Chapter 10

Preparing for a Motions Hearing or Trial: Selecting, Subpoenaing and Preparing Defense Witnesses; Preparing Real or Demonstrative Evidence

Part A. Selecting and Subpoenaing Witnesses

§ 10.01 SELECTION OF WITNESSES FOR A MOTIONS HEARING OR TRIAL

The principal criterion in selecting witnesses for an evidentiary motions hearing (such as a suppression hearing) or for trial is whether a witness has something to say that materially supports the theory of the defense. Although counsel's search for sources of proof must be wide-ranging, counsel must be highly selective in what s/he actually puts on at the motions hearing or trial. It is vital that the evidence be tightly organized so that the defense theory will come across in a cohesive presentation.

A second, almost equally important criterion in selecting witnesses is whether the witness will improve or depreciate the *atmosphere* of the defense. To some extent a respondent is identified with his or her witnesses by the judge (and even more so by jurors, in those jurisdictions that permit jury trials in juvenile cases). This makes the demeanor of defense witnesses critical – their apparent honesty, sound judgment, equanimity, and likeableness. A personable witness might be called to testify cumulatively on a minor point, whereas a shifty or abrasive witness would not be similarly used.

An important consideration in selecting witnesses is whether the witness has prior convictions that are admissible under the impeachment doctrines described in § 30.07(d)] *infra*. Disclosure that a defense witness has a criminal record can seriously damage not only the witness's believability but the tone of the defense. Counsel should never put a witness on the stand without knowing whether the witness has a criminal record and without having evaluated the possible prejudice to the defense if it is used to impeach the witness. Every prospective witness must be asked whether s/he has ever been arrested or charged with any criminal offense and what was the disposition of the arrest or charge. To make the investigation complete and the inquiry as little embarrassing as possible, counsel should ask about "any sort of arrest or criminal charge, big or little, including traffic violations and juvenile court matters." Counsel can reduce the witness's embarrassment by explaining that s/he always asks this question "because lots of people have some sort of criminal charge made against them at some time." *After* counsel has obtained the witness's complete record, s/he can tell the witness (if this is the case under local practice) that juvenile convictions, traffic offenses, other minor convictions, and arrests that did not result in conviction cannot be brought out by either party in court.

§ 10.02 THE NEED TO SUBPOENA DEFENSE WITNESSES AND KEEP TRACK OF THEM UNTIL THE TRIAL DATE

Once counsel has selected whom to use as witnesses at the motions hearing or trial, counsel will then need to: (i) subpoena the witnesses to the hearing or trial; and (ii) keep in close touch with the witnesses until the hearing and trial have taken place.

Counsel should always subpoena defense witnesses rather than depend upon them to show up voluntarily at the hearing or trial. In the event that the witness fails to show up (either intentionally or inadvertently), counsel probably will be unable to obtain a continuance (see §§ 10.07, 15.02 *infra*) unless s/he can represent to the court that the witness is under subpoena. Similarly, in the very rare case in which counsel elects to respond to a no-show by requesting a bench warrant (see § 10.07 *infra*), that remedy will be unavailable unless the absent witness was under subpoena.

One of the most delicate aspects of subpoena practice is explaining to a witness who wants to be helpful why s/he is being subpoenaed when s/he has already told counsel that s/he is willing to come to court voluntarily. Counsel should treat the witness's good faith and reliability as a given and should explain simply that if some unanticipated factor such as major illness prevents the witness from coming to court, counsel needs to be able to honestly tell the judge that the witness is under subpoena in order to obtain a continuance. In jurisdictions in which witnesses receive witness fees or mileage allowances from the court upon showing the subpoena that they received, counsel can also explain that the subpoena is necessary in order for the witness to be paid.

If a person who is expected to be called as a prosecution witness also has certain information that is necessary to the defense case, counsel should serve a defense subpoena upon the witness rather than relying on the prosecution to bring the witness to court. Otherwise, if the prosecutor decides that the witness is more helpful to the defense than to the prosecution, the prosecutor can excuse the witness from coming to court. Even if the witness appears to be an essential part of the prosecution's case, the prosecutor may respond to the witness's failure to appear by deciding to go forward with the other prosecution witnesses rather than risk a dismissal on speedy-trial grounds; if this occurs and the witness is not under defense subpoena, defense counsel will be forced to go to trial without the witness.

Even after a witness has been subpoenaed, counsel will need to keep in close touch with the witness until s/he has testified at the motions hearing or trial. A subpoena will be of little use if, by the time of the hearing or trial, the witness has moved to a new location and cannot be found. For this reason counsel (or his or her investigator) should always elicit from witnesses whom they interview the witness's home and work addresses, telephone numbers, e-mail and e-text contact information, any plans to move or to be away from home base in the foreseeable future, and the names of persons through whom the witness can be contacted when s/he is not directly reachable. See § 8.08 *supra.* Once counsel has decided to use a witness at a hearing or at trial, the witness should be given counsel's telephonic and electronic contact information and told to be in touch with counsel in the event of any change of residence or any trip out of town. If

the witness is crucial and appears geographically unstable, it may be wise for counsel to call the witness at reasonable intervals during the pretrial period. This assures that the witness will not be gone long before s/he is missed by counsel, and that counsel can take up pursuit while the trail is fresh. Even after a witness has testified, counsel should keep the same tabs on him or her until the hearing or trial is completed. S/he may need to be recalled for unpredictable reasons.

If a witness is leaving the jurisdiction, if the witness's health is bad, or if s/he may be unavailable at trial for any other reason, counsel should consider whether the risk of losing the testimony warrants taking the witness's deposition, notwithstanding the creation of a transcript that can be used by the prosecutor in impeaching the witness if s/he ends up testifying. Local statutory procedures for the taking of depositions to preserve testimony must be consulted. (Frequently these will be codified only in codes of civil procedure, but an examination of their terminology will usually disclose that they are applicable in delinquency cases as well.) In the case of hostile witnesses whom counsel has reason to believe may flee, hide out, or avoid service of a subpoena, an application to the court for their arrest as material witnesses may be advised. Most jurisdictions have statutes that authorize the detention of material witnesses and that can be invoked by the defense as well as the prosecution. When material-witness procedures are limited by law or practice to the prosecutor's use, defense counsel should invoke them anyway and argue that such a limitation is unconstitutional within the principles of § 9.09(b)(7) *supra.*

§ 10.03 TYPES OF SUBPOENAS; PERSONS SUBJECT TO SUBPOENA

A witness subpoena (technically known as a *subpoena ad testificandum*) can be issued to any person in the jurisdiction who has testimony relevant to the case. Under local practice an expert witness may be immune from subpoena to testify solely *as an expert* on matters of his or her professional expertise, but s/he is not immune from process when s/he has factual information that is pertinent to a proceeding. For this reason counsel may ordinarily subpoena government doctors and psychiatrists, for example, when they have examined the respondent in a detention facility or in a state hospital. Counsel may also subpoena police laboratory personnel, medical examiner's personnel, the complainant's physician (who will have to appear and claim the doctor-patient privilege if s/he seeks to be excused from answering specific questions on that account), and the like.

If counsel needs a witness who is involuntarily confined in a prison or hospital, counsel must apply to the court for a writ of *habeas corpus ad testificandum.* The writ directs the custodian of the confining institution to produce the witness for trial. In some cases a judge will also issue the writ to bring a witness to a place at which counsel can conveniently interview him or her. Issuance of the writ is ordinarily discretionary, and courts require some showing of the materiality of the witness's testimony. For discussion of the steps counsel can take to avoid disclosing defense facts and strategy when making the required showing, see § 10.05 *infra.*

The uses and occasions for subpoenas commanding the production of documents and records (technically known as subpoenas *duces tecum*) are summarized in § 8.17 *supra.*

§ 10.04 PROCEDURES FOR OBTAINING SUBPOENAS

Subpoenas are ordinarily obtained from the office of the clerk of the court. Although issued in the name of the judge or the court, they customarily are filled out – or handed out in blank for counsel's completion – by the clerk or a deputy clerk, without action of the judge.

In some jurisdictions, *forma pauperis* subpoenas may be issued only by leave of court, granted upon motion. (A motion may be required even after the court has issued a general order designating the respondent as indigent and entitled to state-provided defense counsel.) The prosecution may appear and oppose the motion unless defense counsel submits it *ex parte*. (An indigent's rights to cost-free compulsory process are discussed in the following section, § 10.05, together with the procedure for seeking *in camera* consideration of defense motions for the issuance of such process.) In the case of paid subpoenas, objections must ordinarily be raised *ex post*, by a motion to quash the subpoenas, made by the person subpoenaed or by the party adverse to the litigant who has procured issuance of the subpoena, after the subpoena has been served.

Subpoenas may be quashed on various grounds covered by local practice, including improper service, ignorance on the part of the subpoenaed person of any matter relevant to the proceedings, lack of jurisdiction or statutory authority of the court to issue the subpoena, and a few kinds of privilege, such as a legislator's immunity from civil process during a legislative session (*see*., *e.g*., *State v. Beno*, 116 Wis. 2d 122, 138, 341 N.W.2d 668, 676 (Wis. 1984)). (Most evidentiary privileges, however, do not immunize witnesses from being subpoenaed to appear or from being called to the stand; they operate only to prohibit specific questions that could produce privileged information.) In some jurisdictions, an alternative procedure for resisting a subpoena is to have the subpoenaed person appear and refuse to be sworn.

Prosecutors will sometimes move *ex parte* for the quashing of defense subpoenas directed to government informers, officers or employees, and courts have been known to grant the motion without notice, leaving defense counsel uninformed until the time of trial that it has been granted. If counsel suspects that the prosecutor may resist a subpoena directed to a witness allied in interest with the prosecution, counsel should inform the prosecutor a few days before trial that the witness has been subpoenaed (a fact which the prosecutor doubtless already knows) and that the witness's presence at the trial is particularly wanted by defense counsel. In this fashion, if the witness does not appear by reason of some secret or last-minute maneuvering by the prosecutor, counsel is in a position to be righteously indignant over the prosecution's lack of candor when, at trial, the defense makes its motion for a bench warrant (§ 10.07 *infra*), continuance (§ 15.02 *infra*), or mistrial (§ 34.11 *infra*), as may seem appropriate.

§ 10.05 RIGHT TO PROCESS AT PUBLIC EXPENSE WHEN THE RESPONDENT IS INDIGENT

As the Supreme Court has observed, the Compulsory Process Clause of the Sixth Amendment "establish[es], at a minimum, that criminal defendants have the right to the

Government's assistance in compelling the attendance of favorable witnesses at trial." *Pennsylvania v. Ritchie,* 480 U.S. 39, 56 (1987). When the respondent is an indigent, the Equal Protection and Due Process Clauses of the Fourteenth Amendment require the issuance of subpoenas for material defense witnesses at public expense (*see, e.g.*, *United States v. Barker*, 553 F.2d 1013, 1019 (6th Cir. 1977) ("[a]lthough the decision whether or not to grant a defense subpoena for the production of witnesses at government expense is ordinarily committed to the discretion of the trial court, . . . nevertheless it is important to bear in mind that the right of an indigent criminal defendant to subpoena witnesses rests not only on [Federal Criminal] Rule 17(b) but also on the Sixth Amendment right to compulsory process . . . and on the Fifth Amendment right not to be subjected to disabilities by the criminal justice system because of financial status"); *United States v. Julian*, 469 F.2d 371 (10th Cir. 1972)) and funding for process servers (*Brown v. Eighth Judicial District Court in and for County of Clark*, 133 Nev. 916, 921, 415 P.3d 7, 11 (2017)). See generally § 4.31(d) *supra;* see also § 11.03(a) *infra.*

The procedure for obtaining subpoenas *in forma pauperis* is not problematic in most jurisdictions. Often the court clerk's office routinely issues subpoenas at public expense in cases of indigents. In some jurisdictions, although local rules technically require an affidavit by counsel showing "good cause" or "materiality," custom permits these affidavits to be filled out with boilerplate language tracking the statute or court rule.

In other jurisdictions, however, factually detailed documentation is demanded, and this requirement poses the very serious hazard of alerting the prosecution to the projected defense. In such jurisdictions counsel should prepare an affidavit making the requisitely detailed showing (*see United States v. Valenzuela-Bernal,* 458 U.S. 858, 867 n.7 (1982) (dictum)), seal the affidavit, and file it with a motion asking that the court receive it in sealed form and consider it *in camera,* without disclosure to the prosecutor, on the ground that it reveals an aspect of defense trial strategy. (This procedure should be followed even in jurisdictions that purportedly provide for *ex parte* submissions, if the reality of the practice is that prosecutors regularly obtain access to the supposedly confidential documents filed by the defense.) If the sealing motion is denied, counsel should move to dismiss all charges against the respondent because of its denial and then either refuse to make the required factual averments or make them under objection (depending on whether s/he can practicably afford to go to trial without the witness) on the ground that the respondent's rights under the Compulsory Process Clause of the Sixth Amendment to the federal Constitution (*see Washington v. Texas,* 388 U.S. 14(1967)), the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and parallel state constitutional guarantees are infringed if an indigent is obliged to disclose his or her defensive case in a way that a respondent with money is not, as the precondition of obtaining compulsory process. See § 9.09(b)(4) *supra* and § 11.03(b) *infra.*

§ 10.06 MECHANICS OF SERVING SUBPOENAS

Counsel will need to check the local rules for service of process, which may be in the juvenile statute, the criminal procedure statutes, or the civil procedure statutes. In most

jurisdictions the rules specify that service is valid only if the subpoena is served personally rather than by mail, and only if served within a certain geographic area. The rules often also establish a deadline, in terms of the number of days before trial when the subpoena must be served. In some jurisdictions the rules require that transportation fees be tendered to the witness at the time of service of the subpoena.

If possible, counsel should always arrange for service of the subpoena by a private process server rather than by the marshal, a sheriff, a police officer, or other law enforcement personnel. There are seldom any practicable means for preventing these government agents from informing the prosecutor about the identity and location of witnesses to whom defense subpoenas have been directed.

In many jurisdictions the rules specify that the process server must fill out an affidavit of service. Even if the rules contain no such requirement, it is good practice to obtain an affidavit of service from the process server and retain it in counsel's file, in case any question arises about the date, exact time, and location of service.

§ 10.07 REMEDIES IF A SUBPOENAED WITNESS FAILS TO APPEAR

Technically, the remedy when a subpoenaed witness fails to appear is for counsel to request the issuance of a bench warrant (or attachment, or *capias*) to have the witness arrested and brought into court by the marshals.

In actuality, it will be the rare case when counsel requests a bench warrant for a defense witness. Quite obviously, a witness who is dragged into court in handcuffs will not be an eager or friendly witness. Although the witness can be compelled to testify under threat of contempt, the result may be that the witness will shape his or her testimony so as to cast the respondent in the most unfavorable and damaging light.

Accordingly, if a crucial witness fails to appear, counsel should seek a continuance. See § 15.02 *infra*; *and see, e.g.*, *Lee v. Kemna*, 534 U.S. 362 (2002). Counsel should offer to make an *ex parte* proffer in support of the continuance motion, with the witness's name and the substance of his or her testimony. (The reason for proceeding *ex parte* is to avoid providing the prosecutor with notice of defense strategy and with impeachment material in case the witness subsequently appears or is found.) This proffer is necessary for the appellate record in the event that the judge denies the request. In most jurisdictions counsel will need to represent to the court that the witness is under subpoena; in some jurisdictions it will be necessary to call the process server to testify that the witness was, in fact, subpoenaed.

The rare circumstances in which counsel might seek issuance of a bench warrant for a witness are when: (i) counsel's best efforts to locate the witness or to persuade the witness to come to court have proved futile, and a bench warrant is the only alternative; or (ii) the witness is already as hostile as s/he can be, and counsel will be able to extract the desired testimony from

the witness on the stand regardless of his or her belligerence.

A refusal by the court to direct the issuance of process or an attachment or to grant a defense continuance requested because of the failure of a properly subpoenaed witness to appear ordinarily is not appealable interlocutorily. If the refusal happens in the course of a protracted trial, it may be possible to ask an appellate court for a writ of mandamus to compel the trial judge to act. See Chapter 26. The ordinary method of review, however, is upon appeal from the final judgment of conviction. As previously explained, counsel should establish a record for that appeal by making a detailed *ex parte* proffer of what the nonappearing witness would have testified. If the judge refuses to permit an *ex parte* proffer, the substance of the witness's testimony should be stated in very general terms. Counsel should then renew the request at the close of defense testimony, this time reciting in detail what the witness would have testified had s/he appeared. Counsel should also submit a written declaration or affidavit setting out this detail in support of a motion for a new trial. See §§ 37.02-37.02(a) *infra*. The affidavit should be made by the witness if s/he has become available to counsel before the deadline for a new-trial motion; otherwise, it can be made by counsel or counsel's investigator.

§ 10.08 SPECIAL ASPECTS OF SUBPOENA PRACTICE NECESSITATED BY THE MISSING-WITNESS DOCTRINE

§ 10.08(a) The Missing-Witness Doctrine

The missing-witness doctrine allows the finder of fact (whether jury or judge) to treat a party's failure to call a witness as giving rise to an inference that the witness's testimony would have been unfavorable to that party if (1) the witness is peculiarly available to that party, and (2) the witness is shown to have knowledge of facts pertinent to the issues being tried, and (3) the witness's information would not be merely cumulative or inconsequential. *People v. Smith*, 33 N.Y.3d 454, 458-59, 128 N.E.3d 649, 653, 104 N.Y.S.3d 572, 575 (2019) (reversing a conviction on the ground that the trial judge erred in refusing to give a missing-witness instruction requested by the defense); "[W]e [have] established the analytical framework for deciding a request for a missing witness instruction. The proponent initially must demonstrate only three things via a prompt request for the charge: (1) 'that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case,' (2) 'that such witness can be expected to testify favorably to the opposing party,' and (3) 'that such party has failed to call' the witness to testify . . . . The party opposing the charge can defeat the initial showing by accounting for the witness's absence or demonstrating that the charge would not be appropriate. . . . 'This burden can be met by demonstrating,' among other things, that 'the testimony would be cumulative to other evidence' . . . . If the party opposing the charge meets its burden by rebutting the prima facie showing, the proponent retains the ultimate burden to show that the charge would be appropriate.") *See also*, *e.g.*, *Commonwealth v. Smith*, 49 Mass. App. Ct. 827, 829-30, 733 N.E.2d 159, 161 (2000) ("The rationale and rule for comment or instruction with respect to the failure to call a witness is that, '[w]here a party has knowledge of a person who can be located and brought forward, who is friendly to, or at least not hostilely disposed toward, the party, and

who can be expected to give testimony of distinct importance to the case, the party would naturally offer that person as a witness. If, then, without explanation, he does not do so, the jury may, if they think reasonable in the circumstances, infer that that person, had he been called, would have given testimony unfavorable to the party.'"); *Commonwealth v. Evans*, 444 Pa. Super. 545, 553, 664 A.2d 570, 573 (1995) ("Our Supreme Court has articulated what has come to be known as the 'missing witness' adverse inference rule as follows: ¶ When a potential witness is available to only one of the parties to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not merely be cumulative, then if such party does not produce the testimony of this witness, the jury may draw an inference that it would have been unfavorable."); *People v. Garcia*, 192 A.D.3d 1463, 145 N.Y.S.3d 213 (N.Y. App. Div. 4th Dep't 2021). The witness's "testimony must be relevant and material to a disputed issue in the case" (*Thomas v. United States*, 447 A.2d 52, 57 (D.C. 1982) (reversing a conviction for unauthorized use of a vehicle because the trial judge gave a missing witness instruction against the defense and allowed the prosecutor to argue a missing witness inference in closing, focused on a witness who was present at the scene of the crime and arrest; the theory of the defense – giving rise to the only disputed issue in the case – was that the owner of the vehicle had, on an earlier occasion, given the defendant permission to drive it, and "[s]ince the circumstances of . . . [the defendant's] arrest did not bear on his criminal liability, and he did not bring those circumstances into contention, he had no reason to bring . . . [the witness] to the trial" (*id.* at 59-60)). Some courts describe the requisite foundation for a missing witness instruction as a showing that the witness is uniquely "available" to the opposing party, and this showing can be established only if the party seeking the instruction cannot procure the witness's presence at trial by subpoena or otherwise. *See*, *e.g.*, *United States v. Orlandella*, 96 F.4th 71, 100 (1st Cir. 2024) (primary ground) ("[W]e long ago recognized that 'our statement in [*United States v.*] *Johnson*[, 467 F.2d 804 (1st Cir. 1972)] regarding 'disposition' of the witness may appear to be in conflict with language in subsequent opinions suggesting that a witness'[s] "availability" is solely determined by the feasibility of obtaining his testimony at trial.'. . . Having noted this apparent conflict, we concluded that '[t]ypically, what is referred to as an "absent witness" or "missing witness" instruction deals only with "control", not with "predisposition."' . . . ¶ And so, as our post-*Johnson* caselaw makes clear, a party's ability to subpoena the missing witness is important to their entitlement to a missing witness instruction."). Other courts – some of which also talk in terms of unique availability – take account of the witness's loyalties and potential partisanship, and consider the foundation laid if the witness is shown to be favorably disposed to the opposing party or hostile to the party seeking the instruction. *See*, *e.g.*, *United States v. Mahone*, 537 F.2d 922, 926-27 (7th Cir. 1976) (considered dictum) ("The first thing that must be shown before a party can raise to the jury the possibility of drawing an inference from the absence of a witness is that the absent witness was peculiarly within the other party's power to produce. This requirement is met both when a witness is physically available only to the opposing party and when the witness has a relationship with the opposing party 'that would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability . . .' . . . . ¶ In the case at hand, Officer Payne was outside the courtroom during the trial and thus physically available to both parties. Recognizing this, the appellant argues that the officer was not in fact available to him because of the officer's special relationship with the prosecution. We

agree with the appellant. While Officer Payne was not employed by the prosecutor, being a state officer in a federal prosecution, he was closely associated with the United States Attorney in developing the case and had an interest in seeing his police work vindicated by a conviction of the defendant. ¶ '[W]here there is likelihood of bias on the part of the person not called as a witness in favor of one party, "that person is not, in a true sense, 'equally available' to both parties."'"); *Thomas v. United States*, 447 A.2d at 58 ("[T]he ability to hail the witness into court is not enough. Practical availability is also required. . . . The party's ability to produce the witness, or his reasons for doing so, must be stronger than those of the party seeking an inference in his favor. Otherwise, an inference might just as well be drawn *against* the party who favors a missing witness inference. A finding of peculiar availability may be justified where circumstances suggest a potential bias in favor of one party, *e.g.*, where he is employed by that party . . . ."); *Commonwealth v. Thomas*, 429 Mass. 146, 150, 706 N.E.2d 669, 673 (1999) ("Where a defendant has knowledge of an available witness whose general disposition toward the defendant is friendly, or at least not hostile, and who could be expected to give testimony of distinct importance to the defendant's case, but the defendant, without explanation, fails to call that witness, the jury may permissibly infer that that witness would have given testimony detrimental to the defendant's case."); *cf. People v. Modeste*, 1 Misc. 3d 315, 318, 764 N.Y.S.2d 561, 563 (N.Y. Sup. Ct., Kings Cty. 2003) ("A complainant in a criminal case is generally considered to be under the control of the People and would tend to give testimony favorable to the prosecution. When there are allegations of domestic violence and where the defendant and the complainant continue or resume their intimate relationship, the issue of whether the complainant is under the control and/or available to the People is different."). Whatever the elements of the foundation may be, the trial judge must make a factual finding that the predicate circumstances exist in order to bring the doctrine into play. *Simmons v. United States*, 444 A.2d 962 (D.C. 1982); *Dansbury v. State*, 193 Md. App. 718, 1 A.3d 507 (2010); *Commonwealth v. Saletino*, 449 Mass. 657, 670, 871 N.E.2d 455, 466 (2007); *and see Carr v. United States*, 531 A.2d 1010 (D.C. 1987) (reversing a conviction for error in giving a missing witness instruction against the defense: "Although Samuel Eates had been introduced as a defense witness at the beginning of the trial (including name, home address, and place of employment), he was not called by the defense in presenting the alibi defense. ¶ During the discussion about instructions, the prosecutor proposed that a missing witness instruction be given. Defense counsel . . . objected. As 'an officer of the court,' she proffered that Eates was not called because he was unable to remember the day in question . . . The trial court with no elaboration ruled in the government's favor and agreed to give the instruction." *Id*. at 1011. "At trial, the prosecutor based his argument for the missing witness inference on the grounds that Eates was peculiarly available to the defense because they had presented him as a witness, and that he was 'unavailable' to the government because he had left the courtroom area prior to the close of the defense case. We have held that a witness can be peculiarly available when 'physically available' to only one of the parties, for example, to a defendant, but beyond the subpoena power of the government. . . . Plainly this was not the case here. Eates was introduced to the jury at the start of the trial, and the government at that time knew his name, address, and place of employment. We have rejected any rule which holds that witnesses are rendered automatically physically unavailable whenever the opposing party learns of their existence for the first time at trial. 'In

many circumstances, a party may readily secure by subpoena the testimony of a witness who comes to that party's attention for the first time during trial.' . . . Such is the case at bar. Eates was within the government's subpoena power. The only attempt to secure Eates as a witness was a search by the prosecutor made at the time the defense rested without calling Eates. Our case law cannot be stretched to allow this situation to constitute physical unavailability." *Id*. at 1012-13.); *Commonwealth v. Alves*, 50 Mass. App. Ct. 796, 741 N.E.2d 473 (2001) (dictum because error held harmless) (holding that the trial court erred in giving a missing witness instruction against the defense when the defendant's mother, testifying as a defense witness, broke down during her direct examination (saying that she had a heart condition) and did not return to the stand: the Appeals Court holds that while the trial judge properly struck the witness's testimony because of the impossibility of cross-examination, the giving of a missing-witness instruction in addition was an abuse of discretion); *People v. Gause*, 230 A.D.3d 1573, 1576, 219 N.Y.S.3d 496, 500-01 (N.Y. App. Div,, 4th Dep't 2024) ("the court properly denied . . . [the defendant's] request for a missing witness instruction with respect to her friend and the second man who, as noted above, were present at the scene of the crimes. Defendant failed to meet her burden of establishing that the witnesses would naturally be expected to provide testimony favorable to the People . . . . Indeed, as accomplices, their testimony 'would have been presumptively suspect . . . or subject to impeachment detrimental to the People's case'"); *United States v. Orlandella*, 96 F.4th at 100-01 (secondary ground) (upholding the district court's refusal of a defense request for a missing witness instruction regarding the child ["Minor A"] who was the subject of defendant's communications in a prosecution for sexual exploitation of a minor by exchanging sexual material through an internet chat app: the Court of Appeals finds that the defendant's purported foundation for such an instruction was deficient in several particulars including the following: "In assessing whether Minor A was 'favorably disposed' to testify in favor of the government, the district court explained that there was no evidence Minor A had any relationship with the government and that it was unclear whether Minor A would have testified favorably for the government because she had a prior relationship with Orlandella. We discern no abuse of discretion in the district court's considerations or its explanation. For starters, the record before us does not support the contention that Minor A had a relationship with the government. The only substantive communication between Minor A and any individual involved in the investigation or prosecution was Sergeant Griffith's safety check, the details of which Orlandella did not seek when imploring the district court for a missing witness instruction. Besides that, there's nothing from which we could even infer that Minor A played a role in the federal agents' or prosecutors' investigation and prosecution. There's also nothing in the record indicative of Minor A's disposition toward Orlandella, his prosecution, or the government's case against him. Without any such evidence or proffer in the record, we cannot say that the district court abused its discretion when it concluded that Minor A was not so clearly favorably disposed in favor of the government, due to her prior relationship with Orlandella."). In a jury trial, once the finding is made, the judge will instruct the jury on the inference, and counsel may refer to it in closing argument. *See*, *e.g.*, *People v. Fuqua*, 122 A.D.3d 1249, 996 N.Y.S.2d 410 (N.Y. App. Div., 4th Dep't 2014). *Cf. People v. Thomas*, 21 N.Y.3d 226, 230-31, 991 N.E.2d 200, 203, 969 N.Y.S.2d 426, 429 (2013). In a bench trial either side can ask the judge to use this inference in his or her decision-making on the issue of guilt or innocence. A parallel doctrine, the spoliation-of-

evidence rule, permits an "'adverse inference . . . [to] be drawn against a party who [loses or] destroys relevant evidence' . . . [when] there . . . [is] 'a showing that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction'" (*United States v. Johnson*, 996 F.3d 200, 206 (4th Cir. 2021)).

Local practice varies concerning whether, if an adequate basis for the missing-witness charge is not laid, counsel is permitted to argue from the failure of the other side to call a witness. *Compare Commonwealth v. Pena*, 455 Mass. 1, 17, 913 N.E.2d 815, 828 (2009) ("a defendant may not argue in a case where there is no missing witness instruction that the jury should infer from the Commonwealth's failure to call a witness that the witness would have been unable to rebut a defense witness. . . . 'It is a powerful accusation – that a party is withholding evidence that would be unfavorable – and that is why we regulate it closely and require judges to assess very carefully whether to give the instruction and to permit the argument in a given case.'"), *with People v. Thomas*, 21 N.Y.3d at 230-31, 991 N.E.2d at 203, 969 N.Y.S.2d at 429 ("a lawyer who has not sought a missing witness instruction '"may nonetheless try to persuade the jury to draw inferences from the People's failure to call an available witness with material, noncumulative information about the case"'"; "a request for a missing witness instruction" is not "a prerequisite to a missing witness argument," and "counsel ha[s] no obligation to make an offer of proof as a predicate for a missing witness argument.").

Some jurisdictions have restricted the prosecutor's ability to obtain a missing witness charge against the defense. *See, e.g.*, *Harris v. State*, 458 Md. 370, 182 A.3d 821 (Md. App. 2018) (discussing the "growing number of jurisdictions [that] have limited the use of a missing witness instruction in criminal cases, at least to the extent that it would allow an adverse inference based on the failure of a defendant to call a witness" (*id*. at 394-95, 182 A.3d at 836), and declaring that a trial court "should rarely – if ever" give "a missing instruction at the behest of the prosecution against the defendant" because such a judicial endorsement of "the particular inference that the prosecutor asks the jury to draw against the defendant . . . may be at odds with the constitutional principles that govern a criminal case." (*id*. at 377, 182 A.3d at 825).); *State v. Hill*, 199 N.J. 545, 566, 974 A.2d 403, 416 (2009) (holding that a missing witness charge "generally should not issue against criminal defendants" because such a "charge from the court risks improperly assisting the State in its obligation to prove each and every element of a charged crime beyond a reasonable doubt"); *State v. Tahair*, 172 Vt. 101, 109, 772 A.2d 1079, 1085 (2001) (dictum) (announcing that "the missing witness instruction should no longer be given in criminal cases" (*id*. at 109, 772 A.2d at 1086) because, *inter alia*, "many courts and commentators have noted that the instruction raises constitutional concerns by implying that the defendant has some obligation to produce evidence, thus diminishing the State's burden of proving the defendant's guilt beyond a reasonable doubt . . . [and] we . . . agree that the constitutional argument supports the conclusion that, as a matter of sound judicial policy, the instruction is no longer warranted in criminal cases" (*id*. at 109, 772 A.2d at 1085-86). In such jurisdictions, the prosecution may still be able to comment in closing argument on the defense's failure to call a witness. *Compare Harris v. State*, 458 Md. at 377, 182 A.3d at 825 ("a prosecutor may legitimately urge the jury to draw an inference adverse to the defendant under the

missing witness rule" as long as the judge does not "endorse that element of the prosecutor's argument" by giving a missing witness charge), *with Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) (*per curiam*) ("It is generally . . . outside the boundaries of proper argument [for a prosecutor] to comment on a defendant's failure to call a witness. . . . This can be viewed as impermissibly shifting the burden of proof to the defense.").

§ 10.08(b) Subpoenaing Defense Witnesses To Avoid a Missing-Witness Inference Against the Defense

Before giving a missing-witness instruction, the court is required to conduct an adequate inquiry and find that the factual circumstances justifying such an instruction exist. *See*, *e.g.*, *Simmons v. United States*, 444 A.2d 962, 964 (D.C. 1982) ("The trial judge is required to make an 'informed decision' on both the absent witness' availability and the likelihood that the absent witness will be able to elucidate the transaction."); *Dansbury v. State*, 193 Md. App. 718, 1 A.3d 507 (Md. Ct. Special App. 2010). Unless counsel is practicing in a jurisdiction that has foreclosed the prosecution from using a missing witness inference against the defense (see § 29.4.7.1 *supra*), counsel should take the necessary steps to prepare for an evidentiary submission in opposition to the prosecutor's request for a missing-witness instruction. Counsel should review his or her evidence prior to trial, noting whether there are witnesses (i) whom s/he has been unable to locate or does not plan to call and (ii) who will appear from the trial testimony either (A) to have material evidence helpful to the defense if the defense version of the facts is true (for example, a person who, respondent will testify, was with the respondent at some other place at the time of the offense) or (B) to have witnessed events relating to the offense and to be allied in interest with the defense (for example, respondent's brother who was with the respondent at the time of the episode giving rise to the charge). Counsel should subpoena these persons. If they are served and appear, s/he can tender them to the prosecutor. *See Commonwealth v. Boyd*, 356 Pa. Super. 302, 306-07, 514 A.2d 623, 625 (1986). If they cannot be served or do not appear, s/he can inform the court and the prosecutor that s/he has served the witness or attempted to serve the witness, as the case may be. Counsel should have the process server prepared to testify that service was made or that diligent unsuccessful efforts to find the witness were made, and counsel should proffer the process server's testimony to this effect. The defense has now achieved the maximum possible protection against a missing-witness instruction or inference. *Compare People v. McClinton*, 2013 WL 6182635, at *4 (Mich. App. 2013) (the defendant was not entitled to a missing witness instruction where "[t]he prosecutor made many attempts to call . . . [the witness in question] and many attempts to serve her with a subpoena, but he was unable to locate her"), *and Commonwealth v. Joyner*, 55 Mass. App. Ct. 412, 418, 771 N.E.2d 193, 199 (2002) (" Based upon representations that the Commonwealth had issued subpoenas for the witnesses, had made phone calls, had spoken to people in . . . [one witness's] putative household, and had sent cruisers to the city . . . in an attempt to locate . . . [the witnesses], the trial judge was well within her discretion when she determined that neither . . . [witness] could be 'located and brought forward.'"), *and United States v. Burgos*, 579 F.2d 747, 750 (2d Cir. 1974) ("The district court did not err in refusing to give a 'missing witness' instruction as to the informant . . . , who was made available to defense counsel both for

interview and for testimony"), *with People v. Savinon*, 100 N.Y.2d 192, 791 N.E.2d 401, 761 N.Y.S.2d 144 (2003) ("[C]ounsel's failure to subpoena . . . [the defendant's friend and former employee, who was the only witness to the charged offenses], having just met with him, justified the trial court's determination that the defense did not rebut the People's prima facie showing of the witness's availability."). *But see People v. Hall*, 18 N.Y.3d 122, 130-31, 960 N.E.2d 399, 403-04, 936 N.Y.S.2d 630, 634-35 (2011) (under New York law, the proffering of a witness to the other side's counsel does not rebut the basis for a missing witness inference because "the common-sense inference that a [party's] failure to call a seemingly friendly witness suggests some weakness in a party's case . . . is not rebutted when the opposing party chooses not to call the same witness – a witness who, by definition the opposing party would expect to be hostile").

In some cases, when the prosecutor is denying the existence of a person whom the respondent claims was with the respondent at the time of the offense and when the process server has found verification of the existence of such a person in the course of unsuccessful efforts to locate him or her, defense counsel may want to call the process server to testify. In this situation the avowed purpose of the testimony is to show vigorous efforts to locate the missing person in order to rebut any negative inference from that person's absence, and hearsay reports about the person that the process server attempted to follow up are admissible to prove the extent of the process server's efforts. Incidentally, these reports tell the factfinder that the person does exist.

Of course, if bringing a particular witness into the case is going to give the prosecutor something s/he can use advantageously and does not already have, counsel may well prefer to risk a missing-witness inference rather than to issue a subpoena.

§ 10.08(c) Laying a Foundation for a Missing-Witness Inference Against the Prosecution

The missing-witness instruction is often refused if the party requesting it appears to have had ample opportunity to subpoena the witness, since the witness is not then thought to be uniquely available to the opposing side. Therefore, if counsel's investigation identifies an individual who would appear able to help the prosecution's case but whom counsel cannot locate or whom counsel knows the prosecution is not going to call, counsel will often want to have that person subpoenaed and to be prepared to prove the unsuccessful diligent efforts of a process server to find the person. This will lay the basis for a defense request that the missing-witness charge be given against the prosecution. In connection with police spies, informers, "special agents," and other similar marginal and transitory police characters, counsel should both issue subpoenas and write the prosecutor at an early stage of the investigation, asking the prosecutor to make certain that the police know the whereabouts of the witness, so that s/he can be available for trial. Frequently s/he will disappear, and counsel is then in a position to request a missing-witness instruction even if the prosecutor professes present unsuccessful efforts to locate the person, based on the prosecutor's failure, after notice, to keep in touch with the witness prior to trial when the prosecutor had an opportunity to do so. *See People v. Davydov*, 144 A.D.3d 1170, 1172-73, 43 N.Y.S.3d 74, 78 (N.Y. App. Div., 2d Dep't 2016) (the defendant was denied

effective assistance of counsel due to his lawyer's errors, which included "fail[ing] to request a missing witness charge" to "instruct[ ] the jury that an unfavorable inference could be drawn from the People's failure to call Aminov [an eyewitness] as a witness"). *Cf.* §§ 9.10(a), 9.10(c), 10.02 *supra.* There is some authority supporting an argument that law enforcement agents, habitual or paid informants, snitches, and other persons innately allied with the prosecution may be qualified for missing-witness treatment even if they are accessible to defense subpoena: "We have recognized that the government's failure to call a witness who is physically available to the defense and could be subpoenaed by them could be a basis for the defendants to receive a missing witness instruction in limited circumstances. We have explained that if such a witness is 'clearly favorably disposed' to the government, the witness may be treated as not legally 'available' to criminal defendants such that the defendants would be entitled to the missing witness instruction even though they would have had the means to call that witness." *United States v. Sandoval*, 6 F.4th 63, 103 (1st Cir. 2021) (dictum); *cf. People v. Vasquez*, 76 N.Y.2d 722, 723-24, 557 N.E.2d 109, 109-10, 557 N.Y.S.2d 873, 873-74 (1990) (reversing a conviction on the ground that the trial judge erred in refusing to give a missing-witness instruction requested by the defense; "[T]here was a sufficient showing that Pena was in the 'control' of the People and could be expected to testify favorably to them. Pena's relationship with law enforcement officials spanned a number of years, and it was Pena who informed the police that defendant – whose existence was previously unknown to the police – had had part of a shipment of cocaine delivered to her apartment. ¶ . . . The fact that a witness has at some time been a police informant does not invariably establish that he or she can be expected to give favorable testimony to the People, although it may well evidence a disposition to do so. However, a witness who has provided key information in the very case at hand can surely be expected to give testimony favorable to the People, absent some unusual circumstance.").

Concerning defense entitlement to a missing witness instruction or its equivalent in cases in which the prosecution or another state agency has destroyed potentially material evidence, see §§ 9.09(b)(6)-9.09(b)(7) *supra*.

Part B. Preparing Defense Witnesses To Testify

§ 10.09 TECHNIQUES OF WITNESS PREPARATION

The work of preparing a witness to testify is different from that of interviewing a witness to discover facts. Whereas investigative interviews involve striking up a congenial relationship and encouraging expansiveness that produces free-roaming narration by the witness, trial preparation focuses on what specific pertinent testimony the witness has to offer and on how to present it most effectively.

§ 10.09(a) Reviewing the Facts and Trial Procedure with the Witness

Counsel should review the facts previously ascertained from this witness and others, point out any discrepancies or unclarities, and have the witness resolve them to the extent that

they are truthfully resolvable. It is not necessary, or even desirable, that all defense witnesses come into trial with the same "pat" story. But no defense witness should be permitted to testify without awareness of the points at which his or her testimony diverges from that of other known witnesses or without a plausible explanation for the divergence.)

Counsel should explain the general theory of the defense to each witness and demonstrate the witness's role and exact place in this defense. Trial procedures, including the purposes and methods of direct, cross, and redirect examination, and objections, should also be explained. The atmosphere of court must be demystified as much as possible so that the witness will be at ease when s/he arrives for the trial. If a particularly important defense witness is showing signs of excessive nervousness, it may be wise for counsel to take him or her to court to observe the examinations of witnesses in another trial, a week or so before the client's, choosing a case that is likely to proceed routinely, without explosive drama.

§ 10.09(b) Instructions to the Witness About Demeanor and Dress

The witness should be instructed (i) not to answer any question unless s/he understands it but simply to say that s/he does not understand the question if s/he does not (many witnesses do not realize that this is appropriate or even permissible behavior in court), and (ii) to give answers that are true to the best of the witness's knowledge rather than trying to guess and say what would be a favorable answer from the defense standpoint.

The importance of the overall impression created by the witness's conduct in the courtroom (both on the stand and off) should be mentioned, and counsel should discuss with the witness how the witness can make the best impression. (This may be different for different witnesses. In some cases it is desirable for the witness to appear serious and businesslike; in some cases, relaxed and easy-going; in some cases, nervous or upset. Counsel cannot ethically or practically teach a witness to act in ways that dissimulate but can and should assist the witness to perceive and control aspects of the witness's demeanor that may convey undesired messages.)

It is ordinarily wise for counsel to suggest to the witness how s/he should dress for court and, if practicable, to ask the witness to come to a pretrial interview dressed as s/he will dress when s/he testifies. (Admonitions to some witnesses to "dress well" or "dress casually" may produce results that amaze – and horrify – counsel; it is best for counsel to see in advance what the witness thinks these admonitions mean.) For witnesses who are regular church-goers, an instruction to dress "as if they were going to church" will produce the effect that counsel wishes.

§ 10.09(c) The Dry Run of the Witness's Testimony

Counsel should ordinarily engage every witness in a thorough "dry run" of direct, cross, and redirect examination, asking every question that counsel intends to ask in court or foresees that the cross-examiner may ask.

If counsel's questions are not bringing out the desired answers, they should be changed and that portion of the examination should be rerun until both counsel and the witness are satisfied with it. Counsel will often find it useful to ask for the witness's help in framing questions best suited to elicit the witness's story or particular details of it that counsel has noted in earlier investigative interviewing: "Last time we talked, you said ___. That seemed to me to be something that the court will want to hear. Now I am trying to get the right question to ask you, so that in your answer you will say it pretty much the same way you said it in our last interview. Would it be better if I asked ___ [suggesting one form of question] or if I asked ___ [suggesting another form of question]? Or maybe you can suggest a way to ask it that will be sure to bring out the information we want."

In this process counsel may have to explain to the witness – without confusing technicalities and legal jargon – some of the constraints imposed upon counsel's questioning by the rules of evidence. "I can't just call you to the witness stand and say, 'Okay, go ahead and tell your story.' It's got to be a back-and-forth thing, in which I ask you particular questions, and you give the answers. There are certain legal rules about the questions I can ask. I can't do what courts call 'leading a witness,' which means putting words into a witness's mouth by saying in my question what your answer is supposed to be. For example: you've told me that it was very dark out that evening. I can't ask you in court, 'Was it very dark out?' and have you simply say 'Yes.' I've got to ask you something like, 'Would you please describe the lighting conditions,' and then *you* have to say, 'It was very dark out,' if it was. You see what I mean? My questions can direct you to the subject that I am asking about, but you have to be the one who fills in the details by your answer. So, if there are important details, you must be the one who remembers them and says them, and I must find the right questions. Also I have to ask the questions in a certain logical order. I can't ask, 'What time did Joe arrive at the drive-in?' before you have first testified that Joe *did* come to the drive-in that evening. Lawyers would call that question 'assuming a fact not in evidence,' and the judge would not let it be asked until I had first asked some question that caused you to tell the court that Joe did come to the drive-in. Now, going back to the beginning of the evening, let me try out a line of questions. After you have answered them, we can go over the answers and see if everything has been brought out, and maybe we can improve the questions so as to be sure that they will bring everything out fully and accurately."

Optimal predictability in getting the answers that counsel wants in court is usually obtained by making the conditions in the "dry run" as similar as possible to those that will exist in the courtroom. The sequence of the questioning should be the same; and, once counsel has worked out questions that produce the desired result, s/he should stick closely to them in form and language. If alternative possible forms have been tried out, both counsel and the witness should be clear at the end of the "dry run" which questions will be asked in court and which will not. In important areas of the witness's testimony, single questions should not be asked in isolation; sizeable blocks of questions and answers should be run – and rerun as often as necessary – so that each question will be asked in the "dry run" against the same background that will frame it when it is later asked in court. To avoid confusion and to maximize the similarity between the "dry run" and the courtroom examination, counsel will find it useful to conduct the

"dry run" itself with counsel standing and facing the witness, or at least sitting face-to-face with the witness some distance apart. When breaks are made in the "dry run" to discuss the questions and answers, to work on reformulations of questions, or to conduct follow-up investigative questioning that will not be used in court, counsel should change his or her physical position – for example, by coming over and sitting down beside the witness – so that the demarcation between the questioning that will occur in court and all of the other conversation in the preparatory interview will be sharp and clear. (If the witness is left confused and thinks that counsel intends to ask in court certain questions that counsel actually meant to ask in the preparatory interview only for his or her information, or as try-outs that counsel then rejects as unsatisfactory, trouble is likely to follow. When the witness finds in court that the questions s/he expects are not being asked, s/he may begin to worry and think that s/he has done something wrong to cause counsel to deviate from the prepared line of questioning. Consequently, s/he may begin to look apprehensive or insecure or may blurt out the answer to the question that counsel "forgot" to ask, instead of responding to the question actually asked, or s/he may do both. Conversely, if questions that the witness does not expect to have asked in court *are* asked, the witness may feel that s/he has been misled or even betrayed by counsel; s/he is likely to lose his or her bearings and become visibly rattled. The key to effective witness preparation is a clear, common understanding by counsel and the witness concerning exactly what will happen in the courtroom.

§ 10.09(d) Preparing the Witness for Cross-Examination by the Prosecutor

A witness should be instructed that if s/he is asked on cross-examination whether s/he has previously discussed his or her testimony with defense counsel, s/he should reply that s/he has – and should do so in a manner that communicates a tone of "why, of course!" or "certainly! doesn't everybody?" If s/he is asked whether s/he has rehearsed his or her testimony with counsel, s/he should answer something along the lines of "[Mr.] [Ms.] ____ asked me all of the questions that were asked in court today, and I told [him] [her] exactly what my answers are." If asked whether defense counsel did not tell the witness how to answer the questions – or what answers were expected to the questions – the witness should reply in the vein of "No, first I told [Mr.] [Ms.] ____ exactly what I knew about the case, and then we went through all of these questions and answers because [Mr.] [Ms.] ____ told me that [he] [she] wanted to prepare the best questions to bring out in court the facts that I had told [him] [her]." (In a jury trial, if the prosecutor impugns the witness's integrity by asking any of these questions in a derisive manner, counsel may find it advisable at trial, *after letting the witness answer the question,* to demand in the jury's presence that the prosecutor produce the basis for the innuendo or discontinue that line of questioning.) Counsel can also ask the court to instruct the jury that there is nothing wrong with an attorney discussing a witness's testimony with the witness before trial (*see*, *e.g.,* FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES 3.9 [Weighing the Evidence] ("It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony.")) and/or to admonish the prosecutor for unfairly attacking the defense.

It is important for counsel to assure the witness that the "dry run" and other preparation of the witness's testimony which they are doing is perfectly proper – "I wouldn't ask you to do it if it weren't" – so that the witness will not feel or appear guilty when s/he is asked about it on cross-examination. And, in order to permit counsel to prepare the witness to answer questions on cross-examination in the manner just described both truthfully and comfortably, it is good practice for counsel to tell the witness, *before beginning the first rehearsal or "dry run,"* something like: "Now, let's try out a line of questions and answers for your testimony. We want to do this in order to make sure that my questions in court will be clear and understandable, so that your answers will tell [the jury] [the judge] the relevant facts that you and I have been going over, not only accurately and truthfully but also in a way that touches all of the bases and complies with the rules of evidence. The idea is to work out a series of questions I can ask you in court that will bring out all of the necessary details clearly and in the order easiest for [the jury] [the judge] to follow. If my questions aren't doing that when we go through them now in question-and-answer form, we'll revise them until they work for you. I also want to ask you the sorts of questions that the prosecutor might ask on cross-examination, so that we can predict whether any redirect examination is likely to be necessary and can prepare questions for the redirect examination." If the witness is one whom counsel wishes to invite to assist counsel in the formulation of questions, this is also the time for an explanation of that process, as suggested in § 10.09(c) *supra*.

After the substantive portions of the witness's testimony on direct, cross, and redirect have been sufficiently rehearsed, it is useful for counsel to remind the witness of the explanation that s/he gave the witness at the outset (along the lines of the immediately preceding passage in quotation marks) and to prepare a brief line of redirect examination for possible use if the prosecutor's cross-examination implies that the witness has been improperly coached. The following exchange usually does the trick:

Q. You said on cross-examination that you and I had discussed your testimony before you took the stand and had gone over it in question-and-answer form. Do you recall what I said before we did that, regarding the reason for doing it?

A. Yes.

Q. Please tell the jury what I said, as best you can recall.

A. You said that you wanted to be sure that your questions would cover all of the bases and bring out all of the facts accurately, and that if the questions you were planning to ask did not do that, you would revise them to be clear and complete.

In rehearsing cross-examination, counsel should spare the witness nothing that the prosecutor may possibly use against the witness at trial. Counsel may want to introduce delicate or embarrassing subjects in a friendly way by interrupting the "dry run" to explain why the prosecutor will probably question the witness on such-and-such a subject and why it is important

that the witness answer the questions satisfactorily. But eventually the questions must be put to the witness in the "dry run" in the toughest form in which the prosecutor could put them. Rehabilitation can follow. See § 8.09 *supra.* There is a natural human tendency for defense counsel to go easy on a witness who, after all, is doing the respondent the favor of testifying in support of the defense case. That tendency should be avoided like the plague, since it can prove equally deadly.

A witness who has prior convictions or prior acts of misconduct that can be used for impeachment (see § 30.07(d) *infra*) should be told the way in which s/he is likely to be questioned about them at trial. (The standard procedure is described in §§ 31.12, 33.06 *infra.* S/he should be instructed that when s/he is asked whether s/he is the person who was convicted of such-and-such a crime on such-and-such a date, s/he should listen carefully to the description of the crime and, if it is correct, s/he should answer the question by a simple "yes," without attempting to explain the conviction away. Any explanatory matter allowed by local practice can best be developed on redirect examination, and this aspect of the redirect should be rehearsed with care. Poor explanations of prior convictions are worse than no explanation at all. Both cross-examination and redirect examination on prior convictions and prior "bad acts" should be rehearsed until the witness is as comfortable with them as s/he can be made.

§ 10.09(e) Refraining from Taking Notes or Written Statements from the Witness

As explained in §§ 27.12(b), 33.03 *infra,* state statutes or rules may give the prosecution a right to at-trial discovery of prior statements of defense witnesses for purposes of impeachment. This discovery may be limited to witnesses' prior written or recorded statements or may extend to notes made by counsel or a defense investigator during witness interviews. Disclosure is usually required only after the completion of each witness's testimony on direct examination, but in some jurisdictions it can be requested by the prosecutor at the beginning of the defense case or even earlier. (Constitutional and "work-product" grounds for defense objection to disclosure before a witness testifies on direct are discussed in §§ 9.12-9.13 *supra* but may not persuade the trial judge.) Even minor discrepancies between a witness's trial testimony and his or her prior statements can be put to damaging use by a capable prosecutor. Defense counsel who practice in jurisdictions that authorize prosecutorial discovery of defense-witness statements should familiarize themselves with the local rules and should ordinarily refrain from taking pretrial witness statements in discoverable forms. If notes of a witness's oral interview language are essential, they should be incorporated in a strategy memorandum that will be maximally insulated from discovery as the attorney's "work product." See §§ 5.05, 8.10, 9.13 *supra.*

§ 10.10 PREPARING THE RESPONDENT TO TESTIFY; CONFERRING WITH THE RESPONDENT ABOUT TRIAL STRATEGY

Preparing the respondent to testify requires special care. The respondent's testimony is more carefully scrutinized than that of any other witness. That an alleged delinquent is presumed to be innocent until proved guilty is a canard. In reality, most juvenile respondents must prove

their innocence – and often their likeableness as well.

The respondent ordinarily testifies last so that s/he can have heard all the other testimony given in the case. (It has been held unconstitutional to require a criminal defendant to testify first in a case in which the defense intends to present the testimony of the defendant and other defense evidence. *Brooks v. Tennessee,* 406 U.S. 605 (1972); *see also Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980) (dictum); *State v. Kido*, 102 Hawai'i 369, 374-78, 76 P.3d 612, 617-21 (Hawai'i App. 2003).) Because the respondent has a right to be present throughout the trial (see § 27.01 *infra*), s/he cannot be excluded during the testimony of earlier witnesses by the prosecutor's invocation of the rule on witnesses (see § 27.11 *infra*); and the court's power to forbid consultation between the respondent and defense counsel during the course of the trial is significantly limited by the Sixth Amendment, see § 27.02 *infra.* Thus a respondent who is reasonably bright and articulate usually makes the best clean-up hitter. There are bound to be some inconsistencies in the most well-planned defense testimony, but if the respondent testifies last, s/he is given the opportunity to reconcile any contradictions that have been left by earlier defense witnesses. The downside of this strategy is that the prosecutor may be able to argue in closing that the respondent has tailored his or her testimony to the preceding evidence. *See Portuondo v. Agard*, 529 U.S. 61, 63 (2000) (prosecutor's closing argument did not violate the Fifth or Sixth Amendments or the Due Process Clause by "call[ing] the jury's attention to the fact that the defendant [who testified last] had the opportunity to hear all other witnesses testify and to tailor his testimony accordingly"); *but see State v. Walsh*, 125 Hawai'i 271, 260 P.3d 350 (2011) (holding that generic tailoring arguments (*i.e.*, arguments urging that the defendant's trial testimony be disbelieved because s/he had the opportunity to hear all of the preceding testimony and to tailor his or her own version of the facts accordingly) violates the state constitutional rights to confrontation (which assures a defendant that she can be present throughout the trial) and to testify, although specific tailoring arguments (*i.e.*, arguments that specific aspects of the defendant's trial testimony were fabricated to conform to specific items in the testimony of particular preceding witnesses) are permissible); *State v. Daniels*, 182 N.J. 80, 861 A.2d 808 (2004) (exercising the court's supervisory authority to hold that "prosecutors are prohibited from making generic accusations of tailoring during summation" (*id*. at 98, 861 A.2d at 819) and that "at no time during cross-examination may the prosecutor reference the defendant's attendance at trial or his ability to hear the testimony of preceding witnesses" (*id*. at 99; 861 A.2d at 820) because these practices "undermine the core principle of our criminal justice system – that a defendant is entitled to a fair trial" (*id*. at 98, 861 A.2d at 819)); *State v. Stephanie U.,* 206 Conn. App. 754, 789, 261 A.3d 748, 772 (2021) (exercising the court's supervisory authority to "to set forth a procedure to ensure that prosecutors make only specific and not generic tailoring remarks during a criminal trial"); *State v. Swanson*, 707 N.W.2d 645, 657-58 (Minn. 2006) (construing evidentiary rules so as to limit *Portuondo v. Agard* to cases in which there is "specific evidence" that the accused "has tailored his testimony to fit the state's case"); *Commonwealth v. Gaudette*, 441 Mass. 762, 765-68, 808 N.E.2d 798, 801-03 (2004) (reserving the question of whether *Portuondo v. Agard* should be rejected on state constitutional grounds and holding that tailoring comments may be made only in cases in which "there is evidence introduced at trial to support" a prosecutorial argument that the accused "shape[d] his testimony to conform to the trial evidence"). Where such comment is permitted, it

is probably less likely to impress the judge in a bench trial than the jury in a jury trial, particularly in locales where the convention of reserving the respondent's testimony until the end of defense evidence is so widely followed as to appear routine.

If counsel concludes that the respondent should serve as clean-up hitter at trial, counsel must fully explain to the client the nature and implications of that role. The theory of the defensive case must be thoroughly described to the respondent, and counsel should explain what s/he is attempting to show by each witness (including the respondent) and how it all hangs together. Also, in those jurisdictions that have not developed state-law rules which will preclude the prosecutor from comment or cross-examination implying "tailoring" of the respondent's testimony (as in *Portuondo v. Agard*, *supra*), counsel should prepare the client for the possibility that the prosecutor may ask the client on cross whether s/he "did not sit here in court and listen to the testimony of all the other witnesses before testifying," whether s/he "did not discuss the testimony of the other witnesses with counsel before testifying," whether s/he and counsel "did not discuss your testifying in ways that would be consistent with the testimony of earlier witnesses," and so forth, and/or that the prosecutor may claim in closing argument that the respondent took advantage of the order of witnesses to adjust his or her testimony to what the other witnesses said. (Respondents who are surprised and irritated by remarks made in the prosecutor's closing may react by visible signs of anger or even audible denials. Counsel wants to forestall these potentially damaging displays.)

To the best of counsel's ability, s/he should foresee and tell the respondent exactly what will happen at trial. It is important that the respondent be put at ease as much as possible, and the device of taking an inexperienced or particularly nervous respondent to observe earlier trials is often advised.

As with other witnesses (see § 10.09(c) *supra*), the respondent's testimony should be subjected to "dry runs" to assure against omissions and inadvertent inconsistencies and to organize it in the most comprehensible and persuasive manner. See § 33.08 *infra.* Direct, cross, and redirect examination should be role-played; and in role-playing the cross-examination, counsel should press the respondent with the toughest questions that the prosecutor could conceivably ask at trial. See § 33.09(a) *infra*; see also §§ 5.12, 10.09(d) *supra.*

In particular, the respondent must have a plausible explanation for any confessions, admissions to police, or other prior inconsistent statements with which s/he will expectably be impeached. A serious problem in preparing the respondent's testimony is that there may be some prior statements of which counsel is unaware. (These may not surface before the respondent testifies. When a respondent has made multiple statements to the police, a canny prosecutor will often withhold some of them in the prosecution's case-in-chief, so as to leave fresh material for impeachment of the respondent or for rebuttal.) Discovery and investigation must be as complete as possible when the respondent's testimony is prepared, to minimize this hazard.

Finally, counsel should help the respondent to see ways in which the respondent can best

present himself or herself to the judge or jury – both in the respondent's demeanor on the witness stand and in the respondent's deportment at counsel table throughout the trial – as a likeable person. But counsel should not ordinarily attempt to have the respondent dress, behave, or talk in a manner to which s/he is substantially unaccustomed or use vocabulary that is out of keeping with his or her character or situation in life. This sort of acting is seldom convincing. Whether "street talk" should be laundered depends upon counsel's appraisal of how it will go over with the judge or jury. Profanities usually should be edited out, although common profanities may not be punished by contempt, at least in the absence of prior warning by the judge that they are out of order. *Eaton v. City of Tulsa*, 415 U.S. 697 (1974) (per curiam).

Whether or not the defendant is going to testify, counsel should remain in close touch with him or her as the trial date approaches and should discuss in detail counsel's proposed trial strategy and the reasons for it, giving the defendant a chance for input. *See Keys v. State*, 2019 WL 5858138, at *4 (Md. Ct. Special Appeals 2019) ("A lawyer is required to *both* prepare for trial *and* communicate with his client; doing one does not excuse neglecting the other.").

§ 10.11 THE RESPONDENT'S DRESS FOR TRIAL

Clients not in custody should be advised to dress and groom neatly. The more "respectably" or "well" dressed they can appear without looking costumed for the occasion, the better. Counsel should ask the client to dress for one of their pretrial interviews as the client will dress at trial, so that counsel can look over the client's outfit and suggest any necessary improvements. *Cf.* § 10.09(b) *supra.* If the case involves a misidentification defense, counsel should review the descriptions of the perpetrator given by prosecution witnesses (see § 8.19 and subdivisions (2) and (6) of § 9.07(c) *supra*) and be sure that the client does not dress for trial in clothing matching or approximating the clothing worn by the perpetrator.

If a respondent is in custody, counsel should arrange for the client to have civilian clothes to wear during the trial. See § 27.01 *infra.*

§ 10.12 CO-RESPONDENTS AND ACCOMPLICES

As explained in § 8.15 *supra,* counsel's investigation will need to include interviews of co-respondents, adult co-perpetrators, and unarrested accomplices. The primary purpose of these interviews is to prepare to deal with these people if they flip and testify for the prosecution (or if they are tried jointly with counsel's client and take the stand in their own defense), and to obtain a complete picture of relevant events for counsel's litigation-planning purposes. Except in unusual cases, it is probably not wise to call any alleged accomplice or co-respondent who is being tried separately to testify for the defense. If s/he disagrees with the respondent, both will be viewed as liars; if s/he agrees, it will be presumed that they colluded on their stories.

If counsel has been retained by, or appointed to represent, corespondents, counsel will need to be alert to any potential conflicts of interest and, if one exists, secure relief from the

conflicting appointments. *Holloway v. Arkansas,* 435 U.S. 475 (1978). *See also Mickens v. Taylor*, 535 U.S. 162, 166-74 (2002); *Burger v. Kemp,* 483 U.S. 776 (1987); *Cuyler v. Sullivan,* 446 U.S. 335 (1980); *Purnell v. State*, 254 A.3d 1053, 1104-13 (Del. 2021).

Part C. Preparing Real or Demonstrative Evidence for Use at a Suppression Hearing or Trial

§ 10.13 GENERAL CONSIDERATIONS IN PREPARING AND PRESENTING REAL AND DEMONSTRATIVE EVIDENCE

Although the terms "real evidence" and "demonstrative evidence" are often used loosely (and occasionally even interchangeably), it is useful for purposes of this discussion to distinguish between them. The term "real evidence" will be used here to refer to objects that were involved in the crime or other relevant events; records of relevant events or circumstances, such as documents, audio and visual recordings, and photographs; and electronic evidence such as e-mail messages, e-texts, and postings on social media like Facebook. Such objects can be admitted at trial as "substantive evidence" – that is, their probative capacity is not restricted to or by whatever any witnesses may testify about them; rather, the trier of facts may rely upon its independent observations of them to support factual conclusions deducible from the existence, contents and characteristics of such an item. The term "demonstrative evidence" will be used here to refer to objects that neither were involved in the events being litigated nor are direct records of those events but which are proffered to illustrate or elucidate the testimony of a witness. Thus, a witness who orally describes the scene of an event may also draw a map of it upon a piece of graph paper or a whiteboard in the courtroom; or a map drawn by the witness before trial may be identified by the witness on the stand and then shown to the jury in connection with the witness's testimony. Such a map, if admitted into evidence, is not admitted "substantively" or "generally"; rather, the jury is instructed that the map can be considered only insofar as it clarifies or illustrates the oral testimony of the witness.

Both real and demonstrative evidence can have a dramatic impact upon the fact-finder, sometimes far exceeding the persuasive force of oral testimony. Tangible objects and concrete images can shape the fact-finder's visualization of events in ways that strongly support the story line of the party introducing the evidence. *See*, *e.g.*, NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY : THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT (2009); Philip N. Meyer, *"Desperate for Love": Cinematic Influences upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994). Moreover, because corporeal and virtual displays are often more gripping than witnesses' oral narrations of what took place, evidence of this sort will often be more memorable to a jury (or even to a judge in a bench trial), especially in a lengthy trial that is filled with mostly oral testimony and lawyers' arguments. Also, if an item is introduced into evidence and available to the jury in the jury room during its deliberations (as is usually the case), it serves as a graphic reminder of whatever propositions the proponent of the evidence sought to convey by introducing it.

To gain these benefits of real and demonstrative evidence, defense counsel will need to

satisfy the often-complex conditions prerequisite for the admissibility of each item s/he proffers. When it comes to real evidence, this will usually require planning, far in advance of trial, to (1) obtain the evidence in whatever form is needed for introduction at trial; (2) preserve it in the requisite form; and (3) line up and prepare the witnesses who can lay whatever foundation is needed for its introduction. For demonstrative evidence, advance planning also is essential to obtain or create illustrative objects or diagrams that will conform to local evidentiary requirements. The sections that follow will discuss the usual preconditions for the admissibility of real and demonstrative evidence. But, because evidentiary requirements vary considerably across jurisdictions, it is essential that counsel be thoroughly familiar with local rules and practices.

In addition to ensuring that the item is admissible, counsel will need to think about the most effective way to present it in court. If the requisite foundation can be laid by various possible witnesses rather than just one particular person, then counsel will need to select among them, taking into account how each of them would likely come across to the fact-finder. See § 10.01 *supra*. The way in which a witness handles an item while talking about it, or what s/he says about it, can play a crucial role in how the fact-finder perceives the item and what s/he thinks about it. Accordingly, counsel will need to give careful thought to all aspects of the presentation and rehearse the witness thoroughly for it. See § 10.09 *supra*.

§ 10.14 REAL EVIDENCE

§ 10.14(a) Preserving Physical Evidence for Use at Trial or a Pretrial Hearing

Section 8.18 *supra* describes the general practices counsel will need to follow to preserve physical evidence for trial. As that section explains, counsel will have to use procedures that are essentially equivalent to those used by sophisticated police investigators and examiners to preserve crime-scene evidence: bagging and tagging objects with the case name and number and the date and time of collection; inspecting and recording the current condition of the object; locking it down in a secure facility; and maintaining records to show chain-of-custody. That section also describes the additional procedures counsel will need to follow if the object is shown to anyone or tested in some way.

§ 10.14(b) Photographs of the Crime Scene or Other Relevant Sites or Objects

Whenever a description of the physical characteristics of a site or of an object not capable of being presented in court is important, counsel should arrange to have appropriate photographs taken. Photographs are ordinarily quite convincing, particularly if they are taken from several angles and at several distances, so that all spatial relations involved are fully depicted. Counsel should remember that photographs are not admissible until a foundation has been laid by a person who testifies that they are an accurate reproduction of the scene which s/he observed. A photographer should therefore be selected who will be available at the time of trial and who will make a good and personable witness. S/he should be informed that s/he will be

asked at trial, as a basis for testifying that the photographs are accurate, whether s/he has a present recollection of the scene that s/he photographed.

§ 10.14(c) Authentication

When counsel seeks to introduce a physical object, paper document, or item of electronic information at trial or at a pretrial evidentiary hearing, counsel will need to lay a foundation to authenticate the evidence s/he is proffering. In this sense, "authentication" is a factual showing that the exhibit is the particular thing which its proponent asserts that it is. The usual criteria for authentication, as set forth in Federal Rule of Evidence 901 (which is a model for many state statutes and local rules on the subject), are:

> "(a) *In General*. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
>
> "(b) *Examples*. The following are examples only – not a complete list – of evidence that satisfies the requirement:
>
> > "(1) *Testimony of a Witness with Knowledge*. Testimony that an item is what it is claimed to be.
> >
> > "(2) *Nonexpert Opinion About Handwriting*. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
> >
> > "(3) *Comparison by an Expert Witness or the Trier of Fact*. A comparison with an authenticated specimen by an expert witness or the trier of fact.
> >
> > "(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
> >
> > . . . .
> >
> > "(9) *Evidence About a Process or System*. Evidence describing a process or system and showing that it produces an accurate result."

Counsel should check the specifics of whatever statute or rule applies in his or her jurisdiction.

If the prosecutor is at all likely to challenge the authenticity of the item, counsel should come to court armed with copies of both the rule and any caselaw that supports counsel's position. Because the prosecutor may be willing to stipulate to authenticity, it is often worth raising the matter with the prosecutor in advance of trial if establishing authenticity will be

burdensome to counsel in some way (*e.g.*, if it will require that counsel subpoena a witness who would not otherwise be needed and whose presence may be difficult to arrange) and if having such a conversation with the prosecutor will not disclose information that counsel would prefer to withhold until the trial or hearing.

When it comes to traditional sorts of real evidence like physical objects and paper documents, authentication usually does not present much of a challenge. The criteria for admitting such objects are well established in most jurisdictions, and there is usually ample caselaw about the very type of object that counsel seeks to get admitted. More difficult, at least at present, is authenticating video recordings and electronic evidence like e-mail messages, e-texts, and postings on social media like Facebook. *See, e.g.*, *Hawes v. Perry*, 633 Fed. Appx. 720 (11th Cir. 2015) (*per curiam*) (trial counsel's failure to take the steps necessary to authenticate an email message for its admission into evidence at trial should have been raised by appellate counsel as a ground for challenging trial counsel's effectiveness; appellate counsel's failure to raise this claim on appeal was itself ineffectiveness of appellate counsel; the email, which was "sent from [complainant] K.P.'s known email account to Hawes's account," supported "his claim that the alleged second [sexual] encounter [with the minor complainant] never occurred" (*id*. at 723), and would have "show[n] that K.P. was not truthful in her testimony at trial" (*id*. at 725), but "she denied writing the email in front of the jury, the court granted the State's objection to further questioning on authentication grounds," and defense "counsel did not offer a foundation for the email, such as testimony from the internet service provider (as suggested by the State at trial." *Id*. at 723.). In many jurisdictions, the evidentiary rules and practices have not kept pace with the technological developments that have made such items a central part of everyday life. As a result, there may not yet be rules on the subject in counsel's jurisdiction (or they may be very limited or unclear) and the judge who presides over the case may be unfamiliar with whatever rules do exist. If that is the case, counsel can usually find helpful caselaw in other jurisdictions.

Concerning video recordings, courts usually apply the well-established rules for photographs and tape recordings, holding that foundation testimony must establish that the recording is true, accurate, and authentic. *See, e.g.*, *United States v. Cejas*, 761 F.3d 717, 723 (7th Cir. 2014) ("For video recordings, like tape recordings, the proponent should . . . show that the camera functioned properly, the operator was competent in operating the equipment, and the recording fairly and accurately represented the scene depicted"); *People v. Patterson*, 93 N.Y.2d 80, 84, 710 N.E.2d 665, 668, 688 N.Y.S.2d 101, 104 (1999) ("Similar to a photograph, a videotape may be authenticated by the testimony of a witness to the recorded evidence or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted. . . . Testimony, expert or otherwise, may also establish that a videotape 'truly and accurately represents what was before the camera' . . . . Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering . . . ."). *See also People v. Nunez*, 63 Misc.3d 150(A), 115 N.Y.S.3d 597 (Table) (N.Y. App. Term, 2d, 11th & 13th Jud. Dist. 2019) (the prosecution's audio recordings of 911 calls were not sufficiently authenticated and therefore should not have been admitted into evidence: although a

"tapes and records technician for the New York Police Department" testified that "she knew that the recordings of the 911 calls were 'fair and accurate' recordings of the 911 calls because she had listened to the 'original' recordings of the 911 calls that had been emailed to the District Attorney's Office," the *voir dire* of the technician revealed that the recordings "had already been extracted from the database and sent to the District Attorney's Office" and that "the technician never accessed or listened to the calls contained in the police database"; the technician thus could not lay the requisite foundation that "the offered recordings were genuine and that they had not been altered or tampered with").

Concerning electronic evidence, courts typically require a showing (1) that the e-mail message, e-text, or social media posting was actually written by the individual who is claimed to be the author; and (2) that whatever copy of the electronic evidence counsel seeks to introduce (screen shot, photograph, printout, whatever) is a fair and accurate reproduction of what appears in the actual electronic source (the e-mail server, cellphone that produced the text, or social media website). *See, e.g.*, *United States v. Browne*, 834 F.3d 403, 405, 408-16 (3d Cir. 2016) (rejecting the government's assertion that "records of 'chats' [the defendant allegedly] exchanged over Facebook" could be introduced under FED. R. EVID. 902(11) as "'self-authenticating' . . . business records accompanied by a certificate from the website's records custodian" (*id*. at 405), but nonetheless affirming the prosecution's introduction of the records because a "veritable mountain of [extrinsic] evidence linke[d] Browne . . . to the incriminating chats" (*id*. at 415) and the Government thus satisfied its "authentication burden under a conventional Rule 901 analysis" (*id*. at 405)); *United States v. Vayner*, 769 F.3d 125, 127 (2d Cir. 2014) (the trial court erred in granting the prosecution's request to admit "into evidence a printed copy of a web page, which [the government] . . . claimed was Zhyltsou's profile page from a Russian social networking site akin to Facebook": "the government presented insufficient evidence that the page was what the government claimed it to be – that is, *Zhyltsou's* profile page, as opposed to a profile page on the Internet that Zhyltsou did not create or control."); *United States v. Craig*, 953 F.3d 898 (6th Cir. 2020) (reversing a gun-possession conviction because, on cross-examination of the defendant, the prosecution showed a Facebook video of a masked individual rapping and waving a gun; testimony by two officers that they had viewed a video in which a rapper's jacket was like the one that the defendant was wearing when arrested and that the rapper's gun was like the one underlying the possession charge was insufficient authentication, even after the defendant admitted on cross that he had done raps); *People v. Price*, 29 N.Y.3d 472, 2017 WL 2742214 (N.Y. Ct. App. June 27, 2017) (the prosecution failed to proffer "a sufficient foundation at trial to authenticate a photograph – purportedly of defendant holding a firearm and money – that was obtained from an internet profile page allegedly belonging to defendant"; the court explains that even if it were to follow some other jurisdictions by adopting a two-pronged "approach [that] allows for admission of the proffered evidence upon proof that the printout of the web page is an accurate depiction thereof, and that the website is attributable to and controlled by a certain person, often the defendant," the "evidence presented here of defendant's connection to the website or the particular profile was exceedingly sparse. . . . For example, notably absent was any evidence regarding whether defendant was known to use an account on the website in question, whether he had ever communicated with anyone through the account, or whether the account

could be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account, or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein. . . . Thus, even if we were to accept that the photograph could be authenticated through proof that the website on which it was found was attributable to defendant, the People's proffered authentication evidence failed to actually demonstrate that defendant was aware of – let alone exercised dominion or control over – the profile page in question."); *People v. Mayo*, 202 A.D.3d 833, 833-34, 158 N.Y.S.3d 876, 876-77 (Mem) (N.Y. App. Div., 2d Dep't 2022) (the trial court "erred in admitting into evidence a photograph downloaded from a Facebook account allegedly belonging to the defendant and allegedly depicting the defendant wearing certain clothing similar to that worn by the perpetrator. In order to admit a photograph into evidence, it must be authenticated by proof that it is genuine and that it has not been tampered with . . . . Here, the People failed to properly authenticate the photograph. The People's only authentication evidence consisted of the testimony of a police witness who searched for the Facebook profile 1½ years after the crime. They did not proffer any evidence or testimony demonstrating that the photograph was 'a fair and accurate representation of the scene depicted or that it was unaltered' . . . . To the contrary, the police witness testified that he did not know whether the photograph had been altered. Furthermore, the People did not present any evidence 'to establish that the web page belonged to, and was controlled by, [the] defendant' or any evidence as to when the photograph was created or posted"); *Smith v. State*, 136 So.3d 424, 432-33, 434-35 (Miss. 2014) ("The trial court . . . abused its discretion by admitting the Facebook messages purporting to be from Smith's account, because these messages were not properly authenticated.": "The authentication of social media poses unique issues regarding what is required to make a prima facie showing that the matter is what the proponent claims. Creating a Facebook account is easy. . . . Not only can anyone create a profile and masquerade as another person, but such a risk is amplified when a person creates a real profile without the realization that third parties can 'mine' their personal data. . . . ¶ Because of the special concerns regarding fabrication, 'the fact that an electronic communication on its face purports to originate from a certain person's social networking account is generally insufficient standing alone to authenticate that person as the author of the communications.' . . . The ease with which defendants and alleged victims alike could fabricate a social media account to corroborate a story necessitates more than a simple name and photograph to sufficiently link the communication to the purported author under [Mississippi] Rule [of Evidence] 901."; "The State failed to make a prima facie case that the Facebook profile from which the messages came belonged to Smith, as the only information tying the Facebook account to Smith was that the messages purported to be from a 'Scott Smith' and were accompanied by a very small, grainy, low-quality photograph that we can only assume purported to be Smith. . . . ¶ The State likewise failed to make a prima facie case that the messages were actually sent by Smith. The only information tying the actual messages to Smith was [his wife] Waldrop's testimony that they were Smith's messages to her. This does not suffice as the testimony of a witness with knowledge, because the State utterly failed to provide any information as to the basis of her purported knowledge. . . . Furthermore, the information contained in the Facebook messages was known not only to Smith, but to Waldrop and

apparently to several of her friends and family members. . . . Also, no testimony regarding the security of or access to Smith's Facebook account was elicited. Indeed, cases in which romantic partners have accessed social networking accounts illustrate the susceptibility of social media accounts to security breaches."); *Griffin v. State*, 419 Md. 343, 19 A.3d 415 (2011) ("The identity of who generated the profile [on a social networking website] may be confounding, because 'a person observing the online profile of a user with whom the observer is unacquainted has no idea whether the profile is legitimate.' . . . The concern arises because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password . . . ." *Id*. at 352, 19 A.3d at 421. "The potential for fabricating or tampering with electronically stored information on a social networking site, thus poses significant challenges from the standpoint of authentication of printouts of the site . . . ." *Id*. at 354, 19 A.3d at 422. "We agree with Griffin and disagree with the State regarding whether the trial judge abused his discretion in admitting the MySpace profile as appropriately authenticated, with Jessica Barber as its creator and user, as well as the author of the 'snitches get stitches' posting, based upon the inadequate foundation laid. We differ from our colleagues on the Court of Special Appeals, who gave short shrift to the concern that 'someone other than the alleged author may have accessed the account and posted the message in question.' While the intermediate appellate court determined that the pages allegedly printed from Ms. Barber's MySpace profile contained sufficient indicia of reliability, because the printout 'featured a photograph of Ms. Barber and [Petitioner] in an embrace,' and also contained the 'user's birth date and identified her boyfriend as "Boozy,"' the court failed to acknowledge the possibility or likelihood that another user could have created the profile in issue or authored the 'snitches get stitches' posting." *Id*. at 357, 19 A.3d at 423). *Cf. United States v. Recio*, 884 F.3d 230, 236-37 (4th Cir. 2018) (the Government "properly authenticated the Facebook post" by presenting sufficient evidence "that the post in question was authored by Recio": "the Government presented a certification by a Facebook records custodian, showing that the Facebook record containing the post was made 'at or near the time the information was transmitted by the Facebook user.' And the Government sufficiently tied that 'Facebook user' to Recio by showing that: (1) the user name associated with the account was 'Larry Recio,' (2) one of the four email addresses associated with the account was 'larryrecio20@yahoo.com,' (3) more than one hundred photos of Recio were posted to the account, and (4) one of the photos posted to the user's timeline was accompanied by the text 'Happy Birthday Larry Recio.' ¶ Recio suggests that even if it was his Facebook account, someone else may have accessed it. But there was no evidence that another person accessed the Facebook account. Moreover, what matters is not whether a jury could find that Recio did not author the post in question, but rather whether the jury could reasonably find that he did. Given the strong evidence that the Facebook account was Recio's, and without any evidence of unauthorized access, the jury could find that Recio was the true author of the post."); *United States v. Spila*, 136 F.4th 1296, 1307-08 (11th Cir. 2025) ("Original or copies of domestic business records that are accompanied 'by a certification of the custodian' are considered 'self-authenticating.' . . . [FED. RULE EVID. 902(11). . . . ¶ The government presented certifications from Google that the emails were authentic. In other words, a Google employee certified that on a specific day, at a specific time, the recorded account sent the recorded message, along with its attachments, to the recipient account. The certifications

stated, 'The Document is a record made and retained by Google.' They explained that 'Google servers record this data automatically at the time, or reasonably soon after, it is entered or transmitted by the user, and this data is kept in the course of this regularly conducted activity and was made by regularly conducted activity as a regular practice of Google.' ¶ The district court did not err in authenticating the emails based on the Google certification. Google kept records of the addresses, accounts, timing, and contents of the emails sent using its server in the regular course of its business. That attestation satisfies the requirements of Rule 902(11)."); *United States v. Mebrtatu*, 543 Fed. Appx. 137, 140-41 (3d Cir. 2013) (the government sufficiently authenticated "text messages found on the seized cellular phone" and adequately attributed them to Mebrtatu: "the device containing these messages was found on Mebrtatu's person"; "the content of the text messages indicates that Mebrtatu was the user of the seized phone and hence the sender and receiver of the messages found on that phone"; and "the phone contained other text messages whose content, when considered in conjunction with . . . [a witness's] testimony, supports a finding of authenticity."); *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007) ("the e-mails and transcripts of instant-message chats offered by the government were . . . properly authenticated" even though "the documents were largely cut from . . . [the defendant's] electronic communications and then pasted into word processing files, [and thus] they were not originals and . . . [the defendant contended that they] could have been subject to editing by the government": "We have stated that the standard for authentication is one of 'reasonable likelihood' . . . and is 'minimal,' . . . . The testimony of a witness with knowledge that a matter is what it is claimed to be is sufficient to satisfy this standard. See Fed. R. Evid. 901(b)(1). In this case, both the informant and Agent Berglas testified that the exhibits were in fact accurate records of Gagliardi's conversations with Lorie and Julie. Based on their testimony, a reasonable juror could have found that the exhibits did represent those conversations, notwithstanding that the e-mails and online chats were editable."); *People v. Hughes*, 114 A.D.3d 1021, 1023, 981 N.Y.S.2d 158, 161 (N.Y. App. Div., 3d Dep't 2014) ("Photographs of text messages sent from defendant's cell phone to the victim were properly authenticated": "the People produced testimony from a Verizon employee confirming that text messages had been sent between certain phone numbers, the victim identified the phone numbers as belonging to her and defendant, and she identified the photographs as depicting text messages she received from him. Defendant's testimony that someone else could have sent the messages from his phone presented a factual issue for the jury, and we discern no basis for setting the jury's determination aside."). *And see* Bailey R. Ulbricht, Christopher Moxley, Mackenzie D. Austin & Molly D. Norburg, Note, *Digital Eyewitnesses: Using New Technologies to Authenticate Evidence in Human Rights Litigation*, 74 STAN. L. REV. 851 (2022).

§ 10.14(d) Other Potential Evidentiary Impediments

Of course, authentication is only one of several evidentiary hurdles that counsel may need to overcome in order to introduce an item into evidence. These may include questions of relevance (see § 30.03 *infra*) and hearsay (see § 30.04 *infra*), particularly when it comes to documentary evidence and electronic evidence.

§ 10.15 DEMONSTRATIVE EVIDENCE

Visual aids of all sorts are regularly used in criminal trials. The most common is probably the one mentioned in § 10.13: a map of a relevant location. It is also commonplace for expert witnesses to use a visual aid (*e.g.*, a PowerPoint projection or a graphic poster on an easel) to enhance their presentation of complex information: *e.g.*, a chart showing the features of a mental disease or defect that the testifying psychiatrist has diagnosed; or an anatomical diagram or plaster model that a testifying medical expert uses to explain the nature of an injury; or a chart that a ballistics examiner uses to show a bullet match (or a lack of a match).

With the computer technology now available, numerous things are possible. For example, a defense expert's testimony about the trajectory of bullets, which traditionally might have been demonstrated with a life-sized mannikin with colored dowels in the locations where the bullets hit, can now be supported with a computerized animation (with as much or as little realism as counsel deems appropriate) showing the paths of the bullets.

Counsel should be wary, however, of becoming overly enamored of such sophisticated electronic presentations. For some jurors and even for some judges in a bench trial, computerized animations and the like may seem too "slick" and too subject to manipulation. Fact-finders of this sort may actually prefer the more homespun approach of the witness who draws a diagram on a whiteboard or a piece of graph paper. Another risk of the more sophisticated electronic aids is that they can overshadow the testifying witness, causing the witness's important oral testimony to get lost.

Accordingly, as with all other aspects of trial preparation, counsel will need to give careful thought to what type of presentation is likely to play best with the particular audience. If the witness who will be using the visual aid is an expert witness, s/he will likely have experience in using such aids in other trials and will be able to provide counsel with essential guidance on how such aids usually are received.

Whatever form of visual aid counsel ultimately selects and uses at trial or at a pretrial hearing, s/he will need to make sure that it is adequately preserved in the record in the event of a conviction and later appeal. Thus, for example, if a witness were to draw a diagram with a marker on a whiteboard in the courtroom, and if it is important for that diagram to be preserved for appeal, counsel will need to have the diagram photographed and to ask the judge to put the photograph into the record.