can then proceed to ask:*) Would you please tell the court what those prizes and awards were and what they were for?]
[(29) Dr. . . . , have you ever previously testified as an expert witness in court?]
(30) On how many occasions, if you remember? [*If the witness has previously testified for the prosecution in an impressive percentage of cases:* How many of those were in delinquency cases? How many were in criminal cases? Of the times you have testified in delinquency or criminal cases, how many times did you testify for the prosecution?]
[(31) And have you also been appointed by the court to testify [*or,* serve] as a neutral

and impartial expert witness [in delinquency [*or* criminal] cases]?]

If the court please, I ask the court to accept Dr. . . . as a qualified expert in the field of . . . .

§ 33.12(b) Stipulating the Qualifications of the Expert

If the defense expert is known to the prosecution, the prosecutor will often offer to stipulate that s/he is qualified to testify as an expert. A stipulation makes the preceding routine unnecessary but thereby forfeits the opportunity to use it as a display piece. Counsel has a right to decline the stipulation and to make his or her record. Generally, it is advisable not to agree to stipulate to the witness's qualifications unless (a) there is some doubt whether s/he will qualify as an expert, or (b) the witness's qualifications are less impressive than those of the prosecution's expert, or (c) the qualifications of the experts for both sides are equally impressive, and the prosecution has agreed to stipulate to the qualification of both witnesses.

§ 33.13 GENERAL STRUCTURE OF THE EXPERT'S TESTIMONY

An expert gives opinion testimony. S/he describes the studies s/he has performed, the conditions under which they were performed, and the reliability of the studies under these conditions. After describing the data that s/he has examined or observed, s/he must be asked whether s/he has formed an opinion, based upon these data, concerning a legally relevant issue. (For example: "Based upon the examinations of Ruth Jones [the respondent] that you have described, have you formed an opinion with regard to whether Ruth was capable or incapable of forming an intent to kill during the late evening of October 1?") Upon the expert's affirmative answer to this question, s/he may be asked what the opinion is. To be admissible, the opinion usually must be of "reasonable certainty."

After the expert has stated his or her opinion, s/he should be asked to explain the reasoning that led to it. This portion of the expert's testimony should ordinarily emphasize each item of factual information that supports his or her ultimate conclusion and also indicate that s/he has considered every item of factual information in the case that might tend to cut against his or her conclusion. S/he can deal best with the latter facts by either (1) describing how they can be reconciled with his or her conclusion if they can or (2) admitting that they cut against his or her conclusion and explaining why s/he gives greater weight to other facts that support his or her conclusion. Either sort of testimony tends to be more convincing on direct examination than on cross.

The direct examination of the expert should be concise. If at any time the witness uses technical terms, s/he should be asked to explain them. Expert testimony must be carefully prepared to assure that the witness will speak to the level of understanding of the trier of fact. During dry runs of the expert's testimony, counsel should point out to the expert the terms and concepts that will need explanation in everyday language. The expert should have formulated these explanations to the satisfaction of counsel before coming to court. An expert should never

be put in the position of having to coin a definition for the first time on the stand. S/he is not necessarily used to explaining his or her specialty in terms that are not its own, and the explanation may make things even less clear.

Counsel's questioning of an expert at trial should show the expertise of the witness, not that of counsel. Simple questions drawing on the experience and knowledge of the expert and calling for full answers will impress upon the trier of fact that the witness possesses the knowledge and understanding necessary to testify authoritatively in his or her specialty.

§ 33.14 HYPOTHETICAL QUESTIONS

When an expert's opinion is required to be based on facts in addition to those of which s/he has personal knowledge or knowledge gained through his or her professional investigation of the matters at issue in the trial, s/he may testify in response to a hypothetical question of counsel that asks the expert to assume the requisite facts. These facts, of course, must be established by independent proof. It is obviously not necessary that the hypothetical question include all of the facts of record, but it is necessary that all of the facts which it does include be facts that could be found on the basis of the record.
As a practical matter counsel should include as much of the evidence as s/he can without making the question tediously long; if s/he does not, the expert will likely be asked on cross-examination whether his or her opinion would change if each of the omitted facts were added – one by one. Even if s/he says that the opinion would not change, s/he is cast in the posture of appearing to explain away matters and to defend his or her opinion more than is desirable

The form of the hypothetical question normally is "Now, I ask you to assume the following set of facts to be true and correct: [*stating facts*]. Assuming those facts to be true and correct, can you express an opinion with reasonable certainty as an expert whether [*stating the problem*]?" Following an affirmative answer to this question, counsel asks: "What is that opinion?" When the opinion is given, counsel asks for an explanation of the reasoning on which it is based. This much is technically necessary. The following dialogue is not, but it will add a good deal to the expert's explanation of the basis for his or her opinion:

Q. Now, Dr. . . ., I have just asked you to assume certain facts, which I related in detail, and to give the court your opinion based upon them. When I recited those facts, was that the first time that they had been brought to your attention?

A. It was not.

Q. When were those facts previously brought to your attention?

A. Several weeks ago, you gave me a statement of the same set of facts in writing and asked me to assume that they were true and to study them and formulate an opinion based on them.

Q. [*After marking document as a defense exhibit for identification:*] I show you this document, marked Respondent's Exhibit No. 1 for identification. Do you recognize that document?

A. I do.

Q. And what is it?

A. That is the statement of facts that you gave me several weeks ago, to which I just referred.

Q. Will you read that, please, to yourself and tell the court whether the statement of facts there is identical with the facts which I asked you to assume this afternoon.

A. It is.

Q. What did you do with this statement when I gave it to you?

A. I studied it carefully. I considered the facts that you had stated there, and, as you asked, I formulated an opinion on the basis of those facts.

Q. And was that opinion the one which you have given in court this afternoon?

A. Yes.

Q. Was the opinion you have given in court formed for the first time today?

A. Oh, no. It was based on a quite careful study and consideration of those facts, which I had had for several weeks.

COUNSEL: I ask that Respondent's Exhibit No. 1 be admitted into evidence. The witness has stated that these facts on which he [she] based his [her] opinion are the same as those which I asked him [her] to assume today. [*In a jury trial:* I think there is no need to have the jury see that if they do not want to, but they should have it available to examine if they wish.]

§ 33.15 THE EXPERT'S REPORT

Whether a defense expert testifies in response to a hypothetical question or entirely on the basis of facts gathered in his or her investigation of the case, s/he should ordinarily submit a signed and dated written report to counsel in advance of trial. Such a report entails the danger that it may be discoverable by the prosecution under certain circumstances, but its value to the defense usually outweighs that danger *if* counsel advises the expert closely in the preparation of the report so as to assure that nothing potentially damaging creeps into it through inadvertence.

See § 11.04(b)(1) *supra.*

Most courts will permit counsel to examine the witness by use of the report. Counsel should have five copies at trial: one for counsel's own use, one for the witness, one for the court, one for the prosecutor, and one for formal admission into evidence. Counsel should:

(1) Mark the report as an exhibit for identification,
(2) Hand it to the witness, ask leave of the court to hand it up to the judge, and hand a copy to the prosecutor, and
(3) Ask the witness to identify the exhibit. (The basic form of examination for identifying a document is illustrated in the third and fourth pair of Q's and A's in the concluding script in § 33.14 *supra*. In the present setting, the witness's scripted answer to question number 4 will presumably be something like "That is a report I prepared at your request regarding my study of this case.")

Counsel may then direct the witness's attention to anything in the report, by page and paragraph number, that may prove useful in organizing the examination. This device is particularly desirable if there are matters such as charts, graphs, and diagrams; numerical equations; collections of numbers tabulating data; and so forth, on which the witness bases his or her reasoning or which explicate his or her analysis. In a bench trial, directing the witness's attention (and thereby the court's attention) to the page on which each matter of this sort appears will suffice to enable the judge to follow the train of the testimony. In a jury trial the charts, graphs, diagrams, or figures should be reproduced on large graph paper or in electronic format for display or projection to the jury (see §§ 10.13, 10.15 *supra*), and the witness should identify the enlargement displayed as identical to the one in his or her report.

At the close of the direct examination, counsel should ask that the report be admitted as *substantive* evidence, stating that it exemplifies the testimony of the witness and that the witness will, of course, be subject to cross-examination on anything in it. In a bench trial, many courts will receive it, and the judge will find it useful, as a concise summary of the expert's reasoning, in evaluating the evidence. Incidentally, counsel is guaranteed, in this fashion, against any negligent omission in the trial examination. The report should be prepared with great care, of course, and may go through several drafts with counsel's criticism. In a jury trial, it is less likely to be received, but it will have served the functions of (a) allowing the witness to testify with an organizing outline of his or her own design in hand and (b) impressing the jury with the expert's care.

§ 33.16 PREPARING THE EXPERT FOR CROSS-EXAMINATION

In preparing an expert to testify at trial, counsel should have been careful to give the expert literally *all* the facts at counsel's disposal without editing or screening. Some of the facts may be unimportant, but it is for the witness to make this judgment on the basis of his or her expert knowledge, not for counsel. Important or unimportant, the prosecutor may well confront

the witness with any particular fact on cross-examination at the trial, and the witness should not be left in the graceless posture of having to make a pressured latter-day judgment about its importance *vel non*.

When facts are contested, counsel should fully inform the expert concerning the prosecutor's version of the facts as well as the defense version. It is predictable that the prosecutor will ask the expert at trial whether his or her opinion would change if *x* fact were changed or if *y* fact were changed. Counsel should have asked the expert these questions on dry-run examinations, and the expert should have a ready answer at trial.

Counsel should also explain to the expert the process of impeachment by the use of standard or reputable texts (see § 31.09 seventh and eighth paragraphs *supra*) and should have the expert identify for counsel the texts most likely to be used by the prosecutor. Counsel and the expert should go through these together, anticipating the sorts of questions that might be based on them.

Finally, counsel should take the expert through a detailed review of his or her pretrial report and should conduct a mock cross-examination to identify any vulnerabilities in it and to hammer out the best way to deal with each of them.

Part D. Character Witnesses

§ 33.17 RULES GOVERNING THE PRESENTATION OF CHARACTER TESTIMONY

The rules governing proof of character in a criminal or delinquency case are complex and not very sensible. Subject to local variation, they may be summarized as follows:

(1) The prosecution cannot open the issue of character. That is, it may not present evidence when the sole purpose of that evidence is to show that the respondent is a bad person and for that reason is probably guilty of this offense. See § 30.07(a) *supra*.

(2) The defense can, however, elect to make an issue of character by proving that the respondent is a good person and, accordingly, is probably not guilty of the offense.

(3) Defense evidence of good character is restricted, both in regard to subject and in regard to permissible form:

(i) The defense must address its character evidence to specific traits called in question by the charge against the respondent. It could appropriately prove the trait of honesty in defense of a prosecution for fraud but not for assault and battery. It might prove the traits of "peace and good order" against assault and battery but not fraud.

(ii) These traits must be proved by a time-honored ritual. The witnesses called to prove them may testify only about the respondent's reputation for these traits in a community where the respondent lives or is known. The witnesses may not testify about their own opinions of the respondent or about any specific good deeds or acts of the respondent's that exemplify the character trait in question. What is called "character evidence" is thus essentially reputation evidence. (FED. RULE EVID. 803(21) (2016) and its state counterparts provide that "[a] reputation among a person's associates or in the community concerning the person's character" is admissible hearsay. The traditional limitation of proof-of-character to reputation evidence has been relaxed to some extent under the Federal Rules and in States that have adopted this feature of FED. RULE EVID. 405 (2016) ("Methods of Proving Character"). Rule 405 currently provides:

"(a) *By Reputation or Opinion.* When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

"(b) *By Specific Instances of Conduct.* When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.")

(4) In rebuttal, the prosecution may do two things:

(a) It may cross-examine the respondent's character witnesses. Since they have purported to testify about the respondent's general community repute, they may be asked about any bad rumors concerning the respondent that they may have heard. In this context some jurisdictions suspend the usual rule barring the introduction of a respondent's prior juvenile adjudications and even the universal rule excluding evidence of a respondent's prior arrests, and permit the prosecution to ask defense character witnesses on cross-examination whether the witness has heard that the respondent was arrested or adjudicated a delinquent or did a specified evil deed on a specified date. *See Michelson v. United States,* 335 U.S. 469 (1948). However, the trial judge has discretion to preclude inquiry into particular prior adjudications or disreputable acts on a finding that their disclosure would be substantially more prejudicial than probative (see § 30.03(c) *supra*), and there are appellate cases holding that the admission of inquiries into stale or especially inflammatory priors is a reversible abuse of discretion. *See*, *e.g.*, *Commonwealth v. Feliz*, 2015 WL 9320079 (Pa.

Super. 2015).

(b) The prosecution may also present evidence independent of the defense character witnesses. It may prove that the respondent's reputation for the trait in question is bad. Traditionally, it may prove adverse rumor and nothing else. (However, that restriction has been loosened in federal trials by the provisions of Federal Evidence Rule 405 quoted in subsection (3)(b) *supra* and in some States. This aspect of Rule 405 is less widely copied statewise than much else in the Federal Rules.)

§ 33.18 QUALIFICATIONS AND FORM OF EXAMINATION OF CHARACTER WITNESSES

The following are the traditional qualifications for a character witness:

(a) That the witness knows the respondent.

(b) That the witness is familiar with some community where the respondent is well known (neighborhood, school, work, church) and where, if the respondent had bad character in the dimension to which the witness speaks, the respondent's bad character would be known.

(c) That the witness has discussed the respondent with other people on numerous occasions. (If s/he cannot say "more than a half-dozen," s/he will probably not be permitted to testify in many localities.)

(d) That those conversations have related to the character trait in question, which is germane to the offense with which the respondent is charged.

These qualifications, together with the very small amount of substantive evidence that the witness is permitted to give, are elicited by a set of standard questions, which differ somewhat on a local basis but generally run as follows:

(1) Please state your name for the record.
(2) Where do you live, [Mr.] [Ms.] . . . ?
(3) What is your occupation?
(4) Where do you work?
(5) Do you know . . . , this respondent?
(6) For how long have you known [him] [her]?
(7) Have you seen [him] [her] often during that time?
(8) What is the nature of your acquaintance?
(9) Do you know other people who know [him] [her] in . . . [*designating the appropriate community, on the basis of the answer to the previous question*]?

(10) Have you had occasion to discuss with these people [respondent's] reputation for [*e.g.*, "peace and good order"]?
[(11) And have you also heard these people discuss [respondent's] reputation for [*e.g.*, peace and good order] among themselves?]
(12) How frequently?
(13) What is [respondent's] reputation for [*e.g.*, peace and good order]?

§ 33.19 CHOICE OF THE CHARACTER WITNESS

In a bench trial in a delinquency case, character testimony provides an invaluable opportunity to convey certain important messages to the judge. Many judges assume that any child who has been charged with a delinquency offense, whose case was not diverted by the prosecutor or the probation office, probably is so unruly at school or has such a long record that s/he needs court intervention. Judges who subscribe to this view may be prone, consciously or unconsciously, to return a conviction in order to ensure that the respondent receives the rehabilitative services which the judge (correctly or incorrectly) assumes that the respondent needs.

Through careful selection of character witnesses, counsel can correct these negative assumptions. If a teacher or guidance counselor from the respondent's school testifies, even if s/he testifies only to the limited information permitted from character witnesses, the judge will infer that the teacher's willingness to come to court on the respondent's behalf signifies that the respondent is a good student (with all that that implies: good attendance, good behavior, and good grades). The presentation of an employer or athletic coach or community center counselor will inform the judge that the respondent is involved in beneficial activities outside of school and thus may not need court intervention. Finally, in jurisdictions that allow the prosecutor to cross-examine character witnesses about the respondent's juvenile adjudications, the prosecutor's failure to do so will alert the judge to the fact that the respondent has no prior record. It should be noted that, in many jurisdictions, these favorable aspects of the respondent's character and record can also be presented to a judicial trier of fact through a motion for diversion. See Chapter 19.

In a jury trial the trier of fact will be far less sophisticated about the implications of the character witnesses for the respondent's general adjustment at school, at home, and in the community. To jurors a character witness's real significance is as a presence standing up for the respondent – someone who has enough faith in the respondent to vouch for him or her. The witness is not permitted to say this, but s/he can look it. Character witnesses must be expressive. They, more than other witnesses, must be sympathetic. Prestige is desirable, but it must be coupled with likeableness.

There should be at least two character witnesses, preferably three or four. Individuality of character and some differences of types among the witnesses are desirable if the factfinder is not to be bored with the routine patter of the examination.

§ 33.20 PREPARATION OF THE CHARACTER WITNESS

Preparation of character witnesses is more important than it might seem in light of the flimsiness of the testimony they are allowed to give. Good preparation has several aspects:

The nature of the reputation testimony that the witness is being asked to give must be made clear to him or her. Some witnesses cannot seem to get straight that they are not being asked for their personal evaluation or opinion of the respondent. Precisely because the evidentiary rule is arbitrary and rather senseless, it must be carefully explained to the witness. The response of the inadequately prepared character witness – "Have I heard? I *know* the respondent. S/he's as honest as the day is long . . ." – is usually good for some courtroom humor but does the respondent no good. The witness simply gets into a wrangle with the judge, and the value of the exercise is lost.

Counsel must be sure that the witness has had enough contacts with people who know the respondent and that s/he has heard the respondent talked about sufficiently often so that s/he will qualify as a character witness. It is vital to direct the witness's attention to this subject and to the fact that it is going to be asked about in court. Many witnesses who have actually had sufficient contact with the respondent will appear not to have had it if they are not prepared for the standard cross-examination on *voir dire.* The prosecutor will ask the character witness, first, to limit himself or herself to the precise character trait s/he is speaking about – "honesty" – and to tell the court the names of some people with whom s/he has discussed that trait of the respondent, and how it came to be discussed. This will not be easy for the unprepared witness because, thinking under pressure, s/he is likely to give narrow range to the concept of "honesty" and also be trying to remember specific occasions on which *explicit* conversational reference was made to this trait – which will probably have been few. The witness will therefore falter somewhat.

The prosecutor will then move in with the question on precisely how many occasions the witness can recall discussing this specific trait of the respondent's. Thinking literally and having been once stung, the witness will estimate conservatively. Not aware that s/he is likely to be disqualified if s/he answers that s/he has discussed the trait infrequently, the witness will say "three or four times, maybe, that I recall" and thus put himself or herself out of court.

There is no need for this problem to arise. Counsel must make the witness understand that people talk about "honesty" under many other names when they talk about the respondent and also when they act toward the respondent in ways that express confidence and trust. Counsel should elicit specific instances from the witness and give the witness confidence that s/he is on sound ground in recalling that the general sense of the community is that the respondent 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, s/he will be all right. It is usually understandable that s/he will have forgotten the names of another half-dozen persons with whom s/he has discussed the respondent or whom s/he has heard discuss the respondent, and s/he should be encouraged to say this when the prosecutor pushes him or her on cross if s/he believes that it is true. The

important thing is that s/he does not fluster and that s/he continues to assert with confidence the fact that s/he has discussed the respondent's honesty often.

If the respondent has a record and the jurisdiction is one in which the prosecutor is allowed to bring that record out on cross-examination of defense character witnesses, then a character defense is very risky and unlikely to succeed. Should such a defense be put on, the witnesses must be prepared for the questions (1) whether they have heard about each of respondent's arrests and adjudications and (2) whether each arrest or adjudication, if it happened, would change the witness's view of the respondent's character. (The latter question is allowed in many jurisdictions, although the witness is not supposed to be testifying about his or her own view of the respondent. The theory is that the question tests the witness's standards for "honesty" and so forth.) Witnesses should be selected who answer both questions "no," the first with indignation and the second with conviction. Since "have you heard" means "have you heard in the community," there may be no problem in defense counsel's informing the witness of the respondent's record in the course of trial preparation, but the question is a sensitive one.

Even in jurisdictions that allow the prosecutor to bring out the respondent's prior record in cross-examining character witnesses, counsel has a valid ground of objection to questions about arrests or adjudications if: (a) the arrest or adjudication does not bear upon the specific character trait to which the witness has testified (*see*, *e.g.*, *State v. Watson*, 321 Md. 47, 580 A.2d 1067 (1990); *People v. Pratt*, 759 P.2d 676, 683 (Colo. 1988)), or (b) the prosecutor has no sound basis in fact for asserting that there was an arrest or adjudication (*see*, *e.g.*, *id*. at 683-86; *State v. Banjoman*, 178 W. Va. 311, 318-20, 359 S.E.2d 331, 338-40 (1987) (dictum); *cf*. *Barker v. State*, 52 Ark. App. 248, 916 S.W.2d 775 (1996); § 33.09(a) subdivision (1) *supra*). In addition, the trial judge may, in his or her discretion, disallow questions about some or all prior arrests or adjudications as incommensurately prejudicial. See § 30.03 *supra.* In jury trials, counsel should request at sidebar that the prosecutor identify the arrests and adjudications that s/he intends to use so that the judge can rule on their admissibility and can exercise this discretion before the jury hears any questions about the respondent's prior record.

§ 33.21 EXPERT EVIDENCE OF EXCULPATORY PERSONALITY TRAITS; DIMINISHED CAPACITY

In addition to lay reputation testimony, some jurisdictions permit expert testimony in support of a defense theory that the psychological traits of the respondent would make it unlikely for him or her to have committed the crime. This sort of testimony has been received particularly in the area of sex crimes, when the accused is charged with a pedophilic offense and has sought to prove by psychiatric evidence that his or her personality is inconsistent with this type of offense, or when the accused is charged with homosexual rape and offers psychiatric evidence that his or her sexual orientation is exclusively heterosexual, or *vice versa*. A showing might also be attempted, for example, in a homicide case involving extreme violence that the respondent was a passive type incapable of such violence.

This sort of evidence, going to show that the respondent did not do the act charged, should be distinguished from psychiatric or psychological evidence proffered to support the defense sometimes called *partial responsibility* or *diminished capacity.* The latter is presented when specific intent or some other precise mental state is an element of a crime: The defense expert is called to testify that the accused could not or did not form such an intent or such a mental state by reason of mental illness or other incapacitating factors. *See, e.g., United States v. Brawner,* 471 F.2d. 969, 998-1002 (D.C. Cir. 1972) (en banc), and cases cited. While more than half of the States permit persons who are charged with crimes defined in terms of subjective mental elements to adduce expert testimony for this purpose, many other States do not; and the Supreme Court of the United States has held that nothing in the federal Constitution requires a State to admit such "diminished capacity" evidence. *Clark v. Arizona*, 548 U.S. 735 (2006). *But see id*. at 756-65, reserving the question whether, if the prosecution asks the trier of fact to draw a specific factual inference from the accused's behavior (for example, that the accused drove around during pre-dawn hours with his car radio blaring for the purpose of stimulating a 911 call that would lure a police office into an ambush), the accused would have a federal due process right to respond with expert mental-health evidence that made this inference less likely (for example, that the accused suffers from schizophrenia, experiences auditory hallucinations, and plays his car radio at high volume to drown them out); *compare id* at 781-801 (Justice Kennedy, writing for three dissenting Justices and answering the latter question in the affirmative).

The recognition of expert character evidence has thus far been limited to a few jurisdictions, although that of "partial responsibility" has been relatively widespread. *See generally* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 7-6.2 (1989) (Criminal Justice Mental Health Standards: "Admissibility of Other Evidence of Mental Condition"). Resourceful counsel should keep both of them in mind.

Part E. Other Defense Witnesses and Other Aspects of the Defense Case

§ 33.22 ALIBI WITNESSES

The key to establishing credible alibi testimony is to have the witness relate *why* s/he remembers being with the respondent at a specific time and at a specific place. Counsel should lead up to the date of the alibi by developing the relationship between the respondent and the witness and eliciting the times during the course of a week or a month (or within the appropriate pattern of their relationship) that they see each other. Counsel may then move to the month of the crime, pinpoint something unusual or significant that happened during that month, and then focus on the day of the crime, relating the date and the time to the significant happening just described and to the pattern of the witness's daily routine or relationship with the respondent. The nub of the matter is to prove convincingly that the witness can and does remember that particular day and time and could not be mistaken on it. Reference to the weather (which counsel can establish independently by United States Weather Bureau records admissible as business entries), television programs (provable independently by station records), and regular school or work hours (provable by school records, timecards, and other business records) is useful in fixing dates

and times with certainty and apparent extrinsic corroboration.

In cases in which the witness remembers the respondent's clothing, and especially when s/he can cite a good reason for remembering it, counsel will usually want to elicit a description of the clothing that the respondent was wearing when the witness saw him or her – assuming, of course, that this differs from the perpetrator's clothing as described by prosecution witnesses. However, this should not be done when it would seem unrealistic for someone in the witness's position to recall the respondent's attire.

When preparing alibi witnesses, counsel should caution them not to claim to remember things they have forgotten. A standard prosecutorial tactic is to cross-examine alibi witnesses about wholly insignificant details, such as what the witness ate for breakfast or lunch or the precise time of irrelevant events that were not memorable. If the witness professes to have a superhuman memory of these details, the witness's credibility will be impaired not only with regard to the details but also with regard to the substance of the alibi.

§ 33.23 WITNESSES WHO ARE ALLEGED ACCOMPLICES

In the unusual case (see § 10.12 *supra*) when a witness who is an accomplice of the respondent under the prosecution's theory testifies for the defense, counsel should bring out (a) the lack of opportunity for the respondent to coerce the accomplice to testify favorably, (b) the lack of any other motive for the accomplice's favorable testimony, and (c) the potential benefits to the accomplice if s/he testifies against the respondent. These are principally matters to be stressed in closing argument, but they can be argued only if a testimonial basis is laid for arguing them. In some jurisdictions, a respondent is permitted to call an accomplice or other alleged perpetrator to the stand for the purpose of requiring him or her to claim the Privilege Against Self-Incrimination in front of the trier of fact, provided that the respondent has laid a foundation for this tactic by evidence indicating the witness's possible guilt. *See State v. Whitt*, 220 W. Va. 685, 688-89, 696, 649 S.E.2d 258, 260-61, 269 (2007) (trial court violated the defendant's state constitutional right to compulsory process by preventing the defendant from calling an alleged accomplice to the witness stand for the purpose of having her assert a Fifth Amendment privilege in front of the jury: although state law ordinarily precludes a party from calling a witness to the stand "solely for the purpose of exercising his or her Fifth Amendment privilege," an exception applies "where a defendant in a criminal case seeks to call a witness to the stand who intends to invoke his or her Fifth Amendment privilege against self-incrimination and the defendant has presented sufficient evidence to demonstrate the possible guilt of the witness for the crime the defendant is charged with committing.").

§ 33.24 SURPRISE BY A DEFENSE WITNESS

A defense case that appears beautiful in prospect may be marred by unexpected testimony of a defense witness. The best safeguard against this occurrence is careful preparation and the taking of detailed pretrial statements from witnesses. See § 8.12(a) *supra.* Whether statements

should be taken in writing or orally involves a tradeoff. Written statements are usually more effective in impeaching a turncoat witness, but they are also more susceptible to discovery by the prosecution. See § 8.10 *supra.* The judgment should be made by counsel after considering both the sensitivity of the particular witness's information and the likelihood that s/he will change a favorable story that s/he has given counsel before trial. If counsel opts to take oral rather than written statements from witnesses, counsel should make detailed notes of the statements in a form that maximizes their "work product" insulation against discovery. See §§ 5.05, 8.10, 9.13 *supra.*

Whenever counsel has reason to suspect that a witness is unstable or untrustworthy or may have had second thoughts or may have changed his or her story since counsel took a pretrial statement, counsel should question the witness again in the few hours preceding trial. This can be done without alarming or offending the witness – or making the witness's trial testimony go stale – by asking the witness several specific questions about details that go to the heart of his or her story, purportedly for counsel's clarification.

If, notwithstanding all precautions, the witness turns around at trial and presents testimony damaging to the defense, counsel should inform the court that counsel has been surprised by the testimony of the witness and should request permission to impeach the witness. (In jury trials this request should be made at sidebar, and counsel should request that the jury be excused during any colloquy or *voir dire* on the issue.) In some jurisdictions counsel's representation that s/he has been surprised is sufficient to justify a judicial ruling permitting counsel to impeach his or her own witness. In other jurisdictions counsel will need to make an evidentiary showing of surprise. To do this, counsel should proceed as follows:

(1) Ask the witness whether the witness did not make a statement concerning this case to counsel (or to counsel's investigator) on *x* date at *A* place.
(2) Ask the witness whether s/he did not at that time sign (or correct or approve) a written statement relating to the case.
(3) Mark the statement as an exhibit for identification.
(4) Hand it to the witness.
(5) Ask the witness whether s/he recognizes the document.
(6) Ask the witness whether it is not the statement that the witness gave counsel on *x* date.
(7) Read to the witness the portions of the statement that are inconsistent with the witness's trial testimony and ask the witness whether those are not the witness's statements.
(8) Ask the witness whether the witness has not seen counsel on *y* date and on *z* date since giving the statement to counsel on *x* date.
(9) Ask the witness whether they did not discuss the case on *y* date and on *z* date.
(10) Ask whether, in fact, they did not discuss the case this morning just before trial.
(11) Ask whether on any of those occasions the witness informed counsel that s/he was going to change his or her story from that in the written statement made on *x* date.

If the witness denies making the statement, counsel should represent to the court that counsel (or counsel's investigator) did take the statement from the witness, and counsel should offer to testify (or offer to call the investigator to testify) regarding the taking of the statement from the witness. Counsel should, in this representation or testimony, authenticate the statement as that given by the witness on *x* date. Counsel should then offer the statement in evidence.

In the case of an oral statement, of course, items (2) through (7) *supra* are omitted and replaced by counsel's narration to the witness of the witness's words on *x* date; and counsel's or the investigator's representation or testimony must establish the content of the witness's oral statement.

Once the judge determines that counsel has made an adequate showing of surprise, counsel will be permitted to impeach the witness with the prior statement. Of course, if the trial is a bench trial and if counsel has conducted the full line of questioning just described, the trier of fact will already have heard the impeachment. Accordingly, counsel can offer to forgo taking up the court's time by repeating the line of inquiry if the court prefers simply to treat the testimony of the witness on *voir dire* as if it had been taken also on the general issue (that is, on the question of the respondent's guilt or innocence) and to treat the witness's prior statement as admitted for impeachment on the general issue. In a jury trial, counsel will have to repeat the entire set of questions before the jury when it returns to the courtroom, and then pass or read the prior statement to the jury.

§ 33.25 COURT WITNESSES AND HOSTILE WITNESSES

The court has discretion to call witnesses *sua sponte* when the parties have not called them and the testimony indicates that they may have information desirable for the just disposition of the case. The discretion is broad: A trial judge will virtually never be reversed for calling a witness (so long as its examination of the witness is fair and not slanted) or for failing to call one.

Counsel for either side may request that a witness be called as a court witness when the other side has not called the witness and the requesting party is unwilling to accept whatever "vouching-for" responsibility local evidentiary law imposes upon a party calling a witness as his or her own. Court witnesses may be examined as on cross-examination by both parties and impeached by both. *See*, *e.g.*, FED. RULE EVID. 614(a).

Counsel may also request leave of court to call a witness who is shown to be hostile for examination as on cross-examination and subject to impeachment. *See*, *e.g.*, FED. RULE EVID. 611(c); *United States v. Duncan*, 712 F. Supp. 124, 126-27 (S.D. Ohio 1988). Here again, the trial judge has considerable discretion but it is not unlimited. *See*, *e.g.*, *United States v. Bryant*, 461 F.2d 912, 916-19 (6th Cir. 1972). The refusal to permit defense counsel to call and examine persons as hostile witnesses (or "adverse witnesses," in the terminology of some jurisdictions) can be challenged as an abuse of discretion as a matter of state evidentiary law (*State v. Perolis*, 183 W. Va. 686, 687-89, 398 S.E.2d 512, 513-15 (1990)), and, in some circumstances, as a

violation of the state and federal constitutional guarantees of the right to confrontation (*see Chambers v. Mississippi,* 410 U.S. 284, 302 (1973), summarized in § 33.04 *supra*).

The importance of the court-witness and hostile-witness procedures varies greatly from jurisdiction to jurisdiction, depending upon the restrictions to which a party is subject in leading and impeaching his or her own witnesses. When these restrictions are significant, counsel should take the position that all complainants, relatives of complainants, and all police, including informers, "special agents" and other police spies, are *per se* hostile to the defense. *See*, *e.g.*, *United States v. Duncan*, 712 F.Supp. 124, 126-127 (S.D. Ohio 1988) ("a law enforcement official or other investigating agent (regardless of whether he or she be a local, state or federal officer) may qualify as a witness identified with an adverse party in an action brought by the Government against criminal defendants, absent a positive showing by the Government that the witness is not hostile, biased or so identified with the adverse party that the presumption of hostility which is the cornerstone of Fed. R. Evid. 611(c) should not be indulged. Therefore, Defendants' Motion to Invoke Rule 611(c) in direct examination of police officers and government agents is granted."); *Clingan v. United States*, 400 F.2d 849, 851 (5th Cir. 1968) ("Generally, the determination of whether a witness is adverse is discretionary. . . . But when a paid government informer or one acting in concert with law enforcement officers refuses to be interviewed by defendant's attorneys concerning the facts and circumstances surrounding the alleged crime and the government informer has previously discussed his testimony with the prosecution, we believe that a sufficient showing of prejudice to . . . [defendant's] case has been made to permit . . . [defendant's] attorneys to call these witnesses as adverse witnesses. Adversity need not be established only by the demeanor of the witness on the stand where the witness shows an unwillingness to testify except by an order of the Court. A sufficient showing of adversity is made where the witness' interest is on the side of the prosecution to such an extent that he is unlikely to give a true account of the transaction."). As for other witnesses, counsel may profitably attempt to demonstrate (a) personal animosity against the respondent, (b) an extrajudicial statement of the witness incriminating the respondent or (c) a refusal to talk to defense counsel, coupled with some signs of animosity. These and other matters should be developed by examination of the witness (which, in jury trials, should be conducted in the absence of the jury). Most courts will allow counsel to ask the witness leading questions for the purpose of attempting to show his or her hostility. When the witness denies facts that, if admitted, would make the witness hostile, counsel is usually allowed to prove them extrinsically.