

2022 TENNESSEE JUDICIAL ACADEMY

Witnesses and Impeachment From the Judge's Point of View

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Objectives:

Witnesses and Impeachment

After this session, you will:

1. Understand the evidentiary principles and rules related to witnesses;
2. Appreciate the methods of impeachment and limitations on those methods;
and
3. Manage the presentation of testimony in an efficient and fair manner.

Relevant Rules:

Tenn. R. Evid. 601-618; Tenn. R. Evid. 701-702

I. Competency

A. Common Law Disqualifications and the Evolution of Rule 601 and Impeachment

Witness competency refers to the witness' qualifications to testify. At common law, competency to testify was also referred to as capacity to testify. The rules pertaining to competency and qualification have evolved significantly over time. At common law, there were numerous categories of disqualified individuals. For example, at common law, the parties were considered incompetent to testify because of their interests in the case. Additionally, children, those convicted of crimes, and those considered mentally ill were prohibited from testifying. As early as 1918, the United States Supreme Court remarked on the harshness and unfairness of common-law disqualification rules: "the conviction of our time [leads us to conclude] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in the case, leaving the credit and weight of such testimony to be determined by the jury or the court." *Rosen v. United States*, 245 U.S. 467, 471 (1918); *see also Washington v. Texas*, 388 U.S. 14 (1967) (striking down state laws prohibiting accomplice from testifying in favor of defendant).

With this recognition, courts began to move toward eliminating categories of witness disqualification, allowing witnesses to testify, but subjecting the witness' to cross-

examination on topics bearing on the reliability of their testimony. Thus, many of the categories that served to disqualify witnesses from testifying at common law (also referred to as “rendering a witness incompetent”) have now evolved into impeachment rules. Codified rules of evidence, and case law, allow the impeachment of witnesses with evidence of interest or bias and with proof that the witness has been convicted of certain crimes.

Under codified rules of evidence, such as Tennessee Rule of Evidence 601, every person is competent to be a witness except as otherwise provided in the rules. Under Rule 702, witnesses whose opinions are offered on scientific, technical, or other specialized matters, must meet special qualifications to testify based upon their skill, experience, education, and training. However, the presumed competency rule must be read in conjunction with Rules 602 and 603, which require that witnesses have personal knowledge and that they declare that they will testify truthfully before testifying.

The one remaining vestige of common-law disqualification is so-called “dead man” statutes or “dead man” acts. These statutes were designed to protect the estates of deceased against fraudulent claims and while they do not bar a witness from testifying, dead man’s acts do limit the subject matters upon which a witness may testify. Tennessee’s dead man’s act provides:

In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party. If a corporation is a party, this disqualification shall extend to its officers of every grade and its directors.

B. Oath or Affirmation – Rule 603 - Oath or Affirmation

Under Rule 603, witnesses must declare that the witness will testify truthfully “by oath or affirmation administered in a form to awaken the witness’s conscience and impress the witness’s mind with the duty to do so.” Rule 603 does not require that the oath or affirmation be given in a specific form. Flexibility might well be required, for example, to accommodate beliefs and opinions protected by the First Amendment. The Advisory Committee to the parallel federal rule notes that flexibility is provided for purposes of dealing with “religious adults, atheists, conscientious objectors, mental defectives, and children.”

C. Special Considerations

1. Child witnesses

Although children were disqualified from testifying at common law, this exclusion does not exist today. Rule 603 requires that the judge ascertain that the child is capable of

understanding the nature of the oath and abiding with its obligations before the child is allowed to testify. This is ordinarily done through a voir dire procedure in which the judge asks the child witness questions to determine whether the child can differentiate between the truth and fiction.

2. Mental Competency

Although people of “unsound mind” were disqualified from testifying at common law, this exclusion does not exist today. As is true of children, those who suffer from mental disabilities may testify so long as they are capable of communicating and of understanding the nature and obligation of the oath.

3. Capacity to Communicate

Witnesses who find it difficult to communicate have been allowed to communicate through a variety of devices. This includes sign language, gestures, or interpretation by those familiar with the witness’ communication signals. *See United States v. Bell*, 367 F.3d 452, 463 (5th Cir. 2004)(allowing testimony through sign language, grunts, and gestures); *People v. Spencer*, 457 N.E.2d 473, 479 (Ill. App. 1983)(allowing testimony through gestures, references to dolls, symbols, colors, numbers, and alphabet)’ *Byndom v. State*, 39 S.W.3d 781 (Ark. 2001)(allowing testimony through facial expressions, signing of “yes” and “no”, and use of computer yes/no function).

D. Judges and Jurors

Under the Tennessee Rules of Evidence, the competency of judges and jurors as witnesses is limited. Rule 605 provides that the “judge or chancellor presiding at the trial may not testify in that trial. Thus, in common-law terms, the presiding judge is incompetent to testify in the trial.

Rule 606 deals with juror testimony and greatly restricts it. At the trial, a juror may not testify. Tenn. R. Evid. 606(a). At times, parties will attempt to call jurors after the trial for purposes of inquiring into the validity of the verdict. Rule 606(b) greatly limits a juror’s competency to testify concerning the validity of the verdict (or, in the case of a grand juror, the indictment). It provides that a juror may not testify about “as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything on upon any juror’s mind or emotions as influencing that juror to assent or dissent from the verdict or indictment or concerning the juror’s mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury’s attention, whether any outside influence was properly brought to bear upon any juror, or whether the jurors agreed in advanced to be bound by a quotient or gambling verdict without further discussion.” The rule also prohibits the introduction of affidavits or evidence of a juror’s statement about such matters.

Cases interpreting Rule 606 have focused upon protecting the jury verdict. Generally, the cases divide juror testimony into two categories. Testimony about internal influences is prohibited, but testimony about external influences is allowed. Additionally,

testimony about clerical mistakes is allowed. The rule addresses only when a juror's testimony may be received and not what the effect of the testimony would be on the trial.

II. Witness Examination

A. Foundation – 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. Rule 702 sets out a different foundational rule for witnesses who will testify as to their opinions regarding scientific, technical, or specialized matters.

As evidence scholars have explained, “the rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact” is a “most pervasive manifestation” of the common law insistence upon “the most reliable sources of information.” McCormick on Evidence §10, p. 19 (quoting in Advisory Committee Comments, Rule 602).

Personal knowledge may be acquired by any of a witness' senses. It is not limited to visual observation. Moreover, it is the witness' knowledge at the time of trial that is determinative. The fact that a witness expresses uncertainty goes to the weight, not the admissibility of the testimony so long as the witness “had an opportunity of personal observation and did get some impressions from the observation.” 2 Wigmore on Evidence, § 658, at 894 (Chadbourn rev. 1979).

The trial judge does not decide whether a witness has personal knowledge. Rather the trial judge determines whether there is evidence sufficient to support a finding that the witness has personal knowledge exists. If this prima facie evidence standard is met, the witness testifies and the jury decides whether the witness actually has personal knowledge. In effect, this is an application of the conditional relevancy doctrine.

B. Scope and Style of Examination

1. Non-Leading and Leading Questions

The traditional rule requires that witnesses are examined by direct, non-leading question on direct examination, but are subject to leading questions on cross-examination. The traditional rule gives way to some exceptions. Rule 611(c) of the Tennessee Rules of Evidence allows leading questions to develop a witness' testimony or when a party calls a witness “determined by the court to be a hostile witness.” A hostile witness is a witness who is evasive, reluctant, or unwilling to testify. The determination of hostility is for the judge but most jurisdictions allow leading questions when a witness is evasive, reluctant, or unwilling to testify but not privileged from testifying.

2. Cross-Examination

Tennessee allows “wide open” cross-examination. Specifically, Rule 611(b) provides that a “witness may be cross-examined on any matter relevant to any issue in the case, including credibility, except as provided in paragraph (d).” The exception in paragraph (d) limits cross-examination to the scope of direct examination when an adverse party is called.

The judge has inherent authority and rules-based authority under Rule 611(a), to exercise control over the interrogation of the witnesses. While the judge must protect witnesses from embarrassment and harassment, the judge must also assure the right to cross-examination and, in criminal trials, the right to confrontation. Thus, any limits on cross-examination should be carefully imposed.

3. Redirect and Recross-Examination

Redirect and recross-examination are limited to new matters. Whether, and to what extent, to allow either redirect or recross rests in the sound discretion of the trial judge.

C. Judge and Juror Questioning of Witness

Rule 614 of the Tennessee Rules of Evidence provide that the court “may not call witnesses except in **extraordinary** circumstances or except as provided for court-appointed experts” Tenn. R. Evid. 614 (a) (emphasis added). When the court calls a witness, both sides are entitled to cross-examine the witness and objections may be made outside the presence of the jury. Judges may interrogate witnesses, Tenn. R. Evid. 614 (b), but must avoid “commenting on the evidence” in violation of Article VI, Section 9 of the Tennessee Constitution.

D. Exclusion of Witnesses

In order to keep witnesses from tailoring their testimony to match, courts preclude witnesses from hearing the testimony of others. “The rule” set out in Rule 615 requires, upon request, the exclusion of most witnesses. Generally, the rule applies except as to parties, a person designated by counsel for a party that is not a natural person and employees of non-individual parties, essential persons, and persons who are statutorily authorized to be present. Tenn. R. Evid. 615. The Advisory Commission Comments to Rule 615 provide additional essential information, including: (1) lawyers and others should be instructed not to transmit what witnesses say in court; (2) rebuttal witnesses are covered by the rule, contrary to common law practice; (3) a “party that is not a natural person” includes the State; consequently “the prosecuting attorney could designate a crime victim, a relative of a crime victim, or an investigating officer; (4) the exception to the rule applies to parties and those designated by non-natural person parties as a matter of right, while the essential person exception is a matter of judicial discretion.

E. Refreshed Memory

Witnesses who forget may have their memory refreshed in order to testify. This does not mean that a witness may read a document to the jury or court, however. The principle behind refreshed recollection is that a witness has her memory jogged by looking at something. This “memory device” may be the witness’ statement, but it may also be the statement of someone else, a photograph, or a diagram. Anything can be used to refresh the witness’ memory. After the witness views the memory device, counsel must remove the device from the witness and then ask the witness the question again. The theory is that the witness is now testifying from memory that has been refreshed by use of the device. Based on fairness principles, opposing counsel must be shown the refreshing device upon request.

Under Tennessee Rule of Evidence 612(b), if a witness uses a writing to refresh memory for testifying, “an adverse party is entitled inspect it, to cross-examine the witness thereon, and to introduce in evidence those portion which relates to the testimony of the witness.” If the producing party claims that the writing includes unrelated matters, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record. If the party fails to produce the writing, “the court shall make any order justice requires which, in a criminal case, “shall be one striking the testimony, or, . . . declaring a mistrial.”

Lawyers, and unfortunately sometimes judges, confuse the hearsay exception for recorded recollection, Tenn. R. Evid. 803(5), with the process of refreshing recollection. Under the hearsay exception, certain types of writings may be read (and if offered by the opposing party admitted) in evidence when a witness’ memory fails. But in that situation, the writing, not the witness’ testimony is the evidence. When a witness’ memory has been refreshed pursuant to the refreshing recollection technique, the witness’ testimony is the evidence.

III. Witness Credibility

A. Credibility, Generally

Credibility refers to the believability of a witness’ testimony. It is the function of the trier of fact to determine the witness’ credibility, but the rules of evidence provide a variety of methods that lawyers may use to affect that determination. Judges must carefully monitor lawyers’ efforts to impeach to assure compliance with the rules. More than any other areas of evidence law, the areas of witness credibility and impeachment are affected by common law, by case law holdings, and by differing approaches.

As a general proposition, a witness’ credibility may be affected by the manner of his or her testimony, the substance of the testimony, and external factors related both to the substance of the testimony and the witness. The process by which a witness’ credibility is

lessened, or discredited, is known as impeachment; the process by which a witness' credibility is enhanced or improved is known as bolstering or rehabilitation.

At common law, lawyers were seen as vouching for their witnesses, thus prohibiting lawyers from impeaching witnesses they called. This common-law voucher rule has been replaced with a rule that provides that a witness may be impeached by any party.

B. Impeachment, Underlying Principles

Evidence rules affect both the substantive and procedural aspects of impeachment. Two principles that underlie all impeachment issues are the collateral matters and extrinsic evidence rules. In essence, both are rules of efficiency. Since impeachment involves diverting the factfinder's attention somewhat from the main issue in the case at bar, the rules are concerned with allowing the opportunity to impeach without subverting the reason for the proceeding.

1. Collateral Matters and Extrinsic Evidence

Under the collateral matters principle, if the subject matter of the impeachment is collateral, counsel must accept the witness' answer even if it is false. Collateral matters are those that do not tend to prove or disprove a material proposition in the case. If a matter is collateral, extrinsic evidence may not be used to establish the matter. Thus, a witness confronted with a question about a collateral matter must answer the question, but even if the answer is untruthful, inquiring counsel is not allowed to offer extrinsic evidence to prove the falsity of the answer. If, however, the subject matter of the impeachment is noncollateral, the untruthfulness of a witness' answer can be established by extrinsic evidence. Noncollateral matters include those that tend to prove or disprove a material proposition in the case and those that seek to impeach on the basis of bias, character for untruthfulness, or criminal convictions.

Some types of impeachment, such as proof of bias, interest, or motive, are never considered collateral, while others are *always* collateral. *See* Tenn. R. Evid. 608(b)(providing that specific instances of untruthful conduct are collateral and may not be proved with extrinsic evidence). For other categories of impeachment, the trial judge must assess the nature of the impeachment and make a determination as to whether the matter is collateral or noncollateral, thus determining whether counsel may or may not introduce extrinsic evidence to prove the impeachment.

2. No Bolstering Before Attack

Another universal principle of impeachment is that a witness' credibility may not be bolstered before credibility is attacked. In other words, evidence of good character may not be offered until the witness' credibility has been attacked.

C. Witness Impeachment

1. Methods of Impeachment

At common law, seven methods of impeachment existed. Impeachment could be by proof of bias, motive, or interest; mental impairment; contradiction; prior inconsistencies; character for untruthfulness; criminal convictions; and religious beliefs. Rules of evidence have abolished impeachment based on religious beliefs. Tennessee allows impeachment of an expert by learned treatises. Tenn. R. Evid. 618.

a. Bias, motive, or interest

The testimony of a witness who is biased, has a motive for testifying, or is interested in the outcome of the case, may be shaded in favor or against a party. Thus, impeachment by any of these methods is always relevant and always noncollateral. Under common law and under Rule 616 of the Tennessee Rules of Evidence, impeachment by this method can be established through the introduction of extrinsic evidence.

In order to impeach a witness based on bias, motive, or interest, the facts or circumstances from which the trier of fact might find that the witness is partisan or dishonest must be introduced by the impeaching counsel. The facts may consist, for example, of proof of a relationship to or with a party or witness, a stated prejudice in favor or against a party or cause, or circumstances indicating that a witness may incur personal loss or gain based on the outcome of the case. The Tennessee rule does not speak to any preadmission foundation requirements, but some courts require that the witness be allowed an opportunity to explain if the bias, motive, or interest is in the form of a prior statement by the witness.

Rule 616 allowing impeachment by bias, motive, and interest is quite liberal, allowing a party to “offer evidence by cross-examination, extrinsic evidence, or both.” The only real restriction on the introduction of extrinsic evidence of bias, motive, interest are the relevance rule and rules that allow the court to exclude unfairly prejudicial evidence.

b. Mental Impairment and Sensory Defects

A witness may be impeached by virtue of mental impairment or sensory defects that affect the witness’ ability to perceive, recollect, and explain. In Tennessee, Rule 617 provides that a party may offer evidence “that a witness suffered from impaired capacity at the time of an occurrence or testimony.”

Impeachment on this basis may also consist of courtroom cross-examination which reveals a faulty memory or ability to perceive. A witness whose testimony concerns distance, for example, may be asked by way of experiment to answer questions about known or easily verifiable distances, such as the distance from the witness stand to the courtroom door. A witness who claims a near photographic memory of an event may be questioned about other events at or around the same time. Whether extrinsic evidence may be admitted to prove sensory defects is a matter left to the discretion of the court.

If a witness is under the influence of an intoxicant or drug at the time of the event about which the witness is testifying, counsel may offer evidence of that fact. Generally, though, evidence that the witness is a habitual drunk or drug user will not be allowed absent some connection to the date in question. Similarly, mental illness that could have affected the witness at the relevant time or that could be affecting the witness at trial is generally admissible, but a wholesale exploration of a witness' mental health history will rarely be allowed.

c. Contradiction

Impeachment by contradiction is accomplished by showing that the witness is mistaken about some fact either through the witness' own testimony or the testimony of another witness. When a witness is asked about a contradiction the witness has made, the collateral matters rule applies so that examining counsel is bound by the witness' answer. Only if the contradiction concerns a material proposition in the case can counsel offer extrinsic evidence to establish the contradiction. Thus, before counsel can call another witness or introduce an exhibit to contradict a statement and impeach a witness who has testified, the contradiction must relate to evidence that tends to prove or disprove a material proposition of fact in the case.

d. Prior Inconsistent Statements

A witness' prior inconsistent statement may be used to impeach the witness at trial. This impeachment use of prior inconsistent statements should be distinguished by the substantive use of prior inconsistent statements under oath in jurisdiction that subscribe to the federal rule's classification of such statements as nonhearsay. Tenn. R. Evid. 803(26).

Before a prior inconsistent statement may be used to impeach a witness' trial statement, the statement must be inconsistent. Modern courts have interpreted that requirement to allow impeachment if at least one inference that may be drawn from the prior statement is that it is inconsistent with the statement testified to at trial. As was the case for impeachment by contradiction, the collateral matters rule applies to prior inconsistent statement impeachment and excludes extrinsic proof of prior inconsistent statements that are collateral to the issues at trial.

A procedural requirement, known as the rule in *Queen Caroline's Case*, has been altered by Tennessee Rule of Evidence 613. The rule removes the requirement that a cross-examiner, prior to questioning a witness about a prior written inconsistent statement, first show the statement to the witness. Rule 613(a) abolishes that requirement, but requires that upon request, the statement must be shown or its contents disclosed to opposing counsel.

An application of the collateral matters-extrinsic evidence rules is found in Rule 613(b) of the Tennessee Rules of Evidence, and in most jurisdictions, providing that extrinsic evidence of a witness' prior inconsistent statement "is not admissible unless and

until the witness is given an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon” Tenn. R. Evid. 613(b). The rule does allow an exception when “justice so requires.” An example of the application of the rule may be found in *State v. Martin*, 964 S.W.2d 564 (Tenn. 1998).

e. Character for Untruthfulness

A witness’ character for untruthfulness is admissible to impeach the witness’ credibility. Untruthfulness is provable by opinion evidence and by reputation evidence as well. In the court’s discretion, prior specific acts that are probative of untruthfulness may be inquired into on cross-examination, but may not be proven by extrinsic evidence. Tenn. R. Evid. 608(a),(b). Tennessee judges must follow a precise pre-admission procedure, which requires that the judge, in a jury out hearing, find that (1) the alleged conduct has probative value; (2) a reasonable factual basis exists for the inquiry; and (3) the conduct occurred no more than ten years before the commencement of the action. Depending on the type of case and the witness being impeached, the judge must employ a specified balancing test weighing the probative value of the evidence and the prejudicial effect. Tenn. R. Evid. 608(b)(1),(2),(3). In criminal cases, written notice must also be given in advance of trial, but the Advisory Commission Comments note instances in which notice may not be required, including when bad acts are discovered after the trial begins.

To prove untruthfulness by opinion evidence, a witness must be produced to give an opinion on the subject. While there is no test of long familiarity or fresh information, the opinion witness’ cross-examination will undoubtedly include questions intended to reveal an insufficient basis for the opinion.

To prove untruthfulness by reputation evidence, a witness must be produced who can testify to his or her familiarity with the witness’ reputation for truthfulness and untruthfulness in the community in which the witness worked or lived. The reputation witness must be able to establish that he or she is in a position to know the witness’ reputation.

f. Criminal Convictions

Witnesses who have been convicted of crimes punishable in excess of one year felonies or of crimes involving dishonesty or false statement may be impeached with these criminal convictions. Tenn. R. Evid. 609(a)(2). The rule specifies the procedure for criminal conviction impeachment and the limitations relating to offenses under appeal, offenders who have been pardoned, and juvenile adjudications. In Tennessee, the witness must be asked about the conviction on cross-examination; if the witness denies the conviction, the conviction may be established by public record. The applicable balancing tests, like those in Rule 608, depend upon whether the witness being impeached is the accused in a criminal case or some other person. The rule of thumb is that no more than ten years may have elapsed between the date of release from confinement and commencement of the action or prosecution. Tenn. R. Evid. 609(b). Special rules

sometimes allow for the introduction of more remote convictions based upon a balancing test

D. Witness Rehabilitation

1. Rehabilitation after Impeachment

The universal rule of rehabilitation is that a witness' testimony may not be bolstered absent impeachment. If no impeachment has occurred, no rehabilitation is necessary. Thus, for example, even though a witness may be rehabilitated by reputation and opinion evidence of truthfulness, that rehabilitation evidence is not admissible until impeachment evidence of untruthfulness has been introduced against the witness. Whether impeachment has occurred is a matter left to the judge's discretion.

2. Methods of Rehabilitation

Rehabilitation may be accomplished in three ways. The first, by calling opinion or reputation witnesses to testify to a witness' truthfulness, is limited to situations in which similar witnesses have testified to the witness' untruthfulness. Additionally, a witness whose testimony has been impeached through contradiction; bias, interest, or motive; mental disability; or prior inconsistent statements may be rehabilitated by a denial or explanation of the impeachment evidence. If the impeachment has been by a suggestion that the witness has recently fabricated his or her testimony, the witness may be rehabilitated by use of a prior consistent statement, in the judge's discretion.