

EXAMINERS' ANALYSIS OF QUESTION NO. 3

1. Evidence Of Bias Does Not Render A Witness Unqualified To Testify.

The court should overrule Polly's objection to Vince taking the stand. Pursuant to MRE 601:

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

The facts show Vince is well-spoken, is willing to take an oath and understands he is obligated to testify truthfully. The fact that he has a bias or interest in Sully's vindication because Sully is his younger brother is not a basis for disqualifying Vince as a witness. *Lorenz Supply Co v American Standard Inc*, 100 Mich App 600, 613 (1980), *aff'd on other grounds*, 419 Mich 610 (1984). Rather Vince's bias can be explored on cross-examination as an avenue for impeachment, but is not disqualifying.

2. The Witness's Unrelated Consensual Affair Is Irrelevant Under MRE 401 And, Even If Relevant, It Is Unduly Prejudicial Under MRE 403.

MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

To be relevant, evidence must be material (i.e., of consequence to the determination of the action); it also must have probative value (i.e., make a fact of consequence to the action more or less probable than it would be without the evidence). *People v McKinney*, 410 Mich 413, 418-19 (1981).

The issues of consequence in Polly's action revolve around whether Sully sexually harassed her. Whether a corporate officer who made no decisions in Polly's case was once in a consensual sexual relationship with a person other than his wife

is not a material fact of consequence nor does it make it more or less probable that Sully sexually harassed Polly at work.

Moreover, even if relevant, the probative value of the witness's consensual relationship "is substantially outweighed by the danger of unfair prejudice" under MRE 403. See *Elezovic v Ford Motor Co*, 472 Mich 408, 430 (2005) (not an abuse of discretion to rule that prejudicial effect of sexual conduct wholly unrelated to plaintiff's circumstances "would substantially outweigh any probative value the evidence might have"). The moral disapproval by the jury of Vince's extramarital affair could inflame the jury so they would be distracted from the issues in the case.

3. Polly's Impeachment Evidence Is Improper Because It Involves Extrinsic Evidence of a Collateral Matter.

The entire topic of Vince's extramarital affair is also a collateral matter. Evidence unrelated to a material trial issue and used strictly for impeachment purposes is collateral evidence. *Lagalo v Allied Corp (on Rem)*, 233 Mich App 514, 518 (1999). It is a "well settled rule that a witness may not be impeached by contradiction on matters which are purely collateral." *Cook v Rontal*, 109 Mich App 220, 229 (1981). Any attack on Vince due to an unrelated consensual relationship, being collateral, is improper for this additional reason.

Nor would the ex-mistress' testimony be proper impeachment evidence. Pursuant to MRE 608, "[s]pecific 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." MRE 608(b). Accord, *Lagalo*, 233 Mich App at 518 ("evidence rules do not allow extrinsic evidence to be used to prove specific instances of a witness' conduct for the purpose of attacking the witness' credibility"). See also *People v McGillen #1*, 392 Mich 251, 266-67 (1974) ("As a general rule, a witness may not be contradicted as to collateral, irrelevant, or immaterial matters, and, accordingly, subject to some qualifications, where a party brings out such matters on cross-examination of his adversary's witness, he may not contradict the witness' answers.").