THE LEGAL DEFENSE OF PERSONS WITH THE DIAGNOSIS OF MULTIPLE PERSONALITY DISORDER

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ABSTRACT

This paper is based on the experience of a trial attorney who spent more than six years representing a young man accused of killing his parents. After being diagnosed as suffering from multiple personality disorder (MPD), issues regarding that defendant’s sanity and competency were litigated extensively. What became painfully obvious during that experience is that the defense of MPD is in its infancy stages and that there are only a handful of appellate decisions which discuss the disorder in the context of criminal responsibility. The decisions, however, do not articulate a sophisticated understanding of the disorder and for the most part are very restrictive in their analyses. Issues of insanity were normally couched in terms of the mental state of the perpetrating alter as opposed to the accused’s mind as a whole. In one case, lip service was paid to an accused’s amnesia with respect to the issue of competency. No reported case found a defendant insane or incompetent.

The author describes the various legal tests that may exist throughout the country with respect to these mental conditions. He suggests arguments to be made to convince a factfinder that the accused meets these tests and highlights counter-arguments that may be anticipated on behalf of the adversary. Finally, he outlines the types of evidence that should be amassed for the successful defense of one suffering from this controversial mental disorder.

THE DEFENSE OF A MULTIPLE

The forgiving of an accused’s criminal responsibility because of a sick mind has been an established legal principle long before the birth of psychology or psychiatry. As far back as 1582, the law’s view on insanity was: “If a man, or a natural fool, or a lunatic in the time of his lunacy, or a child who apparently has no knowledge of good or evil, do kill a man, this is no felonious act... for they cannot be said to have any understanding will.” (United States v. Freeman, 1966, pp. 615-616). Although this right-wrong test has been the subject of much criticism for over four centuries, some form of the test is still the prevailing standard in this country. The more hotly debated question in many cases, however, is whether or not a specific mental illness should qualify to negate responsibility. On that issue, the mental health community takes center stage.

Although Paracelsus is credited as having described the first case of multiple personality disorder (MPD) in 1646 (Putnam, 1980), the recognition of that disorder as a mental illness that would excuse responsibility did not occur until Billy Milligan was declared insane in 1978 (State v. Milligan, 1978). The 1980s have witnessed other highly publicized cases such as the Hillside Strangler, Kenneth Bianchi (State v. Bianchi, 1979; People v. Buono, 1981), Ross Michael Carlson (People v. Carlson, 1983), and Juanita Maxwell (State v. Maxwell, 1988) where MPD was raised as the defense. Since the recent DSM-III-R (American Psychiatric Association, 1987) no longer considers MPD rare, and since there may presently be at least a quarter of a million MPD sufferers in the continental United States (Kluft, 1988), one can anticipate that cases involving this illness will occur with increasing frequency. Just what is it about this disorder that may render an individual insane, or, more importantly, incompetent; and, how can psychiatrists and psychologists assist in answering those questions? This paper attempts to provide some answers through the perspective of a defense attorney who served as co-counsel for Ross Carlson.

In September of 1983, Ross Carlson, age nineteen, was charged with the murders of his parents. In December of 1983, he was diagnosed with MPD, and in June of 1984, he was found incompetent to proceed. He spent the next five years in the Colorado State Hospital in order to be restored to competency, during which time his case was the subject of two appellate decisions (Kort v. Carlson, 1986; and Estate of Ross Michael Carlson v. Colorado State Hospital, 1987), and numerous lower court proceedings.

On November 23, 1989, Ross died of leukemia, less than three weeks after having been declared competent. His sanity trial was to have begun the following month.

THE EXISTING CASE LAW

During the last decade, only a handful of decisions have been reported in which MPD has been raised as a defense. Most of these cases were tried before the explosion of the literature regarding MPD that occurred in the 1980s. None of these cases provide a thorough state-of-the-art discussion of the disorder. The earlier cases decided issues of criminal responsibility on the basis of the capacity and mental state of the perpetrating alter. Such a restrictive analysis does not account for the situations where one alter cannot be identified as the perpetrator or where the accused’s mind is so malfunctioning or fragmented that an opinion regarding mental state must more appropriately be offered on the
accused’s mind as a whole. The later cases in Hawaii and Washington refer to expert testimony which touched upon the latter approach. No decision found a defendant insane or incompetent. 

*State v. Darnall (1980)* involved a male who was convicted by a jury of murdering his father. Defense experts diagnosed Darnall as suffering from “alternating multiple personality” with evidence of three personalities, while the prosecution’s experts believed that he was either malingering or that, if he suffered from MPD, it was not such a mental disease that would preclude responsibility. One of the grounds of Darnall’s appeal was that the trial court erred in not directing a verdict in his favor on the issue of responsibility. The appellate court disagreed saying that issue was properly a jury question. As a result, Darnall’s conviction was upheld.

*State v. Grimsley (1982)* involved a female who was convicted by a judge of drunk driving. She argued on appeal that her MPD prevented her from forming the required culpable mental state to commit the crime, or alternatively, that it rendered her insane. The basis of her argument regarding intent was that the offense was committed by her secondary personality which was dissociated from her primary personality who had no control over and was unaware of what the secondary personality was doing. The court disagreed with her culpable mental state defense saying it was immaterial what state of consciousness or personality she was in as long as the personality controlling her behavior was conscious and aware of her actions. On the insanity claim, the court said that Grimsley failed to show that either or both of her personalities did not have the ability to refrain from driving while drunk. Although her conviction was reversed, the basis for reversal related to the trial court’s failure to honor Grimsley’s timely request for a jury trial.

*Kirkland v. State (1983)* involved a female who was found “guilty but mentally ill” of bank robbery, by a judge. She contended on appeal that the judge should have found her insane based upon her diagnosis of psychogenic fugue which, the court noted, her own experts explained was a disorder similar to MPD. In affirming Kirkland’s conviction, the appellate court favored the rationale of the Grimsley case and noted that the appeal presented “…two issues taxing the outer limits of criminal law and psychiatric science…” (Kirkland v. State, 1983, p. 563), namely, how the conditions of MPD could affect criminal accountability. In rejecting the insanity claim, the court observed that “the law adjudges criminal liability of the person according to the person’s state of mind at the time of the act; we will not begin to parcel criminal accountability out among the various inhabitants of the mind” (Kirkland v. State, 1983, p. 564). Thus, it concluded that if it is determined that the accused had the mental capacity to distinguish between right and wrong in relation to the criminal act, “…the law will not inquire whether the individual possesses other personalities, fugues, or even moods in which he would not have performed the act or perhaps did not even know the act was being performed” (Kirkland v. State, 1983, p. 564).

In *State v. Rodrigues (1984)*, the defendant was charged with sodomy and rape. He was diagnosed as having two personalities. At his sanity trial, the trial court did not allow the jury to consider the issue of sanity but instead declared that Rodrigues’s MPD rendered him insane as a matter of law. The appellate court reversed on the basis of the many diverse opinions offered at trial. Specifically, there was disagreement among the experts regarding the accused’s diagnosis and some of those who made the MPD diagnosis did so without any previous clinical experience in the disorder. In addition, the two defense experts with MPD experience reached different conclusions regarding why Rodrigues’s illness rendered him insane. One doctor believed that the defendant as a whole lacked substantial capacity to appreciate the wrongfulness of his conduct (i.e., the cognitive or M’Naghten test) and also lacked substantial capacity to control his conduct to the requirements of the law (i.e., the volitional or second prong of the American Law Institute [ALI] test), while the other expert believed that only the cognitive test was satisfied. In returning Rodrigues’s case to the lower court, the appellate court relied on Kirkland and stated that each personality must be examined for insanity to determine if it can be held responsible for its conduct. Then, the jury should decide the question of defendant’s sanity at the time of the offense and the corresponding question of which personality was present at the time of the offense.

*State v. Badger (1988)* is a trial court decision involving competency of a habitual criminal who had been diagnosed as suffering from MPD since the age of seventeen. A few months after Badger was found incompetent to stand trial for burglary, he was re-evaluated by a court-appointed psychiatrist who found him competent, but still suffering from MPD. Badger persisted he was incompetent on the basis that his dominant personality, Christopher, had amnesia for the crime which was allegedly attempted while his secondary personality, Phillip, was out. The trial court found Badger competent citing New Jersey law which refuses to recognize amnesia for a crime as a bar to prosecution. While the court appeared to sympathize with Badger’s disability and with the likelihood that Badger might dissociate during the trial, it ordered him to proceed to trial, believing that Badger’s lawyer could keep each of the alters apprised during trial of what occurred before either became executive.

In *State v. Jones (1988)*, the defendant was convicted of the murder of a female he met at a bar. The crux of this decision dealt with whether Jones’s Fifth Amendment rights were violated during his interview with a psychiatrist pursuant to Jones’s plea of insanity. The jury rejected the accused’s insanity defense, notwithstanding his expert testified that Jones’s multiple personalities “paralyzed” his ability to distinguish right from wrong. Jones’s conviction was upheld.

**INSANITY OR NOT**

The defense of insanity is raised in a very small percentage of cases and is successful in even smaller numbers. In one study of nearly 500,000 persons arrested in Colorado from 1980 to 1983, only 0.03% raised the defense and a mere 0.007% of those arrested obtained not guilty by reason of insanity adjudications (Pasewark, Jeffrey, & Bieber, 1987, p. 65). Most lay people believe that a plea of insanity is a way to “beat the rap” and to avoid imprisonment. Independent
studies belie this notion and show that individuals adjudicated NGRI (not guilty by reason of insanity) spend more time in confinement than those convicted of similar crimes. For example, Colorado statistics for the same time frame as the previous study revealed that for those convicted of homicide the average number of days spent in prison was 2,518.5 whereas their insane counterparts were confined an average of 2,899.2 days (Perry, Pogrebin, & Regoli, 1985, p. 570). Contrary to their counterparts who forego the NGRI plea and suffer convictions for their crime, those who plead NGRI may be unable to plea bargain, are often stigmatized as "mad and bad," have no access to probation or parole, and can be confined for an indefinite period of time (Perry, Pogrebin, & Regoli, 1985, p. 571).

In spite of these disadvantages and with this seemingly insignificant effect on the criminal justice system, a District of Columbia jury's verdict of insanity on June 21, 1982 for John W. Hinckley, Jr. nevertheless caused the United States Congress, forty states, and various professional organizations to re-examine their views on mental responsibility.

Prior to Hinckley, nearly all the federal circuits and many state courts followed the American Law Institute's definition of insanity (American Law Institute, 1962). As adopted in United States v. Freeman (1966), the test provides that:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. (United States v. Freeman, 1966, p. 622)

However, six months after Hinckley, the American Psychiatric Association (APA), while approving the retention of the insanity defense, also recommended that mental disorders potentially leading to exculpation should usually be of the severity (if not always of the quality) of conditions that psychiatrists diagnose as psychoses (APA 1983, pp. 685). The APA approved the following standard:

A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense. As used in this standard, the terms mental disease or mental retardation include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances. (APA, 1983, p. 685)

In 1984, the American Bar Association advocated the elimination of the volitional prong (i.e., conform one's conduct) of the ALI test and supported federal legislation aimed at removing that component (Rogers, 1987).

In 1984, the position of the American Psychological Association on the insanity defense ran counter to the sentiments and proposals for change advocated by the psychiatric and legal communities. The American Psychological Association argued for an empiricist approach, in which both existing standards and proposals for change would be carefully examined for their scientific merit (Rogers, 1987). It repudiated changes based upon mounting social and political pressures. It emphasized that psychological research on the validity of criminal responsibility standards involves the translation of legal concepts into psychological constructs.

In response to the aftermath of Hinckley, Congress passed a comprehensive crime control bill which includes the Insanity Defense Reform Act (1984). The act is not only a codification of the APA/ABA severe, cognitive only proposals, but also places the burden on the defendant to prove his insanity. The act is headlined "Affirmative Defense" which means it is the defendant's responsibility to produce evidence why he should be excused from criminal liability. It provides that:

Affirmative Defense.

(a) It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Burden of Proof.

(b) The defendant has the burden of proving the defense of insanity by clear and convincing evidence. (Insanity Defense Reform Act, 1984)

Of the states which eventually amended their test of insanity, many eliminated the volitional component, essentially adopting a right-wrong standard based upon the classic rule announced in M’Naghten’s Case (1843). That rule provides that:

To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it that he did not know he was doing what was wrong. (M’Naghten’s case, 1843, p. 722)

In order to determine an accused’s sanity under the M’Naghten standard, the words right and wrong must be
clarified, i.e., legal or moral right and wrong? In other words, in order to prove sanity, it may not be enough to merely show that the accused knew that what he did was against the law.

The predominant view is that knowledge of the moral character of the act and not the legal character is controlling (Polidori, 1989, pp. 7-8, citing People v. Schmidt, 1915; LaFave & Scott, 1972). Thus, to be sane, the accused must appreciate that what he did was wrong in the moral sense, even if he knew it was against the law. A smaller number of jurisdictions hold that the accused is sane as long as he knows the act was prohibited by law (Polidori, 1989, p. 8). The distinction between the words right and wrong becomes relevant where the perpetrator appreciates that his conduct is criminal, but because of a delusion, believes it to be morally justified (United States v. Freeman, 1966, p. 622, n.52). In the case of a multiple, if an alter has a delusion that an individual is trying to kill a young, defenseless alter, even though the perpetrating alter knows that killing is illegal, he may believe he has a moral obligation to protect the young by eliminating the threat from the potentially harming individual.

Only after determining the meaning of the key words of the sanity standard in the relevant jurisdiction can one begin to address the mental capacity of the accused person who suffers MPD. As part of the analysis, the accused's multiplicity should be assessed in, at least, the following particulars:

1. Identification of the alter personalities, their features, traits, time of and reasons for formation;
2. The configuration of the system of alters and how they relate to one another;
3. The extent of the fragmentation and fractionalization of the accused's mind as evidenced by the constellation of ego states;
4. The function of each alter within the system including which one/s enjoy positions of dominance, power, mediator, protector, etc., within the constellation and under what circumstances;
5. The nature of the amnesia between the alters;
6. Identification of the alter/s which committed each element of the offense and why;
7. Whether the test of sanity can be applied to the perpetrating alter/s or if the test should be applied to the system as a whole.

Some believe that a multiple should be held responsible for his antisocial acts because of the feature of control. Control, it is said, equals responsibility. Control, it is said, is evidenced by (a) the individual being able to control diffusion of his personalities; (b) the ability of an alter to reappear according to environmental distress to serve specific organizational needs; (c) the awareness by certain alters of the other personalities; and (d) the ability of the individual to switch to a specific alter at his own volition, especially at the behest of his therapist (Halleck, 1988).

Akin to this view are those who believe it is wrong to allow someone to avoid responsibility by blaming his malevolent behavior on another part of him. That individual, it is argued, must own and accept both his good deeds and his bad ones (Orne, 1988). Contrarily, others ask if it is just to punish one Siamese twin who was asleep while the other twin committed the bad deed (Resnick, 1985).

No matter what the approach, any opinion is faulty without an examination of all of the relevant facts of a particular case. At a very minimum, the accused's multiplicity should be examined in accordance with the previously outlined factors in order to determine how this particular multiple functions. Only then can one understand what was occurring in the accused's mind at the time of the commission of the crime.

**IS THE ACCUSED COMPETENT TO PROCEED?**

According to Colorado Revised Statutes (1986), an individual is "incompetent to proceed" if he is suffering from a mental disease or defect which renders him incapable of any one of the following:

1. Understanding the nature and course of the proceedings against him, or
2. Participating or assisting in his defense, or
3. Cooperating with his defense counsel.

The federal test is somewhat narrower. It is whether the defendant "...has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceeding against him." (Dusky v. United States, 1960). Congress codified the Dusky test in the Comprehensive Crime and Control Act of 1984 (1984).

The question of competency may be raised at any time since competency attaches at the commencement of formal criminal proceedings and continues throughout the execution and satisfaction of the sentence (Jones v. District Court, 1980, p. 807). Placing an accused on trial on the issues of sanity or on the merits when he is incompetent to proceed violates due process of law (Drope v. Missouri, 1975). When defense counsel has reason to believe the accused is incompetent, he is obliged to bring the matter to the court's attention, even if it is to the disadvantage of the accused (Jones v. District Court, 1980, p. 807).

Whether a defendant believes he is competent to stand trial is irrelevant for, if a defendant is incompetent to stand trial, his belief that he is able to do so is without import (Bundy v. Dugger, 1987). An incompetent cannot waive his constitutional rights, and a trial judge must carefully safeguard such rights if the judge has a reasonable doubt as to a defendant's competency (People v. Lopez, 1982).

An accused's competency must be assessed with specific reference to the nature of the proceeding with which he is confronted and the appropriate level of understanding necessary for meaningful cooperation with his attorney (United States v. Musters, 1976). For instance, the level of awareness and comprehension necessary for a valid waiver of constitutional rights when entering a guilty plea differs from the level necessary to stand trial (United States v. Musters, 1976, p. 726).

One of the most comprehensive lists of factors to consider in determining competency was outlined by the Nebraska
Supreme Court in State v. Guatney (1980, p. 545). By using some or all of these enumerated factors, a trial court should be able to arrive at an appropriate conclusion in most cases. The list includes:

1. That the defendant has sufficient mental capacity to appreciate his presence in relation to time, place, and things.
2. That his elementary mental processes are such that he understands that he is in a court of law charged with a criminal offense.
3. That he realizes that there is a judge on the bench.
4. That he understands that there is a prosecutor present who will try to convict him of a criminal charge.
5. That he understands he has a lawyer who will under take to defend him against the charge.
6. That he knows that he will be expected to tell his lawyer all he knows or remembers about the events involved in the alleged crime.
7. That he understands that there will be a jury present to pass upon evidence in determining his guilt or innocence.
8. That he has sufficient memory to relate answers to questions posed to him.
9. That he has established rapport with his lawyer.
10. That he can follow the testimony reasonably well.
11. That he has the ability to meet stresses without his rationality or judgment breaking down.
12. That he has at least minimal contact with reality.
13. That he has the minimum intelligence necessary to grasp the events taking place.
14. That he can confer coherently with some appreciation of proceedings.
15. That he can both give and receive advice from his attorneys.
16. That he can divulge facts without paranoid distress.
17. That he can decide upon a plea.
18. That he can testify, if necessary.
19. That he can make simple judgments.
20. That he has a desire for justice rather than unde served punishment.

Because one of the most debilitating features of a multiple’s illness is the pathological nature and extent of his amnesia, factors which may lead to a finding of incompetency of an accused amnestic for the crime must be considered in conjunction with the Guatney list. In one well-reasoned opinion where the defendant claimed that his amnesia for the crimes rendered him incompetent, the court in Wilson v. United States (1968, pp. 463-464) considered the following factors in determining if the defendant could receive a fair trial:

1. The extent to which the amnesia affected the defendant’s ability to consult with and assist his lawyer.
2. The extent to which the amnesia affected the defendant’s ability to testify on his own behalf.
3. The extent to which the evidence could be extrinsically reconstructed in view of the defendant’s amne sia. Such evidence would include evidence relating to the crime itself as well as any reasonably possible alibi.
4. The extent to which the government assisted the defendant and his counsel in that reconstruction.
5. The strength of the prosecution’s case. Most important here will be whether the government’s case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.
6. Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

Courts like Badger and other critics would disagree with this approach and would argue that interrupting the adjudicatory process because of a condition of memory failure would be a miscarriage of justice. In support of their argument, they might point to estimates that between forty to seventy percent of all persons accused of murder claim some type of memory loss or form of amnesia regarding the crime (Bradford & Smith, 1979), and other studies that amnesia is present to some degree in everyone (State v. Badger, 1988, p. 210). These arguments miss the mark when applied to a multiple because the nature and extent of the multiple’s amnesia differs from the types of memory failure and forgetfulness described above. A multiple’s amnesia is part of the ongoing structure of his disease and not merely transitory. It not only concerns events regarding the criminal transaction, but, more importantly, concerns events that must be proved to show the existence and etiology of the disease. After taking into account the totality of the problem associated with the accused’s amnesia, together with the likelihood of him dissociating during trial, an assessment of his competency should then be made on the basis of whether or not he can assist counsel in the following matters:

1. In order to overcome the prosecution’s arguments of iatrogenesis and malingering, counsel needs the assistance and cooperation of his client to identify witnesses who can relate pre-offense evidence of the client’s forgetfulness, of behavior that was considered so unusual, different or out of the ordinary, or of traits or features which are compatible with any of the alter personalities;
2. Attorneys need to learn about instances of childhood abuse and/or trauma in order to establish the antecedents of MPD.
3. If the accused is likely to dissociate and experience lost or altered consciousness and/or amnesia during court proceedings, he cannot have continuity of thought and concentration to assist his counsel during any of those proceedings. For example, (a) During jury selection, attorneys invariably solicit the opinions of their client to make challenges of potential jurors; (b) During trial, attorneys need the assistance and participation of their client in cross-examining the prosecution’s witnesses and in examining
defense witnesses during direct and re-direct examination;
(c) The accused has a constitutional right to be present during every critical stage of his case. The phenomena of dissociation with attendant amnesia violates this right.
4. Attorneys need the assistance of their client to conduct an independent investigation of the case in order to uncover facts helpful to the defense and which have not been uncovered by law enforcement’s investigation, including the location of specific witnesses.
5. In the event a mental capacity defense is compelled, attorneys need the assistance of their client to learn about the accused’s medical and mental history.
6. The accused has a right to testify on his own behalf, and only he can waive that right. The waiver must be voluntarily, freely, and intelligently made. If there is disagreement among the alters with regard to taking the stand, is the accused competent to make a voluntary waiver?
7. If the accused wants to testify but, under the stress of testifying, is likely to switch to another alter, the transformation could be quite dramatic and appear phoney to certain jurors. The negative impact that such would have on the accused’s credibility would be disastrous to his case.
8. The accused’s constitutional right to counsel includes the right to represent himself. The election of self-representation lies exclusively with the accused. It need only be made with an understanding of the risks inherent in such an undertaking. Is the accused as a whole capable of making such an election?

If the accused cannot assist counsel in one or more of the above, his competency should be argued.

PRESENTING MPD TO THE FACTFINDER

Whether one is attempting to prove incompetency or insanity, the accused must establish (1) that he suffers a mental disease or defect (in this case, MPD) and (2) that as a result of that illness, he meets the test of that particular condition. The following types of evidence should be considered to make that showing.

Pre-offense Evidence

Because a mental capacity defense often results in a “war between the experts” and claims of malingering, a successful MPD defense may well hinge upon evidence of the disorder before any forensic assessments have begun. In the Hillside Strangler case, the view that the defendant Bianchi was faking MPD was based, in substantial part, on the absence of evidence of his multiplicity prior to the offense (Orne, Dinges, and Orne, 1984). Although some consider this criterion less important because MPD patients hide rather than flaunt their condition (Kluft, 1987a), proof of such evidence is extremely important. Not only is such evidence probative of the pre-existence of mental illness, but it may provide the defense with lay witnesses who, in many states, are permitted to give an opinion of the accused’s insanity (Colorado Revised Statutes, 1986b).

Sources other than the accused must be pursued for this evidence because the alter with whom one may be dealing may have no recall of events which lay people would consider unusual or bizarre, or such events may have been considered normal by that alter. The following people should be interviewed:

(a) Parents and grandparents (who may be the least helpful if they were the abusers), siblings, teachers, family doctors, relatives, neighbors, classmates, friends, family friends, etc. They may recall instances of self-mutilation, depression, imaginary playmates, lying, forgetfulness, distinct differences in wardrobe, significant mood shifts, opposite behavioral extremes, different speech patterns, contradictory food tastes, expressions of somatic complaints (e.g., headaches, back pain, stomach distress), etc.

(b) Professionals, including previous psychiatrists, psychologists, lawyers, etc., who have witnessed and experienced different features and behavior of the accused. For example, in Carlson, Ross presented to the author as a very intelligent, articulate, well-versed individual who acted much older than his chronological age. Just a few months earlier, as a patient, he had presented to his psychiatrist as an immature, narcissistic, self-absorbed teenager.

Evidence Regarding the Crime

(a) If possible, determine from the perpetrating alter/ his recollection of the events before, during, and after the crime. Identify his state of mind during each of these periods.

(b) The accused’s account of the crime may reflect a dissociative episode during which time he did not picture himself as taking an actual part in any aspect of the criminal episode. Therefore, interview witnesses to determine changes in the accused’s moods or behavior during any part of the overall criminal transaction. Interview police officers and jailers for observations of the accused’s behavior during his arrest, interrogation, and confinement.

(c) Interview all witnesses to any part of the criminal transaction regarding the accused’s behavior.

Evidence of Abuse

Existence of child abuse and/or trauma should be determined. It is estimated that over 80% of all prison inmates have been the victim of some form of childhood abuse and that one out of every five males under the age of eighteen has been sexually abused (C. Henry Kempe Center, 1990). Thus, it is not surprising that individuals suffering from MPD would find themselves in the criminal justice system and why many studies of therapy cohorts reflect a higher incidence of MPD in females. Many male multiples may have been incarcerat-
ed, and may never have been properly diagnosed.

**Mental Health History**

Most likely, the accused will have a history of mental health treatment. Interviewing previous mental health intervenors to determine the characteristics and features of the presenting patient. Most MPD patients have a history of prior mental treatment, an average of 3.6 incorrect diagnoses, and an average of 6.8 years between the time of first presenting for mental therapy before being diagnosed as MPD (Kluft, 1987b; Putnam, Gurroff, Silberman, Barban, & Post, 1986).

**Miscellaneous Evidence**

During the interviews of the accused and any other witness, determine if the accused ever experienced or complained of any of the signs or features commonly associated with MPD (Clary, Burstin, & Carpenter, 1984).

**Expert Opinion**

The primary role of the expert will be to show that (1) MPD is a specific mental disease which is generally accepted as such in the mental health community (see Frye v. United States, 1923, which holds that a scientific principle must be sufficiently established to have gained general acceptance in the particular field in which it belongs before expert testimony will be admitted regarding that principle); (2) the accused suffers from that disease; and (3) the disease rendered the accused mentally incapacitated. The sources which support the first proposition are overwhelming, including the DSM-III-R (American Psychiatric Association, 1987), a wealth of psychiatric literature, and the various cases like Badger, Rodrigues, etc. However, the relationship between the accused’s MPD and the particular legal issue involved is the difficult part. Expert opinion is then essential to support propositions not established by the above-sources, namely that the accused is incompetent or insane as a result of his MPD.

A forensic assessment is fraught with many pitfalls and should not be attempted by someone not experienced in medico-legal issues. During an evaluation of the accused, when MPD is suspected, all interview sessions with or without hypnosis should be audio- or videotaped, if possible. The following additional precautions should be observed:

1. The experience of the examiner is very important; the examiner should be someone skilled and experienced in MPD (Kluft, 1987a). Since the tapes are certain to be critiqued by one’s adversary, one’s technique should painstakingly avoid any suggestion of alternate selves to the accused. Otherwise, issues of malingering, iatrogenesis, and tainted sessions will be one’s Achilles heel.

2. If an assessment of hypnotizability is made as part of the forensic evaluation, or, if hypnosis is desired to facilitate the emergence of alters, adhere to the following safeguards for the use of hypnosis (the guidelines may have to be slightly modified according to the circumstances of each case) (Newton, 1984; Orne, 1979).

(a) The interview must be conducted by a skilled clinician (psychiatrist or psychologist) who is highly competent in the use of hypnosis.

(b) The interviewer must have no other connection with the case. It would be best if the interviewer were hired by the court rather than by either side.

(c) Prior to the interview, he must have no knowledge of the case or what he knows he should write down ahead of time. Furthermore, what he is told by anyone should be given to him in writing.

(d) No one else should be in attendance but the subject and the interviewer.

(e) Every moment of the interview must be taped. If possible, it should be videotaped.

(f) Before hypnosis is induced, the subject must tell the interviewer all that he can remember about the time period in which the crime was committed.

(g) The interview must be carried out with great care to not suggest to the subject what is wanted or expected.

Although the states are divided on the issue of the admissibility of post-hypnotic recall testimony, no *per se* rule barring such testimony can apply to the defendant (Rock v. Arkansas, 1987). In addition, although the contents of the tapes are considered hearsay, if unedited, they should be admitted into evidence as an exception to the hearsay rule as “Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations or the inception or general character of the cause of external source thereof insofar as reasonably pertinent to diagnosis or treatment” (Colorado Revised Statutes, 1984). King v. People (1990) is case authority for the principle that out-of-court statements by a defendant to a non-treating physician for the purpose of establishing a mental capacity defense are admissible under this rule. The federal rule is identical (Federal Rules of Evidence).

There is a double-edged sword to the use of video tapes. They can be very convincing if they show the spontaneous and unpredictability of the accused’s switching. Conversely, if tainted by suggestion, if they appear staged, or if they look too dramatic without plausible explanation, they may prove to be the death knell of the accused’s defense.

**CONCLUSION**

Because MPD presents with features that are unusual psychiatrically and considered bizarre by most people outside the mental health field, it will be some time before all participants in the criminal justice system understand and appreciate the disorder’s psychodynamics. Before lawyers and judges attempt to pigeonhole MPD cases into traditional concepts of competency and sanity, they must fully understand the illness and the unique problems it presents to an accused and his or her attorney. The development of a
community of mental health professionals informed as to the applicable law regarding these legal concepts will be invaluable to this process.

REFERENCES

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State v. Grutney, 299 N.W. 2d 538 (Neb. 1980).


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(Cir. Ct., Pinellas County, Fla. 1988).

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