

Evidence – Class 3

Rules that Qualify a Witness to Testify

- ▶ Witness must:
 - Be competent;
 - Have personal knowledge;
 - Take an oath or affirmation.

Competency: Who Can Testify?

- ▶ Rule 601. Competency to Testify in General
 - Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.
- ▶ The default rule is that **everyone** is competent unless any of the exceptions apply.
 - Under the FRE, even children may testify as long as they are competent.
 - Some states have a minimum age limit for competency. This would be applicable for civil cases which are tried in state courts.

Rule 602. Need for Personal Knowledge

- ▶ The first basic element that is required of a witness is *personal knowledge* as to what he or she will testify about.
- ▶ A witness can generally not testify as to any fact unless it has been established that the witness has personal knowledge.
 - Usually, though not always, this is established by the witness him/herself
 - e.g. “I was walking my dogs at 8 o’clock on the 5th and so I was at this corner...” is enough to establish that he was at that corner and thus has personal knowledge of what happened there.
- ▶ A witness must be able to recollect the facts for him/her to have first hand knowledge (unless an exception applies).
- ▶ Even where hearsay is allowed, the witness is testifying that s/he “first hand” heard the declarant tell him/her the hearsay statement.

Rule 603. Oath or Affirmation to Testify Truthfully

- ▶ To be allowed to testify, the witness must swear or affirm to tell the truth.
- ▶ The oath must be done in a manner that is “calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to tell the truth.”
- ▶ The judge must be satisfied that the witness understands the oath and understands the duty to tell the truth.
- ▶ If the judge is convinced that the witness will lie, the judge can bar the testimony.
 - This applies even for criminal defense witnesses.

Rules 604, 605, and 606

- ▶ Rule 604 – an interpreter must be qualified and must give an oath or affirmation to make a true translation.
- ▶ Rule 605 – a presiding judge may not testify as a witness at the trial.
- ▶ Rule 606 – a juror may not testify as a witness before the other jurors at the trial.
 - Rule 606(b) says that “a juror may not testify about any statement made or incident that occurred during the jury’s deliberations.”
 - This rule applies in both civil and criminal cases.

Witnesses' Roles in a Case

- ▶ In the Sixth Amendment, the Constitution controls whether a criminal defendant has the right to confront witnesses against him and/or be confronted by the witnesses against him.
- ▶ The Sixth Amendment says:
 - In all criminal prosecutions, the accused shall enjoy the right to... be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Witnesses' Roles in a Case

- ▶ Witnesses present essentially all evidence in a criminal or civil case. The lawyer's role is simply to argue about what the witnesses said and introduced, and to argue points of law.
- ▶ The right to present witnesses, and even in many cases, the right to compel witnesses to testify (by subpoena) is guaranteed by the Constitution (especially in the case of a criminal defendant).

What a Witness Does

- ▶ A witness performs the following roles in establishing evidence:
 - Testifies from personal knowledge;
 - Testifies from second hand knowledge, where the rules of evidence allow;
 - Gives opinion and expertise, where allowed;
 - Impeaches other witnesses or other evidence;
 - Establishes the validity and chain of custody of physical evidence;
 - Has physical evidence and documents introduced through them.

How Witnesses are Examined

▶ Direct Examination

- Conducted by the attorney who called the witness to the stand
- Can cover any relevant topic
- Attorney constructs a story to present his client's case

▶ Cross Examination

- Conducted by opposing attorney
- Limited to:
 - Topics discussed on direct examination
 - Credibility/bias of the witness

▶ Re-Direct Examination (and re-cross...)

- Only to address topics covered in cross examination

▶ Questioning by the judge

- The judge can do this at his/her discretion.

Direct Examination

- ▶ A foundation must be established for every piece of important evidence given by the witness.
 - Make sure to ask questions that elicit information about how the witness knows to what s/he is testifying.
- ▶ Questions that assume facts not in evidence are improper; e.g.
 - “When did you stop drinking?” is inappropriate unless we already know from testimony that:
 - 1) the witness was drinking
 - 2) the witness stopped drinking
- ▶ Compound questions are improper; e.g.,
 - “Were you speeding and if so, why?”
 - “Do you drink and how much?”

Leading Questions

- ▶ Leading questions are generally NOT allowed in direct examination because the lawyer would be, in effect, testifying for the witness.
- ▶ Examples:
 - “Did you see the defendant drive 50 miles per hour?”
 - “You saw it happen, didn’t you?”
- ▶ Exceptions: Leading questions may be allowed:
 - Where they are “preliminary” (in the interest of saving time and speeding things along)
 - “Were you in Flagstaff on the 17th?”
 - On cross-examination
 - On direct examination, where the attorney gets permission from the judge to treat the witness as a “hostile witness”
 - Used when the witness is uncooperative

Cross-Examination

- ▶ The purposes of cross examination are:
 - To discredit the witness
 - To elicit other facts that will hurt the testimony
 - To narrow down the testimony as much as possible
 - To elicit facts that will help your case
- ▶ Scope of cross-examination is generally restricted to:
 - Subjects brought up on direct examination
 - However, the trial judge has a lot of discretion in enforcing this rule.
 - Impeaching the credibility of the witness (for whatever reason)

Cross-Examination

- ▶ Differs from direct examination in two important ways:
 - Leading questions are allowed
 - The cross-examiner may ask questions only about issues covered during the direct examination.
- ▶ Rule 611(b) explicitly allows questions designed to test the credibility of the witness.

Other Rules Regarding Witness Examination

- ▶ The judge can interrogate, or even call, witnesses, on his or her own accord.
- ▶ Religious beliefs or opinions may not be used to discredit a witness. However, when religious belief goes to the essence of a relevant point, it may be brought up.
- ▶ A court can exclude a future witness from being present in the courtroom so as not to allow him or her to have later testimony be tainted by hearing earlier testimony.
 - However, someone with a key stake in the case, like a party, cannot be excluded.

Rule 611. Objections

- ▶ Argumentative
- ▶ Asked and Answered
- ▶ Assumes a Fact not in Evidence
- ▶ Beyond the Scope
- ▶ Calls for Narrative
- ▶ Calls for Speculation
- ▶ Compound Question
- ▶ Harassing or Badgering the Witness
- ▶ Improper Characterization of Testimony
- ▶ Leading Question
- ▶ Non-Responsive Answer
- ▶ Vague



QUIZ TIME!

Helping a Forgetful Witness

- ▶ What happens if you ask a question and the witness says “I don’t remember”?
- ▶ There are two basic ways to refresh a witness’ memory:
 - ▶ **Present Memory Refreshed**
 - ▶ **Past Recollection Recorded**

Helping a Forgetful Witness

▶ Present Memory Refreshed

- You can present the witness with anything that will “jog” his or her memory, including notes, pictures etc., but:
 - The testimony must come from the witness’ memory, not from the prop itself
 - The prop is not entered into evidence, however, the other side must have access to the prop.

▶ Past Recollection Recorded

- This is used if the witness still can’t remember the incident
- It must be introduced into evidence (and must qualify for a hearsay exception) and the witness then reads the document