


1981

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### Recommended Citation

Roberta R. Kwall, *The Use of Expert Services by Privately Retained Criminal Defense Attorneys*, 13 Loy. U. Chi. L. J. 1 (1981).  
Available at: <http://lawcommons.luc.edu/lucj/vol13/iss1/2>

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# The Use of Expert Services by Privately Retained Criminal Defense Attorneys

Roberta Rosenthal Kwall\*

## INTRODUCTION

Attorneys have an enormous degree of latitude in utilizing expert services during the various stages of the judicial process.<sup>1</sup> The judiciary applies a liberal standard of usefulness.<sup>2</sup> The courts admit expert testimony whenever there is a material issue in a lawsuit involving the expert's particular skill or knowledge, and the expert possesses the kind of skill or knowledge that will assist the jury in arriving at an intelligent decision.<sup>3</sup>

Of course, not every expert with whom an attorney confers during the pretrial preparation stage will eventually testify in court.<sup>4</sup> Regardless of the manner in which an attorney employs a particular expert, an attorney's search for the most authoritative source

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1. In the context of the trial itself, for example, the Federal Rules of Evidence afford a liberal standard of qualification for testifying experts: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702. The rule is phrased broadly so that anyone possessing "specialized knowledge" may come under the rubric "expert witness." See *id.*, Advisory Committee's Note.

This liberal standard of qualification is also generally accepted in state court proceedings. See, e.g., *Kuisis v. Baldwin-Lima-Hamilton Corp.*, 457 Pa. 321, 338-39, 319 A.2d 914, 924 (1974) ("[I]f a witness has any reasonable pretension to specialized knowledge on the subject under investigation he may testify . . .").

2. See Slovenko, *Reflections on the Criticisms of Psychiatric Expert Testimony*, 25 WAYNE L. REV. 37, 64 (1978) [hereinafter cited as Slovenko]. Slovenko notes three unusual examples of expert testimony: "One who has been a psychotic may qualify as an expert on psychosis. A heroin addict may qualify as an expert to testify whether a substance sold was heroin. A funeral director may qualify as an expert on grief." *Id.* (footnotes omitted).

3. H. LIEBENSON & J. WEPMAN, *THE PSYCHOLOGIST AS A WITNESS* 115 (1964) [hereinafter cited as LIEBENSON & WEPMAN]. See FED. R. EVID. 702.

4. Attorneys may utilize an expert simply as "a consultant, to give an independent opinion for use by the attorney or by other witnesses." Ames, *Preparation of the Expert Witness*, 13 TRIAL 20, 23 (Aug. 1977) [hereinafter cited as Ames].

on a given subject is theoretically, limitless.<sup>5</sup> In reality, however, several critical factors constrain the use of expert services: money, time, and the attorney's technique, knowledge, imagination, and skill.

This article explores how these constraints operate to impair the use of expert services by privately retained criminal defense attorneys.<sup>6</sup> The discussion focuses on the use of expert services during the pretrial and sentencing stages of the judicial process.<sup>7</sup> Accordingly, the discussion begins with a hypothetical situation involving a criminal act, and outlines the manner in which a criminal attorney would "ideally" utilize expert services in preparing a defense for the accused. The article then examines both the perceived inadequate use of experts by privately retained criminal defense attorneys and the structural factors in our legal system responsible for this condition, and concludes by suggesting several ways to help eliminate some of the existing impediments to more effective use of expert services.

#### USE OF EXPERT SERVICES IN PREPARING A CRIMINAL DEFENSE: AN IDEALIZED CONCEPTION

The importance of skillful use of expert services by the criminal defense attorney cannot be overstated.<sup>8</sup> Indeed, denying a criminal

5. See Slovenko, *supra* note 2, at 64.

6. Although many of the considerations discussed in this article are also relevant to the problems encountered by public defenders and court-appointed attorneys, this article does not treat these categories of defense counsel.

7. Actual trial strategies relating to the presentation of expert testimony are discussed only to the extent they relate to preparing the expert witness for testifying. Similarly, a discussion of the complex evidentiary rules governing the use of expert testimony at trial is also outside the scope of this article. Some of these evidentiary problems are treated in McCORMICK, EVIDENCE §§ 13-18 (2d ed. 1972 & Supp. 1978) [hereinafter cited as McCORMICK]; Reed, *The Practical Pitfalls in Handling Scientific Evidence*, in SCIENTIFIC AND EXPERT EVIDENCE IN CRIMINAL ADVOCACY 17 (S. Arnold & J. Cedarbaums eds. 1975) [hereinafter cited as Reed]; Comment, *Expert Testimony in Illinois*, 10 LOY. U. CHI. L.J. 503 (1979).

8. Criminal attorneys may find themselves in need of a wide array of experts: psychiatrists, psychologists, pathologists, ballistics investigators, forensic scientists, and criminologists are among those types of experts most frequently used by criminal attorneys. See generally Reed, *supra* note 7. The role such individuals play in the trial process is considerable:

In many instances [the expert witness] carries more responsibility at trial than an ordinary witness. . . . He applies his knowledge, experience and skills to facts to draw inferences that the fact finder, be it a judge or jury, could not intelligently draw on its own. Indeed, by using the tools of his profession to render opinions that are admissible evidence, the expert often determines the outcome of cases.

Comment, *Expert Witness Fees: Proposals for Change in Pennsylvania*, 83 DICK. L. REV. 315, 321 (1979) [hereinafter cited as Comment, *Expert Witness Fees*].

defendant certain essential expert services may even constitute a violation of the right to *effective* assistance of counsel, which has been grafted onto the sixth amendment's mandate.<sup>9</sup> Based on a variety of instructive articles that have been written for the criminal attorney regarding the use of expert testimony and services, it is possible to construct a detailed account of the manner in which an effective attorney would "ideally" use expert services in preparing a criminal defense. By way of illustration, the hypothetical situation set forth below<sup>10</sup> is used as a vehicle for describing the relevant strategies, and demonstrates the painstaking effort that defense counsel should expend in working with their experts. Accordingly, the reader is asked to make the unrealistic (at least in the majority of cases) assumption that unlimited funds are available for defense counsel's use.<sup>11</sup>

Defendant Richard Allen, an eighteen-year-old mail clerk, has been charged with murder and rape. The facts are as follows: On Friday evening, September 5, 1980, Mr. and Mrs. John Woodruff were sitting on a park bench in Washington Park (Any City, U.S.A.). According to Mrs. Woodruff's statement to the police,

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Defense attorneys may need expert witnesses even more than do prosecutors:

[W]e must face the fact that the social setting in which criminal proceedings take place give the prosecution a great advantage. All the respectable people are for the prosecution. . . . On the other hand, defense counsel, generally speaking, enjoy a very poor reputation. . . . This low status that the community assigns to the criminal lawyer is a blow to the adversary system. The popular advantage in litigation is heavily on the side of the prosecution.

Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW. 25, 26 (May, 1961) [hereinafter cited as Steinberg & Paulsen]. Assuming the observations of criminal defense attorney Harris B. Steinberg still contain a measure of truth, defense counsel should engage in even more painstaking preparation than the prosecution in order to compensate for this imbalance.

9. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense"); *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970) ("It has long been recognized that the right to counsel is the right to effective assistance of counsel").

See Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 826 (1976) [hereinafter cited as Bazelon]: Comment, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 CORNELL L. REV. 632, 641 (1970) [hereinafter cited as Comment, *The Indigent's Right to an Adequate Defense*] ("If the 'assistance' of the sixth amendment guarantee is emphasized in conjunction with necessities of effective representation, then the concomitant services of experts and investigators must be supplied."). *But see* *State v. Crose*, 88 Ariz. 389, 357 P.2d 136 (1960) (no constitutional obligation for state to fund expert services).

10. Both the hypothetical situation presented in the text and the names contained therein are fictional.

11. In reality, financial difficulties are one of the major obstacles encountered by privately retained criminal defense attorneys. See notes 93-99 *infra* and accompanying text.

around 11:00 p.m., a "rather bizarre" youth walked by them, abruptly turned around, and lunged at her husband, stabbing him three times with a switchblade. As Mrs. Woodruff jumped up from the park bench to try to aid her husband, the youth pushed her, causing her to fall and knock her head against the park bench.

Police found the couple around 12:30 a.m. A switchblade covered with blood was found nearby. Mr. Woodruff was dead, and Mrs. Woodruff still unconscious. Her blouse was ripped open and her pants and underwear were pulled down. She was rushed to a nearby hospital where she was treated for her head injury (a mild concussion) and given an internal examination. According to the hospital report, she had been raped while she was unconscious.

The evening of the attack, at approximately 11:45 p.m., two police officers in a patrol car relatively near the scene of the crime spotted a young man (Richard Allen) staggering through the streets. When they got closer to him, they observed that he had a glazed expression and that his shirt was covered with blood. According to the policemen, he "babbled incoherently." Allen was searched and taken into custody. The precinct then sent out another patrol car to survey the area, at which time the bodies of Mr. and Mrs. Woodruff were found.

The following evening, Mrs. Woodruff, still somewhat disoriented and in shock from her husband's death, went to the police station and identified Allen as her husband's assailant. She selected him from a lineup of five males.<sup>12</sup> By this time he appeared "relatively normal." He had no recollection of the past evening's events, could not explain his blood-soaked shirt, and could not understand why he was being held in custody. Moreover, he insisted that he had never seen Mrs. Woodruff before the lineup.

After Allen was arraigned the next morning, he retained a friend, Lorraine Bellows, to represent him. He was subsequently indicted for the murder of John Woodruff and the rape of Margaret Woodruff. During his initial conference with Bellows, Allen admitted to Bellows that the last thing he remembered about the evening of September 5th was swallowing a capsule of P.C.P. ("angel dust") for "kicks."

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12. Under *Kirby v. Illinois*, 406 U.S. 682 (1972), Allen's lack of representation by counsel at the lineup stage is not an issue, since adversary proceedings had not yet been initiated against him.

*General Considerations In Working With Experts*

## 1. Selecting the Expert Witnesses

Bellows would want to obtain, as soon as possible, the services of at least seven types of experts to assist her in preparing Allen's defense: (1) a serologist or blood expert; (2) a medical doctor; (3) a forensic scientist; (4) a pathologist; (5) a psychiatrist; (6) a psychologist; and (7) a criminologist.<sup>13</sup> Selecting these experts at an early stage of the proceeding is crucial. During the preliminary phase of litigation, the trial attorney requires the almost constant guidance of an expert to aid the attorney in understanding the real nature of the controversy and its scientific aspects.<sup>14</sup>

There are several means of locating an expert witness. A good place for Bellows to begin is the nearest college, university, or medical school maintaining a department in the desired discipline.<sup>15</sup> Alternatively, she might want to check medical society listings or even the advertisements in legal periodicals.<sup>16</sup> In making her selections, Bellows should carefully consider the expert's area of specialization, even within his field.<sup>17</sup> If an expert overextends his competence, he risks not only embarrassment for himself and counsel, but also an unfavorable verdict.

Counsel should also consider the expert's professional reputation. Bellows should thoroughly investigate all prospective experts,

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13. This list is not intended to be comprehensive. Indeed, any given case may require the services of other experts such as investigators, polygraph specialists, probation officers, etc. For purposes of this analysis, however, the discussion will be confined to the seven experts enumerated in the text.

14. Ames, *supra* note 4, at 23. "The attorney also needs the help of the expert in preparing to defend against the adversary's position. Specifically, he will need the counsel of his own expert in determining how, and on what subject matters, to cross-examine the expert of the other side." *Id.* Additionally, the early involvement of an expert such as a psychiatrist or criminologist may result in a dismissal of the charges. See Cohen, *How and Why to Use Experts at Sentencing: A Comment*, 15 CRIM. L. BULL. 151, 156 (1979) [hereinafter cited as Cohen] (in juvenile or family court proceedings, "[i]f counsel can obtain the services of a criminologist . . . he may even be able to keep the matter at the police level and avoid the filing of a petition"); Shlensky, *Psychiatric Expert Testimony and Consultation*, 24 MED. TRIAL TECH. Q. 38, 39 (1977) [hereinafter cited as Shlensky] ("A sensitive prosecutor may forego indictment if convinced by expert information that mental illness is a part of the picture and that treatment is both indicated and being undertaken").

15. Such departments could either refer Bellows to qualified experts available for consultation or inform her of other sources that could provide this information. See Cohen, *supra* note 14, at 155; G. HAUGEN, *THE PSYCHIATRIST AS A WITNESS* 17 (1966) [hereinafter cited as HAUGEN]; Shlensky, *supra* note 14, at 42.

16. Shlensky, *supra* note 14, at 42.

17. HAUGEN, *supra* note 15, at 12; LIEBENSON & WEPMAN, *supra* note 3, at 257.

especially those whom she intends to call as witnesses during the trial. Such an investigation is necessary not only to assure that the potential expert is of a high caliber, but also to prevent the adversary from surprising the expert with damaging evidence when he is on the stand.<sup>18</sup> A thorough attorney should not only explore the potential witness's reputation among his peers, but also tactfully question the witness regarding any prior bankruptcy difficulties, criminal records, arrests, and involvement in professional disciplinary proceedings.<sup>19</sup> In addition to the expert's professional reputation, Bellows should consider those attributes which would enable a particular expert to make a good impression in the courtroom.<sup>20</sup> Previous courtroom experience is also useful, although certainly not essential.<sup>21</sup>

Finally, Bellows must allow each expert to work with complete professional objectivity and to write his reports and recommendations as the facts of the case require.<sup>22</sup> Although she may acquaint an expert with several aspects of the case in order to receive a tentative opinion before the expert writes his report,<sup>23</sup> under no circumstances may she compel or obligate an expert to reach a particular conclusion.<sup>24</sup> An unfavorable report is not necessarily bad.<sup>25</sup>

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18. Particularly devastating evidence could relate to something questionable in the expert's past, or a previously expressed viewpoint inconsistent with the opinion proffered at trial. Thus, counsel's investigation must include a review of the potential witness's records of his prior professional associations, engagements, and experiences as an expert witness. Counsel should determine the number and types of court proceedings in which the expert has previously participated and if possible, procure transcripts of his prior testimony. Any articles or books written by the potential witness (or even for him or under his name) or speeches presented by him should also be checked for expressions of contrary opinions. Ames, *supra* note 4, at 22, 26-27.

19. *Id.*

20. Ideally, an expert witness should "be able to project his personality and knowledge to the court and jury," "make a nice appearance," and possess the mettle to "stand up for his opinions." LIEBENSON & WEPMAN, *supra* note 3, at 258. Haugen maintains that, "[f]rom a practical point of view, an attorney may at times have to weigh the long experience in a particular field of one . . . against the good courtroom impression made by another—unless he has funds to obtain both." HAUGEN, *supra* note 15, at 19.

21. LIEBENSON & WEPMAN, *supra* note 3, at 258.

22. Dash, *The Defense Lawyer's Role at the Sentencing Stage of a Criminal Case*, 54 F.R.D. 315, 324 (1972) [hereinafter cited as Dash].

23. See Browning, *The Psychiatric Expert*, 15 TRIAL 36, 37 (Feb. 1979) [hereinafter cited as Browning].

24. See Ames, *supra* note 4, at 25; Dash, *supra* note 22, at 324; Schwartz, *The Proper Use of a Psychiatric Expert*, in EVIDENCE IN CRIMINAL ADVOCACY (S. Arnold & J. Cederbaums eds.) (1975) at 99 [hereinafter cited as Schwartz].

25. "If nothing else, a negative conclusion . . . disposes of [the] issues and directs the attorney to the other paths he must follow. Such a report will also show that the attorney

Moreover, the decision to use a particular expert's services at trial is not irrevocable, because counsel may suppress the unhelpful or adverse reports of experts whom she has consulted in preparation for trial.<sup>26</sup>

## 2. Preparing the Expert Witnesses

After Bellows has selected her experts, she will have to spend many hours acquainting herself with the relevant scientific principles. Attorneys working with scientific evidence tend to be overawed by the scientific aspects of the case, and thus need to become as familiar as possible with the science in order to avoid overvaluing such evidence.<sup>27</sup> Indeed, counsel cannot effectively prepare the witness unless she understands completely both the expert's theory and the theory's professional acceptance.<sup>28</sup>

At a preliminary conference with each of the experts, Bellows should furnish them with information regarding Allen's case and determine what additional information each expert will require to complete his report.<sup>29</sup> Bellows should cooperate fully in providing her experts with pertinent data and materials, because maximum disclosure on her part will generate more convincing expert reports.<sup>30</sup> Moreover, a well-informed expert frequently will explore

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has pursued all reasonable endeavors in his client's behalf." Schwartz, *supra* note 24, at 99.

26. Slovenko, *supra* note 2, at 61. See also Dash, *supra* note 22, at 325. In responding to whether an attorney must disclose an expert's presentencing report containing information unfavorable to his client, Dash notes that "[u]nder ABA opinion 287 . . . , the defense lawyer may not be required to make such a disclosure, and without his client's consent, the lawyer is probably under a duty not to disclose."

It is thus easy to see how a courtroom can turn into a battleground for expert witnesses. See Slovenko, *supra* note 2, at 60. To avoid this result, McCormick advocates the use of impartial experts appointed by the court and suggests the possibility of a conference among the experts to resolve the relevant issues and narrow the controversies. MCCORMICK, *supra* note 7, at § 17. See also Uniform Act on Expert Testimony; Ordover, *Expert Testimony: A Proposed Code for New York*, 19 N.Y.L.F. 809, 824-26 (1974).

27. Reed, *supra* note 7, at 18.

28. See Ames, *supra* note 4, at 27. "The lawyer must recognize that in any field of learning, there is generally more than one theory on any issue and none of them may be considered gospel, closed to question by representatives of another school of thought." See also HAUGEN, *supra* note 15, at 18; Browning, *supra* note 23, at 37-38 (the attorney "must work with the . . . [expert] in compiling a bibliography of books and treatises relating to the general area."); Kelner, *On Expert Testimony*, 51 N.Y. St. B.J. 186, 216 (1979) [hereinafter cited as Kelner]; Watson, *Untying the Knots*, in EXAMINING THE MEDICAL EXPERT: LECTURES AND TRIAL DEMONSTRATIONS 15-16 (A. Sugerman ed. 1969) (collaborative research on pertinent information by attorney and expert is "of primary importance").

29. See Ames, *supra* note 4, at 23.

30. Among the materials that must be made available to the experts are a list of all parties and participants in the litigation, the pleadings and other pertinent documents, a



ideas overlooked by the attorney, as well as provide insight into areas related to his specialty in which he has acquired expertise over the years.<sup>31</sup>

Bellows must work on an on-going basis with every expert whom she intends to call as a witness during the trial.<sup>32</sup> Specifically, counsel must not only review with her experts all of the questions she intends to ask on direct examination,<sup>33</sup> but also teach the experts how to address the jury.<sup>34</sup> Each expert should rehearse his presentation in front of the attorney so that together they can smooth out any rough spots before the actual trial.

Counsel must also prepare the expert witnesses for the rigors of cross-examination.<sup>35</sup> All prospective witnesses must be told that the opposing attorney may attack their qualifications and opinions, or may attempt a showing of interest.<sup>36</sup> Bellows should play

chronology of the relevant facts, and copies of every important deposition and trial exhibit. See Ames, *supra* note 4, at 23-24, 26; Browning, *supra* note 23, at 37; Schwartz, *supra* note 7, at 99, 101; Steindler, *Lawyer and Expert: A Cooperative Exercise*, 12 TRIAL 46, 47 (July 1976) [hereinafter cited as Steindler]. ("[I]t is best for all concerned if the lawyer presents the case to the expert and lets the expert tell [her] just what he wants to see, examine, test, or study").

31. "The expert should also be used to develop other sources of helpful materials, such as trade publications, that the average attorney and certainly the average layman is not aware of, but which are found in scientific or trade association libraries." Ames, *supra* note 4, at 24.

32. Browning, *supra* note 23, at 37. See also Ames, *supra* note 4, at 28; Shlensky, *supra* note 14, at 43.

33. HAUGEN, *supra* note 15, at 19; A. Bowman and B. Bowman, *Defense of a Homicide Case*, in III CRIMINAL DEFENSE TECHNIQUES (1980) § 50.03(3) [hereinafter cited as Bowman & Bowman]; See Ames, *supra* note 4, at 25:

Counsel must [also] consider whether it is advisable to prepare a witness-sheet to outline the expected testimony of the witness, and, if so, whether to show it to the witness in advance of his appearance on the stand.

The obvious advantage is that it expedites and clarifies the presentation of the opinion of the witness.

The obvious disadvantage is that if the witness concedes that he has looked at it in advance of his testimony, in order to refresh his recollection and to prepare himself to testify, counsel and witness will then have to produce it on demand by the other side.

Additionally, counsel should review the expert's entire file as a precautionary matter before the witness testifies. *Id.* at 28 ("There may be any number of damaging items which the oppositon may come across if and when they ask and are given leave to check over the expert's file").

34. Bellows should instruct her experts to adhere to certain basic procedures when testifying before a jury, such as always speaking in terms of the exhibit numbers and refraining from talking while counsel is passing out photographs or other objects.

35. Ames, *supra* note 4, at 23.

36. Kelner, *supra* note 28, at 216. In order to prevent subjecting an expert to a charge of partiality, counsel must not only insure that the expert is truly objective, but also compen-

“devil’s advocate,” attacking her experts’ arguments as she foresees the prosecutor will.<sup>37</sup> The experts should be encouraged to take exception to the lawyer’s postulations and to “thrash out the subject matter, just as [they] will be expected to do later in court.”<sup>38</sup> Additionally, if a particular prosecutor has been assigned to Allen’s case, Bellows should try to obtain a transcript of one of his/her former trials to enable her witnesses to get a preview of that prosecutor’s technique.<sup>39</sup>

Counsel should instill as much confidence as possible into her witnesses. Every witness should be cautioned against displaying unwarranted modesty.<sup>40</sup> Moreover, Bellows should make a preliminary agreement with each expert witness that, in the event the prosecutor asks him something he does not appear to know (but as a qualified expert *should* know), she will ask him on redirect why he did not know the answer. A prosecutor, sometimes will resort to the use of tricks to produce a distorted impression, thus leaving the expert with no answer.<sup>41</sup> An opportunity to explain on redirect will expose these tricks and bolster the witness’s image and confidence.

Even if an attorney takes the utmost care in preparing her witnesses for testifying, the cross-examination can be an unpleasant experience for many witnesses. Bellows can use certain techniques to mitigate her witnesses’ discomfort, however, thus insuring their cooperation during the remainder of the Allen proceeding as well as in subsequent cases. Counsel should assure all of her experts *before* they take the stand that she will not allow the cross-examiner to “mop up the courtroom floor” with her witness.<sup>42</sup> She

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sate him in a manner “commensurate with the time and effort expended in the particular case, the difficulty of the case, and his usual professional charges.” Ames, *supra* note 4, at 22.

37. Counsel should “look for weaknesses, try to strengthen soft spots, and assess the ability of [her] witness to withstand cross-examination.” Schwartz, *supra* note 24, at 109.

38. Ames, *supra* note 4, at 24.

39. Bowman & Bowman, *supra* note 33, at § 50.03(3).

40. “[C]ounsel must admonish [her] witness in advance that he is indeed an expert, and that the court will undoubtedly permit him to express his opinions as an expert, and that when asked whether he is an expert, he should be prepared to concede that indeed he is.” Ames, *supra* note 4, at 25.

41. Shlensky, *supra* note 14, at 44.

42. Browning, *supra* note 23, at 38:

It is amazing how rapidly the testimony of an expert can change during cross-examination if the expert feels he has been “abandoned” on the stand. Some experts are better able to parry and thrust on cross-examination than others; therefore, the degree of protection necessary must be carefully gauged by the attorney,

should also use the recesses in her experts' testimony to boost their confidence.<sup>43</sup> Moreover, because any expert who is the subject of a rigorous cross-examination will need a break sooner or later, counsel should be sensitive to her experts' level of fatigue and request a recess whenever appropriate.

### 3. Post-Trial Use of Experts

No amount of diligent preparation can insure an acquittal for Allen. Beyond a certain point, his fate is in the hands of the trier of fact. If Allen is found guilty of raping Mrs. Woodruff and/or murdering Mr. Woodruff, then Bellows must direct her attention to obtaining the most suitable sentencing alternative.<sup>44</sup> In imposing a sentence, the judge will want to consider factors such as predictions of dangerousness, the treatment or rehabilitation potential of the offender, the limited resources of the correctional system, retribution, and the political realities of the sentencing process.<sup>45</sup> Bellows must be prepared to introduce evidence relevant to these considerations if she is to represent her client effectively at the sentencing stage. Rather than rely exclusively on the probation department's investigation,<sup>46</sup> counsel must thoroughly investigate the relevant facts and try to construct a positive program of rehabilita-

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and will vary from case to case.

*Id.*

43. "A pat on the back by counsel and a verbal assurance that the cross-examiner 'has not laid a glove' on the . . . [expert] will do much to insure the expert's continued performance on the stand." *Id.* See also HAUGEN, *supra* note 15, at 25; Slovenko, *supra* note 2, at 60; Steindler, *supra* note 30, at 48.

44. "In order to provide effective assistance to . . . [her] client the defense lawyer must be prepared to present to the court the most favorable facts relating to . . . [her] client's life history, employment record and opportunities, and his potential and prospects for rehabilitation." Dash, *supra* note 22, at 316. See also ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION § 8.1 & Commentary (Approved Draft, 1971) [hereinafter cited as THE DEFENSE FUNCTION]; ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES § 5.3 & Commentary (Approved Draft, 1968) [hereinafter cited as ABA SENTENCING ALTERNATIVES].

45. Rodgers, Gitchoff, & Paur, *The Privately Commissioned Pre-Sentence Report: A Multidisciplinary Approach*, 2 CRIM. JUST. J. 271 (1979) [hereinafter cited as Rodgers, Gitchoff & Paur].

46. Unless it is a particularly notorious case, the probation department, with its limited resources and often staggering case load, frequently is not able to adequately assess the needs of the offender. The probation officer who prepares the pre-sentence report, like the judge, is subject to time and organizational pressures. The resulting recommendation is usually based on a traditional sentencing model. This, unfortunately, too often results in a recommendation of unnecessary institutionalization. . . .

Rodgers, Gitchoff & Paur, *supra* note 45, at 271-72.

tion.<sup>47</sup> Undoubtedly, she will want to call on some or all of her experts to assist her in this endeavor.

### *Using Specific Expert Services In Preparing A Defense*

The foregoing discussion sets forth some general guidelines to which Bellows should adhere in dealing with all types of experts. The discussion which follows examines the specific avenues of expert investigation she would want to pursue in preparing Allen's defense.

#### 1. The Forensic Serologist or Blood Expert

The services of a forensic serologist or blood expert would be valuable to Bellows in defending Allen against both the murder and rape charges. The forensic serologist can type and compare the blood stains on Allen's shirt with the blood stains on the deceased's shirt. He can also compare the blood group and type of both Allen and the deceased.<sup>48</sup> Although the prosecution undoubtedly will perform these tests as well, and probably will seek to introduce Allen's shirt into evidence as an exhibit if the tests reveal that the shirt stains contain the same blood type and match that of the deceased,<sup>49</sup> Bellows should hire her own expert as soon as possible to make this determination. If, by some chance, the blood type on Allen's shirt is found to be dissimilar to that of the deceased, Bellows will have some basis for proving Allen's innocence at trial, or perhaps for getting the charges dismissed.<sup>50</sup> Alterna-

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47. See ABA SENTENCING ALTERNATIVES, *supra* note 44, at § 5.3(f)(v) ("In appropriate cases, the attorney should make special efforts to investigate the desirability of a disposition which would particularly meet the needs of the defendant, such as probation accompanied by employment of community facilities or commitment to an institution for special treatment") and Comment n at 250. See also text accompanying note 112 *infra*.

48. R. Stone & I. Stone, *Scientific Evidence in Rape Cases*, 41 Tex. B.J. 517, 518 (1978) [hereinafter cited as Stone & Stone].

49. Although blood typing tests performed on stains on garments are "most probative when used in the negative sense" (i.e., when a dissimilarity results), some jurisdictions allow the admissibility of blood grouping evidence supporting "positive" as well as "negative" results. *Id. See, e.g., Sneed v. State*, 356 S.W.2d 785 (Tex.), *cert. denied*, 371 U.S. 843 (1962). "This recognition of the relevancy of the use of blood grouping evidence in the 'positive' application provides the basis for the admission of bloody garments into evidence which often times would be excluded in favor of the general rule of excluding inflammatory pieces of evidence." Stone & Stone, *supra* note 48, at 518. See, e.g., *Brown v. State*, 475 S.W.2d 938 (Tex. Cr. App. 1971); *Slater v. State*, 336 S.W.2d 163 (Tex. Cr. App. 1960).

50. The only concrete connection of Allen to the murder (assuming the fingerprints on the switchblade are not usable) would then be Mrs. Woodruff's identification, which can be questioned as to its reliability in view of her mental state at the time. See notes 79-81 *infra* and accompanying text.

tively, if Allen and the deceased have different blood types and the blood type on Allen's shirt matches that of the deceased, Bellows will probably want to investigate immediately the feasibility of an insanity defense. Regardless of the results the tests ultimately yield, time is of the essence in getting an expert to make these determinations.

Leaving aside for the moment the murder charge, Allen's commission of the rape can be proved, according to the facts outlined above, only by circumstantial evidence. Assuming that the prosecution does not have any solid evidence pointing to Allen, Bellows can attempt to exonerate her client by requesting her forensic serologist to try to identify the blood type of the rapist. The majority of the population have the ability to secrete a substance into body fluids, such as seminal fluid, which identifies their blood type.<sup>51</sup> Thus, the forensic serologist would first test Allen's ability to secrete this substance and would then compare those test results with the results from a secretor analysis performed on available specimens of the rapist's seminal fluid. Two possible specimens with which he could work are Mrs. Woodruff's vaginal specimens taken during her examination at the hospital<sup>52</sup> and, assuming their existence, the vaginal stains Mrs. Woodruff secreted on her underwear after the rape.

Bellows can also ask her expert to perform some additional tests on the seminal fluid specimens. Stains containing seminal fluid can be analyzed for determining the presence of enzymes PGM and

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51. Approximately 80% of the population have this secreting ability. Stone & Stone, *supra* note 48, at 518.

52. Because seminal fluid in the vagina undergoes dilution in a matter of hours, the vaginal specimen must be obtained promptly if a secretor analysis is to be successful. *Id.* at 524.

It should be noted, however, that the results of secretor analysis are not admissible in all jurisdictions, and a preliminary hearing may be necessary to establish an adequate basis for this or any other type of scientific test. *See, e.g.,* People v. Robinson, 27 N.Y.2d 864, 865, 265 N.E.2d 543, 543 (1970):

Proof that defendant had type "A" blood and that the semen found in and on the body of decedent was derived from a man with type "A" blood was of no probative value in the case against defendant in view of the large proportion of the general population having blood of this type and, therefore, should not have been admitted.

*But see* State v. Alexander, 339 So.2d 818 (La. 1976) (if secretor analysis had been available in Louisiana at the time of this case, the failure to perform such tests would go only to sufficiency of the evidence); McGilvray v. State, 533 S.W.2d 24 (Tex. 1976) (secretor evidence admitted) and discussion of these cases in Stone & Stone, *supra* note 48, at 518-20. Even if the evidence could not be introduced in court, any information the secretor analysis yields would be of invaluable assistance to Bellows in planning her defense strategy.

peptidase-A. The forensic serologist can then compare his findings on the stain with specimens from the suspect.<sup>53</sup> Further, certain genetic markers may appear in seminal fluid which may be helpful in associating a seminal stain more positively with a particular person.<sup>54</sup>

## 2. The Medical Doctor

If possible, Bellows should have the defendant examined by a medical doctor before the defendant has had a chance to shower. Sometimes a doctor can determine whether a male recently has engaged in an act of intercourse or has had an emission.<sup>55</sup> Although by the time an examination of Allen occurs it is probable that any indication of intercourse will have been lost,<sup>56</sup> Bellows may nevertheless want to order such an examination in her effort to learn as much as possible about Allen's case. Bellows should also ask the doctor if it is possible to discover, through testing, vestiges of P.C.P. in a person's system several days after he ingested the drug.

Further, Bellows should ask a doctor, preferably a drug specialist, to complete a report regarding the effects of P.C.P. on the human body. Specifically, the report should include information on whether a male who has ingested P.C.P. is capable of maintaining an erection and ejaculating. Bellows should try to get some idea from Allen as to the amount of P.C.P. he ingested on the evening in question, because the doctor must establish his findings "with reasonable medical certainty."<sup>57</sup>

## 3. The Forensic Scientist

The prosecutor probably will have collected hair samples and other pieces of evidence<sup>58</sup> in his effort to convict Allen. Bellows

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53. Stone & Stone, *supra* note 48, at 522. These enzymes can be determined in stains only for approximately one month.

54. *Id.* at 521-22.

55. If penetration of the vagina by the penis was complete, there may be evidence of vaginal epithelial cells on the penis. If ejaculation occurred, seminal material may be present on the pubic hair, the penis, or clothing of the accused. The clothing of the accused may have physiologic fluids or hairs from the female. Transfer of pubic hairs occurs in almost all cases, although they are readily lost.

Wecht & Perper, *Use of Forensic Pathology in Defending Criminal Cases*, in IV CRIMINAL DEFENSE TECHNIQUES (1980) at § 67.09(3)(b) [hereinafter cited as Wecht & Perper]. See also Herold, *Defense of Sex Crimes*, in III CRIMINAL DEFENSE TECHNIQUES (1979) at § 53.03(5).

56. Wecht & Perper, *supra* note 55, at § 67.09(3)(b).

57. See *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967); Aker, *Medical Evidence in Orphans Court Division Proceedings*, 47 PA. B. A. Q. 567, 569 (1976).

58. These pieces of evidence may include the switchblade with possible fingerprints, and

must engage a forensic scientist to examine all such material the prosecutor intends to introduce as evidence. Bellows should also try to get permission from the court for her expert to perform independent tests on these materials. Moreover, the forensic scientist should be asked to study the hospital laboratory reports, if this is possible. Bellows's forensic scientist thus can provide her with the requisite knowledge for meaningful cross-examination of the prosecution's expert at trial.<sup>59</sup>

#### 4. The Forensic Pathologist

If Bellows is retained before an autopsy is performed on Mr. Woodruff, she should engage a forensic pathologist to attend the autopsy, because coroners and public medical examiners usually are prosecution-oriented.<sup>60</sup> Alternatively, if Bellows is not retained until after the autopsy, she should seek permission from the court for her pathologist to see the coroner's work papers and whatever physical materials were taken from the body.<sup>61</sup> Many examiners dictate their reports, which are later transcribed. If such is the case, and the tape is available, counsel should try to obtain it so that she can compare it with the typed report. Specifically, Bellows will want to insure that the cause of death specified by the coroner is accurate and that every step in the chain of events postulated by the coroner is foreseeable with reasonable medical certainty.<sup>62</sup> In this case, however, she probably will regard all of these strategies relating to the autopsy as merely precautionary; undoubtedly her expectation that Mr. Woodruff died from the wounds inflicted by his assailant will be confirmed by the coroner's report.

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fingernail, vaginal, and pubic hair samples from Mrs. Woodruff.

59. Indeed, "[c]ross-examination of the Government expert . . . should never be attempted without substantial pretrial investigation and education in his field." Bowman & Bowman, *supra* note 33, at § 50.01(3). See also Wecht & Perper, *supra* note 55, at § 67.

60. Coroners and public medical examiners are usually prosecution-oriented since their dealings are with police, who must close their cases, and prosecutors, who like to win theirs. The mere presence of the defense pathologist may have an impact on methodology and procedure of the autopsist and an influence on the conclusions drawn from the physical evidence. If the defense pathologist testifies at trial, his conclusions will gain credence from his presence at the autopsy.

Bowman & Bowman, *supra* note 33, at § 50.01(1). See generally Wecht & Perper, *supra* note 55, at § 67.

61. Bowman & Bowman, *supra* note 33, at § 50.01(1).

62. See Delvin, *The Autopsy in Criminal Cases*, in EVIDENCE IN CRIMINAL ADVOCACY (S. Arnold & J. Cederbaums eds.) (1975), at 34-37.

### 5. The Psychiatrist

The psychiatrist will be one of Bellows' more important expert witnesses.<sup>63</sup> In selecting her psychiatrist, there are several critical factors she must take into account. First, she should be certain that the doctor whom she selects is certified and has had experience working with narcotics users and making determinations of criminal responsibility.<sup>64</sup> Second, she should make an effort to obtain a forensic psychiatrist, because such psychiatrists generally have a better appreciation for the trial process than clinical or academic psychiatrists.<sup>65</sup> Finally, since psychiatrists usually have orientations toward either prosecution or defense viewpoints, Bellows should carefully question a prospective expert to determine his natural sympathies.<sup>66</sup>

Once Bellows has selected her expert, she must furnish him with the records or reports of any previous psychiatric treatment which Allen has undergone. She must also obtain a court order permitting her expert to see the defendant.<sup>67</sup> Additionally, Bellows should urge the expert to provide some form of treatment, if at all possible, because a treating psychiatrist has a greater degree of latitude in testifying than does an examining physician.<sup>68</sup>

Bellows' psychiatric expert may have to address four basic issues at some point during the Allen proceeding: (1) whether Allen is competent to stand trial; (2) whether Allen was criminally respon-

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63. Although ultimately she may need to retain more than one psychiatrist, this discussion assumes that she will be dealing with only one throughout the Allen proceeding.

64. See HAUGEN, *supra* note 15, at 12.

65. [F]orensic psychiatrists are more familiar with the nature of a trial and where psychiatry fits into the trial process than are their nonforensic brethren. They tend to be more adept at testifying in language which the court and/or jury can understand. . . . [A] forensic psychiatrist can present a more detached picture on the stand. Academic and clinical psychiatrists tend to think of the defendant as a "patient," thereby exuding an air of partiality when testifying. More than one prosecutor has decimated defense psychiatrists by making it appear that the good (defense) doctor believed everything that his "patient" told him. Since a defendant facing criminal charges might have a strong motivation to lie to his doctor/examiner, this can be devastating. . . . [F]orensic psychiatrists [also] tend by their very nature to be more experienced in handling cross-examination.

Browning, *supra* note 23, at 36. See also Ames, *supra* note 4, at 24.

66. See Browning, *supra* note 23, at 37.

67. See Schwartz, *supra* note 24, at 98-99. Schwartz also notes the pros and cons of defense counsel attending the psychiatric examination performed by her own expert and advises the defense attorney always to accompany her client to an examination by the prosecutor's psychiatrist. *Id.* at 99-100.

68. Shlensky, *supra* note 14, at 43. See also LIEBENSON & WEPMAN, *supra* note 3, at 254; note 86 *infra* and accompanying text.



sible at the time of the act; (3) whether Mrs. Woodruff's mental state at the time of her identification of Allen was such that she could make an accurate determination; and (4) what type of rehabilitation program best meets Allen's needs.<sup>69</sup>

(a) Fitness to Stand Trial

Bellows should request a competency examination for Allen if she believes that he is seriously depressed or suicidal, or if she repeatedly observes him displaying highly unusual behavior.<sup>70</sup> Although such examinations are funded if the defendant sees a court-appointed psychiatrist,<sup>71</sup> counsel could have him examined instead by the psychiatrist whose services she intends to use throughout the proceeding. If Bellows decides to proceed with a competency examination, she must explain to her expert why she is raising the competency issue and inform him of the degree of fitness required for Allen to stand trial for murder and rape.<sup>72</sup>

(b) Mental Responsibility at Time of Offense

Assume for purposes of this discussion that Allen is fit to proceed with the trial, that the prosecution has a strong case against him, and that most of the tests counsel's other experts have performed suggest that Allen may be guilty of one or both of the crimes. Bellows should then explore the possibility of raising a defense based on lack of criminal responsibility, given Allen's admission of having ingested P.C.P. into his system on the evening in question.<sup>73</sup>

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69. Bellows may also want to have her psychiatrist make a report recommending that Allen be set free on bail so that he can assist counsel with his defense to the maximum extent possible. See Slovenko, *supra* note 2, at 56. Additionally, psychiatrists sometimes are called upon to establish whether a defendant had the mental capacity to waive knowingly one of his rights, such as the right to counsel when making a confession. See Manzella, *Motions to Suppress Evidence*, in 1A CRIMINAL DEFENSE TECHNIQUES, § 16.05(2)(b) (1979) [hereinafter cited as Manzella]; Schwartz, *supra* note 24, at 117-18. This concern, however, is not an issue in the Allen proceeding.

70. Schwartz, *supra* note 24, at 100-01.

71. *Id.* at 101.

72. The result of a competency examination "should be an evaluation as to the presence or absence of a disabling condition and testimony as to how this disabling condition, if found, might affect the defendant's capacity to function in the role of the defendant." Fosdal, *The Contributions and Limitations of Psychiatric Testimony*, 50 WIS. B. BULL. 31-33 (Ap. 1977) [hereinafter cited as Fosdal]; Schwartz, *supra* note 24, at 101-02.

73. According to *Watson v. United States*, 439 F.2d 442 (D.C. Cir. 1970), the test for determining criminal responsibility of a narcotics addict is the same as that for insanity, *i.e.*, whether the offense is the "product of an 'abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.'" *Id.* at 451, quoting *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962). Of

The presentation of an insanity or lack of criminal responsibility defense probably is the most demanding task of the defense lawyer.<sup>74</sup> Bellows' painstaking process of preparation therefore should begin as soon as possible. Before her expert examines Allen, Bellows must explain to the doctor his role in the proceeding and emphasize that he should not attempt to make legal judgments.<sup>75</sup> She must stress that his job is to examine Allen as a "patient," keeping in mind the documented effects of P.C.P. on the human body. If the psychiatric expert concludes that Allen was not criminally responsible at the time of the offense, counsel should make certain that the grounds on which the psychiatrist bases his opinion conform with the legal defense of lack of criminal responsibility.<sup>76</sup> Once counsel has determined that she will put the psychiatrist on the witness stand, she must prepare him in the same deliberate manner she would any other expert witness.<sup>77</sup> Specifically, she must carefully delineate the allowable parameters of the psychiatrist's testimony at trial.<sup>78</sup>

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course, Bellows probably will have to prove that Allen actually took the drug on the evening in question. The testimony of the policemen who apprehended him, probably will be helpful in establishing that he had taken some type of drug.

74. Bowman & Bowman, *supra* note 33, at § 50.03(3).

75. *Id.*

76. Schwartz, *supra* note 24, at 109. Dr. Schwartz also discusses the advisability of counsel obtaining a written report before trial from the psychiatrist:

Whether defense counsel should obtain before trial a written report asserting that his client was not criminally responsible is debatable. The danger is that it alerts the prosecution to the arguments the defense will use, gives the adversary time to do research and confer with his witnesses before trial and possibly provides him with written mistakes to use against the defense psychiatrist during cross-examination. If the defense psychiatrists's arguments are not the strongest, and if the court does not insist on a written report, the defense is probably better off without it.

If the psychiatrist retained by defense counsel concludes that the defendant was criminally responsible, a written report should be made at some time . . . so that defense counsel's files will demonstrate that he took appropriate steps on behalf of his client.

*Id.* Of course, even if the first psychiatrist concludes that the defendant was criminally responsible, counsel can then have her client examined by a second psychiatrist.

77. See Bowman & Bowman, *supra* note 33, at § 50.03(3); Carnahan & Zusman, *Presenting Psychological Evidence in Criminal Defense Proceedings*, in IV CRIMINAL DEFENSE TECHNIQUES § 68 (1980) [hereinafter Carnahan & Zusman]; Schwartz, *supra* note 24, at 109.

78. See, e.g., *Washington v. United States*, 390 F.2d 444 (D.C. Cir. 1967):

In criminal prosecutions wherein defendant raises the defense of insanity, psychiatrists should explain how defendant's disease or defect relates to his defense, that is, how development, adaptation, and functioning of defendant's behavioral processes may have influenced his conduct, but psychiatrists should not speak directly in terms of product or even result or cause.

(c) Mental State of the Witness

Although Bellows undoubtedly would want to counter a very strong case against Allen with a lack of criminal responsibility defense, she may want to dispute Allen's factual guilt if the prosecution's evidence is not very conclusive. She can dispute Allen's factual guilt by attacking the reliability of Mrs. Woodruff's identification of Allen. Counsel therefore may request permission to have her psychiatrist examine Mrs. Woodruff, as well as examine the reports of the hospital physician who attended her on the evening of the crime, so that he can evaluate whether her mental faculties on the day after she was raped and her husband was killed were such that she could make a reliable identification.<sup>79</sup>

If Bellows's psychiatrist concludes that Mrs. Woodruff's identification of Allen is questionable, counsel can file a pretrial motion to suppress this evidence. If the court were to grant this pretrial motion, Mrs. Woodruff would be precluded from identifying Allen at trial unless the prosecution could satisfy the court that her trial identification is independent of her pretrial identification at the police station.<sup>80</sup> Bellows's psychiatrist can thwart the prosecution in this endeavor by offering testimony on "perception, memory and recall" which would negate the independence of the trial identification.<sup>81</sup>

(d) Rehabilitation

If Allen should be found guilty of committing one or both of the crimes, Bellows may find the psychiatrist to be of tremendous assistance in formulating a suitable presentence recommendation. Due to the complexity of this task, Bellows must insure that her psychiatrist is knowledgeable about the penal law, the various sentencing possibilities, and the available correctional facilities.<sup>82</sup>

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*But see Fosdal, supra note 72, at 36 (advocating questioning psychiatrist with regard to whether the criminal act was a "product of the mental disorder").*

79. See Schwartz, *supra* note 24, at 119.

80. See Manzella, *supra* note 69, at § 16.05(2)(b).

81. *Id.*

82. See Schwartz, *supra* note 24, at 128. Schwartz advises that:

The psychiatrist's report must carefully document the defendant's emotional problems, explain how the crime grew out of them, and offer a practical suggestion within the limits of the sentencing possibilities available to the court. . . .

Even if imprisonment is mandatory, there may be special facilities or programs within the Department of Correction for defendants with emotional problems. A psychiatrist's recommendation for sentencing to such a program may be of great benefit to the defendant.

Despite the gravity of the crimes that Allen has been convicted of committing, Bellows can use his ingestion of P.C.P. as a tremendous point of leverage at the sentencing stage.<sup>83</sup> The presentence report of a well-informed psychiatrist, shedding light on Allen's reasons for ingesting the drug, therefore may be the key to the court's willingness to impose a program of rehabilitation that is more viable than a long period of incarceration.

## 6. The Psychologist

A psychologist's report may also aid Bellows in understanding why and under what circumstances Allen took the drug. A psychologist's evaluation differs from a psychiatrist's report in that the latter typically is based on personal interviews and observations, whereas the former incorporates the results of both objective and projective testing.<sup>84</sup>

Bellows should apply many of the strategies relating to her expert psychiatrist in working with her expert psychologist.<sup>85</sup> Thus, she should try to select a psychologist who has had experience

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If the psychiatrist recommends probation or some other kind of release from custody, he must offer, in addition to everything else, cogent reasons why the defendant should no longer be considered dangerous.

*Id.* at 120.

Psychiatric predictions of dangerousness are used in many contexts:

Setting bail, waiving juveniles charged with serious crimes to adult courts, sentencing decisions with respect to probation supervision or imprisonment, decisions concerning civil commitment, decisions concerning "sex psychopaths" or "defective delinquents," decisions concerning sentencing for "habitual offenders" or the imposition of the death penalty, and decisions about the release from confinement of incarcerated offenders.

Slovenko, *supra* note 2, at 56-57. It should be noted, however, that the reliability of such predictions are very controversial. See, e.g., Davis, *Texas Capital Sentencing Procedures: The Role of the Jury and the Restraining Hand of the Expert*, 69 J. CRIM. L. & CRIMINOLOGY 300, 303-07 (1978) [hereinafter cited as Davis]; Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 452 (1974); Fosdal, *supra* note 72, at 36; Slovenko, *supra* note 2, at 57 (American Psychiatric Association advocates "that a psychotherapist should not be obligated to report a patient who presents a 'serious danger' because he cannot reliably predict behavior").

83. The involuntary nature of Allen's actions may influence the judge's selection of a rehabilitation program for Allen, in that the judge may be inclined to reduce Allen's sentence or place him in a drug rehabilitation program rather than a penitentiary.

84. "The psychologist reaches his opinions and conclusions from the study of behavior, through objective and projective testing." LIEBENSON & WEPMAN, *supra* note 3, at 247. One of the most frequent services a psychologist performs is determining the defendant's I.Q. and interpreting this result to the court. See *id.* at 59. Thus, should Allen's intelligence become an issue during any stage of the proceeding, the testimony of a psychologist will be essential.

85. See notes 64-66 *supra* and accompanying text.

working with narcotics users. In fact, it is a good practice for counsel to ask her expert psychiatrist to recommend a psychologist with whom he frequently works, so that there will be a greater degree of compatibility between the two experts.

Bellows should also urge the psychologist to treat the defendant, if possible, as this will widen the scope of the expert's testimony.<sup>86</sup> Finally, if Bellows calls her psychologist to the witness stand, she must insure that the court realizes that psychology is now considered a "learned and respected" science rather than just a poor relation to psychiatry.<sup>87</sup>

### 7. The Criminologist

The services of a criminologist can provide Bellows with a greater understanding of the social and environmental circumstances of the offense.<sup>88</sup> Criminologists, who are specialists dealing with "theories as to crime causation," are especially useful in situations where defense counsel anticipates difficulties at the sentencing hearing and desires to bring to the court's attention all external factors bearing upon the defendant's behavior.<sup>89</sup>

Although criminologists thus provide valuable assistance at the sentencing stage, Bellows probably will want to consult one much earlier in the proceeding to aid her in evaluating her defense strategy.<sup>90</sup> Additionally, Bellows should allow her criminologist access to the reports of her other experts early in the proceedings, so that he will have the maximum amount of time to prepare his evaluation.

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86. If [the psychologist] is an expert witness he is limited to just his psychological objective findings. If he is examining the individual in the course of treatment he is a treating psychologist. . . . If the psychologist is limited to just his psychological objective findings he will not be permitted to testify to personal statements . . . which may be a deterrent to his evidence. If he is a treating psychologist he can testify to both personal statements and actions.

LIEBENSON & WEPMAN, *supra* note 3, at 254-55. See also text accompanying note 68 *supra*.

87. This can be done in two ways: "First the lawyer should lay a proper and adequate foundation during direct examination. Second, [she] should make proper legal objections to medical questions asked of the psychologist during cross-examination." LIEBENSON & WEPMAN, *supra* note 3, at 258. See generally Carnahan & Zusman, *supra* note 77, at § 68.

88. Gitchoff, *CCE-SR Offers Rehabilitation Breakthrough*, 3 CRIM. DEF. 11-12 (Nov. 1976) [hereinafter cited as Gitchoff] (quoting defense attorney Milton Silverman). See also notes 118-124 *infra* and accompanying text.

89. Cohen, *supra* note 14, at 153-54.

90. Gitchoff, *supra* note 88, at 12.

STRUCTURAL FACTORS IN THE LEGAL SYSTEM RESPONSIBLE FOR THE  
PERCEIVED INADEQUATE USE OF EXPERTS BY PRIVATE CRIMINAL  
DEFENSE ATTORNEYS: PROBLEMS AND PROPOSALS

The foregoing discussion indicates that the "ideal" use of expert services in preparing a criminal defense requires much more than unlimited funds. Indeed, plentiful monetary resources certainly supplement, but are not a substitute for, counsel's diligence and skill.<sup>91</sup> A survey of the literature on ineffective assistance of counsel reveals very little about how private defense attorneys actually use expert services during the various stages of the judicial process.<sup>92</sup> The sparse information available, however, suggests that the idealized conception outlined above is a far cry from reality.

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91. Consider the following remarks which James L. Browning, the federal prosecutor opposite F. Lee Bailey in the Patty Hearst prosecution, made in the course of his argument in that case:

[T]he doctors who were called by the defense in this case are basically not experienced in examining persons who are charged with criminal offenses, as were . . . [the prosecution's experts]. You will recall the defense doctors, I think every one of them, referred to the defendant as "a patient," not a "subject" or a "defendant," but a "patient." Most of these doctors who are not trained in evaluating persons charged with criminal offenses tend to accept everything that the person tells him. They are used to working with individuals who come to them for treatment, and obviously you believe what the patient tells you in trying to help him.

But there is a great difference between that type of a relationship and one in which you are experienced in evaluating persons charged with criminal offenses who often not only have motivation to lie in what they tell the doctor, but who often do, in fact, lie in what they tell the doctor.

Secondly, I think it is clear that most of the psychiatric experts called by the defense, if not all three of them, are basically professorial and literary people. In other words, they are academicians; they are not forensic psychiatrists. They are apt to find in any subject whom they examine a varying degree of the particular malady or the particular psychiatric problem that is found in that branch of psychiatry that they happen to specialize in, that they teach and write about.

In other words, it is quite frequently we find that a doctor who is a specialist tends to find his own specialty in a patient to some degree or another. . . .

Browning, *supra* note 23, at 36. Although Browning's selection and preparation of his experts have also been subject to criticism, *see* Ames, *supra* note 4, at 20-22, his remarks indicate that even the best defense attorneys unhampered by financial constraints are not infallible.

92. An enormous volume of literature has been written on the general topic of ineffective assistance of counsel in the context of criminal representation. *See, e.g.*, Bazelon, *supra* note 9, at 811; Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Comment, *Identifying and Remediating Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752 (1980) [hereinafter cited as Comment, *Ineffective Assistance*]. *See also* United States v. Decoster, 624 F.2d 196 (D.C. Cir.), (Decoster III), *cert. denied*, 444 U.S. 944 (1979).

*Economic Considerations*

As might be expected, inadequate funding represents a major obstacle to the effective use of expert services by private criminal defense attorneys.<sup>93</sup> For example, lack of client funds often prevents an attorney from working the long hours necessary to utilize expert witnesses in the most effective manner.<sup>94</sup> Presumably, two major consequences occur due to these financial constraints. First, most defendants represented by private attorneys are denied expert services because they cannot finance such defenses. Second, because many private criminal defense attorneys do not represent people with a great deal of money, they must handle several cases at once to compensate for their "affordable" yet low fees. Thus, such attorneys may not have the time to prepare experts properly even in those cases where the defendants can afford some expert services.<sup>95</sup>

A provision of the Federal Criminal Justice Act enables a private attorney to apply for funded expert services if his client is charged with committing a federal crime.<sup>96</sup> Although this provision repre-

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93. According to Harris B. Steinberg (a "highly respected defense attorney," Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179, 1202 (1975) [hereinafter cited as Alschuler]), "the principal roadblock in the way of the defendant's getting at the information he needs to present his case properly is obviously money. It takes money to have the laboratory tests made; to have the photographs made; to copy documents; to have the necessary medical examinations." Steinberg & Paulsen, *supra* note 8, at 28.

94. The defense counsel has to cut his cloth to the pattern of the fee that can be paid. It is just not feasible to put in \$10,000 worth of time and work in cases where the accused has \$500 to spend. This sounds cold-blooded and heartless but it is just a fact. No matter how much free work one wishes to do—no matter how much work at half-pay one wishes to do (and we do a good deal)—nevertheless, the sad fact is that lawyers must make a living for their families and themselves. In a curious way, a good lawyer is very realistic and quite objective about such matters. The very hard-headedness that makes him budget his time very carefully in some kind of relationship to his fee . . . is exactly the same kind of practicality that will make him a good defense lawyer. Instead of fussing, in a search for perfection, he goes ahead with the fundamentals as quickly and practically as he can. A great many persons charged with crime have some money, enough to make them ineligible to receive a free assignment of counsel, but not enough to finance the kind of defense that may be necessary.

Steinberg & Paulsen, *supra* note 8, at 32-33. Many other commentators have expressed similar views regarding the severe financial constraints under which most criminal defense attorneys operate. See, e.g., Alschuler, *supra* note 93, at 1181, 1199-1203; Davis, *supra* note 82, at 302; Tague, *The Attempt to Improve Criminal Defense Representation*, 15 *AM. CRIM. L. REV.* 109, 130 (1977); Comment, *Ineffective Assistance*, *supra* note 92, at 777.

95. See generally notes 93-94 *supra*; Bazelon, *supra* note 9, at 818 (maintaining that overwork is a major cause of ineffective representation).

96. Subsection (e) of the Federal Criminal Justice Act provides:

sents a step in the right direction, several problems remain. First, the relevant provision has been seldom used, especially by privately retained defense attorneys.<sup>97</sup> Second, the Act has been criticized because it allows an attorney to obtain "services necessary to develop and present existing defenses" but not "services needed to ascertain whether other defenses are available."<sup>98</sup> Finally, narrow construction of the term "necessary" can result in a denial of important services to needy defendants.

Private attorneys have even less chance of receiving funding for expert services in most state courts, where the granting of such aid generally is discretionary with the trial judge.<sup>99</sup> Although several

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(1) Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed \$150 and expenses reasonably incurred.

(3) Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed \$300, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit.

18 U.S.C. § 3006A(e) (1976).

Although not all provisions of the Criminal Justice Act are applicable to privately retained defense attorneys, subsection (e) services generally are available to both retained and appointed attorneys. See *Christian v. United States*, 398 F.2d 517, 518 n.2 (10th Cir. 1968); *Oaks, Obtaining Compensation and Defense Services Under the Federal Criminal Justice Act*, in I CRIMINAL DEFENSE TECHNIQUES (1979) at § 7.12(1) & (2) [hereinafter cited as *Oaks*] (Subsection (e) services are available to retained counsel in at least 50 districts, although "there are a few provisions to the contrary in a few district court Criminal Justice Act plans").

97. See *Christian v. United States*, 398 F.2d 517, 518 n. 2 (10th Cir. 1968); *Oaks, supra* note 96, at § 7.14(1); Comment, *Ineffective Assistance, supra* note 92, at 777. It has been suggested that administrative constraints may be responsible for this underutilization. See Comment, *Ineffective Assistance, supra* note 92, at 777.

98. Comment, *The Indigent's Right to an Adequate Defense, supra* note 9, at 634.

99. Courts in some jurisdictions refuse to exercise their discretion on the ground that the payment of expert and investigative fees is a matter for legislative determination. In jurisdictions in which courts exercise their discretion, additional assistance is often *seriously* considered only for capital offenses. Even then, requests for assistance are not always granted; some courts refuse requests for aid unless



states have adopted statutes similar to the federal Criminal Justice Act, these state statutes often modify the federal provisions, making expert and other services available only in capital cases or only to persons accused of murder.<sup>100</sup> Moreover, those state statutes which essentially follow the Federal Criminal Justice Act possess the same limitations discussed above in connection with the federal statute.<sup>101</sup>

The foregoing discussion suggests that some funding modifications definitely are in order. Initially, all states should pass legislation conforming to the relevant provision of the Federal Criminal Justice Act. To further improve that Act's efficacy, however, the federal and state legislatures should consider some new proposals.

First, the statutes providing for funding of expert services should allow the trial courts less discretion, by delineating those minimum services necessary for an adequate defense in certain types of cases. For example, raising an insanity defense should mandate a psychiatrist's services; raising issues concerning the defendant's behavior or intelligence should require the services of a psychologist. Second, the statutes must also incorporate a general standard governing the use of other, unspecified expert services. At the very least, the statutes should allow the use of such services when the court is satisfied that they appear *reasonably* necessary to assist counsel in preparation.<sup>102</sup> An even better standard would presume that counsel's requests are based legitimately on professional judgment and would therefore give counsel the primary responsibility for determining when funded expert services are necessary.<sup>103</sup>

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and until the prosecution calls or indicates its intention to call experts, thus precluding defendants from determining whether possible defenses are available.

Comment, *The Indigent's Right to an Adequate Defense*, *supra* note 9, at 635-36 (emphasis in original).

In Pennsylvania, for example, the criminal defendant lacking the monetary resources to acquire an expert's services must "seek a court-appointed expert or request the county to either pay his expenses or provide the necessary experts." Comment, *Expert Witness Fees*, *supra* note 8, at 326. Thus, trial judges operating "within budget constraints" have the discretion to approve or deny these requests. *Id.* The Comment also notes that "the defendant may be effectively denied his right to a fair trial if his request is denied and he must rely on a potentially hostile witness." *Id.* at 326-27.

100. For examples of such state statutes, see Comment, *The Indigent's Right to an Adequate Defense*, *supra* note 9, at 636.

101. See notes 97-99 *supra* and accompanying text.

102. See Comment, *Expert Witness Fees*, *supra* note 8, at 327. See also *United States v. Pope*, 251 F. Supp. 234, 241 (D. Neb. 1966).

103. See *Report on Criminal Defense Services in the District of Columbia by the Joint*

Finally, these modifications should be accompanied by a full-scale program of education, sponsored by the American Bar Association, to inform attorneys of the statutes' existence and function.

### *Need for Sound Official Guidance and Educational Programs*

Sometimes expert services are not effectively utilized for reasons other than funding problems. For example, available literature suggests that some members of the bar do not know how to use expert services effectively.<sup>104</sup> One source estimates that "only 3-5% of the total [attorneys] even have *any* idea of what to do or how or where to seek help in sentencing matters."<sup>105</sup> Although every community possesses a few attorneys who perform their duties in a perfunctory fashion,<sup>106</sup> the majority of attorneys sincerely desire to render to their clients the best possible representation. Thus, individual attorneys cannot take the entire blame for the perceived inadequate use of expert services by privately retained criminal defense attorneys. The legal profession as a whole remains largely responsible due its failure to provide adequate official guidance and education. Indeed, improving the training that lawyers receive has little value if the defense counsel's role remains unclear.<sup>107</sup>

The various American Bar Association Minimum Standards for Criminal Justice provide only sparse guidance on the use of expert services.<sup>108</sup> Although detailed standards admittedly would be cum-

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*Committee of the Judicial Conference of the D.C. Circuit and the D.C. Bar (Unified)* 90 (Apr. 1975).

104. In the context of rape trials, for example, one commentator has stated:

[M]uch more is known scientifically in the detection and proof of rape than is usually and customarily utilized in most cases. One of the reasons for this seemingly paradoxical situation is that many inexperienced prosecutors and defense attorneys do not bother to research the medical literature to find out how they can best prepare and evaluate their cases.

Wecht & Perper, *supra* note 55, at § 67.09(1).

105. Letter from Dr. G. Thomas Gitchoff, a noted criminologist and professor of criminal justice at San Diego State University, who has spent nearly a decade assisting attorneys in sentencing matters, to author, March 6, 1980. See notes 114-22 *infra* and accompanying text. See generally, *United States v. Martin*, 475 F.2d 943, 955 (D.C. Cir. 1973) (Bazelon, J., dissenting); ABA SENTENCING ALTERNATIVES, *supra* note 44, at § 5.3, Comment h; Dash, *supra* note 22, at 315.

106. See, e.g., Alschuler, *supra* note 93, at 1211, 1223; Bazelon, *supra* note 9, at 818; Tague, *supra* note 103, at 130-131.

107. Bazelon, *supra* note 9, at 818.

108. See THE DEFENSE FUNCTION, *supra* note 45, at § 4.4 (Relations with Expert Witnesses) & § 8.1 (Sentencing); ABA SENTENCING ALTERNATIVES, *supra* note 45, at § 5.3 (Duties of Counsel); ABA MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES § 1.5 (Tent. Draft 1967) (Supporting Services) [hereinafter cited as PROVIDING DE-

bersome, the existing standards could be broadened without any significant difficulties. For example, the standard stating that a lawyer should explain to the expert his role in the trial process<sup>109</sup> should incorporate a provision requiring the appropriate degree of pretrial preparation of the expert witness. Similarly, the standard providing for "necessary" investigatory and other expert services<sup>110</sup> should be more sharply defined, so that it stipulates which specific expert services are required in certain types of cases. Such specificity would comport with the modifications discussed above in connection with the funding statutes and hopefully would encourage legislatures to pass the appropriate funding provisions.<sup>111</sup>

The ABA standards also state that defense counsel should be prepared to recommend a program of rehabilitation in appropriate cases.<sup>112</sup> These standards should be reworded to *require* defense counsel to make sentencing recommendations tailored to the individual defendant's needs. Over a period of time, this change hopefully would make judges more sympathetic to outside suggestions during the sentencing process.

The adoption of more concrete guidelines represents the initial step in educating attorneys as to the adequate use of expert services. Nevertheless, this effort must be complemented with educational programs emphasizing the most effective techniques in working with experts. For example, a comprehensive study of the habits and techniques of criminal attorneys with regard to their use of expert services would prove an invaluable teaching tool.<sup>113</sup> Moreover, the American Bar Association could sponsor seminars and workshops on the use of expert services for criminal defense

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FENSE SERVICES}.

109. "To the extent necessary, the lawyer should explain to the expert his role in the trial as an impartial witness called to aid the fact-finders and the manner in which the examination of witnesses is conducted." THE DEFENSE FUNCTION, *supra* note 44, at § 4-4.4.

110. "The plan should provide for investigatory, expert and other services necessary to an adequate defense." PROVIDING DEFENSE SERVICES, *supra* note 108, at § 1.5.

111. See text accompanying notes 99-103 *supra*.

112. See THE DEFENSE FUNCTION, *supra* note 44, at § 4-8.1(b); ABA SENTENCING ALTERNATIVES, *supra* note 44, at § 5.3(f)(v).

113. Perhaps the American Bar Association could channel its efforts into sponsoring a nationwide study of the use of experts by a representative cross-section of criminal attorneys. The study could examine, for example, the use of experts during the individual stages of the judicial process. Incorporating the observations of the experts themselves would be a valuable component of such a study, and the American Bar Association could enlist the cooperation of professional societies and journals in surveying their members and readers with regard to their individual experiences in providing expert services for attorneys. See note 107 *supra* and accompanying text.

attorneys and mandate attendance at one such seminar every year. Additionally, law school criminal clinic programs should devote a substantial portion of time training students in working with experts. Those law schools in close proximity to medical schools and departments of psychology and criminology should also draw on these resources in educating their students.

### *Centralized Expert Services—A Proposal*

Guidance and education, by themselves, will not solve the problem of inadequate use of expert services by private criminal defense attorneys. Attorneys must be given a model of how expert services can be used to their maximum potential in the pretrial and sentencing stages. One proposal involves a "package" of centralized expert services. In this regard, the work of Dr. Thomas G. Gitchoff<sup>114</sup> in developing the Criminological Case Evaluation and Sentencing Recommendation (CCE-SR) deserves special mention.<sup>115</sup>

The CCE-SR "includes interviews and field observations averaging 6-12 hours plus considerable confirmation of data and exploration of mitigating circumstances."<sup>116</sup> Preparation of the CCE-SR involves data collection through "psychiatric and/or criminological interviews, psychological testing and review of the attorney's case file including enforcement reports."<sup>117</sup> The review of sentencing alternatives emphasizes community-based alternatives to incarceration and innovative probation programs.<sup>118</sup> Although the majority of cases referred to Dr. Gitchoff involve nonviolent crimes, CCE-SR reports can also benefit the client where incarceration is mandatory. In those cases, the CCE-SR can impact upon the prison classification process, sentence modification proceedings, or attempts to transfer the client to a different institution better

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114. Dr. Gitchoff's work initially was made possible by a newly amended California statute that allows a defendant or his attorney to file a written report on the defendant's background and personality and to recommend a program of rehabilitation. CAL. PENAL CODE § 1204 (West Supp. 1979).

115. Gitchoff, *supra* note 89, at 11.

116. Rodgers, Gitchoff & Paur, *supra* note 45, at 274.

117. *Id.* at 275-77.

118. The CCE-SR sentencing strategy generally involves restitution, either to the victim or the community, counseling, continuation of pre-offense activities, and follow-up services. *Id.* Examples of alternatives to incarceration "include giving clients options of either serving their time in jail or serving in a volunteer fashion on any number of charitable, community or public service projects in need of donated labor." Letter from Dr. G. Thomas Gitchoff to Editor, 24 *DICTA* 29 (Ap. 1977).

sued for his successful rehabilitation.<sup>119</sup>

The CCE-SR program has tremendous potential for the legal profession, not only in the context of sentencing, but in all stages of the judicial process. If multidisciplinary centers providing comprehensive defendant profiles were developed throughout the country, criminal defense attorneys could use a centralized service to fill all of their expert witness needs. Centralization of expert services would result in greater efficiency, and hence, lower fees.<sup>120</sup> Most importantly, a centralized system would provide criminal defendants with easy and continual access to as many expert services as their defenses required. Federal or state government subsidies for these centers would provide even greater savings to defendants. Those defendants who still would not be able to afford the service hopefully could receive funding under the relevant provision of the Criminal Justice Act,<sup>121</sup> or a comparable state provision enacted as part of a comprehensive program to promote more effective utilization of expert services for criminal defendants.

Indeed, the implementation of this type of system would have a tremendous impact on the adversary process and the quality of defense representation.<sup>122</sup> Such a far-reaching proposal, however, would entail some difficulties at the outset. Organizing these centralized services on a national scale would require strong leadership, money, and an abundance of manpower. In order to succeed, the project would also need the active support of the bar, the judiciary, and the various other professions involved. Finally, because implementing a system of centralized expert services could not be accomplished overnight, the virtue of patience must not be

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119. Rodgers, Gitchoff & Paur, *supra* note 47, at 277. As of April, 1977, Dr. Gitchoff's "recidivism rate" was fairly low—71% of his cases were successful as opposed to the 66-75% national failure rate. Letter from Dr. G. Thomas Gitchoff to Editor, 24 *DICTA* 29 (Ap. 1977).

120. In a recent conversation with Dr. Gitchoff, the author learned that Dr. Gitchoff's fee is approximately \$300.00 for a case evaluation, plus an additional \$200.00 for testifying in court.

121. 18 U.S.C. § 3006A(e) (1976).

122. The use of centralized expert services should not be confined to private defense attorneys. Public defenders are equally in need of such a system. In the District of Columbia, for example, the Offender Rehabilitation Project of the Legal Aid Agency provides Legal Aid Agency attorneys and some appointed counsel with services at the sentencing stage similar to those provided by Dr. Gitchoff. See Dash, *supra* note 22, at 317-18. According to the President's Commission on Law Enforcement and Administration of Justice, "[t]he adoption of similar programs by other jurisdictions would do much to provide defense counsel with the facts and evaluation necessary for an intelligent presentation of sentencing alternatives to the court." *TASK FORCE REPORT: THE COURTS* 19 (1967). Again, the potential of such programs in contexts other than sentencing is great.

forgotten.

#### CONCLUSION

The perceived inadequate use of expert services by private criminal defense attorneys constitutes but one of many facets of the larger problem of insuring effective assistance of counsel to the criminal defendant. Criminal defense attorneys, both privately retained and appointed, require better guidance and more education in many other aspects of their work.<sup>123</sup> Thus, adopting measures designed to fund adequately, guide, and educate attorneys in the use of expert services will not, by itself, automatically insure a sharp rise in the quality of defense representation. Such action would, however, be an appropriate step in the right direction.

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123. Most trial attorneys, for example, could profit from attending seminars on a variety of subjects such as cross-examination techniques, plea bargaining, pretrial investigation, ethical concerns, and the attorney's role at sentencing.

