

Witness Questioning

Direct Examination

Objective: To obtain information from favorable witnesses you call in order to prove the facts of your case; to present your witness to the greatest advantage; to establish your witness's credibility; and to present enough evidence to warrant a favorable verdict.

What Should Be Included

- Isolate exactly what information each witness can contribute to proving your case and prepare a series of questions designed to obtain that information.
- Be sure that all items you need to prove your case will be presented through your witnesses.
- Use clear and simple questions.
- Never ask a question to which you don't know the answer.

Advice in Presenting

- Try to keep to the questions that you've practiced with your witnesses and ask a limited number.
- Be relaxed and clear in the presentation of your questions.
- Listen to the answers.
- If you need a moment to think, do not be afraid to ask for a moment to collect your thoughts or to discuss a point with your co-counsel or Senior Attorney.
- Be sure to have all documents marked for identification before you refer to them at the trial. Then refer to them as Exhibit 1, or Exhibit A, etc. After you have finished using the exhibit, if it helps your case, ask the judge to admit it as evidence.

Avoid

- Complex and verbose questions. Keep it simple.
- Attempting to elicit conclusions – that's the jury's job.
- Allowing narrative testimony; it could prove dangerous if the witness gets out of your control.
- Leading questions.

Other

- Practice with your witnesses.
- When your facts are in evidence, cease questioning. Say "No further questions" or "Your witness."

Cross-Examination

Objective: To obtain favorable information from witnesses called by the opposing counsel, and if a witness has no testimony favorable to you, to discredit the witness. Try to secure admissions that help your case.

Types of Questions to Ask

- Questions that reflect on the witness's credibility by showing that he or she has given a contrary statement at another time (i.e., the witness first testifies to not being at the scene of an accident and later admits to being there). When such an inconsistency arises, this may be done by asking the witness, "Did you make this statement on June 1st?" Then read it or show a signed statement to the witness and ask, "Is this your statement?" Then ask the witness to read part of it aloud or read it yourself and ask, "Did you say that?"
- Questions that show that the witness is prejudiced or biased or has a personal interest in the outcome (i.e., the witness testifies that the defendant was her landlord and evicted her).
- Questions that weaken the testimony of the witness by showing that his or her opinion is questionable (i.e., the witness with poor eyesight claims to have observed all the details of a fight that took place 50 feet away in a crowded bar).

- Questions that show that an expert witness or even a lay witness who has testified to an opinion is not competent or qualified due to lack of training or experience (i.e., a high school student or even a dentist testifying that in her opinion the defendant suffers from a chronic mental disease).

Advice in Presenting

- Be relaxed and ready to adapt your prepared questions to the actual testimony given during the direct examination.
- Always listen to the witness's answers.
- Avoid giving the witness an opportunity to re-emphasize the points made against your case during direct examination.
- If the witness is in fact "hostile," do not give him/her an opening to explain anything. Keep to the "yes" or "no" answers whenever possible. Try to stop the witness, if his or her answer or explanation is going on and hurting your case, by saying "You may stop there. Thank you" or "That's enough. Thank you."
- Don't harass or attempt to intimidate the witness.
- Don't quarrel with the witness.
- Ask leading questions that will result in "yes" or "no" answers.

Other Suggestions

- Anticipate each witness's testimony and write your questions accordingly, but be ready to adapt your questions at the trial depending on the **actual** testimony.
- In general, ask only leading questions (questions that suggest the answers and normally only require a "yes" or "no" answer).
- Be brief. Don't ask so many questions that well-made points are lost.
- Prepare short questions using easily understood language.
- Ask only questions to which you already know the answer.

Avoid: Hostility toward the witness-juries and judges usually resent it. Don't engage in "fishing expeditions" by giving the witness a chance to clarify damaging statements. When you have a favorable answer, drop the matter and wait for closing argument to emphasize it. Don't ask too many questions; only ask those which really help your case.

Impeachment: If testimony is given by a witness on direct examination which you feel contradicts the witness's statement, wait until cross examination, then confront the witness with the statement and bring out inconsistencies in testimony given.

Note: Witnesses must admit making their statements when directly confronted with question, "Do you remember making and signing this statement under oath."

Redirect/Re-cross

Purpose: To rehabilitate a witness or repair damage done by your opponent. Only a few questions, if any, should be asked during re-direct or re-cross.

Direct examination and cross-examination sections were taken in part from the *2001-2002 Nevada High School Mock Trial Competition Handbook* published by the State Bar of Nevada with their permission.

Four Stages in Preparing Questions for Witnesses

*For each stage, questions should be prepared in chronological order.

Stage 1: Background Information

This is general information about the person such as where they go to school/work; how they

know the defendant; and/or how they know of the incident in question.

Stage 2: Pre-Event Questions

Pick a natural point prior to the event where the event may have been affected, but still a point that is not part of the event. This could be an hour, a day, a week, etc. There is no universal point (it is often easier to identify the Event stage first and then the pre-event stage). For example – What would the pre-event stage be in the following situations?

- The defendant is charged with petit larceny

Answer: An hour prior to the incident – “How did s/he get to the store?”

- The defendant is charged with battery

Answer: Could be the morning of the incident or prior if there were previous situations that lead up to the fight – “When did you first meet the victim?”

All pre-event questioning is to find the underlying cause of the incident and/or any circumstance that may have lead to the occurrence.

Stage 3: Event Questions

The “Event” begins at the point that there was no return. There should be a direct relationship between the beginning of the event and the point at which damages occurred. For example – What would the beginning of the event be in the following?

- Petit Larceny

Answer: When the item(s) were taken with the intent to deprive the owner

- Battery

Answer: First indication of hostility

The event ends at the point where the eventual defendant is no longer in a position of liability for his/her conduct. For example – What would the end of the event be in the following?

- Petit Larceny

Answer: The moment the defendant was detained

- Battery

Answer: When the situation permanently stopped

Consider having the witness relate the entire event in his/her own words first. While this may be difficult, never interrupt during this recounting. Pause for a few seconds once the witness is finished. Then, explain that you are going to go back over the event in question again. This time using your prepared questions to make sure everything was covered.

For both pre-event and event questions you may consider asking the witness, “How do you know...” as a method of validating their statement. The best questions are those that lead to a cause and effect situation where the witness is also questioned on how they reacted at all stages of the incident in question.

Stage 4: Post Event Questions

This stage may not always apply, but refers to the events from the moment that the defendant was in no legal jeopardy for his/her actions and lasts until you are finished with your questions.

For example – some post-event questions may be:

- What happened immediately after the event?
- Has the defendant/victim been in contact with the victim/defendant since the incident occurred?
- Has the witness spoken to anyone regarding his/her testimony prior to coming to court?

Cross Examination

PURPOSE:

1. Create an Image Goal- (Use this image in your closing)
 - Determine what you image you want the jury to have of the witness
 - Structure your examination to emphasize this image
2. Advance your theory of the case
3. Demonstrate why the jury should not believe this witness= Impeachment

IMPEACHMENT:

1. Areas that impeach a witness
 - a. Bias
 - b. Sensory defect
 - c. Contradictions
 - d. Truth/Untruthfulness
 - Oath
 - Personal Knowledge
 - Completeness
 - Perception
 - Recollection
 - Communication

PROCEDURE:

Organization

- A. Pin point your image goal
- B. Sequence of questions
- C. Pattern of Questions
 - a. Don't jump around= you will lose/confuse the jury
 - b. Avoid abrupt topical transitions= from image goal to image goal
- D. Alternative Endings/Questions based on Witness' answers

Execution

- A. Avoid Using Notes, they are distracting to the jury
- B. Do not repeat your opponents' direct examination!
- C. Maintain control over the witness by asking precise questions
 - a. Who, what, when, why, explain, describe= TURNING IT OVER TO THE WITNESS NOT CONTROLLING THE WITNESS
 - b. NO OPEN ENDED QUESTIONS
- D. Don't ask One Question Too Many, May Open a Door you Don't want Open
- E. Control Witness
 - a. Lead, lead, lead
 - b. General to Specific
 - c. One Fact Per Statement
 - i. Develop a rhythm and pacing
 - ii. Pause between important questions so the jury absorbs the answers that are given
- F. Don't Argue with Witnesses
- G. Get the Answer by Eliminating Alternatives
- H. Listen to Answers- If you get "The Rambler" State:
 - a. So your answer is "Yes"
 - b. So your answer is "No"
 - c. Then it is neither

I. If Witness is being evasive, ask “You Understand My Question Don’t You”

J. If Witness is being non-responsive, state “You’re Answering This Question, but I’m Asking Another Question”

IMAGE GOALS DRIVE CROSS EXAMINATION!!

What Do You Want the Jury to Think About the Witness?

COMMON IMAGE GOALS:

- Liar
- Wasn’t there
- Didn’t see what happened
- Doesn’t know what happened
- Doesn’t remember what happened
- Too far away to be reliable
- Relationship with Defendant or Victim has skewed their perception
- Was not present for the duration and therefore is unreliable
- Trying to keep themselves out of trouble

Other Points to Remember When Questioning a Witness:

Take notes while listening to the other side question the witness. It may lead to additional questions.

Two common errors are asking repetitive questions and asking trick questions. They generally accomplish little and create sympathy.

- Do not cut off the witness while s/he is answering the question.
- Try to keep the witness “on-topic” and focused.

Witness Considerations

There are five kinds of witnesses. They are:

1. Friendly – A witness on your side
2. Neutral – A witness that does not care who wins
3. Skeptical – A witness that does not want to be involved
4. Hostile – A witness with interests against your client
5. Combination – Some characteristics of two or more of the above.

When considering whether or not to question a witness, consider the following:

Credibility Will the witness provide information that will verify the information that you have? Will they appear to know what they are talking about?

Competence - To be competent, the witness must know the difference between right and wrong, and be able to communicate that information in court. The witness must also know what s/he is talking about.

Believable Will the judge/jury believe what the witness is saying?

Do you believe what the witness is saying?

Attitude What kind of attitude does the witness convey?

Personal Knowledge Is the witness speaking from personal knowledge?

Motivation Does the witness have any motivational issues that could be tainting the testimony either in favor of, or against your position?

Appearance If you know that you will be calling a witness to testify in court, go over the proper attire for court with the witness, especially if they are a juvenile.

Suggestions on How to Handle Various Types of Witnesses

Unresponsive Witness - When questioning an unresponsive witness, try to determine the reason for the unresponsiveness (cultural difference, fear of retribution, shyness, embarrassment). Ask such witnesses

open-ended questions or begin with comments that might stimulate their interest, build their confidence, and/or reassure them that their testimony is valuable to the court.

Angry/Verbally Abusive Witness

When questioning an angry or verbally abusive witness, acknowledge their anger calmly and encourage them to express the anger in a productive manner. For example, “Mrs. Durant, I can see that you’re very angry about this, but it’s important that we show respect for this court and handle this case in a manner that will result in a fair outcome.”

Emotional Witness - When questioning an emotional witness, it might be good to keep a packet of tissues in your pocket. Avoid using language that will trigger an emotional response. Instead, seek to use a matter-of-fact, calm, and respectful manner that will encourage the witness to respond calmly. If the witness begins to cry, you can say something like, “I can see you’re upset. Have a tissue and take a couple moments to relax and compose yourself before you answer.”

Witness in a Higher Position of Authority - When questioning a person in a higher position of authority, always use proper mode of address (Officer, Mr./Ms./Mrs.) and acknowledge his or her position as you begin. For example, “Officer Alvarez, as you were the first to arrive at the scene, you will be able to tell us. . . .”

Suggestions on how to handle various types of witnesses were taken from *Youth Court Adult Model: A Handbook for Student Volunteers*. Reprint privileges were granted by permission of the American Bar Association on behalf of its Standing Committee on Public Education.

Defense Sample Questions

To Ask:

Direct Examination of Defendant:

- Please tell the court your name.
- Where do you live/go to school? (Depending on where incident occurred)
- How old are you?
- What grade are you in?
- *Following questions ONLY if they help the defendant appear to be a good kid.
- Tell the court a little about how you do in school. What are your favorite subjects?
- What type of grades do you get?
- Do you have a job?
- How long have you worked there?
- What do you do in your free time?
- Tell the court about your friends.
- Tell the court about your family.
- Have you ever been in trouble with the law?
- Please tell the court about the events that led up to the incident.
- Have you ever done something like this before?
- Who were you with at the time of the incident?
- Were you forced into the incident in question?
- Whose idea was it?
- Do you have any problems at home?
- Have you ever stolen anything?
- Have you ever consumed alcohol?
- Have you ever taken illegal drugs?
- Have you ever done anything to lose your parent’s trust?

- Do you still associate with the other people who were involved in the incident?
- Have you ever had conflict with the defendant/victim before?
- Did you feel peer pressure to become involved in the incident?

Cross Examination of Police Officers:

- Officer, you were not at the scene when the incident occurred, isn't that true?
- Therefore Officer, you don't have any firsthand knowledge of what happened, do you?
- Officer, isn't it true that the defendant cooperated with you during the arrest or when you issued the ticket?
- Officer, isn't it true that the defendant said (he/she) was sorry?
- Isn't it true that the defendant admitted to the crime?

Cross Examination of Victims:

- Isn't it true that the defendant admitted the crime?
- Isn't it true that the defendant apologized right away for committing the crime?

Prosecution Sample Questions

To Ask:

Direct Examination of Victims:

- Please tell the court your name.
- Where do you live/go to school? (Depending on where incident occurred)
- Where were you on the day the crime took place?
- Have you ever had conflict with the defendant/victim before?
- Please tell the court what happened.
- What exactly did the defendant do to you?
- What exactly did the defendant say to you?
- How did this act make you feel?
- Is there anything else you would like to tell the court?

Direct Examination of Police Officers:

- Please tell the court your name.
- Where do you work?
- How long have you worked as a police officer?
- Please describe the contact you had with the defendant on (date).
- What exactly happened?
- What was the defendant's attitude when you made the arrest or issued the ticket?
- Officer, did the defendant admit to being responsible for committing the crime?
- Were you able to speak to the victim?
- What did the victim tell you?
- Did you write a police report on this crime?
- I am showing you prosecution's exhibit 1 for identification. Do you recognize this?
- Is this your signature?
- You honor, I would like to introduce the police report into evidence as prosecution's exhibit 1.
- Officer, will you please read what you wrote about the offense?

Cross Examination of Defendant

- Isn't it true that you committed this crime?
- You are only apologizing in court today because you hope to get a lower sentence, aren't you?
- You only apologized to the victim because the police officer arrested you, correct?

Sample Questions taken from *Youth Court Adult Model: A Handbook for Student Volunteers*. Reprint privileges were granted by permission of the American Bar Association on behalf of its Standing Committee on Public Education.

COMPETENCY, EXAMINATION, & CREDIBILITY OF

WITNESSES

GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as otherwise provided in these rules.

3 categories

Ability to perceive (see, hear, touch, smell)

Ability to recollect (What kind of memory does the person have)

Ability to communicate (small children, mental deficiencies)

Sincerity

LACK OF PERSONAL KNOWLEDGE

A *witness* may not testify to a matter *unless* evidence is introduced *sufficient to support* a finding that the witness has *personal knowledge of the matter*. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony.

This rule is subject to the provisions relating to opinion testimony by expert witness.

OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

WHOMAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or religious opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

COMPETENCY

Witnesses are incompetent if:

- They lack *personal knowledge*
- If the witness will not solemnly *promise to tell the truth*.

FRE 611: MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presentation evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

DIRECT EXAMINATION

Leading Questions: Generally, the examiner *may not ask leading questions*.

- **Definition:** A leading question is one that *suggests to the witness the answer desired by the questioner*.

o Exceptions:

» **Hostile witness:** If the witness is *hostile* or *becomes hostile* then leading questions may be asked

» **Preliminary matters:** Leading questions may be used to discover *preliminary questions*, or questions not really in dispute.

» **Memory jogging**

» **Less competent witness:** The witness may have some kind of *handicap* that make it difficult for him to respond to non-leading questions, e.g., if the witness is very *young*, has trouble *speaking English*, is unusually *unintelligent*, or very *timid*

Argumentative Question

o **Definition:** A question designed to induce the witness to affirm counsel's interpretation of the evidence.

o **Admissibility:** *Improper* during direct

Misleading Questions

o **The vice:** The vice of a misleading question is that it assumes as true a fact that either is not in evidence or is in dispute.

o **Admissibility:** *Improper* during direct

o Example: "At any time during this assault, did anyone attempt to leave?"—assumes the existence of the assault, yet the fact of the assault may be contested.

(b) Scope of cross-examination. Cross-examination should be *limited* to the *subject matter of* the *direct* examination and *matters affecting the credibility* of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading question. Leading questions should *not* be used *on* the *direct* examination of a witness *except as may be necessary* to develop the witness' testimony.

Ordinarily leading questions should be *permitted on cross*-examination. When a party calls a *hostile witness*, an *adverse party*, or a *witness identified with an adverse party*, interrogation may be by leading questions.

CROSS-EXAMINATION

Terms

o **Adverse party** = opposing party

o **Identified w/ an AP** = relative/close friend associated w/ D or P

o **Hostile:** Just b/c W is on the opposing party's witness list does by that fact alone make him hostile

Purpose: The purpose of C-E is usually to *undermine* or *discredit an adverse witness's testimony* or to *cast doubt on the witness's credibility*, cross is also used to develop facts of consequence omitted in the direct examination and merely to clarify potential misimpressions from the witness's testimony.

Leading questions are *allowed* on cross

Scope of Cross: FRE *limit* the c-e to the *matters testified* to on the *direct examination*.

Also know as the "*scope of direct*" rule.

o **Credibility:** Questions relevant to the witness's credibility are always regarded as within the proper scope of c-e.

Argumentative Question

o **Definition:** A question designed to induce the witness to affirm counsel's interpretation of the evidence.

o **Admissibility:** *Improper* during cross

Misleading Questions

o **The vice:** The vice of a misleading question is that it assumes as true a fact that either is not in evidence or is in dispute.

o **Admissibility:** *Improper* during cross

REDIRECT EXAMINATION

Scope

o Permitted only to reply to significant *new matter* raised in cross

EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

(a) **Opinion and reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation¹, but subject to these limitations: (1) the evidence may refer only to character for TRUTHFULNESS or TRUTHFULNESS, and (2) evidence of truthful character is admissible *only* after the character of the witness for truthfulness has been attacked¹ by *opinion* or *reputation* evidence or *otherwise*.

(b) **Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, *other than* conviction of crime as provided in **RULE 609**, may *not* be *proved by extrinsic evidence*. They may, however, in the discretion of the court, if *probative of truthfulness or untruthfulness*, be inquired into a *cross-examination* of the witness: (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

IMPEACHMENT GENERALLY (CROSS EXAMINATION)

IMPEACHMENT BY CONVICTION OF A PRIOR CRIME

(a) For the purpose of attacking the credibility of a witness,

(1) evidence that a witness *other than an accused* has been convicted of a crime shall be *admitted, subject to Rule 403*, if the crime was *punishable by death or imprisonment* in excess of one year under the law which the witness was convicted, and evidence that an *accused* has been convicted of such a crime *shall be admitted if* the court determines that the *probative value* of admitting this evidence *outweighs its prejudicial effect* to the accused¹; and

(2) evidence that *any witness* has been convicted of a crime shall be *admitted* if it involved *dishonesty or false statement*, regardless of the punishment.

IMPEACHMENT GENERALLY (CROSS EXAMINATION)

Generally: It refers to the introduction of evidence *aimed at discrediting the testimony of a witness*.

The examiner is looking to attack the witness's (1) perceptions, (2) memory,

(3) ability to communicate (narrative), or (4) sincerity (bias, interest, oath, corruption)

o Techniques of Impeachment

» **Character**—IS A DIRECT ATTACK

· Convictions

· Bad acts

· Reputation

» **Prior Inconsistent Statement (PIS)**

» **Bias**—NOT A DIRECT ATTACK

» **Sensory Defects**

» **Contradiction**

A recurring issue: Whether the impeaching party is entitled to present impeaching evidence by “extrinsic means—that is, by adducing evidence in addition to that which could be developed during c-e?

o This issue typically arises when the attacking party calls one or more witnesses for the sole purpose giving impeachment testimony

Impeachment is concerned with one character trait *truthfulness/untruthfulness*, and *every person who takes the stand is subject to being attacked*

CONVICTION OF A CRIME

Desired Inference

o A person who commits a criminal offense is likely—or at least more likely than one who has not committed such an act—to give false testimony.

Rules of Evidence permits...

- o The use of any conviction—misdemeanor or felony—involving “dishonesty or false statement” to impeach any witness
- o Felony-grade convictions not involving dishonesty or a false statement are admissible against any witness *other than a criminal D* subject to the balancing test (FRE 403)
- o Felony-grade convictions not involving dishonesty or a false statement are admissible against a *criminal D* only if the probative value of the evidence > the prejudicial effect to the accused.

Judges Power

- o Evidence Rules give the judge discretionary power to admit evidence of a prior conviction of the accused where he determines the probative value of the evidence is less than the prejudicial effect to the accused. Thus, the probative vs. prejudicial test is reversed. It is presumptively inadmissible to use a prior conviction.
- o Evidence Rules give the judge discretionary power to admit evidence of a prior conviction of a witness other than the accused unless the probative value of the evidence substantially outweighed by the possibility of unfair prejudice or other concerns. Here the evidence is presumptively admissible and must show that unfair prejudice would result
- o In both cases above the judge must articulate for the record the reasoning of his decision to either admit or exclude the proffered evidence.

Probative vs. Prejudicial Flowchart

Is the **crime punishable by death or imprisonment in excess of 1 year** (felony), or involving **false statement or dishonesty**?

No The material must come in as an “unconvicted bad act”.

Yes

Does the crime in question involve **dishonesty** or **false statements**, i.e., **crimen falsi**?

Have **more than 10 years elapsed**?

Admissible Inadmissible

No

Yes

The conviction will be **admitted** if its **probative value substantially outweighs** the **prejudicial effect**. If it does **not** then it is **inadmissible**.

Yes

No Yes

The conviction will be **admitted** if its **probative value outweighs** the **prejudicial effect**. If it does **not** then it is **inadmissible**.

No Is W the **accused**?

Crimen Falsi

- o **Perjury** or **subornation of perjury**
- o **False statement**
- o **Criminal fraud**
- o **Embezzlement**
- o Taking property by **false pretenses**
- o **Counterfeiting**
- o **Forgery**
- o **Filing false tax returns**

IMPEACHMENT BY PRIOR BAD ACTS

Collateral or Material

o Prior bad acts that did not lead to a criminal conviction are deemed *collateral*, and are *not provable* by *extrinsic* evidence

2 Difficulties w/ This Method

- o There may be an issue of relevance b/c not all “bad” acts cast doubt on credibility
- o Courts generally are concerned that trials be neither unduly prolonged nor so conducted that the trier’s attention is diverted from principal issues in the case
 - » Courts do not want to conduct a trial w/in a trial—adjudicating the existence and circumstances of some distant act, which has relevance only b/c it brings into question the credibility of a witness

Most jurisdictions

- o *Allow* impeachment by prior bad acts, but require that the examiner *settle for such admissions* or concessions as he can adduce during cross
- o The examiner *cannot prove* the prior bad act by “*extrinsic*” evidence
- o The examiner also must inquire only in *good faith*, based on his reasonable belief that the witness has committed the prior bad act in question

All courts

- o Agree that the *impeaching party may offer witnesses* who assert that *based upon their knowledge* of the principal witness, derived either from their familiarity with his *reputation* or their observations of his conduct, he has a *bad character for truth and veracity*
- o Those who take the stand for purposes of impugning the character of the principal witness are restricted to giving evidence of the latter’s bad reputation for truth and veracity.
 - » To give reputation evidence W must have some familiarity w/ the person
- o The *intended inferences*: from W’s unfavorable reputation, the trier can infer the existence of a mendacious trait, and then can infer that W is giving untruthful testimony at trial.

The Shift

- o There has been a shift in allowing the *impeaching witness* straightforwardly to give his *opinion* of the veracity of the principal witness
- o Evidence Rules do not go so far as to permit the impeaching witness to describe, during *direct examination, specific instances* of conduct that reflect adversely upon the truth and veracity of the principal witness
- o The cross-examiner may probe the basis of the opinion (or reputation) by inquiring about these specific events
 - » To give opinion evidence W must have know the person

FRE 613: Prior Inconsistent Statements

(a) Examining a witness concerning prior statements. In examining a witness concerning a prior inconsistent statement made by a witness, whether written or not, the *statement need not be shown nor its contents disclosed to the witness at that time*, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. *Extrinsic evidence* of a prior inconsistent statement of a witness is *not admissible* unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded the opportunity to interrogate the witness thereon, or the interest of justice otherwise requires. This provision does not apply to admissions of a party-opponent

PRIOR INCONSISTENT STATEMENTS

Theory In Allowing Prior Statements For Inconsistencies

- o If the witness has rendered prior inconsistent statements about comparatively unimportant topics, his testimony about more important events should be evaluated with special care

Considerations To The Witness

o Many courts require counsel **first** to **ask** the witness **about the prior inconsistent statement** and then to **give** the witness an **opportunity to deny, affirm, or explain** the earlier statement

Types of Proof Allowed

o **Intrinsic:** From the mouth of the witness

o **Extrinsic:** All other evidence not from the mouth of the testifying witness

» Most courts don't allow extrinsic proof of PIS on a **collateral issue**

» **Collateral Matter Rule:** Collateral evidence offered to attack the credibility of a witness may be inquired into c-e intrinsically, subject to the courts discretion, but, extrinsic evidence with regard to collateral matters on the same question may not be introduced

IMPEACHMENT BY BIAS

Four Ways to Show Bias

o Interest in the outcome

o Economic or marital relationship

o Hostility or favoritism

o The fee paid to an expert witness

Bias is never collateral, it is always material

IMPEACHMENT BY SENSORY/MENTAL DEFECTS

General Rule: A witness can always be impeached by showing that his capacity to **observe, remember, or narrate events correctly** has been impaired.

Drugs and Alcohol

o **Proof of intoxication:** All courts agree that the witness may be impeached by showing that he was **drunk** or **high on drugs** at the time of the events he purported to witness.

o **Addiction:** Most courts would not allow proof of alcoholism or drug addiction in the absence of proof that the witness was drunk or high at the time of the events in question.

Extrinsic Evidence Allowed: A witness' sensory/mental defect is **never** deemed to be of "**collateral**" importance. Therefore, the rule barring **extrinsic evidence** on collateral issue does **not apply** to impeachment by sensory/mental defects.

IMPEACHMENT BY CONTRADICTION

Four Ways to Impeach by Contradiction

o **Cross-examination:** The attacking party may use **cross-examination** to get W to concede that she was wrong in her direct testimony, or at least to get her to hedge or retract what she previously stated unequivocally

o **Use of other previously-introduced testimony:** The attacking party may use other **previously introduced testimony** or physical evidence as a weapon during cross, to show that W has lied or is mistaken

o **W's own PIS:** The attacking party may show that W has **previously made statements inconsistent w/ W's trial testimony.**

o ****New evidence contradicting W's story**:** The attacking party may attack W's testimony by **introducing new evidence**—either testimony by a **second witness** or **physical** evidence, such as a document—showing that W's story is not correct

Mere Contradiction

o Mere contradiction is **not** tantamount to an attack

o The inference that W is not telling the truth must be clear or it is not an attack

o If there is another explanation then the contradiction is probably not an attack on W

Contradiction of Direct Testimony About Case (Collateral Issue): If W1's testimony relates directly to the facts of the case (not to W2's own qualifications or credibility), the collateral issue rule applies to contradictory testimony for W2.

o Only if W2's testimony relates to a fact that is important to the outcome of the case will W2 be permitted to contradict the underlying fact.

REHABILITATION OF CREDIBILITY OF WITNESSES

General Principles

- o The credibility of a witness may **not** be **supported in the absence of an impeaching attack**
- o **Justification:** the assumption is that most witnesses are conscientious and honest, so there is no reason to prolong the trial by allowing supporting evidence of credibility when truthfulness is not questioned
- o If allowed, parties could be motivated to create favorable evidence knowing it will be used later to bolster their case

General Rule Not Violated If

- o Incidental background info about a witnesses employment or profession
- o Introduction of potentially harmful evidence in order to diffuse an anticipated attack by opposing counsel

When May You Rehabilitate A Witness

- o When she has been attacked with respect to her on character for truth (direct)
 - » Questioning W herself regarding past truthfulness » all court permit
 - » Regarding W's reputation and opinion for truthfulness w/in her community
 - » Prior convictions w/ reputation and opinion as to truthfulness

Maybe an Attack on Truthfulness

- o Bias; in abstract considered NOT to be attack.
- o P.I.S. (Prior inconsistent statement): Judge makes the decision
- o Contradiction
 - » If yes, the rehabilitation allowed by reputation or opinion
 - Under the circumstances it is so severe that the only reason for its use of impeachment is that W is lying. If yes, then it is an it is an attack on truthfulness
 - » If no, then there is no rehabilitation

When Has A Witness Been Impeached

- o A witness has **not** been **impeached** when the party opposing the witness merely calls **other witnesses** who **give contrary testimony**
- o The issue if a contextual one and the trial judge's discretion should be sustained

What Kind Of Accrediting Evidence Rebut The Impeaching Evidence

- o NOTE: the evidence designed to rebut impeaching evidence can be directed either at *the impeaching witness* or at *the inference of untruthfulness* that arises from the impeaching facts
- o The latter often generates issues of relevance

Questioning Witnesses Homework

For this exercise, use the sample case located in Appendix A.

1. As prosecuting counsel, come up with 2 questions to ask each witness, including defendant.
2. As defense counsel, come up with 2 questions to ask each witness, including defendant.

Lined area for writing.