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MEETING THE PROSECUTION'S CASE: TACTICS AND STRATEGIES OF CROSS-EXAMINATION

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The purpose of every function of an advocate is to aid his client's cause—from the first word spoken in the opening statement to the last word of the final argument. So it is with cross-examination.

The first question concerning every witness called by the prosecution is, "Should I cross-examine at all?" The answer to this depends upon the answer to another question, "Have I been hurt in any way by his testimony?" If not, it is wise to decline to cross-examine.[1] The only exception occurrs where the preparation for trial indicates something helpful can be developed from the mouth of the witness, although his testimony has not been damaging. In such a case, cross-examination should be limited to the specific matter which can be developed favorably. Caution is required because a skillful adversary often takes his witness over innocuous direct examination in order to set a trap for the overly ambitious cross-examiner. Many experienced prosecutors deliberately elicit a skimpy story from the complaining witness on direct examination with the hope that the anxious defense counsel will ask penetrating questions which will bring forth his story in full bloom and with much added force on cross-examination.

Once the decision to cross-examine is made, the cross-examination should be directed immediately to the weaknesses in the witness's direct testimony. The weak points must be explored fully and shown clearly to the jury. The jurors can then put the testimony into proper perspective and not give it more weight than its intrinsic merit demands. A witness' weak testimonial points may include his testimony itself if parts of it are inconsistent or preposterous, his relation to an occurrence to which he has testified, his relation to the complaining witness, or his background or occupation. His testimony can be attacked directly, by exposing inconsistencies in his narrative, collaterally, by showing good reasons for distrusting or disbelieving him, or in both ways.

To discover all the weak points requires a thorough preparation of the law and facts of the case and close scrutiny of the witness during direct examination. This leaves little or no time to compile notes on his testimony. But conscientious preparation of the case for trial will provide the cross-examiner with occasional words or phrases in his notes to remind him of the weak points to develop and the questions to ask on cross-examination. No lawyer can observe a witness' demeanor on the stand if he is preoccupied with making copious notes of the content of the direct examination.[2]

The scope of cross-examination is generally controlled by the sound discretion of the trial court.[3] The amount of time consumed or the number of pages consumed in the transcript is never the sole measure of permissible latitude on cross-examination. The court is more likely to consider whether the subjects covered on direct have been attacked and explored sufficiently.

Just as it is important on direct examination for counsel to place his questions in an orderly sequence so that one question leads logically to the next, it is equally important on cross-examination not to permit the witness to retell his story in the same orderly fashion.[4] Instead, questions on cross-examination should point to selected, specific parts of the witness' direct testimony. They should be logically arranged for that purpose. Questioning should shift smoothly to the specific parts of the

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[1] I. GOLDSTEIN, TRIAL TECHNIQUE § 561 (1935) [hereinafter cited as GOLDSTEIN]; R. KEETON, TRIAL TACTICS AND METHODS 89–92 (1954) [hereinafter cited as KEETON]. *See* 3 BUSCH, LAW AND TACTICS IN JURY TRIALS § 370 (1960) [hereinafter cited as BUSCH].

[2] J. APPLEMAN, PREPARATION AND TRIAL 293 (1967) [hereinafter cited as APPLEMAN]; GOLDSTEIN § 557.

[3] C. MCCORMICK, EVIDENCE § 30 (1954) [hereinafter cited as MCCORMICK]; 6 J. WIGMORE, EVIDENCE § 1867 (3d ed. 1940) [hereinafter cited as WIGMORE].

[4] GOLDSTEIN § 563.

direct examination at the will of the cross-examiner.

There are various specific goals to which cross-examination should always be directed in order to point out to the jury the weaknesses in the witness's previous testimony.[5] Questioning should always delve into the interest of the witness in the subject-matter of the controversy[6] so as to reveal the witness's possible motives or prejudices in favor of the complaining witness or against the defendant.[7] Certainly the witness's means of knowing the facts to which he has testified and the manner in which he has used these means should be brought to light.[8] Defense counsel may well seek to test the witness's truthfulness or credibility.[9] This involves interrogation into his power of discernment, memory and description.[10] The witness is also subject to impeachment by comparing the witness's prior testimony with his responses on cross-examination.[11] In revealing such discrepancies, new or old facts should be developed in a posture favorable to the cross-examiner.[12]

A legitimate and proper purpose of cross-examination is to discredit the witness himself.[13] A conviction of an infamous crime affects the credibility of the witness in most jurisdictions.[14] Cross-examination directed toward eliciting the fact of such a conviction from the witness himself is most effective.[15] Local statutes and cases should be checked to determine what types of crimes affect a witness's credibility and the procedure which is prescribed for putting this into evidence before a jury.[16]

The limited notes taken on direct examination and the questions blocked out for each witness before trial are the starting point for cross-examination.[17] It has been observed that the more experienced a lawyer is, the more thoroughly he prepares his cross-examination before the trial.[18] There are certain do's and don't's in the method or manner of cross-examination that are fundamental.

1) Strike telling blows with the first few questions, but save some meaningful questions for the end of the cross-examination.

2) Ask simple questions so that people of ordinary intelligence can understand them.[19]

3) Don't go over the same story as given on direct without a purpose, like exposing a rehearsed witness, or demonstrating his inability to recall detail.[20]

4) Don't try to be eloquent in the framing of questions. The eloquence of the cross-examiner should never be so conspicuous as to draw attention away from the witness.[21]

5) Be a gentleman at all times, though firmness, forcefulness, aggressiveness, and even outrage are sometimes necessary.[22]

6) Never lose your temper. A good cross-examiner may appear to be angry under certain circumstances, but he never really is.[23]

7) Cover only the portions of the direct exami-

[5] *See* McCormick § 30; 5 Wigmore § 1368.

[6] *See* J. Baer & S. Balicer, Cross-Examination and Summation § 39 (2d ed. 1948) [hereinafter cited as Baer]; 3 Busch § 389.

[7] *See* Baer § 39; 3 Busch § 389; 3 Wigmore § 949.

[8] *See* 3 Busch § 378; Keeton at 114–16; 3 Wigmore § 876.

[9] *See* Baer §§ 22–28; Goldstein §§ 612–15; Keeton at 106–13.

[10] *See* Appleman at 310–11; 3 Busch § 376; Keeton at 104–06.

[11] *See* 3 Busch §§ 394–400; Goldstein §§ 601–02; Keeton at 94–98. *See also* Gordon v. United States, 344 U.S. 414 (1953); authorities cited note 36 *infra*.

[12] *See* Baer § 21; Keeton at 116–23.

[13] McCormick § 30; 5 Wigmore § 1368.

[14] 3 Wigmore § 987. *See, e.g.*, Richards v. United States, 192 F.2d 602 (D.C. Cir. 1951); People v. Romer, 218 Cal. 449, 23 P.2d 749 (1933); Moore v. Leventhal, 303 N.Y. 534, 104 N.E.2d 892 (1952).

[15] 3 Wigmore §§ 980, 980a, 985–87.

[16] In Illinois, for example, the defendant cannot be cross-examined regarding a conviction for an infamous crime, but a witness may be cross-examined on such a conviction. People v. Birdette, 22 Ill.2d 577, 177 N.E.2d 170 (1961). To prove the felony record of the defendant, a certified copy of his conviction can be introduced after he testifies. He is entitled to a limiting instruction to the jury that the conviction pertains only to the defendant's credibility and not to his guilt. People v. Moses, 11 Ill.2d 84, 142 N.E.2d 1 (1957).

[17] A great many lawyers have written about the method of conducting a cross-examination. Some of the better ones are listed in the bibliography at the end of this article.

[18] Most lawyers who will tell you of brilliant cross-examination will not confess this:

> We are entranced by a brilliant flash of insight which broke the witness, but the plain truth of the matter is, as brother to brother, that ninety-nine per cent of effective cross-examination is once more our old friend 'thorough preparation,' which places in your hands a written document with which to contradict the witness. That usually is the great gift of cross-examination.

Nizer, *The Art of the Jury Trial*, 32 Corn. L.Q. 59, 68 (1946).

[19] Appleman at 278–79. *See* some examples of the baroque in F. Wrottesley, The Examination of Witnesses in Court 70–72 (2d ed. 1926). *See, e.g.*, Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956).

[20] *See* 3 Busch § 406; Goldstein § 563.

[21] Goldstein § 566.

[22] *See* Wrottesley, *supra* note 19, at 72–74.

[23] L. Lake, How to Cross-Examine Witnesses Successfully 20–22 (1957).

nation necessary to demonstrate weak spots. Witnesses can be stupid, evasive, hostile, dishonest or flippant. Cross-examination should be directed toward the particular weakness and nothing more.[24]

8) Don't make much of minor triumphs. The inexperienced lawyer often gloats over slight discrepancies by repeating the questions or repeating the answer. Juries are not impressed.[25]

9) Quietly pass on to another question if the witness' response has been harmful to your case.

10) Control the loquacious witness. He is an adverse witness and may say something damaging if given the chance.[26]

11) Each cross-examiner should be himself, whether he is bombastic and aggressive or smooth and quiet. But don't be monotonous, using only one technique.[27]

12) Don't ask a question without knowing the answer, if it is a *critical* question.[28] Otherwise the answer doesn't matter, and may not help.

13) Make the point, then pass on to something else.[29]

14) Don't humiliate the witness by shouting, browbeating, or embarassing him. The jury is more likely to identify with the helpless witness than with the over-brilliant lawyer.[30]

15) Never hazard an important question without laying the proper foundation. Ask a series of questions which elicit a series of affirmative responses, building to the final telling question, which also must be answered in the affirmative.[31]

16) Attack the credibility of a witness with great care. Never ask a question accusing him of wrongdoing without being able to substantiate the accusation.[32]

[24] GOLDSTEIN § 565.

[25] *Id.* § 568.

[26] *See* Friedman, *Some Gentle Hints on the Art of Cross-Examination*, 9 PRAC. LAW. 35, 37 (May, 1966).

[27] *See* BAER § 372; 2 M. BELLI, MODERN TRIALS §§ 283(1)–(3) (1954) (hereinafter cited as BELLI); Jaworski, *Cross-Examination of Witnesses*, 19 ARK. L. REV. 37 (1965).

[28] Older lawyers have always said, "If you don't know the answer, don't ask the question." *See, e.g.*, GOLDSTEIN § 559; W. REYNOLDS, TRIAL EVIDENCE § 142 (1911). This is too general to be entirely accurate.

[29] *See* Busch, *Some Observations on Cross-Examination*, 24 ALA. LAW. 227, 233–35 (1963); GOLDSTEIN § 567; Jaworski, *supra* note 27, at 41.

[30] *See* GOLDSTEIN § 558; LAKE, *supra* note 23, at 32; WROTTESLEY, *supra* note 19, at 74–75.

[31] This follows a simple dialectic technique which has been proved successful for hundreds of years. Lawrence, *The Art of Advocacy*, 50 A.B.A.J. 1121, 1124 (1964). *See* GOLDSTEIN § 560.

[32] 3 BUSCH §§ 386–87.

The foregoing are accepted guides for the cross-examiner, but they are not hard and fast rules. The best trial lawyer is the one who knows the well-established rules of the art of cross-examination but has a lively appreciation of when they should be broken. Often it is necessary to take a risk in cross-examination, particularly when the cross-examiner is in a desperate situation which is salvageable only by dramatic questions. As in every move made during the course of a trial, asking a question on cross-examination involves a subtle value judgment. In desperate situations, the accomplished cross-examiner often thinks, "I have nothing to lose now—I might as well ask the question." Under the circumstances, some of the rules must be broken.

Never ask questions on cross-examination merely because the questions are suggested by the client.[33] A particular question should be weighed by the same standards the cross-examiner u es for his own questions. Satisfying the client should not enter into the determination. The responsibility for the eventual success in the litigation is the lawyer's, and the client will hold the lawyer responsible if mistakes are made, even though he suggested the mistakes.

The aforementioned principles do not admit to universal application. Obviously the style and strategy of cross-examination will vary considerably with the idiosyncracies of each witness. Certain legal and practical principles, however, do apply to each of the various categories of witnesses that commonly confront defense attorneys in criminal cases.

POLICE OFFICERS

Generally, police officers can be broken down into two categories—arresting officers and investigating officers. Frequently, the arresting officer is also an eyewitness and should be treated the same as any other eyewitness. An investigating officer usually enters the case after the occurrence and, if there is a statement or a confession, he generally has either taken it or is a witness to it.

In preparation for the cross-examination of a police officer, one should get as much information from the police file as possible. In an identification case, it is wise to subpoena the original station complaint, the message sent out over the police wires giving descriptions, and any other documentary evidence produced while the case was in

[33] BAER § 33; LAKE, *supra* note 23, at 312–13.

police hands. Also, examine any physical objects in the hands of the police, such as ballistics, clothing, handwriting samples and narcotics. If there is an allegation of brutality, obtain the admission card from the jail to see if the doctors have recorded bruises. Where the coroner is involved, the investigating officers may have read into the record statements of witnesses and statements of the accused which counsel should have. Moreover, the police officer's testimony at the preliminary hearing or at the coroner's inquest may be a basis for impeachment.

It is now established in most jurisdictions that the previous statements of witnesses are generally available to the defense after the witness's direct testimony.[34] Consistent with this rule, the portions of a police officer's reports to his superiors which relate to his testimony in court should be made available to defense counsel for cross-examination.[35] In the federal courts, the Jencks Act[36] codifies this rule. Under the Act, the defendant is given the right to inspect statements, notes, or reports of a government witness for purposes of cross-examination subject to one limitation. The items which defendant may have produced must relate "to the subject matter as to which the witness has testified." [37] If the trial judge, after examining the statements, rules that the reports do not relate to the police officer's testimony on direct, defense counsel should ask that they be impounded to preserve the point for appeal.

As a general proposition, the cross-examination of police officers is very delicate because they are usually antagonistic toward the defendant.[38] Many inexperienced cross-examiners try to humiliate police officers, often with the contrary result that they themselves are humiliated. Police officers often have great experience in testifying and they have a marked antipathy toward lawyers.[39] They pounce upon the slightest opportunity to fence with lawyers from the witness stand. A police officer who has investigated his case thoroughly is well informed and, if given an opportunity, will volunteer information harmful to the defendant. An officer often fashions himself a great law enforcer and feels that it is within his line of duty to do everything possible to convict.[40] The cross-examiner should be scrupulously careful never to ask the question "why?" [41] This holds especially true for police officers.

On the other hand, a police officer who clearly and unfairly demonstrates his antagonism toward the defendant can be the subject of a justified attack by defense counsel. Generally cross-examination to reveal the interest, motive, ill-feeling or bias of a witness is admissible, and its exclusion

[34] People v. Estrada, 54 Cal. 2d 713, 355 P.2d 641, 7 Cal. Rptr. 897 (1960); People v. Cole, 30 Ill.2d 375, 196 N.E.2d 691 (1964); People v. Moses, 11 Ill.2d 84, 142 N.E.2d 1 (1957); People v. Rosario, 9 N.Y.2d, 173 N.E.2d 881, 213 N.Y.S. 448 (1961); State v. White, 15 Ohio St.2d 146, 239 N.E.2d 65 (1968). *See* Annot., 7 A.L.R.3d 181 (1966).

[35] State v. Saenz, 88 Ariz. 154, 353 P.2d 1026 (1960); People v. Scott, 29 Ill.2d 97, 193 N.E.2d 814 (1963); State v. Grunau, 273 Minn. 315, 141 N.W.2d 815 (1966); Commonwealth v. Swierczewski, 215 Pa. Super. 130, 257 A.2d 336 (1969).

[36] 18 U.S.C. § 3500 (Supp. IV, 1969). The Jencks Act was promulgated in response to the Supreme Court's decision in *Jencks v. United States*, 353 U.S. 657 (1957). For further discussion of the Jencks Act, *see* Dennis v. United States, 384 U.S. 855 (1966); Norton, *Discovery in the Criminal Process*, 61 J. CRIM. L.C. & P.S. 11, 28–30 (1970); Comment, *The Jencks Act: After Six Years*, 38 N.Y.U.L. REV. 1133 (1963).

[37] 18 U.S.C. § 3500(b) (Supp. IV, 1969).

[38] *Cf.* J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966).

[39] A. CORNELIUS, THE CROSS-EXAMINATION OF WITNESSES 176 (1929). This antipathy may result from lawyers who write like this:

> Policemen as a class, are usually not well educated, skilled mechanically or industrious. They are men above the average in physical strength and appearance who have lacked sufficient persistence to acquire an education or learn a trade. Their contacts with the criminal element tends to make them suspicious of human nature. They are daily engaged in the prosecution of others, and of course, in defending their own acts. Their entire attention is focused upon the derelictions of mankind and not to the more noble, kindlier or more humanitarian traits. Therefore, it naturally follows that when a person is charged with a crime, the officer is naturally predisposed toward belief in his guilt. This, ofttimes, leads him to testify to things as actual facts about which he has no professional knowledge, and to state boldly that a certain thing happened, when, what he actually saw were merely circumstantial facts.

Id.

Much of the disdain for lawyers can be attributed to the restrictions recent constitutional decisions have placed on law enforcement officers. *See* Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L.C. & P.S. 85 (1962), wherein at 86 and 89 the author states,

> The Court has taken upon itself, without constitutional authorization, to police the police.... [L]aw enforcement officers cannot offer the required protection demanded of them from within the strait-jacket placed upon them by present day court and legislative restrictions.

See also Carrington, *Speaking for the Police*, 61 J. CRIM. L.C. & P.S. 244, 250 (1970).

[40] This attitude may come from the expectations of society, rather than from any innate mental processes. *See* Ward, *The Police Role: A Case of Diversity*, 61 J. CRIM. L.C. & P.S. 580 (1970).

[41] *See* Keeton at 131–32; L. FRIEDMAN, ESSENTIALS OF CROSS-EXAMINATION § 8.1 (1968).

may constitute reversible error.[42] Counsel for the defense is not bound by a police witness's answers denying any special bias or prejudice. He may offer contradictory evidence if it is sufficiently probative.[43] It is an old adage that police officers are placed on trial rather than defendants where it is quite obvious that they have used brutal methods in obtaining a confession or are clearly guilty of other improper conduct.[44]

Many times, it is advantageous to attack a police officer on collateral matters, especially where he has been on the force for a long time. For instance, the police officer may allege that he obtained an oral statement or confession from the defendant. In any type of serious charge, it is expected that the police officer will reduce the statement or confession to writing and ask the defendant to sign it. His failure to do this immediately makes the statement suspect and is an inferential accusation that the police officer is either inept, or the defendant never made the alleged oral statement. One example of police ineptness was pointed up in a murder trial where the defendant surrendered himself with an attorney at a police station. They left unescorted and the sergeant, who directed them to another station, went back to work, completely oblivious to the fact that a potential murderer walked the streets and might not go to the other station. Though it had no direct relevance in the case, it held the police officer up to some ridicule, while emphatically making the point that the defendant voluntarily surrendered.

Special problems are presented on the cross-examination of police officers on motions to suppress physical evidence or confessions.[45] In cross-examining police officers in these areas, it is important to dwell on probabilities. It is highly improbable that a person who has remained in custody for an extended period of time and refused to give a confession until the last moment has given that confession voluntarily.[46] It is also highly improbable that an experienced burglar arrested on the street would voluntarily give consent to police officers to go to his home and make a search. Each situation presents a much different problem, but the probabilities should be developed by the cross-examiner in accordance with the most logical human behavior of the individuals involved.[47]

In cross-examining police officers who are eyewitnesses, or any other eyewitness, it is of the utmost importance to view and examine the scene of the occurrence. Not only is such an examination a genuine help for the cross-examination of witnesses, but it also indicates to the jury that the cross-examiner is familiar with the scene. The jury and the court respect a lawyer who knows what he is talking about and is thoroughly prepared.

Eyewitnesses

When the cross-examiner embarks on the cross-examination of an eyewitness, it should be with purpose and clear direction. A good identification can be reinforced by purposeless cross-examination, just as a bad identification can be destroyed by careful cross-examination.

If the cross-examiner has prepared his case, he has many tools with which to cross-examine effectively. He may have the description given to the police by the identification witness immediately after the crime occurred. If such description was recorded by the police and sent out over the police teletype or other communication means, it can be subpoenaed by defense counsel.[48] If this description differs markedly from the defendant's actual description, cross-examination of the eyewitness can be devastating. Another valuable tactic is to determine whether the witness made his original identification from a picture or in a show-up. If it was from a picture, it should be determined how many pictures and how many volumes of police photographs the witness looked at as well as how

[42] Peinhardt v. State, 262 Ala. 10, 76 So.2d 179 (1954); State v. Lewis, 236 La. 473, 108 So.2d 93 (1959); Flannigan v. State, 124 Neb. 748, 248 N.W. 92 (1933). *See* 3 Busch § 388.

[43] Ewing v. United States, 135 F.2d 633, 640 (D.C. Cir. 1942).

[44] Consider Chief Justice Warren's introductory statement in *Miranda v. Arizona*, 384 U.S. 436, 439 (1966):

> The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime.

[45] *See, e.g.*, Ill. Rev. Stat. ch. 38, §§ 114–11, 114–12 (1969). In Illinois, as in other jurisdictions, motions to suppress illegally seized evidence or confessions are made before trial. As a matter of practice, judges allow defense counsel considerable latitude in the scope of police cross-examination.

[46] *See, e.g.*, Miranda v. Arizona, 384 U.S. 406 (1966); Watts v. Indiana, 338 U.S. 49 (1949); Ashcraft v. Tennessee, 322 U.S. 143 (1944).

[47] 3 Busch § 380.

[48] Fed. R. Crim. P. 17(c). *See* Bowman Dairy Co. v. United States, 341 U.S. 214 (1951); Mackey v. United States, 351 F.2d 794 (D.C. Cir. 1965); People v. Shipp, 59 Cal.2d 845, 31 Cal. Rptr. 457, 382 P.2d 577 (1963). For the limitations of Rule 17(c), *see, e.g.*, United States v. Marchisio, 344 F.2d 653, 669 (2d Cir. 1965); United States v. Murray, 297 F.2d 812, 821–22 (2d Cir. 1962); United States v. Smith, 209 F. Supp. 907 (E.D. Ill. 1962).

old the picture of the defendant was. The cross-examiner might demand that the prosecutor or the police present this picture in open court if the similarity is not a good one.[49] If it was a show-up, defense counsel might ask who were the other people in the line-up. If they were all men who were quite different from the defendant in size, manner of dress, or in any other respect so that the defendant's appearance was grossly conspicuous, the line-up can be revealed as a mere farce.[50] Indeed, the cross-examination of an identifying witness may demonstrate that there was no line-up at all. The courts have held that such an identification is impaired although not completely discredited.[51]

This type of examination may prove useful in a *voir dire* hearing on a motion to suppress the pre-trial identification of the defendant based upon the United States Supreme Court decisions in *United States v. Wade*[52] and *Gilbert v. California*[53] and their progeny. *Wade* was based on the theory that counsel's assistance at a line-up is indispensible to protect a defendant's basic right to meaningful cross-examination.[54] In these situations, most courts have concerned themselves primarily with a consideration of whether the pre-trial identification was so unnecessarily suggestive and conducive to mistaken identification so as to deprive the defendant of due process.[55] Such inquiry can demonstrate to the court that the witness may not have had an adequate basis for the courtroom identification and, therefore, the in-court identification was tainted at the pre-trial confrontation. In such event, the in-court identification is suppressed and cannot be put before the jury. If, however, it is put before the jury, counsel has had the advantage of his pre-trial "dry run."

Quite often it is important to ask an eyewitness if he gave a description of the person he accused and, if so, whether he pointed out certain obvious characteristics of the defendant. If the defendant has a pronounced nose, mustache, or any other outstanding characteristic that the witness failed to give in his original description, such things should be revealed in order to diminish the value of the identification. Similarly, the manner of dress of the person accused in the original description is extremely important.

Another type of cross-examination is to ask the eyewitness about other things surrounding the crime. If a car was used, ask for a description of the car. If the crime occurred in given surroundings—a room, a store, or any other type of enclosure—have the witness give details about these surroundings to test his recollection with regard to details.

The rule permitting the exclusion of witnesses from a courtroom while the other witnesses are testifying is never more valuable than when eyewitnesses are being cross-examined.[56] A celebrated

[49] Photographs can be produced under the Jencks Act, 18 U.S.C. § 3500 (1964), however, only if the witness makes a statement based on them. Simmons v. United States, 390 U.S. 377, 386–89 (1968). *See* note 36 *supra*.

[50] It may also, of course, be so suggestive that it should be thrown out entirely as violative of due process of law, depending on "the totality of the circumstances" surrounding the identification. Stovall v. Denno, 388 U.S. 293, 302 (1967). *See* Foster v. California, 394 U.S. 440 (1969); Simmons v. United States, 390 U.S. 377 (1968). What constitutes that degree of suggestiveness is far from certain. *See* Biggams v. Tennessee, 390 U.S. 404, *reh. denied*, 390 U.S. 1037 (1968) (affirmed by equally divided court); People v. Floyd, 1 Cal.3d 694, 83 Cal. Rptr. 608, 464 P.2d 64 (1970); State v. Monteiro, —N.H.—, 261 A.2d 269 (1969); State v. Mustacchio, 57 N.J. 265, 271 A.2d 582 (1970).

[51] Identification is an issue for the trier of fact, and it need not be positive to support a conviction. *See, e.g.*, Neighbors v. People, —Colo.—, 467 P.2d 804 (1970); People v. Oswald, 26 Ill.2d 567, 187 N.E.2d 685 (1963); People v. Barnes, 118 Ill. App.2d 128, 255 N.E.2d 18 (1969); State v. DeFoe, 284 Minn. 110, 169 N.W.2d 404 (1969); State v. Matlack, 49 N.J. 491, 231 A.2d 369 (1967); State v. Harris, 40 Wis.2d 200, 161 N.W.2d 385 (1968).

[52] 388 U.S. 218 (1967).

[53] 388 U.S. 263 (1967).

[54] 388 U.S. at 237. While some jurisdictions limit *Wade* to post-indictment line-ups, there is much to say for requiring the presence of counsel at pre-indictment line-ups, since the same prejudicial factors are present. *See id.* at 228–36; *cf.* Coleman v. Alabama, 399 U.S. 1, 19 (1970) (Harlan, J., concurring and dissenting) Many states have so extended the right to counsel as a matter of state law. *See* People v. Fowler, 1 Cal.3d 335, 82 Cal. Rptr. 363, 461 P.2d 643 (1969); Joyner v. State, 7 Md. App. 692, 257 A.2d 444 (1969); Palmer v. State, 5 Md. App. 691, 249 A.2d 482 (1969); Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970); Hayes v. State, 46 Wis.2d 93, 175 N.W.2d 625 (1970). *But see* People v. Palmer, 41 Ill.2d 571, 244 N.E.2d 173 (1969); State v. Mustacchio, 57 N.J. 265, 271 A.2d 582 (1970).

[55] *See* note 51 *supra*. *See* Comment, *The Right to Counsel at Lineups, Wade and Gilbert in the Lower Courts*, 36 U. CHI. L. REV. 830 (1969).

[56] Generally, the exclusion of witnesses is discretionary with the court, although in practice, it is very seldom denied if a timely motion is made. *See, e.g.*, United States v. 5 Cases, 179 F.2d 519 (2d Cir. 1950); Coonan v. Baltimore & O. R. Co., 25 F. Supp. 834 (E.D. Pa. 1938); Great Lakes Airlines, Inc. v. Smith, 193 Cal. App.2d 338, 14 Cal. Rptr. 153 (Dist. Ct. App. 1961); Devlin v. Dept. of Labor & Industries, 194 Wash. 549, 78 P.2d 952 (1938). Abuse of this discretion in a criminal case may be grounds for reversal, however. *See* People v. Dixon, 23 Ill.2d 136, 177 N.E.2d 206 (1961); State v. Pikul, 150 Conn. 195, 187 A.2d 442 (1962); Annot., 32 A.L.R.2d 358 (1953).

case[57] involving the robbery-murder of a participant in a card game in a home where there were ten to fifteen people present demonstrated this. The cross-examination of seven or eight of the participant-witnesses regarding identification of one of the robbers showed that these people may have seen the same person, but their descriptions were so different that by the time each was cross-examined at great length, the jury was so confused that a verdict of not guilty was returned. It was subsequently shown that the defendant was, in fact, the killer in this case, but the effective cross-examination of the identifying witnesses and the rule of exclusion won the case for the defense.

Medical and Scientific Experts

Persons with special knowledge, training, skill and experience not possessed by laymen are permitted to testify as expert witnesses.[58] Unless counsel is properly prepared, the cross-examination of an expert witness is dangerous as well as difficult.[59] The best way to prepare is to consult with an expert in the same field. It is wise, if the court permits,[60] to have a defense expert sitting in the courtroom during the direct examination of the prosecution's expert. The danger in cross-examining an expert is that on each question, he is permitted to elaborate and to give full explanations on matters within his own special knowledge even though he may have merely touched upon them on direct examination.[61] Unless the cross-examiner knows exactly where he is going with each question and reasonably expects to contradict the answers given on direct, he should restrict his cross-examination or not cross-examine at all.

Normally, the expert put on the stand has impressive qualifications. If the cross-examiner is aware of these qualifications and knows them to be accurate, he is wise to stipulate to them to avoid the effect before the jury. If the expert's qualifications are not especially impressive and the cross-examiner intends to put on his own expert later to contradict the expert on the stand, he should permit the qualifications to be elicited in order to show the comparison with his own expert.[62]

At times, it is also wise to go into the question of the renumeration that the expert is receiving for testifying.[63] If the cross-examiner has information that the expert is being compensated by an exorbitant sum, he might go into this fact to show that the expert is not objective but a paid partisan.

If the expert has answered a hypothetical question on direct, it is important to review the question with another expert to see if an error can be found in the observed or assumed facts or in the conclusion or opinion of the expert on which he can be cross-examined.[64] Nothing is more damaging to the expert than bring out such an error. If the cross-examiner can impeach the qualifications of the expert by showing either a misstatement of his qualifications or by showing that there is a general lack of qualifications, the jury will surely take notice.[65] Some considerations concerning the more frequently-encountered expert witnesses follow.

Usually, the state's pathologist in a homicide case simply gives an opinion as to the cause of death in simple or technical terms. In the typical homicide case, a cross-examination of the pathologist is useless.[66] It only becomes important to cross-examine him when the defense contends that the injury inflicted by the defendant did not in fact cause death. In such instances, do not cross-examine until the defense pathologist performs an autopsy or examines the supporting documents received from the state's pathologist. The pathologist should also be cross-examined where it is believed that the injury may give a clue to the physical circumstances of the occurrence. For example, the path of a bullet might indicate the position of the deceased in relation to the position of the defendant. An important item to look into is the toxicologist's report that supports the findings of the pathologist.[67]

[57] This case was finally decided as *People v. Horodecki*, 15 Ill.2d 130, 154 N.E.2d 67 (1958).

[58] *See* 2 Wigmore §§ 555–56, 559–62.

[59] 2 Belli § 288(1); I. Goldstein & L. Shabat, Medical Trial Technique 20 (1942).

[60] *See* Annot., 85 A.L.R.2d 478 (1962). *See, e.g.*, Space Aero Products Co., Inc. v. R. E. Darling Co., Inc., 238 Md. 93, 208 A.2d 74, *cert. denied*, 382 U.S. 843 (1965); Elizabeth River Tunnel Dist. v. Beecher, 202 Va. 452, 117 S.E.2d 685 (1961).

[61] Goldstein § 490; Keeton at 147–48.

[62] Keeton at 153–54.

[63] *See* Baer § 49; Annot., 33 A.L.R.2d 1171 (1954).

[64] 2 Belli §288(2). *See* Friedman, *supra*, note 41, § 10.14; Annot., 71 A.L.R.2d 6 (1960).

[65] 3 Wigmore § 991; 5 Wigmore § 1621. *See* Appleman at 470–72.

[66] A coroner's testimony is not so authoritative, since most coroners are laymen. *See* W. Curran, Medical Proof in Litigation 29–30 (1961); J. Richardson, Doctors, Lawyers, and the Courts 169–74 (1965).

[67] *See, e.g.*, State v. Pease, —Vt.—, 271 A.2d 835 (1970) (medical examiner's report of blood alcohol did not support claim of inability to waive right to counsel).

A ballistics expert is extremely difficult to cross-examine, particularly if he has compared the pellets taken from the deceased's body with pellets fired from the same gun immediately after the occurrence leading to the death. Such comparisons are about as accurate as fingerprint comparisons and their accuracy is almost unimpeachable.[68] If, however, the pellets compared have been fired from the same gun after a long interval, something can be made on cross-examination of the fact that the lands and grooves of a gun change with the passage of time.[69] Since this is such a highly technical field, the cross-examiner must have his own expert examine the ballistics information in order to prepare for cross-examination.

Handwriting experts are often worth cross-examining because the expert merely gives an opinion about certain similarities in the known handwriting and the unknown handwriting.[70] Because it is not an exact science, cross-examination can be directed toward the fact that the expert is only giving an opinion.[71] Cross-examination can be directed toward the fact that the same person writes differently during different periods of his lifetime and that the same person writes differently in different positions.[72] The cross-examiner should compare handwriting in a standing position with that executed in a sitting position, or perhaps when signing for a package. If the defense expert confirms the opposing expert, however, the cross-examination should be restricted to innocuous questions, such as the remuneration the expert is receiving for his services or the fact that he always testifies for either the prosecution or the defense.[73]

Psychiatric testimony is probably the most difficult of all expert testimony to give and to understand.[74] It is a rare case when expert witnesses cannot be obtained who will contradict each other, either wholly or partially, regarding the psychiatric condition of the defendant.[75] Most psychiatrists who take the witness stand have seen the defendant only for a short time. Much should be made of this on cross-examination.[76] Jurors, as well as many judges, do not have a great deal of confidence in psychiatric testimony so a vigorous cross-examination of psychiatrists is wise, particularly if the cross-examiner puts a defense psychiatrist on the stand to give contradictory testimony.

Since accounting is quite exact and lawyers are particularly inept with figures, the cross-examination of an accountant should be assumed gingerly. Here, above all, a lawyer should have an accountant who has examined all the books and records sitting at counsel table if he intends to cross-examine effectively. An effective cross-examination should be directed toward honest differences among accountants in their definition and treatment of capital investments and expense items, depreciable assets, or in methods of bookkeeping.[77] The

[68] 3 BELLI § 380. *See* Berg, *Filing .22 Firing Pin Impressions*, 55 J. CRIM. L.C. & P.S. 290 (1964); Bigler, *Identification by Means of Revolver Chamber Markings*, 55 J. CRIM. L.C. & P.S. 155 (1964); Matthews, *A Measurement of Land Impressions on Fired Bullets*, 44 J. CRIM. L.C. & P.S. 799 (1954).

The incompetent expert is quite another matter. *See* J. GUNTHER & C. GUNTHER, THE IDENTIFICATION OF FIREARMS 312–25 (1935).

[69] *See* Van Amburgh, *Common Sources of Error in the Examination and Interpretation of Ballistics Evidence*, 26 BOSTON U.L. REV. 207 (1946).

[70] *See* C.A. MITCHELL, DOCUMENTS AND THEIR SCIENTIFIC EXAMINATION (1922); A. OSBORN, THE PROBLEM OF PROOF (2d ed. 1926); Annot., 128 A.L.R. 1329 (1940).

[71] *See* LAKE, *supra* note 23, at 230–35; Conway, *The Identification of Handwriting*, 45 J. CRIM. L.C. & P.S. 605 (1955); Smith, *Determining Tendencies*, 55 J. CRIM. L.C. & P.S. 526 (1964); Smith, *Six Basic Factors in Handwriting Identification*, 44 J. CRIM. L.C. & P.S. 810 (1954).

Indeed, Wigmore states that "any person able to read and write is competent to form and to express a judgment as to the genuineness of handwriting," unless technical problems are present, dealing with paper, ink, or alterations. 2 WIGMORE § 570 (emphasis removed). *See* 3 WIGMORE §693; 7 WIGMORE § 2012. *See, e.g.*, Black, *Identifying Ball Pens by the Burr Striations*, 61 J. CRIM. L.C. & P.S. (1970); Crown, *et al.*, *Differentiation of Blue Ballpoint Inks*, 52 J. CRIM. L.C. & P.S. 338 (1961); Mathyer, *The Expert Examination of Signatures*, 52 J. CRIM, L.C. & P.S. 122 (1961).

[72] FRIEDMAN, *supra* note 41, § 58.

[73] *See* Moore, *Cross-Examining the Incompetent Document Examiner*, 1 WASHBURN L.J. 533, 545–46 (1962); MOORE, *Testimony of the Expert Document Examiner*, 22 U. PITT. L. REV. 675, 698–703 (1961).

[74] *See* S. GLUECK, LAW AND PSYCHIATRY 5–19 (1962); S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 87–95, 441–49 (1925); M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 3–5 (1952); Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335 (1965); Karpman, *An Attempt at a Re-evaluation of Some Concepts of Law and Psychiatry*, 38 J. CRIM. L.C. & P.S. 207 (1947); Overholser, *Psychiatric Expert Testimony in Criminal Cases since McNaughten—a Review*, 42 J. CRIM. L.C. & P.S. 283 (1951); Suarez, *A Critique of the Psychiatrist's Role as Expert Witness*, 12 J. FOR. SCI. 172 (1967).

[75] *See* Kinberg, *Forensic Psychiatry without Metaphysics*, 40 J. CRIM. L.C. & P.S. 555 (1950); Selling, *Forensic Psychiatry*, 39 J. CRIM. L.C. & P.S. 606, 610–12 (1949).

[76] *See* LAKE, *supra* note 23, at 283. *See* GUTTMACHER & WEIHOFEN, *supra* note 74, at 230–47.

[77] *See* B. FERST, BASIC ACCOUNTING FOR LAWYERS 4–6, 84–86 (1950); H. FINNEY & R. OLDBERG, LAWYER'S GUIDE TO ACCOUNTING 77–89, 91 (1955); G. HILLS, THE LAW OF ACCOUNTING AND FINANCIAL

typical trial lawyer can bring out these points on cross-examination only after being shown them by an accountant. Unless the cross-examiner knows exactly where he is going, he is better off to refrain from cross-examination.

Accomplices and Addict Informers

Though the limit of cross-examination is within the sound discretion of the trial court, great latitude is allowed in the cross-examination of a witness for the prosecution to show motive.[78] The general rule of liberal latitude is particularly applicable where the witness was an accomplice of the defendant.[79] It is normally prejudicial error for the trial court not to permit an inquiry of an accomplice about explicit or implicit promises of immunity from prosecution.[80] Also, remarks by the court that such an inquiry is not material is prejudicial error.[81] An accomplice who has been sentenced may be cross-examined along the line that his sentence may be shortened because of his testimony or other charges pending against him may be dropped.[82] He may be questioned concerning special treatment by the jailer,[83] an expectation of *nolle prosequi*, or even hopes of immunity.[84] He may be questioned about hopes of financial gain, such as a reward, even though the source is private and does not come from the state.[85] The most typical instance occurrs when the defendant seeks to show on cross-examination that the accomplice now testifying against him has been released from custody, no indictment has been returned against him, and he is not threatened with or in danger of being charged for complicity in the crime.

The extent to which the cross-examination of an accomplice may be pursued is pointed up in a case in which the accomplice testified that he had no direct promise of favorable treatment from the state's attorney, but that he expected that he would receive leniency.[86] Defense counsel asked upon what particular occurrence, transaction, or conversation he based his conclusion, but an objection by the prosecution to the questioning was sustained.[87] In reversing, the court stated that it was proper for counsel to inquire into the particulars forming the basis of the accomplice's conclusion. Many experienced lawyers do not search sufficiently into the reasons for an accomplice's expectations of leniency. The liberality of the decided cases[88] should serve as a reminder to lawyers who are frustrated by overly strict trial courts that they are entitled to the closest cross-examination possible where accomplices testify.[89]

Statements 3–41, 167–77 (1957); H. Sellin, Attorneys' Practical Guide to Accounting 1–20—1–30, 8–1—8–4 (1965).

[78] 3 Wigmore § 944. *See* Alford v. United States, 282 U.S. 687 (1931); Rosado v. United States, 370 F.2d 542 (9th Cir. 1966), *cert. denied*, 386 U.S. 1010 (1967); People v. Werhollick, 45 Ill.2d 459, 259 N.E. 2d 265 (1970); State v. Curcio, 23 N.J. 521, 129 A2d 871 (1957); State v. Pontery, 19 N.J. 457, 117 A.2d 473 (1955); Annot., 62 A.L.R.2d 613, 616–24 (1958).

[79] 3 Wigmore §§ 916(3), 967. *See* Alford v. United States, 282 U.S. 687 (1931); United States v. Masino, 275 F.2d 129 (2d Cir. 1960); State v. Holden, 88 Ariz. 43, 352 P.2d 705 (1960); People v. Winston, 46 Cal.2d 151, 293 P.2d 40 (1956); People v. Baker, 16 Ill.2d 364, 158 N.E.2d 1 (1959); 62 A.L.R.2d at 624–29.

The right to cross-examine can be abused, however. *See* Beach v. United States, 149 F.2d 837 (D.C. Cir. 1945) (defense counsel may not ask impeaching questions third time).

[80] 3 Wigmore § 967. *See* Alford v. United States, 282 U.S. 687 (1931); United States v. Hogan, 232 F.2d 905 (3d Cir. 1956); People v. Simard, 314 Mich. 624, 23 N.W.2d 106 (1946); State v. Taylor, 49 N.J. 440, 231 A.2d 212 (1967); State v. Mathis, 47 N.J. 455, 221 A.2d 529 (1966); 62 A.L.R.2d at 630–53.

[81] *See, e.g.*, People v. Dail, 111 P.2d 723, 727 (Cal. Dist. Ct. App. 1941), *modified*, 22 Cal.2d 642, 140 P.2d 828 (1943).

[82] 3 Wigmore § 967. *See* Sandroff v. United States, 158 F.2d 623 (6th Cir. 1946); State v. Hogan, 13 N.J. Misc. 117, 176 A. 709 (1935); State v. Bailey, 208 Ore. 321, 300 P.2d 975 (1956). Furthermore, the prosecution has a duty to come forward with the truth, if it knows it, when its witness lies. Napue v. Illinois, 360 U.S. 264 (1959); People v. Savvides, 1 N.Y.2d 554, 154 N.Y.S.2d 885, 136 N.E.2d 853 (1956); Napue v. People, 13 Ill.2d 566, 571, 150 N.E.2d 613, 616 (1958), *rev'd.*, 360 U.S. 264 (1959) (dissenting opinion).

[83] *See, e.g.*, People v. Bote, 376 Ill. 264, 33 N.E.2d 449 (1941).

[84] 3 Wigmore § 967. *See* Hudson v. United States, 387 F.2d 331 (5th Cir. 1967), *cert. denied*, 393 U.S. 876 (1968); State *ex rel.* Kowalski v. Kubiak, 256 Wis. 518, 41 N.W.2d 605 (1950). *Cf.* Orozco-Vasquez v. United States, 344 F.2d 827 (9th Cir. 1965), *cert. denied*, 386 U.S. 1010 (1967); United States v. Migliorino, 238 F.2d 7 (3d Cir. 1956); State v. Vigorito, 2 N.J. 185, 65 A.2d 841 (1949).

[85] 3 Wigmore § 969(3). *See* Harris v. United States, 371 F.2d 365 (9th Cir. 1967); People v. Todd, 301 Ill. 85, 133 N.E. 645 (1922); Bewley v. State, 247 Ind. 652, 220 N.E.2d 612 (1966); State v. Martinsen, 198 Iowa 1325, 201 N.W. 1 (1924); Commonwealth v. Sacket, 39 Mass. 394 (1839); 62 A.L.R.2d at 653–60. *Cf.* Annot., 120 A.L.R. 751 (1939).

[86] People v. Moshiek, 323 Ill. 11, 153 N.E. 720 (1926).

[87] *Id.* at 20–21, 153 N.E. at 724.

[88] *See* notes 78–85 *supra*.

[89] An interesting situation developed in one Illinois case, *People v. Durand*, 321 Ill. 526, 152 N.E. 569 (1926). An accomplice sat through the entire trial ostensibly as a co-defendant before he testified that he had an agreement with the prosecution all along. The Illinois Supreme Court said:

> Where an accomplice is used as a witness for the prosecution the widest latitude of cross-examination ought to be permitted. There is always the

Somewhat different is the case where the defendant attempts to attack the credibility of an accomplice or an informer, not on the ground that he has a motivation to get the defendant convicted, but on the ground that the informer or accomplice is a generally untrustworthy character for one reason or another.[90] It is proper to get the address of the accomplice, however reluctant he may be to reveal it, in order to conduct an investigation regarding his credibility and reputation.[91]

Because the addict informer differs from an accomplice in some respects so does the cross-examination of such a witness. An informer will often approach the police in the first instance to inform them that he will be able to "put them on to something." He will then assist the police in the preparation of the arrest and will often participate as a "special police employee" [92] in the crime itself. This is different from an accomplice, who in most instances is arrested with the defendant and then decides to extricate himself from the situation.

The addict informer has many reasons for cooperating with the police. Most of the reasons that apply to accomplices also apply to addict informers. The cross-examination of an informer witness as to this area is the same as for accomplices. However, the addict informer is unique in some respects. It has been said that the motivations of informers "run the gamut from sheer mischief to calculated self-aggrandizement." [93] The defense lawyer should take great pains to point out to the jury that the testimony of addict informers, because of the informers' varying motives, should be scrutinized intensely.

The right of the defense to cross-examine an addict regarding his use of narcotics is well-established.[94] It is helpful to develop on cross-examination such facts as the length of time the witness has been addicted, the type of drug he uses, the "size of his habit," where he obtained the drugs, and how he obtained the money to pay for them. It is most important to find out the last time he took drugs before getting on the stand[95] and whether drugs were furnished by the police. Defense counsel should attempt to establish that the witness would do or say almost anything to obtain drugs. It is also important to determine whether the police or the addict informer made the initial contact and what the informer intended to receive from the police as a *quid pro quo*. There might have been payment in money or narcotics, elimination of competition, or simply police assurances of non-interference.

Children

The correct test of a child's competency to testify is whether the child has the capacity to observe, recollect, and communicate and to appreciate the obligation to speak truthfully.[96] If there is any

temptation for an accomplice to testify falsely, and the jury are entitled to know what inducements have been held out to him as a reward for his assistance to the prosecution, and anything else that in any way affects his credibility. This rule applies with even greater force where an accomplice sits at the trial table as a defendant and tricks his co-defendant into belief that he is going to work in harmony with him in defense of the charge.

Id. at 530, 152 N.E. at 571. Despite the court's strong language, however, this was held harmless error due to the strength of the corroborating evidence of guilt.

[90] *See generally* 3 Wigmore §§ 926, 977, 980–87. *See* Davis v. United States, 409 F.2d 453 (D.C. Cir. 1969); United States v. Benson, 369 F.2d 569 (6th Cir. 1966), *cert. denied*, 391 U.S. 903 (1968); Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966); People v. Cardinal, 154 Cal. App.2d 835, 316 P.2d 1001 (1957); Flowers v. State, —Del—, 272 A.2d 704 (1970); People v. Birdette, 22 Ill.2d 578, 177 N.E.2d 170 (1961); Annot., 41 A.L.R. 341 (1926).

[91] Smith v. Illinois, 390 U.S. 129 (1968). *See* Alford v. United States, 282 U.S. 687 (1931); United States v. Palermo, 410 F.2d 468 (7th Cir. 1969); United States v. Lyon, 397 F.2d 505 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968); Annot., 37 A.L.R.2d 737 (1954). *Cf.* United States v. Persico, 425 F.2d 1375 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970) (depends on danger to witness's personal safety); United States v. Marti, 421 F.2d 1263 (2d Cir. 1970); United States v. Varelli, 407 F.2d 735 (7th Cir. 1969).

[92] *See, e.g.*, Harris v. United States, 371 F.2d 365, 367 (9th Cir. 1967).

[93] Rodgers v. United States, 267 F.2d 79, 88 (9th Cir. 1959).

[94] 3 Wigmore § 934. *See* Gurleski v. United States, 405 F.2d 253 (5th Cir.), *cert. denied*, 395 U.S. 977, 981, *reh. denied*, 396 U.S. 869 (1969); United States v. Masino, 275 F.2d 129 (2d Cir. 1960); State v. Reyes, 99 Ariz. 257, 408 P.2d 400 (1965); People v. Perez, 239 Cal. App.2d 1, 48 Cal. Rptr. 596 (1965); State v. Fong Loon, 29 Idaho 248, 158 P. 233 (1916); People v. Crump, 5 Ill.2d 251, 125 N.E.2d 615 (1955); People v. Williams, 6 N.Y.2d 18, 187 N.Y.S.2d 750, 159 N.E.2d 549, *cert. denied*, 361 U.S. 920 (1959); Lankford v. Tombari, 35 Wash.2d 412, 213 P.2d 627 (1950); Annot., 52 A.L.R.2d 848 (1957). *Cf.* Annot., 8 A.L.R.2d 745, 764 (1966) (cross-examination as to habitual drunkenness).

[95] *See, e.g.*, Campbell v. United States, 269 F.2d 688 (1st Cir. 1959). One court has ruled that the cross-examiner may compel an addict informer to exhibit his arm to the jury to show them the informer's use of narcotics. People v. Boyd, 17 Ill.2d 321, 326, 161 N.E.2d 311, 314 (1959).

[96] 2 Wigmore §§ 505–07. *See* Wheeler v. United States, 159 U.S. 523 (1895); People v. Davis, 10 Ill.2d 430, 140 N.E.2d 675, *cert. denied*, 355 U.S. 820 (1957); People v. Crowe, 390 Ill. 294, 61 N.E.2d 348 (1945);

question regarding the child's competency, an objection should be made so that a *voir dire* examination can be conducted outside the presence of the jury.[97] On *voir dire*, examine the child thoroughly as to his qualifications. Pay particular attention to whether or not the child understands the meaning of an oath. Ascertain whether or not anybody has explained the meaning of it to him. Ask whether he knows what it is to lie and what would happen to him if he lied. This is a wise move under almost all circumstances simply to get an insight into the type of witness the child will make before the jury. Object, under any circumstances, to the child being sworn.

Cross-examination of a child should be undertaken cautiously. It is an old adage that the truth is heard from fools and small children. Giving either the opportunity to expand his story on cross-examination may strengthn his direct testimony. On occasion, however, it may become obvious that the child is too well rehearsed and appears to have memorized his story. In this case, it may be wise to take the child over the same ground in order to elicit answers in which the child uses the identical language.[98] This memorization can also be exposed by having the child meticulously and rapidly repeat his testimony. As he speaks rapidly, the memorized portions of his testimony will stand out from those that were not memorized. He may be using words that are not natural for his age and vocabulary. Testimony is easily implanted in the minds of children by interested persons. Under these circumstances, it is wise to examine carefully the number of times the child has gone over the story with parents, police, prosecutors, and friends.

The prosecutor may ask leading questions of a child of tender years on direct examination.[99] Whether to object to the leading nature of the questions and risk antagonizing the jury is a value judgment counsel must make. Few objections should be made, but those that are can be accompanied by a statement for the benefit of the jury that the prosecutor is testifying and not the child. This will show them that the child's testimony was the product of suggestive direct examination by the prosecutor.[100]

Children are extremely imaginative. Their stories can be pure fiction or part fact and part fiction.[101] If the child has let his imagination run away with him, encourage him to exaggerate. Gently lead him further and further until his story reaches the point of absurdity. Since young children are prone to suggestion, it is well to state questions affirmatively. The child is likely to answer "yes" to a question that suggests a yes answer. If the cross-examiner can lead the child into ridiculous admissions by a soft, friendly and suggestive technique, it becomes apparent to the jury that the child may have been led in direct examination in the same manner.

Conclusion

The importance of cross-examination in criminal trials can hardly be over-emphasized.[102] Deliberate and thoughtful cross-examination of prosecution witnesses will have a devastating effect on the state's case. Conversely, a perfunctory, meandering examination by defense counsel may well vitiate whatever merit his case holds. As one lawyer observed, "More cross-examinations are suicidal than homicidal." [103]

As a rule, defense counsel's cross-examination will not be "suicidal" if he has adequately prepared his case. This requires the use of all modes of pretrial investigation and discovery. It involves a keen perception of all testimony given by adverse witnesses before and during trial. With this sort of preparation, the skilled lawyer will design the style and strategy that will maximize the impact of his cross-examination. The suggestions and ideas proffered in this article hopefully will aid in the achievement of that end.

Senecal v. Drolette, 304 N.Y. 446, 108 N.E.2d 602 (1952); Annot., 81 A.L.R.2d 386 (1962); Comment, *Youth as a Bar to Testimonial Competence*, 8 Ark. L. Rev. 100 (1954). This is also the rule in Canada. *See* Cartwright, *The Prospective Child Witness*, 6 Crim. L.Q. 196 (1963).

[97] Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 303, 312–13 (1962). *See* People v. Moretti, 6 Ill.2d 494, 129 N.E.2d 709 (1955), *cert. denied*, 356 U.S. 947 (1958); LoBiondo v. Allen, 132 N.J.L. 437, 40 A.2d 810 (1945).

[98] Baer § 37, 3 Busch § 406.

[99] *See, e.g.*, People v. Schladweiler, 315 Ill. 553, 146 N.E. 525 (1925); State v. Davis, 20 Wash.2d 443, 147 P.2d 940 (1944).

[100] *See* Stafford, *supra* note 97, at 308; Note, *The Problem of the Child Witness*, 10 Wyo. L.J. 214, 220 (1956).

[101] Baer § 37; Goldstein § 576; Stafford, *supra* note 97, at 309–10. *See* 3 Busch § 374; Cornelius, *supra* note 39, at 130–37. *See, e.g.*, People v. Oyola, 6 N.Y.2d 259, 189 N.Y.S.2d 203, 160 N.E.2d 494 (1959).

[102] "[Cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore § 1367.

[103] Emory R. Buckner as quoted in F. Wellman, The Art of Cross Examination 204 (1936).