CROSS-EXAMINATION

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I. INTRODUCTION AND SCOPE OF ARTICLE

Cross-examination is at the heart of the adjudication of criminal trials. It is only through cross-examination that the jury is led to see the "whole truth".

Most cross-examinations are conducted without a great deal of prior preparation or thought devoted to the purpose of the cross-examination. Far too often, cross-examination consists of a number of unplanned questions without purpose that often fill gaps in the prosecution, repeat direct testimony and result in an argument with the witness. All of these end products have the net effect of hampering rather than enhancing the cross-examiner's cause.

With the expansion of the admissibility of extraneous offenses (that always dangerous prosecution tool) and the number of criminal defendants with prior convictions (who are therefore unable to testify), the criminal defense practitioner is called upon more often to establish a defense solely through cross-examination. The purpose of this article is to assist the cross-examiner in developing such a defense and avoiding the pitfalls mentioned above by utilizing a systematic approach to this most challenging art.

The only absolute rule in the trial of a criminal case is that everything that counsel does, including cross-examination, must be done with a sincere and alert consideration of the jurors' beliefs and the integrity of his or her case. This article may appear to have many rules concerning cross-examination. These should not be considered rules but rather "red flags" since experience demonstrates that most mistakes in cross-examination are made when the "red flags" are disregarded. Sound judgment, not rules, must determine how the cross-examiner approaches each witness.

While cross-examination is an art, no single article can begin to make a lawyer proficient. The cross-examiner must have a deep understanding of the considerations involved, experience and ability to make immediate judgments and talent to execute without having time to think of all the consequences. There are no neat concepts or techniques for cross-examination that can overlap into every case and be placed into neat categories and lists. Every successful cross-examination hinges on a combination of all these factors.

The criminal defense practitioner cannot hope to become proficient in the art of cross-examination without first becoming thoroughly conversant with the constitutional principles governing cross-examination and the applicable rules of evidence. Particularly important are Article IV, Relevancy; Article VI, Witnesses; and Article VII, Opinion and Expert Testimony. What follows should be more than a practice guide but less than a legal treatise. It is hoped that this blend of ingredients will fuel the reader through your next cross-examination without the knocking, pinging and stumbling so very often associated with this endeavor.

Good luck!!

II. THE AUTHORITY TO CROSS-EXAMINE

A. Generally

Cross-examination is a matter of right. Wigmore asserts that cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth". 5 Wigmore, Evidence Sec. 1367; see *California v. Green*, 399 U.S. 149, 158 (1970). It is one of the safeguards essential to a fair trial. *Alford v. United States*, 282 U.S. 687 (1931).

B. Constitutional Right of the Accused

U.S. Constitution Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...".

Texas Constitution, Article I, § 10: "In all criminal prosecutions the accused...shall be confronted by the witnesses against him..."

The Bill of Rights in the United States and Texas Constitutions contains a confrontation clause. U.S. Constitution, Sixth Amend.; Tex. Const. Art. 1, Sec. 10. The primary purpose of the right of confrontation is the opportunity to cross-examine. *Douglas v. Alabama*, 380

U.S. 415 (1965); *Alford v. United States*, supra; *Mattox v. United States*, 156 U.S. 237 (1895). The Texas Constitution Art. I, Sec. 10 has been similarly interpreted to embody the valuable right of cross-examination in the confrontation clause. *Garcia v. State*, 151 Tex.Crim.R. 593, 210 S.W.2d 574 (1948). *Long v. State*, 742 S.W.2d 302, (Tex.Crim.App. 1987).

Although Texas decisions parallel the federal case law, it was not until 1965 that the landmark decision in *Pointer v. Texas*, 380 U.S. 400 (1965) incorporated the Sixth Amendment confrontation clause into the Fourteenth Amendment due process clause applicable to the states. The right of Texas citizens to confront and cross-examine witnesses is now protected by both state and federal constitutions. A comprehensive discussion of the history and progress of both federal and state confrontation and cross-examination rights may be found in *Long v. State*, supra.

An adequate opportunity for cross-examination may satisfy the confrontation clause even in the absence of physical confrontation. *Douglas v. Alabama*, supra. However, the clause guarantees a face to face meeting with witnesses appearing before the trier of fact. *Coy v. Iowa*, 487 U.S. 1012 (1988). *Coy* struck down a state law allowing child witnesses to testify behind a screen in child abuse cases as a denial of the right to physical confrontation in court before the fact finder. See also *Long v. State*, supra, where the Texas Court of Criminal Appeals held that the use of videotape testimony of a child witness was a violation of the right to confrontation, declaring Art. 38.071, V.A.C.C.P. unconstitutional. However, the Court later rejected this proposition in *Briggs v. State*, 789 S.W.2d 918 (Tex.Crim.App.1990). The *Briggs* Court ruled that the statute [38.071] was not unconstitutional on its face, but recognized that the statute may function in an unconstitutional manner, depending on the circumstances of the case.

The constitutional right to cross-examine witnesses is not absolute and can be denied when the evidence bears an indicia of reliability to insure the integrity of the fact finding process. For example, testimony subject to cross-examination by the same party at a former trial is admissible when the witness is unavailable so long as there is an indicia of reliability. *Mancusi v. Stubbs*, 408 U.S. 204 (1972). See also, *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Dutton v. Evans*, 400 U.S. 74 (1970); *Porter v. State*, 578 S.W.2d 742 (Tex.Crim.App. 1979); *Sellers v. State*, 588 S.W.2d 915 (Tex.Crim.App. 1979). The preceding cases deal with well recognized exceptions to the hearsay rule such as business records that would not literally survive a confrontation analysis but are allowed because they are deemed reliable. Defense lawyers are well advised to couple hearsay objections with a complaint of denial of cross-examination and confrontation rights. Few cases are reversed on the basis of hearsay violations so counsel must develop the constitutional infirmity in order to preserve error.

"From the earliest days of our Confrontation Clause jurisprudence, we have consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause". *Idaho v. Wright*, 497 U.S. 805 (1990); *see Dutton v. Evans*, 400 U.S. 74, 80 (1970) (right to confrontation does not require that no hearsay ever be introduced). Although the hearsay rules and the Confrontation Clause generally protect the same values, the two are not identical. "The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule." *Idaho v. Wright*, supra, at 814 (1990). The Confrontation Clause might be violated even if evidence is admitted under a recognized hearsay exception. "The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied." *California v. Green*, 399 U.S. 149, 156 (1970).

The Court of Criminal Appeals addressed improper denial of the right to cross-examination in *Shelby v. State*, 819 S.W.2d 544 (Tex.Crim.App. 1991). In *Shelby*, the Court adopted the Sixth Amendment test to determine when the denial of cross-examination requires reversal. Citing *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) the Court first examined the potential harm of limiting cross-examination. Next, the Court reviewed the error, considering the following factors:

1) The importance of the witness' testimony in the prosecution's case;
2) Whether the testimony was cumulative;
3) The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
4) The extent of cross-examination otherwise permitted; and
5) The overall strength of the prosecution's case.

Finally, the reviewing court must determine if the error was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 24 (1967). Keep in mind that *Shelby* dealt only with the Sixth Amendment issue and did not address state constitutional grounds. Also note that the *Van Arsdall* test is used to determine whether an error is reversible and is not a mandate for restrictions to be placed on trial counsel.

The Court of Criminal Appeals revisited *Shelby* in *Young v. State*, 891 S.W.2d 945 (Tex.Crim.App. 1994) and held that where a limitation on cross-examination prevents a defendant from negating one of the elements the prosecution was required to prove, the use of the over-whelming evidence test is inappropriate. *Young* did not address constitutional harm under Article 1, Section 10 of the Texas Constitution. However, it is still incumbent on counsel to pack the record with reasons why a limitation on cross-examination would constitute harm and how it might impact one of the elements of the offense. To avoid revealing trial tactics in open court, counsel may want to request an ex parte hearing to be included in the record to demonstrate the harm caused.

III. SCOPE OF CROSS-EXAMINATION

The constitutional scope of cross-examination has been described as follows:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject to the broad discretion of the trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness.
>
> *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

As noted, the trial court retains the power of reasonable regulation of the cross-examination, to prevent confusion, *U.S. v. Ackal*, 705 F.2d 523 (5th Cir.1983); or to prevent inquiry into matters having little relevance or probative value, *U.S. v. Young*, 655 F.2d 624 (5th Cir.1981).

Recognizing the important role that cross-examination plays in the truth finding process, Texas has historically allowed wide latitude in the cross-examination of witnesses:

> "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Rule 610(b) T.R.C.E.

This rule endorses the Texas practice of wide open cross-examination, unlike the examination permitted in federal courts which limits cross-examination to the scope of direct examination." 33 S. Goode, O. Wellborn & M. Sharlot, Guide to the Texas Rules of Evidence: Civil and Criminal, Sec. 611.4 (Texas Practice 1988); see *Wiggins v. State*, 778 S.W.2d 877, 895 (Tex.App. -- Dallas 1989, pet ref'd); *Arnold v. State*, 679 S.W.2d 156, 159 (Tex.App. -- Dallas 1984, pet. ref'd).

Adoption of this rule indicates a specific intent by the Court of Criminal Appeals to follow longstanding precedent in Texas and to refuse to adopt the related federal rule that limits the scope of cross-examination to the subject matter of the direct examination and to credibility of the witness. Therefore, in state court counsel can inquire into other relevant areas outside the direct testimony and often obtain favorable evidence from the opponent's witness.

Texas permits cross-examination of any matter relevant to the issues. On the other hand, cross-examination cannot extend to irrelevant, collateral and immaterial matters. A matter is "collateral" if the cross-examining party would not be entitled to prove such matter as part of his case-in-chief. *Posey v. State*, 738 S.W.2d 321, 325 (Tex.App. --Dallas 1987, no pet.)

Compare the Texas rule with the following Federal Rule 611(b), Scope of Cross-Examination:

> Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The Court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

"Federal Rule of Evidence 611 makes clear that a trial judge is not required to permit cross-examination that exceeds the scope of the direct examination." *U.S. v. Carlock*, 806 F.2d 535, 553 (5th Cir. 1986) cert. denied, 107 S.Ct. 1611 (1987); see also *Lowenberg v. U.S.*, 853 F.2d 295, 300 (5th Cir. 1988). The strict effect of this rule would require that the witness be called back to the stand during

the examiner's portion of the case to adduce testimony outside the scope of direct. However, the rule grants the trial court discretion to prevent this inefficiency by allowing the examiner to proceed as if on direct. This usually means that once counsel strays beyond the scope of cross, he or she may no longer ask leading questions. However, the wording of the rule appears to allow leading questions of adverse witnesses since leading is permissible on direct. F.R.C.E. 611(c).

IV. CREDIBILITY OF THE WITNESS

A. Impeachment with Bias or Motive to Testify

One of the most fertile areas of cross-examination is bias of the witness. It is here that lawyers are permitted to probe the witness state of mind.

Bias is defined in *U.S. v. Abel*, 105 S.Ct. 465, 468 (1984) as "a term used in the `common law of evidence' to describe the relationship between a party and witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self interest." The State also has the right of thorough cross-examination on the issues of bias, interest, prejudice, motive or any other mental state affecting credibility. *Duncantell v. State*, 563 S.W.2d 252 (Tex.Crim.App. 1978). This right flows from the common law and not the Constitution.

The trial court should generally allow the defendant great latitude to show any relevant fact that may affect a witness' credibility. *Virts v. State*, 739 S.W.2d 25 (Tex.Crim.App.1982). Even though Texas law is clear that great latitude should be permitted in impeachment, counsel must be careful to establish the proper predicate during cross-examination for collateral impeachment. In *Willingham v. State*, 897 S.W.2d 351 (Tex.Crim.App. 1995), the State presented a witness who testified that the Defendant admitted to him that he committed the murders. The Defendant cross-examined the witness but never asked him if he had any kind of interest in the resolution of the case. When the Defendant sought to impeach the witness by calling another witness to explain the first witness' interest in the case (the witness was allegedly to receive preferential treatment in prison), the Trial Court sustained the State's objection. The Court of Criminal Appeals held that in order to lay a proper predicate for impeachment, the witness should be asked about any possible interest or bias he may have before there is an attempt to prove interest or bias otherwise. Because the Defendant did not establish a "nexus" between the witness and his alleged interest, the Defendant did not establish the proper predicate and no error was preserved.

1. SNITCHES AND ACCOMPLICES

We all know that the defense is entitled to know the terms of any agreement or "deal" with the prosecution. However, the inquiry does not stop there because it is the witness' state of mind or possible expectations that are the crucial issue, not the formal terms of the agreement or "deal". In fact, cross-examination is allowed in this area even when the witness and the prosecutor claim there is no "deal". *Spain v. State*, 585 S.W.2d 705 (Tex.Crim.App. 1979). Therefore such things as juvenile probations which might otherwise be undiscoverable or inadmissible must give way to the right to expose possible motives to prevaricate before the jury. This is true even in the face of statutory constraints. See *Davis v. Alaska*, supra.

In *Davis v. Alaska*, the Defendant sought to cross-examine the State's witness about a pending juvenile probation. Alaska state law made juvenile probations confidential and the prosecutor was successful in preventing this disclosure before the jury. The Supreme Court ruled that the State's interest in the confidentiality of juvenile court proceedings must give way to the Defendant's right to cross-examine the witness and bring before the jury the argument that the witness might be motivated to testify on behalf of the State in order to shift the blame from him since he was in the vulnerable position of being on probation. It is important to note that there was no affirmative evidence of any pressure being applied to the witness by the State because of his probation. However, the Court held that the Defendant was entitled to expose this possible motive to the jury so that they might give it what weight they desired. The Court also recognized that this was not an attempt to impeach the witness' character with a prior conviction but to show his possible state of mind and motivation to testify.

A number of Texas courts have found harm where cross-examination was restricted in violation of *Davis v. Alaska*. Appellant had an unqualified right to ask the State's primary witness whether she had also been accused of the offense on trial, because the jury was entitled to understand the witness' vulnerable status in juvenile court and to observe her testimony. *Harris v. State*, 642 S.W.2d 471 (Tex.Crim.App. 1982). The Trial Court erred in not allowing Appellant to prove that the

complaining witness had three arrests -- for possession of marihuana, unlawfully carrying a weapon and burglary -- and that all three charges had been dismissed. It is not important that the charges had been dismissed, since there is the possibility they could be refiled. *Simmons v. State,* 548 S.W.2d 386 (Tex.Crim.App. 1977). The Trial Court erred in not permitting Appellant to prove that the principal witness against her had been charged with a felony drug offense and the State had not filed a Motion to Revoke Probation, even though the witness testified that "no one has offered me anything." *Coody v. State,* 812 S.W.2d 631 (Tex.App. --Houston [14th Dist.] 1991). The Defendant was entitled to demonstrate to the jury the bias or motive of the State's rebuttal witness by proving that he was under indictment for possession of methamphetamine. This fact was admissible to show a basis for an inference of undue pressure due to his status as an indictee. This is true even though the prosecutor denied there was a deal for his testimony. *Randle v. State,* 565 S.W.2d 927 (Tex.Crim.App. 1978). The Trial Court erred in prohibiting Appellant from showing that the State had filed and then withdrawn a Motion to Revoke Probation against its eyewitness where this tended to show the witness' potential bias and motive for testifying favorably for the state. Even though the motion had been withdrawn, it could have been refiled. *Morgan v. State,* 740 S.W.2d 57 (Tex.App. --Dallas 1987).

The Court of Criminal Appeals recently endorsed *Davis v. Alaska* in *Carroll v. State,* No. 1368-94 (Tex.Crim.App. January 24, 1996) when the trial court refused to permit impeachment of the state's witness with evidence that he was awaiting trial on an aggravated robbery charge. The broad scope of cross-examination permitted by the constitution "necessarily includes cross-examination concerning criminal charges pending against a witness and over which those in need of the witnesses testimony might be empowered to exercise control." Such evidence is *always* admissible to prove bias. It is not determinative that there is no agreement between the state and the witness. "What is determinative is whether appellant was allowed to demonstrate any possible bias or interest that the witness may hold to testify on the State's behalf. In other words, it is possible, even absent an agreement, that the witness believed his testimony in this case would be of later benefit.

However, a number of Texas courts have found no error from restrictions placed on cross-examination in violation of *Davis v. Alaska.* The Trial Court did not err in prohibiting Appellant from impeaching the State's witness where appellant did not show that the witness testified against him as a result of bias, motive or ill will emanating from his status of deferred adjudication. *Callins v. State,* 780 S.W.2d 176 (Tex.Crim.App. 1986). *Davis v. Alaska* is not offended when a defendant is prohibited from asking a witness about an unrelated pending charge, provided that the defendant has otherwise been afforded a thorough and effective cross-examination and where the bias and prejudice of the witness is patently obvious. *Carmona v. State,* 698 S.W.2d 100, 104 (Tex.Crim.App. 1985). The Trial Court did not err in refusing impeachment with a pending worthless check case having no connection with the instant case, where the witness is a rebuttal and not a material or accomplice witness, and where there was nothing to show that the prosecutor was using the charge to pressure favorable testimony. *Green v. State,* 676 S.W.2d 359, 363 (Tex.-Crim.App. 1984).

As noted, an inquiry to show bias or motive is not subject to the same standard as impeachment with prior convictions and is therefore not subject to the rigid requirements set out in Rule 609, F.R.C.E. and T.R.C.E. See *Massengale v. State,* 653 S.W.2d 20 (Tex.Crim.App. 1983) "Great latitude should be allowed the accused in showing any fact which would tend to establish ill feeling, bias, motive or animus on the part of any witness testifying against him." *Evans v. State,* 519 S.W.2d 868, 871 (Tex.Crim.App. 1975); *Steve v. State,* 614 S.W.2d 137 (Tex.Crim.App. 1981). In *Evans* the Court ruled that it was reversible error to prohibit evidence of a pending sodomy charge against the witness. See also, *Parker v. State,* 657 S.W.2d 137 (Tex.Crim.App. 1983). The trial court may have discretion to disallow such evidence if there is a basis to find that the pending charges are minor or unrelated and prejudice outweighs probative value. *Gutierrez v. State,* 681 S.W.2d 698 (Tex.App.-Houston [14 Dist.]) 1984). However, the trial court is entertaining the risk of fundamental error because if wrong:

> The erroneous denial of this right to confrontation is constitutional error of the first magnitude and no amount of showing of want of prejudice will cure it.

Spain v. State, supra, citing *Davis v. Alaska,* supra, 415 at 318 and *Evans v. State,* supra.

The harm is done when a proper cross-examination is restricted by the trial judge. It is not necessary for the defendant to show that answers to proper questions

would be favorable. The defendant should, however, proffer the questions by an informal bill of exception for the reviewing court. *Hurd v. State*, 725 S.W.2d 249 (Tex.Crim.App. 1987), *Koehler v. State*, 679 S.W.2d 6 (Tex.Crim.App. 1984) and *Spain v. State*, supra. Defense counsel retains an absolute right to make a bill of exception in question and answer form. *Kipp v. State*, 876 S.W.2d 330 (Tex.Crim.App. 1994).

The consistent theme in the cases cited above in both state and federal decisions is that the jury is entitled to know the true status of the accomplice or informant witness in the criminal justice process. Then the jury can weigh for themselves what pressures or expectations, either real or imagined by the witness, might color the testimony.

The scope of inquiry into bias is not unlimited, however, and the following excerpt from *Hurd v. State*, 725 S.W.2d 249 (Tex.Crim.App. 1987) is a good summation of the law in this area:

> This right to confront witnesses does not prevent a trial court from imposing some limits on the cross-examination into the bias of a witness. Trial courts retain some discretion in deciding how and when bias may be proved, and what collateral evidence is material for that purpose. *Spriggs v. State*, 652 S.W.2d 405 (Tex.Crim.App. 1983) and *Green v. State*, 676 S.W.2d 359 (Tex.Crim.App. 1984). In exercising this discretion, the trial courts have the latitude to impose reasonable restrictions on such cross-examination. These restrictions may be based on concerns such as harassment, prejudice, confusion of issues, the witness' safety, or interrogation that is repetitive or marginally relevant.

The trial court's discretion in this area has limits. For example, a trial court may not restrict a defendant to any one method in showing any fact which would tend to establish bias. *Harris v. State*, 642 S.W.2d 471 (Tex.Crim.App. 1982). Also, it is not within a trial court's discretion to prohibit a defendant from engaging in "otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness". *Delaware v. Van Arsdall*, supra at 679. But see *Gutierrez v. State*, 764 S.W.2d 796 (Tex.Crim.App. 1989) for an example of limitation of impeachment on collateral issues.

Even the Fifth Circuit follows the principles of *Davis v. Alaska*. The Court recently held that the district court erred in limiting cross-examination of the government's primary witness concerning pending drug charges. *United States v. Alexius*, __ F.d. __, 1996 WL 67931 (5th Cir. Fed. 15, 1996) (No. 95-50175). The witness, who was in federal custody, had pending drug charges in federal and state court. Alexius sought to ask the witness about the pending cases in an effort to demonstrate his motive for testifying for the government. The trial court refused to allow this impeachment. Outside the jury's presence, the witness stated that he had not been promised anything for his testimony, and he did not know if it might aid him in his pending cases. The Fifth Circuit held that, because Alexius' defense hinged on the witness' credibility, and because the restriction on cross-examination removed Alexius' only impeachment evidence, the trial court abused its discretion in refusing to permit the questioning.

2. OTHER FORMS OF BIAS

a. Favor: whether or not the witness is a friend, relative, employee, member of the same organization or otherwise aligned with one side.

b. Hostility: previous trouble with the adverse party, including litigation. This might also include prior hostile acts of the witness which would otherwise be inadmissible as extraneous misconduct.

c. Financial Stake: also includes litigation, either pending or contemplated. Victim's assistance claims should be considered, especially if they require or would be enhanced by close cooperation with law enforcement. See Art. 56.03(g), C.C.P., Victim Impact Statements. Also, counsel must be familiar with Articles 56.31 through 56.61 C.C.P. which now contain the Crime Victims Compensation Act and provide a wealth of information including a verified application form pursuant to Article 56.36 C.C.P.

This application requires a description of the offense, a complete financial statement, information concerning indemnification from other sources and a statement describing the injuries.

3. PROCEDURE FOR EXAMINING A WITNESS AS TO BIAS

Under Rule 612(b) T.R.C.E., the witness must be confronted with the circumstances of the claim of bias and first be given a chance to explain or deny the bias. If the witness admits the bias then no further extrinsic evidence is allowed. Corresponding Rule 613 F.R.C.E. deals with prior statements of a witness but contains no specific rule as to bias of the witness.

B. Impeachment with Prior Convictions

Rules 609 T.R.C.E. and 609 F.R.C.E. set out the requirements for impeachment with prior convictions. It is not within the scope of this article to exhaust the law of impeachment. Suffice it to say that a witness may be impeached with a prior felony conviction or other crime of moral turpitude when the conviction or release from confinement is not more than ten years old.

Counsel may prove a foreign conviction by offering supporting documents from the country of conviction, accompanied by proper authenticating testimony. *Jordan-Maier v. State,* 792 S.W.2d 188 (Tex.App. --Houston [1st Dist.] 1990). Admissibility is generally proven under T.R.C.E. 902(3).

An otherwise final conviction may not be used to impeach a defendant if it was obtained when the defendant was without counsel. *Loper v. Beto,* 405 U.S. 473; *Wood v. State,* 478 S.W.2d 513 (Tex.Crim.App. 1972). This applies to any conviction that resulted in imprisonment. *Aldrighetti v. State,* 507 S.W.2d 770 (Tex.-Crim.App. 1974). A prior final conviction obtained without counsel is admissible for impeachment if imprisonment did not result. To contest the use of a prior conviction for impeachment on these grounds the defendant should assume the burden of showing the following:

1. The absence of counsel at the time of conviction;

2. The indigency of the defendant at the time of the conviction;

3. The right to counsel was not waived or that there was no offer of counsel made; and

4. Defendant would have accepted counsel if offered.

Jenkins v. State, 488 S.W.2d 130, 131 (Tex.Crim.App. 1973):

However, the use of a void prior conviction for impeachment results in reversal only if the court determines that its use may have influenced the outcome of the trial. *Dorsey v. State,* 485 S.W.2d 569, 573 (Tex.Crim.App. 1972).

As mentioned above, if the impeaching offense is not a felony, it may only be used for impeachment if it involves moral turpitude. There is no statutory definition of this term, and the appellate courts have undertaken to determine whether offenses involve moral turpitude on a case-by-case basis. Generally, moral turpitude means something that is inherently immoral or dishonest. *Hutson v. State,* 843 S.W.2d 106 (Tex.App. --Texarkana 1992).

Offenses that have been found to involve moral turpitude include the following:

1. Theft. *Poore v. State,* 524 S.W.2d 294 (Tex.Crim.App. 1975).

2. Aggravated assault on a female. *Trippell v. State,* 535 S.W.2d 178 (Tex.Crim.App. 1976).

3. Prostitution. *Johnson v. State,* 453 S.W.2d 828 (Tex.Crim.App. 1970).

4. Making a false report to a police officer. *Robertson v. State,* 685 S.W.2d 488 (Tex.App. --Fort Worth 1985).

5. Indecent exposure when it involves intent to arouse or gratify sexual desire. *Polk v. State,* 865 S.W.2d 630 (Tex.App. --Fort Worth 1993).

Offenses that have been held not to involve moral turpitude include the following:

1. Driving while intoxicated. *Cohron v. State,* 413 S.W.2d 112 (Tex.Crim.App. 1967).

2. Illegal sale of whiskey. *Smith v. State,* 346 S.W.2d 611 (Tex.Crim.App. 1961).

3. Unlawfully carrying a weapon. *Trippell v. State,* 535 S.W.2d 178 (Tex.Crim.App. 1976).

4. Driving without a license and drunkenness. *Ochoa v. State,* 481 S.W.2d 847 (Tex.Crim.App. 1972).

5. Aggravated assault. *Valdez v. State,* 450 S.W.2d 624 (Tex.Crim.App. 1970). In general, misdemeanor assaultive offenses that do not involve violence against women are not crimes involving moral turpitude. *Patterson v. State,* 783 S.W.2d 268, 271 (Tex.App. --Houston [14th Dist.] 1989). However, see *Hardeman v. State,* 868 S.W.2d 404 (Tex.App. --Austin 1993) which held that a misdemeanor assault conviction by a man against a woman is admissible for impeachment under Rule 609 T.R.C.E. as a crime of moral turpitude.

6. Criminal mischief. *Gonzales v. State,* 648 S.W.2d 740 (Tex.App. --Beaumont 1983)

7. Misdemeanor possession of marijuana. *Bell v. State,* 620 S.W.2d 116 (Tex.Crim.App. 1981).

Counsel must be cognizant of Rule 609(f) T.R.C.E. which provides that evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Rule 609(f) T.R.C.E. was interpreted in *Cream v. State,* 768 S.W.2d 323 (Tex.App.--Houston [14th Dist.] 1989) as constituting a method to prevent ambush of an adverse party's witness with prior convictions when the adverse party has not had a fair opportunity to contest the use of such evidence. The Court went on to hold that there was no such ambush where the only convictions the defendant had to consider prior to testifying were those already known to him.

Although there is no authority interpreting what would constitute "written request for notice" under Rule 609(f) T.R.C.E., counsel should avoid "hiding" the request in a motion for discovery. By analogy, the Court of Criminal Appeals held in *Espinosa v. State,* 853 S.W.2d 36 (Tex.Crim.App. 1993) that filing a motion for discovery in the trial court and serving a copy on the State does not trigger the notice provisions of T.R.C.E. 404(b) and the defendant instead must obtain a ruling on his Rule 404(b) motion in order to invoke the protection of that rule.

In *Luce v. United States,* 469 U.S. 38 (1984), the defendant moved in limine to preclude the government from using a prior conviction for impeachment. This motion was overruled, and appellant did not testify. The Supreme Court held "that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." This is also the rule in Texas. *Richardson v. State,* 832 S.W.2d 168 (Tex.App. --Waco 1992).

C. Impeachment with Character Evidence

Rules 608 T.R.C.E. and 608 F.R.C.E. control impeachment with character evidence and limit it to the character trait of truthfulness. In contrast to the Texas rule, the federal rule does allow an inquiry into specific instances of conduct in cross-examination as long as the inquiry concerns that witness' character for truthfulness. Compare F.R.C.E. 608(b) with T.R.C.E. 608(b); see *U.S. v. Farias-Farias,* 925 F.2d 805, 809 (5th Cir. 1991); *U.S. v. Thorn,* 917 F.2d 170, 175 (5th Cir. 1990); see also *Ramirez v. State,* 802 S.W.2d 674, 676 (Tex.Crim.App. 1990) (unlike its federal counterpart, Texas Rule 608(b) allows for no exception). The Texas rule does not allow evidence or cross-examination about specific conduct. The federal rule leaves this to the discretion of the court under certain circumstances.

D. Impeachment with Prior Inconsistent Statement

Rules 612 T.R.C.E. and 613 F.R.C.E. are treated more specifically elsewhere in the paper. The state and federal rules differ somewhat but generally the witness must first be advised of the contents, time, place and to whom the statement was made so that the witness may explain or admit the inconsistent statement. If the statement is admitted, no extrinsic evidence is allowed in state court. If the witness denies or equivocates, extrinsic evidence and further cross-examination may follow. If the statement is in writing, it need not be furnished to the witness but must be given to adverse counsel if requested.

E. Impeachment with Writing Used to Refresh Memory

1. TEXAS RULE 611

"If a witness uses a writing to refresh his memory for the purpose of testifying either while testifying or before testifying, an adverse party is entitled to have the

writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portion not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial." Tex.R.Crim.Evid. 611.

2. TEXAS CASE LAW

a. A writing used by a witness to refresh his memory either while or before testifying is discoverable, even though the statement was not made by the witness. *Marsh v. State,* 749 S.W.2d 646 (Tex.App. --Amarillo 1988), statement used to refresh memory is discoverable "regardless of authorship".

b. In *Marsh v. State,* 749 S.W.2d 646 (Tex.App. --Amarillo 1988), a supervisor from the Texas Department of Human Services testified for the state, and admitted to having previously examined records compiled by a colleague. The trial court denied defendant's request to inspect the department's file. This was error under Rule 611. "The wording of the Rule is unambiguous and unequivocal. If a witness uses a writing to refresh his memory for the purpose of testifying, an adverse party is entitled to immediate production of the writing for the purposes specified in the Rule. The witness used the DHS file to prepare for her testimony. Therefore, appellant was entitled to the file as requested".

c. Where the prosecutor testifies that he reviewed his jury selection notes prior to testifying at a *Batson* hearing, defendant is entitled to production of those notes under Rule 611. *Salazar v. State,* 795 S.W.2d 187 (Tex.Crim.App. 1990).

d. Rule 611 is "cast in terms of entitlement". *Young v. State,* 830 S.W.2d 122 (Tex.Crim.App. 1992). When appellant invokes Rule 611, the trial court is obliged to honor the request by requiring the witness to produce the materials before directing appellant to proceed with cross-examination.

e. Once appellant moves for production and that motion is denied, error is complete. Appellant does not bear the burden of acquiring these withheld records from the witness for inclusion in the appellate record. *Young v. State,* 830 S.W.2d 122 (Tex.Crim.App. 1992).

f. *Ballew v. State,* 640 S.W.2d 237 (Tex.Crim.App. 1980), is a pre-rules case. There the court recognized that the attorney-client privilege extends to a psychiatrist hired to assist in the preparation of an insanity defense. The court went on to hold, however, that the privilege is waived when the defendant calls the psychiatrist to testify. Accordingly, it was not error for the trial court to compel the defense to allow the state to examine the notes and reports the witness made during his examination of the appellant for purposes of cross-examination.

g. On direct examination, the state's witness, a juvenile probation officer, testified that he had prepared for testifying by reading a psychological evaluation of defendant. The document was used to refresh the witness' memory. The report related to his testimony. *Robertson v. State,* 871 S.W.2d 701 (Tex.Crim.App. 1993), 115 S.Ct. 155 (1994). The trial court erred in not admitting this report in its entirety on cross-examination under Rule 611. "When the writing is used by the witness to refresh his memory, the opposing party upon request can inspect the document and use if for purposes of cross-examination. Further, the opposing party can introduce the document, not for the truth of the matter asserted, but for use by the jury in comparing the document to the witness's testimony." However, the error was harmless because the report had no impeachment value.

F. Production of Statements of Witnesses for Impeachment

1. TEXAS RULE 614

a. Motion for production. After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession

and that relates to the subject matter concerning which the witness has testified.

b. Production of entire statement. If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

c. Production of excised statement. If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of appeal.

d. Recess for examination of statement. Upon delivery of the statement to the moving party, the court, upon application of that party, shall recess proceedings in the trial for a reasonable examination of such statement and for preparation for its use in the trial.

e. Sanction for failure to produce statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the state who elects not to comply, shall declare a mistrial if required by the interest of justice.

f. Definition. As used in this rule, a "statement" of a witness means:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by him;

(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof, or

(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury.

2. RULE 614 APPLIES TO PRE-TRIAL HEARINGS

a. Rule 614 applies "in criminal proceedings in all Texas courts and in examining trials before magistrates." Tex.R.Crim.Evid. 1101(a). This includes motions to suppress confessions and illegally obtained evidence. Tex.R.Crim.Evid. 1101(a)(4).

3. TEXAS CASE LAW

a. Rule 614(d) provides for a recess to allow a reasonable examination of the statement in question. How much of a recess is "reasonable?" In *Camacho v. State,* 864 S.W.2d 524 (Tex.Crim.App. 1993), cert. denied, 114 S.Ct. 1339 (1994), no abuse of discretion was found where the trial court recessed long enough for counsel to read and comprehend the statement and to compare that statement with statements given by other witnesses.

b. Before Rule 614, the question on appeal was whether the trial court had abused its discretion in not ordering production. The rule now governs. "Under the provisions of Rule 614 if the requested statement is in the possession of the State, a trial court, upon timely request by the accused, must order the attorney for the State to produce such statement if it relates to the subject matter to which the witness testified." *Marquez v. State,* 757 S.W.2d 101 (Tex.App. --San Antonio 1988), no error where records shows report was not in possession of the state.

c. The work-product rule and the attorney-client privilege cannot be asserted to prevent discovery under Rule 614(a). *Mayfield v. State,* 758 S.W. 2d 371 (Tex.App. --Amarillo 1988).

d. Rule 614 error may be harmless where the material is consistent with the trial testimony and where virtually all the information in the material is developed at trial. *Mayfield v. State,* 758 S.W.2d 371 (Tex.App. --Amarillo 1988).

e. In *Newsome v. State,* 829 S.W.2d 260 (Tex.App. --Dallas 1992), the first appeal was abated for a retroactive *Batson* hearing, at which time appellant sought production of the prosecutor's notes for cross-examination under Rule 614 of the Texas Rules of Criminal Evidence. The prosecutor responded that he had no notes from the jury selection itself, but that he had prepared some notes in anticipation of *Batson* hearing. He objected to disclosure, invoking the work product privilege and the trial court sustained the objection. The court of appeals affirmed the judgment below on two grounds. First, the court held that these "private writings

that a witness has made solely for his own use in testifying and that only the witness has seen" are not "statements" within the purview of Rule 614. Second, even if these notes where within the purview of Rule 614, appellant failed to preserve this issue on appeal. Even though trial counsel requested that the notes be made a part of the record, they were not included in the record. "The record does not reflect any efforts to incorporate the statement in the appellate record nor does Newsome complain in a point of error of the trial court's refusal to include the statement in the record."

f. In *Guilder v. State,* 794 S.W.2d 765 (Tex.App. --Dallas 1990), the court held that appellant's request for the prosecutor's notes under Rule 614 was properly denied since these notes do not constitute a "statement" as contemplated by that rule. Appellant did not complain on appeal that the notes were producible under Rule 611.

g. In *Jenkins v. State,* 912 S.W.2d 793 (Tex.Crim.App. October 1995), the state called a narcotics investigator with the Texas Department of Corrections who testified about the importation of drugs into prison and their widespread use. On cross-examination, he testified that it was part of his job to make reports and findings of his investigations. Appellant requested production of these reports under Rule 614, and the request was denied, except as to those report that specifically concerned appellant. This was not error, since the statements were not in the possession of the prosecutor. "We hold the `plain language' of Rule 614(a) requires a prosecutor to produce witness statements that are in the prosecutor's possession. And, since the record does not reflect that Bitter's reports were in the prosecutor's possession or that Bitter was part of the prosecutorial arm of the government the trial court did not error in denying appellant's request to order Bitter to produce them".

h. A report by the arresting police officer detailing the items found after an inventory of appellant's car was a "statement" under Rule 614. *Cross v. State,* 877 S.W.2d 25 (Tex.App. --Houston [1st Dist.] 1994, pet. ref'd). The statement was not discoverable, however, because it had been destroyed, and was therefore not in the state's possession.

i. The court of appeals erred in holding that victim impact statements, made pursuant to Article 56.03(g) are exempted from Rule 614 of the Texas Rules of Criminal Evidence. *Enos v. State,* 889 S.W.2d 303 (Tex.Crim.App. 1994).

j. The trial court erred, under Rule 614, in not providing to appellant a transcription of the testimony of an eyewitness given at the trial of appellant's co-defendant. The statement was in the state's possession because it was readily accessible to the state. Appellant had a particularized need for the transcript to impeach the witness. *Brooks v. State,* 893 S.W.2d 604 (Tex.App. --Fort Worth 1994).

4. TEXAS COMMENTARY

a. Previously, the right to discover statements and testifying witnesses was governed by the familiar case of *Gaskin v. State,* 353 S.W.2d 467 (Tex.Crim.App. 1961). Rule 614 expands the Gaskin Rule in two respects. First, it gives the state a right of discovery similar to the defendant's. Second, it applies to some statements which have not been reduced to writing. 33 S.Goode, O. Wellborn & M. Sharolt, Guide To The Texas Rules of Evidence: Civil and Criminal, § 615.1 (Texas Practice 1988).

G. Impeachment with Inability of the Witness to Accurately Perceive and Recall Events

Fundamental to cross-examination is the ability to test the witness' ability to observe or assimilate the information originally and then to recall it accurately before the jury. These issues deal more with human frailties and limitations than with truthtelling. It would serve little purpose to list examples here because they are as numerous as the fact situations in which they may be found. Suffice it to say that cross-examination on these issues is enhanced directly proportional to the extent of counsel's investigation and knowledge of the facts. It is far easier to convince a jury that a witness might be mistaken than it is to convince them that a witness is lying. Therefore, even though this topic is treated here only in general terms, it is probably more important in practical use than all the others.

V. RECALLING WITNESSES FOR CROSS-EXAMINATION TO GAIN TACTICAL ADVANTAGE

A. Texas Case Law

1. In *Craig v. State,* 594 S.W.2d 91 (Tex.Crim.App. 1980) defense counsel announced after

direct examination that he had no questions "at this time". After his motion for instructed verdict was overruled, the defendant attempted to recall the witness for cross-examination. The trial court refused to allow this procedure. The Court of Criminal Appeals found that this was error. "A defendant does not lose his right to recall a State's witness for cross-examination merely because he does not exercise the right of cross-examination immediately after direct examination by the State, nor because the witness was subpoenaed by him and then placed on the witness stand by the State." However, in *Craig* error was not preserved because no bill of exception made. In *Love v. State*, 861 S.W.2d 899 (Tex.Crim.App. 1993), Appellant preserved error through an offer of proof which showed he wanted to recall the witness to impeach the credibility and reliability of his previous testimony.

2. The trial court abuses its discretion in not permitting the defense to recall a state's witness where further cross-examination would not cause undue delay in the trial or present cumulative evidence. *Love v. State*, 861 S.W.2d 899 (Tex.Crim.App. 1993).

3. Error, of course, is subject to review for harm. In *Love v. State*, 861 S.W.2d 89, 904-07 (Tex.Crim.-App. 1993), the Court applied a three prong analysis for making this determination, and found the error was harmful. *Cf. Johnson v. State*, 773 S.W.2d 721 (Tex.App. --Houston [1st Dist.] 1989, pet.ref'd) harmless error.

B. Federal Case Law

1. The trial judge did not err in refusing to permit the defense to recall a government agent as a defense witness for further cross-examination after the government had rested its case, because the witness already had already been extensively cross-examined. *United State v. James*, 510 F.2d 546 (5th Cir.); *Vasquez v. United States*, 423 U.S. 855 (1975).

2. The recalling of witnesses for further cross-examination, and acceptance or rejection of rebuttal testimony, are matters within trial court's broad discretion, the exercise of which will not be disturbed on appeal, absent a clear showing of abuse. *Johnson v. United States*, 207 F.2d 314, 322 (5th Cir. 1953), cert. denied, 347 U.S. 938 (1954).

VI. PREPARATION - PRETRIAL INVESTIGATION AND DISCOVERY

The key to effective cross-examination is full preparation which begins with a thoroughly developed defense theory. Many times an entire defense strategy will be based on destruction of the prosecutor's case by cross-examination of the witnesses. This being the case, counsel's garnering and mastery of the facts and attention to the direct examination will be essential to success.

Before you have fully developed your defense theory -- long before -- begin the investigatory procedures which hopefully will enable you to know all there is to know about the prosecution witnesses including facts which the prosecution does not know or does not know that you know.

Counsel should build an extensive profile on each of the potential prosecution witnesses including not only his expected testimony, but also relevant impeachment information. The following are some steps which will aid the cross-examiner in achieving these objectives:

A. Talk to Every Witness Prior to Trial Even if Only to Get Them to Refuse to Talk to You

Contact the witness for an interview. If possible, record the conversation with the witness for later transcription and also for your own protection. In most cases, especially those involving the hostile witness, you will want to have a third party witness the interview so they, and not you, can testify if necessary at trial. In any event, record your recollection of the interview immediately.

Try to get a written statement from the witness even if it's damaging. It's very difficult for anyone to tell the same story twice and you will have a version not available to the prosecutor. If the witness refuses to talk with you, find out why and learn the details. Counsel may very well learn that the prosecutor has instructed him not to speak with anyone associated with the defendant.

If the witness refuses to talk to you (or conveniently avoids the opportunity), send them a carefully drafted letter (see Appendix "A") by certified mail explaining that you are seeking to "learn the truth" and wish to talk to them for just a few minutes. If the witness persists in refusing to talk or continues a pattern of avoidance, this letter can provide significant cross-examination and evidence of evasiveness when comparing the number of meetings and elaborate witness preparation by the prosecution.

If the witness does agree to meet with you but indicates he/she will do so only with the prosecutor present, you can be assured that this was at the prosecutor's suggestion. This can be further exploited during trial by asking the witness if there were any other suggestions the prosecutor made that he/she chose to follow concerning their testimony. It doesn't matter what answer you receive.

B. Use Pretrial Discovery

Use pretrial discovery to gain information about the case. However, remember it is always better if the prosecution does not know that you know. Obviously, documents produced in discovery will assist you to isolate areas of further investigation.

C. Tape Record Preliminary Proceedings

Tape record preliminary proceedings such as examining trials, traffic citation hearings, and lineup proceedings so that you have available all testimony or occurrences preserved for future use.

In counties where the grand jury does not meet on a regular basis and may be unavailable to return an indictment within the time set for the examining trial, this procedure can provide a very useful discovery and cross-examination preparation tool. Defense counsel should use the examining trial to extensively cross-examine all witnesses called on behalf of the State in order to obtain information to be used in impeachment and for discovery of the exact nature of the State's evidence. Further, counsel should obtain witness statements pursuant to Rule 611 T.R.C.E. for purposes of cross-examination.

Article 16.09 C.C.P. requires that the testimony of each witness appearing at the examining trial be reduced to writing (or statement of facts) and can provide not only a free and useful cross-examination tool but preservation of that testimony without the necessity of court reporter expense.

D. Subpoena Records to the Preliminary Hearings

In every assaultive or homicide offense, medical records should be subpoenaed to preliminary hearings. The prosecutor may agree to stipulate to the predicate and the custodian of such records can leave the records in court. The records, or copies, are then left with you and you do not introduce them but take them with you.

E. Try to End up with Diagrams and Exhibits Without the Prosecutor Having a Copy

Have the officers diagram the scene and describe it at preliminary hearings. Do not introduce the diagram. Take it with you.

F. Use Subpoenas for Discovery

Pretend you are a prosecutor with a stack of grand jury subpoenas. Well in advance of actual trial, subpoena documents to which you would otherwise not have access such as bank records, insurance company investigations and phone toll records. Select some preliminary court date such as arraignment, docket call or meaningless trial date. Then attach a letter to your subpoena explaining that the records custodian may or a may not be actually called as a witness on the date in question and that the subpoena may be complied with by furnishing true copies of the documents to you and the witness can then remain on call until actually needed in court. Always explain that if the records custodian prefers, they can actually appear in person with the originals. You will find that most people are only too happy to give you the copies as long as they have the subpoena to cover them.

G. Visit with the Expert Witness(es)

Go to the office of the expert witness prior to trial and talk with him. While there, make notes of his displayed diplomas, professional memberships or recognitions and the books on his bookshelves which concern the subject matter of his testimony. Thereafter you may want to consult your own expert, particularly if the testimony is subject to opinion as in the case of handwriting experts and especially in the case of psychiatrists. Counsel should carefully study the diplomas and certificates of the expert and maybe learn that his present field of expertise is a second, or even third, career. Look for gaps in his educational process and try to learn what he was doing during those periods of time. Also, look for any literature or brochures distributed by the expert that might be used in cross-examination.

The most frequently encountered expert witness in criminal trial practice is the medical examiner. When counsel is involved in a case where the medical examiner's opinion will be critical to the outcome of the case, a public inquest should be requested by letter (see Appendix "B") This request will be summarily rejected or ignored. It is

also an excellent idea to retain your own forensic expert or pathologist. Send a letter requesting that your own expert be present for the autopsy or any other testing performed. (See Appendix "C")

Finally, counsel must be familiar with the Medical Examiners Act codified in Chapter 49 of the Texas Code of Criminal Procedure. Section 49.25 requires that the medical examiner maintain extensive records (not just a report) of each homicide case and mandates that these records are "public". These records should be requested pursuant to the letter included in Appendix "D". This statutory provision is separate and apart from the Texas Open Records Act, so the medical examiner should not be permitted to avoid releasing the records by asserting the law enforcement investigative exception contained in the Texas Open Records Act.

When meeting with the medical examiner or expert, this is also the time to ask all of those opened ended questions you dare not ask in front of the jury. -- But don't disclose too much, i.e., don't argue or disagree with the expert because you will reveal your cross-examination and allow him or her to prepare.

In preparing to cross-examine experts, counsel should be thoroughly familiar with Rule 803(18) T.R.C.E. which provides an exception to the hearsay rule as follows:

> **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

Rule 803 (18) T.R.C.E. provides an excellent vehicle to present an expert's opinion from learned treatises by simply having the opposing party's expert recognize the material as "reliable authority" in the field. The material can then be literally read to the jury. In a very poorly reasoned opinion, the Amarillo Court of Appeals even went as far as to hold that a videotape can qualify as a learned treatise under this rule. *Loven v. State,* 831 S.W.2d 387 (Tex.App. --Amarillo 1992).

Counsel should be familiar with *Zwack v. State*, 757 S.W.2d 66 (Tex.App. --Houston [14 Dist.] 1988) where counsel sought to introduce material from learned treatises after the State's expert had completed his testimony and been excused. *Zwack* expressly recognized and authorized the procedure set forth in Rule 803(18) T.R.C.E., but held that learned treatises are to be used only in conjunction with testimony by an expert witness, either on direct or cross-examination, even though the authority of the treatise or publication is otherwise established. Lesson learned: Do it while the expert is on the witness stand.

H. Discover Law Enforcement Instruction Manuals

Instruction manuals used in the training of law enforcement officers can be very useful in the cross-examination of those officers and especially so in the case of police officers and D.E.A. agents. The manuals can be used to show the inconsistencies between the actions of the officers and the training received. These instruction manuals are generally available under the provisions of the Freedom of Information Act, 5 U.S.C. 522(a)(2)(c) and The Texas Open Records Act, Chapter 552 of the Texas Government Code. (see Appendix "E")

I. If You Know a Witness is Vulnerable, Carefully Plan Your Cross-Examination

Set out precisely what you want to achieve from your cross-examination and plot the precise, even minute, steps you will take to accomplish your objective. Phrase your questions for the most impact.

J. Compile a Witness Book or File for Each Witness

In the early phases of preparation, begin a file for each potential witness. As your preparation proceeds, add to the file any material which constitutes either a statement of the witness or a mention of him and his conduct in the statement of another, any biographical data, any employment information, or any other information which even remotely concerns the individual witness.

As a practical matter, counsel should always have two copies of any statement or report by each witness. One copy can be used to highlight or make notes and a "clean" copy to be utilized with the witness in the presence of the jury.

Before preparing your specific areas of cross-examination or the precise questions you want to address with the witness, review all the information you have collected in that witness' file. A vital clue to preparation at this phase is to look for what has been omitted as well as the more obvious contradictions. These omissions may warrant further investigation to determine whether some useful fact is being obscured by the witness.

Your "witness book" (either a file folder or a loose leaf notebook) should contain documents, notes, and evidence upon which you want to cross-examine the witness and, at the front, a summary sheet which contains: a brief biographical summary, a list of potentially harmful facts in the knowledge of the witness, a list of facts you want to elicit, any impeachment information you plan to use, and an applicable list of exhibits upon which you want to examine the witness. The summary sheet should be typed and generously spaced so you can make notes upon it during the witness' direct examination. This device enables you to observe the demeanor of the witness on the stand without being distracted by trying to take copious notes of his direct examination. This is also a judgment call because often it is important to take detailed notes not only for cross but for comparison with other witness' testimony.

K. Use Sources of Background Information

You can never know too much about a witness. Here are a few sources of such information:

1. City Directory/Cross Cross

This will let you know who the neighbors are and give some background information about the witness.

2. Credit Bureaus

If you're not a member, find a merchant who is one. This can give a great deal of information not only as to financial institutions and creditors of the witness but also as to past employers. You may find a potential witness who terminated the witness for theft or dishonesty. Those witnesses become your witnesses as to the reputation for truth and veracity of the prosecution witnesses.

3. Public Records

Don't forget tax records, vehicle registrations, driving records and civil court proceedings. Domestic Relations Court is often a fertile ground for pleadings, temporary orders and social study reports. Additionally, conferences with an ex-spouse following a bitter divorce will prove invaluable.

Counsel should be thoroughly familiar with the provisions of the Texas Open Records Act, Chapter 552 of the Government Code. The Open Records Act is invaluable in obtaining jail records, booking records, offense reports and witness statements from disposed cases and police officer resignation and termination records (see Appendix "E").

Chapter 552.301 of the Government Code provides that when a governmental body receives a written request for information that it considers to be within one of the Open Records Act exceptions, it must ask for a decision from the Attorney General about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the Attorney General's decision within a reasonable time but not later than ten (10) days after receiving the written request.

If a governmental body does not request an Attorney General decision as provided by Section 552.301 of the Government Code, the information requested in writing is presumed to be public information. In 1981, the Attorney General's Office ruled in ORD-278 that documents containing the reasons and circumstances surrounding a public employee's resignation or termination are not exempt from disclosure under the Texas Open Records Act.

4. Public Utilities

These records will reveal who is (or is not) paying the bill.

5. Long Distance Telephone Calls

These records can connect witnesses together or to law enforcement and gives counsel the date and time of the calls.

6. Military Records

These records will reveal terms of discharge, locations of assignment and disciplinary matters.

7. Bank Records

Persons to whom witnesses write checks and the dates and amounts of deposits are often very revealing.

8. Income Tax Records

If you can't get them from the IRS (and it truly is complicated and time consuming), subpoena the witness to produce these records in court. It is rare that a cooperating government witness files a tax return, much less pays taxes and certainly not on the undercover or reward money he receives. Therefore, this is another benefit of snitching, i.e., tax free money, tax evasion and unspoken immunity from tax fraud prosecution.

9. Incarceration Records

These materials invariably reveal disciplinary matters while in jail, psychiatric evaluations and parole hearings. The identity of visitors will also be revealed. Records of tattoos revealing gang affiliation, girlfriends and beliefs can prove to be very beneficial. Many county jails now take intake booking photos of gang members flashing gang signs in order to verify and provide for gang segregation. These photos could prove invaluable depending on what one of these witnesses says at trial.

10. Medical and Psychiatric Records

Gems can be found hidden in doctors' notes. Don't forget to check the methadone centers and psychiatric "dry out" hospitals for drug and alcohol addicts. If counsel is aware of previous mental health treatment, you may want to file a pretrial motion to determine competency of the witness under Rule 104(a) T.R.C.E. (providing the competency of a person to be a witness is a preliminary question) and Rule 604 T.R.C.E. (see Appendix "F") This hearing should provide a forum to subpoena and peruse these records if they cannot otherwise be obtained.

11. Probation Files

The contact log and monthly reporting form of the probation officer can disclose some productive statements (usually self serving and deceitful) made by the witness. Further, you can always count on numerous lies to the probation officer about simple things like employment, residence, associates, and even arrests while on probation. The probation officer may become a valuable witness as to the reputation for truth and veracity of a prosecution witness.

12. Applications Made by the Witness

This material includes apartment rental agreements, loan applications, and employment applications. Another great source of lies and associates.

13. Credit Card Records

This material includes applications, payment history and specific charges. This is often a perfect way to prove a witness was at a specific location on a specific date, e.g., hotel or restaurant charges. If material, subpoena the witness' copy of the charge receipt to discover what information was included on the records for tax purposes.

14. Victim Impact Statements and Crime Victim Compensation Applications

A victim impact statement is subject to discovery under Article 39.14 C.C.P. before the testimony of the victim is taken only if the court determines that the statement contains exculpatory materials. Article 56.03(g) C.C.P.

The Court of Criminal Appeals recently held pursuant to Article 56.03(g) C.C.P. that a victim impact statement is discoverable before the testimony of the victim is taken only if the court determines that the statement contains exculpatory material. *Enos v. State,* 889 S.W.2d (Tex.-Crim.App. 1994). *Enos* went on to hold that Article 56.03(g) addresses only discoverability of victim impact statements before the victim's testimony whereas the Gaskin Rule and Rule 614(a) T.R.C.E. address the discoverability of statements after a witness testifies on direct examination.

Formerly codified in Article 8309-1 V.A.T.S., the Crime Victims' Compensation Act was moved to Articles 56.31 through 56.61 C.C.P. during the 1993 legislative session. This fund is still administered by the Attorney General.

The Act is silent on whether the records generated the Attorney General are public. Therefore, counsel should always request this material pursuant to the Texas Open

Records Act. Some of the possible sources of information include:

a. A verified/sworn application including a description of the offense, expenses, other indemnification sources and the extent of disability. Article 56.36 C.C.P.

b. The victim must report the crime within seventy two (72) hours of the conduct or provide justification for failure to do so pursuant to extraordinary circumstances. Article 56.46 C.C.P. What would constitute "extraordinary circumstances" could be most revealing.

c. Payments received by the victim. The victim can be paid in lump sum or installments.

VII. CONDUCTING THE CROSS-EXAMINATION: GENERAL RULES

There are exceptions to every rule. While certainly every cross-examination should be tailored to the case and the witness, counsel might want to consider and adopt the following general rules of cross-examination:

A. Always Ask Leading Questions

One of the primary difficulties in cross-examination is controlling the witness. Leading questions will allow you to restrict the testimony to the essential points you want brought out without allowing the witness to meander, explain or otherwise dilute the impact of the cross-examination. By the use of leading questions, you can get the witness to agree with your characterization of the testimony. If possible, always frame your questions so the witness has only one answer -- "YES". This means you are: (1) asking leading questions, (2) controlling the witness, (3) describing the facts with words you, rather than the witness, have chosen. To accomplish this you must apply some of the rules which follow:

B. Keep the Questions Simple

A question loaded with too many facts or exaggerations will always allow the witness to wiggle off the hook. Also, the jury will be turned off if you are obviously trying to add facts to your question which the witness is unwilling to adopt. Only use one fact per question until you get the witness to admit to that fact, then you can add it to your next question for repetitive emphasis.

C. Quit When You are Ahead or Score the Point Desired

First, consider you might be ahead if you don't cross-examine the witness at all. For example, in a burglary case in which the victim testifies solely to the fact that a burglary occurred, makes no attempt at identification, and you have no "quarrel" with the testimony, you would probably be better off not to cross-examine. Whether you want to cross-examine depends entirely on your defense theory and the facts you need to elicit in support of that theory.

If you are going to cross-examine, be brief. Develop the questions so you not only lay a proper predicate, but also so you get the witness committed to the desired position before you score your point. Once he is committed, or boxed in, as it were, then bear down on the meat of the examination. Ordinarily you will not have more than a few points you want to make. When you get those points made, stop. Remember too, there is still the specter of redirect facing you, so limit the possible ammunition for rehabilitation once you have the testimony desired.

D. Do Not Cross-Examine the Witness Who Did Not Hurt You

Less seasoned veterans of courtroom battles may consider it necessary to cross-examine every witness. Clients sometimes favor this approach based on their exposure to Perry Mason but ultimately the burden of the outcome is on the attorney. Don't cross-examine on minor discrepancies just for the sake of the exercise or to demonstrate your perceived brilliant command of the case. Ask yourself, "Have I been hurt by this witness' testimony?" If not, then don't cross-examine. The only exception to this rule might be where your preparation shows that something favorable could and should be elicited from the witness. But even in this case, proceed with caution because the potential for harmful answers might outweigh the favorable information you are seeking. Remember, all lawyers invariably forget to ask questions on direct and wish they could have the witness back. If you cross-examine, your opponent will have time to think of the forgotten questions and cure their omissions on redirect.

E. Do Not Cross-Examine on Minor Matters Unless You are Certain of Success

Why take on the witness in areas where you have little to gain in the way of information and much to lose in terms of credibility? You should cross-examine on minor matters only if you can go in, make a quick score, and get out. You must keep your examination terse and hardhitting. Do not focus on unimportant discrepancies in the witness's testimony. Haggling over relatively insignificant points detracts from your presentation and confuses the jury as to the truly important elements of your examination. Regrettably, if the witness outmaneuvers you on a lesser point, the impact is not lessened commensurately in the jury's mind. The fact is that you have lost a battle, and it is noted for the record. In addition, the witness will gain confidence, and you will have greater difficulty in controlling him or her.

On the other hand, if you feel you can nail the witness, do it early. Try to build up the issue into one of life-or-death proportions as if the entire case rested on its resolution. It is possible to win cases on minor matters, if they can be used to destroy credibility. Thus, even though it is irrelevant that the light was red and not green, it is relevant that the witness insists incorrectly that it was red.

F. Maintain Your Theory of Defense Throughout the Cross-Examination

If the questions which could be asked are not supportive of your defense theory, don't ask them. If the testimony to be elicited supports your defense theory, then bear down until you get the desired testimony.

G. Do not Re-Emphasize Damaging Testimony

Don't give the prosecution double exposure by allowing the witness to repeat damaging testimony given on direct. If you must cover the subject, frame your questions as to the harmful testimony in such a way that the harmful testimony is not repeated.

H. If in Doubt About a Question, Do Not Ask It

In examining an adverse witness, the odds are such that if you do not know what the answer is likely to be and are in doubt about the question, the response will not be helpful and may well be damaging. So, if in doubt, don't.

I. Get the Witness Clearly Committed to Testimony Before Demonstrating His Error

Here you want to know with precision where exactly you are taking the witness and, with precision, get him there. You may want to first get the witness to testify as to agreed upon facts which support your defense theory. Then ask him a series of questions to which he will give affirmative responses. Begin in a soft, nonconfrontational manner to get the witness to agree with you. In this way, the witness is not alerted to the trap you are laying, is not aware of any antagonism, and is thus much less apprehensive himself. Don't alert the witness to the error you intend to demonstrate so that he can seize the offensive and attempt to explain it away. Write down your roadmap in detail. Don't become overanxious and step by seductive step you can lead the witness to the end of the journey and be at the destination before he knows you have arrived. Remember, use only one fact per question.

J. Never Ask an Adverse Witness "Why?"

Asking "why" will permit the witness to take control of the testimony, will almost always result in a rambling, self-serving explanation and eventual dilution of the testimony you have adduced. It will invariably cause serious damage to your position. SAVE THE ANSWER TO YOUR "WHY?" QUESTION FOR FINAL ARGUMENT. Assuredly, you can make the point sound much better than any adverse witness will ever permit.

K. Keep Good Eye Contact

When cross-examining a difficult witness, always maintain strict eye contact. Avoiding eye contact is often interpreted as weakness. Our life experiences verify this. People who will not look us in the eye are uncomfortable and less than forthright. If the cross-examining lawyer suspects the witness will become unresponsive, the lawyer must keep his eyes fixed on the witness when asking questions and when receiving the answer. It is important that counsel avoid looking away to refer to or jot down notes. By directing your
full attention at the witness' eyes, you serve nonverbal notice that you will put up with no nonsense, and permit no deviation from the question and answer approach you have been following. Control the runaway witness' eyes until the witness is off the stand.

L. Do Not Bear Down Once You Get the Answer You Want

This rule might appear repetitious and, if so, it warrants repeating. Quit while you are ahead. Don't let the witness go on and explain after you have your answer -- and don't give him the opportunity to rehabilitate himself or his testimony by continuing the line of questioning which elicited the desired response. When you begin a new line of questioning after having elicited the desired response, return to your soft, nonconfrontational demeanor.

M. Get Favorable Testimony First, Before Making the Witness Mad

When you are dealing with antagonistic witnesses, you know they hold views which oppose those of the defense. They will be on their guard. However, there may still be undisputed facts which will bear on your defense theory. Get these first. Get a sort of monotonous rhythm of affirmative responses going before you antagonize the witness or bring his submerged antagonism to the fore. You should not get angry with the witness, even though you might feign anger for effect. If you become angered or frustrated with the witness, you will have lost control of the testimony. Lull the witness into a sense of security with you, get him relaxed, get favorable testimony before coming back to areas guaranteed to make him mad. But don't fail to ask questions which might anger the witness just because of that potential. His demeanor, as well as yours, will go to the credibility ultimately accorded him by the jury.

N. Use the Approach of Asking the Witness "You Have Given the Impression that Such and Such is True"

Use the approach of asking the witness "you have given the impression that such and such is true," as this is much harder for him to get around than "Isn't it a fact that you're lying!"

O. Write on the Prosecutor's Exhibits

Often you can demonstrate favorable facts by writing on the prosecutor's exhibits so that the jury has the benefit of the demonstration on one exhibit. The prosecutor may squeal about your writing on their exhibits, but the fact of the matter is the exhibits are for the benefit of the jury and you can make a persuasive argument to this effect. Follow the Doug Tinker approach: "But Judge, they're the jury's exhibits, not the Prosecutor's."

P. Do Not Let the Jury Know When You've Been Hurt

If the witness' response has been harmful to your case, quietly pass on to the next question. If it is a response you can't ignore and must pursue, you might give the impression you're not hurt by saying "Well let's just talk about that".

Q. Leave Argument for Closing

Resist the temptation to argue your case too soon. When you get to the argument phase, you will be able to tie up all the loose ends, to highlight the inconsistencies in testimony and to address the witnesses' credibility. Argument incorrectly included in the cross-examination phase will usually have a negative effect on the jurors. It also gives the prosecutor an opportunity on redirect to have the witness explain away the points you have made. Once again, you can always make it sound better than any adverse witness.

R. Repeat Helpful Facts

Just because you heard an answer you liked doesn't mean the jury will remember it, or grasp the significance. After you get a favorable fact confirmed, continue to incorporate it in your questions in a manner that would not be subject to an objection for being repetitious. (Example: "So, after you lied to the Grand Jury, did you have a cup of coffee with the prosecutor?" "While you were having this cup of coffee, did you happen to tell the prosecutor about the lies you told?"). This will not only make certain that the jury remembers the fact, it will begin to condition them to accept your theory of defense.

S. Do Not Give the Witness Chances to Explain

Any experienced lawyer knows that the jury wants to know why a witness has testified to one set of facts at a given time and then testified on a different occasion to a different set of facts. Once again, the lawyer can always say it better in argument than the witness will say it from the stand. This paper advised earlier for counsel to never ask a "why" question on cross-examination. In matters of inconsistency, it is equally unwise to ask the witness their

reasons. The time and place to explain the witness' motivation to the jury is in the cross-examiner's closing argument. At that time, the witness can no longer contradict the cross-examiner or persuade the jury. If the witness is asked why the story has changed, the witness inevitably has a perfectly logical explanation. Whether the witness is an intentional deceiver or honestly and understandably mistaken, the witness will have an acceptable explanation for the jury.

In a simulated television trial concerning the assassination of President John F. Kennedy, an experienced cross-examiner, Vincent Bugliosi, was cross-examining a defense expert witness. The witness had testified in direct examination over twenty-five years ago and had not then been cross-examined. He had not told the Warren Commission, the Congressional Committee on Assassinations or the Federal Bureau of Investigation about certain aspects of Kennedy's brain injury. The defense team, led by Gerry Spence, was offering this evidence as critical to the defense. After skillfully establishing that the witness had never testified to these facts and had failed to tell anyone, including various government entities and the cross-examiner in a recent telephone conversation, Mr. Bugliosi asked the witness, in effect: "Why didn't you ever tell anyone this before, on what has to be the crime of the century?" The response of the witness, who had been in the military at the time of the assassination, was, in essence, "I had been ordered not to talk with anyone about the assassination and the autopsy." This is a classic example of one question too many that really didn't need to be asked.

T. Control the Difficult Witness

Many witnesses, especially police officers, want to aid the prosecution by adding unresponsive information to their answers on cross-examination. Any lawyer who has tried lawsuits for any significant period of time is aware of these difficult to handle runaway witness. Regardless of the lawyer's training or preparation, these witnesses always seem to appear in the most difficult of cases at the most difficult times. These witnesses ramble and talk at length in a nonresponsive fashion when all that counsel's question warranted was a simple "yes" or "no" answer.

If counsel yells or confronts the witness and cuts him off with "just answer my question" or requests the judge to instruct the witness accordingly, counsel will appear rude or as if he is afraid of the answer.

Still further, most judges will simply look at the jury and tell the witness that he may explain his answer if an explanation is necessary (which the witness will always claim that it is). The bottom line is that one can simply not count on the court for help.

For a lawyer to instruct a witness to "answer the question yes or no" is a signal to the jury that you are not in control. It suggests to the jury that you, as the lawyer, are trying to trick the witness or put words in the witness' mouth. Such exchange does nothing but lower the credibility of counsel and his position in the eyes of the jury. The following constitutes a number of tried and proven techniques for dealing with the difficult, nonresponsive and runaway witness. Naturally each technique should be tailored to a given situation and the amount of latitude that the jury will grant in those given situations:

1. Sarcasm

Counsel may consider peering up at the witness and semi-sincerely say, "perhaps you didn't understand my question". After you've done this a few times, the jury will get the idea and blame the witness instead of you. As for the witness who can never seem to understand your question, especially if he would rather not answer, you might ask, "are my questions more complicated than the prosecutor's?" Be extremely careful with this kind of sarcasm because it will backfire unless you are in the jury's good graces and unless the witness is clearly being evasive. If your question was indeed a simple one, you might just ask, "what part of the question did you not understand?". Of course, none of this will work if your questions are not clear so remember -- keep it simple and limit yourself to one fact per question.

2. "That Didn't Answer My Question, Did It?"

First approach:

Q: You did not identify my client?

A: It was a long day. I was very tired. There was a lot of stress from the robbery.

Q: That didn't answer my question, did it?

A: No.

Q: The question is: You did not identify my client?

A: No, I did not identify your client.

Second approach:

Q: You did not identify my client?

A: It was a long day. I was very tired. There was a lot of stress from the robbery.

Q: That didn't answer my question, did it?

A: Yes, I think it did.

Q: Repeat my question?

A: (If you're lucky) I don't know it.
or

A: (If you are very lucky and having one of those truly incredible days in the courtroom) ...I know it was something about your client. What was it?

This technique is clearly confrontational. In order to be successful, the jury must recognize that this confrontation is necessary before it is used. The witness must have repeatedly refused to answer simple questions. This is very effective after using the approach: "If the answer is yes, you will say yes?"

3. "So Your Answer Is Yes"

This is a very simple approach that can be used with the witness who is willfully non-responsive or tends to ramble. The cross-examiner's tone should be adjusted depending on the circumstances, but not the question itself. That is to say, if the unresponsiveness is obvious and is only the latest in a string of nonresponsive answers, the tone can be firm. If the witness' personality tends toward unresponsive answers or answers at length, then the lawyer can be more kind, gentle, and understanding. Regardless of where on the emotional spectrum the voice falls, the question remains the same: "So your answer is yes?" Then complete the question with the information you are seeking to elicit.

This technique is best utilized after a long unresponsive answer, without moving or taking your eyes from the witness' eyes and with a slight, helpful smile. Usually the affirmative response is quickly forthcoming.

This technique was used in *The Nuremberg Trials*. Sir David Maxwell-Frye's cross-examination of Herman Goring during the Nuremberg Trials contained the following example of this technique:

Maxwell-Frye: This order would be dealt with by your Prisoner of War Department in your Ministry, wouldn't it?

Goring: This department, according to the procedure adopted for these orders, received the order, but no other department received it.

Maxwell-Frye: I think the answer to my question must be "yes." It would be dealt with by the Prisoner of War Department, your ministry, isn't that true?

Goring: I would say yes.

4. Using The Court Reporter

The court reporter can be a valuable tool in controlling a difficult unresponsive witness. The judge is the highest ranking member of the courtroom. However, the jury views all court personnel as persons of authority. All members of the judge's staff are seen as "official" and are treated by the jury with special respect. More importantly, the courtroom staff is seen as neutral.

Having asked the witness a leading question and having received a rambling non-responsive answer, counsel should turn to the court reporter and ask, "May I please have my question read back to the witness?" The courtroom will grind to a chilled silence as the reporter locates the question and slowly reads it back.

Having the question repeated by a court official and read back with simple clarity is persuasive to the jury and should bring the non-responsive witness back to reality with a short, responsive answer.

Most judges consider the court reporter as an extension of the court. When using the court reporter technique, the judge seems to listen more intently to the read back and often visually, if not verbally, directs the witness to answer the question as read back. This is a very subtle way of having the judge volunteer to get involved by directing the witness to answer the question.

5. Repeat The Question

Some witnesses are impossible. The lawyer will ask a good, basic question, in its briefest, simplest form, using words of common understanding. The only possible answer is "yes". In order to avoid giving the cross-examiner an answer, the witness sidesteps or rambles with a non-answer.

Without taking your eyes from the witness, slowly ask the question again, in exactly the same words and tone of voice, articulating each word. If the witness is so foolish as to again ignore the obvious "yes," slowly lean slightly forward never taking your eyes from the witness. Repeat the identical brief, simply constructed question.

The successively slower repetition of the identical words and tone emphasizes to the witness, the court, and, most importantly, the jury that the witness is refusing to answer. The forward body motion emphasizes that all are waiting for a response.

What about the judge who will not permit the lawyer to ask the same question? This technique maximizes the likelihood that the judge will voluntarily intervene and insist that the witness answer the simple question. Further, counsel should argue that it is not redundant or repetitious to ask the same questions, if that question has not been answered.

Q: You were in a hurry?

A: I was traveling down the street, and started to go through a green light...I saw your client come out of the bank with a gun.

Q: (Slower) You were in a hurry?

A: Well, the light was green when I went through it. I could see everything just fine...including your client.

Q: (Slower Still) You were in a hurry.

A: Yes, I was in a hurry.

6. Using the Hand to Stop the Rambling Witness

A witness begins to answer the question with a long unresponsive answer. The lawyer can simply hold up his or her hand like a traffic officer's stop signal (we have all been psychologically conditioned). It sounds odd, but it is psychological body language at its best.

Once the lawyer has silently interrupted, the witness will wait to see what will happen next. The safest way to get back on track is to remind the witness gently of where the lawyer is in the questioning and begin the next question:

"Let me make sure we understand each other. My question is ..."

7. Eliminating Non-Responsive Answers Until You Get Desired Answer

This approach is particularly valuable to teach the witness that it can be embarrassing - even humiliating -to be a runaway witness. It tells the witness: "We can do this the easy way or the hard way, but we will do it."

The question is posed, and the witness gives a nonresponsive answer. The cross-examiner begins eliminating other possible factual variations. At some point during the process, the witness will offer to give the "yes" that was warranted by the original question asked. Do not let the witness off the hook. Continue with this technique until the witness insists on giving the response that you first requested.

Q: My client's shirt was white?

A: Well, I only saw it for a moment... (Minutes later the answer concludes without ever giving the color of the shirt.)

Q: The shirt was black?

A: No.

Q: The shirt was green?

A: No.

Q: The shirt was purple?

A: No.

Q: The shirt was yellow?

A: No it was white. It was white.

Q: Thank you.

The more undesirable the witness and wilful nonresponsive the answer, the more outrageous the process of elimination.

8. The Witness Who Does Not Recall

The "I don't recall" response is an effective defense mechanism for any evasive witness. It becomes a smoke screen of failed memory and prevents further inquiry. If counsel is not prepared to deal with this tactic, cross-examination will be stymied and the witness will leave the witness stand undamaged.

First, you should recognize that a failure of memory on the part of a hostile witness is actually an opportunity to exploit. The witness should initially be neutralized by carefully exploring the scope of the absence of recollection. Demonstrate the witness's inability to testify on as broad a range of issues as possible.

You may want to take the additional step of demonstrating the implications of the witness's failure to recollect for the jury:

Q: Who was present at the drug buy of January 1, 1993?

A: I don't recall.

Q: If you don't remember who was present at the meeting, then I take it that you can't contradict Mr. Thompson's testimony that my client was not present.

Counsel should demonstrate that the witness's recall of contemporaneous events is unimpaired. The witness should be set up for this approach during background examination before asking about the key events. At that time, he will be unaware that you are actually pinning him down for later impeachment. Then demonstrate that the witness has a selective memory. Refer to his direct testimony or defensive reactions on cross to point out that he has no problem recalling information that is helpful to his side.

If the forgotten facts are crucial to the resolution of the prosecution, then they probably would have been important to the witness at the time of their occurrence. Common experience indicates that people tend to remember such things. Therefore, you should highlight the importance of the events in questions to the witness. For example, you might show that someone in his position is actually responsible for remembering or at least making a record of such matters. The foundation for this type of examination can also be laid early in the examination during the background questioning, when you determine the witness' responsibilities and duties and the type of information necessary to carry out those duties. Such questions should be asked with little emphasis in an almost perfunctory fashion. Make the witness think the questions are purely routine, and thus conceal your purpose.

9. The Witness Who Asks for Definition

We have all experienced it many times. We ask the witness a question ("Have you ever performed an identification procedure before?") and he asks you to define your terms ("That depends on what you mean by an identification procedure"). This type of response disrupts the flow of cross-examination and puts you on the defensive. Keep in mind that this is precisely what the witness is trying to do. He is seizing control, while gaining time to formulate a response. Undoubtedly, some problem will be found with your definition, which you were forced to come up with on the spur of the moment, and the witness will haggle with you over your definition. Then it looks as if you have failed to answer the question. The jury will not hold this delay against the witness, because it appears to them that he is merely trying to understand your question. Don't take the bait. If so, you will appear to be unfair.

Obviously, you have got to turn the tables quickly and decisively with this type of witness. There is a simple and effective technique available. It will not only allow you to regain control, and put the witness back on the defensive by forcing him to answer. It will also send an important psychological message. The witness will realize that you are skillful and experienced and that you will not relinquish control of the examination.

Ask the witness to state their definition of the term, and then incorporate it into your question:

Q: How would you define identification procedure Officer Smith?

A: Well... a photo spread, a physical lineup or a show up.

Q: Using your definition, have you ever performed an identification procedure?

This method has a positive impact on the jury. Besides demonstrating that you are in command, you demonstrate your fairness and objectivity through your willingness to use the witness's own definition. By allowing the insertion of a familiar definition, you have permitted the witness to anticipate in formulating the question. If he fails to answer, there will be little excuse for evading what is in effect his own question. Alternatively, you should be ready to employ definitions from a dictionary or other unimpeachable sources. If the witness is persistent to the degree of being stubborn (i.e. a Brewer and Bickel deposition witness) and the jury senses it, ask for a recess to use the dictionary in the judge's library. This delay will be charged to the witness.

10. Pointing Out Signs of Shifty or Evasive Demeanor

A polygraph examination merely provides evidence of physiological factors that are believed to relate to truthfulness. A qualified examiner must interpret the results. The parameters measured, such as heart rate or skin response, are for the most part not ordinarily observable.

In a way, the jury functions much like a polygraph, searching for observable clues to credibility, such as a shifty and evasive demeanor. Of course, squirming about in the witness chair may prove no more than that the witness becomes dreadfully self-conscious when everyone is staring.

The jury's task of assessing credibility is far more complex when it evaluates testimony. During trial, if you want to put pressure on a nervous witness, you should consider focusing on certain physical factors in your questioning in order to note their existence in the record. This is one area where the "why" question may be appropriate. Ask the witness whether he/she is nervous; why he/she is sweating; why he/she will not look you in the eye; why he/she looks at the prosecutor before answering; or why he is taking long pauses before answering each question. You will notice that these are open-ended questions. There is some risk involved in asking them, because the response is likely to be very defensive and hostile. You should take this risk only where you have scored heavily and want to rattle the witness even further.

A no risk question that can be posed to snitches and cooperating witnesses (not police officers) is to ask: "Is there something distinctive that you do... something we all can observe... when you lie?"

The witness will invariably answer "no" at which time the predicate is established to argue that "we" (i.e. the jury) simply can't tell when and if he is lying and that it appears he is a seasoned liar.

VIII. CONCLUSION

While cross-examination may be an art, effective cross-examination is available to any lawyer willing to work for it. Some lawyers are as naturally gifted as the great painters and musicians. Others can achieve the same results, but have to do it with hard work and long hours of preparation and thought. Always remember that the only thing that counts at the end of a trial is the information the jurors recall which controls their verdict. A jury's attention span is short. If you start to forget this, just remember your days in college when you had that hour and a half class right after lunch. Sometimes a cross-examination needs to be long, even several days. This does not mean you can't make it interesting.

There is always more than one way to ask a question or to make a point. Any lawyer can ask it the boring way. The winning lawyers think it through and come up with the way that has the most impact.

Also remember that the purpose is not to impress your fellow lawyers or even your client. You may be able to brag at the bar about the clever legal points you scored or the snide remark you laid on the prosecutor. Just remember you may have to answer the final question, "Oh yeah, well what was the verdict?".

May 9, 1996

Fort Worth, Texas

Re:

Dear

I represent _____ in a case where the state has accused her of capital murder and is seeking the death penalty. In order to assist my client, I am interested in learning the truth concerning all the facts of this case.

You name has been listed by the State as a prospective witness in this case.

I would very much appreciate the opportunity to spend 10 to 15 minutes with you and learn what you know about this accusation. I would be agreeable to meet with you at any time and place convenient to you. I have no objection to your parents being present while we visit.

Please call me at my office number above or at my home number _____ in the evening so that we can make arrangements to meet and discuss your knowledge concerning this matter.

Thank you in advance for your willingness to meet with me.

Sincerely,

MARK G. DANIEL

MGD/sb

APPENDIX "A"

May 9, 1996

Chief Medical Examiner
Tarrant County Medical Examiner's Office
200 Geliks Gwozdz
Fort Worth, Texas 76104

Re: *Deceased:*
Date of Death:
Fort Worth Police Department Incident No.

Dear Sir:

I represent _____ who is a subject of the above investigation being undertaken by the Fort Worth Police Department. It is my understanding the above matter has been referred to your office for purposes of forensic and pathology consulting work. I presume that you will be conducting an autopsy, blood spatter analysis, firearm analysis, gunshot residue analysis, blood comparison and toxicology.

On _____ behalf, I am requesting this matter be referred to a Justice of the Peace and that a full and complete public inquest be undertaken pursuant to Articles 49.04, 49.05, 49.14 and 49.15 of the Code of Criminal Procedure. I am certain that you can recognize the benefits of this procedure as opposed to the behind closed doors investigations customarily performed by your office. Such an open forum would permit a full, complete and objective analysis of all of the evidence in the case and opinions forthcoming by your office. Further, this format would permit your opinions to be tested and examined.

Additionally, I have retained _____ of Forensic Consulting Services to assist in my representation of _____. I would ask that _____ be permitted to be present at any time someone from your office is conducting any autopsy, analysis or testing on any evidence in this case.

Please contact me immediately to make the necessary arrangements.

Sincerely,

MARK G. DANIEL

MGD/sb

May 9, 1996

Chief Medical Examiner
Tarrant County Medical Examiner's Office
200 Geliks Gwozdz
Fort Worth, Texas 76104

Re: *Deceased:*
Date of Death:
Fort Worth Police Department Incident No.

Dear Sir:

I am writing to follow up on our conversation of this past Monday concerning the above matter.

You had previously advised in correspondence on the ___ day of _____, 1995 that your office did not engage in public inquests out of respect to the family of the decedent. I think it is important that you understand that my client, _____ constitutes the family of the deceased. On his behalf and with his approval, I would once again specifically request that the work and investigation undertaken by your office be conducted in a public inquest format.

I anticipate that you will not agree to the public inquest format which I have suggested. Therefore, I am again requesting that _____ be present in your office to assist during any forensic testing including but not limited to firearms testing, reconstructions and forensic analysis. I am certain you can see where presence and experience would bring the highest level of expertise available in the Fort Worth area to this investigation. I am making him available for that reason. In the even that you do not agree to comply with that request, I would merely request that _____ be present any time such work is performed. You indicated during our telephone conversation of the ___ day of _____ 19__ that you had no objection to his presence as long as the Fort Worth Police Department had no objection.

I conferred with _____ on the ___ day of _____ 19__ concerning _____ presence, he indicated that he would be agreeable for me to communicate to you that he had no problem with _____ being present and observing your investigative procedures but had reservations concerning _____ active participation in this investigative work. _____ and _____ may be reached by phone at _____ to confirm this position.

Therefore, I am again requesting in the alternative _____ be present for any and all forensic testing including firearm analysis testing, gunshot residue examination, forensic testing and crime scene reconstruction. _____ can be available with a two hour notice.

Thank you again for your courtesy and attention to this matter.

Sincerely,

MARK G. DANIEL

MGD/sb

January 9, 2002

Police Department

Re: *Open Records Request*
Report Nos. _____

Dear Sir:

I am writing to request information pursuant to the Texas Open Records Act, Chapter 552 of the Government Code. Specifically, I am requesting all reports, notes, memos, jail records, booking records, offense reports and witness statements pertaining to the _____ Police Department report numbers listed above. It is my understanding that these matters have been closed and do not constitute an ongoing law enforcement investigation.

Further, I am requesting your department's instruction training and procedures manuals for your police officers. I am also requesting any and all resignation and/or termination records relating to Officers _____ and _____.

It is my opinion that the above and forgoing are public records and are subject to the Texas Open Records Act. If you object to the disclosure of the aforementioned request, please contact me immediately. Otherwise, I would appreciate you having the above referenced documentation copied and sent to me at the above address. I will promptly reimburse any costs associated with the photocopying of the requested information. Please include a statement of charges when forwarding the requested information.

Thank you for your cooperation and assistance with the above request.

Sincerely,

MARK G. DANIEL

MGD\sb

NO. _____

THE STATE OF TEXAS	§	IN THE CRIMINAL DISTRICT
VS.	§	COURT NUMBER _____, OF
_____	§	TARRANT COUNTY, TEXAS

MOTION FOR PRETRIAL EVIDENTIARY HEARING TO DETERMINE COMPETENCY AND QUALIFICATIONS OF WITNESS: _____

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, _____, Defendant in the above entitled and numbered cause, by and through his attorney of record, MARK G. DANIEL, and pursuant to Rules 104(a) and 601(a)(2), Texas Rules of Criminal Evidence, files this Motion for Pretrial Evidentiary Hearing to Determine Competency and Qualifications of Witness and in support thereof would show the Court the following:

I.

That _____, whom the Defendant in good faith believes will appear as a witness in the trial of the above cause, appears to suffer from psychiatric condition, and does not possess sufficient intellect to which he/she would be interrogated due to his/her, psychiatric condition and lack of intellect, both at the time of the alleged offense and at the time of trial, such that he/she would not be able to adequately recall the facts and circumstances at the trial of this cause.

II.

The competency of any witness is a preliminary question and a pretrial evidentiary hearing is necessary to adduce facts under oath for the Court to make a legal determination regarding the sufficient intellect to relate transactions with respect to which she would be interrogated, both at the time of the alleged offense and at time of trial, and the degree that such would impact on the competency and qualification of said witness, _____, to testify in the trial of the above cause. APPENDIX "E"

WHEREFORE, PREMISES CONSIDERED, the Defendant prays this Honorable Court set this Motion for pretrial evidentiary hearing, require the appearance of Melissa McCullough and require the State of Texas to present evidence in support of her competency and qualification as a witness in the trial of the above cause.

Respectfully submitted,

_____

MARK G. DANIEL, SBN 05360050
Sundance Square
115 W. Second St., Suite 202
Fort Worth, Texas 76102
(817) 332-3822
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion has been hand delivered/mailed to the Tarrant County District Attorney's Office, 401 W. Belknap, Fort Worth, Texas on this _____ day of _____, 1995.

_____
MARK G. DANIEL

NO. _____

THE STATE OF TEXAS	§	IN THE CRIMINAL DISTRICT
VS.	§	COURT NUMBER _____, OF
_____	§	TARRANT COUNTY, TEXAS

ORDER

On the _____ day of _____, 1995, came on to be heard the foregoing Defendant's Motion for Pretrial Evidentiary Hearing to Determine Competency and Qualifications of Witness, and it is ORDERED:

GRANTED, and is set for hearing on the _____ day of _____, 1995; or

DENIED, to which action of the Court the Defendant excepts.

_____
JUDGE PRESIDING