

Psychiatric Evidence and Full Disclosure In the Criminal Trial

Leonard Dieden* and Chris Gasparich**

THE PSYCHIATRIST as an expert witness introduces into the judicial process a very broad and far ranging type of evidence. In line with his own methods, he asks the law to give consideration to information concerning all factors which influence and determine specific human behavior. Notwithstanding the many difficult problems in relating psychiatric concepts to those of criminal law, his testimony performs an essential function in the criminal process by providing a fuller disclosure of the background and development of the individual on trial. Properly developed, psychiatric evidence broadens the inquiry beyond an isolated consideration of the circumstances of the crime and provides an explanation of the defendant's behavior in the context of his entire life history, including his childhood, his social environment, his conscious and unconscious thoughts, and his emotional experience.¹

Until recently, psychiatric evidence in California has been confined mainly to the single issue of legal responsibility, and introduced only in the separate "sanity phase" of the trial conducted after an adjudication of the defendant's guilt.² Fortunately, this limitation has been overcome through the judicial development of a rule, primarily in *People v. Wells*,³

* A.B., University of California, Berkeley, 1937; LL.B., Hastings College of the Law, 1940; Judge of the Superior Court, Alameda County.

** A.B., University of California, Berkeley, 1953; LL.B., University of California, Berkeley, 1958; Assistant Public Defender of Alameda County.

¹ "The good practice of modern psychodynamic psychiatry demands a total approach toward a patient. We are interested in and find significant everything that has happened to the patient, starting with his ancestors and going through the entire life history right up to the present moment. This same totalistic approach should be carried over into the courtroom." Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 83 (1961).

² See CAL. PEN. CODE § 1026. Strangely enough, the split trial device was introduced on the premise that the evidence concerning the defendant's mental condition was not probative to the question of whether or not he committed the offense charged and only confused issues by including testimony that was designed to appeal to the sympathy, passion or prejudice of the jury. See REPORT OF THE CAL. COMM'N FOR THE REFORM OF CRIMINAL PROCEDURE 16-17 (1927). Fortunately, much of the ill effect of this procedure has been corrected by subsequent rules expanding the relevancy of psychiatric testimony. See text accompanying notes 3-5 *infra*. For a comprehensive criticism of the bifurcated trial procedure, see Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805 (1961). Its abandonment has been recommended. See SPECIAL COMMISSIONS ON INSANITY AND CRIMINAL OFFENDERS, FIRST REPORT 30 (1962).

³ 33 Cal. 2d 330, 202 P.2d 53 (1949).

and *People v. Gorshen*,⁴ expanding the relevancy of psychiatric testimony. A defendant charged with a crime requiring some specific intent or other particular state of mind now may introduce evidence, including expert testimony, to show that he did not act with that intent. This evidence is admissible in the "guilt phase" of the trial since it is relevant to prove or disprove the existence of any essential subjective element of the offense. As was stated in *Gorshen*:

Such expert evidence, like evidence of unconsciousness resulting from voluntary intoxication, is received not as a "complete defense" negating capacity to commit any crime but as a "partial defense" negating specific mental state essential to a particular crime The inquiry to be made is whether the crime which the defendant is accused of having committed *has in point of fact been committed*, and for this purpose whatever will fairly and legitimately lead to the discovery of the mental condition and status of the accused at the time, may be given in evidence to the jury, and may be considered by them in determining whether the defendant was in fact guilty of the crime charged against him.⁵

The principal effect of this rule allows the court and jury to receive a medical evaluation of the mental condition of the defendant in all phases of the criminal trial. More importantly, it permits the kind of needed disclosure, in adjudicating the matters of guilt and degree of guilt, that can be derived from the proper development of psychiatric evidence.⁶

I

THE NEED FOR FULL DISCLOSURE—THEORY VERSUS PRACTICE

The effectiveness of any psychiatric testimony hinges on the ability of the expert to learn as much as possible about the mental condition of the accused and to present this information to the court and jury in explanation and support of his diagnosis. The expert must be permitted to explore all avenues and to consider all sources in obtaining the necessary background data. Since this background material forms the basis upon which his ultimate medical opinion is founded, it would seem logical that such material must be brought to the attention of the trier of fact if the opinion is to be properly assessed. In practice, however, there has been an absence of full disclosure of information both to the psychiatrist and to the court. This has proven to be the most serious impediment to the effective employment of psychiatry in criminal proceedings. In many

⁴ 51 Cal. 2d 716, 336 P.2d 492 (1959).

⁵ *Id.* at 727, 336 P.2d at 499-500.

⁶ On the improved communication between criminal law and medical psychology made possible by the Wells-Gorshen rule, see generally Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59 (1961); Diamond, *With Malice Aforethought*, in ARCHIVES OF CRIMINAL PSYCHODYNAMICS 1 (1957).

instances it has generated confusion rather than understanding and has often given rise to judicial distrust of psychiatry.

The absence of full disclosure can be traced to four identifiable practices, each the result of some misconception of the role of psychiatric evidence and the rules governing its admission.

First, many psychiatrists, especially those appointed by the court, are hesitant to apply medical methods in gathering factual material. They often limit their inquiry to little more than a personal examination of the defendant.⁷ Although this practice often may be attributed to lack of adequate compensation, it is also caused by a misapprehension that there is something improper about seeking information from other sources when the doctor expects to be called as a witness. The expert often harbors a fundamental misconception that the rules of evidence and procedure somehow prohibit him from considering information which would be deemed indispensable in the diagnosis of a private patient.

Psychiatrists must understand that, even though there often may arise problems of evidentiary admissibility, they can and should ascertain pertinent information concerning the defendant from whatever source available in a manner consistent with accepted medical practice.

Second, defense attorneys often fail to appreciate the nature of psychiatric evidence and the requirement of full disclosure. They sometimes feel justified in concealing "incriminating" background information while at the same time endeavoring to introduce a "favorable" psychiatric opinion. This effort usually takes the form of a slanted hypothetical question with its resultant opinion concerning the condition of a nonexistent hypothetical man.

The defense, of course, is under no obligation of full disclosure in any criminal trial. The defendant quite properly may reveal nothing and may compel the prosecution to introduce sufficient evidence to justify a conviction. When, however, an explanation of his conduct is offered through psychiatric testimony the need for full disclosure must be satisfied and now may be compelled by the trial court.

Third, in the minds of many prosecuting attorneys there exists an exaggerated suspicion that psychiatric testimony is offered by the defense primarily as a vehicle for the introduction of otherwise incompetent ma-

⁷ See *People v. Rittger*, 54 Cal. 2d 720, 355 P.2d 645, 7 Cal. Rptr. 901 (1960), in which two court appointed psychiatrists examined the defendant together for an hour or two and failed to consider any other source of information. In discussing the sufficiency of the evidence the supreme court commented: "[W]e cannot reject the opinions of the court appointed alienists, despite the seeming superficiality of their inquiry into defendant's sanity." *Id.* at 734, 355 P.2d at 653, 7 Cal. Rptr. at 909.

terial, especially as a method for circumventing the hearsay and best evidence rules. This often results in numerous technical evidentiary objections, sometimes erroneously sustained, leading to a disruption of the orderly presentation of the evidence, to confusion, and to a curtailment of essential disclosure.

Although the rules relating to the recitation in court of information relied upon by the expert have to a great degree relaxed the traditional requirements of evidentiary competency, prosecutors should understand that there are full and sufficient safeguards against the intentional misuse of psychiatric testimony.

Finally, trial judges have been at fault in not assuming an active role in the development and presentation of psychiatric evidence. A failure to compel full disclosure frequently has resulted in the introduction of confusing and misleading testimony. Judges must realize that the rules of evidence no longer pose an obstacle to any legitimate effort at fully revealing all pertinent background information. Furthermore, the court is empowered to control the development of the testimony at trial and to prevent such misleading devices as the slanted hypothetical question.

This Article will discuss the rules relating to the admissibility and orderly development of psychiatric testimony. It will show that full disclosure can be achieved in the criminal trial through the introduction of such evidence. Consideration will first be given to the varieties and admissibility of the source material a psychiatrist should rely upon in support of his opinion. This will be followed by a proposed method for regulating the introduction of such testimony at trial. Finally, attention will be given to a problem that has caused needless confusion in the reception of psychiatric testimony—the competency of the doctor to testify on the ultimate legal issue.

II

VARIETIES AND ADMISSIBILITY OF BACKGROUND INFORMATION

A. The Range of Available Sources—Disclosure to the Expert

Psychiatrists, whether court appointed or privately retained, can obtain background information from a variety of sources, from which to form their conclusions concerning the mental condition of the defendant. Such information may be based entirely on extensive personal observation, as in the case of a doctor who has treated the defendant prior to the criminal act. Usually, however, the opinion will be grounded on a mixture of direct and secondhand source material. In most cases the expert will have had an opportunity to conduct a personal examination prior to trial. In addition he may have gathered background information

from the attorneys, the defendant, and from witnesses and other parties. He also may have been provided with written statements given to police officers, members of the district attorney's office, and defense investigators, as well as with hospital records, and other relevant documents such as prison, probation, and parole records. He may have considered the opinions of or the results of tests performed by other experts appointed or retained in the case.

If the expert performed a proper job and formulated a diagnosis in keeping with accepted medical practice, he should have considered all possible sources of background information.⁸ There is certainly no rule which prohibits the doctor from seeking out a full disclosure of all pertinent facts. Furthermore, in keeping with his own professional responsibilities the psychiatrist can even demand such disclosure as a condition of his appointment.

B. Disclosure to the Court: Problems and Considerations

It is generally recognized that the value of any expert opinion rests primarily on the accuracy of the facts and the validity of the reasons upon which it is grounded.⁹ Consequently, it is an accepted rule that in addition to stating his ultimate opinion the expert witness should be encouraged to explain all the reasons and disclose all the facts in support of his conclusions.¹⁰ Unfortunately, a good deal of confusion persists in trial practice in applying these general considerations to the testimony of the psychiatrist whose opinion necessarily is grounded on some information or material not admissible under the traditional rules of evidence. This is true especially in those instances where the doctor relies on out-of-court statements for the truth of matters asserted in those statements.¹¹ Therefore, a conflict exists between the requirement of medical science that the doctor rely on all available information in forming his diagnosis, and the traditional legal requirement that evidence be the result of first-hand knowledge.

⁸ See Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473 (1961); Maguire & Hahey, *Requisite Proof of Basis for Expert Opinion*, 5 VAND. L. REV. 432 (1952).

⁹ "Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions." *People v. Martin*, 87 Cal. App. 2d 581, 584, 197 P.2d 379, 380 (1948).

¹⁰ See CAL. CODE CIV. PROC. § 1872 which provides: "Whenever an expert witness gives his opinion, he may, upon direct examination, be asked to state the reasons for such opinion, and he may be fully cross-examined thereon by opposing counsel."

¹¹ A typical expression of the attitude giving rise to this confusion is seen in *United States v. Nickle*, 60 F.2d 372, 374 (8th Cir. 1932): "Any one familiar with the trial of cases knows that the history of a patient, testified to by a physician, is frequently much more impressive than the same history given on the stand by the . . . [party] himself."

To a considerable extent the rules set forth in recent California appellate decisions have struck a sensible balance in resolving this conflict, permitting a full disclosure while at the same time safeguarding against the intentional misuse of psychiatric evidence. What follows is a consideration of these rules in relation to each of the particular varieties of background information relied on in support of the psychiatric opinion.

1. General Knowledge Gained from Education and Experience

It is primarily the specialized knowledge and skill possessed by an expert which authorizes him, unlike most other witnesses, to render an opinion on a set of facts. Rules prescribing the required degree of education and experience are normally treated as matters of qualification. Although the subject of qualification is beyond the scope of this Article it should be noted that this special knowledge, as does all knowledge obtained scholastically, results from what the expert has read or been taught and consequently is grounded on the clearest form of hearsay information. Of course, the admissibility of the expert's testimony has never been seriously questioned on this basis. It is properly recognized that these matters affect only the probative value of the expert's ultimate opinion. It is, however, anomalous that this recognition does not carry over to all secondhand information relied upon by the expert. In the field of psychiatric opinion divergent assumptions and conceptual orientations often constitute the sole reason for the widely conflicting conclusions reached by different alienists testifying in the same trial. It seems that many members of the bench and bar who become overwrought with the possible introduction of "facts" not resulting from sworn testimony, through the use of the expert witness, might more effectively direct their efforts towards permitting and practicing more extensive cross-examination to uncover the assumed conceptual premises such witnesses bring to bear on the factual material.

The reading of textbooks in the courtroom presents a special hearsay problem. It is established in California that a medical expert, in forming his opinion, may take into consideration the products of his education and the study of his profession including a reliance, in part, on the study of textbooks.¹² Reasoning that medical texts constitute hearsay of a particularly damaging sort (on the assumption that the jury is overly impressed with the written word), appellate courts have held uniformly that the contents of a book are not admissible on direct examination in support of the expert's opinion.¹³ Although the contents cannot be read

¹² *Hope v. Arrowhead & Puritas Waters, Inc.*, 174 Cal. App. 2d 222, 344 P.2d 428 (1959).

¹³ *Gallagher v. Market St. Ry.*, 67 Cal. 13, 6 Pac. 869 (1885); *Gluckstein v. Lipsett*, 93 Cal. App. 2d 391, 209 P.2d 98 (1949).

in evidence, a physician who testifies as an expert may state the grounds for his opinion including the fact of reliance, to some degree, on particular books.¹⁴ On cross-examination, however, the rule is somewhat more relaxed. If during direct examination the expert indicated that he relied on some text, he may be cross-examined as to its particular contents.¹⁵

2. *Knowledge Gained from Personal Observation*

From the legal standpoint, the most acceptable form of supportive information is derived from the psychiatrist's personal examination of the defendant. The doctor may describe the inferences drawn by him from the appearance, mannerisms, and speech content of the person examined.¹⁶ Furthermore, the results of tests personally conducted by the psychiatrist are admissible providing that the accepted reliability of the particular test involved can be shown.¹⁷ The necessary foundation of accepted reliability can, of course, be laid through the psychiatric witness.¹⁸

3. *Knowledge Gained Prior to Trial from Secondhand Sources*

Where evidence is introduced at trial concerning declarations, conduct, and the mental condition of the defendant, such as testimony of sworn witnesses, the defendant's statements introduced by the prosecution as confessions or admissions, or medical and other records introduced under an exception to the hearsay rule, the psychiatrist obviously may state his reliance on such information in support of his opinion. The serious problems of admissibility, however, occur in the doctor's attempt to recite as bases for his opinion background information obtained from secondhand sources prior to trial and not introduced through some other competent evidence. The foremost obstacle to disclosure of this material is the rule against hearsay evidence.

(a) *Statements of the Defendant: A Few Distinctions.*—The area of greatest confusion surrounds the attempted recital by a medical witness of out-of-court assertions by the defendant. Some of this confusion can be alleviated by the recognition of a few essential distinctions. The extrajudicial declarations of the defendant, to the extent they might be confronted by a possible hearsay objection, may be classified as follows: (1) verbal acts, or declarations taken not for the truth of the matters

¹⁴ *Hope v. Arrowhead & Puritas Waters, Inc.*, 174 Cal. App. 2d 222, 344 P.2d 428 (1959); *Healy v. Visalia & Tulare R.R.*, 101 Cal. 585, 36 Pac. 125 (1894).

¹⁵ *Gluckstein v. Lipsett*, 93 Cal. App. 2d 391, 209 P.2d 98 (1949).

¹⁶ The expert's reliance on the defendant's declarations for the truth of the matters asserted, however, presents different problems. See text accompanying notes 21-30 *infra*.

¹⁷ See *People v. Spigno*, 156 Cal. App. 2d 279, 319 P.2d 458 (1957).

¹⁸ *People v. Modesto*, 59 Cal. 2d 722, 732, 382 P.2d 33, 39, 31 Cal. Rptr. 225, 231 (1963) (trial court's refusal to permit a qualified psychiatrist to prove the accepted reliability of hypnosis as an analytical tool held to be error).

asserted, but as circumstantial evidence of some other fact relevant to the issues involved in trial; (2) spontaneous declarations of the defendant as to his present physical or mental condition; and (3) assertions of prior facts regarding his physical or mental condition.

Verbal Acts. It is not uncommon that a psychiatrist will consider the defendant's utterances as evidence of some relevant condition: hallucinations, delusions, or other symptoms of mental disorder. It should be understood that if the expert is predicated his opinion on extrajudicial statements, not for the truth of the matters he is asserting, but solely for the manner in which the statements reflect some pertinent mental state, there can be no proper hearsay objection. The declarations are admissible on the same footing as other relevant circumstantial evidence.¹⁹

Spontaneous Declarations. The defendant's declarations regarding his present bodily or mental condition are admissible as evidence of the facts asserted under an exception to the hearsay rule.²⁰ Admissibility is predicated on the theory that such statements, given spontaneously, contain a degree of probable reliability. It normally is left to the trial court to exercise discretion in considering the circumstances under which the declarations were made in deciding whether they were uttered spontaneously or with design. Once qualified under this exception, such declarations may be received not only to support the opinion of the expert, but as direct evidence of the matters asserted.

Assertions of Prior Facts. The greatest difficulty arises with respect to the third class of declarations, namely those describing past facts as symptoms of a physical or mental condition. Under the traditional application of the hearsay doctrine such declarations, when accepted for the truth of the matters asserted, are incompetent evidence.²¹ However, the increasing recognition of the expert's need to rely on such statements in order to arrive at a proper medical opinion has given rise to the formulation of new rules relaxing to some degree the traditional bar to reliance upon such declarations, even though they are not necessarily admissible.

Many jurisdictions act on the suspicion that a medical expert employed to testify at trial may be called primarily as a conduit for the introduction of incompetent, "self-serving" material. Therefore, they

¹⁹ See McCORMICK, EVIDENCE § 227 (1954); 6 WIGMORE, EVIDENCE § 1770 (3d ed. 1940).

²⁰ See McCORMICK, EVIDENCE §§ 265-68 (1954); 6 WIGMORE, EVIDENCE §§ 1718-40 (3d ed. 1940); McBaine, *Admissibility in California of Declarations of Physical or Mental Condition*, 19 CALIF. L. REV. 231, 234 (1931).

²¹ See *People v. Bray*, 42 Cal. App. 465, 183 Pac. 712 (1919), where the court draws the distinction between inadmissible declarations of past symptoms and declarations of present symptoms, admissible as part of the *res gestae*.

refuse to receive opinions based on declarations of past facts and symptoms whenever the expert did not diagnose the declarant for treatment but examined him solely for the purpose of appearing as an expert witness. If, however, the doctor did treat the individual as a patient prior to the events in litigation then he usually will be permitted to base his medical opinion, in part, on such declarations although the statements themselves are not received as evidence of the asserted facts.²²

In California a much broader rule has been developed. Even an expert who has not treated the defendant is permitted to use the declarations of past fact, usually designated as part of the patient's "case history," as a proper basis for his medical opinion. When needed in the formulation of a medical opinion such declarations may be relied upon in part and may be recited in support of the opinion. The statements themselves, however, are still not admissible as evidence of the asserted facts.

The earliest pronouncement of the California approach occurred in *People v. Shattuck*,²³ where the defendant, charged with murder, asserted the defense of insanity. A medical witness for the defense was prohibited from reciting statements made to him by the accused concerning the accused's case history. The doctor had used this history as a basis for his opinion that the defendant was legally insane. The supreme court reversed the trial court, holding that the statements and declarations are admissible when they constitute in part the basis for the expert opinion, and when the expert declares that they are necessary for the formulation of his opinion.²⁴

The *Shattuck* rule has been followed consistently in a number of appeals following convictions for criminal abortion where the prosecution has elicited opinions of physicians that a mechanical abortion had occurred,²⁵ based in part on statements made to them by the victims before trial. In these cases, however, the recitation of the declarations has been limited to those which pertain to facts connected with diagnosis and treatment. Statements not germane to that purpose, for example disclosing where and by whom the victim had been aborted, may not be recited by the doctor.²⁶ Furthermore, the limitation of partial reliance upon such declarations has been enforced to bar the reception of a doc-

²² See McCORMICK, EVIDENCE § 267 (1954); WIGMORE, EVIDENCE §§ 665, 1720 (3d ed. 1940).

²³ 109 Cal. 673, 42 Pac. 315 (1895).

²⁴ *Id.* at 678-79, 42 Pac. at 316.

²⁵ *People v. Brown*, 49 Cal. 2d 577, 320 P.2d 5 (1958); *People v. Powell*, 34 Cal. 2d 196, 208 P.2d 974 (1949); *People v. Wilson*, 25 Cal. 2d 341, 153 P.2d 720 (1944); *People v. Hickok*, 56 Cal. App. 13, 204 Pac. 555 (1921).

²⁶ *People v. Brown*, *supra* note 25.

tor's opinion which rested exclusively on the statements of the examined party.²⁷

The California rule was further developed and refined in the recent case of *People v. Modesto*.²⁸ The defendant, charged with a felony-murder, introduced the testimony of a psychiatrist that he did not harbor the necessary felonious intent at the time of the commission of the criminal act. The doctor was permitted to base her opinion, in part, on what the defendant had told her while under hypnosis. This evidence was held to be clearly admissible.²⁹ Of greater importance was the ruling that the court erred in refusing to exercise discretion in the exclusion of a tape recording of the defendant's statements while under hypnosis. The court recognized that the trial court must exercise discretion by weighing the probative value of the proffered evidence as part of the basis for the expert's opinion, against the risk that the jury might improperly consider it as independent proof of the facts recited in the statement.³⁰

Thus, from this line of cases emerge three general limitations on the use of the defendant's declarations to support the expert's opinion: (1) the material in the declaration must be needed in the formulation of the expert opinion; (2) the opinion may not be based wholly on the declarations; and (3) the trial court must be satisfied that the jury will not consider the declarations as independent proof of the matters asserted.

(b) *Information Obtained from Attorneys, Witnesses, and Other Third Parties Prior To Trial.*—In the typical case the psychiatrist, at the time he is appointed or retained, will have no previous personal knowledge of the defendant's background or of the circumstances surrounding the crime charged. Before examining the defendant he must familiarize himself with the case and this is usually done by talking with the attorneys. He may also be shown the defendant's written statements, witnesses' statements, police and defense investigation reports and other

²⁷ *People v. Lee*, 55 Cal. App. 2d 163, 130 P.2d 168 (1942).

²⁸ 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963).

²⁹ A psychiatrist's opinion may also be grounded on results of a sodium pentathol ("truth serum") test administered to the defendant, although the declarations are not admissible to prove the truth of the defendant's statements. *People v. Cartier*, 51 Cal. 2d 590, 335 P.2d 114 (1959); *People v. Jones*, 42 Cal. 2d 219, 266 P.2d 38 (1954).

³⁰ 59 Cal. 2d 722, 732-33, 382 P.2d 33, 39-40, 31 Cal. Rptr. 225, 231-32 (1963). In setting forth this further qualification to the rule of the *Shattuck* case, the supreme court tacitly adopted the reasoning contained in *Adkins v. Brett*, 184 Cal. 252, 193 Pac. 251 (1920), where it was stated that evidence of extrajudicial declarations offered for the limited purpose of showing the declarant's state of mind should not be received "where there is good reason for believing that the real object for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which the evidence is incompetent." *Id.* at 258-59, 193 Pac. at 254.

similar documents. After examining the defendant the psychiatrist may try to round out the picture by talking with others who have some knowledge of the defendant's conduct and condition, such as witnesses, friends, or relatives. It should be emphasized that this is a perfectly proper method of gathering essential background material.

It has been held that the medical expert may partially base his opinion not only on information given by the examined party, but on the case history as partially provided by other lay observers prior to trial.³¹ Of course, in relying on such material and in disclosing it in the courtroom the previously mentioned limitations of necessity and partial reliance should apply, and this kind of information should be recited by the psychiatrist only in support of his opinion and not as proof of the facts stated. Furthermore, the information should reflect only the direct knowledge of the person providing it to the doctor. Therefore, an opinion of the defendant's attorney or relative that the defendant was insane or did not have the requisite intent would not be admissible even for the limited purpose of supporting the expert's conclusions.

(c) *Information Obtained from Other Experts.*—Usually more than one expert will appear in any criminal case in which psychiatric evidence is involved.³² In addition to the number who may be appointed or retained, clinical psychologists, neurologists and other medical experts may have tested, examined or treated the defendant.³³ The information known to one can and should be made available to all the experts involved in the case.

California courts adhere to the generally accepted rule that an expert may not base his opinion exclusively on the conclusions of other experts.³⁴ It has been held, however, that doctors may express an opinion based partly on facts provided by, or upon accepted tests performed by other experts.³⁵ In *Kelley v. Bailey*,³⁶ a doctor testified that he formed his medical opinion in part on information contained in the report of another doctor who diagnosed the defendant but who did not testify during the trial. In approving the procedure the appellate court reasoned

³¹ *People v. Powell*, 34 Cal. 2d 196, 208 P.2d 974 (1949).

³² Upon a plea of not guilty by reason of insanity, California law requires the trial court to appoint at least two psychiatrists. CAL. PEN. CODE § 1027.

³³ A psychiatrist often will require information that can only be secured through neurological or psychological testing. If the doctor indicates his need for these tests, the trial court is empowered to appoint and reasonably compensate such additional experts. CAL. CODE CIV. PROC. § 1871.

³⁴ *Frampton v. Hartzell*, 179 Cal. App. 2d 771, 4 Cal. Rptr. 427 (1960).

³⁵ *People v. Cravens*, 192 Cal. App. 2d 676, 13 Cal. Rptr. 510 (1961); *People v. Lewis*, 186 Cal. App. 2d 585, 9 Cal. Rptr. 263 (1960); *Christiansen v. Hollings*, 44 Cal. App. 2d 332, 112 P.2d 723 (1941).

³⁶ 189 Cal. App. 2d 728, 11 Cal. Rptr. 448 (1961).

that such reports were equivalent to statements made by a patient to the testifying expert. Consequently, the reports may be relied upon by the expert and recited in court with, of course, the same evidentiary limitations as would apply to statements made to the expert by the patient himself.³⁷

(d) *Medical Records and Other Relevant Documents.*—Many reports, including hospital records and forms, may qualify upon proper foundation as business records and therefore can be admitted into evidence to prove the truth of the matters asserted under the "business records exception" to the hearsay rule.³⁸ Even if such reports do not so qualify they still may be used as a basis for medical opinion with the same limited evidentiary effect noted in the *Kelley* case. There is a high degree of probable reliability in information contained in medical reports and documents of a similar nature prepared not by parties to the litigation but by independent experts and observers. Consequently, where such supplemental information is needed as a basis for the psychiatrist's opinion its use unquestionably will be supported by the California courts.

4. *Evaluation of the California Approach*

As has been indicated, the scope of permissible disclosure is extensive. The California rules are clearly in accord with the modern approach of permitting greater latitude to the medical expert in his efforts at obtaining all information bearing on the physical or mental condition of the individual in question. They also effectively implement the requirement that all information relied upon by the expert in forming his opinion be brought to the attention of the court and jury.³⁹ If put to work in actual trial practice these rules could lead to a more effective application of medical psychology to the factual issues involved in criminal litigation. Indeed, there no longer can be any excuse for the badly prepared and ill-grounded psychiatric testimony that has been presented more often than not in criminal cases, especially those with little public attention. The psychiatrist must understand that he should not alter his methods merely because he expects to be called as a witness in a lawsuit. Attorneys must understand that medical science cannot be misused if it is to be an effective instrument for shedding light on the mental and emotional makeup of the defendant. Finally, trial judges should encourage

³⁷ *Id.* at 738, 11 Cal. Rptr. at 453.

³⁸ *Loper v. Morrison*, 23 Cal. 2d 600, 145 P.2d 1 (1944); *Frampton v. Hartzell*, 179 Cal. App. 2d 771, 4 Cal. Rptr. 427 (1960). On the Uniform Business Records as Evidence Act, see generally McCORMICK, EVIDENCE § 281 (1954); 5 WIGMORE, EVIDENCE §§ 1517-19 (3d ed. 1940). In California see CAL. CODE CIV. PROC. §§ 1953e-53h; WITKIN, CALIFORNIA EVIDENCE § 283 (1958).

³⁹ Forward looking courts have recognized this requirement for many years. See *Sundquist v. Madison Ry.*, 197 Wis. 83, 87, 221 N.W. 392, 393 (1928).

better psychiatric evaluations in criminal practice, not only by putting the rules of evidence to work in compelling full disclosure, but also by appointing only those alienists who are willing to put forth the effort to gather essential background information.

Although the California rules have been molded into an effective instrument of legitimate full disclosure, some critical comment seems appropriate with respect to the limited evidentiary effect given the various types of information received from secondhand sources. If the expert opinion is valuable only to the extent that it finds support in valid assumptions of fact it seems of doubtful wisdom to exclude from consideration by the trier of fact the matter of the truthfulness of any information relied upon as a basis for the opinion. As a practical matter this finely drawn limitation probably has little effect on the actual deliberations of a jury. As a logical matter it should not. If a doctor predicates his conclusions on information provided to him by some secondhand source, the truthfulness of such information is assumed. To stipulate that the trier of fact may consider the information for the manner in which it "supports" the opinion, yet exclude any consideration of the validity simply makes no sense.

Whether considered as supporting information or as independent evidence on a par with any other evidence introduced at trial, there are sufficient safeguards against any illegitimate use of secondhand information. It may be recited only when needed in the formulation of the expert's opinion. The limitation of partial reliance makes it necessary that the expert corroborate the validity of secondhand information with his own findings from personal examination of the defendant. The psychiatrist, by virtue of his skill and training, is well equipped to evaluate the reliability and accuracy of this kind of information since it is much like the material he must deal with in the everyday diagnosis and treatment of his own patients.⁴⁰ Furthermore, the trial court may bar recitation of secondhand information whenever it is evident that the sole or primary purpose of the psychiatric evidence is to bring otherwise incompetent material before the jury. Finally, cross-examination is always available as the most effective device in revealing any undue reliance on hearsay material of doubtful validity.

III

A NEW MODE FOR INTRODUCING PSYCHIATRIC EVIDENCE

The present method of eliciting psychiatric testimony impedes full disclosure in the criminal trial. The difficulty stems primarily from the

⁴⁰ "The concept, simply put, is that the *doctor validates what he uses*. He follows a process scientifically ingrained: he analyzes what he hears, casts out what seems inaccurate, pulls together the rest and reaches an opinion and course of action." Rheingold, *The Basis of Medical Testimony*, 15 VAND. L. REV. 473, 532 (1962).

use of hypothetical questions delimiting the material upon which the expert's opinion is to be grounded. On both direct and cross-examination attorneys are permitted to control the psychiatrist's consideration of information by framing the assumed facts in a manner most suitable to their own particular theory of the case. This sometimes results in a failure to consider crucial material and at other times in an overemphasis on facts of doubtful importance. In the introduction of psychiatric evidence the hypothetical question has been used as a very effective device of concealment, and as a technique for avoiding the open admission of certain facts which are not established by evidence independent of the expert's testimony. As a result medical opinion is often introduced concerning some totally hypothetical man who bears little or no actual resemblance to the defendant whose mental condition is in question.

Unfortunately, the hypothetical question has been the traditionally accepted method of adducing expert testimony. It even has been characterized as one of the truly scientific features of the rules of evidence⁴¹ in that it is designed to reveal all of the pertinent facts in the most logical order to support the expert opinion. In fact, its objectives have never been realized and the method has been uniformly criticized by the authorities,⁴² as well as the California courts which have commented on the undue length and complexity of hypothetical questions⁴³ and the slanting of their hypotheses.⁴⁴ Medical men have also been outspoken in expressing their disdain for the technique.⁴⁵

The defects inherent in the hypothetical method of eliciting psychiatric testimony can be remedied simply by compelling, and not merely

⁴¹ 2 WIGMORE, EVIDENCE § 686 (3d ed. 1940).

⁴² See, e.g., 2 WIGMORE, EVIDENCE § 686, at 811 (3d ed. 1940), who describes the defects of the method: "In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. . . . In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. . . . In the third place, it has tended to confuse the jury, so that its employment becomes a near waste of time and a futile obstruction."

⁴³ See *Guardianship of Jacobsen*, 30 Cal. 2d 312, 182 P.2d 537 (1947) (40 page hypothetical question); *Treadwell v. Nickel*, 194 Cal. 243, 228 Pac. 25 (1924) (hypothetical question 83 pages long with a 14 page objection thereto).

⁴⁴ *Estate of Dolbeer*, 149 Cal. 227, 243, 86 Pac. 695, 702 (1906): "Such questions themselves are always framed with great particularity to meet the views of the side which presents the expert. They always eliminate from consideration the countervailing evidence which may be of a thousand-fold more strength than the evidence upon which the question is based. They are astutely drawn, and drawn for a purpose and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result." See also *Estate of Rich*, 79 Cal. App. 2d 22, 179 P.2d 373 (1947).

⁴⁵ See, e.g., WHITE, *INSANITY AND CRIMINAL LAW* § 86 (1923); Hulbert, *Psychiatric Testimony in Probate Proceedings*, 2 LAW & CONTEMP. PROB. 448, 454-57 (1935).

permitting, the expert to state in his own words and as fully as possible his opinion and all the reasons and information in support of it. This rule should be strictly enforced on direct examination whenever the psychiatrist has performed a personal investigation into the factual background relating to the mental condition of the defendant. On cross-examination the hypothetical question should still be permitted in order to compel the expert's consideration of all other factual material and any possible countervailing reasons. The questioning, however, can and should be controlled to prohibit the attorneys from forcing the expert to assume improbable facts which may suggest untenable inferences.⁴⁶

A number of desirable results would ensue from putting this suggested procedure to practice. A fuller disclosure of all the relevant material would be effected since the expert could freely reveal all of the reasons and all of the background information relied upon in the formulation of his opinion. Through fuller disclosure a more effective communication between the witness and the court and jury would be realized. The jury's attention would be focused on the witness, where it belongs, rather than on counsel propounding the question. Most importantly, through direct and cross-examination in the suggested manner the disputed factual bases could be better isolated and highlighted for the attention of the jury, thereby allowing greater comprehension of the reasons for the varying opinions presented by the psychiatrists.

This method of presenting expert testimony has the support of authorities in the field of evidence. Wigmore⁴⁷ and McCormick⁴⁸ have advocated similar proposals which are now contained in the Uniform Act on Expert Testimony and the Uniform Rules of Evidence.⁴⁹ Even ex-

⁴⁶ "The trial court . . . should prevent the use of misleading or unfair hypothetical questions, permitting only questions that sufficiently specify the assumptions on which they are based and contain only such assumptions, as do not contradict the weight of the evidence in the case." *People v. Wilson*, 25 Cal. 2d 341, 348, 153 P.2d 720, 724 (1944). In the absence of judicial control, the hypothetical question can be abused on cross-examination. Prosecutors have been known to exploit the device to suggest improbable but highly inflammatory interpretations of the mental condition of the defendant. For example, in *People v. Busch*, 56 Cal. 2d 868, 366 P.2d 314, 16 Cal. Rptr. 898 (1961), the deputy district attorney, on what was conceded to be meager evidence, sought to establish that the defendant had experienced sadistic sexual pleasure as a result of beating the victim about the head and face. The psychiatrist, in cross-examination, was forced to admit the "possibility" that the defendant could have been motivated by sadistic tendencies, *assuming* both the hypothetical beating and the sexual involvement. The holding of the supreme court that this constitutes a permissible method of testing the expert's accuracy and competency seems open to some question. Perhaps the remedy to this sort of abuse lies in the ability of the knowledgeable expert to reply: "I have no opinion as to your hypothetical man, for he has nothing to do with the facts of this case."

⁴⁷ 2 WIGMORE, EVIDENCE § 686, at 813 (3d ed. 1940).

⁴⁸ MCCORMICK, EVIDENCE § 16, at 34 (1954).

⁴⁹ UNIFORM ACT ON EXPERT TESTIMONY § 9 provides: "An expert may be asked to

isting California law does not require that the expert opinion be received through the medium of a hypothetical question.⁵⁰ In fact, the supreme court has stated that the hypothetical method of eliciting an opinion from the expert is unsatisfactory.⁵¹ It should be noted that the method is especially unsatisfactory when the expert has based his conclusions on personal observation and investigation.⁵²

Additional support for the proposed mode can be found in several recent cases marking a trend away from requiring the use of the hypothetical question. In *Estate of Collin*,⁵³ a psychiatrist was allowed to explain fully his opinion on decedent's sanity based on testimony of other witnesses and letters of the decedent. In *Gillett v. Gillett*⁵⁴ the court permitted a physician to interpret technical hospital records without resort to the hypothetical form. Furthermore, there is an increasing judicial recognition of the need for a full and free elaboration by an expert witness of all the reasons for his opinion.⁵⁵

A. Safeguards Against Abuse

There are two apparent dangers in this method of presenting expert testimony. There are remedies for each. First, the witness may express an opinion on the basis of factual material of which he has little or no personal knowledge without this fact being revealed.⁵⁶ Second, the ex-

state his inferences . . . without first specifying hypothetically in the question the data on which these inferences are based." UNIFORM RULE OF EVIDENCE 58 provides: "Calling for the opinion of an expert witness need not be hypothetical in form unless the judge in his discretion so requires . . ." Furthermore, both of these sections allow the expert to state fully the reasons for his opinion.

⁵⁰ See CAL. CODE CIV. PROC. § 1872.

⁵¹ *People v. Wilson*, 25 Cal. 2d 341, 348, 153 P.2d 720, 724 (1944).

⁵² See *Lemley v. Doak Gas Engine Co.*, 40 Cal. App. 146, 152-53, 180 Pac. 671, 674 (1919), where the court distinguished between the foundation required when an expert testifies on the basis of facts personally observed and when he testifies on the basis of facts not personally observed. The court indirectly pointed out the impropriety of requiring the hypothetical foundation in the former case. Although the expert may freely rely on information obtained through personal investigation of the defendant's background, and may state the basis of his opinion without the restrictions of the hypothetical form, it is well settled in California that he may not form an opinion merely on the consideration of facts testified to by the other witnesses. See *People v. LeDoux*, 155 Cal. 535, 102 Pac. 517 (1909). In such situations, it is impossible for the jury to know precisely the facts on which the expert formed his opinion, and, thus the hypothetical form may be required. *Id.* at 554, 102 Pac. at 525.

⁵³ 150 Cal. App. 2d 702, 310 P.2d 663 (1957).

⁵⁴ 168 Cal. App. 2d 102, 335 P.2d 736 (1959).

⁵⁵ See *People v. Williams*, 200 Cal. App. 2d 838, 845, 19 Cal. Rptr. 743, 748 (1962); *People v. Union Mach. Co.*, 133 Cal. App. 2d 167, 170, 284 P.2d 72, 74 (1955).

⁵⁶ Unfortunately, the presence of the psychiatrist who lacks any personal knowledge of the defendant is still a necessary evil in criminal litigation. The defense is under no obligation to give notice before trial in the offer of psychiatric evidence under the Wells-

pert may do more than assume the validity of the facts upon which his opinion is based and thereby become an advocate on factual issues the determination of which belong solely to the court and jury.

The trial judge has a unique opportunity to prevent or, at least, curb such abuses. This may be accomplished in any of three ways. First, on direct examination the witness could be compelled to state the sources of all information relied upon in support of the opinion. In addition, the court could allow a full and penetrating cross-examination to expose not only the expert's nonobjectivity, but his lack of knowledge gained from personal observation or investigation. Moreover, on cross-examination the hypothetical question should be permitted legitimate use in bringing to bear a consideration of facts which the witness omitted or of which he was unaware. Second, the trial judge in his discretion, if the circumstances required, could compel an offer of proof or informal examination of the expert, concerning the data upon which his opinion is based, outside the presence of the jury, and thereby could indicate the manner in which the testimony should be presented. Finally, where the expert has no personal knowledge but is wholly relying on assumed data, the court could require the examination to be by the hypothetical form on the assumption of proved or provable facts.

B. A Caution to Defense Counsel

It would appear that this proposed method of adducing psychiatric evidence is permissible under present authority. If put into practice it should result in a more complete disclosure of all relevant background information concerning the defendant at trial. In so doing, however, it may also work to the disadvantage of the defense in those instances where damaging facts might be revealed through such evidence and this possibility should be recognized. The defense is under no obligation to openly reveal the entire background of the accused in any trial. But once the initiative is taken to introduce psychiatric evidence to help explain the conduct of the defendant, a full disclosure of all known information may result. If silence and concealment are going to be the strategy chosen by the defense, then the psychiatrist must not be called in as an ally. To do so is to misuse psychiatry, to create judicial distrust of the psychiatric profession, and to mock the values inherent in medical science.

Gorshen principle. Furthermore, the prosecution has no power to subject the defendant to an independent psychiatric examination unless there is a plea of not guilty by reason of insanity. As a result, the prosecution often must introduce rebuttal opinion based exclusively on assumed factual data. A proposal to correct this situation by requiring pre-trial notice and independent examination is contained in SPECIAL COMMISSION ON INSANITY AND CRIMINAL OFFENDERS, SECOND REPORT 15-25 (1962).

IV

TESTIMONY ON THE ULTIMATE LEGAL ISSUE

One further source of confusion, often resulting in disruption of the orderly presentation of psychiatric evidence, involves the competency of the expert to give an opinion which coincides with the so-called "ultimate legal issue." Some California cases have applied an exclusionary rule barring the reception of such opinions in the introduction of expert evidence.⁵⁷ The justification for the rule has been stated: to allow such testimony would be to "usurp" the function or "invade" the province of the jury.⁵⁸

The reasoning of the rule is clear. It seeks to prevent the expert from giving his opinion on such matters as who should win the case.⁵⁹ The rule, however, has been subjected to severe criticism,⁶⁰ and has never been consistently followed.⁶¹ Furthermore, it is probably incapable of any precise definition. The reasons assigned for the rule, if taken literally, are absurd: as Wigmore says, "mere empty rhetoric."⁶²

The defects and abuses which the rule seeks to obviate are remedied by other methods. Recent California cases following the modern trend⁶³ have refused to hold that expert opinion is inadmissible merely because it coincides with an ultimate issue of fact.⁶⁴ This view has now been extended in decisions holding that it may even be prejudicial error to exclude the ultimate opinion of the expert.⁶⁵

⁵⁷ *Estate of Rich*, 79 Cal. App. 2d 22, 179 P.2d 373 (1947); *cf. Wilkerson v. El Monte*, 17 Cal. App. 2d 615, 62 P.2d 790 (1936).

⁵⁸ MCCORMICK, EVIDENCE § 12, at 26 (1954); 7 WIGMORE, EVIDENCE § 1921, at 18-19 (3d ed. 1940).

⁵⁹ See *People v. Mason*, 183 Cal. App. 2d 168, 6 Cal. Rptr. 649 (1960); WITKIN, CALIFORNIA EVIDENCE § 202 (1958).

⁶⁰ See 7 WIGMORE, EVIDENCE § 1921 (3d ed. 1940).

⁶¹ MCCORMICK, EVIDENCE § 12, at 26 (1954) states: "All . . . courts . . . disregard the supposed rule, usually without explanation as to why it should not be applied, when value, sanity, handwriting and identity are in issue."

⁶² 7 WIGMORE, *supra* note 60, at 17.

⁶³ See, e.g., UNIFORM RULE OF EVIDENCE 56(4): "Testimony in the form of opinion or inferences otherwise admissible . . . is not objectionable because it embraces the ultimate issues to be decided by the trier of fact."

⁶⁴ See *People v. Cole*, 47 Cal. 2d 99, 301 P.2d 854 (1956); *People v. Wilson*, 25 Cal. 2d 341, 153 P.2d 720 (1944); *Wells Truckways, Ltd. v. Cebrian*, 122 Cal. App. 2d 666, 265 P.2d 557 (1954). A concise statement of the new approach is found in *People v. King*, 104 Cal. App. 2d 298, 304, 231 P.2d 156, 160 (1951): "[T]here is no hard and fast rule that experts may not be asked questions that coincide with the ultimate issue in the case. . . . [T]he true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large measure of discretion involved. We believe further that the modern tendency is against making a distinction between evidentiary and ultimate facts as subjects of expert opinion."

⁶⁵ See *Reynolds v. Natural Gas Equip.*, 184 Cal. App. 2d 724, 7 Cal. Rptr. 879 (1960).

It is clear that the exclusionary rule is both illogical and inappropriate to the extent that the expert is confined to a statement or explanation of the technical and scientific processes by which he reached a certain conclusion, without being permitted to state the ultimate fact, and leaving the impossible task of that determination to the jury.

The question of defendant's sanity or his capacity to form the requisite intent or other subjective element of the crime charged is relatively easy to resolve when he is afflicted with no significant mental disorder, or on the other hand, has a severe mental illness. The difficulty arises when it is admitted that the accused is to some extent abnormal, and where the issue is whether or not the impairment is sufficient to render him not responsible for his conduct or incapable of forming the necessary intent. It is in these cases that the jury requires the help of experts, and to deprive the jury of this help is to impose the responsibility of decision solely on the jury's inadequate background and experience.⁶⁸ Fortunately, juries in California need not be placed in this position.

The trial court, at its discretion, can and must use its powers to curb abuses in this area, as in any other area of presentation of evidence. Expert opinion can and should be excluded when it is unduly broad and when the expert is performing the function of the advocate rather than the impartial witness. The modern California cases mark the development of a canon of discretion, binding the trial judge to permit the introduction of expert opinion, even though coinciding with the ultimate legal issue, whenever it has probative value and would be helpful and enlightening to the court and jury.

⁶⁸ See WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 220 (1933).

California Law Review

VOL. 52

AUGUST, 1964

No. 3

BOARD OF EDITORS

PATRICK L. SHREVE

Editor-in-Chief

EMIL ROY EISENHARDT

Managing Editor

ELLIS J. HARMON

Article Editor

THOMAS A. LEE, JR.

Article Editor

RALPH C. WALKER

Research Editor

JANE R. BRADY

Book Review Editor

PATRICK S. HOBIN

Note & Comment Editor

CHARLES A. BELL

Note & Comment Editor

DANIEL E. CUMMINS

Note & Comment Editor

JEROME B. FALK, JR.

Note & Comment Editor

DARRYL A. HART

Note & Comment Editor

Research Board

STEPHEN R. GRANT

DOUGLAS A. MCGREW

WALTER V. STAFFORD

GORDON H. VAN KESSEL

Associates

ROBERT B. CHICKERING

VICTOR J. HAYDEL, JR.

JAMES H. NEWHOUSE

GLORIA F. DEHART

WILLIAM J. HOESE

DAVID C. NOLAN

JOSEPH B. GAUDET

BYRON B. KOHN

NORMAN S. OBERSTEIN

FRANKLIN P. GLENN

THEODORE B. OLSON

Candidates

BARBARA LYNN BADER

GORDON LEE GRAHAM

BILL EDWARD SCHROEDER

DOUGLAS KEITH BILTER

KENNEY FINTAN HEGLAND

LEE JOHN SCLAR

LLOYD DONALD BODEN

RICHARD LESTER JAEGER

GARY JOHN SHAPIRO

WIEBKE LUISE BUXBAUM

EDWIN NOBLES LOWE, JR.

DAVID JOHN SPOTTISWOOD

LOYD PAXTON DERBY

WILLIAM DALE MARKENSON

ROBERT WALKER STEDMAN

DENNIS MICHAEL EAGAN

RODOLFO MONTEJANO

DIANA GAIL STOPPELLO

THEODORE J. ENGLAND

GERALD EDWARD MULLEN

CLIFFORD KINLOCK THOMPSON, JR.

JOHN CONRAD FOSSUM

CHARLES T. PASTERNAK

MICHAEL EDWARD TIGAR

FREDERICK INNES FOX

DOUGLAS ROY REYNOLDS

DAVID MICHAEL WILSON

ALBERT JAMES ROBERTS III

Administrative Assistant

MARJORIE DEVEREUX