STATE v. DELANEY

PROBLEMS AND TEACHING NOTES

Second Edition
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STATE v. DELANEY

PROBLEMS AND TEACHING NOTES

Second Edition

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NATIONAL INSTITUTE FOR TRIAL ADVOCACY
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SECTION I

PROBLEMS
INTRODUCTION

The problems in this book are intended to simulate realistic courtroom situations. Advance preparation is essential to their successful utilization as instructional materials.

These problems are based on the *State v. Delaney* case file and are designed to simulate the materials a trial lawyer would have on the eve of trial. The materials must be mastered before attempting to perform the problems in a courtroom setting.

All years in these materials are stated in the following form:

- YR -0 indicates the actual year in which the case is being tried (i.e., the present year);
- YR -1 indicates the next preceding year (please use the actual year);
- YR -2 indicates the second preceding year (please use the actual year); etc.

At the outset we should acknowledge that it is impossible for one person to teach another how to become a trial lawyer. Advocacy is an art, the performance of which is dependent on talent and mastery of skills. One becomes a trial lawyer through a mixture of predisposition, motivation, observation, doing it, reading how others have done it and then constantly repeating the latter three—observing, doing, and reading.

It is possible, however, to simulate some of the intellectual, ethical, emotional, and physical demands of trial lawyering and advocacy by teaching in a mock courtroom or classroom setting. That is what is done by the National Institute for Trial Advocacy. These materials are intended to serve as the basic teaching materials for trial advocacy courses and programs that are based upon the learning-by-doing method. Although the materials have been prepared for NITA programs, they are adaptable for use in other settings.

Most of the skills learned in a trial advocacy course will be applicable to trial work generally, without regard to the nature of the case. Obviously, however, different kinds of cases present different problems. We believe that these materials illustrate some of the more significant peculiarities of robbery, eyewitness identification, and alibi in a criminal trial.

The student should read the assigned case file as soon as possible. A reading of the complete case file early will permit the student to fit an individual problem into context of the entire litigation. If the student is using these teaching materials as a part of a program, then the student should read the assigned problems and do as much preparation as possible in advance of the program. Preparation time during the program will be limited. Thus, advance preparation will allow a more efficient use of the limited time available during the program.
DIRECT, CROSS, AND REDIRECT EXAMINATION

The ability to examine and oppose the examination of witnesses in open court in an adversarial setting is the most basic skill of the trial lawyer. Yet, the most common criticism of trial lawyers is that they are unable to conduct proper, intelligent, and purposeful examinations and to oppose these examinations.

As with any skill, practice is the only sure way to achievement. The practice should be conducted with some guidelines in mind.

1. The purpose of any witness examination is to elicit information.
2. The basic format is an interrogative dialogue.
3. The witness is probably insecure. She is appearing in a strange environment and is expected to perform under strange rules. This is a handicap you must overcome on direct and an advantage you have (and may choose to exploit) on cross.
4. Your questions should be short, simple, and understandable to the witness, the judge, and the jury on both direct and cross-examination.
   (a) It is imperative that your audiences—the judge and the jury—understand your question so that they can reasonably comprehend the answer.
   (b) On direct examination, the insecurity or anxieties of the witness will be increased if she does not understand your questions.
   (c) On cross-examination, the complex argumentative question provides a refuge for the witness to evade the point.
5. As a general proposition, you may not lead on direct except as to preliminary matters or to refresh the recollection of the witness. Both of these exceptions are discretionary with the judge. In any event, on direct examination, leading questions and the perfunctory answers they elicit are not persuasive.
6. On cross-examination you may lead and you should do so. Control of the witness on cross is imperative.
7. At the outset on direct examination, have the witness introduce herself. Then place her in the controversy on trial and elicit the “who, where, when, what, how, and why” of the relevant information the witness has to offer. Then stop. Do not be repetitious.
8. If you know that the cross-examination will elicit unfavorable information, consider the possible advantage of eliciting it during your direct examination.

9. Do not conduct a cross-examination that does nothing other than afford the witness an opportunity to repeat her direct testimony.
   (a) If there is nothing to be gained by cross-examination, waive it.
   (b) If you can accomplish something by cross-examination, get to it. Organize your points and make them.
   (c) Be cautious about cross-examining on testimony elicited on direct that was favorable to your position. You may lose it.
   (d) Be cautious about asking questions to which you do not know or cannot reasonably anticipate the answer. Be particularly cautious in these situations if the only evidence on the point will be the unknown answer.

10. Listen to (do not assume) the answers of the witness. As an examiner, you are entitled to responsive answers. Insist on them by a gentle, repetitive question on direct or a motion to strike on cross. Of course, if the answer is favorable, accept it and return to the pending question.

11. Objections to the form of the question must be made before an answer is given. If the question reveals that the answer sought will be inadmissible, an objection must precede the answer. The grounds of the objection should be succinctly and specifically stated. If the question does not reveal the potential inadmissibility of the answer, but the answer is inadmissible, a prompt motion to strike should be succinctly and specifically stated. In most jurisdictions only the interrogator is entitled to move to strike an answer on the sole ground that it was unresponsive to the question. If the answer is unresponsive and contains objectionable matter, then the opposing counsel is entitled to object.

12. If an objection to the content of the answer (e.g., relevancy or hearsay), as opposed to the form of the question, is sustained, then the interrogator should consider the need for an offer of proof at the first available opportunity. If an objection to the form of the question is sustained, then the interrogator should rephrase the question to cure the objection.
PROBLEM 1

Detective Alex Lowrey

Assume that the case is at trial and the prosecution’s first witness is Detective Lowrey.

(a) For the prosecution, conduct a direct examination of Detective Lowrey.
(b) For the defense, conduct a cross-examination of Detective Lowrey.
(c) For the prosecution, conduct any necessary redirect examination.

PROBLEM 2

Ardell Delaney

(a) For the defense, conduct a direct examination of Ardell Delaney.
(b) For the state, conduct a cross-examination of Ardell Delaney.
(c) For the defense, conduct any necessary redirect examination.
HANDLING AND INTRODUCTION OF EXHIBITS

The ability to examine and oppose the examination of witnesses in open court in an adversarial setting is the most basic skill of the trial lawyer.

The second basic skill of the trial lawyer is the proper, efficient, and orderly handling and introduction of tangible evidence. Again, however, a common criticism of the trial bar is its lack of facility in this truly simple undertaking.

This is all the more regrettable when one considers the highly persuasive quality of relevant exhibits. Jurors (and judges, too) trust them. They are the real thing. They do not exaggerate as witnesses do, and they do not overstep their bounds as lawyers do. Many a case has been won or lost because a particularly intriguing exhibit was received in evidence or excluded.

The four touchstones for the handling and introduction of exhibits are:

1. Authenticity
2. Relevance
3. The Hearsay Rule
4. The Best Evidence Rule (or Original Documents Rule)

These four touchstones must be satisfied before an exhibit can be received into evidence. Some call it “laying the foundation.” By whatever phrase, the essential element is testimony establishing that the exhibit is authentic and relevant and complies with both the hearsay and best evidence rules.

Authenticity is simply a demonstration that the exhibit is what it purports to be. Is this thing—whatever it is—that is being offered in evidence prima facie that which it purports to be? The essential requirement is testimonial vouching for the thing unless, of course, authenticity is established by admissions in the pleadings, discovery, or a request to admit. See, e.g., Fed. R. Civ. P. 36.

Relevance, as well as the hearsay and best evidence rules, is intrinsically dependent on the issues raised in the case and the purpose for which the exhibit is offered into evidence. In each instance, however, the foundation must be laid demonstrating that the exhibit is relevant and that it complies with the hearsay and best evidence rules.

For each exhibit, counsel should check the four touchstones and then lay the foundation necessary for its admission in evidence through the testimony of one or more witnesses.

1 The standard is a prima facie showing of authenticity, as the court determines admissibility. The weight to be assigned to the particular piece of evidence is left to the fact-finder.
As in the case of witness examination, the skill of handling and introducing exhibits is developed by practice and is conducted with certain guidelines in mind.

1. Select with care the witness or witnesses you will use to lay the foundation for your exhibits. A mistake here could be fatal.

2. Because the introduction of exhibits usually is done through witnesses, keep in mind the basic principles of witness examination.

3. Have the exhibit marked for identification by the appropriate court official (usually the court reporter or clerk) at the earliest opportunity. Many lawyers have their exhibits marked for identification prior to trial in the sequence in which they expect to use them. Some judges insist on this. It is a good practice in cases involving many exhibits. But also consider the advantages to be gained from a brief pause (respite for the witness) and a little bit of the lawyer doing his or her “thing” that attends your stepping to the bench and requesting in a voice the jury can hear, “Your Honor, may the reporter (or clerk) mark this document (or object) Defendant’s Exhibit 1 for Identification?”

4. Once the exhibit has been marked for identification, include that identification in any reference you make to the exhibit and see to it that your opponent, the witnesses, and the judge do likewise. Never permit the record to read merely, “this letter” or “the cap” or “the photograph” or “the diagram.”

5. Proceed to lay the foundation as follows:

   (a) Elicit from the authenticating witness those facts that qualify him or her to authenticate the exhibit. For example, have the witness say the witness saw the coin bag in the gutter.

   (b) Have the witness identify the exhibit by saying, for example, that State’s Exhibit 1 is the bag (or looks like the bag) the witness saw in the gutter.

   (c) If the condition of the exhibit is a factor in its relevancy, either elicit testimony that its condition has not changed between the event and the time of trial, or offer a testimonial explanation of the change in condition.

   (d) If the exhibit is a reproduction of a place, a thing, or an event (e.g., a photograph, tape recording, video, or diagram), elicit testimony that it fairly and accurately portrays that which it purports to portray.

   (e) If more than one witness is required to authenticate or connect the exhibit, withhold your offer until you have completed your foundation. A premature offer and rejection can condition a judge to reject the exhibit later when the foundation has been completed.

6. Once the foundation for an exhibit has been laid properly, offer it in evidence and obtain a ruling on its admissibility. In some jurisdictions an exhibit may not be offered during cross-examination and, in those instances, the formal offer of the exhibit is reserved to your case-in-chief or rebuttal.

7. When you are opposing the introduction of an exhibit, you are entitled to conduct a cross-examination on the foundation before the court rules on the offer. The scope of the
examination, often referred to as voir dire on the exhibit, is limited to the admissibility of the exhibit. The proponent of the exhibit should be alert to so limit the voir dire on the exhibit and not permit the opponent to conduct a general cross-examination on the weight that is to be given to the exhibit.

8. When you are opposing the introduction of exhibits, be on the alert for changed conditions or distortions (particularly in photographs, videos, or diagrams). Insist that an adequate testimonial explanation of the changes be given by the authenticating witness.

9. Do not permit your opponent to display tangible items in the presence of the jury until they are marked for identification and proffered to the witness for identification.

10. Keep a separate record of the status of your exhibits and those of your opponent. Know at all times their identification numbers, their general descriptions, the witness or witnesses who authenticated them, and whether they have been offered and received or excluded. Many lawyers keep a columnar record somewhat like this:

<table>
<thead>
<tr>
<th>No.</th>
<th>Description</th>
<th>Date or page of record offered</th>
<th>Date or page of record received</th>
<th>Date or page of record refused</th>
</tr>
</thead>
</table>

11. At the close of your case, if you are uncertain as to the status of any of your exhibits, re-offer them before you rest.

Each exhibit has its own standards of authenticity and admissibility. For our purposes, they are better demonstrated than described.
Problem 3

*Photo*

Assume the case is at trial.

(a) For the state, introduce into evidence the photo of the interior of Miller’s Fine Jewelry marked State’s Exhibit 1 for Identification. You may use any witness(es) you desire to lay the foundation for the exhibit. Examine the witness(es) to the extent necessary to lay the foundation, and then offer the exhibit. Be prepared to discuss your choice of witnesses.

(b) For the defense, oppose the examination of the witness(es) and the offer of the exhibit. Be prepared to voir dire the witness(es) on the admissibility of the exhibit.

Problem 4

*Coin Bag and Silver Dollar*

Assume the case is at trial.

(a) For the state, introduce into evidence the coin bag and silver dollar recovered by supervising ID Technician Nicholson. The coin bag and the silver dollar have been jointly marked as State’s Exhibit 1 for Identification. You may use any witness(es) you desire to lay the foundation for the exhibit. Examine the witness(es) to the extent necessary to lay the foundation, and then offer the exhibit. Be prepared to discuss your choice of witness(es).

(b) For the defense, oppose the offer of the exhibit. Be prepared to voir dire the witness(es) on the admissibility of the coin bag and silver dollar.
IMPEACHMENT AND REHABILITATION OF WITNESSES

Impeachment

Although it is a part of the cross-examiner’s art, impeachment is a sufficiently difficult problem in itself to warrant separate consideration.

1. The cross-examiner must consider not only how to impeach, but also whether the witness should be impeached at all. Just as the trial lawyer should not cross-examine in some situations, he often may decide wisely that, although impeaching evidence is available, it should not be used. If the witness has not hurt your case, usually it is better not to impeach and avoid the risk of offending the jury. If the testimony of a witness can be turned to your advantage, as in the case of a truly impartial expert witness, do so and do not impeach.

2. Foundation for impeachment by prior inconsistent statement:
   (a) Under the law of most jurisdictions, the witness must be confronted with a prior inconsistent statement during cross-examination. If his or her attention has not been called to the earlier statement, the extrinsic evidence of it will not be admissible. Cross-examination should be specific as to the time, circumstances, and content of the earlier statement.
   (b) The rule requiring a foundation for prior inconsistent statements is relaxed under the Federal Rules of Evidence. Federal Rule 613(b) provides that the witness must be “afforded an opportunity to explain or deny” the prior inconsistent statement in order for extrinsic evidence to be admissible, but no time sequence is specified. Therefore, as long as the witness is available to explain the inconsistency if she so desires, extrinsic proof is admissible.
   (c) Most advocates will prefer to lay a foundation on cross-examination regardless of whether or not it is required under the rules. The reason for this is two-fold. First, the witness may admit the statement, making extrinsic evidence unnecessary. More significantly, confronting a witness with her own inconsistency often will have a dramatic impact that cannot be duplicated by introducing evidence of the earlier statement through another person.

3. If the witness denies making an earlier statement, be prepared to prove it by extrinsic evidence.

4. If the witness admits making an inconsistent or otherwise impeaching statement, do not ask questions that give her an opportunity to explain it away, unless you are certain that this
cannot be done. The attorney who has called the witness will have an opportunity on redirect to elicit explanations, if any are available. This affords you the opportunity to re-cross.

5. There is no need, and it is usually harmful, to dwell on the impeaching matter after it has been brought out in cross-examination. Remember, you have a closing argument.

**Rehabilitation**

If a witness has been impeached during cross-examination, counsel must evaluate whether to attempt to rehabilitate the witness on redirect examination.

1. As with any redirect examination, counsel should limit the scope of the redirect to those items in which the witness needs an opportunity to explain or amplify upon her testimony after the cross-examination. Redirect examination and rehabilitation of a witness is not the time to rehash the direct testimony once again.

2. In considering whether to rehabilitate a witness on redirect examination, counsel should first of all be absolutely certain that the witness has, in fact, been impeached. If the witness has not been effectively impeached, do not attempt to rehabilitate the witness as you may only worsen matters.

3. Rehabilitation generally consists of providing the witness with an opportunity to explain the circumstances pertaining to the impeachment and to elicit any exculpatory factors. Give the witness the opportunity to put the impeachment in context.

4. If the impeachment can be explained, do it; if not, leave it alone on redirect as you just may worsen matters.

5. If the witness has been impeached by a prior inconsistent statement, counsel should consider the admissibility of any prior consistent statements. See Fed. R. Evid. 801(d)(1)(B). Prior consistent statements are generally admissible if they rebut an express or implied charge of recent fabrication.
PROBLEM 5

Val Cavarretta

The case is now at trial. The state has called Val Cavarretta, and Cavarretta has testified on direct examination consistent with Cavarretta’s direct testimony at the preliminary hearing as set out on pages 61–63 of the case file.

(a) For the defense, conduct a cross-examination and impeachment of Val Cavarretta. Use the information in the police report on page 33, the police report at pages 35–37, the arrest and conviction record on pages 47–48, and cross-examination at pages 62–63 of the case file.

(b) For the state, conduct a redirect examination to the extent it is necessary to rehabilitate the witness.

PROBLEM 6

Marty Pafko

The case is now at trial. The state has rested its case, and the defense has called Marty Pafko as a witness. Pafko has testified on direct examination consistent with Pafko’s statement to Investigator Elwood Jurges as set out at pages 69–70 of the case file. Pafko in the direct testimony made no mention of Pafko’s prior conviction for receiving money for transmittal to a foreign country, no mention of Pafko’s taking calls for Delaney, and no mention of what Pafko told Detective Lowrey about Delaney’s whereabouts on September 14.

(a) For the state, conduct a cross-examination and impeachment of Pafko. Use the information in the statement on pages 41–42 of the case file, the conviction record on page 49, and the statement to Investigator Jurges at pages 69–70.

(b) For the defense, conduct a redirect examination to the extent necessary to rehabilitate the witness.
EXPERT WITNESSES

As a conservative estimate, 80 percent of all trials in courts of general jurisdiction involve the examination of skilled or expert witnesses. For example, in personal injury cases, there are medical experts and experts in accident reconstruction; in criminal cases, there are chemical, ballistics, fingerprint, DNA, and handwriting experts; and in commercial cases, there are economists and market analysts. The opportunities for use of skilled or expert witnesses are limited only by human knowledge and the trial lawyer's ingenuity. Accordingly, no lawyer is worthy of the name “trial lawyer” until she has mastered the techniques that attend the direct and cross-examination of skilled or expert witnesses.

The function of the expert witness is to bring to the trial of a case knowledge beyond the everyday and to apply that knowledge to the facts in the case so that jurors may better determine the issues.

The basic guidelines are stated simply, but they are not so simple to apply.

1. **Qualifications.** The proposed expert witness must be qualified by training or experience in a recognized field of knowledge beyond that of the average layman.2

2. **Explanation of Expertise.** If the field of knowledge is at all esoteric, the expert witness should provide a brief explanation of it, particularly with reference to its application to the case at hand.

3. **Ruling on Qualification as an Expert.** In some jurisdictions, after the witness’s qualifications have been elicited, the witness is tendered to the court as an expert in his or her field, and the court either accepts or rejects the witness as an expert at that time. Some courts, however, are reluctant to give their imprimatur to the witness’s testimony or to rule on the witness’s qualifications as an expert prior to hearing the actual opinion the expert will be asked to give. In those jurisdictions, the direct examination simply proceeds unless there is an objection, at which time the court rules.

4. **Cross-Examination on Qualifications.** The opposing counsel may voir dire (cross-examine) the witness on his or her qualifications at the time the witness is tendered to the court as an expert or, if that procedure is not utilized, before the witness is permitted to express his or her opinion.

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2 Under the Federal Rules of Evidence, the test is whether the witness's knowledge, training, or experience will assist the trier of fact in understanding the evidence or determining a fact in issue. Note also that the witness, if qualified as an expert, may testify in the form of an opinion or otherwise. FED. R. EVID. 702.
5. **Basis of Opinion.** The direct examination should elicit a description of what the expert did with regard to the case and the facts that are the basis of the opinion.3

The facts that may be used as the basis for the expert’s opinion and may be elicited on direct examination are limited to those facts that:

(a) The expert personally observed,

(b) Were elicited in the courtroom and heard by the expert, or

(c) Were transmitted to him or her hypothetically.

In the federal courts and in some state courts, facts that were made known to the expert outside of court, and other than by his or her own perception, may also be used if they are of a type reasonably relied upon by experts in the expert’s field. See Fed. R. Evid. 703.

In most state courts, the hearsay rule and the other traditional principles of admissibility apply to expert testimony. Opposing counsel should keep an ear carefully tuned for the application of these principles during the expert’s direct examination. In the federal courts “[f]acts or data that are otherwise inadmissible shall not be disclosed to the jury . . . unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.” Fed. R. Evid. 703. In some state courts that have relaxed the hearsay rule and the other traditional requirements for admissibility for expert testimony, the expert may testify to, and base his or her opinion on, facts that are not admissible in evidence.

6. **Opinion.** The expert’s opinion may not be speculation or conjecture. Rather, it must be an opinion to a reasonable degree of certainty within the expert’s field. Most courts require that the opinion be elicited in a two-question sequence: (1) Do you have an opinion as to _____?, and then (2) What is that opinion? This gives opposing counsel an opportunity to object before the opinion is heard by the jury.

When the expert’s opinion is based on facts that the expert did not personally observe or hear in the courtroom, the hypothetical question format is required in most state courts. However, in the federal courts and some state courts, the hypothetical question no longer is required, and the trial lawyer has the option of using it or not. Fed. R. Evid. 703, 705. When this format is optional, the trial lawyer’s decision is a matter of trial strategy, which depends on many factors. Some of those factors may be demonstrated in the exercises.

The primary objections that are available to opposing counsel when the hypothetical question format is utilized are:

---

3 In most state courts the direct examination must elicit the factual basis for the expert’s opinion as a foundation prerequisite for the expert stating his or her opinion. This is the method for ensuring that the expert’s opinion is based on admissible evidence. While in the federal courts the underlying facts for the expert’s opinion need not be disclosed on direct examination, the expert will be required to disclose them on cross-examination. Fed. R. Evid. 705. The court, however, has the discretion to require that the underlying facts be disclosed prior to the expert stating his or her opinion when the interest of justice so requires. See Fed. R. Evid. 703.

The underlying facts for the expert’s opinion are usually quite persuasive, and most trial lawyers will make them an integral part of their direct examination. The trial lawyer has the option in federal court, and he or she may tailor the direct examination to meet the needs of the particular case.
(a) That the hypothetical question included facts not in evidence, or
(b) That it did not include relevant facts that are in evidence.

Thus, in a complicated case the hypothetical question can be quite cumbersome. In anything but
the most routine case, it can be a delicate procedure with pitfalls to snare the unwary.

7. Cross-Examination. The expert witness may be cross-examined with respect to his or her
opinion on the basis of:

(a) The expert’s qualifications,4
(b) Other facts in the case, or
(c) The published opinions of other recognized authorities in the field (learned treatises).

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4 The cross-examination of qualifications discussed in paragraph 4 is a voir dire on the admissibility of the expert’s opinion. The
cross-examination of qualifications discussed here in paragraph 7(a) goes to the weight of the expert’s opinion. Counsel should
weigh carefully whether to cross-examine in both instances or to elect one or the other.


**Problem 7**

*Jan Nicholson*

The case is now at trial. Lexi Waitkus, Detective Lowrey, and Val Cavarretta have testified.

(a) For the state, conduct a direct examination of Jan Nicholson.

(b) For the defendant, conduct a cross-examination of Jan Nicholson.

(c) For the state, conduct any necessary redirect examination.

**Problem 8**

*Dr. Leslie Scheffing*

The case is now at trial and the prosecution has rested its case. Ardell Delaney, Marty Pafko, and Pepper Hack have all testified for the defense.

(a) For the defense, conduct a direct examination of Dr. Scheffing.

(b) For the state, conduct a cross-examination of Dr. Scheffing.

(c) For the defense, conduct any necessary redirect examination.
If one were to interview ten able trial lawyers at random with regard to how to select a jury, one would get ten different answers. The answers would range from, “Take the first twelve (or six) and put them in the box,” to “Examine each juror firmly and searchingly.” We will discuss the pros and cons of both attitudes as well as the way stations between.

There is virtual unanimity among trial lawyers that makeup of the jury is important. There is also agreement among those who watch trial lawyers at work that we do a pretty fair job of jury selection, regardless of how we do it or why we excuse those who are excused.

There are certain basic guidelines that should be followed in selecting a jury:

1. In those jurisdictions that permit lawyers to interrogate the veniremen, realize that this is your first direct contact with the jurors. Don’t alienate them. Don’t try them.

2. Know the statutory qualifications for jurors and the caselaw grounds for challenge for cause.

3. Know the number of peremptories to which you are entitled.

4. Never challenge a juror for cause in the presence of that juror unless you have a peremptory by which you can excuse him if your challenge is overruled.

5. Use your peremptories wisely. Do not spend them too quickly.

6. Be alert for jurors whose background and experience indicate that they possess knowledge particularly relevant to the facts in the case. You may end up with a one-juror jury.

7. Be alert for jurors whose background and experience indicate a high potential of prejudgment of the case adverse to your position. They may hang the jury.

8. Seek a cross-section of the community, but bear in mind that studies have indicated a correlation between ethnic-socio-economic background and juror vote.
PROBLEM 9

*Jury Selection in State v. Delaney*

Select a jury for either the prosecution or the defense in the case. To permit an in-depth interrogation and analysis of each juror within a limited time frame, only four jurors will be selected. Each side will be limited to one peremptory challenge. Use the following jury information sheet.
Jury Information Sheet

Assume the role of a person whom you know well, so you will be able to answer voir dire questions in that role. Please be realistic. Try to pick a role that will be commonly represented on jury panels and not a role of an eccentric. Your taking an eccentric role would seriously impair the realism and benefit of the exercise for your classmates, both those who serve as counsel and those who observe the exercise.

Please fill in the following form and be prepared to use it at the class session on Jury Selection. You may be asked to deliver it to the instructor in advance of the class or during the class session.

Your real name: ____________________________________________

Information about you in your assumed role:

1. Name: ____________________________________________

2. Age: ____________________________________________

3. Address in Nita City: ____________________________________________
   Characterize the neighborhood: ____________________________________________

4. Length of residence in Nita City: ____________________________________________

5. Occupation: ____________________________________________
   Duties in that occupation: ____________________________________________

6. Marital status: ____________________________________________

7. Number and ages of children: ____________________________________________

8. Number of years of education: ____________________________________________

9. Other relevant information: ____________________________________________
OPENING STATEMENT

The opening statement is akin to the first scene in a play—it had better capture the audience. It is the trial lawyer’s first direct contact with the jury, save in those jurisdictions that permit substantial lawyer participation in the voir dire examination of the jury. Even in those states, in the overwhelming majority of cases, it is the lawyer’s first opportunity to present the jury with an intelligent, cohesive description of the case.

Most successful civil litigators agree that the opening statement is the most important part of the trial. Many criminal prosecutors agree with this; even criminal defense attorneys who believe that the closing argument is the most important part of the trial nevertheless recognize the importance of the opening statement.

There is no excuse for a poor opening statement (unless, of course, the case is so poor it should not be tried). The opening statement is essentially ex parte; it can and should be prepared well in advance of its presentation, and it should be rehearsed.

It is a skill that can be mastered with practice more readily than any other skill. The general guidelines for opening statements are:

1. Practice, rehearse, try out, and listen to your opening statements before you make them. Do not memorize your opening statement. Repeated rehearsals will allow you to present your opening without unduly long pauses. You have a wife, a husband, a friend, a colleague who will listen if you ask. As you rehearse, you can listen, too. The preferred audience is a lay one.

2. Recognize the opening for what it is: a prologue or synopsis of a play; a blueprint; a travel guide folder; or the old favorite—the picture on a jigsaw puzzle box. We do not urge that you use these similes when you address the jury. We do urge that you recognize the opening statement for what it is. Indeed, in conjunction with the evidentiary portion of the trial and the closing argument, it is the trial lawyer’s application of the oldest of public speaking techniques: tell your audience what you are going to say; say it; and tell them what you have said.

3. Recognize the opening statement for what it is not: it is not an argument. This is not the time to infer, plead, fulminate, or ask the jury to draw conclusions. It is a time to tell the jury what the case is about and what you expect your evidence will be.

4. An opening statement in behalf of the plaintiff or prosecution should include:

   (a) In some jurisdictions, at least by tradition, an opening statement may be expected to begin with a request of the court and the jury: “If the court please, ladies and gentlemen
of the jury.” If it is not expected, the attorney may want to avoid it and get right to the significant portion of the opening statement.

(b) Remember the concepts of primacy and recency: The jury will remember best what it hears first and last. Use the first minute of the opening statement to attract and retain the attention of the jury. This can be done in a number of ways:

1. Start with your theme and theory of the case. This will give the jury a moral imperative why it should find in your favor.

2. Start with a dramatic piece of favorable evidence. Once the jury knows about this evidence, it will want to hear how this evidence fits into your case and what other evidence supports your case.

3. Start with a familiar quotation that can be related to the issues of the case.

(c) A cohesive, succinct, and confident summary of what your evidence will be. This should be done by telling the jury a story, rather than just listing the witnesses and reciting what testimony will be given by each witness.

(d) A conclusion indicating that at the close of the case you will return and request the jury to find in favor of your client.

(e) Some lawyers include the following either at the beginning or the end of the opening statement:

1. A brief statement of the nature of the case.

2. A brief statement of the issues of the case.

3. A candid acknowledgment that the burden of persuasion rests on you and the degree of the burden.

4. A reading of the indictment or information (which is required in some jurisdictions).

(f) Use exhibits and visual aids to allow the jury to visualize the evidence as well as to hear it. If there is any question about the admissibility of the exhibits, clear it with the court at the pre-trial conference.

(g) Choose your words carefully. A plaintiff may use “crash” or “collision,” while the defense may refer to the “accident.”

(h) If there are weaknesses in your case that you are sure the defense will bring up, you should bring them up first and “draw the sting.”

5. An opening statement in behalf of the plaintiff or prosecution should not include:

(a) Reference to evidence the availability or admissibility of which is doubtful.

(b) In a criminal case the defendant has a constitutional right to remain silent, even at trial. Therefore, the prosecution may never comment on whether the defendant is expected to testify, and what that testimony may be. Such comment could cause a mistrial and might result in sanctions against the prosecutor. Other than this, however, if the defense theory
of the case is known, the plaintiff or prosecutor may comment on the evidence that will be produced to refute that theory.

6. In most cases, an opening statement for the defendant should be made immediately following the plaintiff or prosecution. In a criminal case, some jurisdictions permit counsel for the defendant to reserve opening statement until the close of the state’s case-in-chief. Counsel should always consider very carefully the pros and cons of reserving the opening statement until after the state’s case. There are several reasons why the defense may want to reserve opening statement until the end of the prosecution’s case. These include:

   (a) The defense does not want to reveal the defense evidence until there has been an opportunity to cross-examine the prosecution witnesses.

   (b) The defense is not sure what defense will be presented until hearing the prosecution’s case.

   (c) The defense is concerned that the defense witnesses will be harassed if they are revealed early in the case.

If the court has granted permission to defer your opening statement until the close of your opponent’s case, be certain the jury knows this. Be very cautious about waiving a defendant’s opening statement entirely.

7. An opening statement in behalf of a defendant should include:

   (a) Use of the first minute to get the attention of the jury.

   (b) Establishing the theme and theory of the case early in the opening statement.

   (c) Use of items of evidence and visual aids.

   (d) An acceptance of the issues as defined by your opponent, plus any additional ones that will be raised by the defense.

   (e) A reinforcement of the principle that the burden of persuasion rests with your opponent, plus a candid recognition of any issues in respect to which it rests with you.

   (f) A cohesive, succinct, and confident (but non-argumentative) reference to anticipated deficiencies in your opponent’s evidence, plus a like summary of what your evidence will be.

   (g) A conclusion indicating that at the close of the case you will return and request the jury to find in favor of your client.

8. As with your counterpart, a defense counsel’s opening statement should not include references to evidence the availability or admissibility of which is doubtful.

9. Opening statements for defendants in criminal cases often present special problems:

   (a) Never assume the burden of proving innocence.

   (b) If you have any doubt as to whether your client will testify, do not tell the jury he will. On the other hand, if you are certain he will testify, tell the jury, and admonish it that it cannot fairly form any judgment in the case until it has heard from the defendant.
10. Counsel should never inform the jury that the opening statement is not evidence. It isn’t evidence, of course, and the court will surely inform the jury of that fact, but there is no reason for counsel to diminish the importance of the opening statement in the eyes of the jury.
Problem 10

Opening Statement in State v. Delaney

Present an opening statement for one of the parties in the case.

If you are preparing an opening statement for a defendant in a criminal case, consider whether you would introduce any evidence for the defendant and whether the defendant is likely to testify. Your opening statement should be planned accordingly.
CLOSING ARGUMENT

Here is the advocate in her final and finest hour. She won it with her closing argument. She was magnificent! Legion are the legends of summation.

A lawsuit is won during the trial, not at the conclusion of it. It is won by the witnesses and the exhibits and the manner in which the lawyer paces, spaces, and handles them.

The likelihood of a lawyer’s snatching victory from the jaws of defeat with his or her closing argument is so slight that it hardly warrants consideration. On the other hand, lawsuits are lost by fumbling, stumbling, incoherent, exaggerated, vindictive closing arguments.

This is not intended to minimize the importance of the closing argument. It is merely to relegate it to its proper position, which is a summation of the evidence that has preceded it and a relation of that evidence to the issues in the case.

Although the closing argument is not quite as controllable as is the opening statement, it is very close to it—close enough that we can say that there is no excuse for a poor closing argument.

Many trial lawyers begin to prepare their closing arguments with their first contact with the case—as the facts make their initial impressions on their minds. That is when they are as close to being jurors as they ever will be. From that first impression forward, they shape and reshape their closing arguments as the facts develop. Finally, they shape the trial to what they believe their strongest arguments will be; they prove their arguments.

The basic guidelines for closing arguments are:

1. Think about, prepare, and rehearse your closing argument before trial, leaving sufficient flexibility to meet the exigencies of trial.

2. Think about, modify, and rehearse your closing argument at each break in the trial in light of the record to date.

3. Think about, modify, and, if time permits, rehearse your closing argument at the close of the evidence and the conference on instructions.

4. Base your closing argument on the issues, the evidence, the burden of proof in the case, and your client’s right to a verdict.

5. From the standpoint of format:
   (a) Address the court, the jury, and your opponent.
   (b) Tell the jury your purpose—to summarize the facts and relate them to the issues in the case.
(c) Make your argument.
(d) Tell the jury what its verdict should be.
(e) Sit down.

6. From the standpoint of delivery:
   (a) Do not shout.
   (b) Do not engage in personalities.
   (c) Do not tell the jury what you believe, but act and speak as though you do believe, to the depths of your soul, every word you are uttering. If you can’t do the latter, don’t argue.

7. As for some of the canned approaches:
   (a) Do not repeat in chronological order the testimony of each witness. Give the jury some credit; it has heard the witnesses. Put it all together.
   (b) Do not tell the jury what you say is not evidence. Why belittle your argument? The judge will do that for you.
   (c) Do not assume a burden of persuasion that is not yours.
PROBLEM 11

Closing Argument in State v. Delaney

Present a closing argument for one of the parties in the case.

In planning your closing, you may assume that you would have offered any or all of the admissible evidence available to your side at the trial. If you are representing the defendant in a criminal case, as here, you should decide whether you would have had the defendant testify or whether you would have offered any evidence at all. You may also assume that all of the admissible evidence available to the other party has been offered.

In many jurisdictions, counsel for the party with the burden of proof has the right to give the first closing argument and then a rebuttal argument to the defendant’s closing. For the purposes of this problem, counsel for the party with the burden of proof should assume that their closing argument is the first closing argument.
SECTION II

Teaching Notes
DIRECT, CROSS, AND REDIRECT EXAMINATION

PROBLEM 1

Detective Alex Lowrey

Statement of Purpose

Detective Lowrey is a “professional” witness, i.e., the detective has received training at the police academy on how to be an effective witness. This may make the presentation easier on direct examination and will present the cross-examiner with a number of problems. The detective served a number of purposes: apprehending the defendant, interviewing a number of witnesses, taking a statement from the defendant, viewing the scene at Miller’s Fine Jewelers, recovering the coin bag and silver dollar, finding the cap, and conducting the lineup.

Direct Examination

1. Major Points

   (a) Background

   Lowrey is an impartial investigating detective. The detective did not know any of the parties before September 14.

   The prosecutor will want to accredit the detective by establishing length of service, training, experience, present duties, and so forth.

   (b) Set the Scene

   (1) Lay a foundation for the photographs and diagrams of Miller’s Fine Jewelers. The prosecutor can make a choice of witnesses for the scene photos and diagram, but the detective is the most probable witness to lay the foundation for the diagrams. Therefore, it makes sense to use the same witness for the photos and diagram.

   (2) Establish the time sequence, the detective’s location, and the course of travel, from when the detective received the call from dispatch until the detective arrived at Miller’s.
(3) Identify the parties at the scene (Officer Rickert, Audie Passeau, and Waitkus).

(4) Describe the lighting in Miller’s (important to corroborate the identification made by the victim). Describe the condition of the safe.

(5) Describe in some detail the victim’s condition (fear, trembling, unable to give details until calmed down).

c) Action and Details

(1) The prosecutor will have to decide which of Lowrey’s actions should be brought out on direct examination. Keep in mind that if there are any perceived weaknesses in Lowrey’s testimony, the defense may be precluded from exploring this by a “beyond the scope” objection.

(2) On September 14, Lowrey talked to the victim and obtained a brief description, which was released in an all-points bulletin.

   a. The prosecutor should elicit reasons why it was not feasible at the time to get a more detailed description. (Waitkus was trembling, very fearful, and unable to initially withstand a detailed inquiry).

   b. During later questioning of Waitkus, Lowrey did not use leading questions or suggest details.

(3) Lowrey called for identification assistance. Jan Nicholson arrived and began dusting and photographing the scene.

(4) Lowrey checked the area for witnesses with negative results.

(5) Lowrey and Nicholson went outside Miller’s and found the coin bag and silver dollar.

   a. The bag and coin should be described (“1,000 dimes”; 1900 Morgan Philadelphia mint).

   b. The prosecutor should show the photo of the bag and dollar and have them identified.

   c. The coin was not touched by Lowrey or Nicholson.

   d. Lowrey took the coin to Waitkus, who identified both the coin and the bag.

   e. Lowrey gave the bag and coin to Nicholson (chain of custody).

   f. Waitkus later checked and determined that a 1900 Morgan was missing (possible hearsay objection).

(6) On September 21, Lowrey spoke to Val Cavarretta. The prosecutor should cover:

   a. The reason why police deal with informants.

   b. Obtained a detailed statement (may wish to offer contents (possible hearsay objection).

   c. Terms of the deal.
d. Reason no wire used, and what happens to snitches who do wear a wire and go to jail.

(7) On September 22, Lowrey checked with Nicholson who compared print found on dollar with Delaney’s and was able to match seven points.

(8) The Lineup

a. Lowrey obtained court order for lineup.

b. Lowrey located Delaney and directed him to come to lineup. Delaney asked what would happen if he refused.

c. The lineup composition (similar clothing, height, weight, etc.).

d. Position of Delaney (# 4).

e. Instructions to Waitkus (person may or may not be in lineup, take your time, etc.).

f. Waitkus nodded, completed form, and wrote, “I think # 4 is the person.”

g. Lowrey never rushed Waitkus, never said _______ (specifically refute all of Pepper Hack’s statements).

(9) Lowrey arrested and questioned the defendant. The prosecutor will have to decide whether to offer statements made by the defendant, and, if so, which statements. Delaney’s statements should be admitted as a party admission, Fed. R. Evid. 801(d)(2), but the prosecutor will have to decide whether the statement is sufficiently damaging to the defendant to warrant admission. Facts that the prosecutor will want to bring out include:

a. Delaney stated that he played minor league ball in Cedar Rapids, Gulfport, and the Dominican Republic. This tends to corroborate Val Cavarretta, who said that he was told this by the defendant.

b. Delaney injured his arm and was not playing ball. This tends to provide a motive for the robbery.

c. Delaney’s claimed alibi. Initially he said he was at Marty’s in the afternoon, without specifying late or any time. In the second interview, Delaney then said it was late.

d. Delaney said he was in Ben Bridge Jewelers previously looking at watches. In the second interview, he suddenly remembered looking at silver dollars after he was told that silver dollars were taken in the robbery.

e. The prosecutor may want to suggest that Delaney knew there was someone who may “snitch him off” when he said that if anyone suggested it was him, that person was a liar.

(10) Lowrey searched Delaney’s apartment and car, and although he did not find any money, gun, ammo, silver dollars, or cocaine, he did find a cap that was identical to that worn by the robber. Also, his search on September 22 was eight days after the robbery—long enough for the robber to have disposed of the evidence.
(11) The statements of the other witnesses appear to be hearsay, so the prosecutor will want to be able to articulate a substantial legal argument for admissibility before inquiring into these statements. Those statements include talking with a representative of Ben Bridge Jewelers and the statement of Marty Pafko indicating it was “sometime around a week or so ago” without remembering the date.

(12) Although it was Nicholson who dusted for prints and made comparisons, the prosecutor may want Lowrey to explain why no elimination prints were taken from others in Miller’s. One explanation is that it would be very time consuming and not plausible given the other corroborative evidence of the silver dollar print, the confession to Cavarretta, and the eyewitness identification.

2. Possible Stumbling Blocks

(a) Prosecutor may fail to develop Lowrey’s background sufficiently.

(b) Prosecutor may fail to anticipate the weaknesses that the defense will exploit in cross-examination (see Cross-Examination infra) and thus fail to have Lowrey properly explain these areas.

(c) Prosecutor may fail to have Lowrey testify to recovery of bag and silver dollar, thus defeating their admissibility.

(d) Prosecutor may be hit with a series of successful hearsay objections if the statements are attempted to be admitted.

Cross-Examination

1. Major Points

(a) Background. Unless the cross-examiner has specific evidence of improprieties in the detective’s background, it is probably best not to attack the detective. Many jurors look upon police officers as protectors of the public, and the cross-examiner can lose credibility for a gratuitous attack.

(b) If possible, the cross-examiner should attempt to use the detective to advance the defense theory of the case.

(1) For example, if the defense theory is that Delaney was completely cooperative and innocent, then Delaney’s conduct before and after arrest should be explored by emphasizing the cooperation of the defendant—that he willingly talked with Lowrey and allowed the police to search his apartment and car.

(2) Also, if possible, the cross-examiner should develop that Delaney, when he was asked to give a complete statement, immediately informed the officer that he did not commit the crime, that he was at Pafko’s, that he did not use drugs, that he had never been to Miller’s, and that this was a big mistake.

(3) If the defense theory is that the robbery was an inside job, then the cross-examiner should develop that Audie Passeau left conveniently just before the robbery, returned directly after the robbery, and Waitkus told Lowrey that the robber appeared to be
primarily interested in the currency “as if he knew the money would be there.” The
prints on the safe were not Delaney’s. The robber did not ask for the cash register.

(4) To support Delaney’s alibi, Lowrey can establish the distances between Pavilions Plaza
and Marty’s and the transit time between the points by reference to how long it took
Lowrey to go to Pavilions and to Marty’s.

c) Develop the failure of Lowrey to gather additional necessary information and evidence.

(1) For example, the detective failed to request elimination prints from anyone at Miller’s,
including Waitkus, Pafko, Miller, Passeau, or the jeweler.

(2) Lowrey failed to take taped statements from anyone. Lowrey neither photographed or
videoed the lineup nor asked the men to speak in the lineup. Lowrey did not have any
witness review the written summary of statements to verify they were accurate, includ-
ing Pafko.

(3) Lowrey failed to check with anyone other than Pafko who could have seen Delaney at
Pafko’s.

(4) Lowrey did not insist that Cavarretta use a wire in the investigation.

(5) Lowrey never made a follow-up effort to get a detailed description of the robber from
Waitkus by asking height, weight, build, facial features, eye or hair color.

(6) Lowrey never took a detailed statement from Audie Passeau.

d) Develop inconsistencies between statements given by prosecution witnesses. In the event
that other witnesses for the prosecution have already testified, the defense would want to
develop any prior statements those witnesses had given Detective Lowrey that were in-
consistent with their in-court testimony. However, the prosecution could properly object
that such testimony was beyond the scope of direct, and the defense would have to reserve
such testimony by calling Detective Lowrey as a rebuttal witness.

(1) Waitkus’s original description made no mention that the cap was an Astros cap or that
the robber was wearing an athletic shirt or that Waitkus was going to comment to the
robber about the Astros.

(2) Waitkus told Lowrey that the cap was pulled down over much of the upper portion of
the robber’s face.

e) The cross-examiner should develop critical evidence necessary to impeach Val Cavarretta.
The evidence would include:

(1) Lowrey spoke with a newspaper reporter for the Press Clarion and then reviewed the
story on September 15. The article contained an error in quoting the robber as boasting
that he had made a “withdrawal” from the store. Lowrey will establish that Waitkus
never said that, that the article was erroneous, and that Cavarretta also said in the ini-
tial interview with Lowrey that Delaney said he had made “a little withdrawal” from
an account at a jewelry store. This supports Delaney’s claim that Cavarretta’s source of
information about the robbery was from the article and not from Delaney.
(2) Cavarretta refused to wear a wire to work Delaney.

(3) Cavarretta was facing a lengthy term in prison for Possession for Sale of Cocaine, DUI, and violation of probation and was given a deal of straight probation with no jail if he cooperated.

(4) Cavarretta is a liar. According to Officer Johnson’s report (hearsay), Cavarretta lied to Officer Johnson and claimed not to know who owned the one-half kilo of cocaine. Cavarretta then refused to perform any DUI tests. Lowrey knows from Cavarretta’s prior record that he has lied to the police before, and that resulted in his conviction for filing a false report of a crime with a police agency.

(5) It is abnormal for a heavy dealer of cocaine (Duke) to give a street dealer (Cavarretta) one-half kilo of cocaine without receiving any advance payment.

(f) Lowrey can establish important aspects of the lineup identification:

(1) Other people for following lineups could have been in the vicinity (Pepper Hack).

(2) Lowrey had previously told Waitkus that the Nita City Police Department had a good record of catching armed robbers.

(3) As was stated earlier, Lowrey did not have the men speak, did not photograph or videotape the lineup, and did not arrange to have Delaney’s counsel there.

(g) Other points that the cross-examiner may want to establish include:

(1) Waitkus told Lowrey that the robber placed his hands on the glass counter, on the brass door handle, and on the safe. Delaney’s prints were not on the counter, on the handle, and the two usable prints on the safe were not his.

(2) Lowrey searched Delaney’s house and car on September 22. From the time the police first contacted Delaney until the search, Delaney was completely unable to dispose of any evidence. The police found no currency, coins, silver dollars, wrappers, checks, guns, ammo, cocaine, drug paraphernalia. The police did not administer a drug test, found no clothing similar to Waitkus’s description of a tan jacket or dark pants, and were only able to find an Astros cap belonging to a man who plays ball for the Astros.

(h) Defense counsel should be alert to any deficiencies in the prosecution’s foundation for the bag or silver dollar. If the prosecution fails to lay a sufficient foundation for unique identification or chain of custody, the defense should object to the bag or coin being received into evidence. However, if the prosecution calls Jan Nicholson, they should be able to lay the foundation through eyewitness testimony plus chain of custody.

2. Possible Stumbling Blocks

(a) Counsel may simply repeat the direct examination, thus emphasizing the points the prosecution feels most helps its position.

(b) Counsel may actually cover material accidentally forgotten by the prosecutor. For example, if the prosecutor never inquired about the recovery of the bag or silver dollar, bringing
it out on cross-examination will allow the prosecutor to later cover that more completely on redirect.

(c) Counsel may adopt an overly aggressive style of examination, alienating the jury and diminishing counsel’s own credibility rather than the witness’s.
PROBLEM 2

Ardell Delaney

Statement of Purpose

If the defendant testifies in a criminal trial, his testimony will always be among the most important of the trial. Therefore, the direct and cross-examination is more demanding than that of a witness like Detective Lowrey. Defense counsel has the burden of “selling” his or her client to the jury as a decent, hardworking, peaceable, and likeable young person who was victimized by an incomplete and suggestive police investigation and a mistaken identification. The background buildup will need to be thorough and sympathetic. The prosecutor also faces a challenging task: satisfying the jury’s expectation that cross-examination will reveal weaknesses in the defendant’s story. Critique should continue to focus on problem analysis and question formation, but attention should also be paid to the three-way relationship developed between the examining counsel, the witness, and the jury.

Direct Examination

Ardell Delaney is one of two defense eye witnesses to his activities on the late afternoon of September 14. Further, Delaney must explain the reason he was at Marty’s at 5:15 to 5:30 p.m. on the afternoon of September 14. Delaney will have to explain his relationships with both Pafko and Cavarretta. Delaney should explain his shock and surprise when accused of the crime, and his complete cooperation with the police. Lastly and most importantly, he should deny in a strong and believable way that he has ever used cocaine or any controlled substance or that he committed the robbery.

1. Major Points

(a) Background of the witness. This part of the direct examination should portray Delaney as a sympathetic person. This should be done without becoming tedious or obvious. He should describe:

(1) His residency in Nita City.

(2) His family life.

(3) His baseball background.

a. Little League, high school, and college ball.

b. Drafted by Astros, and his progression through the minors.

c. His shoulder injury, rehabilitation, plans for winter ball, the intensity of his goal to play in the majors, and his expectation of making it to the majors next year.

(b) Delaney’s activities on September 14. Delaney should recite and explain:

(1) Most of his activities that day leading up to his going to Marty’s.
(2) The specifics of the problem with his smog system in his Charger, why he chose to go to Marty’s, which is not a certified smog check station, and why he remembers the date and time of his visit to Marty’s.

a. His relationship with Marty, why he trusts Marty, how long Marty has been checking and repairing his cars.

b. Why he would ask Marty to take phone messages for him as opposed to using an answering machine or an answering service.

(3) Setting the scene at Marty’s. Where Marty’s is (pointing out on the map the distance from Pavilions and the time it would take to travel there from Marty’s).

(4) Telling the story. What happened at Marty’s, what time he arrived, how long he stayed, what Marty did, why there was no paperwork, and what he next planned to do with the Charger.

(5) Emphatically denying that he was at Miller’s Fine Jewelers on September 14 or any other date.

(c) Events of September 22.

(1) Delaney was home working out in the pool as part of his rehabilitation, came back to the apartment, and the police arrived.

(2) His initial thoughts were the police were there to ask for information about something that had happened at the apartments. He was shocked to hear them say he was a suspect in a robbery.

(3) He cooperated fully in the investigation.

a. He accompanied officers to the lineup.

b. He never requested the presence of a lawyer.

c. Describe lineup. Indicate he saw others in the area when he arrived (supporting Pepper Hack’s account). He expected that he would be immediately cleared of the crime.

d. Lowrey then arrested him. He talked freely with Lowrey. He immediately told Lowrey he was at Marty’s. Lowrey did not seem interested. He told Lowrey he had never used cocaine. (Prosecution may object on hearsay grounds, and defense counsel should be prepared to offer for non-hearsay purpose).

e. He allowed officers to search his apartment and car without a warrant. He has never had dope, guns, ammo, large currency, coin wrappers, silver dollars, or a tan jacket.

f. The only telephone call he made while in custody was to the Astros to get a lawyer and bail. He never called Marty or anyone else.

g. The cap was his Astros cap that he wears when he plays ball for the Astros.
(d) Val Cavarretta

(1) Delaney remembers Cavarretta from high school. He had little to do with Cavarretta, but remembers that Cavarretta had a reputation for using dope.

(2) Defense counsel will have to decide whether Delaney did or did not see Cavarretta in July at the concert (as Cavarretta claims). If so, Delaney will need to explain the circumstances of the meeting, what was said, and if Delaney gave Cavarretta Marty’s phone number, why he did so. (Note: If Delaney denies seeing Cavarretta or giving Cavarretta Marty’s number, how would Cavarretta know to call Marty or that Marty was taking messages for Delaney. This would enable prosecution to argue Cavarretta could only have gotten this information from Delaney, and, therefore, Delaney is lying. That means Cavarretta must have gotten his information from Delaney about the robbery and not the paper, as the defense claims.)

(3) Delaney has never had any dope dealings of any kind with Cavarretta.

(e) He has never used drugs of any kind, and would never do that. He would never do anything that would jeopardize his baseball career.

(f) If Delaney intends to explain the print on the silver dollar, then he should testify to going to Ben Bridge Jewelers, looking at watches, and looking at silver dollars for a key chain. He should describe how he handled the dollar. If Delaney does not intend to suggest the print on the silver dollar is his, defense counsel may wish not to develop this. However, this may well be an area of cross-examination by the prosecution (see infra).

(g) Anticipating Cross-Examination

(1) If the court has ruled that the prosecution may impeach him with his prior misdemeanor or theft conviction, then this should be covered. If the court permits, the mitigating circumstances of the offense should be developed—that he was playing ball for Nita University; that they visited Ames, Iowa; that he went to a drug store, picked up some items, and forgot to pay for them. On advice of counsel he pled guilty so he could pay the fine and leave.

(2) He should explain why he told Lowrey that if anyone suggested he was involved, that person was a liar and making a big mistake.

2. Possible Stumbling Blocks

(a) Failing to personalize Delaney.

(b) Failing to present an adequate explanation of his activities on the date of the robbery.

(c) Failure to elicit an emphatic denial of any involvement in the robbery or use of dope.

(d) Failure to bring out Delaney’s willingness to cooperate with the police by voluntarily taking part in the lineup, giving a statement, and allowing the police to search and never asking for a lawyer.

(e) Failure to satisfactorily explain the evidence referred to above in Anticipating Cross-Examination.
Cross-Examination

The prosecution’s theory should dictate the cross-examination of Delaney. The theory is that Delaney as a ball player developed a taste for cocaine and was able to pay for it when he was playing ball, but when he injured his arm, he was out of work. His source of income dried up but his cocaine habit didn’t. Delaney had the motive and the opportunity. His identity was established by his print, the eyewitness, by his confession to Cavarretta, and by his MO in committing the robbery with an Astros cap and using baseball language. His alibi was created in response to information that Lowrey gave to him, and his good friend Pafko is just covering for him.

1. Major Points

(a) Unlike Perry Mason, a prosecutor will rarely cause a defendant to break down and confess to the crime while on the witness stand. The prosecutor should therefore concentrate on developing all the major points that are essentially beyond dispute and that Delaney would have to agree to in cross-examination. Major points that Delaney would have to concede:

(1) Delaney is a baseball pitcher. One of the main goals of pitchers is to strike the batter out with three strikes. When the umpire calls the batter out, the umpire will throw up the right hand extending the thumb (actions by robber).

(2) Delaney injured his pitching arm and was not playing ball for the summer of YR -1.

(3) While in the minors, Delaney played in Cedar Rapids, Gulfport, and the Dominican Republic (corroborates Cavarretta’s account).

(4) Delaney lived in an upscale apartment and drove a two-year-old Charger.

(5) As to Delaney’s alibi:

a. If Delaney claims his car was still under warranty, Delaney did not first take the Charger to a dealer.

b. Delaney has no paperwork to prove he was at Marty’s.

c. Marty’s is not a certified smog shop.

d. When first asked by Lowrey, Delaney said he believed it was in the afternoon when he went to Marty’s. Later, after two hours, he told Lowrey it was “late afternoon.”

e. Marty is a good friend (if Delaney denies, then it is especially implausible that Marty would answer personal calls for Delaney).

f. Delaney has no written corroboration of a smog problem in his Charger (from DMV or anyone else).

g. Delaney, before he gave his alibi, was told by Lowrey details of the crime including date and time.
h. Delaney will have to concede that Marty’s is a short distance from the freeway that leads to Pavilions. If Delaney were there on September 14 earlier in the afternoon, it would take only ten to fifteen minutes to get to Pavilions Plaza.

i. Delaney told Lowrey, “if anybody suggested he was involved, that person was a liar and was making a big mistake.” (Suggests that Delaney knew that someone had snitched him, although Lowrey never mentioned an informant.)

j. Delaney only mentioned Ben Bridge Jewelers when Lowrey told him that silver dollars were taken. Then Delaney tried to explain how he might have come into contact with a silver dollar.

(b) If the defendant denies making certain statements to Detective Lowrey, which Lowrey testified to, he has now put his own credibility squarely against the testimony of a respectable police officer. If that happens, clearly that is ammunition on credibility in closing argument.

(c) Delaney’s statements are inherently implausible in several respects:

1. His claim that he didn’t want to use a message machine or a cell phone and asked Pafko to take messages doesn’t make sense. Delaney did not tell Lowrey this in either his first or second statement, and Pafko did not tell Lowrey. It would be much more convenient to have an answering machine, an answering service, or simply use a cell phone. It sounds more consistent with a dope arrangement with Pafko as the contact person.

2. If Delaney claims that he gave Cavarretta, Marty’s phone number, and he claims that Cavarretta was a disreputable person, who he would not associate with, this would seem inconsistent.

3. If Delaney says that he never had any contact with Cavarretta at a concert or never gave Cavarretta the phone number, then the prosecution should not pursue the matter and go on to another subject. Then in closing argument, the prosecution should point out how implausible it would be that Cavarretta would know to call Marty if Delaney had not given him the number. Obviously, Cavarretta could only have gotten his information by talking directly to Delaney.

(d) Impeach Delaney with his prior misdemeanor theft conviction under Federal Rule of Evidence 609(a)(2). Generally, the questioning counsel is allowed to bring out the elements (taking the property of another with the intent to deprive the owner), but not allowed to bring out specific facts of the case. Also, if the defense elects to put on character evidence for honesty or being a law-abiding citizen, seek to impeach with evidence of the prior robbery and burglary juvenile offenses. (This should be pursued out of the jury’s presence so as not to commit prejudicial error.)
Possible Stumbling Blocks

(a) Counsel may take such an overly aggressive style of examination that it creates jury sympathy for the “honest, hardworking person who was cooperative with the police and just trying to tell the jury what happened.”

(b) Counsel fails to establish sufficient facts from the defendant to allow the discrepancies to be developed when questioning other witnesses.

(c) Not controlling the witness and failing to get responses to cross-examination questions.
HANDLING AND INTRODUCTION OF EXHIBITS

PROBLEM 3

Photo

Statement of Purpose

Photographs have been used in court for many years. It is important for students to master the technical requirements of authentication or laying a foundation, so the students should be held to strict compliance with the rules of evidence.

Direct Examination

1. Major Points
   (a) Choice of Witness
       Detective Lowrey, Jan Nicholson, and Lexi Waitkus were all present at the time the photo was taken on September 14. Either Lowrey or Waitkus will probably be called first. The photo of the interior of Miller’s should be shown to both witnesses. Whoever testifies first can establish that the photo accurately depicts the condition of the interior of Miller’s Fine Jewelers as it was on September 14.
   (b) Foundation
       Before the witness authenticates the photo it must be established that the witness was familiar with the store as it was shown in the photo.
   (c) The Offer
       Before the photo can be admitted into evidence it must be offered for a relevant purpose. In this case a number of relevant purposes can be established: location of the entry door, the glass counter, the location of the watches, the area where Waitkus faced the robber before the gun was drawn, and the lighting inside the store.
2. Possible Stumbling Blocks

(a) Counsel may believe that authentication may be done only by the photographer or that it is necessary to establish the lens opening, film speed, lens size, shutter speed, or chain of possession.

(b) Counsel may fail to refer to the exhibit by number.

(c) Counsel may fail to offer the photo into evidence after laying a foundation, or once in evidence may fail to request permission to publish or show the photo to the jury.

Cross-Examination

1. Major Points

(a) The cross-examiner will be able to prevent the admission of the exhibit only if the direct examiner does not lay a proper foundation. The cross-examiner must therefore be alert to object to any objectionable questions being used to lay the foundation and to object to the admission of the exhibit if the foundation is not properly laid.

(b) If Detective Lowrey is the only witness called, the cross-examiner should show that Lowrey has no personal knowledge of what the store looked like at the time of the robbery on September 14, as the detective was not present.

(c) Even if the cross-examiner is not able to prevent the photo from being admitted, cross-examination can advance the defense theory of the case by highlighting significant points in the photo such as the door or glass-counter area that the robber touched but on which no prints were found.

2. Possible Stumbling Blocks

(a) The cross-examiner may fill in gaps in the otherwise incomplete foundation, thus now allowing the exhibit to be admitted.

(b) The cross-examiner may simply allow the photo to be re-shown to the jury without eliciting factors that advance the defense theory of the case.
Problem 4

Coin Bag and Silver Dollar

Statement of Purpose

The coin bag and silver dollar are important pieces of evidence for the prosecution. The bag was used by the robber to carry loot from the store. The prosecution can also show that the robber was “ditching” the evidence as he fled the store. The bag contained the silver dollar, which was printed by Nicholson. The fingerprint comparison constitutes major prosecution identification evidence.

Direct Examination

1. Major Points

(a) Selection of Witness(es)

Detective Lowrey is a necessary witness to establish the foundation for the introduction of the bag and dollar as Lowrey found the bag, took custody of it, delivered it back to Waitkus for identification, and eventually turned it over to Nicholson. Detective Lowrey can establish the exact location, the condition of each, and the fact that the silver dollar was not touched by anyone until Lowrey turned it over to Nicholson.

However, for the bag and silver dollar to be relevant, there must be testimony from Lexi Waitkus describing the use of the bag in the robbery, identification of the bag, and the identification and presence of the silver dollar in Miller’s. Waitkus should also be shown the bag and silver dollar and asked how they compare with the bag and dollar at Miller’s on September 14.

The prosecution will also need to call Jan Nicholson, who took custody of both items, booked them into evidence, printed the dollar, and retained them until trial.

(b) Mechanics of Handling the Bag and Coin as Exhibits

The bag and coin should first be marked as exhibits for identification. The “exhibit walk” should be performed by showing the exhibits to opposing counsel, requesting permission to approach the witness, referring to the exhibits by exhibit number, and asking the foundational questions. If more than one witness is going to lay the foundation, the offer into evidence should come at the conclusion of the foundational testimony.

(c) Use of the Bag and Silver Dollar as Real Evidence

Once the bag and coin have been properly authenticated and the foundation is complete, the prosecuting attorney should have Detective Lowrey illustrate how the bag and silver dollar were positioned when found.
The prosecuting attorney should also show both to Jan Nicholson and ask Nicholson to explain where the print was found on the dollar and how the dollar likely was held to be consistent with the print placement.

2. Possible Stumbling Blocks

(a) Failing to call a necessary witness to establish the authenticity or relevance of the exhibits.

(b) Failing to properly perform the mechanical functions of the exhibit walk.

(c) Failing to properly develop the testimony from witnesses showing the relevance of the bag and dollar.

(d) Failing to effectively use the bag and dollar as visual aids.

Cross-Examination

1. Major Points

(a) As was the case in Problem 3, the cross-examiner will be able to prevent the admission of the exhibits only if the direct examiner does not lay a proper foundation. The cross-examining attorney may wish to argue that the display and introduction of the bag and dollar would be unduly prejudicial under Federal Rule of Evidence 403 and marginally relevant under Federal Rule of Evidence 401, but the likelihood of the court sustaining that position would be slim. So the cross-examiner must be alert to object to any objectionable questions being used to lay the foundation and to object to the admission of the bag and dollar if the foundation is not properly laid.

(b) If the prosecuting attorney attempts to lay the foundation solely with the testimony of Detective Lowrey, the cross-examiner should object to the offer of the bag and dollar as the facts establishing relevancy concerning the attack have not been established and the chain of custody has not been established.
IMPEACHMENT AND REDIRECT EXAMINATION

PROBLEM 5

Val Cavarretta

Statement of Purpose

This problem demonstrates impeachment by use of a variety of techniques including prior inconsistent statements to Detective Lowrey, Cavarretta’s strong motivation to say anything that would please the prosecution and police, inconsistencies between Cavarretta’s testimony and that of other witnesses, evidence that Cavarretta acquired information about the offense not from Delaney but from reading a news account, implausibilities in Cavarretta’s testimony, and Cavarretta’s prior criminal record.

Cross-Examination

1. Major Points

(a) Prior inconsistent statement. Under Federal Rule of Evidence 801(d)(1)(a), prior statements can be received for the truth of the matter asserted only if under oath. Since Cavarretta’s statements to Lowrey were not under oath, they may be used only for impeachment. Attorneys handling this exercise should understand the difference. The cross-examiner must decide whether the prior statement is sufficiently inconsistent to warrant impeachment and whether the inconsistency is sufficiently material to make the impeachment effective. The direct examiner must then decide whether any real impeachment has occurred, and if so, does the witness need to be rehabilitated.

(1) In this case, the prior statement of Cavarretta to Detective Lowrey is inconsistent with the preliminary hearing testimony of Cavarretta, which said the half-kilo would cost sixteen grand. Cavarretta told Lowrey that Duke asked for fifteen grand, and Cavarretta told Delaney it would cost sixteen grand.

(2) If, in cross-examination, Cavarretta denies that Delaney said he was making a “withdrawal” from the jewelry store, the witness should be impeached by the prior statement to Lowrey.
(3) The cross-examiner must decide whether the inconsistencies are sufficiently impeaching to warrant examination. In this exercise, it would appear that the inconsistencies are worthwhile. The previous statement about “withdrawal” is important independent of its impeaching value, as it shows that Cavarretta acquired information about the robbery from the news account and not from Delaney.

(4) If the jurisdiction allows impeachment without requiring confrontation, the cross-examiner must decide whether to confront Cavarretta with the statement or leave it until Lowrey can be called during the rebuttal. There does not appear to be any good reason not to confront Cavarretta.

(5) The cross-examiner should establish where and when the statement was made, who was present, and that the witness knew the officer was conducting an inquiry and that it was important to be completely truthful.

(6) Impeach each point separately.

(b) Motivation to lie. Cavarretta has a powerful motivation to say whatever the police and DA want:

(1) Cavarretta, as a result of the arrest, is facing the potential of five years for Possession for Sale of Cocaine, three additional years if the prior sale is filed, plus one year for DUI, plus ten months for violation of misdemeanor probation, or a total of nine years and ten months.

(2) The deal allows Cavarretta to do straight probation and avoid doing any jail time.

(3) Whether Cavarretta “tells the truth” is going to be determined by the prosecuting attorney, who will not be pleased if Cavarretta now testifies differently than the preliminary hearing testimony and the original statement and suddenly says that Delaney is innocent.

(4) The only mention of this deal on direct exam was Cavarretta’s statement about being required to tell the truth.

(5) Under *Davis v. Alaska*, 415 U.S. 308 (1974), the cross-examiner should be allowed free reign to explore all these incentives.

(c) Impeachment by showing inconsistencies with other witnesses’ testimony and other evidence. Here, Cavarretta’s testimony is at variance with Detective Lowrey if Cavarretta denies that Delaney used the phrase “withdrawal” and further denies telling Lowrey that Delaney used that word.

(d) Impeachment by prior criminal convictions. Cavarretta has suffered two adult criminal convictions and three juvenile convictions or petitions sustained:

(1) The ten-year-old Possession of Marijuana conviction is a juvenile misdemeanor that is beyond the ten-year period listed in Federal Rule of Evidence 609(b), does not involve dishonesty or false statement under Rule 609(a)(2), is violative of Rule 609(d), and is most likely not going to be permitted for impeachment.
(2) The ten-year-old Public Intoxication juvenile misdemeanor is inadmissible for the same reasons set out in (1).

(3) The nine-year-old Sale of Marijuana is a juvenile conviction, which would be a felony for an adult and generally admissible under Federal Rule of Evidence 609(a)(1) subject to Rule 403 and Rule 609(d).

(4) The five-year-old Sale of Methamphetamine is an adult felony and complies with Federal Rule of Evidence 609(a)(1) and should be admissible.

(5) The two-year-old False Report of a Crime, a misdemeanor, should be admissible under Federal Rule of Evidence 609(a)(2) as a crime involving both dishonesty and false statement.

(6) Counsel should argue that even the juvenile offenses are admissible pursuant to Davis v. Alaska, supra, and that Federal Rule of Evidence 403 does not apply as there is no prejudice to Cavarretta.

(e) Other Points

(1) Cavarretta's claim that Duke turned over a half-kilo to him on trust with no money up front is implausible.

(2) Cavarretta refused to wear a wire (a transmitting and/or recording device) and talk to Delaney, which would have corroborated Cavarretta's account if true. The obvious inference is Cavarretta refused to wear the wire knowing Delaney would have said he didn't know what he was talking about. Cavarretta claimed not wanting to be a snitch, but in fact that was what Cavarretta was doing all along and is doing now.

(3) Cavarretta read news accounts in the Press Clarion of Delaney's sports career and would, therefore, know enough to supply the information given in the original statement to Lowrey.

2. Possible Stumbling Blocks

(a) Cross-examiner becomes anxious to impeach one way and forgets to impeach the second way as well.

(b) Cross-examiner tries to impeach on several points in one question.

(c) Cross-examiner allows the witness to explain the inconsistency.

(d) Cross-examiner may not be prepared to justify the use of prior convictions for impeachment purposes under Federal Rule of Evidence 609.

(e) Cross-examiner overlooks the issue of proving Cavarretta's past criminal conduct to establish motivation under Davis v. Alaska.

(f) Cross-examiner assumes an overly hostile and aggressive manner and creates sympathy for witness.
Redirect Examination

1. Major Points

   (a) The attorney handling redirect should object to the use of the prior statement as hearsay. If the cross-examiner does not cite authority and offers the statement for the truth of the matter asserted, the court may sustain the objection.

   (b) Was the witness sufficiently impeached so as to warrant rehabilitation? If not, it may be better to drop the matter and not bring it again to the jury’s attention.

   (c) Is there a reasonable explanation for the inconsistencies? If so, it should be brought out on redirect examination.

   (d) If the impeaching statement was taken out of context, redirect should establish the context under the rule of completion, Federal Rule of Evidence 106.

   (e) The prosecution should have Cavarretta spell out why lying now would be the worst thing the witness could do. All the incentives are in place to tell the truth, and all the disincentives are present to deter lying. If Cavarretta lies, Cavarretta not only faces nine years and ten months in custody, but additional prison time for the felony crime of perjury.

   (f) The prosecution should emphasize all the details Cavarretta knew that could only have come from Delaney including how he injured his arm, his plan to play winter ball this year, his expectation of making the majors next year, his knowing to leave a message for Delaney with Marty, and his knowing Marty’s phone number.

2. Possible Stumbling Blocks

   (a) Simply repeating the direct examination rather than explaining the cross-examination.

   (b) Failure to obtain an explanation that the jury wants to hear.

   (c) If the rehabilitation is not effective, it may simply allow further impeachment on re-cross-examination.
Problem 6

Marty Pafko

Statement of Purpose

The cross-examiner in this problem may use several impeachment techniques. The problem illustrates the use of impeachment by a prior inconsistent statement to Detective Lowrey on September 25. The cross-examiner will want to develop Pafko’s bias. Pafko has a criminal conviction that may well be available for impeachment purposes, and there are certain implausibilities in Pafko’s testimony.

Cross-Examination

1. Major Points

   (a) Prior inconsistent statement. Pafko’s prior statement to Detective Lowrey on pages 41–42 of the case file is clearly inconsistent with Pafko’s present testimony:

      (1) Pafko originally told Lowrey on September 25 that Delaney came by the shop “some-
          time around a week or so ago,” and Lowrey said that Pafko “could not remember what
          date it was.”

      (2) Pafko did not mention the time of day or that it was on a day when Pafko was ordering
          parts.

      (3) If the defense expert Dr. Scheffing is to be believed, there is serious question about
          Pafko’s account, which was very vague in the beginning, and as time passed, became
          more specific. If Lowrey is believed, the first time Pafko mentioned a specific date and
          time was on October 14, thirty days later.

      (4) See notes to Problem 5 at pages 55–56.

   (b) Pafko is biased. Pafko is a friend of Delaney, has known Delaney since high school, has
      worked on Delaney’s cars since that time, and has done a favor for Delaney by taking
      personal phone messages at Pafko’s business. This explains the change in stories when
      the defense investigator got Pafko’s statement one month after the robbery and explains
      Pafko’s present testimony.

   (c) Impeachment by prior criminal conviction. Pafko suffered a misdemeanor conviction of
       Nita Criminal Code (NCC) Section 500, Receiving Money for Transmittal to Foreign
       Country, three years ago. The convicted person must have either failed to forward money,
       give instructions, or refund money within ten days.

      (1) Thus the prosecution can argue that the legislature intended by the enactment of NCC
          Section 500 to declare such conduct fraudulent, and therefore the conviction involves
          elements of dishonesty or false statement within Federal Rule of Evidence 609(a)(2).
(2) The defense should be able to make a strong argument that those elements are not spelled out in the act and the court cannot presume what is not in the clear language of the section.

(3) Generally the court will not permit inquiry into the specific facts of the prior conviction, but some courts permit inquiry by counsel on direct to establish mitigating circumstances.

(d) Other Points

(1) Delaney bringing his car to Pafko for a smog problem seems implausible. Pafko does not run an authorized smog station, the car is nearly new (two years old), and there are no business records to corroborate the alibi.

(2) Pafko knew of Delaney’s arrest and robbery charge and never tried to give the information to the police or DA that was presented to defense counsel.

(3) Pafko remembers receiving a call for Delaney from a “Val.” This tends to corroborate the account of Cavarretta.

(4) If Pafko is just slightly off on the time, it is distinctly possible that Delaney could have been to Pafko’s and committed the robbery. Even at the preliminary hearing Pafko stated, “I’m not exactly sure of the time.”

2. Possible Stumbling Blocks

(a) See the notes to Problem 5 at page 57.

(b) Cross-examiner may not be prepared to justify use of prior conviction for impeachment purposes.

Redirect Examination

See notes to Problem 5 at page 58.
**Statement of Purpose**

Jan Nicholson, the identification technician, is an important witness for the prosecution. Presumably, Nicholson is an unbiased and credible witness and establishes a completely independent component of the defendant’s identification. It is important for Nicholson to retain objectivity, and at the same time convince the jury that the seven points of comparison on the print from the silver dollar suggest strongly that the only person who could have placed the print on the dollar is Delaney. Great care must be taken to make the witness both credible and acceptable to the jury.

**Direct Examination**

1. **Major Points**

   (a) Introduction. Establish the witness’s present occupation, and then ask the “tickler” question—“Supervising Identification Technician Nicholson, have you come to court today prepared to state your opinion concerning the lifting of fingerprints from the area of Miller’s Fine Jewelers on September 14, and comparison of the prints with those of Ardell Delaney’s?” This whets the jury’s appetite for the remainder of the testimony.

   (b) Qualify the witness as an expert.

      (1) Education and Training: B.A., training through the police department, the State of Nita Department of Justice, the FBI, and the International Association of Identification (IAI).

      (2) Occupational positions including total years with the department, years as a Senior Technician, and years as the Supervising Technician. The examiner should develop the duties of a technician with special attention to fingerprint lifting and comparison. Included would be the approximate number of prints lifted and compared.

      (3) Board certification—what does it mean and how is it obtained?
(4) Teaching experience. Experience in the department and teaching in the IAI.

(5) Prior qualification as expert witness in other courts and tribunals as an expert in fingerprint lifting and comparison and the number of times testifying for the defense.

(6) Counsel may wish to offer a résumé to pick up other details too numerous or repetitive to introduce through testimony.

(7) Compensation or the lack of it. Here Nicholson is a City of Nita employee and probably just receives standard compensation.

(8) In some, but not all, jurisdictions the court requires a formal tender of the witness. Counsel should then present the witness to the court as an expert, stating with precision the field of expertise. In those jurisdictions not requiring a formal tender, counsel should indicate verbally the conclusion of the qualifications process, so that opposing counsel will know whether to challenge the expertise before an opinion is offered.

c) Establish the reliability of the science of fingerprinting. The witness should explain the process of fingerprinting, describing how fingerprints are lifted and what a latent print is and how they are compared, describing print characteristics used. Finally, the expert should explain the reliability of the field of study.

d) Factual investigation conducted by the expert.

(1) Examination conducted—time, place, findings. The expert should explain the physical appearance of Miller’s, what areas were checked for prints, how they were checked, and the results, including those areas that did, and those that did not, produce usable prints.

(2) Nicholson should describe the investigation outside the store and Lowrey’s locating the bag and coin. Nicholson should testify to observing Lowrey retrieve the bag and coin and return it to Miller’s to show Waitkus. Nicholson can corroborate the chain of possession and lack of tampering from retrieval to Lowrey’s turning both items over to Nicholson and should testify to the continuous, secure, and exclusive possession of both items until marked as evidence in the courtroom.

(3) Nicholson should identify all relevant exhibits including the bag and coin, the diagram and photo of Miller’s, and the map of the area where the bag and coin were located.

e) Opinion. What is it? The witness should testify to the comparison of Latent #1 and Latent #2 with the known prints of Delaney.

(1) While Delaney’s prints are authenticated from department records, the prosecution may not be permitted to establish either why they were taken or how long they have been on file, as this suggests prior criminal activity. This would undoubtedly be the subject of a pretrial motion.

(2) Nicholson should explain in detail the print lifted from the silver dollar, pointing out its size relative to a full print. The two prints should be displayed side-by-side with the use of Exhibit 5.
(3) Nicholson should explain and point out comparable characteristics (ending ridges and bifurcations) and identify the seven points of comparison with no dissimilarities.

(4) Nicholson requires eight points of comparison to be positive, but while no positive comparison can be made, the print is entirely consistent with Delaney’s left index finger, and had there been just one more point, the opinion would be positive.

(f) Anticipation of cross-examination. Nicholson should explain:

1. Why no elimination prints were taken from others, including Miller’s employees. Possible explanations include prioritizing duties and attendant cost and availability to get prints at later time if necessary.

2. Why it is improbable that a coin claimed to be touched by Delaney three months earlier and then sold through a trade show would retain Delaney’s print, especially if the coin were cleaned by Miller’s.

2. Possible Stumbling Blocks

(a) Using technical language that is difficult for the jury to understand. If Nicholson insists on using technical terms, the prosecutor must have the witness translate them into terms the jury can understand.

(b) If the opinion is too complex or convoluted, the jury will not understand it, even if simple language is used.

(c) The prosecutor may forget to tender the expert in jurisdictions where it is required.

(d) The prosecutor accepts a stipulation to Nicholson’s qualifications without eliciting the important qualifications that the jury needs to hear in order to determine what credibility to give to the expert’s opinion.

(e) The testimony is not explained through the use of visual aids, such as diagrams, photos of the bag, coin, and print, and the comparison exhibit.

Cross-Examination

1. Major Points

(a) Nicholson cannot say with any scientific certainty that the print on the silver dollar belongs to Delaney. Nicholson is not, and cannot be, positive. The results are inconclusive.

1. There are approximately 150 potential points of comparison. Nicholson was only able to find seven.

2. Nicholson is unable to say whether, if the print were larger, there might be points of dissimilarity found.

(b) Nicholson did not take elimination prints from others.

1. Nicholson is unable to say whether the print on the silver dollar belongs to Waitkus, Passeau, Miller (the jeweler), Lowrey, or a customer.
(c) Nicholson cannot say how old the print is. The print could have been on the silver dollar months or even years before September 14.

(1) The position of the print, left index finger on one side, is consistent with a person looking at the coin (thumb on other side).

(2) This line of questioning should be used only if the defense wishes to suggest Delaney’s print was made when he looked at the coin at Ben Bridge Jewelers.

(d) The two prints removed from the safe were *not* Delaney’s. Those prints were consistent with the robber touching the upper part of the safe during the robbery. Counsel should use the photo of the safe door.

(e) Nicholson did not dust the watches shown to the robber.

(f) Counsel should object to any reference to Delaney’s prints on file (see The Pretrial Conference, *infra*) and should object on the grounds of speculation as to any offered opinion on the likelihood that if the print had been larger, eight points of comparison would have been found.

2. Possible Stumbling Blocks

   (a) A common error on cross-examination is to allow the expert to simply repeat the direct examination.

   (b) On cross-examination the expert should never be allowed to explain anything, especially the opinion or the reasons why this witness disagrees with the defense’s theories.

   (c) Adopting a hostile tone or demeanor toward Nicholson, thereby arousing jury sympathy for the witness and dislike of defense counsel.
EXPERT WITNESS

PROBLEM 8

Dr. Leslie Scheffing

Statement of Purpose

Dr. Scheffing, an expert in the field of human memory and eyewitness identification, can dispel myths about the reliability of eyewitness investigation and explain how errors in human memory can occur. If the court permits, Dr. Scheffing can express an opinion about the reliability of the eyewitness identification in this case. The testimony can be exceedingly complicated and potentially dull. Defense counsel will need to take great care to present this expert testimony in a simple, understandable, credible, and interesting manner. The use of analogies with which the jurors can relate and the use of graphic aids will help.

Prosecution counsel can attempt to capitalize on the public’s general mistrust of “hired guns” who testify for profit for criminal defendants, and try to demonstrate that Dr. Scheffing is biased in favor of the defense and is profiting handsomely in the process.

Direct Examination

1. Major Points

(a) Introduction. Establish the witness’s present occupation and have Dr. Scheffing explain the field of forensic psychology. Then ask the tickler question—“Doctor Scheffing, have you come to court today prepared to state your professional opinion concerning the human memory process and the eyewitness identification offered by the prosecution in this case?” This whets the jury’s appetite for the remainder of the testimony.

(b) Qualify the witness as an expert. The qualification process is essentially the same as outlined in Problem 7 at pages 61–62 as those areas relate to Dr. Scheffing’s expertise with the following additions:

(1) Education: Post-graduate education and degrees and their relationship to the human memory process and eyewitness identification.
(2) Professional positions: Full-time teaching at Nita University and transition to forensic psychology practice, again relating this to issues in this case.

(3) Professional publications: Dr. Scheffing lists eight publications. Care should be taken to display objectivity of articles (only two of eight were defense oriented, and one was for a law enforcement journal).

(4) Prior qualification as an expert witness:
   a. Total of forty-five times in both criminal and civil cases.
   b. Retained in eyewitness testimony at least twenty times, qualified in court nine times (eight for defense, one for prosecution).

(5) Curriculum vitae found at page 81 of the case file may be offered to cover more details (subject to hearsay objection).

(6) Professional associations (listed in curriculum vitae).

(7) Compensation. Dr. Scheffing is a private consultant charging $400 per hour plus $1,500 for testimony. Counsel should point out this is a standard rate for a forensic psychologist of Dr. Scheffing's experience.

(8) Awards. Two listed at page 81 of case file.

(9) Tender. See comments in item (8) at page 62.

(c) Dr. Scheffing should explain the human memory process and how eyewitness identification works.

(1) Common misconceptions about eyewitness identification. Scheffing should explain that most think with the witness's confidence, peripheral details, and violence there is greater accuracy, when in reality there is less accuracy.

(2) The three phases of human memory (found at pages 74–78 of the case file). Each should be explained in lay terms, and the event and witness factors and their effects should be outlined verbally and visually.

   a. It is helpful for the expert to relate these by way of analogy. Examples include the suggestibility of questioning by investigators or common mistakes made by people in their everyday lives. Another illustration was a controlled study asking viewers to watch a videotape of an auto accident, and then asking them to recall the color of the coat of the dog at the scene. Witnesses gave varying accounts when, in fact, there was no dog.

   (3) Recognition of people. The importance of the lineup procedure, studies about eyewitness identification, and the phenomenon of unconscious transference should be explained.

(d) Factual investigation conducted by the expert.

(1) Police and investigative reports and transcripts of preliminary hearing testimony.
(2) Scheffing should spell out what was not available, such as video or audio tape or photos of the lineup, recording of the witness statements, and an independent witness at the lineup.

(3) Defense counsel may wish to reverse the order and present the factual investigation first before discussing the human memory and eyewitness identification, and then have Scheffing spell out from the facts of the case what factors were present in this case.

(e) Opinion

(1) Scheffing’s testimonial opinion may well depend upon the court’s pretrial ruling on a prosecution motion to either exclude Scheffing from testifying or limit Scheffing’s testimony (see Pretrial Conference, infra).

(2) Assuming that Scheffing is permitted to testify in all areas, the defense should offer Scheffing’s opinion concerning the human memory and eyewitness identification factors present and their effect on the accuracy and validity of Lexi Waitkus’s identification. Factors would include:

a. The initial vague and generic physical description.

b. The limited amount of time to view the robber.

c. The stress and violence associated with the robbery and the gun.

d. The hat pulled down over the face.

e. Subsequent discussions with police where police may have provided Waitkus with details.

f. Problems at the lineup including the tentative identification eight days after the robbery, the suggestive nature of the lineup including Lowrey’s hurrying Waitkus, telling Waitkus before that they had a suspect, telling Waitkus before that the department had a good record of catching robbers, and Waitkus’s desire to see the robber caught.

g. Waitkus subsequently supplying more detail as days passed including an athletic shirt and an Astros cap.

h. Waitkus finally becoming more confident and positively identifying Delaney thirty-six days later.

i. Waitkus may well have seen Delaney’s photo in the paper and transferred the image in Waitkus’s mind.

(3) There is a reasonable possibility that some or all of these factors caused a misidentification in this case.

(f) Anticipation of cross-examination. Dr. Scheffing should explain:

(1) The prior rape case in which Scheffing expressed a similar opinion and subsequently discovered evidence fully corroborating the victim’s identification and account of the crime. Possible explanations include:
a. Scheffing never said the witness was mistaken, only testified that it was reasonably possible for a mistake.

b. There were less factors present in that case than in the present case.

(2) The reason for not interviewing all witnesses. Explanations could include cost or lack of necessity.

(3) Lack of bias (see Direct Examination 1(b)(3)–(4), supra).

(4) Compensation (see Direct Examination 1(b)(7), supra).

2. Possible Stumbling Blocks

(a) Using technical language without understandable lay explanation.

(b) Counsel may forget to tender the expert in jurisdictions where it is required.

(c) Counsel accepts a stipulation to Dr. Scheffing’s qualifications without eliciting the important qualifications that the jury needs to hear in order to determine what credibility to give to the doctor’s opinion.

(d) Failure to illustrate key points with analogies or visual aids.

Cross-Examination

1. Major Points

(a) Before direct testimony, defense counsel should object to Scheffing expressing an opinion as to whether Waitkus’s identification was valid (see Pretrial Conference, infra).

(b) Scheffing’s qualifications

(1) The prosecution can take Scheffing on voir dire before the court finds Scheffing qualified or can reserve for cross-examination. In view of Scheffing’s apparent qualifications, most counsel would prefer tactically to address qualification issues in cross-examination and not have the court deny their challenge to a tender.

(2) Scheffing has a background of academic life and forensic consulting with no actual psychology practice.

(3) Scheffing’s work displays a defense bias through articles (which should be cited), through testifying eight out of nine times for the defense, and receiving substantial compensation from defense counsel.

a. The prosecution can calculate the number of cases multiplied by the approximate income per case to give the jury a ballpark figure of money made serving as a defense expert.

(c) Inadequate factual review of case.

(1) Scheffing did not interview any witness, including the victim.
a. Scheffing did not ask Waitkus to show how far down over the face the cap was, to show how long the incident took, or to ask what kind of attention Waitkus paid to the robber’s appearance before the gun was displayed.

b. Would Scheffing suggest that the jury would be better able to judge this case by reading reports than hearing and seeing the witnesses testify?

(2) Scheffing did not go to Miller’s to view the scene and observe the lighting and did not go to the police station to observe lineup procedures.

(d) Challenge assumptions. The technique in cross-examining an expert to change the assumptions can sometimes be effective. Here, the cross-examiner has evidence that contradicts some of the expert’s assumptions. Counsel can ask the witness to assume the contrary and ask if that would change the witness’s opinion. The assumptions include:

(1) That Waitkus did not get a good opportunity to identify the robber at the scene.

(2) That Waitkus was unable to positively recognize Delaney from beginning to the end.

(3) That Lowrey used leading questions.

(e) Scheffing’s prior mistake. Counsel should develop in full all the details of the prior opinion Scheffing gave in the rape case four years previously.

(1) Scheffing testified under oath that the questioning process was “unduly suggestive and biased,” it “could taint the identification,” and the victim “may well have been embellishing details,” all nearly identical with the opinions expressed here.

(2) Later the defendant fully confessed.

(3) The defendant produced a videotape that fully corroborated the victim’s account.

a. Scheffing doesn’t know for certain whether the other witnesses were one hundred percent correct or not, since there were no tapes or confessions in those cases.

2. Possible Stumbling Blocks. See comments at page 64, item 2.
Statement of Purpose

Attorneys in jury selection in this case must be concerned with several important issues. The prosecution must be concerned about (1) the potential negative reaction jurors would have to a police informant, with a record of dope sales and lying to police, who is testifying to avoid prison; (2) the potential negative reaction jurors would have to the failure of police to conduct a complete investigation; (3) jurors having experiences and beliefs that eyewitness identification is unreliable; (4) jurors placing undue reliance on the testimony of a forensic psychologist; and (5) jurors’ reluctance to believe a baseball star would commit an armed robbery.

The defense counsel must be concerned about (1) jurors’ skepticism about the reliability of a psychologist hired by defense counsel to testify in a criminal case; (2) the criminal convictions of Delaney, Pafko, and Hack; (3) jurors believing the standard misconceptions of eyewitness identification; (4) jurors placing too much faith in the testimony of police officers; and (5) a jury backlash because there are some bad apples in sports who use cocaine and commit crimes.

Questions on these subjects must be very precise so as to obtain information useful to deciding whether to retain the juror while at the same time not offending any of the jurors.

Major Points

1. For the purpose of obtaining information to be used in deciding whether to challenge a juror, the attorney should ask open-ended questions that force the juror to provide information rather than just answering yes or no.

2. Counsel will need to question jurors about contact with people who have substance abuse problems, particularly cocaine, and their attitudes about people with such problems.

3. Most certainly, the court is going to allow background information about Cavarretta’s past criminal conviction for the Sale of Methamphetamine and Making a False Report of a Crime, as well as the new charges of Possession for Sale of Cocaine and DUI. Also, the court will allow full inquiry about the terms of the deal offered Cavarretta. The prosecution will need to confront these issues by asking questions about the experience jurors have in those areas and what their attitudes are.
4. Defense counsel will need to question jurors about whether they have ever made a mistake in identification or had one made about them to illustrate that such mistakes can happen. Also, defense counsel should ask if any jurors have ever been accused of doing something they didn't do.

5. If the court is going to permit impeachment by prior convictions, defense counsel will need to inquire about the jurors’ feelings on the topic and to condition the jurors that they are not to consider such evidence to prove a propensity to commit crime.

6. Since a police officer will testify on behalf of the prosecution, the jurors should be questioned about prior contacts with law enforcement and whether the jurors were satisfied or dissatisfied with the contact.

7. Counsel should inquire as to the jurors’ attitudes toward psychologists.

Possible Stumbling Blocks

1. Counsel asks questions in such a way as to make the jurors feel as if they are on trial.

2. Counsel asks about private matters that do not appear to be related to the issues involved in the trial.

3. Counsel displays obvious antagonism toward a particular juror. Even if that juror is excused, the other jurors may be offended.

4. Counsel repeats questions so often that the jurors become bored.

5. Counsel asks leading or close-ended questions that do not elicit information.
OPENING STATEMENT

PROBLEM 10

Statement of Purpose

The opening statement is counsel’s first opportunity to present the case to the jury in a complete, logical, and interesting fashion. An opening statement is not the time to argue the case (i.e., ask the jury to draw conclusions from the evidence). Nevertheless, a successful opening statement will persuade the jury that counsel’s position is probably the correct one.

Major Points

1. Prosecution

   (a) The prosecutor must use the first minute or two to get the interest of the jury. If the jury tunes out at the very beginning, it is very hard to regain its attention. There are a number of ways to get the jury’s interest at the outset:

   (1) State the theme or theory of the case. The theme should capture the factual and emotional essence of counsel’s case. The jurors should be able to identify with the theme from their own experiences.

   (2) Counsel should quickly summarize the key facts consistent with its theory of the case. The prosecution can develop the facts in more detail later in the opening statement.

   (3) State some of the most dramatic parts of the evidence. Once the jury knows of this evidence, it will want to hear how it fits into the rest of the case.

   (4) Use a familiar quote or saying that can then be tied into the theory of the case.

   (5) Do not use the opening minute for trivial or mundane material, such as introducing yourself. If you must do it at all, save it for later when you have already obtained the jury’s attention.

   (b) If not established at the very beginning, the theme or theory of the case must be established early in the opening statement.
(c) The prosecution should set out the elements of the crime, so the jury knows what the prosecutor intends to prove.

(d) The prosecution may want to acknowledge its burden of proof.

(e) Counsel should present its evidence in an interesting storytelling form, rather than just stating what evidence will be presented from each witness.

(f) The prosecutor should end on a high point, and then inform the jury what verdict will be requested at the end of the trial.

2. The Defense

(a) The defense must first decide whether to present its opening statement immediately after the prosecution’s opening statement or reserve it until the completion of the prosecution’s evidence. The earlier opening statement will usually be the most persuasive.

(b) Just as with the prosecution, the defense should use the first minute to get the attention of the jury.

(c) Even if the defense does not intend to produce witnesses, counsel can use the opening statement to establish what evidence will be produced on cross-examination to establish reasonable doubt.

(d) If the defense intends to produce witnesses, the evidence should be established by storytelling.

(e) The defense is entitled to remind the jury that the defense will not be able to produce any witnesses until the prosecution rests its case, so the jury should maintain an open mind until all the evidence can be presented.

(f) Defense counsel should also conclude on a high point, and tell the jury what verdict will be requested.

Potential Stumbling Blocks

1. The prosecutor may comment on what testimony might be received from the defendant. This is a serious error that can cause both a mistrial and sanctions against the prosecutor. The defendant has a constitutional right to remain silent, and this decision can be made right up to the last minute.

2. Counsel wastes the first few minutes by thanking the jury for attending the trial and praising them for doing their duty. In most jurisdictions, jurors do not volunteer for jury duty, and many of them may consider this a condescending and phony attempt to butter them up.

3. Counsel attempts to argue the case, and thereby draws objections which are sustained.

4. Counsel fails to use appropriate illustrative aids to visually inform the jury, such as diagrams, photos, or the video.
5. Counsel fails to deal with potential weaknesses in their case. This failure by default allows the other side to be the first to expose the weakness and can seriously damage the credibility of counsel and the client.

6. Counsel delivers the opening statement behind a lectern. Unless the rules of the jurisdiction require counsel to do so, counsel should remove this barrier to communication between the attorney and the jury.

7. Counsel reads the opening statement or keeps his or her eyes down on notes. Eye contact is essential to effective communication.
CLOSING ARGUMENT

PROBLEM 11

Statement of Purpose

The closing argument is counsel’s opportunity to persuade the jury to accept the attorney’s view of the case. Counsel will need to marshal the evidence as it relates to the issues in the case. However, counsel is not limited to a discussion of the law and the evidence. Counsel may refer to anything that will help persuade the jury, as long as it meets ethical limitations and is not unduly prejudicial. It is not uncommon for attorneys to refer to historical events and to quote from literary sources, including the Bible. Stories can be used effectively as analogies.

Major Points

1. Counsel should use the first minute to grab the jury’s attention. This can be done by recalling a piece of important evidence, setting out the theme of the case, telling a story, or by any other means that keeps the jury interested in the remainder of the argument.

2. At some point counsel should establish the law that is applicable to the issues. It can be very helpful to quote some of the jury instructions that the court will give to the jury. When the court does instruct the jury, it will confirm the attorney’s argument. However, counsel must be careful not to bore the jury by reading long, dry legalese. Only the pertinent parts of the instructions should be read.

   The prosecutor should briefly discuss and show visually the elements of the charges of robbery and show why they have been met. Counsel should relate the evidence to each essential element.

   The prosecutor should also discuss and show the factors to consider in proving identity by eyewitness testimony.

3. Counsel needs to establish the issues that must be resolved by the jury, and then collect all the evidence to assist the jury in deciding those issues in favor of the attorney.

4. Counsel should address the burden of persuasion. If counsel has the burden, it should be acknowledged and explained. Counsel should attempt to prevent the jury from applying a higher burden than is imposed by law. If the burden is on the other party, counsel should be
sure to emphasize that point and urge the jury to hold the other party to that burden. In a criminal case, it is almost always helpful to the defense to explain "reasonable doubt" to the jury and show them how it applies to the evidence in the case. In this case, defense counsel should also point out that the State must disprove Delaney's alibi beyond a reasonable doubt. Otherwise, they must find Delaney not guilty.

5. Counsel should discuss the credibility of key witnesses, pointing out in detail any of the witness's inconsistent statements.

6. Counsel should point out to the jury why that party's witnesses are more reliable and credible than the opponent's witnesses.

Possible Stumbling Blocks

1. Counsel assumes a burden that is properly on the other party.

2. Counsel informs the jury that the closing argument is not evidence. While this is true, leave this admonition to the judge.

3. Counsel remains behind a lectern. Unless the rules of the jurisdiction require counsel to do so, counsel should remove this barrier to communication between the attorney and the jury.

4. Counsel reads the closing argument or keeps his or her eyes down on notes. Eye contact is essential to effective communication.

5. Counsel simply recites the evidence to the jury. Usually the jury will be sufficiently intelligent to remember the evidence. It is more important to apply the evidence to the issues rather than simply regurgitating it.

6. Counsel makes personal attacks on the other side. Juries are usually unimpressed with personal attacks, and it often works against the party making the attack.
STATEMENT OF PURPOSE

State v. Delaney is not a complex criminal trial. It is fairly standard and represents the kind of case students would be required to try as lawyers in the criminal arena. Students will be required to present and cross-examine an expert in the field of forensic psychology dealing with the human memory and eyewitness identification. To do so, the students will have to examine carefully the facts of the case, the police and investigation reports, the preliminary hearing testimony of witnesses, and the detailed report of Dr. Scheffing. Students will also be required to present and cross-examine Jan Nicholson, an expert in fingerprint lifting and comparison, and will need to be familiar with Nicholson’s testimony and the related exhibits.

Students will have to understand the legal elements of robbery and the jury instructions relating to alibi and eyewitness identification.

Each side is limited to four witnesses. Students should be instructed to allocate responsibility to ensure that each attorney conducts either an opening statement or a closing argument and a minimum of one direct and one cross-examination. The case is suitable either to be tried as a half-day or full-day trial.

Photographs, diagrams, the lineup form signed by the victim, and a news article are available to be used as exhibits and visual aids.
THE PRETRIAL CONFERENCE

1. For the State

(a) The State should, pursuant to the required stipulations, inform the court that it intends to offer stipulations concerning the lineup, the fingerprint, and the race of the robber as compared with the person playing Delaney.

(b) The State should inform the court and opposing counsel of the gender of witnesses Lowrey, Nicholson, and Waitkus so that opposing counsel can prepare their witnesses to refer to the proper gender.

(c) The State should make the following motions in limine:

(1) Exclude evidence of Val Cavarretta’s past criminal convictions (for itemized list and grounds, see discussion at pages 56–57).

(2) Exclude testimony of Dr. Scheffing. The motion should be made on two bases:

a. The testimony is excludable in total under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Counsel may argue that it is the defense’s obligation to establish the reliability of this field of study, and they cannot do that. Secondly, the prosecution may argue that, even if the field of study is reliable, there is an insufficient showing that there was a proper examination in this case. Additionally, the testimony is unnecessary, since the court’s instruction sufficiently covers the topic.

b. Even if the field of study is well established and accepted by the courts in this case, to allow the witness to testify to the validity of Waitkus’s identification would invade the province of the jury, and the jury does not need that testimony to decide this case. Therefore, the testimony should be limited to a general discussion of human memory and eyewitness identification. See *U.S. v. Rincon*, 28 F.3d 92 (9th Cir. 1994).

The defense should counter that courts have repeatedly allowed such testimony, that Dr. Scheffing is eminently qualified, citing Scheffing’s background, and that Federal Rule of Evidence 704 specifically allows such testimony. Such testimony will help the jury since this field of study shows serious misconceptions by lay people.

(3) Exclude the news article found at page 25 of the case file. The article constitutes hearsay under Federal Rule of Evidence 801(c). There is no opportunity for the State to cross-examine the author.

Defense counsel should argue that the article is not offered for the truth of the matter asserted. To the contrary, it is offered to prove knowledge, to show that the robber did
not use the word “withdrawal,” and to show that the only way Cavarretta knew of the robbery was through the paper.

2. For the Defense

(a) Defense counsel should move to exclude evidence of the defendant Ardell Delaney’s three convictions. See discussion at page 46, item (g)(1) and page 48, item (d). The first two, robbery and burglary, are mandatorily excludable under Federal Rule of Evidence 609(d). The third, a four-year-old misdemeanor, theft fifth degree, will or won’t qualify under Federal Rule of Evidence 609(a)(2), depending on the federal authority cited. Circuit cases go both ways on whether such a theft is a conviction involving dishonesty or false statement.

Defense counsel should include in the motion any reference by Val Cavarretta in testimony to sharing weed and pills in high school and any reference to Delaney being on juvenile probation and being on the same work crew. The prosecution could counter that such information is relevant and admissible to show that Delaney and Cavarretta had a trusting relationship, and this is why Delaney would buy drugs from and confess to Cavarretta.

If the court permits the prosecution to impeach Delaney with the theft conviction, the prosecution should object to any defense attempt to go into the specific facts of the conviction as improper rehabilitation. Again, jurisdictions differ on the admissibility of such evidence.

The defense, however, should be aware that if they put Delaney’s character for honesty in issue, there is authority for permitting the prosecution to ask character witnesses whether they were aware that Delaney had been convicted of robbery and residential burglary and, if they had, would that affect their opinion that he is a person of good character for honesty.

(b) Defense counsel should move to exclude Marty Pafko’s prior arrest and the misdemeanor conviction of receiving money for transmittal to a foreign country three years ago. The receiving stolen property arrest did not result in a conviction. As to the conviction, see discussion supra at pages 59–60.

(c) Defense counsel should move to exclude Pepper Hack’s arrests and convictions and evidence of Hack’s statements against police, judges, and jurors. All three convictions are misdemeanors. The defense should argue they do not relate to dishonesty or false statement and, therefore, under Federal Rule of Evidence 609(a)(2) they are inadmissible for impeachment. The statements are irrelevant and unduly prejudicial under Federal Rule of Evidence 403.

The prosecution should argue that all three arrests and convictions and the indecent exposure arrest are all relevant to show bias and motivation for Hack’s testimony. The adverse police contacts and the statements demonstrate a well-established dislike for police. If the jurors don’t hear such evidence, they won’t know why Hack would either distort or make up testimony against the police.
(d) Defense counsel should move to exclude any reference to the date or source of the inked impression on file with the Nita City Police Department. Such evidence would suggest to the jury that Delaney had previously been in trouble with the law, and this would be impermissible character evidence.

(e) Defense counsel should inform the court and opposing counsel of the gender of witnesses Scheffing, Paiko, and Hack, and the race of the person playing the role of Delaney so that opposing counsel can prepare their witnesses to refer to the proper gender and race.
OPENING STATEMENTS

A complete discussion of opening statements in this case is included at pages 73–75, supra.

STATE’S CASE IN CHIEF

1. Ordering of Witnesses

(a) Generally, presenting witnesses in chronological order is easiest for the jury to follow. Chronological order in this case is Lexi Waitkus, Detective Lowrey, Jan Nicholson, and Val Cavarretta.

Lexi Waitkus can set the scene and describe the action of the robbery on September 14. Waitkus can describe the attacker, can establish the circumstances enabling Waitkus to clearly see Delaney at Miller’s, can testify to identifying Delaney in the lineup and at the preliminary hearing, and can positively identify Delaney in court. Waitkus can identify the coin bag and silver dollar. Waitkus can refute the defense’s contention of coercion or suggestion by the police in the identification.

Detective Lowrey can describe the scene, Waitkus’s condition and the description given, the recovery of the coin bag and silver dollar and Waitkus’s identification of them, the contact with Cavarretta, terms of the deal with Cavarretta, how the lineup was conducted and Waitkus’s identification of Delaney, Delaney’s statements, the search of Delaney’s apartment and car, and additional investigation including checking Delaney’s alibi.

Nicholson can corroborate finding the coin bag and silver dollar, the chain of possession of these items, the fingerprint dusting and retrieval at the scene, and the comparison of the two latents with Delaney’s prints.

Cavarretta can provide the claimed motive for Delaney to rob by testifying to the meeting with Delaney at the concert, preliminary discussions about the purchase of cocaine, Delaney’s statements about his prior use of cocaine, Delaney’s giving him Pafko’s telephone number, and Delaney’s subsequent call to Cavarretta admitting to committing robbery of a jewelry store and stating that he was now ready to buy the cocaine. Lastly, Cavarretta can describe picking up the cocaine, driving to deliver it to Delaney, and being stopped by police. Cavarretta can also explain why all the incentives are in place to tell the truth and why it would be the worst thing Cavarretta could do to lie in court. The prosecution may want to consider not calling Cavarretta due to the serious impeachment problems Cavarretta presents.
(b) There are problems in following this order. While the chronology is helpful, the prosecution ends with a witness of very questionable credibility. Many authorities believe that it is important in understanding and applying the principle of primacy and recency—to start and finish with the best witnesses. Following that approach, it would seem to make sense to start with Waitkus, then Detective Lowrey, then sandwich Cavarretta in the center, and finish with a credible witness in Jan Nicholson. In the author's opinion, this order is preferable.

2. Prosecution Checklist

As in every trial, counsel for the State should prepare a checklist of information and evidence that must be presented to the jury.

(a) Have the elements of robbery been proven?
(b) Counsel should offer the required stipulations.
(c) Counsel should introduce the photos of the coin bag, the silver dollar, the cap, the scene, and the prints.
(d) Counsel should introduce the diagrams.
(e) Counsel should introduce the lineup form signed by Waitkus. If the prosecution doesn’t, defense counsel will and could point out that the prosecution sought to hide it.

3. Direct Examination of Lexi Waitkus

Lexi Waitkus is an essential prosecution witness. See comments at page 85, supra.

(a) Introduction of the witness.

(1) The direct examiner should establish who Waitkus is—covering Waitkus's area of residence, educational background, employment, duties at Miller's, and nature of Miller's business. Evidence should be presented to show why Waitkus is a responsible adult capable of making a proper identification of Delaney.

(b) Setting the scene

(1) Counsel should have the witness describe the store, its location, and the lighting inside using the photos and diagrams to illustrate the testimony.

(c) Telling the story

(1) Lexi Waitkus's testimony should begin with the events of September 14: hours worked, Audie Passeau leaving around 5:25 p.m. to pick up some clothes, Waitkus being alone, and at approximately 5:30 p.m., a man entering the store.

(2) Waitkus should relate the events in the store prior to the man brandishing the gun. The witness should describe how long a period Waitkus dealt with the man, how close Waitkus was to the man, why Waitkus was looking at the face, and what portion of the face Waitkus could see that was unobscured by the cap. Waitkus should describe the man's clothing with particular attention to the cap and why Waitkus knew it was
an Astros cap (star is different, Waitkus had been to Astros game and recognized cap). The man was not wearing gloves. Waitkus had never seen this man before.

a. It would be effective for counsel to ask Waitkus to demonstrate how the cap was worn and how far apart Waitkus was from the man.
b. Waitkus should spell out that there was no stress or fear at this time.
c. Miller’s standard practice is to make eye contact and devote close attention to customers.
d. The prosecutor has two options. Waitkus can identify Delaney at this point and state why Waitkus is able to make the identification, or the prosecutor can wait until reciting the action part of the case and then have Waitkus identify Delaney. Identifying Waitkus at this point enables Waitkus from that point on refer to the man as Delaney.

(3) Waitkus should then tell what happened as Waitkus walked back to get more watches:

a. How Delaney told Waitkus to be quiet, brandished a gun at Waitkus’s stomach, threatened to kill Waitkus, and ordered Waitkus to get the money.
b. When Waitkus explained it was in the safe, which was locked, Delaney commented about three strikes and motioned like an umpire. When the safe was opened, Delaney grabbed the money and coins and stuffed them in a coin bag from the safe, holding the gun and bag in the right hand and stuffing with the left. Waitkus should explain why the store had $22,400 in currency and had silver dollars.
c. Delaney ordered Waitkus to lie down for fifteen minutes or he would kill Waitkus. About five minutes later, Audie Passeau found Waitkus, who called 911. They stopped an officer, and later talked to Detective Lowrey.
d. Later, Lowrey showed Waitkus a bag and a silver dollar. Waitkus recognized the bag from the writing on the side, “1,000 dimes,” and the silver dollar as a 1900 Morgan that Delaney took.
e. When Waitkus gave the initial description to Lowrey, Waitkus was very upset and only gave a general description. Waitkus never had any doubt about being able to recognize the robber again.

(4) Waitkus should then describe what happened at the lineup on September 22:

a. The instructions Lowrey gave Waitkus before the lineup.
b. How the lineup was conducted, where, and the composition of the lineup.
c. No one rushed Waitkus or in any way coerced Waitkus to make an identification (refuting Pepper Hack).
d. Waitkus recognized and identified #4, Delaney. There was no doubt. Waitkus should explain why Waitkus said, “I think #4 is the person.”
(5) Waitkus should describe the prior positive identification of Delaney at the preliminary hearing and reiterate how positive Waitkus is today.

(d) Possible Stumbling Blocks

(1) Insufficient personalization of Waitkus and accreditation as a credible person. For Waitkus to have credibility, Waitkus has to concede what the jury is most likely to conclude, which includes the likelihood that Waitkus was extremely scared; once the robber told Waitkus not to look at him, Waitkus complied; and when Waitkus went to the lineup, Waitkus felt that they probably had the person.

(2) Failing to establish the reasons why Waitkus would be able to get a good look at the robber and then later recognize the person.

(3) Allowing the jury to get the impression that Waitkus was led by an unduly suggestive investigation to identify the defendant. Waitkus is the most important witness with the ability to dispel this defense theory.

4. Cross-Examination of Lexi Waitkus

The cross-examiner should recognize that Lexi Waitkus is a sympathetic crime victim who will most likely be perceived by the jury as an honest person trying to do the best job under the circumstances. The cross-examiner should not develop a hostile or overly aggressive stance, as this could backfire. It is possible to fully develop all the following points in a gentle and respectful manner.

The main areas of impeachment are the impediments to making a good identification, including the stress and fear the witness experienced, the limited opportunity to see the robber, the gun focus, the generic description given immediately after, the suggestive process used by the police in the lineup, the tentative lineup identification by Waitkus, and the pattern of Waitkus’s identification becoming more detailed and stronger as the days progressed.

(a) Waitkus did not have a good opportunity to identify the person.

(1) The man who entered had a cap pulled down over much of the upper portion of his face.

(2) Waitkus estimated about two minutes before the gun was displayed, but Waitkus was not timing.

(3) After the man displayed the gun, Waitkus was extremely frightened, more frightened than at any other time in Waitkus’s life. Waitkus’s hands trembled, and he had difficulty opening the safe.

(4) The man ordered Waitkus not to look at him, and Waitkus complied, only looking at the man’s arm and at the safe.

(5) Waitkus is not sure which hand held the gun.

(6) When Waitkus was told to lie down, that’s what Waitkus did.

(b) Waitkus was unable to give a detailed description of the man.
(1) Waitkus only said a man in his twenties of (see stipulation) race wearing a tan waist length jacket, dark pants, and wearing a cap with a star.

(2) Waitkus did not describe the man’s weight, height, build, hair or eye color, facial features, facial hair, glasses, or scars.

(3) On September 14 Waitkus did not say the man wore an Astros cap and said nothing about an athletic shirt with a stripe. If Waitkus claims to have told Lowrey this, Waitkus can be impeached by Lowrey.

(c) The lineup was held eight days after the robbery.

(1) Lowrey told Waitkus that the police had a good record of catching armed robbers. Waitkus wanted the robber caught. When Lowrey asked Waitkus to come to the lineup, Waitkus felt relieved and felt they probably had the right man.

(2) During the lineup Lowrey might have said something about how much time Waitkus was taking. Waitkus cannot be positive Lowrey didn’t say to hurry up.

(3) The men in the lineup were not asked to speak or wear a cap. No tape recorder was used, and no video or photos were taken to Waitkus’s knowledge.

(4) At the conclusion, Waitkus wrote, “I think #4 is the person.” Waitkus did not write, “I am positive,” or, “#4 is the person,” or, “I know #4 is the person.”

(d) The identification process fits precisely with Scheffing’s opinion.

(1) Waitkus has read the Press Clarion, follows local baseball, and Delaney’s name sounds familiar, therefore, Waitkus could have seen Delaney’s photo. This fits with unconscious transference.

(2) Waitkus saw the gun and was afraid it would go off (gun focus).

(3) Waitkus offered more details as the case progressed.

<table>
<thead>
<tr>
<th>Original Statement</th>
<th>Preliminary Hearing 36 Days Later</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cap with a star</td>
<td>An Astros cap</td>
</tr>
<tr>
<td>No mention of shirt</td>
<td>An athletic shirt with stripe</td>
</tr>
<tr>
<td>No mention of discussion about Astros</td>
<td>Was going to comment about the Astros</td>
</tr>
<tr>
<td>Robber’s age twenties</td>
<td>Mid-twenties</td>
</tr>
</tbody>
</table>
(e) Waitkus can impeach other prosecution evidence.

(1) The robber did not use the word “withdrawal” during the robbery. Waitkus would have remembered that (impeaches Val Cavarretta).

(2) Waitkus previously worked at Ben Bridge Jewelers. They handled silver dollars. Miller’s got their silver dollars from trade shows. It is possible that the silver dollars could have come from Ben Bridge Jewelers. Note: This would be helpful only if defense counsel intends to argue to the jury that the print on the silver dollar could have been Delaney’s from his visit to Ben Bridge.

(f) Defense counsel may decide to argue evidence that this robbery was an “inside job.”

(1) Audie Passeau conveniently left Miller’s just before the robbery and returned just after.

(2) There was an unusually large amount of money on hand.

(3) Waitkus told Lowrey that the “robber seemed to be interested primarily in the currency, as if he knew the money would be there.”

(4) Waitkus claims the robber placed his hands on the counter top, yet there were no prints there or on the door handle.

(5) No elimination prints were taken of other employees, so we don’t know whose prints were on the safe or whether someone else’s print would match the silver dollar print.

(6) See page 41, item (b)(3), supra.

(g) Possible Stumbling Blocks

(1) Allowing the witness to restate the direct testimony.

(2) Adopting a hostile tone or demeanor toward Waitkus, thereby arousing jury sympathy for the witness and dislike of defense counsel.

(3) Not controlling the witness and getting responses to the cross-examination questions.

5. Direct and Cross-Examination of Detective Alex Lowrey

A complete discussion of the direct and cross-examination of Detective Alex Lowrey is included at pages 37–43, supra.

6. Direct Examination of Val Cavarretta

Val Cavarretta’s importance as a witness is discussed at page 85, supra. Whether Cavarretta is called as a witness may depend in part of the court’s ruling concerning the admissibility of evidence of prior convictions. See full discussion at pages 56–57; 81, supra. The court’s ruling on these motions will depend upon the arguments. The prosecution may decide that no matter what the court rules, Cavarretta presents more weaknesses than strengths to the case.

If the prosecution calls Cavarretta, it is imperative for the prosecution’s credibility that all areas of weakness, which the defense can be expected to bring out, be dealt with on direct.
(a) Background of Witness

(1) The prosecution should personalize Cavarretta to the extent possible.

(2) Establish Cavarretta’s relationship with Delaney.
   a. If the court allows, show that they were on juvenile probation together, and they did
doctor together (see page 82, supra).
   b. They went their separate ways, and Cavarretta had not seen Delaney until July.

(3) If conviction(s) are allowed for impeachment, then cover on direct. Most authorities
suggest that this not be either the first or last topic covered but sandwiched somewhere
in the middle of the testimony. In this case, there is little point in trying to minimize
them, and it would seem appropriate to bring them out up front. Many relate directly
to the deal struck by the prosecution (see comments at page 85, supra).

(b) Meeting with Delaney at the concert during the summer.

(1) Cavarretta should spell out the details of what Delaney said regarding his baseball
activities, arm injury, rehabilitation, plans for winter ball, his asking for “good stuff,”
explaining that he meant cocaine and not weed, and his use of cocaine in Gulfport,
Iowa, and the Dominican Republic (this suggests Cavarretta would have gotten these
details only from Delaney).

(2) Cavarretta promised to get back to him, and Delaney gave Cavarretta Marty’s phone
number. Note: Important in corroborating Cavarretta, as how else would Cavarretta
know about Marty?

(c) Cavarretta contacted Duke, arranged for one-half kilo of cocaine for fifteen grand, and
Cavarretta called and left a message with Marty. Shortly after Delaney returned the call.
Cavarretta told Delaney the deal was sixteen grand for one-half kilo. Cavarretta decided
to make $1,000 for the effort. Delaney said he would have to see what he could do about
money and would get back.

(d) Delaney’s confession. Delaney said, “Well, I’m ready. I had to hit a jewelry store.” They
agreed Cavarretta would set up the deal and then call Delaney at Marty’s. In anticipation
of cross-examination, Cavarretta should deny ever hearing Delaney say “withdrawal” and
should deny using that word when talking with Lowrey.

(e) Cavarretta’s arrest and the deal.

(1) Duke agreed to receive payment in two days because he trusted Cavarretta. Cavarretta
picked up the one-half kilo on September 21 around 7:00 p.m. and was coming back
when arrested for DUI and Possession for Sale of Cocaine and taken to jail.

(2) Cavarretta realized a conviction could bring a lengthy prison term and was angry that
Delaney had caused the problem. Cavarretta decided to tell the police whose dope it
was and how Delaney got the money in exchange for leniency.

(3) Cavarretta knew the case was unsolved because Delaney had not been arrested.
(4) After discussions with Detective Lowrey, arrangements were made with the DA to grant Cavarretta probation upon testifying truthfully about the matter. Cavarretta refused to wear a wire because it was one thing to tell the truth, but another to actively become a working informant.

(5) The only way the deal would be made is if Cavarretta told the full truth and did not lie. Otherwise, Cavarretta would be prosecuted for not only the Possession for Sale of Cocaine and DUI, but a probation violation, making a false report to the police, and perjury. This would result in a prison sentence of at least eight years. The worst thing Cavarretta could do now is lie.

(f) Possible Stumbling Blocks

(1) Insufficient development of details to corroborate Cavarretta.

(2) Failure to acknowledge that Cavarretta is not a nice person and attempting to foist a false impression on the jury, which would seriously impair the prosecution’s credibility.

(3) Failure to anticipate cross-examination and deal with chief points on direct.

7. Cross-Examination of Val Cavarretta

A complete discussion of the cross-examination as well as the redirect of Val Cavarretta is included at pages 55–57, supra.

8. Direct and Cross-Examination of Jan Nicholson

A complete discussion of the direct and cross-examination of Supervising ID Technician Jan Nicholson is included at pages 61–64, supra.

9. Matters Before the State Rests

(a) The prosecution should review the prosecution checklist of information and evidence to ensure all elements have been proven and all evidence introduced.

(b) The prosecution should anticipate a defense motion for judgment of acquittal and be prepared to respond. See Fed. R. Crim. P. 29(a). If such a motion is made, the prosecution should argue that the testimony of Lexi Waitkus alone is sufficient as a matter of law to support a verdict of guilty. Additionally, even if Waitkus could not identify Delaney, Delaney’s confession to Cavarretta is sufficient as a matter of law since the corpus of a robbery has been established without dispute.

The defense may wish to move for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a), arguing that the evidence offered by the prosecution does not, as a matter of law, constitute proof beyond a reasonable doubt since the eyewitness identification was originally tentative and the testimony of Cavarretta is inherently untrustworthy. It is exceedingly unlikely that the court would make such a finding and would most probably find that this is a jury question, not a legal determination.
Delaney’s Case in Chief

1. Theory
The obvious theory of the defense is:

(a) The unreliability of the eyewitness identification.

(b) The lack of sufficient information to decide the case, which was the result of an incomplete police investigation.

(c) The inherent untrustworthiness of Cavarretta.

(d) Delaney’s alibi.

(e) The State has failed to overcome the presumption of innocence and failed to prove its case beyond a reasonable doubt.

2. Ordering of Witnesses

(a) Unlike the State’s case, all defense witnesses need not be called. Defense counsel must decide whether to call Ardell Delaney, Marty Pafko, Pepper Hack, and Dr. Scheffing. Defense counsel has to make a judgment balancing the benefits versus the detriments in each decision. Those decisions should be made before deciding the order of witnesses.

In the author’s opinion, the benefits of calling Delaney outweigh the liabilities so long as Delaney is thoroughly prepared to respond to the obvious areas of cross-examination. While juries will intellectually understand an instruction that says a defendant has a constitutional right to not testify, their normal reaction will be that if the defendant was not there, he was at Marty Pafko’s, did not do it, never did dope, and never discussed it with Cavarretta, he should take the stand and say so.

In the event the defense decides not to call Delaney, then Marty Pafko becomes more important in establishing the alibi.

(b) It is generally important to start and finish with strong witnesses. The jury will be most interested in hearing the defendant testify. If the defense decides to call Ardell Delaney, the advantage to calling him first is the jury will hear the complete version of the defense, and the following witnesses will corroborate the defense. If counsel chooses that order, then Dr. Scheffing should be the concluding witness.

(c) Defense counsel may well choose to finish with the defendant, believing that it is important to hear the defendant’s compelling testimony tying the defense evidence together and his emphatic denial immediately before the case concludes. If defense counsel chooses that order, it is the author’s opinion that the defense should begin with Marty Pafko,
who can provide the defense of alibi. Then Pepper Hack can establish the flawed and suggestive lineup. Scheffing can lend expert support to the defense theory of an inadequate investigation and heavily suggestive and unreliable identification, and the defense can finish with Delaney.

3. Defense Checklist

Counsel should prepare a checklist of the important information to be presented by each of the defense witnesses.

(a) Defense should establish the alibi date and times, the reasons why the witnesses know the dates and times, the specifics, and that this was told in detail to Lowrey immediately.

(b) Defense should itemize key factors to develop from Pepper Hack and Dr. Scheffing to show the unreliability of the eyewitness identification (for more details, see comments concerning the direct examination of Dr. Scheffing included at pages 65–68, supra, and comments on direct of Pepper Hack, infra).

(c) If the prosecution does not offer the map of Nita City, defense counsel should introduce it. The foundation should have been laid through cross-examination of Lowrey and Waitkus and showing the map to Delaney and Pafko.

(d) If the prosecution does not offer the lineup form signed by Waitkus, defense counsel should introduce it. The foundation should have been laid through cross-examination of Lowrey and Waitkus.

(e) If the prosecution and defense stipulate to Dr. Scheffing’s curriculum vitae being received, or if there is no prosecution objection, defense counsel should introduce it.

4. Direct and Cross-Examination of Ardell Delaney

A complete discussion of the direct and cross-examination of Ardell Delaney is included at pages 44–49, supra.

5. Direct Examination of Marty Pafko

Marty Pafko is an essential defense witness to establish Delaney’s alibi. Pafko is the only witness who can corroborate Delaney’s version. While Pafko is a friend of Delaney, Pafko is a business person who has reason to remember the incident and the date and time. If Pafko were to make up something, Pafko would have prepared some false documents to corroborate the incident. Pafko initially informed Detective Lowrey of the incident, although there is a dispute whether Pafko told Lowrey of the precise date and time.

The downside to calling Pafko is, if the court allows impeachment of Pafko by the NCC Section 500 conviction, the jury may well decide Pafko is a criminal, and, therefore, Pafko’s friend Delaney may be one as well. This conclusion could be supported by the arrangement of Pafko taking Delaney’s personal calls at Pafko’s business. It might sound as if Pafko was willing to be the contact person for Delaney.
(a) Background of witness

(1) Defense counsel should personalize Pafko; establishing Pafko’s occupation, residence, education, and personal characteristics.

(2) Pafko should testify to the location of Marty’s Repair, show it on the map, and testify to the distance and time of travel from Pavilions.

(3) Establish Pafko’s relationship with Ardell Delaney, that they have been friends since high school, that Pafko has always worked on Delaney’s cars, and has seen him from time to time between baseball seasons. Pafko is aware Delaney hurt his shoulder and is in rehabilitation.

(4) Pafko should explain receiving phone messages for Delaney, the reason Delaney gave, how Pafko handled the messages, and why Pafko agreed to do so.

(b) Received call from Delaney in early September. Delaney told Pafko he had a smog equipment problem and asked Pafko to look at it. Pafko agreed but told Delaney Pafko was not smog certified.

(c) Events of September 14. Pafko should testify:

(1) Delaney came by the shop at around 5:15 p.m. Pafko knows the date and time because Pafko was preparing a parts order for the next day, which was the deadline for the week’s parts, and it was about fifteen minutes before closing, which was at 5:30 p.m.

(2) Delaney flipped the hood up, and Pafko inspected the engine. A valve in the smog system was damaged, possibly turned off to bypass the system. Pafko did not have a part and didn’t want to work on it because it might have been tampered with. Pafko advised Delaney to take it to an authorized dealer.

(3) Delaney was there perhaps five to ten minutes.

(4) There were no records prepared as there was no work done, and, therefore, there was no charge.

(d) Interview by police. Approximately eleven days later a Detective Lowrey called and then came by asking if Delaney had brought his car for a smog check. Pafko explained what happened and told the detective it was on September 14. The detective did not seem to believe Pafko and didn’t write anything down. The detective left.

(e) Pafko did not talk to Delaney at anytime after September 14 until contacted by Delaney’s attorney’s office in October.

(f) Pafko’s criminal conviction

(1) If the court permits the prosecution to impeach Pafko with the prior Receiving Money for Transmittal to Foreign County conviction, Pafko should explain this on direct examination and, if permitted, offer any mitigating circumstances.

(g) Possible stumbling blocks

(1) Insufficient accreditation of Pafko.
(2) Failure to anticipate cross-examination and deal with chief points on direct.

(3) Failure to effectively communicate to the jury the reasons Pafko remembers specifically the date and time Delaney came by the shop.

(4) Failure to prepare the witness concerning opening the door to character and allowing the witness to blurt out testimony that will permit the cross-examiner to inquire about Delaney’s past juvenile convictions for robbery and residential burglary.

6. Cross-Examination of Marty Pafko

A complete discussion of the cross-examination and redirect examination of Marty Pafko is included at pages 59–60, supra.

7. Direct Examination of Pepper Hack

Pepper Hack’s testimony can be helpful in the defense’s effort to establish that Waitkus was unsure in identifying Delaney and that the police hurried and coerced the identification, thus supporting Dr. Scheffing’s opinion that the identification was unreliable. Defense counsel, after the court’s in limine rulings, must make a judgment call whether Hack’s testimony is worthwhile considering the potential impeachment of this witness (see item 2(c) at page 82, supra). The defense can point out that Hack doesn’t know anyone in the case, and the witness had to have been present at the lineup. How else would Hack know Delaney was there, and how would Hack know enough about the case to make up the testimony Hack gives at the trial?

(a) Background of Witness

(1) Hack should testify to Hack’s occupation, residence, and lack of familiarity with any of the parties to this case. Hack should explain knowing what Delaney looks like from photos in the Clarion Press.

(2) If the court permits the prosecution to impeach Hack with the facts of Hack’s arrest for indecent exposure, Hack should explain the circumstances of the incident, the arrest, the detention, and the reason why Hack was in the lineup on September 22.

(b) Events at the lineup on September 22. Hack should:

(1) Explain how the police took Hack to the lineup shortly after 4:00 p.m., the setup of the lineup room, and why Hack was able to see the detective and the witness, since Hack was to be placed in the portion with a one-way mirror.

(2) Describe the six men in orange suits with Delaney in the #4 position.

(3) Explain exactly how the detective (Lowrey) acted and talked to the witness (Waitkus) when:

   a. The detective said, “Come on, you saw this guy before. Let’s finish this up.”

   b. The witness said, “I don’t want to rush. I want to be certain.”

   c. The detective said, “You didn’t think we were going to arrest the wrong guy, did you?”
d. The witness said, “No. I guess we have to finish this sometime.”

Hack should speak the words and recreate the body language just as seen in the lineup room.

Defense counsel should be prepared for a prosecution hearsay objection, and should respond that the statements of both Lowrey and Waitkus are admissible under Federal Rules of Evidence 801(d)(1)(c), 803(1), (2), and (3), and 807, and are further admissible as impeachment of Lowrey and Waitkus.

(4) Hack should identify Delaney in the courtroom as the person Hack saw in the lineup.

(c) Hack’s prior arrests, conviction, and statements about police, judges, and jurors. If the court permits the prosecution to impeach Hack with any or all of the prior arrests, convictions, and/or statements, Hack should explain them on direct examination and, if permitted, offer any mitigating circumstances (see comments included in item 2(c) at page 82, supra).

(1) Defense counsel may want to bring out that Hack believes that there are some bad police but does not believe all police or all judges or all jurors are bad.

(d) Defense counsel should develop the reason that Hack has come forward to testify, to make sure that there is not a mistaken identification (as there was in Hack’s case by the alleged victim).

(e) Possible Stumbling Blocks

(1) Failing to adequately personalize Hack and anticipate the prosecution’s attempt to show Hack as a biased, unreliable, police-hating busybody.

(2) Failing to elicit the prior arrests, convictions, and statements if the court permits such impeachment.

(3) Failing to effectively recreate the coercive, suggestive behavior of Lowrey, and the tentative and timid behavior of Waitkus.

8. Cross-Examination of Pepper Hack

The prosecution should seek to establish the strong and long-lasting anti-police bias of Hack. The court’s in limine ruling will be critical to developing this evidence (see comments in item 2(c) at page 82, supra). If Hack is careless on direct examination, Hack may blunder into describing the room and Hack’s position such that Hack could not see because of the one-way mirror. In addition, the prosecution can show that Hack gave the account to defense counsel one month after the incident, presumably at a time when the details were not fresh and Hack had been talked to by defense counsel.

(a) The prosecution should make a hearsay objection to the entire line of questioning concerning statements made by both Waitkus and Lowrey. It will be up to defense counsel to adequately respond.

(b) The prosecution should establish that Hack was upset at the time of the lineup.
(1) Hack had been in jail overnight and the next day.

(2) Hack believed that “cops try and frame people for things they don’t do,” and Hack doesn’t trust cops.

(c) The prosecution may be able to demonstrate that Hack’s position of observation was such that Hack could not see what Hack claims to have seen because of the one-way mirror.

(1) If Hack on direct draws the picture, either visually or verbally, of a single room, the prosecution can argue in closing that both Lowrey’s and Waitkus’s testimony established this could not be true.

(d) Hack did not come forward with this information until one month after the incident on October 14.

(1) At that time, Hack gave a statement to a criminal defense attorney’s investigator after Hack’s criminal defense attorney contacted Delaney’s criminal defense attorney.

(2) At no time did Hack ever present this information either to the police or to the DA.

(e) If the court permits such testimony, establish Hack’s prior negative contacts with the police, prosecutors, and courts.

(1) Hack was arrested six years ago by the same police department for spousal battery. Hack was convicted and sentenced by the court.

(2) Hack was arrested and convicted four years ago by sheriffs for battery in a gym, was prosecuted by the DA, and was convicted and sentenced to three months in jail by the court.

(3) Hack was arrested by the same police department three years ago for resisting arrest, prosecuted by the DA, convicted by a jury, and sentenced by a judge to four months in jail.

(4) Hack has said that cops frame people. Hack doesn’t trust cops, thinks judges are dumb, and thinks jurors are dumb.

(f) Possible Stumbling Blocks

(1) Failure to control witness and allowing witness to explain and repeat direct testimony.

(2) Adopting a hostile manner toward Hack resulting in jury sympathy for the witness and dislike of counsel.

(3) If the witness testifies contrary to the witness’s report, failing to appropriately impeach by prior inconsistent statement.

9. Direct Examination of Dr. Leslie Scheffing

A complete discussion of the direct and cross-examination of Dr. Leslie Scheffing is included at pages 65–69, supra.
10. Matters before the Defense Rests

   (a) The defense should review the checklist of information and evidence to ensure that all elements of the defenses and all evidence are introduced.

   (b) Defense motion for judgment of acquittal.

**Closing Arguments**

A complete discussion of closing arguments in this case is included at pages 77–78, *supra*. 