



Ethics

Rule 1.2 Code of Ethical Conduct

Rule 1.2.2 Coach's Conduct

...coaches shall comply with their own employment professional codes, rules, and ethical standards. Finally, coaches shall instill in their student team members, team parents, and other team gallery observers the highest standards of sportsmanship and ethical behavior

New Rule 6.5

- Completely rewritten
- Ability to object!!
 - Goals
 - 1 How to avoid objection
 - 2 How to respond to an objection
 - 3 How to object
- Long and complex
- Simple concept

2 principles

- 1 Specific challenge given to students:
 - Given a set of facts
 - Demonstrate their trial and advocacy skills by presenting and arguing *THOSE* facts
- 2 The witness statements are not scripts

Rule 6.5 Unfair Extrapolation

Mock trial competitors are to present and argue the facts provided in the Case Problem. Although participants are encouraged to present the facts and information contained in the Case Problem imaginatively, such presentation may not use facts outside the Case problem to create an advantage for the proponent or to prejudice the opposing team. Teams must be able to rely on the facts stated within the Case Problem. Accordingly, teams may not add or infer material facts or opinions which are not contained in the Case Problem.

What is “Unfair Extrapolation?”

2 part test

- 1 Is the fact in the case file?
- 2 Is the fact material?

Rule 6.5.2 Unfair Extrapolation Prohibited

Unfair extrapolation occurs if a witness testifies on direct or re-direct examination:

- 1) to a fact or opinion that is not in the Case Problem,*
and
- 2) the fact or opinion is material...*

1 Is the fact in the case file?

Rule 6.5.2 Unfair Extrapolation Prohibited

... A witness may testify to any fact that is in the witness's statement, in the Stipulated Facts, or in an exhibit, and may testify to any fact in another witness's statement if the testifying witness would reasonably be expected to know such fact under the circumstances...

1 Is the fact in the case file?

- In the witness's statement
- In the Stipulated Facts
- In an exhibit
- In another witness's statement
 - if the testifying witness would reasonably be expected to know such fact under the circumstances

2 Is the fact material?

- What is “material?”
- Black’s
 - Having some logical connection with the consequential facts
 - Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential

Rule 6.5.2 Unfair Extrapolation Prohibited

... Facts or opinions are material if they affect the merits of the case. A fact is not material if it merely provides background information or develops the character of a witness. Immaterial facts are not unfair extrapolation. One test that judges, panelists, competitors and coaches can use to assess whether a fact or opinion is material is if it is one that could reasonably be used in the party's closing argument...

2 Is the fact material?

- Affect the merits of the case
 - Does *the fact* make one side of the case stronger?
- Rule of thumb
 - Could the fact reasonably be used in the party's closing argument?

Rule 6.5.2 Unfair Extrapolation Prohibited

... It is not unfair extrapolation for a witness to testify to a fact which is not in the witness' statement if the fact is truly neutral and does not create an advantage for the proponent or prejudice to the opposing team. Although such testimony is not unfair extrapolation, the witness may still be subject to impeachment by omission.

2 Is the fact material?

- Truly neutral
 - The fact does not advantage the proponent or prejudice the opposing team
- BUT!
 - Still subject to impeachment by omission

Cross Examination

Rule 6.5.2 Unfair Extrapolation Prohibited

Unfair extrapolation occurs if a witness testifies on direct or re-direct examination:

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- 2) the fact or opinion is material...*

Rule 6.5.2 Unfair Extrapolation Prohibited

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- 1) to a fact or opinion that is not in the Case Problem, and*
- 2) the fact or opinion is material...*

Why is cross different??

- Third principle
 - 3 The goal of mock trial is for students to learn and demonstrate *trial skills*
- There is no unfair extrapolation in a real trial
- Cross examination and impeachment are *fundamental trial skills*

Example

Ortiz witness statement: “I don’t text in front of my parents, but I do text when I drive sometimes.”

Q: Mr. Ortiz, sometimes, you DO text when you drive, don’t you?

A: Oh, I never text and drive.

What should the lawyer do?

- Make an unfair extrapolation objection and see if she can get points deducted from the other team
- Impeach the witness

Extrapolation during cross

- The lawyer is asking about a fact that IS in the case file
- The lawyer is asking about a fact that IS NOT in the case file
- Impeach
- The *lawyer* is cheating

So what if the lawyer cheats?

- Three options
 - 1 Decline to answer
 - 2 Make up an answer
 - 3 Say it's not in the file, but offer to provide an answer

Rule 6.5.3 Applicability to Cross Examination

If, on cross examination, a witness is asked a question which calls for information that is NOT the witness's statement, the witness may:

- 1) decline to answer on the basis that the information is not in the witness's statement;*
- 2) indicate that the information is not in the witness's statement but offer to provide an answer; and/or*
- 3) provide a reasonable answer, as long as the answer is responsive to the question and does not contradict the facts contained in the witness's statement.*

It is not unfair extrapolation for the witness to respond with a fact that is not in the Case Problem as long as the answer fits within the above restrictions...

Rule 6.5.3 Applicability to Cross Examination

... If a question on cross examination seeks information which IS in the witness's statement, it is improper for the witness to contradict his or her statement. Nevertheless, such a violation must be handled through impeachment of the witness. The unfair extrapolation objection may not be made during cross examination.

Important

- This only applies to *CROSS EXAMINATION*
- Must be responsive to the question AND cannot contradict the witness statement
 - But a violation must be handled through impeachment

The Objection

Why?

- Not just that people have been asking for an objection for years (and years)
 - Probably less unfair extrapolation than people think
 - Complainers often also violators
- A rule with no real consequences for a violation
 - And there were violations

Fears

- UE objections would make trials take forever
- UE objection is unrealistic, and displaces actual trial skill (impeachment)
- Winning by objection would become tactical focus
- Judges would not know facts well enough to rule properly

Why not impeach by omission?

- Experience proves impeachment by omission is ineffective
 - Have to wait until after the direct examination is concluded (and people have forgotten what the testimony was)
 - Some witnesses deny or act confused about the extrapolated fact
 - Takes significant time to establish a fact is not in the file
 - Some witnesses well trained to respond
 - Even when done, scoring panelists often don't take into account

The goal of the objection

- To provide some way to call unfair extrapolation to the scoring panelists' attention
- Quickly establish if there was a violation or not
- Remind the panelists to take the rule violation into account in their scoring

When can you object?

Rule 6.5.5 Unfair Extrapolation Objection

... If, during direct examination, a witness testifies to a fact or opinion that is not in the Case Problem, and the fact or opinion is material (as defined in Rule 6.5.2, above), the opposing attorney may object to the unfair extrapolation...

3 parts

- 1 During direct (includes re-direct)
- 2 The fact or opinion is not in the Case Problem
- 3 The fact or opinion is material

How?

- “Objection, unfair extrapolation!”
 - Suggestion: identify the testimony at issue

How to respond

4 possibilities

- 1 Withdraw the challenged testimony or question
- 2 Concede the objection
- 3 Establish that the challenged information is in the case problem
- 4 Establish that the challenged information is not material

Be prepared!

- One option: establish that the challenged information is in the case problem
- Stress and adrenaline = no chance of finding by reading
- Just like with good cross examination: know where every fact is



Then what happens?



***Rule 6.5.5 Unfair Extrapolation
Objection***

... The resolution of any unfair extrapolation objection rests solely with the scoring panelists...

The Risk

Rule 6.5.5 Unfair Extrapolation Objection

Unfair Extrapolation should normally be addressed through cross-examination and impeachment, and the unfair extrapolation objection is intended to be used only for egregious violations. Accordingly, the scoring panelists may not only deduct points for unfair extrapolation, but may also deduct points from the objecting team if they conclude that the objection was not made in good faith, was improvident, or demonstrated poor sportsmanship....

The advisement

Rule 6.5.5 Unfair Extrapolation Objection

You, the scoring panelists, are the sole arbiters of this dispute. Based upon your own individual observations, good faith judgment, and consistent with the intent of this judicial process, you may decide that:

- (a) There was no extrapolation; or*
- (b) The statement was not unfair extrapolation (or the question did not ask for unfair extrapolation) as it was not material; or*
- (c) The statement was unfair extrapolation (or the question was asking for unfair extrapolation) as it was material.*

The ultimate decision is in the discretion of each of you individual scoring panelists. Consistently with your decision, you may award one or more points, deduct one or more points, or take no action at all with respect to any of the parties involved. If you determine that there was no unfair extrapolation (or that there was no question asking for unfair extrapolation) you may deduct one or more points from the objecting party if you believe that the objection was not made in good faith, was improvident, or was poor sportsmanship. Your decision is final.

Rule 6.5.5 Unfair Extrapolation Objection

... Nothing in this Rule 6.5.5 prevents scoring panelists from independently finding that there has been unfair extrapolation, even in the absence of an objection, and to deduct points at their discretion.

Rule 6.5.5 Unfair Extrapolation Objection

...The scoring panelists' decision is final. Consistently with the goals and objectives of the mock trial program, this serves to educate students about the potentially varying perspectives of observers, and to encourage contemporaneous analytical thinking as well as fair and ethical conduct in the courtroom...

Implications

- You probably will not know if you are scored down
- Or, if so, by how much
- You can't fight it anyway
- The moral of the story...
 - AVOID BEING OBJECTED TO IN THE FIRST PLACE

Related Rules

Rule 3.1.1 Stipulations

Stipulations may not be disputed at trial.

Rule 3.1.2 Witness Statements

Witness statements may not be altered.

Rule 4.9.4 Witness Demeanor

...Testimony must not be inconsistent with facts set forth in the witness' statements/affidavits.

Rule 6.5.1 Witnesses Bound by Own Statements

Each witness is bound by the facts and opinions contained in his or her own statement, the Stipulated Facts and the exhibits.

A witness may not deny or contradict facts or opinions contained in his or her own statement.

A witness is not bound by facts or opinions contained in other witness statements.

Expert witnesses are bound by the opinions contained in their witness statements, and only to that extent may give opinions to address or rebut opinions of other expert witnesses and testimony of fact witnesses.

The witness's own statement

- A witness may NOT contradict the facts in his or her own statement
- Distinction between:
 - Making a mistake
 - "... I realized later what I wrote in my statement was wrong."

Help with impeachment

- Each witness statement now ends with:
 - *I have carefully reviewed this statement, and it includes everything I know of that could be relevant to the events I discussed. I understand that I can and must update this statement if anything new occurs to me before the trial.*

Experts

Rule 6.5.1 Witnesses bound by own statements

... Expert witnesses are bound by the opinions contained in their witness statements, and only to that extent may give opinions to address or rebut opinions of other expert witnesses and testimony of fact witnesses.

6.5.4 Expert Witnesses

Only the witnesses specifically identified as expert witnesses in the Case Problem may be tendered as experts under Rule 702.

It shall not be considered unfair extrapolation for an expert witness to testify that s/he agrees or disagrees with facts or opinions that are contained in another witness' statement.

Why?

- Effort to get around evidence issues and extrapolation issues by making someone an “expert”
 - Expert in police investigation
 - Making a reasonable inference that a police officer would be an expert in firearms

Rule of Evidence 703

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

In other words...

- An expert can *RELY* on inadmissible facts in forming an opinion
- That doesn't mean the expert can *TESTIFY* to those facts
- Rule 6.5 makes it harder to misuse Rule 703

Experts

- Only the witnesses specifically identified as expert witnesses in the Case Problem may be tendered as experts under Rule 702.
- This year:
 - Skylar Turner – expert in forensic traffic psychiatry
 - Parker Madden – expert in accident reconstruction

Experts

- Expert witnesses are bound by the opinions contained in their witness statements
- An expert may only give opinions to address or rebut opinions of other expert witnesses and testimony of fact witnesses to the extent such opinion is in the expert's statement
- It is not unfair extrapolation for an expert witness to testify that he agrees or disagrees with facts or opinions that are contained in another witness' statement

Rule 6.6.3

No unfair extrapolation objection

Rule 6.6.3

- There is no Rule 6.6.3 anymore

Judicially noticed facts

CRE 201

(b) A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

MT Rule of Evidence 201

(b) The court may judicially notice a fact that is not subject to reasonable dispute because it is a matter of mathematical or scientific certainty. For example, the court could take judicial notice that $10 \times 10 = 100$ or that there are 5280 feet in a mile.

Review

Rule 6.5 Unfair Extrapolation

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2 part test

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- 2 Is the fact material?

Examples

Direct of Elliot Cook

Q: What happened as you approached the intersection?

A: The crosswalk signal had been flashing, but right as I got to the intersection it stopped.

Q: Then why didn't you stop?

A: I knew I still had about 5 seconds before the light would turn green for the cars. That was more than enough time for me to get across on a bike.

Q: Are you sure the light was still red for the cross traffic?

A: I'm positive!

Direct of Elliot Cook

Q: Is there anything else that leads you to believe the light was red for the cross traffic?

A: There was a big truck in the east bound lane that was still stopped for the light.

Q: Anything else?

A: Well, yeah, of course I could see the light for the cross traffic as I got into the intersection. It was red.

Cross of Elliot Cook

Q: You assume the truck was stopped because the light was red. You didn't actually see the light.

A: That's not correct, of course I could see the light for the cross traffic as I got into the intersection. It was red.



Direct of Cody Ortiz

Q: What kind of cell phone do you have?

A: It's an iPhone 5S.

Q: What color?

A: It's gold, like my car was.



Direct of Finley Bush

Q: How did you pick up Ms. Cook's children?

A: I borrowed my mom's car and drove over.

Cross of Sawyer Beard

Q: Mr. Beard, the bicycle went about 20 feet?

A: Yep, it sure did.

Q: I'm handing you Exhibit 10, that's what the bicycle looked like, isn't it?

A: I don't remember it being banged up quite like that. That looks like somebody went out and ran over it with their car to make it look worse for the picture. That's not how it looked.

Cross of Sawyer Beard

Q: Mr. Beard, the bicycle went about 20 feet?

A: Yep, it sure did.

Q: I'm handing you Exhibit 10, that's what the bicycle looked like, isn't it?

A: I don't know. I went over to the bicyclist after the accident. I didn't go look at the bicycle. I have no idea if that's what it looked like.

Direct of Sawyer Beard

Q: Mr. Beard, how far did the bicycle go?

A: It went about 20 feet. Landed on somebody's yard.

Q: I'm handing you Exhibit 10. What is exhibit 10?

A: That's a picture of the bicycle. That's just what it looked like.

Cross of Sawyer Beard

Q: Mr. Beard, I'm handing you exhibit 10. You recognize that as the bicycle Ms. Elliot was riding?

A: I surely do.

Q: And that's the way it looked after the accident.

A: It is.

Q: Do you see it is on the street?

A: Any fool can see that.

Q: Didn't you say in your affidavit that the bicycle landed in somebody's yard?

A: Whoever typed my affidavit must have got that wrong. I'm pretty sure I said it landed NEAR somebody's yard.

Cross of Cody Ortiz

Q: Mr. Ortiz, you were in mock trial in high school, right?

A: No, I wasn't.

Q: Well, you and Finley Bush both tried out for the lead attorney role in last year's mock trial program and you got the role?

A: I heard Finley testify to that, but it's absolutely false. I have never tried out for any role in mock trial. I have never been in mock trial.

Direct of Parker Madden

Q: Have you read Ms. Turner's affidavit?

A: I have.

Q: Any thoughts on her conclusions?

A: Yes, as a matter of fact. I don't see how she can be critical of Cody Ortiz for being distracted, but just brush off the fact that Elliot Cook was also distracted. Distraction is distraction. If distraction diminishes the ability of the brain to focus, then it shouldn't matter if you are on a bike or in a car. If talking on a cell phone led to thousands of traffic deaths and hundreds of thousands of injuries then it was just as dangerous for Ms. Cook to be talking on her cell phone while she was riding in traffic.

Direct of Cody Ortiz

Q: How well do you get along with Finley Bush.

A: Finley is probably the only kid in school who doesn't like me. It's like Finley is offended by the fact that I'm popular or that I hang out with the cool kids in school.

Direct of Skylar Turner

Q: What do you know about Finley Bush and Cody Ortiz?

A: I know that Finley kid is one jealous little whiner. Everybody at the high school likes Cody except Finley Bush. It's like Finley resents Cody for being popular or hanging out with the cool crowd.

Cross of Cody Ortiz

Q: Mr. Ortiz, did you testify on direct examination that you plan to study political science next year?

A: That's right.

Q: Mr. Ortiz, nowhere in your statement does it say anything about what you plan to study at college, does it?

Cross of Skylar Turner

Q: Mr. Turner, are you aware of the recent research that shows teenagers are actually better at multitasking than adults because they have grown up using electronic devices like video games and laptops?

A: Actually, counsel, that supposed research wasn't from any valid study, but was proven last year to be a false account widely distributed on the Internet. Maybe you shouldn't be so trusting of things you find on the Internet.

Cross of Skylar Turner

Q: Mr. Turner, you have criticized Mr. Ortiz for being distracted, but wasn't Ms. Cook distracted, too?

A: There's a difference between a visual distraction and an auditory distraction. Elliot Cook was still looking where she was going. Cody Ortiz was looking at his phone. The research shows that visual distractions are far more of a problem than auditory distractions.

Cross of Skylar Turner

Q: Mr. Turner, you have criticized Mr. Ortiz for being distracted, but wasn't Ms. Cook distracted, too?

A: There's a difference between a visual distraction and an auditory distraction. Elliot Cook was still looking where she was going. Cody Ortiz was looking at his phone. The research shows that visual distractions are far more of a problem than auditory distractions.

Atty: Objection. Unfair extrapolation. There is nothing in Mr. Turner's statement or the case file that says auditory distractions are different than visual distractions and that is clearly a material fact!

Direct of Sawyer Beard

Q: Mr. Beard, you have a driver's license?

A: Wouldn't be drivin' without one, now, would I?

Q: I assume you had to pass a test on the Colorado motor vehicle laws in order to get your license?

A: Yep, I know all about the traffic laws, unlike some folks it seems.

Atty: Your honor, we tender Mr. Beard as an expert in Colorado traffic law.