The Interplay Between Michigan's Adverse Witness Statute and MRE 611

By Jack J. Mazzara

FAST FACTS

Although Michigan's Adverse Witness Statute still exists as a statutory rule of evidence, MRE 611(d)(3) is broader in scope and provides more flexibility than the statute. There is little reason to invoke the Adverse Witness Statute when counsel can rely on MRE 611(d)(3).

Both Michigan's Adverse Witness Statute and MRE 611(d)(3) address when a party can use leading questions to examine an adverse witness.[1] This article considers the interplay between the statute and the rule. It also summarizes the cases in which either the statute or the express exceptions of the rule were invoked to call an adverse party, a witness associated with an adverse party, or a hostile witness to testify.[2]

The Adverse Witness Statute and MRE 611(d)(3)

The Adverse Witness Statute has remained essentially unchanged as a statutory rule of evidence for more than a century. It allows a party to call the opposing party (or an employee or agent of the opposing party) as part of its case-in-chief, and gives the party "the right to cross-examine such witness the same as if he were called by the opposite party…."[3] Its purpose originally was to allow a party to call an adverse party without vouching for the witness and being bound by the witness's testimony.[4]

The Adverse Witness Statute differs from MRE 611(d)(3) in that the statute applies only to opposite parties and their present and former employees and agents,[5] whereas MRE 611(d)(3) includes the broader categories of "hostile witness" and "a witness identified with an adverse party." However, the Michigan Court of Appeals has held that the statute and the rule share a common purpose. That purpose, it has noted, is "to permit calling the opposite party, or his agent or employee, as a witness with the same privileges of cross-examination and contradiction as if the opposite party had called that witness."[6] This allows "truth to be brought out with great regularity."[7]

Another difference between the statute and the rule is that a party must announce its intention to invoke the Adverse Witness Statute before examining the witness at trial.[8] However, MRE 611(d)(3) expressly states that the examiner is not required to declare the intent to ask leading questions before the questioning begins or moves beyond preliminary matters.[9] Of course, the examiner must be able to demonstrate that the witness fits one of the categories set forth in the rule or that the circumstances justify the use of leading questions.[10]

Although still on the books, the Adverse Witness Statute arguably has been superseded by enactment of the Michigan Rules of Evidence and, in particular, MRE 611.[11] By granting the "right to cross-examine" an adverse witness called to testify in a party's case-in-chief, the statute allows the attorney to use the main tools of cross-examination: contradiction, impeachment, and leading questions.[12] However, MRE 607 eliminated this "technical rule of evidence" by permitting the credibility of a witness "to be attacked by any party, including the party calling the witness," and MRE 611(d)(3) permits leading questions in interrogation of an adverse witness. Consequently, the Adverse Witness Statute no longer has any independent purpose or utility, except perhaps to underscore that a party has the right to call and cross-examine a witness who falls within the ambit of the statute.[13]

MRE 611(d)(3) certainly is broader in scope and provides more flexibility than the Adverse Witness Statute. Thus, even if the statute is still viable, there seems little reason to invoke it instead of MRE 611(d)(3).

Adverse Parties and Their Employees and Agents, Witnesses Identified with an Adverse Party, and Hostile Witnesses

The following case summaries demonstrate when the Adverse Witness Statute or the exceptions in MRE 611(d)(3) or FRE 611(c) can be invoked to ask leading questions of an adverse party, a witness identified with an adverse party, or a hostile witness on direct examination.

Adverse Parties

A defendant can be called as an adverse witness under the statute when the defendant is still technically a party at the time of the testimony even if a settlement is contemplated.[14] However, a party who has entered into a settlement with an opposite party cannot be called as an adverse party under MCL 600.2161.[15]

Agents and Employees

Similarly, an agent of a dismissed defendant is outside the realm of MCL 600.2161.[16] But an independent expert is not the agent of the party who hired the expert for the purpose of obtaining expert opinion; therefore, the expert cannot be called in the opposing party's case.[17] In "a suit within a suit," the attorney who represented a defendant in the underlying suit, who was insured by the insurance company, was an agent of that defendant and could be called by the plaintiffs under MCL 600.2161 in the second suit against the insurance company and its adjuster.[18]

Witnesses Identified with an Adverse Party

Under Rule 611, leading questions on direct examination of witnesses "identified with an adverse party" are permitted without any showing of hostility.[19] Such witnesses include the defendant's fiancée even though she was the victim of the alleged crime and did not demonstrate any hostility during her testimony;[20] a friend of the defendant;[21] and the former college president and personnel director of the defendant.[22] Under former FR Civ P 43(b), the former pilot of a towboat at issue was an adverse witness in a negligence action brought against the towboat owner.[23]

In a criminal case, the defense may ask leading questions of a government agent or a witness closely identified with the interest of the government (e.g., the complaining witness) unless the government establishes that the witness is not hostile or biased. But a paid government informant does not fall within these categories.[24] Similarly, police officers and investigators may come within this approach.[25] However, in a § 1983 case by the estate of a police officer against another officer and the police department, the trial court properly refused to designate the department's lead investigator, who made the departmental determination that the defendant's use of deadly force was justified, as an adverse witness until her testimony showed she was in fact adverse.[26]

Hostile Witnesses

MRE 611(d)(3) and FRE 611(c) expressly designate three categories of witnesses for use of leading questions: hostile witnesses, adverse parties, and witnesses identified with adverse parties. Thus, a witness can be "hostile" without also being an adverse party or identified with an adverse party. Although some

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cases lump all three categories under the label "hostile witness,"[27] the distinctions can be significant when determining what foundation is necessary to proceed with leading questions.[28] Hostility can be established when the witness is biased, evasive, uncooperative, or contradicts his or her prior statements or testimony.[29] But even if the witness was a paid government informant, this alone does not establish the witness was a government agent or require that the witness be declared a hostile witness.[30]

Conclusion

Michigan's Adverse Witness Statute allows a party to use leading questions during the direct examination of an adverse party and the present (and possibly former) employees and agents of the adverse party. However, MRE 611(d)(3) also can be invoked for these purposes but does not require announcing in advance the intent to use leading questions. In addition, counsel can rely on MRE 611(d)(3) to use leading questions on direct examination of hostile witnesses and witnesses identified with an adverse party. Consequently, the Adverse Witness Statute has largely been superseded by MRE 611(d)(3), and there appears little reason to invoke the statute when counsel can proceed under the rule. ■

Jack J. Mazzara is the principal of The Mazzara Law Firm, PLLC, and an adjunct professor at the Wayne State University Law School. He focuses his practice in commercial and complex litigation, civil litigation, and securities law. *He gratefully acknowledges the research assistance of Matthew D. Smith, an associate with The Mazzara Law Firm.*

ENDNOTES

1. MCL 600.2161 provides:

   > In any suit or proceeding in any court in this state, either party, if he shall call as a witness in his behalf, the opposite party, employee or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding grew, was an employee or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true.

   MRE 611(d) states:

   > 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.

2. In addition to the use of leading questions expressly permitted under MRE 611(d)(3) and the corresponding FRE 611(c), the courts recognize numerous implied exceptions to allow leading questions on direct examination. See Mazzara, *Leading questions on direct and cross-examination,* 92 Mich B J 36 (March 2013).
3. MCL 600.2161.
4. See *Ferguson v Gonyaw,* 64 Mich App 685, 689; 236 NW2d 543 (1975) (the Adverse Witness Statute eliminated "a technical rule of evidence" against impeaching one's own witness).
5. *Lozano v Detroit Medical Ctr,* unpublished opinion per curiam of the Court of Appeals, issued December 2, 2008 (Docket Nos. 279087 and 279090).
6. *Linsell v Applied Handling, Inc,* 266 Mich App 1, 26; 697 NW2d 913 (2005).
7. *Jackovich v Gen Adjustment Bureau, Inc,* 119 Mich App 221, 233; 326 NW2d 458 (1982).
8. See *Ruhala v Roby,* 379 Mich 102, 111–112; 150 NW2d 146 (1967).
9. MRE 611 was amended effective October 1, 1991 to add subrule (c)(3) [now MRE 611(d)(3)]. The amendment negated the requirement that attorneys declare in advance that the witness was being called under the Adverse Witness Statute to ask leading questions. See Michigan Supreme Court Staff Comment, *Amendments to MRE 611,* 70 Mich B J 987 (1991); Robinson, *Improving Michigan evidence law,* 70 Mich B J 136, 140–141 (1991).
10. Although there is no requirement to give advance notice of the intent to use leading questions, the party must at least give notice that the litigant/witness will be called as a witness for the opposing party by including the litigant's/witness's name on the opposing party's witness list. *Moy v Detroit Receiving Hosp,* 169 Mich App 600, 607; 426 NW2d 722 (1988).
11. See *Strach v St John Hosp Corp,* 160 Mich App 251, 288; 408 NW2d 441 (1987) (Elliott, J, dissenting).
12. See *Linsell,* n 5 *supra* at 26; *Ferguson,* n 4 *supra* at 689; *McBride v Wallace,* 62 Mich 451, 454; 29 NW 75 (1886).
13. See *Jackovich,* n 6 *supra* at 221.
14. *Strach,* n 10 *supra* at 274–275.
15. *Wilson v W A Foote Mem Hosp,* 91 Mich App 90, 100; 284 NW2d 126 (1979).
16. *Davis v Wayne Co Sheriff,* 201 Mich App 572, 587; 507 NW2d 751 (1993).
17. See *Barnett v Hidalgo,* 478 Mich 151, 163; 732 NW2d 472 (2007).
18. *Jackovich,* n 6 *supra* at 232.
19. *United States v Duncan,* 712 F Supp 124, 126 (SD Ohio, 1988).
20. *People v Finley,* unpublished opinion per curium of the Court of Appeals, issued October 21, 2010 (Docket No. 293151).
21. *People v Burleigh,* unpublished opinion per curium of the Court of Appeals, issued September 14, 2006 (Docket No. 260636).
22. *Chonich v Wayne County Cmmty College,* 874 F2d 359, 368 (CA 6, 1989).
23. *Melton v O F Shearer & Sons, Inc,* 436 F2d 22 (CA 6, 1970).
24. *United States v Bryant,* 461 F2d 912, 918–919 (CA 6, 1972).
25. See *Duncan,* n 18 *supra* at 126.
26. *Gates v City of Memphis,* 210 F3d 371 (CA 6, 2000).
27. See, e.g., *id.* (FRE 611(c) "provides that certain categories of witnesses can automatically be treated as hostile"); *Perkins v Volkswagen of America, Inc,* 596 F2d 681 (CA 5, 1979).
28. Compare *United States v Shoupe,* 548 F2d 636, 642 n 1 (CA 6, 1977) ("A finding of hostility, is technically required to permit the use of leading questions on direct examination…."), with *Bryant,* n 23 *supra* at 917 (The "intrinsic nature of the relationship between the accused and the witness" determines whether a preliminary showing of hostility is required).
29. See *Shoupe,* n 27 *supra.*
30. See *Bryant,* n 23 *supra.*