Cross-Examination:

A Revealing Conversation with a Witness

"Even if one does not completely agree with Wigmore's assertion that cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth,' one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate ."

United States v Salerno, 505 US 317, 328 (1992) (Stevens, J, dissenting)

Hon. Christopher P. Yates
Kent County Circuit Judge
February 16, 2009

I. Basic Principles

A. Leading Questions

"Ordinarily leading questions should be permitted on cross-examination."
MRE 611(c)(2)

The defendant "also argues that the following question to the victim's mother was improper: 'Now here's the reality, ma'am. Your sister made an allegation about your husband doing something improper to her, correct?' There is nothing improper about this question: it is an acceptable leading cross-examination question."
People v Dobek, 274 Mich App 58, 68 (2007)

B. Good-Faith Basis

"[C]ounsel must have sufficient good-faith basis or well-reasoned suspicion for proposed cross-examination."
People v Stokes, No. 269917, slip op. at 3, n.16 (Mich App Feb. 12, 2008)

"'[C]ounsel must have a reasonable basis for asking questions on cross-examination which tend to incriminate or degrade the witness and thereby create an unfounded bias which subsequent testimony cannot fully dispel.' The general rule in such situations is that 'the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the questioning relates.'"
United States v Lin, 101 F3d 760, 768 (DC Cir 1996)

"The record in the instant case shows that plaintiff's counsel had a reasonable basis for asking the question which was proper cross-examination attempting to show the bias of the witness."
LeBlanc v Lentini, 82 Mich App 5, 22 (1978)

C. Scope of Cross-Examination

"A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination."
MRE 611(b)

Michigan Rule of Evidence 611(b) "plainly confers on the trial judge the discretion to limit the scope of cross-examination to matters testified to on direct examination. Additionally, the rule just as plainly indicates that the acceptable scope of cross-examination in Michigan is a broad one."
People v Kimber, No. 206358, slip op. at 3 (Mich App May 2, 2000)

"A trial judge need not permit a party to cross-examine a witness concerning evidence which is marginally relevant to the case as a whole but which is beyond the scope of the witness' testimony on direct examination."
Beadle v Allis, 165 Mich App 516, 522 (1987)

II. Lines of Impeachment

A. Prior Convictions

"For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date."

MRE 609(a) & (c)

"The bright-line aspects of the [1988] amendment of MRE 609 will, with the exception of the execution of the balancing test, apply to witnesses called by the prosecution and nondefendant witnesses called by the defense in the same way they apply to defendants."

People v Allen, 429 Mich 558, 606-607 (1988)

"[T]he burden is not on the prosecutor in all cases to initiate a trial court's ruling with regard to whether a defendant's prior convictions may be used for impeachment purposes."

People v Nelson, 234 Mich App 454, 463 (1999)

B. Prior Inconsistent Statements *Not* Under Oath

"In examining a witness concerning a prior statement made by the 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 and the witness."
MRE 613(a)

"MRE 613(a) allows the questioning of a witness concerning a prior written or oral statement made by the witness. MRE 613 does not require either that the written statement be introduced into evidence or that the hearer first testify regarding the contents of the statement."
People v Avant, 235 Mich App 499, 509-511 (1999)

"Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."
MRE 613(b)

If "a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement."
People v Jenkins, 450 Mich 249, 256 (1995)

"As a general rule, the only contradictory evidence that is admissible [for impeachment] is that which directly tends to disprove the exact testimony of the witness."
People v Johnson, 113 Mich App 575, 579 (1982)

C. Instances of Prior Conduct

"Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' 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 on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness[.]"
MRE 608(b)

"On cross-examination of Houston, defense counsel inquired into specific instances of prior bad acts, which Houston denied. Pursuant to MRE 608(b), defendant was required to accept Houston's responses without recourse to extrinsic impeachment evidence. In other words," defendant "was 'stuck with' Houston's answers."
People v Lester, 232 Mich App 262, 276 (1998)
See also People v Teague, 411 Mich 562, 566 (1981)

"Although MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters, a party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness' statements."
People v Spanke, 254 Mich App 642, 644-645 (2003)
See also People v Vasher, 449 Mich 494, 504 (1995)

D. Bias

A "particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.'"
Davis v Alaska, 415 US 308, 316 (1974)

"Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony."
United States v Abel, 469 US 45, 52 (1984)
See also People v Layher, 464 Mich 756, 762-764 (2001)

"'The law in Michigan is clear that the interest or bias of any witness, or his relationship towards the parties to an action, is a proper factor for consideration on the issue of his credibility.'"
People v Meier, 47 Mich App 179, 196 (1973)

E. Drug Use and Addiction

"The prosecution's questioning of defendant's alibi witnesses and defendant regarding marijuana and alcohol consumption on the evening of the assault was relevant to impeach their credibility by attacking their memory and perception of the criminal episode."

People v Smith, 106 Mich App 203, 214-215 (1981), citing MRE 607
See also People v Duff, 165 Mich App 530, 537 (1987)

"We find no merit in Rodriguez' contention that the prosecutor 'drove defense witness Proden from the stand' by posing potentially incriminating questions concerning the witness' cocaine use, which were irrelevant under MRE 401. Evidence that the witness used cocaine at a party hosted by Rodriguez cannot be viewed as irrelevant."

People v Rodriguez, 251 Mich App 10, 26 (2002)

Although "in some cases the ability of a [drug addict] witness might be so impaired that he cannot satisfy the personal knowledge requirement of Federal Rule of Evidence 602, . . . the threshold of Rule 602 is low."

United States v Hickey, 917 F2d 901, 904 (6th Cir 1990)

F. Payments Made to Witness-Informants

Reversing a conviction because of the district court's restriction of the cross-examination of a paid informant, the Sixth Circuit observed that "surely the evidence of how much [the informant] was receiving from the government for past services and might therefore expect in the future was highly relevant to his potential bias and interest."
United States v Leja, 568 F2d 493, 499 (6th Cir 1977)

Defense counsel "conducted a thorough and effective cross-examination of the witness, during which she brought out both the dismissal of the traffic tickets and the $50 payment."
People v Hatch, 126 Mich App 399, 403 (1983)

G. Cooperating Witnesses' Plea Agreements

"Where an accomplice or co-conspirator has been granted immunity or other leniency to secure his testimony, it is incumbent upon the prosecutor and the trial judge, if the fact comes to the court's attention, to disclose such fact to the jury upon request of defense counsel."
People v Atkins, 397 Mich 163, 173 (1976)

"We would hold, therefore, that the trial court's authority to control the order of proofs, MRE 611, and the completeness rule set forth in MRE 106, vest the trial court with appropriate discretion to determine when the fact and terms of an accomplice's plea agreement may be admitted. As with other preliminary matters, the trial court should assure itself that a witness' credibility will be put in question. Where it has done so, the court may either permit the prosecution to anticipate cross-examination by eliciting the terms of the agreement on direct examination or direct that the terms and conditions of the agreement may be brought out first by defense counsel."
People v Manning, 434 Mich 1, 18-19 (1990) (plurality opinion)

"[T]he trial court abused its discretion when it denied defendant's motion to cross-examine Echols on all of the details of the plea bargain, including the sentencing consideration Echols received in return for his testimony."
People v Mumford, 183 Mich App 149, 154 (1990)

III. Development of Substantive Evidence

A. Prior Inconsistent Statements Made Under Oath

"A statement is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition[.]"
MRE 801(d)(1)(A)

Michigan Rule of Evidence 801(d)(1) "clearly indicates the circumstances in which prior statements are defined as not hearsay: where the prior statement was made under oath and is inconsistent with the witness' testimony[.]"
People v Malone, 445 Mich 369, 376 (1994)

"[A]n affidavit of merit is inadmissible under MRE 801(d)(1)(A) as a prior inconsistent statement because it is not given 'at a trial, hearing, or other proceeding, or in a deposition[.]"
Barnett v Hidalgo, 478 Mich 151, 160 (2007)

Because "'inconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position, . . . the witnesses' grand jury testimony implicating defendant was inconsistent with their trial testimony, where they remembered nothing, and was properly admitted into evidence under MRE 801(d)(1)(A)
People v Chavies, 234 Mich App 274, 282-283 (1999), overruled on other grounds, People v Williams, 475 Mich 245 (2006)