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Rules Pertaining to Witnesses

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Article VI of the Michigan Rules of Evidence contains the rules dealing with witnesses. Trials bring to mind testimonial evidence. There surely are other kinds of evidence, such as documents, guns, automobile tires, chemical substances, and the like. But most evidence comes from the mouths of witnesses, and even demonstrative evidence usually is admitted only after a witness has taken the stand and testified to foundation facts. So it is important and appropriate that we turn to the provisions of the rules that deal with qualifications and credibility of witnesses.

I would like to direct your attention to MRE 601 and 603, dealing with the competency of witnesses, and MRE 602, dealing with the requirement of personal knowledge. There are affirmative and negative aspects of competency. On the affirmative side, there are two requirements. First, Rule 601 requires the physical and mental capacity: one must have had sight to testify to what was seen or hearing to testify to what was heard; the ability to remember what was perceived by these or the other senses; and the ability to communicate understandably what is remembered. In brief, the important mental and physiological factors are the abilities to observe, remember, and communicate. The second affirmative element of competency, stated in Rule 603, is that the person must be willing to commit himself to try to tell the truth. In essence it is a moral qualification.

In addition to these affirmative factors, there may be negative factors that would render incompetent an

otherwise competent witness. For example, in an earlier day a convicted felon was not competent as a witness even though he could observe, remember, and communicate and would promise to tell the truth on this occasion. If one were a party or the spouse of a party, one could not testify. Over the years these incompetencies have been modified, indeed largely eliminated.

With one significant exception, Rules 601, 602, and 603 simply restate prior Michigan law and practice, and for that matter, with that one significant exception, they restate the general law and practice in this regard. Let us look at some of the specific issues involved in these rules.

The introductory clause of Michigan's Rule 601 incorporates the affirmative aspects of competency. Incidentally, if a person cannot testify understandably because he doesn't speak the language of the court, an interpreter is required. There is a slight change in Michigan practice with respect to interpreters: under MRE 604 interpreters must be sworn and the court must find that the interpreter is an expert.

Rule 603 states the familiar requirement that the witness take an oath. The form of the oath is not mandated; it may be in any form that the court will permit that is calculated to awaken the witness's conscience and impress on him or her the duty to testify truthfully. Michigan probably does not have an exotic enough variety of cultures to give rise to the kinds of situations that may arise in places like New York or San Francisco. I remember hearing about a case in San Francisco involving a homicide that was the result of a so-called Tong war. A prospective witness of Chinese ancestry asked to be allowed to take his oath in the courtroom over the ringing of the neck of a white rooster. The symbolism is obvious. There are other oaths in the Far East where a person blows out a candle or breaks a cup in the courtroom. It is unlikely that you will encounter such things in Iron River, but the point is that the oath does not have to be "So help me, God." A judge should be willing to do whatever he or she

believes will extract from the witness an expression of understanding the importance of telling the truth and a commitment to try to do so.

With the witness on the stand having taken the oath, it is then up to the court to determine the witness's competence in the affirmative sense. Federal Rule 601 suggests that any witness a lawyer would put on the witness stand has enough credibility to make it worth the jury's hearing him, with limitations of ability being a matter of weight and not of competence. The Michigan Supreme Court adopted a different version of Rule 601, which makes possible a determination by the court that a proposed witness is incompetent. Such a determination will be rare, of course—typically a very young child or the mentally ill or retarded person.

We turn now to the negative aspects of competency. Michigan, like other states, has long since eliminated such grounds of incompetency as felony convictions, marriage to a party, and interest in the outcome. The only important incompetency remaining appears in the Dead Man's Statute, which makes a survivor incompetent to testify to a transaction equally within the knowledge of the deceased. But even that ground has been of relatively little importance since the 1967 amendment which made such testimony admissible if corroborated. Now, by virtue of Rule 601, the Dead Man's Statute is gone. MRE 601 states that every person is competent to be a witness "except as otherwise provided in these rules"—and there is no Dead Man's Statute in the rules. That is the only significant change in Michigan practice embodied in MRE 601 and 603.

There are two other incompetencies defined in these rules, both unsurprising. MRE 605 provides that a judge cannot testify in a case in which he is presiding. MRE 606 states that a juror cannot testify in a case in which he is sitting as a juror. No objection need be made to preserve either point.

There is one other important aspect of witness qualification in Rule 602. A witness may be qualified physically and mentally and may be perfectly willing

to abide by an appropriate oath, but, according to Rule 602, he can testify only to those matters about which he has personal knowledge. Moreover, evidence that he has such knowledge is a prerequisite, a necessary foundation, to testimony about that matter. For example, a normally competent witness takes the usual oath and is asked, "Who ran the red light?" Not only is that bad advocacy, it violates Rule 602. (Indeed, very often the rules require, or at least encourage, practice that the principles of persuasive advocacy would dictate anyway.) Rule 602 requires that evidence be introduced "sufficient to support a finding that he has personal knowledge of the matter." There must be prima facie evidence that the witness has personal knowledge. An exception exists for the expert witness who may, for example, base his opinion on a hypothetical question. There is, of course, no difference between Rule 602 and previous Michigan practice.

I turn next to impeachment. To impeach a witness is, in the traditional phrase, to detract from his credibility. The rules dealing with impeachment are not exhaustive; there are modes of impeachment not dealt with. For example, it is certainly permissible to show a witness's interest in the case, or his bias, yet there is no rule mentioning it. It is also permissible to show that the witness has made a prior inconsistent statement, but again there is no explicit reference in the rules to that as a legitimate means of impeachment. The rules do contain reference to the procedure for showing prior inconsistent statements, but there is no "authorizing" provision. As adopted, the impeachment provisions of the MRE consist simply of a rule governing who may impeach and a series of rules giving guidance in frequently recurring and particularly troublesome areas, such as impeachment by character, by prior conduct, by prior convictions, and by religious belief.

Under Rule 607 who may impeach? The traditional view is that one may not impeach one's own witness. The justifications for this are a combination of theory and

practicality. In theory, an attorney vouches for the credibility of the witness he presents and therefore cannot turn on the witness when his testimony is disappointing. However, the attorney does not always have a choice of who his witnesses are, particularly eyewitnesses to a tort. On the practical side, the suggestion was that if the party who calls a witness can turn on his witness, there will be no one to protect that witness from attacks on his character and the like. That is probably fallacious also. The court, among others, should protect the witness from improper attack. This traditional rule is widely criticized, and the federal rules responded to that criticism by permitting the impeachment of the witness by any party. The Michigan Supreme Court took the opposite view.

MRE 607 essentially restates the prior traditional rules on the point. First, the opposing party may impeach; that is orthodox. Second, the calling party generally may not impeach his own witness. But he may impeach (a) if the prosecutor is obligated to call the witness, (b) if the witness is the opposite party, or (c) if a witness suprises and harms the calling party's case. Harm does not mean mere disappointment; it means evidence that goes against your case, that is "affirmatively" contrary to what was anticipated. If the witness says, "I don't remember," that is not harm within the meaning of this rule.

MRE 607 does not leave the Michigan trial lawyer totally without remedy against the disappointing witness. The rule in Hileman v Indreica, 385 Mich 1; 187 NW2d 411 (1971), unaffected by MRE 607, states that an examining attorney may seek to refresh his witness's recollection by using prior statements of the witness. Thus, Hileman affords some help in dealing with the witness who surprises but does not harm or who harms but does not surprise.

MRE 608 governs the use of character and conduct of a witness as bearing on his credibility. Essentially, it is a relevance problem. The fact that a person is deemed to be generally honest (or dishonest) may make it more

likely that he is (or is not) telling the truth this time. But the rules set rather tight limits on these kinds of proof. Relevance is a problem and there are other considerable costs and problems involved. How do we prove, in terms of character, that one is a truthful or untruthful person? The time required for this kind of pursuit may be excessive, and the possibility of misuse by the jury is substantial. The necessary limiting guidelines appear in MRE 608, which is similar to the corresponding federal rule.

In the language of MRE 608(a) note the word "reputation." This is where the Michigan rule differs significantly from the federal rule. The federal rule allows proof of character either by reputation or by opinion. The Michigan rule is more traditional and limits proof of character to reputation. The federal rule reflects the widely held feeling that even when testimony is couched in terms of reputation most witnesses (and most jurors) are thinking opinion; it is one witness's opinion of another witness.

Recall the usual scenario:

Q. Do you know witness A's reputation for truth and veracity in the community in which he resides and works?
A. Yes, I do.
Q. What is that reputation?
A. It is bad. He has a bad reputation. Everybody thinks he is a liar.

One other question is allowed in order to see what he means by "bad":

Q. Based on that reputation, would you believe him under oath?
A. No, sir.

That sounds like his opinion. Actually, the purpose of the question is to see how bad that reputation is—perhaps so bad that he should not be believed under

oath. However, the general tenor is that of opinion evidence, in practice if not in theory. The reputation must be one for truthfulness or untruthfulness, not for being a good person, or a law-abiding person, or a peaceable person, or a moral person.

A witness's credibility may not be defended until it has been attacked. One cannot put on Witness No. 1, have him testify, and then call Witness No. 2 to say, "Witness No. 1 has a great reputation for truthfulness." If the witness is attacked, however, then there may be supporting or rehabilitating testimony. Ordinarily mere contradiction of the testimony will not justify support. For example, if my witness testifies that the light was green and the other side testifies that the light was red, I cannot now put in evidence that my person is an honest person. I may not, because contradiction is not an attack on credibility. However, there are cases in which contradiction so carries the implication of dishonesty that a court will call it an attack on credibility and allow rehabilitation. Suppose, for example, that Witness A states that he saw defendant shoot the victim. Witness B, testifying for the defense, states that he was with Witness A on that day and that the two of them arrived at the scene after the victim was already dead. That is a contradiction, of course, but it is also susceptible to no other interpretation but that B is calling A a liar. Accordingly, the cases tend to allow supportive, rehabilitating testimony for Witness A to show that he has a good reputation for truthfulness.

MRE 608(b) governs proof of specific instances of bad conduct as bearing on credibility. The theory is still the same: If a person is not a truthful person on some occasions, he is less likely to be truthful this time. To speak of a person's general reputation is quite different from inquiring into specific incidents in a person's life when he may have been dishonest. The second sentence of 608(b) allows questions about specific instances of conduct bearing on truthfulness. For example, if I have some information that the

witness filed a false income tax statement last year, I may ask about it. But then, as provided in the first sentence of 608(b), I must take the answer that I get. If he denies it, I may not pursue the matter. The court should not allow fishing expeditions, but rather should require some showing at side bar that there is a good-faith basis for asking the question.

Until recently, there was a question in the Michigan cases whether incidents inquired about had to bear on honesty. Some cases in Michigan had held admissible inquiry into misconduct showing that the witness was not a moral person, without reference to honesty or truthfulness as such. But People v Bouchee, 400 Mich 253; 253 NW2d 626 (1977), held that such inquiries are limited to events that reflect on truthfulness. In Bouchee the prosecutor sought to show that the defendant who had testified had four children but was not married. The Court said that having illegitimate children is not relevant to honesty and that the inquiry was therefore improper. MRE 608(b) underlines the point.

The second paragraph of 608(b) provides that a witness properly may assert a privilege against self-incrimination when being examined as to credibility. This issue was previously unclear in Michigan law. For example, if a witness is asked about a specific instance of dishonest conduct under 608(b) (such as "Did you cheat on your tax return?") and the question bears only on credibility and not on the facts of the case, the witness has not waived his privilege against self-incrimination by testifying thus far. Therefore, he may refuse to answer the question if it is an otherwise appropriate claim of the privilege.

Let us turn now to the single most controversial provision of all of these rules, MRE 609, which deals with impeachment by showing a criminal conviction. When Federal Rule 609 went through the Supreme Court of the United States and then Congress, it generated more commentary and more heat—not necessarily more light—than any other single provision of the entire Federal

Rules of Evidence. When it came to the Michigan committee, it evoked more hours of discussion than any other rule. Every time the rule has been drafted, whether by the Supreme Court committee, Congress, the House, the Senate, the Michigan committee, or the Michigan Supreme Court, it has been a compromise. The emotional nature of the issues involved seems to demand a compromise, and therefore no formulation of this rule is ever totally acceptable to anyone.

The relevance of a conviction to credibility depends upon the nature of the crime. If a conviction is for an act of dishonesty, for example perjury, filing a false income tax return, or embezzlement, the desired inference is that the witness has been dishonest before and it is likely that he is being dishonest now. This rule resembles Rule 608(b), which authorizes inquiry about specific instances bearing on truthfulness. Under Rule 608(b), a lawyer cannot prove such instances if denied; but under Rule 609 not only can he ask about them, he can prove them. This is because, being of record, the conviction can be proved economically. The witness probably will concede it, especially if the record is in court; and if he won't concede it, the record can be offered. The process of weighing relevance against time, side issues, etc., is no different from what it was under Rule 608(b); the result is often different because not much time is required and the conviction was of course based on a finding beyond a reasonable doubt.

In addition, even if the offense does not involve dishonesty, conviction of a crime indicates that the witness is not law-abiding, is not a very moral person, or is a person who sometimes takes his obligations to society lightly and therefore may be thought to take his obligation to tell the truth in the courtroom a little lightly also.

Rule 609 uses an amalgam of these ideas to define the grounds of impeachment provided that the crime was serious. Under Rule 609(a)(1), the crime used for impeachment must be punishable by death or imprisonment

in excess of one year, or it must involve theft, dishonesty, or false statement, regardless of the punishment. For example, a homicide conviction is admissible to impeach even though the crime involved no dishonesty or theft, and a shoplifting conviction, at the level of a mere misdemeanor, is admissible because it is a crime involving theft. (Incidentally, the word "theft" was an insertion by the Michigan Supreme Court. The federal rule simply says "dishonesty or false statement." The Michigan Court clarified whether theft involves dishonesty.)

Though the conviction meets the test of Rule 609(a)(1) as a felony and/or a crime of dishonesty, under Rule 609(a)(2) it cannot be used to impeach when the court determines that the probative value in admitting this evidence on the issue of credibility outweighs its prejudicial effect. The burden is on the proponent—unlike the burden under Rule 403. Value on the issue of credibility is measured against the danger that the evidence will be misused by the fact finder. Prejudice is obviously going to be greater when the impeached witness is a party, and especially the accused party in a criminal case. The convictions will be especially damning and prejudicial if the prior crime was the same kind of offense as that charged in the instant case. This is an obvious time for a motion in limine, under Rule 103(c), in order that defense counsel may determine whether to place his client with a record on the stand.

Rule 609(b) creates a ten-year "statute of limitations" on convictions counting usually from the time the person was released from prison. The federal rule gives the court some discretion to allow an older conviction; the Michigan rule does not.

MRE 609(c) excludes proof of a conviction if there has been a pardon, annulment, or the like.

A Michigan statute purports to make juvenile adjudications inadmissible for any purpose. MCLA 712A.23; MSA 27.3178 (598.23). Rule 609(d), which supersedes the statute, preserves that inadmissibility against the

accused himself. However, it permits use of juvenile adjudications for other witnesses if it would be admissible to attack the credibility of an adult, that is, if it meets the tests of 609(a) and (b) and if the court is satisfied that admission is necessary for a fair determination of the issue of guilt or innocence. The rule is responsive to the constitutional concerns expressed in Davis v Alaska, 415 US 308 (1974), suggesting that due process requires that the defendant be given an opportunity to confront the witnesses against him and to explore their credibility.

Under 609(e), though the case is on appeal, the conviction is still admissible, but the party appealing can testify to prove that there is an appeal.

Rule 610 prohibits proof of religious beliefs or opinions to impair or enhance credibility. Not prohibited, however, is evidence of religious affiliations which have a bearing on bias or interest. For example, suppose there is a will contest case in which Mrs. Jones has died and left her estate to the First Baptist Church. Her grandchildren attack the will on the ground that she was not competent to make a will. Testifying in support of the will is Mr. Johnson, an active member of the First Baptist Church. Surely, such membership bearing on bias can be shown.

Rule 707, though not in the "Witnesses" Article, deals with impeachment of expert witnesses by use of learned treatises. In the federal rules and in the proposed Michigan rules, this provision without the last six words was exception 18 of Hearsay Exception Rule 803. It made learned treatises admissible as substantive evidence. The Michigan Supreme Court preferred the traditional approach, limiting the use of treatises to impeachment purposes only. Hence Michigan Rule 707. If the expert relied on a book on direct examination, it can be used for impeachment on cross-examination. If he did not mention the book on direct, it may be called to his attention on cross.

The other requirement of MRE 707 is that the work from which the cross-examiner wishes to read "be

established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice . . . ."

Q. Is this an authority?
A. Yes, it is.

That would establish authority, as would another witness's earlier testimony that the treatise is an authority or the court's judicial notice of the work's status. Then if the expert referred to it on direct or if it was called to his attention on cross, it may be used to impeach him; but the passages read are not substantive evidence.