

# **RELEVANCY BENCH GUIDE**

Does it logically tend to prove the fact it was offered to prove?

Is that fact material?

Even if the evidence offered is logically relevant and material, **ask further:**

Is the probative value of the evidence substantially outweighed by the risk of unfair prejudice against the opposing party, confusing the issues, misleading the jurors, or the needless presentation of cumulative evidence?

## **Balancing analysis:**

- The need for the evidence;
- The tendency of the evidence to suggest an improper basis for deciding the case;
- The emotional impact of the evidence;
- The chain of inference necessary to establish the material fact;
- The effectiveness of a limiting instruction (jury trial).

## **TIPS TO AVOID BEING REVERSED**

A. Conduct 90.403 balancing analysis on the record; and,

B. Announce findings and ruling on the record.

### **Examples:**

“The court finds the danger of unfair prejudice is high when weighed against the probative value of the evidence being admitted because...”

“the collateral issue will become a feature of the trial and confuse or mislead the jury”

“the evidence will inflame the emotions of the jury”

“the evidence will be cumulative to other versions of the same facts already in evidence”

# **IMPEACHMENT BENCH GUIDE**

## ***METHODS OF IMPEACHMENT***

1. Prior Inconsistent Statements;
2. Bias
3. Reputation for Lack of Veracity
4. Defect in Capacity, Ability or Opportunity
5. Contradiction
6. Character
7. Conviction of Crime

## ***GENERAL RULES***

1. Any party, including the party calling the witness, may attack the credibility of a witness.
2. Cannot call witness just to impeach.
3. Cannot ask questions solely to embarrass the witness.
4. Witness cannot comment on credibility.
5. Must accept witness answer if cross-examination concerns irrelevant or collateral matters. Collateral means not admissible for any other purpose than contradiction.
6. Anticipatory rehabilitation is permissible but not as to character.
7. A hearsay declarant may be impeached.

## ***PRIOR INCONSISTENT STATEMENTS***

1. Admissible but not to show prior statement is true.

**EXCEPTION:** some prior inconsistent statements made under oath are admissible as substantive evidence.

2. Prior statement must:
  - directly contradict
  - be materially different from testimony
  - or omit something that would naturally have been mentioned.
3. Inability to recall a fact or event is not inconsistent unless judge

finds witness is lying.

4. Some prior inconsistent statements are privileged, e.g., accident and hospital reports, violation of wiretap statute, etc.

### **Method and Foundation**

1. Give witness an opportunity to admit, explain or deny the statement;
2. Give witness the date, place, occasion and person to whom made;
3. If in writing, show it to witness or disclose contents.
4. Must you be able to prove PIS before asking about it, or just Good Faith?
5. If witness admits making statement, no extrinsic evidence permitted
6. If witness does not admit, extrinsic evidence admissible
7. Not necessary for statement of party opponent – 90.803(18)
8. Limiting instruction if requested

### ***BIAS***

1. Must have a bearing on the credibility of the witness.
2. Subject to the 90.403 balancing test.
3. May be brought up for the first time on cross.
  4. If the witness admits the bias, no further evidence is admissible on the point.
  5. If the witness denies the bias, the party may introduce other evidence to prove the bias.

### ***CONTRADICTION***

1. Generally, the evidence must be probative of the issues in case.
2. If not probative, it is probably collateral.

### ***DEFECTS IN MENTAL OR SENSORY CAPACITY***

1. Must be either at the time of the event or at trial;
2. Memory of witness may be tested if of probative value;
3. However, drug/alcohol abuse history is not admissible unless to show it affected the witness' capacity at the time.

## ***CHARACTER***

1. Must only relate to lack of truthfulness;
2. May be only by reputation testimony;
3. Must come from a sufficiently broad community;
4. Opinion testimony not permitted;
5. Evidence of truthfulness is permitted but only if first attacked

## ***CONVICTION OF A CRIME***

1. Only felonies and crimes of dishonesty;
3. Must be a conviction;
4. Guilty plea is not enough;
5. Withheld of adjudication is not enough;
6. Remoteness
  - a. Criminal cases – no set time period
  - b. Civil cases – issue of remoteness applies;
7. 403 balancing test might make remoteness applicable in criminal cases.

## **90.403 BALANCING APPLIES TO IMPEACHMENT EVIDENCE**

In weighing the evidence the probative value against the danger of unfair prejudice, the court must conduct a balancing analysis and consider:

- The need for the evidence;
- The tendency of the evidence to suggest an improper basis for deciding the case;
- The emotional impact of the evidence;
- The chain of inference necessary to establish the material fact;
- The effectiveness of a limiting instruction, if necessary (jury trial).

# Hearsay Bench Guide

**IS IT HEARSAY? (out of court and offered for truth of statement)**

**BUT NOT WHEN DECLARANT TESTIFIES AND STATEMENT IS:**

Inconsistent and under oath at a deposition, trial, or other proceeding.

Consistent and offered to rebut suggestion of improper influence, motive, or recent fabrication.

One of identification (not description)

***IS THERE AN EXCEPTION THAT APPLIES?***

***SPONTANEOUS STATEMENT.***

Describes or explains an event or condition.

Made at or very near time of event or condition.

***EXCITED UTTERANCE.***

Relates to startling event.

Made while under stress caused by event without time to reflect.

Factors to consider:

Time lapse

Age of declarant

Physical and mental condition of declarant.

Nature or characteristics of event (how startling or stressful was it).

***MENTAL/PHYSICAL CONDITION***

Offered to show condition existing at relevant time or explain subsequent conduct of declarant

Not if circumstances suggest untrustworthy

## **STATEMENTS FOR PURPOSE OF MEDICAL DIAGNOSIS OR TREATMENT**

Must be reasonably pertinent to diagnosis

### ***RECORDED RECOLLECTION***

Made when matter fresh in memory.

Insufficient recollection to testify fully and accurately

Read but not introduce as exhibit.

Not the same as refreshing recollection

### ***BUSINESS RECORDS***

Made at time of receiving information.

By or from person with knowledge of information.

Kept in regularly conducted business activity.

Regular practice to make such record.

Qualified witness must establish the above four facts.

### ***ABSENCE OF BUSINESS RECORD***

If normally there would be a record.

To prove the non occurrence or non existence of something.

### ***PUBLIC RECORDS.***

Activities of agency or matters observed pursuant to legal duty

Law enforcement reports in criminal cases excluded.

### ***ABSENCE OF PUBLIC RECORD***

If normally there would be a record.

If offered to show non existence or non occurrence of something.

***STATEMENT OF PARTY OPPONENT***

Offered by opposing party.

Not required that it be admission or statement against interest.

Can be statement of representative or co conspirator admission.

In criminal case state must establish corpus delicti first.

***IS RIGHT OF CONFRONTATION SATISFIED?***

Is it a criminal trial (not pre or post trial, except capital sentencing)?

Is the declarant a witness at trial?

If not, is the statement testimonial in nature? (primary purpose to establish past events relevant to future prosecution)?

Was the declarant subject to prior cross examination?

# LAY OPINION BENCH GUIDE

1. Personal perception, knowledge (not hearsay).
2. Subject does not require special knowledge, skill, etc.
3. Can't adequately testify about it without giving inference or opinion.
4. Won't mislead jury.

## Examples:

Distance

Speed

Height and weight

Time

Identity

Signature

Mental condition

Physical appearance

Intoxication

Value of his or her property

# EXPERT OPINION BENCH GUIDE

- Specialized knowledge will assist the jury.
- Witness is qualified by training or experience.
- Expert may relay on and relate hearsay or other inadmissible evidence but may not be used merely as a conduit to present inadmissible evidence.
- May not vouch for the credibility of another person.
  
- If opinion is based on scientific principle or methodology:
  - The party offering the opinion must show that the methodology or principle employed by the expert has sufficient acceptance and reliability.
  - It is the underlying theory or methodology that must have general acceptance, not the opinion.