

Witnesses

Impeachment

From the Judge's Viewpoint

Witnesses and Testimony

- **Witnesses**
 - Lay, Expert, Hybrid, Rule 701, 702
- **Testimony**
 - Before the judge
 - On deposition
 - By affidavit or otherwise, as allowed
 - Examples: Record of Regularly Conducted Activity; Public Record; Statutory Records

Witnesses

General Requirements

- **1. Competency – Rule 601**
- **2. Oath or Affirmation – Rule 603**
- **3. Personal Knowledge – Rule 602**

1. A person must promise, swear, or affirm to tell the truth before he or she may be allowed to testify.

- A. True
- B. False



Rule 601 - Competency

- **Every person is presumed competent to be a witness except as otherwise provided in these rules or by statute.**

Statutory Competency Challenges

- **Dead Man's Statute – TCA 24-1-203**
 - **In actions by or against executors, administrators, or guardians, neither party shall be allowed to testify against the other to transactions with or statements by testator, intestate, or ward, unless called by opposite party**

2. Before a child witness testifies, I must make a threshold finding that the child witness is competent.

- A. True
- B. False



Other Challenges

- Incompetents or "Lunatics"
- Children

Child Witnesses

- Presumed Competent
- Care in applying precedent involving pre-1992 convictions
- Interplay of Rules 601 and 603
- Competency vs. Credibility

Rule-based Competency Challenges

- Rule 605 - Judge as witness

- Rule 606 – Juror as witness

Misnomers that are not Competency Issues

- Privileges

- Corroboration of Accomplice Testimony
 - "corroborative evidence fairly and legitimately tends to connect a defendant with the commission of the crime charged"

Rule 603 – Oath or Affirmation

- Administered before testifying
- Applies " with equal force" when the witness does not appear "live" in court
- Requires declaration that 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

3. All witnesses must have personal knowledge concerning the subject matter of their testimony

- A. True
- B. False



4. A witness who is uncertain as to what he or she saw or experienced does not have personal knowledge and is barred from testifying.

- A. True
- B. False



Rule 602 – Personal Knowledge

- **A witness may not testify to a matter unless**
 - **Evidence is introduced sufficient to support a finding**
 - **Evidence may, but need not consist of witness' own testimony**
 - **That the witness has personal knowledge of the matter**
 - **Rule 703 provides special caveat for witnesses qualified as experts**

5. Unless a witness is associated with an adverse party, the witness may not be considered hostile for purposes of allowing leading questions.

- A. True
- B. False



6. When an adverse party is called as a witness, cross-examination is limited to the scope of direct.

- A. True
- B. False



Rule 611 - Witness Examination

- **Court's duty to Control**
 - Court has duty to "exercise appropriate control"
 - Over presentation of evidence and conduct of trial to avoid "abuse by counsel"

Rule 611 - Witness Examination

■ Leading Questions

- To develop testimony
- To examine "witness determined by . . . court to be a hostile witness"
- When adverse party is called
 - But "cross" then limited to subject matter of direct

7. The state is considered a non-natural party for purposes of being allowed to designate a witness to be exempted from the rule of sequestration.

- A. True
- B. False



8. The rule of sequestration applies to rebuttal witnesses in Tennessee.

- A. True
- B. False



Rule 615 – Witness Exclusion

- Exclusion of witnesses, including rebuttal witnesses
- Before opening, or before voir dire in court’s discretion
- Exempted from the rule are:
 - Parties
 - Designated Representative of nonnatural person parties
 - Persons whose presence is essential to presentation

9. Ordinarily, a judge should not call witnesses in Tennessee, except as provided for expert witnesses.

- A. True
- B. False



Rule 614 – Witness Examination by the Court

May call witnesses “in extraordinary circumstances” or as allowed under Ryle 706 (court-appointed expert)

May interrogate witnesses

Must allow objections to either to be made out of presence of jury

10. A witness who has a memory lapse may read portions of notes or other documents into the trial record.

- A. True
- B. False



11. A witness may only refresh her memory with writings or documents that are admissible.

- A. True
- B. False



12. An adverse party is entitled to see any writing that a witness uses to refresh memory.

- A. True
- B. False




Rule 612 – Writing used to refresh memory.

**When a writing is used to refresh “for the purpose of testifying”:
an adverse party is entitled to**

- ❑ inspect
- ❑ cross-examine the witness “thereon”
- ❑ introduce in evidence “those portions that relate to the testimony of the witness”

13. If a witness testifies from a recorded recollection, the recorded recollection may be admitted in evidence by the offering party.

A. True
B. False



Similar, yet different

- Writing Used to Refresh – Tenn. R. Evid. 612
- Refreshing Recollection – Common Law
- Past Recollection Recorded, Tenn. R. Evid. 803(5)
 - “If admitted, the memo or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.”

Impeachment

- **Voucher Rule Displaced – Rule 607**
- **Collateral Fact/ Extrinsic Evidence Rule – Rule 612, Common Law**

14. Impeachment by bias, motive, or interest is always noncollateral and may be proved by extrinsic evidence.

- A. True
- B. False



15. A witness' mental impairment may not form the basis for impeachment.

- A. True
- B. False



Impeachment Techniques

- **Rule 616 – Bias or prejudice**
 - May offer “evidence by cross-examination, extrinsic evidence, or both”

- **Rule 617 – Impaired capacity**
 - May offer “evidence that a witness suffered from . . . at the time of an occurrence or testimony”

16. Extrinsic evidence of a witness' prior inconsistent statement may not be admitted until the witness has been given an opportunity to explain or deny the statement.

- A. True
- B. False



17. If a witness admits to a prior inconsistent statement, extrinsic evidence of the prior inconsistent statement may not be introduced.

- A. True
- B. False



Rule 613

■ Rule 613

- Not required to show or tell witness about prior statement before questioning about, but must show or disclose, upon request, to counsel
- Extrinsic evidence of prior inconsistent statement is not admissible "until and unless" witness given opportunity to admit or deny, and opposing party given opportunity to interrogate, unless offered against party opponent

18. The Rule 608 balancing test which applies to the admission of evidence of specific instances of untruthfulness to impeach is the same as the balancing test under Rule 403

- A. True
- B. False



19. The Rule 608 balancing test which applies to the admission of evidence of specific instances of untruthfulness disfavors admission of the evidence.

- A. True
- B. False



Rule 608

■ Rule 608 – Character and Conduct of Witness

- Type of Evidence
 - Opinion/reputation, not extrinsic evidence
- Nature of Evidence
 - Character for truthfulness/untruthfulness
- Discretion
 - Inquiry on cross, in court's discretion, of specific instances probative of truthfulness/untruthfulness,
 - AND ONLY, upon request, AFTER HEARING AND FINDINGS

20. The Rule 609 balancing test applicable to admission of criminal convictions to impeach is the same as the balancing test under Rule 403.

- A. True
- B. False



21. The Rule 609 balancing test which applies to the admission of criminal convictions to impeach the accused disfavors admission of the evidence.

- A. True
- B. False



Rule 609

■ Rule 609

- Differentiation between "witness" and "accused"
 - Type of evidence
 - Pretrial notice and determination
- Nature of Conviction
 - Felony/ Crime involving dishonesty or false statement
- Method of Proof
 - Asked on cross; if denied, established by public record; identity, if denied, by other evidence

22. Statements contained in learned treatises may be used to impeach the testimony of a testifying expert but may not be admitted as substantive evidence.

- A. True
- B. False



23. A qualified expert witness must testify that a learned treatise is reliable authority before the learned treatise may be used to impeach.

- A. True
- B. False



Impeachment Techniques

- **Rule 618 – Learned Treatise**
 - Called to expert’s attention or relied upon
 - Published treatises, etc., on history, medicine, science or art
 - Established as reliable authority
 - By admission, other expert, or judicial notice
 - Used to impeach, but not as substantive evidence

24. Interpreters must take an oath as prescribed by Rule 603 and be qualified as experts.

- A. True
- B. False



Rule 604

- **Rule 604**
 - Interpreter is
 - “subject to the provisions of these rules and applicable statutes relating to qualifications as an expert”
 - “administration of an oath or affirmation to make a true interpretation”

25. Witnesses offering opinion or reputation evidence of another witness' character for truthfulness may relate specific instances of conduct that establish truthfulness.

- A. True
- B. False