

WITNESS EXAMINATION

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CAP Seminar – “Anatomy of a Murder Case”

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Michigan Rules of Evidence

- Although all the rules of evidence apply, the following seem to arise most often:
 - ◆ Rule 611 – Mode and Order of Interrogation and Presentation
 - ◆ Rule 615 – Exclusion of Witnesses
 - ◆ Rule 602 – Lack of Personal Knowledge
 - ◆ Rule 609 – Impeachment by Evidence of Conviction of Crime
 - ◆ Rule 612 – Writing or Object Used to Refresh Memory
 - ◆ Rule 613 – Prior Statements of Witnesses
 - ◆ Rule 801(d)(2) - Hearsay

MRE 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 presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) Michigan Rules of Evidence Last Updated 1/3/2012 avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment. (b) Appearance of Parties and Witnesses. The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons. (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. (d) Leading Questions. (1) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. (2) Ordinarily leading questions should be permitted on cross-examination. (3) When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions. It is not necessary to declare the intent to ask leading questions before the questioning begins or before the questioning moves beyond preliminary inquiries.

MRE 615

- Exclusion of Witnesses

- At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

MRE 602

- 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 of Rule 703, relating to opinion testimony by expert witnesses.

MRE 609

- Impeachment by Evidence of Conviction of Crime

- (a) General rule. 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 Michigan Rules of Evidence Last Updated 1/3/2012 trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect. (b) Determining probative value and prejudicial effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor. (c) Time limit. 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 the confinement imposed for that conviction, whichever is the later date. (d) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. (e) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule, except in subsequent cases against the same child in the juvenile division of a probate court. The court may, however, in a criminal case or a juvenile proceeding against the child allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the case or proceeding. (f) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. GRIFFIN, J., states: Because I disagree with the majority opinion in *People v Allen*, [429 Mich 558 (1988)] I dissent from the adoption of this amendment of MRE 609.

MRE 612

- Writing or Object Used to Refresh Memory
 - (a) While testifying. If, while testifying, a witness uses a writing or object to refresh memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying. (b) Before testifying. If, before testifying, a witness uses a writing or object to refresh memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying. (c) Terms and conditions of production and use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence, for their bearing on credibility only unless otherwise admissible under these rules for another purpose, those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

MRE 613

- Prior Statements of Witnesses

- (a) Examining witness concerning prior statement. 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 it shall be shown or disclosed to opposing counsel and the witness. (b) Extrinsic evidence of prior inconsistent statement of witness. 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. This provision does not apply to admissions of a partyopponent as defined in Rule 801(d)(2).

MRE 801(d)(2)

- Admission by party-opponent:
 - The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, except statements made in connection with a guilty plea to a misdemeanor motor vehicle violation or an admission of responsibility for a civil infraction under laws pertaining to motor vehicles, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.

Preparing to Examine a Witness

- You would expect a civilian witness who has experienced a death to be more emotional than witnesses in other cases.
- The witness may be more hostile towards you because you are representing who they believe to have murdered a loved one.
- Don't rely on pre-written questions – focus on specific areas of questioning that is helpful to your case. Specific questions will throw you off if a witness goes left. You need to be able to pivot.

Preparing to Examine a Witness

- The witness statement – what about their statement bothers you?
 - What do you want to highlight to the jury?
- What tone do you want to set for the jury? Your approach to a witness will vary because of their importance to the case and their relationship to other individuals in the case, including other witnesses.
- Jury Instructions can be helpful in preparing your questions.

Identification – Jury Instruction

- M Crim JI 7.8 Identification:
- (1)One of the issues in this case is the identification of the defendant as the person who committed the crime. The prosecutor must prove beyond a reasonable doubt that the crime was committed and that the defendant was the person who committed it.
- (2)In deciding how dependable an identification is, think about such things as how good a chance the witness had to see the offender at the time, how long the witness was watching, whether the witness had seen or known the offender before, how far away the witness was, whether the area was well-lighted, and the witness's state of mind at that time.
- (3)Also, think about the circumstances at the time of the identification, such as how much time had passed since the crime, how sure the witness was about the identification, and the witness's state of mind during the identification.
- [(4)You may also consider any times that the witness failed to identify the defendant, or made an identification or gave a description that did not agree with (his / her) identification of the defendant during trial.]
- (5)You should examine the witness's identification testimony carefully. You may consider whether other evidence supports the identification, because then it may be more reliable. However, you may use the identification testimony alone to convict the defendant, as long as you believe the testimony and you find that it proves beyond a reasonable doubt that the defendant was the person who committed the crime.

Credibility – Jury Instruction

- M Crim JI 2.6 Judging Credibility and Weight of Evidence
- (1) It is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. You do not have to accept or reject everything a witness says. You are free to believe all, none, or part of any person's testimony.
- (2) In deciding which testimony you believe, you should rely on your own common sense and everyday experience. However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you have based on the race, gender, or national origin of the witness.*
- (3) There is no fixed set of rules for judging whether you believe a witness, but it may help you to think about these questions:
 - (a) Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?
 - (b) Does the witness seem to have a good memory?
 - (c) How does the witness look and act while testifying? Does the witness seem to be making an honest effort to tell the truth, or does the witness seem to evade the questions or argue with the lawyers?
 - (d) Does the witness's age or maturity affect how you judge his or her testimony?
 - (e) Does the witness have any bias or prejudice or any personal interest in how this case is decided?
 - (f) Have there been any promises, threats, suggestions, or other influences that affect how the witness testifies?
 - (g) In general, does the witness have any special reason to tell the truth, or any special reason to lie?
 - (h) All in all, how reasonable does the witness's testimony seem when you think about all the other evidence in the case?

Direct Examination

- You're telling a story to the jury through witness testimony.
- When defending murder cases, the prosecutor will usually have more opportunities to conduct direct examination, as they are generally presenting the most witnesses.
- Defense attorneys shine on cross-examination.

Cross-Examination

The attorney is in control. Your goal is to have the witness affirm the information you're presenting to the jury – you must have a general idea of the answers to your questions ahead of time.

- ◆ Remember your goal: impeachment, supporting testimony for your closing argument, etc.

Yes or No questions – Don't invite the witness to explain their testimony.