The Tax Lawyer

VOL. 64, NO. 1 • FALL 2010

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MICHAEL LOUIS MINNS*

I. Introduction

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses against him . . . ."[1] That impartial jury decides the ultimate question of guilt or innocence based, often in large part, on confrontation by cross-examination of witnesses hostile to the defendant—the ultimate tool to test the witnesses' truth-telling. The Confrontation Clause requires the witness who is adverse to the defendant "to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'"[2] "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."[3]

President Dwight Eisenhower recognized the principle of confrontation behind cross-examination:

> I was raised in . . . Abilene, Kansas. We had as our marshal for a long time a man named Wild Bill Hickok . . . . Now that town had a code, and I was raised as a boy to prize that code.

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The author was lead counsel in the following cases discussed herein: United States v. Goris, No. 09-100 (D. Minn. Apr. 30, 2010); United States v. Hatch, No. 05-98 (D.R.I. May 24, 2006), *aff'd*, 514 F.3d 145 (1st Cir. 2008); United States v. Moran, No. 02-423 (W.D. Wash. Jan. 7, 2008); United States v. Hanson (D. Utah 1993) (on file with author); United States v. Buford, No. 88-81 (N.D. Tex. filed Apr. 13, 1988), *rev'd*, 889 F.2d 1406 (5th Cir. 1989), *remanded to* No. 88-00081 (N.D. Tex. Apr. 4, 1990); United States v. Oliver (N.D. Tex. 1987) (on file with author). Of the 113 indictment counts in these 6 cases, the author's clients were acquitted on 107 and convicted on 6.

[1] U.S. CONST. amend. VI.

[2] Maryland v. Craig, 497 U.S. 836, 846 (1990) (quoting California v. Green, 399 U.S. 149, 158 (1970)).

[3] *Id.* at 845.

It was: meet anyone face to face with whom you disagree. You could not sneak up on him from behind, or do any damage to him, without suffering the penalty of an outraged citizenry.[4]

II. A Brief History of Cross-Examination

Although shortly after the adoption of the United States Constitution early American lawyers traced the right to cross-examination back to the Magna Carta, the roots go much deeper.[5] Cross-examination as a method for truth-finding has roots in ancient Greece.[6] Socrates, charged with corrupting Athenian youth, is credited with a dramatic and effective cross-examination 2,500 years ago as expressed through the pen of his "court reporter," Plato. Socrates began with an opening argument:

> With respect, then, to the charges which my first accusers have alleged against me, let this be a sufficient apology to you. To Melitus, that good and patriotic man, as he says, and to my later accusers, I will next endeavor to give an answer; and here, again, as there are different accusers, let us take up their deposition. It is pretty much as follows: "Socrates," it says, "acts unjustly in corrupting the youth, and in not believing in those gods in whom the city believes, but in other strange divinities." Such is the accusation; let us examine each particular of it. It says that I act unjustly in corrupting the youth. But I, O Athenians! say that Melitus acts unjustly, because he jests on serious subjects, rashly putting men upon trial, under pretense of being zealous and solicitous about things in which he never at any time took any concern. But that this is the case I will endeavor to prove to you.[7]

Socrates then cross-examined his accuser, Melitus:

> [Socrates] Come, then, Melitus, tell me, do you not consider it of the greatest importance that the youth should be made as virtuous as possible?
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> [Melitus] I do.
>
> [Socrates] Well, now, tell the judges who it is that makes them better, for it is evident that you know, since it concerns you so much; for, having detected me in corrupting them, as you say, you have cited me here, and accused me: come, then, say, and inform the judges who it is that makes

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[4] President Dwight Eisenhower, Remarks Upon Receiving the America's Democratic Legacy Award at a B'nai B'rith Dinner in Honor of the 40th Anniversary of the Anti-Defamation League (Nov. 23, 1953).

[5] *See* Duncan v. Louisiana, 391 U.S. 145, 151 n.16 (1968); James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249 (1892).

[6] In fact, the Goddess of Justice, Themis, was one of the original Greek gods. Her ability to see the future got her a job as an oracle at Delphi, which led to her becoming "the goddess of divine justice." When the Romans incorporated her into their system, she became Justitia, and they gave her a sword and blindfolded her. Barbara Swatt, *Themis, Goddess of Justice*, MARIAN GOULD GALLAGHER L. LIBR., U. WASH. SCH. OF L., http://lib.law.washington.edu/ref/themis.html (last updated Oct. 31, 2007).

[7] Plato, *The Apology of Socrates, in* DIALOGUES OF PLATO 3, 10 (Henry Cary trans., 1888).

them better. Do you see, Melitus, that you are silent, and have nothing to say? But does it not appear to you to be disgraceful, and a sufficient proof of what I say, that you never took any concern about the matter? But tell me, friend, who makes them better?

[Melitus] The laws.

[Socrates] I do not ask this, most excellent sir, but what man, who surely must first know this very thing, the laws?

[Melitus] These, Socrates, the judges.

[Socrates] How say you, Melitus? Are these able to instruct the youth, and make them better?

[Melitus] Certainly.

[Socrates] Whether all, or some of them, and others not?

[Melitus] All.

[Socrates] You say well, by Juno! and have found a great abundance of those that confer benefit. But what further? Can these hearers make them better, or not?

[Melitus] They, too, can.

[Socrates] And what of the senators?

[Melitus] The senators, also.

[Socrates] But, Melitus, do those who attend the public assemblies corrupt the younger men? or do they all make them better?

[Melitus] They too.

[Socrates] All the Athenians, therefore, as it seems, make them honorable and good, except me; but I alone corrupt them. Do you say so?

[Melitus] I do assert this very thing.[8]

Socrates summarized his examination of Melitus in the classic equivalent of a closing argument:

[Socrates] You charge me with great ill-fortune. But answer me: does it appear to you to be the same, with respect to horses? Do all men make them better, and is there only some one that spoils them? or does quite the contrary of this take place? Is there some one person who can make them better, or very few; that is, the trainers? But if the generality of men should meddle with and make use of horses, do they spoil them? Is not this the case, Melitus, both with respect to horses and all other animals? It certainly is so, whether you and Anytus deny it or not. For it would be a great good-fortune for the youth if only one person corrupted, and the rest benefited them. However, Melitus, you have sufficiently shown that you

[8] *Id.* at 10–11.

never bestowed any care upon youth; and you clearly evince your own negligence, in that you have never paid any attention to the things with respect to which you accuse me.[9]

Thus, Socrates, through cross-examination, elicited an opinion from his accuser, Melitus that—while insufficient to win over a majority of his 400-or-so jurors—has won over practically every thinking mind who has read *The Apology* over the last couple millennia. In the appeal court of thinking historians, philosophers, students, and teachers, Socrates won his argument, albeit not in time to save his life.

"[T]he jurymen of England were originally nothing but witnesses."[10] Long before the Magna Carta, the "original and proper functions of the English jury [were] to inform the court . . . of certain facts of which they had peculiar means of knowledge."[11] Jurors were "to be absolutely free from any professional bias or prejudice"[12] and "were merely witnesses deposing to facts with which they were acquainted."[13] Over the course of time, jurors stopped being witnesses to report facts, and came to judge the witnesses and determine facts. Thus, the trial evolved into a spectacle of confronted witnesses before the fact-deciders—the jury.

III. Modern American Confrontation Principles

"The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him,'[14] [which] 'means more than being allowed to confront the witness physically.'"[15] Rather, as summarized by the U.S. Supreme Court, "the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."[16]

Reasonable limits to the right to cross-examination may be imposed by the trial court *only* when the court is concerned about "harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant."[17] But when "the trial court prohibit[s] *all* inquiry into the possibility that [the witness] would be biased," on an issue "that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violate[s] . . . the

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[9] *Id.* at 11–12.

[10] William Forsyth, History of Trial by Jury 14 (James A. Morgan ed., The Lawbook Exch. 1994) (1852).

[11] *Id.* at 38.

[12] *Id.* at 7.

[13] *Id.* at 92.

[14] Delaware v. Van Arsdall, 475 U.S. 673, 678 (1986) (quoting U.S. Const. amend. VI).

[15] *Id.* (quoting Davis v. Alaska, 415 U.S. 308, 315 (1974)).

[16] *Id.* (citing *Davis*, 415 U.S. at 315–16) (emphasis and internal quotation marks omitted).

[17] *Id.* at 679.

Confrontation Clause."[18] The Sixth Amendment right to confrontation gives the cross-examiner a chance to really "delve into the witness'[s] story to test the witness'[s] perceptions and memory [and] to impeach, *i.e.*, discredit, the witness."[19]

Thus, curtailing cross-examination is a serious matter. A defendant need not show that the trial court's refusal to allow cross-examination that would show bias of the witness prejudiced the outcome of the trial.

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."[20]

Rather, the appropriate inquiry is whether, had "the damaging potential of the cross-examination" been fully realized, the error nonetheless "was harmless beyond a reasonable doubt."[21] Curtailing a defendant's cross-examination on issues central to the defense is inappropriate to an extent that cannot be overstated.[22] "It is principally through cross-examination that a defendant exercises his right to confront witnesses called to testify against him."[23]

IV. Defendant's Cross-Examination of Adverse Witnesses in the Criminal Tax Case

If the reader has experience in civil or criminal defense work, there are similarities that can be used to better understand cross-examination in the criminal tax case. The lawyer who has no criminal defense experience should not start out in criminal tax defense; the lawyer who has no civil tax defense experience should not start out alone in a criminal tax jury trial.

The criminal tax case is unlike civil cases and many non-tax criminal cases because the white collar criminal allegation is based solely on a "willful" violation of a civil duty to the federal government—specifically, a violation of the

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[18] *Id.* (holding that the trial court's "cutting off all questioning" as to a particular event violated the Confrontation Clause).

[19] *Davis*, 415 U.S. at 316; *accord* Olden v. Kentucky, 488 U.S. 227, 231–32 (1988) (holding that the court of appeals "failed to accord proper weight to petitioner's Sixth Amendment right 'to be confronted with the witnesses against him,'" which "includes the right to conduct reasonable cross-examination." "[T]he limitation here," which was made "without acknowledging the significance of, or even adverting to, petitioner's constitutional right to confrontation" by cross-examination, "was beyond reason.").

[20] Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (quoting *Davis*, 415 U.S. at 318).

[21] *Id.* at 684.

[22] *See Olden*, 488 U.S. at 233 (holding that where the witness's testimony was central to the prosecution's otherwise thin case, the jury's verdicts could not be squared with the State's case, and the witness's impartiality would have been impugned by revelation of critical facts on cross-examination, the court's restriction on the petitioner's right to confrontation was not harmless).

[23] Krilich v. United States, 502 F.2d 680, 682 (7th Cir. 1974).

Internal Revenue Code. In a civil case, truth-traps often can be laid out for the witness utilizing formal discovery. Perhaps she was deposed prior to trial. Perhaps requests for admissions or interrogatories have surrounded her with inconsistencies. In a criminal trial, the defense lawyer does not have these pretrial discovery methods, so the truth-trap is less guaranteed and more intuitive.

In the criminal tax case, you might succeed in getting a voluntary interview with the adverse witness. More often this witness has been screened by the government and coached not to cooperate. On very rare occasions, the government gets pretrial depositions, but it is even rarer for the defense to obtain one.[24] Usually, the criminal tax case is like entering a dark, undiscovered room, with not much more than a book of fast-burning matches for a little light.

And who do you confront in the courtroom? Is the criminal tax defendant's accuser always a live witness? No. The "accuser" is often a government witness saying what a piece of paper written by another witness says about an entry into a computer that states what was or was not entered into the computer. The problem then becomes: *How do you confront the accuser?*

All criminal tax cases are about willfulness, so willfulness is never to be ignored. This does not mean that there are not frequently other compelling issues; it just means that willfulness is always the common denominator. Did the defendant try to break the law? Theoretically, the defendant could deliberately try to break the law and fail, therefore being innocent. Willfulness would become less important in such a case. In a career of over 33 years trying cases from coast to coast (and in Hawaii and Alaska), the author has never participated in a case where defending state of mind was not of paramount importance. In the area of criminal tax liability, our national legal policy has long been—since the U.S. Supreme Court case of *Murdock* in 1933[25] to *Cheek* in 1991[26]—that "a bona fide misunderstanding as to . . . liability for the tax . . . [or even the] duty to make a return" does not constitute criminal conduct.[27] If the defendant did not willfully withhold tax payments or give false information, he must be found not guilty.

A. *The Offshore Tax Shelter*

A criminal tax defendant's use of an offshore tax shelter provides an excellent case-in-point of how the government must prove willfulness—and how the defense attorney must use cross-examination, among other tools, to remind the jury that even actions about which they might be skeptical or mistrustful

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[24] *See* FED. R. CRIM. P. 15.

[25] United States v. Murdock, 290 U.S. 389 (1933).

[26] Cheek v. United States, 498 U.S. 192 (1991).

[27] *Id.* at 200 (quoting *Murdock*, 290 U.S. at 396). *See generally* Michael Louis Minns, *A Brief History of Willfulness as It Applies to the Body of American Criminal Tax Law*, 49 S. TEX. L. REV. 395 (2007).

are not necessarily the equivalent of willful tax evasion.[28] A definitive review of the offshore tax shelter is beyond the scope of this Article. Suffice it to say that since the September 11 attacks, jurors have been more suspicious about defendants with foreign transactions and offshore accounts. The Service has, with the blessings of Congress, aggressively sought civil penalties and interest against those who use offshore accounts for illegal purposes. After disclosure rulings by a Swiss court in 2010, Switzerland's banking giant UBS AG agreed to provide bank account information about approximately 4,450 clients whom the Service suspected of tax evasion.[29]

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[28]Complete success on tax cases involving offshore accounts—meaning no convictions on any count—has been elusive. The author is aware of only four this decade: *United States v. Moran*, No. 02-423 (W.D. Wash. Jan. 7, 2008) (the jury found the defendants, who used a Costa Rican offshore company, not guilty on 64 counts, and the court awarded a return of seized property); *United States v. Castroneves*, No. 08-20916 (S.D. Fla. May 22, 2009) (the verdict was not guilty on six counts, and the jury hung on the seventh (a conspiracy) count, which was later dismissed); the case involved a Panamanian offshore company; *United States v. Auffenberg*, No. 07-47 (D.V.I. Mar. 6, 2009) (four individual defendants plus corporate defendants were found not guilty on 96 counts; the offshore company was in the Virgin Islands, which technically is not "offshore"). In *Auffenberg*, the entire defense appears to have been by cross-examination—there was only one defense witness in two months, and the defendants did not testify.

In *United States v. Brodnik*, No. 09-67 (S.D.W.V. Nov. 8, 2010), Brodnik, a West Virginia doctor, was charged with seven counts of tax evasion, obstruction of justice, and conspiracy with Kritt, his attorney and CPA. The government alleged that the co-defendants illegally diverted funds to foreign accounts. Brodnik refiled in subsequent years and paid the tax liability prior to his trial; his defense was that he relied on expert legal advice. Kritt had the harder hill to climb. His defense was that he was following the law and gave sound legal advice. Brodnik and Kritt were acquitted on all 14 counts.

The author makes a studied effort to keep up with criminal tax exonerations. These are the only "offshore cases" from 2000–2010 the author is aware of that resulted in complete victories. Although the Service publishes its indictments and convictions, it does not publish its defeats or the names of those who were wrongfully accused and/or acquitted—nor does it assist in clearing up their records. Accordingly, there may be other acquittals in offshore cases that the author is unaware of. In *United States v. Doyle*, 956 F.2d 73 (5th Cir. 1992), the author won a reversal in a tax evasion case, but 17 years later, the client was still shown as a convicted felon in federal documents.

[29]Klaus Wille & David Voreacos, *IRS Says It May Withdraw UBS Lawsuit After Handover of Swiss Account Data*, BLOOMBERG (Aug. 26, 2010), http://www.bloomberg.com/news/2010-08-26/irs-says-may-it-withdraw-ubs-lawsuit-after-handover-of-swiss-account-data.html. Bradley Birkenfeld, the "informant" who claimed on the television program *60 Minutes* to have exposed, in his words, "19,000 international criminals," proves the maxim that when you sleep with dogs you get fleas. He is currently, after his snitching, a guest of the government, doing time. To date no one has challenged one of these indictments—thus, the government's record is 100%. All convictions have been through guilty pleas. Thus, for a generation the Swiss protected Nazi bank secrets, *see* Alan Cowell, *Hard Calculus: Nazi Gold vs. Swiss Bank's Secrets*, N.Y. TIMES, Sept. 21, 1996, but recently, for economic reasons, folded to U.S. tax interests. The extent of Swiss banks' involvement in assisting U.S. taxpayers with using offshore tax havens—even to the point of criminal conduct on the part of some of the bankers—might be revealed. *See* Kara Scanell, *U.S. Prosecutors Expand Tax Haven Probe to Include Credit Suisse*, FINANCIAL TIMES, Feb. 24, 2011, at 1.

Mutual Legal Assistance Treaties (MLATs) require the cooperating country to give evidence, in a legally useable form, to its partner country. St Lucia, St. Vincent, the Grenadines, Switzerland, the Turks and Caicos, Panama, Belize, Cayman, and many other so-called tax havens as of June 1, 2010 all have MLATs with the United States.[30] The government is now going full speed ahead to obtain foreign records, bring them to the States, and prosecute cases. A 2010 case in Florida dealing with father and son hotel magnates is illustrative. After the government's initial crusade against taxpayers who use offshore accounts, and collection of numerous guilty pleas, in October 2010 it won convictions in Florida against Mauricio Cohen Assor, 77, and his son Leon Cohen Levy, 46, after arguing that they secreted away $33 million in accounts in the Bahamas, British Virgin Islands, Panama, Liechtenstein, and Switzerland. They had been arrested on April 15th, 2010, no doubt for publicity purposes.[31]

Offshore really means "another country." Hawaii, Puerto Rico, the U.S. Virgin Islands, and Manhattan Island are disconnected from the mainland United States, but are not "offshore." Mexico and Canada are connected but legally "offshore," that is, non-U.S. jurisdictions. At first blush, when most citizens hear about offshore bank accounts they presume guilt—why put your money offshore if you were not committing a crime? But there are numerous legitimate reasons to be offshore, such as international deals, international treaties, privacy, forum selection, choice of law, and legitimate tax benefits. There are also illegal reasons, like drug trafficking, arms trafficking, and tax evasion.[32]

As with demonstrating the defendant's lack of willfulness generally, government witnesses should be confronted by cross-examination to demonstrate

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[30] Bruce Zagaris, Obtaining Foreign Evidence in U.S. Tax Cases: The Use of Treaties and Compulsory Mechanisms (Dec. 2, 2010) (unpublished paper submitted at the American Bar Association's 27th National Institute on Criminal Tax Fraud) (on file with author).

[31] United States v. Assor, No. 10-cr-60159 (S.D. Fla. 2010). The defendants were denied bond so they were in custody during their trial. The very hardest cases to try are when the court denies liberty to the accused and keeps him in custody. Client preparation and cooperation are hampered significantly.

[32] IBM has a presence in Singapore, including a chip factory. After IBM purchased chips from its subsidiary for the same price it would have paid if they were made in America, the Service disallowed the deduction. *See generally* David Cay Johnston, Perfectly Legal: The Covert Campaign to Rig Our Tax System to Benefit the Super Rich—and Cheat Everybody Else (2003). Chrysler, after it was saved by American tax dollars, merged with Daimler, and rather than stay in the U.S. became a German company to avoid paying U.S. taxes on its considerable overseas income. *See Chrysler Opted Out Of U.S. Tax System*, Center for Pub. Integrity (July 20, 2001), http://elsmar.com/pdf_files/Chrysler-No-Taxes.pdf. Intel moved much of its business to Costa Rica largely for tax purposes. Debora Spar, Foreign Inv. Advisory Serv., Occasional Paper 11, Attracting High Technology Investment: Intel's Costa Rican Plant (Apr. 1998) *available at* https://www.wbginvestmentclimate.org/uploads/Attracting%20High%20Technology%20Investment%20%28April%201998%29.pdf. The motivating reason for each of these decisions was to cut taxes. Each company actually avoided taxes. Evasion is illegal; avoidance is legal.

legitimacy in use of offshore accounts. Many of those persons who have gone offshore have done so for legitimate (or at least legal) purposes, often on the basis of legal or accounting advice they believed to be valid. Those persons, who will incur substantial interest and penalties under tax laws and Foreign Bank and Financial Accounts reporting requirements, may very well not be guilty of willful misconduct.[33]

The come-in-and-be-saved agreement with American offshore money holders expired October 15, 2010, sending chills down the backs of many who had hoped to escape reporting foreign income. The formal voluntary disclosure brought in thousands of the repentant and perhaps some scared innocents, but left unknown thousands outstanding. These taxpayers—or non-taxpayers—range from those who relied on the smartest men in the field who were also wrong, to money launderers, to clear crooks. Counsel should first figure out which one of these is in the office, and then examine his or her case from the view of presumed innocence. (If counsel presumes guilt from the start, there will not likely be much exculpatory information discovered.) Once the case has been examined, a decision has to be made whether to fold or fight. There are always arguments both ways. The final decision constitutionally belongs to the client.

The practicalities of offshore practice are that in the very near future there will be virtually no protection of hidden assets. Come out or get found. All legitimate banks are protecting themselves and turning in the individuals who will find themselves swept up in the new wave of prosecuting holders of offshore accounts—the individuals who will make their way to your office seeking representation. Perhaps Cuba or Libya will hide assets, but few American capitalists would feel safe in these jurisdictions, and Cuba might someday sign an MLAT.

B. *The Jury's Initial Assumptions*

It is very hard for a citizen who files her returns every year with H&R Block and has no complicated deductions to understand how someone can leave large sums off a sworn document or fail to file at all. Thus, the criminal tax jury typically presumes guilt at the outset. Most jurors, however, intuitively know that the Code itself is a mystery. This itself can be exculpatory and, if properly utilized, of great benefit to the defense. It is the reason for key

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[33] Instruments under treaties that purport to show foreign records will be entered into evidence on the basis of "authentification" alone. Practitioners know that banks and federal institutions often err in both the preparation and interpretation of their documents. The document will often require translation. All effort to confront these presumptively accurate documents will have to be through cross-examination of witnesses (perhaps the Service's summary witness) who, generally, do not produce or lay a factual foundation for the document. Attacks on the document, if appropriate, will require timely receipt. Such problems with documents have created a growing intrusion on the right of confrontation.

rulings from *Murdock*[34] to *Cheek*.[35] If the Code were to have life breathed into it and sit on the stand, ultimately it might break down in tears under cross-examination and proclaim, "Nobody understands me!" Although government witnesses on cross-examination can often substitute for the Code, most jurors are prepared to accept this key to the defense—that the Code is very difficult to understand.

While the issue of tax return accuracy is often a question of fact, the great weight of the defense effort always must be on the issue of willfulness, and it must be in the background of every single cross-examination question. This tax stuff is very complicated and easy to screw up. It is filled with quicksand and taxpayer traps. This is the undeniable truth, as Congress and the Supreme Court have acknowledged for the last half-century. The solution—to make the Code simple—has been a mantra of both political parties in most modern elections. Unfortunately, the necessary collective will to fix the problem has not, to date, been shown to exist in Washington.

Inventor and serious hunter Brooks Hanson conceived the American version of the Aborigine blowgun dart, as well as a powerful and easily disassembled and reassembled crossbow gun. In *United States v. Hanson*, this weapons designer, art collector, and art seller was indicted after he wrote off $400,000 in silver losses in a single year.[36] Federal law only allowed a capital loss to be taken in $3,000 increments per year.[37] The Service concluded Hanson had committed income tax violations by not reporting the entire amount of the silver losses as a gain. By putting the silver purchases and losses on Schedule C—the $400,000 sought to be offset did not appear on the face of his 1040—he took losses the government said he was not entitled to. Hanson's position was that he believed the silver losses constituted an immediately deductible business loss and not a capital loss.

In the tax case, the government went to extreme measures to prove that Hanson had made a lot of money and spent a lot of money. It flew in a dozen people who had mailed Hanson money for Hanson's crossbows. Now, the general rule is that you should pass on cross-examining a witness you cannot harm. Why let the factfinder focus on testimony that does not help your case? In an income-tax trial there generally is going to be proof about income earned, or else there will be a directed verdict, so why fight it? The problem is the cumulative effect of witness after witness who appears to be saying something bad about the defendant. So, in *Hanson*, I asked each of the dozen witnesses if the crossbows worked. Each one said yes. No further cross-examination, and I thanked them for their time. By the last of these witnesses, the judge commented, *I bet I know what your question is going to be.* The jurors

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[34]United States v. Murdock, 290 U.S. 389 (1933).

[35]Cheek v. United States, 498 U.S. 192 (1991).

[36]United States v. Hanson (D. Utah 1993) (on file with author); *see also* Michael T. Davis, United States v. Hanson, *An Analysis of a Successful Defense*, LITIG. SUPPORT, Apr. 1995, at 5–6.

[37]I.R.C. § 1211(b).

laughed, the judge was right, and the judge asked the question in a very leading way: *I'll bet that crossbow worked, didn't it?* The jurors laughed again, but we had established the integrity of the invention and thereby the integrity of the inventor. We would begin to build on that. Effective cross-examination does not require the advocate to attack the witness. Often, leading questions enable counsel to enlist the legally hostile witness as an ally.

Also in *Hanson*, a Persian carpet salesman was flown in from New York to Utah with the sole purpose of showing use of income. Use of income is often irrelevant and prejudicial, so a decision had to be made whether or not to object and attempt to keep it out. I happened upon the witness in the hallway and got to talk with him for a moment. I told him how much Hanson respected him and loved his carpets, and how sorry we were that he was forced to be here. I would not ask him many questions. He wanted to know what the government was going to ask him, and I responded that I could not hazard to guess. Then, he gave me a bit of gold: he had been forced to leave a sick child behind. He had told the government attorneys but they did not care.

Direct examination was short. *Did Hanson order the carpet? Did he pay for it? Is this a check you deposited in your account?* The government attorney displayed the check boldly and proudly, strutting from one end of the jury rail to the other with the exhibit. Here the government's hubris was part of our defense. Cross-examination was shorter. *Thank you for coming. You and I had a brief conversation. You told me you had a sick child at home, remember? Yes. Did you tell the government you couldn't leave your sick child? Yes. But you are still here? Yes. Pass the witness—and the defense requests that His Honor release the witness to go back home to his sick child.*

Those sentiments were totally sincere and honest. Honest sentiment rings true with the jury, though it is too infrequently used by trial lawyers. The purpose of this cross-examination was to share truth with the jury. The more that is uncovered about the conduct of the parties, the more the jury can judge the government and its case. It was a sort-of "reverse 404(b),"[38] and was effective. Hanson was acquitted on all counts.

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[38] Evidentiary Rule 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

V. Witnesses to Be Cross-Examined in the Criminal Tax Case and Getting the Most Out of Each Examination—If There Is Something to Get.

A. *The IRS Service Center Representative and the Best Evidence Rule*

Every tax case against the individual taxpayer involves a civil servant as witness. This is often the person from the IRS Service Center or the custodian of the computer records, whose job it is to lay the documentary foundation for the government's case against the taxpayer.

In the trial in *United States v. Buford*,[39] I cross-examined Service records custodian Marsha Boatright about certain certificates of assessment—paper interpretations of original documents that the government failed to turn over to the defense or the court. In the end, the case was submitted to the jury based on the supposed infallibility of the hand-prepared copy of the official document.

The best evidence rule is often used incorrectly by ill-prepared lawyers and judges who fail to consider the ancient purpose of the rule. When documents were copied by hand, there was, understandably, frequent error. Today, photocopies are usually identical to the original, making the best evidence rule antiquated and obstreperous rather than enlightening. However, when there is even a remote chance of altered versions, whether by chance or choice, the original use of the rule remains: Ensuring confrontation of the actual "accuser," rather than a "look-alike" from which potentially different conclusions can be drawn.

In Stephen Buford's case, the difference between the original and its copy was ultimately game-changing.[40] The original document was the tax return. As a Service record, it was broken down into fragments and typed into the Individual Master File (IMF). The IMF is a computer spreadsheet that breaks down all the various transactions on tax returns and the related filed tax papers.[41] It also has some limited accounting functions. Rather than pull up the entire form on a computer and print it, the procedure (at the time) was for a government employee to read the original and write out what that employee found relevant on the "Transcript of Account." The Transcript of Account was then handed to another government witness who testified as to what the Transcript of Account said the IMF said.

The hand-prepared Transcript of Account for Buford showed, for the purpose of impeachment, that he did not file at all. What credibility did a defendant tax preparer have if he did not file his own return? The truth—while not relating to the issue in chief—was exculpatory, and the lie was highly incriminating.

Judge Thomas Gibbs Gee, one of the legal giants of his time and a master of cross-examination before taking the bench, wrote the decision reversing the

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[39] 889 F.2d 1406 (5th Cir. 1989).

[40] *See id.* at 1408.

[41] The main computer is housed in Martinsburg, West Virginia.

verdict that reflected acceptance of Boatright's ridiculous position that mistakes were never made on the handwritten copies. Judge Gee[42] wrote, "Buford's attorney, in a very able cross-examination of Boatright, elicited testimony that the Certificates of Assessments were hand-prepared, using information taken from the IMF. When asked whether a mistake might have occurred, she said she had never seen one."[43] Boatright conceded on cross-examination that a computer-generated summary of the IMF contained information that the Service would not have if Buford had not filed his tax returns.[44] In the final rendition, after the Fifth Circuit Court of Appeals ordered production of the original record, Agent Boatright's interpretation of the system as infallible was determined to be erroneous. The IMF original record showed that Buford had filed. Ultimately, Buford was acquitted.[45]

The purpose of cross-examination of each witness is, first and foremost, to prove to the jury by the witness's truthful testimony a fact that is exculpatory to your client. This is the most important guard to liberty against government power in the two hundred plus years since the creation of the Sixth Amendment. Cross-examination's secondary purpose is to prove that exculpatory fact to the trial court. More often than not, the trial court is pro-government, but can frequently be convinced of the weakness of the government's case, if not the defendant's innocence, through effective cross-examination. The third purpose for cross-examination is to convince the three-judge panel of the court of appeals if your client is inappropriately convicted—as was the case in *Buford*—so that conviction can be set aside (as was also the case in *Buford*) due specifically to cross-examination.[46]

B. *The Service Special Agent—Find Exculpatory Evidence*

In *United States v. Oliver*, the case was solely about Joe Oliver's state of mind, as it is in so many criminal tax cases.[47] Oliver had failed to file tax returns in many years, although he had earned enough income to require filing. His only legal defense was that he did not believe he was required to file—a sound legal defense if the belief was held honestly and in good faith. Judge Belew had ordered the special agent's report to be produced. In the report, the special agent wrote, ridiculing Oliver, "Mr. Oliver, the suspect, really believes he is not required to file tax returns." That, of course, was Oliver's point.

The special agent took the stand and summarized the case from the standpoint of the Service, surmising that Oliver well knew of his requirement to file, as proven by prior filings. I made no objections. I wanted his testimony to be as detailed as possible. Cross-examination was quite simple. *Mr. Special*

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[42] Judge Gee paid the author a kind compliment in his opinion.

[43] *Buford*, 889 F.2d at 1408.

[44] *Id.*

[45] Michael Louis Minns, How to Survive the IRS: My Battles Against Goliath 172 (2001).

[46] *See* 889 F.2d 1406 (5th Cir. 1989).

[47] *See* Michael Louis Minns, The Underground Lawyer 309–13 (2d ed. 2001).

Agent, do you understand what this case is about? Essentially, Mr. Special Agent, this case is about whether or not Mr. Oliver believed he was following the law. And what did you put down about that in your report? The witness fought and fought and fought—and that was all to the good, to emphasize the final point. *Your Honor, may I show Mr. Special Agent his report? Mr. Special Agent, I have highlighted one sentence and I ask that you read it silently.*[48] *Does that refresh your memory about what you said about Mr. Oliver's belief?*

It did not. So it was put into the record, and the witness had to read it out loud to the jury. He read: *The suspect really believes he is not required to file.* I asked him to clarify: *The suspect you are talking about is Joe Oliver?* He made the point for me: *Yes.*

Closing argument centered on the one point. I emphasized that the only contested issue was what Oliver believed, and that the agent in charge of the case stated in the official government report that Oliver believed he was not required to file a return. The jury acquitted on all four counts. As well it should have. The trial was won essentially in the five minutes of cross-examination of the government's chief witness, the investigating officer.

In *United States v. Moran*, I was able to lead a successful defense based in part on cross-examination of several Service witnesses.[49] Jim and Pamela Moran were accused during the trial of not filing their own tax returns, which obviously sounds bad—failure to file is a crime and if they failed to file might they also be guilty of giving illegal advice?—but the Morans were never *charged* with failure to file. Criminal defense lawyers routinely tell their clients not to file returns while they are under criminal investigation.[50] The Morans had been instructed by counsel not to file their own returns, and they had obeyed. I created a chart of 404(b) conduct[51] that the government asserted showed the Morans had done bad deeds. One by one, I went through each deed in the chart, asking the special agent if the Morans had been charged with that crime. To each she said, *No, they have not been charged.* I also asked her whether, when the trial was over, the Service would agree not to so charge them. *No, the Service would not agree not to do so in the future.* The point was to isolate these things that looked bad from the charges actually alleged. In closing, I argued successfully that the government did not believe in its own case. It spent so much time on unrelated, uncharged conduct.

One of the government's accusations was that the company the Morans worked for had violated federal tax law, and consequently the Morans also must have violated the law. But the government custodian of records began to erode this theory. The Service expert for the computer files testified that

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[48] The key sentence was highlighted with a yellow highlighting marker. Computers were not yet in the courtrooms.

[49] United States v. Moran, No. 02-423 (W.D. Wash. Jan. 7, 2008).

[50] This is often very bad advice.

[51] While character evidence or evidence of other crimes is generally not admissible to prove the person's conformity therewith, evidence of prior crimes, wrongs, or acts is admissible for some purposes. *See* FED. R. EVID. 404(b).

the company the Morans worked for had not filed the appropriate returns. This was the case because the computer said so—and the computer was "telling" the truth. On cross-examination, she admitted that the Morans did not have access to those private records and that even she could not have shared them with the jury without a court requiring it. I asked her if she would share the other confidential tax records with the Morans outside of the courtroom and she responded that she was not allowed to do so. I thanked her for following the law, then summarized: *So the Morans had no way of knowing that the company they worked for had violated the law; if they had asked you, you would have refused, for reasons of confidentiality, to tell them; and these records you have introduced to the jury were never shown to the Morans.* Yes to each question. This expert was competent, well-qualified, and honest—and her responses aided the defense. The cross-examination tactic was to agree with this "hostile" witness—and simultaneously to show that federal law prevented the Morans from seeing the evidence that their employer was a crook. How could they have participated?

Finally, an undercover Service special agent testified that the Morans told him to hide funds that belonged to him when he filed his corporate bankruptcy, and he had a version of that on a tape recording.[52] The implication was that the Morans had advised him to commit bankruptcy fraud. On cross-examination, the jury was reminded that the Morans were not charged with bankruptcy fraud. The government witness admitted he had actually filed a false bankruptcy, under oath, under his fake name, with a fake company that had entered the very real public bankruptcy court—all to preserve his undercover identity. In other words, he had committed perjury in the bankruptcy court.[53] He responded that he had the permission of his boss to do so. When I asked if he had permission from his boss to continue lying under oath, I left the podium satisfied that either answer he gave would be of assistance to

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[52]The seminar at which the undercover special agent secretly recorded many people was in Costa Rica, and he was violating the wiretapping and recording laws of that country by not getting the Costa Rican government's approval for his bugging adventure. *See generally* POLITICAL CONSTITUTION OF THE REPUBLIC OF COSTA RICA tit. IV, art. 24 ("The right to intimacy, freedom, and secret communications is guaranteed. Private documents and written verbal or other communications of the inhabitants of the Republic are inviolable."). When he left the stand he had confessed not only to perjury but also to violating the criminal statutes of an allied state.

[53]We had a transcript of that witness's testimony from a related trial involving different defendants, at which he had reluctantly admitted that while undercover he shared a room with his female undercover agent—suggesting literal under-cover work. In the Morans' trial, he did not want to admit that the taxpayers had paid for the agents to go to a luxury hotel. The agent came up with a ludicrous excuse for leaving the premises where he was stationed—that he feared for his safety and so took a room at a nearby hotel. Astonished, I asked him how, if he was truly fearful for his safety, he could have left his female co-agent on the premises. Did he know where she was staying? Did she have a room close to his for protection? The jury ultimately learned that "for protection" they had shared a room. I did not ask if they shared a bed, and the agent did not want to educate me or the jury, so we left the matter open to speculation.

the Morans. When he answered *no*, implying that we could now rely on his sworn word, I returned to the podium for a few more questions.[54]

You used a fake name. You concocted a fake corporation. You filed a fake bankruptcy under your fake corporate name in a real bankruptcy court under oath. The facts that you swore to under oath were not true. You told the Morans you had personal money unrelated to the fake corporation.[55] The witness was evasive so it took many questions to get him to admit his actions were fake as opposed to "undercover," but the evasion strengthened the force of the cross-examination. *Isn't that one of the reasons you form a corporation, to keep your personal assets separate and safe?* The agent did not know. He confessed that he was not an expert at bankruptcy.[56]

Another government witness, a Certified Public Accountant (CPA) informant who essentially called the Morans crooks, was shown to have a "special" relationship with the chief prosecuting agent. Cross-examination revealed that the special agent had given him her private home phone number (no one gets the home phone number of special agents), and that the law might allow him to collect a reward. Finally, after refusing to answer my questions on the full extent of her relationship with her informant—a CPA who was apparently willing to tape record, secretly, for the Service, his own clients—she admitted that the informant had been retained by her to handle her own personal tax returns. I did not ask if she paid him or not. This witness was compromised, clearly pushing the bounds of ethics, and aided the defense.

A juror who later wrote a newspaper letter about the *Moran* case indicated that the government witnesses all turned out to help the defense. The Morans were acquitted on all 64 counts.

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[54] It is important for the attorney not to formally pass the witness until he is finished. Otherwise, the court may exercise its discretion and not allow the last couple of questions.

[55] Just as in the cross-examination by Socrates, in modern cross-examination the question is often the answer. Sometimes inexperienced judges confuse direct questioning, where the question cannot suggest the answer, with cross-examination, where it often properly does suggest the answer. The harm is that the question must be rephrased until the judge either realizes she is not even pretending neutrality or shuts down legitimate cross-examination. More often than not, the court's stated goal is to "move things along"; meanwhile, the opposite is occurring. In the *Moran* trial, we were blessed with a very successful former trial lawyer who was also a very experienced trial judge. The best trial judges enjoy good cross-examination in their courtroom, and will prevent frivolous objection and interference, looking forward to watching the truth unfold. The worst fear it as a challenge to their control.

[56] The work involved to get ready for this witness is an article by itself. We obtained the transcript from the agent's prior trial testimony. We had the bankruptcy record pulled in another state and only received a copy of it the night after direct testimony, a few hours before cross-examination. We interviewed two defense lawyers who were willing to help, having "gotten to know" the agent on the stand in prior trials. So, preparing for a 30-minute examination took three lawyers about 50 hours of prep time.

C. *The Government's Expert—Focus on Qualifications, or Lack Thereof*

It appears that the only qualification for rendering an expert witness opinion for the government as to the calculation of a tax is that the witness works for the Service. Many Service employees are not CPAs or experienced accountants, and have no formal training but for completion of a Service course about testifying. These "experts" are ripe for cross-examination on their credentials.

Additionally, opposing experts are often hugely useful in identifying, segregating, and interpreting 404(b) materials. If the government wants to base its case on allegations of "other bad acts," then the defense must be allowed to distinguish these acts from the charged conduct. This is where the testifying expert comes in. *Mr. Expert, you understand my client is not being charged with these bad acts? You understand he might be guilty of these bad acts but innocent of the conduct charged? Yet it is your goal to mention this conduct for the purpose of securing a conviction?* The answers are predictable and suggested by the question until you get to the trial summary question about the expert's goal. Often the "trained Service expert" will say he has no goal. But any response is usually useful and exculpatory—derailing the government's attempt to show the defendant had an improper purpose. If the expert says she has no goal, often she loses credibility. If the expert admits he is trying to obtain a conviction, that too diminishes the force of his "convictions."

One of the geniuses of cross-examination, Francis L. Wellman, said in his 1902 classic about experts, "It has become a matter of common observation that not only can the honest opinions of different experts be obtained upon opposite sides of the same question, but also that dishonest opinions may be obtained upon different sides of the same question."[57] Yet, he continued, "some careful and judicious questions, seeking to bring out separate facts and separate points from the knowledge and experience of the expert, which will tend to support the theory of the attorney's own side of the case, are usually productive of good results."[58]

It is a common ploy in criminal tax cases for the defense lawyer to be rude, to contest every witness who takes the stand, and to argue over every detail in the indictment. The strategy is generally doomed to failure. It effectively focuses the trial on the strength of the government's case. The defense should focus on the strength of the *defendant's* case.

Wellman coined the term "silent cross-examination" for a pointed passing-up of the opportunity to cross-examine a witness who could harm the attorney's client on further examination.[59] Nothing could be more absurd or a greater waste of time than to cross-examine a witness who has testified to no material fact against your client. And yet, strange as it may seem, the courts

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[57] FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 40 (Am. Bar Ass'n 2009) (1903).

[58] *Id.*

[59] *Id.* at 69.

are full of young lawyers—and alas! not only young ones—who seem to feel it their duty to cross-examine every witness who is sworn. It not infrequently happens that such unnecessary examinations result in the development of new theories of the case for the other side, and a witness who might have been disposed of as harmless by mere silence develops into a formidable obstacle in the case.

"The infinite variety of types of witnesses one meets with in court makes it impossible to lay down any set rules applicable to all cases."[60] Following that sage advice, Wellman instructed how to discredit a female witness by looking down on her and passing without questioning, using his body language as if to say, "[w]hat's the use [in bothering to question her]? [S]he is only a woman."[61]

Putting aside for a moment the fact that Wellman's trials were conducted in front of all-white, all-male New York juries and the fact that the male chauvinism that was common to the times (1890s–1900s) would likely fail and perhaps even backfire in the face of the examiner, it would be foolish to ignore Wellman's point. Wellman was talking about a female witness he believed would "be more than a match for the cross-examiner,"[62] and therefore dangerous. His effort was to disarm, rather than take on, a very effective enemy. His method of silent cross-examination was calculated to attack her subtly without risking a futile attempt at cross-examination that would only strengthen her in the eyes of the jury. This strategy remains valid today.

The art of cross-examination was demonstrated at its best by my co-counsel, Joseph Friedberg, in *United States v. Goris*, a trial that took place in Minneapolis, Minnesota in 2010.[63] Friedberg, one of the greatest criminal defense lawyers, cross-examined Service employee Shauna Henline. Direct examination revealed that Henline was a senior technical advisor for the Frivolous Return Program (FRP) in Ogden, Utah—"a program that was created to handle documents that are submitted to the Service that have been deemed to be frivolous, or in other words, they have no basis in law, they have no merit."[64] After certain types of filings are deemed "frivolous," she explained, the workers in the FRP can make the determination that a particular correspondence or return is frivolous.[65] The government had established Ms. Henline as an expert with lots of experience. She testified that the defendant's return was frivolous, and she corroborated that testimony with the hearsay opinion of the lofty- and expert-sounding "chief counsel." She also identified the defendant's returns as having the incriminating FRP stamp on it. (The FRP mark, more hearsay, was placed on the return after it was filed by the

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[60] *Id.*

[61] *Id.* at 69–70.

[62] *Id* at 69.

[63] United States v. Goris, No. 09-100 (D. Minn. Apr. 30, 2010).

[64] Transcript of Record for Mar. 1, 2010 at 3, United States v. Goris, No. 09-100 (D. Minn. Apr. 30, 2010), ECF No. 86 [hereinafter Transcript of Record].

[65] *Id.* at 6.

government.) Left alone, this testimony would have been sufficient to sway a jury to convict the taxpayer defendant. Friedberg's cross-examination went as follows:

> [Q] You must drive to work every morning in Ogden saying to yourself, "I wonder what they'll think of next." You've got a very interesting job. You talked about putting these frivolous returns into bins.
>
> [A] Yes.[66]
>
> [Q] I don't want to show too much knowledge about this.
>
> [Laughter][67]
>
> . . . .
>
> [Q] There's the basic unconstitutionality of the Federal Reserve system that is asserted by some people, correct?
>
> [A] Correct.
>
> [Q] They say that money isn't money because we don't back it with gold anymore, right?
>
> [A] Correct.
>
> [Q] There's another one that says the federal government stole from us when they stopped issuing silver certificates, correct?
>
> [A] Correct.[68]
>
> . . . .
>
> [Q] Now, you even were able to identify one of, if I can call them schemologists, by his handwriting, correct?
>
> [A] Correct.[69]
>
> . . . .
>
> [Q] I really don't know the answer to this question: Are you familiar with how they ["tax schemologists"] sell their products to people?
>
> [A] In some instances, yes.
>
> [Q] Do some of them hold seminars?
>
> [A] They hold seminars, yes.[70]
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> . . . .

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[66] *Id.* at 22.

[67] Friedberg brilliantly focused on the issue of willfulness while simultaneously courting the jury. Every trial lawyer has his own style—few could pull this off without objection. Friedberg is one of the few who can.

[68] Transcript of Record, *supra* note 64, at 23–24.

[69] *Id.* at 24.

[70] *Id.* at 24–25.

[Q] In other words, somebody says, "Geez, I met a great accountant last week. He reworked my taxes and the government owes me money as opposed to me owing them."

[A] Yes.[71]

. . . .

[Q] If I choose one of these schemes, I'm probably going to end up in one of your bins, right?

[A] Yes.

[Q] Now—and if I end up in one of your bins, the chances are I'm going to get fined $5,000 per frivolous return, correct?

[A] That's correct.[72]

. . . .

[Q] Okay. And do you all charge interest on the 5,000?

[A] Yes.[73]

. . . .

[Q] The promoters of this stuff know what they're doing is wrong, correct?

[A] Well, I believe—well, they should know. Let's put it that way.

[Q] Okay. Some of them might be legitimately crazy, but they know or should know what they're doing is wrong, correct?

[A] Correct.

[Q] They, however, don't just hurt themselves, they hurt other people too, don't they?

[A] Yes, they do.

[Q] Whereas the people who are on the receiving end and buy into this nonsense, they're hurting themselves, correct?

[A] That's correct.[74]

. . . .

[Q] And these people that sell that scheme, they've actually convinced people that [the scheme is] true, right?

[A] That's correct.[75]

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[71] *Id.* at 26.
[72] *Id.* at 27.
[73] *Id.* at 28.
[74] *Id.* at 29–30.
[75] *Id.* at 39.

Through a gentle and agreeable cross-examination the government's expert had now testified that the defendant might in fact have been a victim. Great cross-examination of course does not guarantee an acquittal, but it can turn a government witness into a defense witness.

D. *The Government's Summary Witness*

Typically, the government's last witness is its "summary" witness. Summary witnesses' qualifications vary widely. She might be a special agent with no tax training, a collection agent, an auditor-CPA, a special agent-CPA, or even an outside-the-Service CPA with an MBA, or a lawyer or professor with a Master's degree in taxation.[76]

The theoretical purpose of this summary witness is to summarize the government's previously admitted evidence from the position of an "expert," by adding and subtracting—and "opinionating." The witness generally will have had a course or courses in testimony. The real purpose is for the prosecution to give an interlocutory closing argument before the defense's case-in-chief.

Rebuttal for the defense by a well-qualified expert who also acts as a summary witness can save the day. The jury will have a choice between someone who is well-qualified and professional and someone who is just saying what he was told to say by his division chief. In *United States v. Moran*, the government's summary witness assured the jury the Morans had violated bankruptcy law because his chief said they did.[77] He did not have a CPA certification. The defense expert witness was a lawyer with a Masters in Taxation who also taught CPA students as a professor.

E. *The Defendant's Accountant-Turned-State's-Witness—Show Motive and Incompetence*

There was a report in *Money* magazine that undertook to examine complex tax returns for several years with 45 well-qualified, ostensibly honest professionals. Each came up with a separate conclusion for the tax returns.[78] The Code is so poorly written, and so differently interpreted by the various courts dealing with it, that on a complex return there can be several qualified but different opinions.

In reality-show winner Richard Hatch's trial on three tax counts, elements of the Sixth Amendment—including the right to cross-examination of the witness against him—were violated. Thus, Hatch was prevented from defending himself against the government's characterization of him as a willful tax violator. In a contest to show whether it was Hatch or his tax preparer who

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[76] The author has examined government tax experts with all of these credentials.

[77] 493 F.3d 1002 (9th Cir. 2007); *see supra* notes 46–50 and accompanying text.

[78] Teresa Tritch, *Why Your Tax Return Could Cost You a Bundle*, MONEY, Mar. 1, 1997, at 80. In 1993, the author appeared on the *Geraldo* show with Ms. Tritch and several clients who had been acquitted.

caused false tax returns to be filed, the trial court ruled that the accountant was beyond reproach.[79]

All of the evidence to show Hatch's supposed willfulness to evade taxes and commit fraud upon the government came down to several tax returns. The tax returns he was convicted of filing unlawfully were prepared in one year by one CPA, Jodi Rodrigues-Wallis. She was the government's key witness.[80]

But Rodrigues-Wallis also was key to Hatch's defense. Richard Hatch faced an uphill battle to explain why he filed an erroneous tax return. His explanation was twofold: (1) his own mistaken understanding of the obligations and agreements of others, and (2) his reliance on what he believed to be the integrity and competence of his CPA tax preparer.

Hatch sought to show that it was Rodrigues-Wallis's incompetence, not his knowing evasion, that caused him to file the erroneous tax returns she had prepared. Hatch thus should have been entitled to test Rodrigues-Wallis's perceptions, truthfulness, competence, experience, motives, and potential bias through the rigors of cross-examination. But when defense counsel tried to cross-examine Rodrigues-Wallis on the tax returns that she prepared (and on which Hatch was indicted), the district court repeatedly sustained objections, ruling that Rodrigues-Wallis's competence, or lack thereof, was not relevant to Hatch's defense that he did not willfully evade taxes. Hatch's attempts "to test the witness'[s] perceptions and memory [and] to impeach, *i.e.*, discredit, the witness,"[81] were pre-empted as "irrelevant." The district court's limitation on the defense's cross-examination of Rodrigues-Wallis comprised a grand denial of Hatch's Sixth Amendment rights by the district court.

The court of appeals affirmed.[82] Although trial court limits on cross-examination "should be scrutinized 'with the utmost caution and solicitude for the defendant's Sixth Amendment rights,'"[83] the district court's limitations in *Hatch* were, in the words of the appellate court, "relatively few" and "were largely of questions that could reasonably be thought to be [of] scant relevance to the charges upon which Hatch was being tried."[84]

John Mortimer,[85] in the last of his brilliant British *Rumpole* series, *Rumpole Misbehaves*, described this as "premature adjudication," as exemplified by the following exchange:

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[79] United States v. Hatch, No. 05-98 (D.R.I. May 24, 2006), *aff'd*, 514 F.3d 145 (1st Cir. 2008); *see Hatch*, 514 F.3d at 160–61 ("[T]he fact that the returns prepared by [the accountants] may not have been 'letter perfect' or 'absolutely correct in every single respect' was irrelevant.").

[80] Hatch was charged with ten felony counts. *Hatch*, 514 F.3d at 147. The three counts he was convicted on were based on tax returns prepared by Rodrigues-Wallis. *Id.* at 147–53. The defense was allowed to cross-examine government witnesses on the seven counts not involving Rodrigues-Wallis, and obtained acquittals on all seven.

[81] *See* Davis v. Alaska, 415 U.S. 308, 316 (1974).

[82] *Hatch*, 514 F.3d at 146.

[83] *Id.* at 157 (quoting United States v. Tracey, 675 F.2d 433, 437 (1st Cir. 1982)).

[84] *Id.* at 158.

[85] Mortimer died January 16, 2009.

[Q] Well, for instance, were there signs of rigor mortis?

[A] I did notice some stiffening of the joints, yes.

[Q] *Some* stiffening? Are you telling us that the stiffening was quite far advanced?

[A] I thought it was. But I'd been told the time of death was only an hour before. So I felt I'd been mistaken.

[Q] And what if you weren't mistaken?

[A] I'm not quite sure what you mean . . .

[The court] Neither am I, Mr. Rumpole. You could put it more clearly to the doctor.

Mr. Justice Barnes added his pennyworth.

[Q] I mean that would have meant death two or three hours before your examination of the body.

[A] Put like that, I suppose it is possible.[86]

Hatch's trial, by way of cutting off cross-examination, likewise was "prematurely adjudicated." The First Circuit's ruling came down to this: The credibility of the witness's "expert" opinions were not relevant and therefore could not be challenged.[87]

VI. Defendant's Discovery in the Criminal Tax Case

In a typical civil case you take depositions. You make requests for admissions. You receive answers to interrogatories, and you receive production related to certain specific requests. In the federal criminal case you might receive answers to a bill of particulars asking for more detail in the indictment, but more often than not you do not. You receive the indictment, which varies in detail from prosecutor to prosecutor. It might have great particularity or little more than a recitation of the statute allegedly violated.

Discovery, depending on the prosecutor and the judge, can be useful or simply a tool to limit what is used in trial. Frequently, you receive a plethora of paperwork, most of which has little or no application to the case, and you have to find the needle of useful information in this haystack. An index useful for finding information in the piles of fodder should be requested. Often the government refuses to provide an index of the material, claiming it does

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[86] JOHN MORTIMER, RUMPOLE MISBEHAVES 181–82 (2007). Rumpole is a British barrister—the equivalent of an American defense attorney. His forte is cross-examination.

[87] *See Hatch*, 514 F.3d 145. Such extreme limitations on cross-examination in tax cases appear to be an anomaly in the First Circuit only. In the last decade, the First Circuit's favor of the government in tax cases has been woefully out of balance with the rest of the circuits. The First Circuit judicially reduces effective cross-examination and rebuttal for tax defendants, while allowing unqualified government witnesses to say whatever they please. The author expects that eventually the Supreme Court will review these standards.

not have an index, which of course is ridiculous. It chooses what it regards as relevant information, and puts that into the case file to use at trial. If you never obtain an index, at least you can ask the special agent who put the case together how she was able to find all her useful evidence without an index. This might lead to exculpatory or impeachment materials, or form the basis of a reasonable motion for mistrial or sanctions.

The greatest risk in every criminal tax trial is that the judge will preclude useful cross-examination that would convince the jury to acquit. Occasionally, when the judge does not understand basic tax law, yet presumes to know more than anyone else, effective cross-examination can cause the judge to realize his own error in presuming guilt. This of course requires intellectual curiosity or humility. Alas, some judges have neither; fortunately, many have both.

If the evidence is not heard, neither judge nor jury nor appellate panel can evaluate it. For that reason, the defense must make an immediate offer of proof. The court might instruct counsel to offer it later so as not to waste the jury's time. (A "Rumpoleon" oxymoron: Omit evidence to save the evidence evaluator's time. Then later, out of context, submit it again.) When that happens, counsel must be diligent to re-offer until it is allowed. There are two reasons. First, a good judge, when it is brought to her attention, might repent and give you another bite of the justice apple. Second, when your innocent client is convicted you will have a record to show the (hopefully more interested) appellate panel what you offered and what the jury did not see.[88]

Preliminarily, therefore, you must get the government to produce the materials that will support your offer of proof. There are requests for materials that are common to all criminal defendants, some that are commonly requested in almost all white collar criminal cases, as well as some that are unique to tax defenses. The point is that you need information on all of the government's witnesses to cross-examine them, and you have to start right out of the gate. Other members of the defense bar who have tried cases against your opposing witnesses can offer tips on how they conduct themselves, as well as transcripts of prior testimony. Of course you cannot begin this research until you have the names of the witnesses.

A legitimate fear in cross-examination is how to confront the records that return, especially notes in the official records that make it back to our shores in the government's raids on offshore accounts.[89] Who wrote the notes? When were they added into the business records? In the *Goris* case, government documents contained handwritten, incriminatory language that was put there by the government after it received the documents.[90] Responding to a hearsay

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[88] *See* United States v. Buford, 889 F.2d 1406 (5th Cir. 1989), discussed *supra* notes 39–46 and accompanying text.

[89] In *Moran*, the documents came from a government raid in Costa Rica. After 2010, most of the evidence will come from cooperative exchanges under MLATs.

[90] This was the FRP language, discussed *supra* notes 64–65 and accompanying text.

objection, the court asked, "Will counsel link this up?," meaning will counsel show that the hearsay is not really hearsay, but perhaps the statements of a co-conspirator, or the unprotected statements of the client. When dealing with foreign accounts, an admission against interest might be recorded by a servant to the bank. Or, it could be a Swiss interpreter's translation from French to English, a Panamanian translator's translation from English to Spanish, and a final interpretation from a U.S. translator who uses her personal experience in tax coupled with the assistance of the special agent to come up with a story that no high school language teacher would agree is reflected by the documents.

Cross-examination over these types of discovery can be challenging. Conviction rates will be higher unless counsel can come up with effective ways to insure Sixth Amendment dissection of the story. Better yet, cross-examine the real authors. The government either gets the real authors, who may have reason not to appear,[91] or the hearsay business records. Summary witnesses may be needed as a last resort to disprove the government's case.

Typically, requests for discovery are made under Rule 16 of the Federal Rules of Criminal Procedure, which lists the information that is subject to the government's and to the defendant's disclosures. When you make the request for documents and objects, you open the door to reciprocal discovery.[92] You will have to give up your information. Sometimes, if there are two defendants, you might want to consider having one defendant provide the discovery and the other not—so as to not show all the cards. For practical purposes, many judges require submission of exhibits before trial, so you are likely to be forced to give up most of your exculpatory cross-examination material before trial. With modern discovery, surprises are reduced—theoretically at least. That said, in a trial practice of over 33 years to date, the author cannot remember a trial without at least one unanticipated revelation on each side of the docket. Courtrooms are not stagnant. Surprises are born constantly, and a tiny surprise can grow into an acquittal when it is carefully nurtured by competent counsel.

The key Supreme Court cases of *Brady v. Maryland*[93] and *Giglio v. United States*[94] are—or should be—in every single forms file of every single criminal defense lawyer, and they belong in your tax discovery forms file too. Most

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[91] For instance, in the Florida trial against the Assor family, *see supra* note 31 and accompanying text, a family member was given "safe passage," a letter promising he could come to the States testify against the defendants and leave without imprisonment.

[92] *See* FED. R. CRIM. P. 16(b)(1)(A) ("If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy [materials] . . . within the defendant's possession, custody, or control [if] the defendant intends to use the item in the defendant's case-in-chief."). The government will always so request.

[93] 373 U.S. 83 (1963). The government is required to give the defense exculpatory evidence in its possession, such as the Oliver statement. *See supra* text accompanying notes 47–48.

[94] 405 U.S. 150 (1972).

circuits will have a case interpreting *Brady* and *Giglio*, and those cases should be included also even if they are not tax cases.

Your *Brady* discovery requests are mostly *pro forma*. The government is supposed to give the information to you without the request. Each jurisdiction is likely to have some local rules that are applicable, and each judge acts and reacts differently, so the diligent practitioner should check written and unwritten[95] local rules. Some courts require you to request *Brady* information informally by letter or phone before filing a motion. It is the better practice to reduce your request to writing because you can attach your letter to the motion if the requested material is not voluntarily turned over.

Following is a partial list of the discovery materials the criminal tax defense attorney should request when applicable:

***Defendant's Statement(s)*:**

You should obtain all statements made by your client or clients: whether exculpatory or incriminating, written or oral, direct or to third parties, in the possession of the government or any employees or potential witnesses under government control or in contact with the government. Case law supports some of this, and some not, depending on the circumstances.[96] It is important to start building a record of requesting these statements. One does not want to learn for the first time during trial that the witness claims your client wanted to blow up the Service building and the witness talked him out of it. He said–she said situations are dangerous, but more importantly, you cannot prepare cross-examination of the hostile witness without knowing what your client is accused of saying to the witness.[97] Surprise is the enemy of the surprised lawyer. A motion in limine to keep out obviously prejudicial

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[95] Check the unwritten local rules by conferring with counsel who has been in that judge's courtroom, or other sources like the *Almanac of the Federal Judiciary*, which is updated bi-annually.

[96] *See* United States v. Koskerides, 877 F.2d 1129, 1133–34 (2d Cir. 1989) (stating that the government complied with Federal Rule of Criminal Procedure 16 by providing the defense with typed memoranda prepared from a Service agent's notes); *see also* United States v. Gray, 521 F.3d 514, 531–32 (6th Cir. 2008) (holding that Federal Rule of Criminal Procedure 16 did not require disclosure of sealed wiretap recordings that were obtained illegally and thus were prohibited from disclosure; moreover, the recordings were not available for use by either party at trial); United States v. Bailey, 123 F.3d 1381, 1399 (11th Cir. 1997) (holding that the defendant's statements were not discoverable as statements made in response to interrogation by person known to be a government agent where the defendant did not know at the time that the investigator was a government agent).

[97] The author's firm recently filed a criminal tax appeal to the Fourth Circuit; another firm had handled the trial-level defense. During trial, the defendant surgeon's boss testified that the surgeon had based his opinions about the Code on clearly fraudulent material. A battle was required to keep this incompetent and prejudicial testimony out of the courtroom. The defense team did not effectively utilize the information that this doctor witness had had a feud with the defendant doctor, who had accused him of dishonesty in an unrelated business transaction, and had previously told others he would get him put in jail. Alas, none of this made it into the record.

and improper—and often untrue—evidence is usually more effective than a motion to disregard and strike after the jury has heard it.

Evidence Seized in a Raid:
You should request every document seized in any raid.

Recordings:
Request all recordings and transcriptions of interactions with the defendant. Yes, this is often redundant, but it happens more often than one would believe that there has been an undercover agent recording surreptitiously or without authorization. Sometimes, as in the *Moran* case, such recording might even be illegal.[98]

Notices of Government Witnesses:
Request notices of the planned use of any government witnesses favorable to the defense.[99] You want to know if a government witness is biased.[100] Many courts require formal trading of witness lists, but the government seldom turns over names of witnesses it "ran into" after the list exchange, who favor the defense, but are not "germane." It cannot hurt to receive reports on all interviewed persons.

Government Witness Statements:
Request the government witness statements that are favorable to the defense.[101] You also have the right to examine earlier statements made by a government witness to the FBI.[102]

The Jencks Act[103] requires that the government produce statements or reports by a government witness at the time the witness testifies. Generally, the court will require or the government will provide Jencks Act material at least a day in advance for the defendant to study before beginning cross-examination; sometimes the judge will require production plenty of time before the testimony so the defense actually has time to review the material. In *United States v. Holmes*, the court held that the trial court had committed error by not allowing one day's recess so that the defense could review Jencks Act material that was eight inches thick and included 1,000 pages of testimony from 10 witnesses, a 45-minute tape recording, and other documents.[104] Now, a day is

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[98]Tape recording in Costa Rica without government authorization (by Costa Rica, not the U.S.) is illegal in Costa Rica. *See supra* note 52.

[99] *See* United States v. Wilkins, 326 F.2d 135, 136 (2d Cir. 1964).

[100] *See* Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (reiterating the rule, "Of course, the right to cross-examine includes the opportunity to show that a witness is biased . . . .").

[101] *See* Jackson v. Wainwright, 390 F.2d 288, 298–99 (5th Cir. 1968) ("[T]he nondisclosure of the evidence favorable to the defense . . . offends the fundamental conceptions of a fair trial essential to due process.").

[102] *See, e.g.*, United States v. Pisello, 877 F.2d 762, 768 (9th Cir. 1989).

[103] 18 U.S.C. § 3500(a).

[104] 722 F.2d 37, 40–41 (4th Cir. 1983) (stating the rule that "the Jencks Act contemplates not only the furnishing of the statement of a witness but a reasonable opportunity to examine it and prepare for its use in the trial").

better than nothing, but typically a trial lawyer could not possibly effectively review all of that information in a day. Most courts are more reasonable with their Jencks Act rulings.[105] As the Seventh Circuit stated, "[T]he failure to provide material to which the defense is entitled under the Jencks Act may adversely affect a defendant's ability to cross-examine government witnesses and thereby infringe upon his constitutional right of confrontation."[106] But, the reality is that you might have weeks or only minutes to review the Jencks Act documents.

Even if documents are not considered Jencks Act material, the government nonetheless might be required to produce them. In *United States v. Moran*, the court of appeals held that although field notes written by drug enforcement field agents did not fall under the rubric of the Jencks Act because they were not "statements"—*i.e.*, written by a government witness and signed by him or her—"fundamentals of due process [would have] require[d] the government to produce them" had they been "exculpatory or . . . of value in impeaching government witnesses."[107]

Even if you do not request such statements (you might not know they exist), you are entitled to the government's voluntary disclosure of material statements favorable to your client, even if they are useful only for cross-examination. "[T]he prosecution's failure to disclose [such] statements denie[s the defendant] his fourteenth amendment right to a fair trial."[108] Ask for the typed and handwritten notes of interviewing agents, as well as phone messages. Ask the court to order that no messages be destroyed.

Attorneys' Notes of Witness or Victim Interviews:
You should request copies of any government attorney's notes of interviews with witnesses and victims; you are generally entitled to these notes under *Brady* or the Jencks Act.[109]

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[105] *See, e.g.*, United States v. McKoy, 78 F.3d 446 (9th Cir. 1996) (affirming the district court's grant of mistrial as sanction for failure to produce Jencks Act materials 30 days before trial); United States v. Wecht, No. 06-0026, 2007 WL 2343845 (W.D. Pa. Aug. 15, 2007) (in adherence to a Third Circuit standard, ordering that all Jencks Act materials be disclosed the Wednesday before the week in which each government witness was scheduled to testify); United States v. Bermingham, No. H-02-597, 2007 WL 1052600 (S.D. Tex. Apr. 5, 2007) (ordering that the government provide Jencks Act materials 30 days prior to trial).

[106] Krilich v. United States, 502 F.2d 680, 682 (7th Cir. 1974).

[107] 994 F.2d 1129, 1139 (5th Cir. 1993).

[108] Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973), *overruled on other grounds by* Garrison v. Maggio, 540 F.2d 1271, 1274 n.4 (5th Cir. 1976) (restating the valid rule that the government has a duty to volunteer evidence favorable to the defense).

[109] *See* United States v. Serv. Deli, Inc., 151 F.3d 938 (9th Cir. 1998) (holding the defendant was prejudiced by the government's failure to provide the antitrust division's attorney's interview notes); *see also* United States v. McArthur, No. 3:06-CR-347-D, 2007 WL 2049914 (N.D. Tex. July 17, 2007) (ordering disclosure of attorney's notes); United States v. Park, 319 F. Supp. 2d 1177 (D. Guam 2004) (stating rule that assistant U.S. attorney's notes must be disclosed under *Brady*); United States v. Leichtfuss, 331 F. Supp. 723 (N.D. Ill. 1971) (stating that prosecutor's notes must be disclosed either under the Jencks Act or *Brady*).

Defendant's Criminal Record:
The defendant's criminal record is an important piece of information you should request from the government. Sometimes you will not be able to find it, or your client will "neglect" to tell you about damning criminal history. You do not want it to be used by ambush on the stand against the defendant or a character witness.

Curricula Vitae of Government Experts:
Every expert—including those who are not really experts—has a curriculum vitae (CV)—a resume—which constitutes his or her qualifications to testify. You are entitled to the names and CVs of all experts the government intends to use in trial, and the same for experts those experts have relied on. These documents are critical. Usually you have to specifically ask for them—sometimes you have to ask many times, and sometimes you will be told they do not exist. When that happens, ask the court to make the government create them. Every judge to whom the author has made such a request, even those that lean towards the government, has required production of a CV. You are entitled to a *Daubert* hearing to determine if the proposed "expert" is qualified.[110] Many judges will resist this, but you need that information. It may be all you have to develop cross-examination questions.

Expert Reports from Each Testifying Expert:
Request an expert report from each testifying expert. Some witnesses may claim not to be experts and therefore are not required to give a report if the court agrees. The court usually will not agree. It might be error to deny the request, but it is never error to grant it. Sometimes the summary witness will claim that he is merely making calculations of the tax due and owing. But that is expert work. You need to know if he is qualified and, more importantly, you need information on him for cross-examination. The charts, his summary—all are valuable.

You might find that the government attorney delays in giving you materials on her expert while simultaneously demanding information on yours—asking that you lay your rebuttal cards on the table without knowing what you are required to rebut. The government might even ask to preclude your expert witness. An experienced judge with trial work under her belt should pick up on this intellectually dishonest approach quickly. (If the judge does not, you drew a bad judge.) Make your request clear, consider following up in writing with a brief, and plan on appealing.

Since you do not get to take depositions in your criminal tax case—at least, it is exceedingly rare[111]—you have to squeeze out pretrial information in both

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[110] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[111] The Federal Rules of Criminal Procedure allow depositions of prospective witnesses "because of exceptional circumstances and in the interest of justice." FED. R. CRIM. P. 15(a)(1). Depositions by agreement of the parties also are allowed. FED. R. CRIM. P. 15(h). The author has seen depositions allowed in such cases only twice in 33 years.

traditional and creative ways. If you have notice that the expert will testify that she relies on particular books or reports, or wrote books or reports, you have to get them. If the expert has testified in other cases, you have to find the testimony using the resources of the criminal defense bar. If there was no appeal, this can be tough.

Tax Return(s) and Related Service Documents:
Tax returns and the papers used to prepare them, if any, constitute the report of the defendant. The government will always have these and often will have the full and complete cooperation of the tax preparer who worked for the accused. Expect the tax preparer who created the problem to try and distance himself from it. The government will have met with potential witnesses and often made deals with them for "cooperation"—loosely defined as saying what the government believes should be said—in exchange for freedom, food and lodging during trial, audit protection, or other various kindnesses. Obtain information about these deals. They will usually be reduced to writing.

A Freedom of Information Act (FOIA)[112] request can often generate the materials for a successful cross-examination. In Stephen Buford's case[113] the government alleged that he had not filed his own returns, which would have been a fatal mistake for someone charged with willfully filing bad trust returns for others. The government "proved" this fact, which later turned out to be untrue, with the use of a Transcript of Account that showed that he had not filed. The government had not turned this original record over to the defense, but a FOIA request turned up, among a bunch of relatively useless information, a Discriminate Information Function (DIF) score. The DIF score is created by the government, for the government, using the taxpayer's tax return to determine whether or not the taxpayer should be audited. Buford had a middle range DIF score. The point? You cannot have a DIF score if you have not filed a tax return. In spite of the government's prevailing at the trial, the cross-examination was effective in demonstrating to the Fifth Circuit that the evidence against Buford was suspicious. He received a new trial and was ultimately acquitted.

Individual Master File of the Defendant and Individual Master File of Any Witness Testifying About His or Her Own Taxes:
On occasion, the Individual Master File (IMF)—the government's analysis (in code) of the defendant's tax returns and related forms and documents—has been useful in providing relevant cross-examination materials, as shown in the discussion of *Buford*, above.[114] In *United States v. Farris*, the government used this record to secure a conviction.[115] If it is available to the government, it should be available to the defense.

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[112] 5 U.S.C. § 552.
[113] United States v. Buford, 889 F.2d 1406 (5th Cir. 1989); *see* discussion *supra* Part V.A.
[114] *See* discussion *supra* Part V.A.
[115] 517 F.2d 226 (7th Cir. 1975).

You also should obtain the IMF on any witness testifying about his or her own taxes, for example, as a "victim" of the wrongs allegedly committed by your client.

Special Agent's Report(s):

In a tax case, the criminal investigation is run by the special agent who reduces his findings to the Special Agent Report (SAR).[116] The SAR is the grand slam. Prepared by the Service agent who recommended the case for prosecution, it is the reason for the indictment. This report is as valuable as a deposition or two (or ten) because it is the government's roadmap. It is usually sitting at the side of the prosecutor helping her win the conviction.

Get the SAR and its interpretation as soon as possible to prepare for cross-examination. Sometimes included in the report are the witnesses' statements, including statements of the witnesses who testified before the grand jury. You are not entitled to obtain the full grand jury report, but for all government witnesses you are entitled to testimony, affidavits, and notes about them taken by the special agent. Generally, no government witness takes the stand unless he or she has spoken to the special agent first.

Today, many prosecutors seek to hide the SAR and sometimes judges work to limit access to them. The solution, as in *Buford*, is to demand an *in camera* review for exculpatory information, impeachment information, or inconsistent facts that will lead to figuring out the truth. If the case agent, a person trained to prosecute tax crimes, has doubts regarding the *mens rea* of the crime, then the jury should share those doubts and acquit. Too often, the court will hand the SAR to his clerk who unwittingly removes potentially exculpatory material. With a careful review you might notice large blank spaces, blacked-out sentences, or incoherent paragraphs that require explanation. If there are gaps in the SAR, or in any of the materials you receive, object.

To gain facility with the information obtained from the government, you should, if the client's budget will allow it, retain a *Kovel* accountant,[117] a CPA, or an enrolled agent. This expert will help you under the protection of the attorney–client relationship to interpret the government forms—to the extent they are available—before going to trial. To preserve privilege, the accountant must be hired as a consulting expert by the law firm and not the client.

VII. Putting the Information to Good Use

The prosecutor in a criminal tax case must convince the jury, beyond a reasonable doubt, to answer affirmatively all of the following:

1. Was something done or not done that violates the Code?

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[116]The Special Agent's Report can get confused with the Suspicious Activity Report, also called an SAR, which deals with banking transactions but also has criminal tax implications. This distinction becomes particularly important in U.S. money laundering and offshore tax cases.

[117]*See* United States v. Kovel, 296 F.2d 918 (2d Cir. 1961).

2. Was it done by or on the instructions or under the control of the person accused of wrongdoing?
3. Was the wrongdoing willful, that is to say, did the accused know her actions were illegal but, regardless, knowingly violate the law?

If the jury answers the first question "maybe" or even "probably" the client should be acquitted. More often, the advocate must focus on the third question. Suppose the client earned $400,000 that year, filled out the return, signed it, and left the entirety of the $400,000 off his return. The defense case will be about the third issue only—willfulness.[118] If there is a lawyer or CPA involved, the second question is never certain unless the accused confirms to witnesses that he knowingly violated the law.

VIII. Conclusion

Back in 1977, when the author started trying this type of case, it was not commonplace for the government to obscure discovery in criminal tax cases. Today the trend is for prosecutors to make it difficult for defendants to access documents to which they are entitled.[119] Unscrupulous prosecutors will move mountains to hide vital cross-examination material, or hold it until moments before trial.

Judges with significant trial experience understand the need to get these documents to the defendant as quickly and as completely as possible. Given that the government has the defense material before indictment, a fair argument can be made that a level playing field requires such parity. A proliferation of well-meaning but inexperienced judges has led to some abuse in this area.

"One of the oldest puzzles of politics is who is to regulate the regulators. But an equally baffling problem, which has never received the attention it deserves, is, who is to make wise those who are required to have wisdom."[120] In a system of justice run by people, there are no guarantees of perfection. No matter how well-intentioned, no matter how adequately administered, innocent people will be convicted; guilty people will be exculpated. The system can only aspire to get it right. At the system's best, every accused has the opportunity to confront not just the witnesses, but the government's entire case. At its worst, the government's case is accepted unchallenged.

Part of the solution is to release information in a search for truth. A successful argument can be based on any number of variations of the fundamental

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[118]Of course, in a failure-to-file misdemeanor case, when the accused made a substantial income and did not file, some issues are factually if not legally moot and foolish to contest. The defense should concede obvious points against the cause and do battle where reasonable minds may differ; usually that means the issue of "willfulness."

[119]There are prosecutors who have open-file policies in tax cases. They do not seek to hide evidence. This can lead to settlement on cases that otherwise would be tried. These prosecutors are often called prosecutors with integrity.

[120]JOHN KENNETH GALBRAITH, THE GREAT CRASH: 1929, 29 (2d ed. 1961).

truth, but is more likely available under the steady hand of a good judge or the threat of a genuine issue on appeal. Sometimes the lawyer will succeed or fail based on which side of the bed the judge woke up on the day of the determination. The same may unfortunately be true with appellate panels.

In the multiple names of harassing the witness, confusing the jury, and applying the evidentiary requirement of relevance, the court might intervene and cut off cross-examination, often subjecting the defendant to an interim, unrefuted government rebuttal. Sometimes cross-examination is curtailed just to save time, although the objections nearly always take more time than the material kept from the jury. In recent years, some judges have curtailed cross-examination based on a relevance objection—stretching the relevance argument further than anyone exercising common sense would—and the tests, similar to tests African Americans once had to take to prove their worthiness to vote, bar the path to the truth and the exercise of human rights.

There are multiple causes of the growing limitation on confrontation. One cause is an increasingly partisan and inexperienced bench. It is an unfortunate fact of litigation that some judges are appointed who have little or no trial experience as lawyers. Many judges' trial experience is largely limited to government service. Some of these judges learn the law on the bench. Some, never having an interest in it in the first place, do not. On occasion the judge who once was the government counsel turns into a true believer in the Bill of Rights, testing the truth of the evidence. Judge Earl Warren was such a man.

Another threat to complete cross-examination is the mood of the tax defense bar, which has become one of surrender with minimal loss instead of defending to win.[121] The typical tax defense lawyers seminar is filled with derision and suspicion and the presumption of guilt. Many lawyers do not themselves believe in the possibility of their client's innocence, and therefore cannot serve the truth to support the right to confrontation. For example, at the 2008 ABA Criminal Tax Fraud seminar,[122] the section on "Effective Defense Strategies," originally scheduled for an hour, was reduced to 30 minutes to allow for additional discussion on plea bargaining. It was followed by a section on sentencing guidelines—jail time. One speaker who boasted that she had in fact tried a criminal tax case (but did not clarify whether or not she had succeeded in the adventure) asked for a show of hands—how many of the criminal tax specialists had *ever* tried a case? The surprising response out of over a hundred in attendance was ten, three of whom came from the author's

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[121] Plea bargaining is always an option and the client must be instructed on the risk faced in confrontation as opposed to submission, which is substantial. An offer of a single misdemeanor (which the author on occasion has secured) in lieu of numerous felony counts should never be dismissed casually. For many, a guaranteed year or less is more palatable than exposure to potentially a decade or more. In 1977, a client would more often than not be able to secure probation. Today, the government usually requires a felony count and imprisonment to secure a deal.

[122] The seminar was well conducted and a useful source of excellent research, but defense strategies were seriously neglected.

office. She did not go further asking how many had tried two or more, or won any acquittals.

Thirty years ago, a trial lawyer was someone who cross-examined witnesses in front of juries every year, usually multiple times. A ten-year veteran could accumulate 100 trials or more. Today, "experts" with three decades under their legal belts boast of 10 or 20 trials plus an arbitration or two thrown in for good measure. So cross-examination of witnesses, particularly in tax cases, is a machine moving the way of the slide rule and the typewriter. Perhaps slide rules and typewriters are properly relegated to museums of ancient artifacts, but jury trials with complete and thorough cross-examination should not become so relegated. The constitutional protections of our Sixth Amendment depend on honing, practicing, and applying these skills.

Further, the system now punishes the accused who insists on her day in court. The defendant who accepts a plea bargain and avoids court often does less time (or no time) than the citizen who wants to go to court. It is as if the bench and bar and government collectively view trial as a waste of time. But it can never be a waste of time to apply the Constitution.[123]

The Sixth Amendment is also diluted by the bar's evasion of responsibility, which is far more problematic than any evasion of taxes. Much of the most competent criminal defense bar is put off by tax issues, and much of the tax bar is intimidated (as all rational people are) by the courtroom. Trial is frightening. The risks are serious. But the reward is great—freedom itself. When the government dragon comes out, it is for the criminal defense lawyer to pull out his sword and defend the accused by slaying the dragon.

Cross-examination is most useful to determine grey areas of the facts applied to the law. In a complex income tax evasion case there is more likely than not more than one legitimate interpretation of the taxpayer's duty. In *Rumpole Misbehaves*, Rumpole cuts to this point:

> [I]t [is] outrageous that a young child should be deprived of his liberty on charges that have never been tested by cross-examination.
>
> . . . Madam Chair gave me a look of exasperation and said, "You may put your questions shortly, Mr. Rumpole.
>
> I hope to keep them short, Madam. That depends on the witness.[124]

Without rigorous testing of government positions through unobstructed confrontation, the fable of American jurisprudence becomes a charade. The curtain of lies can only be pierced by brave lawyers conquering their fears, and by honorable men and women on the bench who take the presumption of innocence seriously. All too many of the bench and bar laugh at the presumption of innocence and therefore see no use in vigorous cross-exam-

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[123] In the typical tax case, the limitations on cross-examination could make the tax defendant jealous of the trial rights afforded defendant drug dealers and pornographers.

[124] MORTIMER, *supra* note 86, at 150–51.

ination. The accused stands alone as the only one to fight for a finding of innocence. The author is certainly not saying that all government witnesses lie, or that all prosecutors suborn perjury. To the contrary, more often than not there are honest people on both sides trying to win a case by the rules. But government witnesses do lie. Prosecutors put liars on the stand, and at times honest witnesses and well-intentioned prosecutors make serious mistakes in pursuit of victory that result in conviction of innocent defendants. Without exercising the Sixth Amendment right to cross-examination there is no check and balance; the presumption of innocence becomes a theory rather than a constitutional reality.