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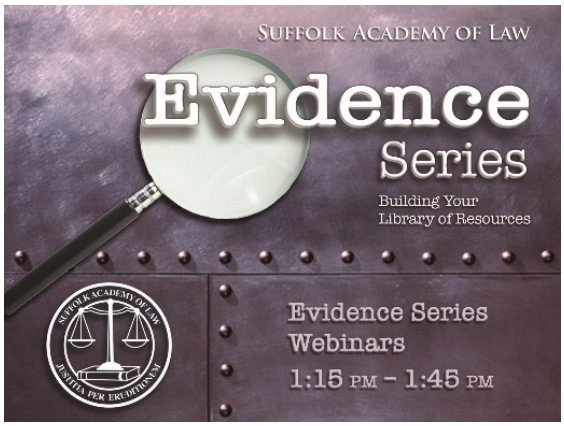

ZOOM WEBINAR

EVIDENCE SERIES
Adverse Witness Including Parties

FACULTY:

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Coordinators: Hon. John J. Leo and Harry Tilis, Esq.

May 12, 2021
Suffolk County Bar Association, New York

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President, Bar Association of Nassau County, New York, 1988-89

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Member, Matrimonial Practice and Rules Committee, Office of Court Administration, 1997 - present

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Editor, Matrimonial Law Journal, published by American Academy of Matrimonial Lawyers, New York Chapter, 1986-1995

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Recipient, Nassau County Bar Association "Distinguished Past President Award", 2002

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Chapter on "Use of Appraisers in the Valuation of Marital Property", Valuation & Distribution of Marital Property, Matthew Bender, 1984

"Equitable Distribution and Valuation of Assets", Family Law Review, New York State Bar Association

"Child Support and Visitation", Family Law Review, New York State Bar Association

"Distribution of Proceeds from Partition and Sale of Real Property", Family Law Review, New York State Bar Association

"Stipulations of Settlement in Matrimonial Litigation", The Nassau Lawyer, Nassau County Bar Association

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SUFFOLK ACADEMY OF LAW – EVIDENCE SERIES

ADVERSE WITNESS INCLUDING PARTIES

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I. GENERAL RULE

A. A party who calls adverse party as witness should not be bound by witness's answers and should be permitted to lead and cross-examine, because he is obviously a hostile witness. *Mtr. of Arlene W. v. Robert D.*, 36 AD2d 455, 456, 324 NYS2d 333 (4th Dept. 1971); see also, *Cornwell v. Cleveland*, 44 AD2d 891, 355 NYS2d 679 (4th Dept. 1974).

B. No Vouching

1. CPLR 3117 (subd [a], par 2) is clear in its direction that upon trial, "the deposition of a party * * * may be used for any purpose by any adversely interested party". The rule is not restricted in its application to situations where the party previously deposed is physically present in the courtroom. Nor is it at all relevant that the portion of the deposition could have been read while defendant was on the stand. The CPLR places no such restriction on the use of an adverse party's deposition transcript. To the contrary, the rule provides for the use of such transcript "for any purpose" and the failure to permit a party to use an adverse party's deposition transcript has been held to be error *(Rodford v Sample*, 30 AD2d 588, *supra; Murphy v Casella*, 263 App Div 1001). *Gonzalez v Medina*, 69 AD2d 14, 21 [1st Dept 1979])

2. The general rule prohibiting a party from impeaching his or her own witness (*see, e.g., Hanrahan v New York Edison Co.,* 238 NY 194, 198) does not apply where the witness is an adverse party (*see, Kelly v Wasserman,* 5 NY2d 425, 428-429; *see also, Becker v Koch,* 104 NY 394; *see generally,* Prince, Richardson on Evidence §§ 6-419, 6-425, at 426-427, 434 [Farrell 11th ed]). Since the examining party may claim that the witness is mistaken, present contradictory evidence and otherwise impeach the witness (*see, People v Reed,* 40 NY2d 204, 207; *Spampinato v A. B. C. Consol. Corp.,* 35 NY2d 283, 286-287; *Jordan v Parrinello,* 144 AD2d 540, 541), no presumption of the honesty or credibility of such a witness arises. *Cammarota v Drake*, 285 AD2d 919, 920-921 [3d Dept 2001]

II. GENERAL DISCRETION OF COURT

A. While an adverse party who is called as a witness may be viewed as a hostile witness and direct examination may assume the nature of cross-examination by the use of leading questions (*see, Becker v Koch,* 104 NY 394, 400-401), whether to permit such questions over objection is a matter which rests in the discretion of the trial court (*see, Jordan v Parrinello,* 144 AD2d 540, 541; Prince, Richardson on Evidence § 6-228, at 374 [Farrell 11th ed]).

B. "...when an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the *discretion* of the court, direct examination may assume the nature of cross-examination by the use of leading questions.

C. Refusal to Permit.

1. Family court's denial of mother's requests to conduct direct examination of father through the use of leading questions did not improperly restrict mother's examination of father as a part of her direct case in child custody proceeding, where mother already had the opportunity to cross-examine the father using leading questions when he testified as part of his own direct case, father was not reluctant or evasive in answering questions, mother's counsel asked many leading questions despite the court's ruling, and, to the extent objections were sustained, mother, on appeal, identified no instance in which she was unable to elicit necessary information without the use of leading questions. While an adverse party who is called as a witness may be viewed as a hostile witness and direct examination may assume the nature of cross-examination by the use of leading questions, whether to permit such questions over objection is a matter which rests in the sound discretion of the trial court. *Argila v. Edelman*, 174 AD3d 521, 106 NYS3d 71 (2d Dept. 2019)

2. The record discloses that respondent was neither reluctant nor evasive in answering questions posed during direct examination, including several questions regarding the children and guns. When the objections to the leading questions were sustained, petitioner's counsel made no effort to elicit the information through questions which were not leading, and petitioner does not claim that such questions were not feasible or that their use would have been frustrated by respondent's hostility as an adverse party. In these circumstances and considering the lack of evidence to support petitioner's application for a change in custody, we see no reversible error in Family Court's ruling." *Ostrander v. Ostrander*, 280 AD2d 793, 720 NYS2d 635 (2001)

III. LIMITS ON CROSS EXAMINATION OF ADVERSE PARTY

A. Criminal Conviction

1. An adverse witness or a hostile party may not be impeached on direct examination by evidence of his or her criminal conviction. *Morency v. Horizon Transp. Servs., Inc.,* 139 AD3d 1021, 33 NYS3d 319 (2d Dept. 2016)*; Miller v. Galler*, 45 AD3d 1325, 846 NYS2d 493 (4th Dept. 2007)

B. Prior Inconsistent Statement (CPLR 4514)

1. However, a party may not impeach the credibility of a witness whom he calls (see *Becker v. Koch*, 104 NY 394) unless the witness made a contradictory statement either under oath or in writing (see CPLR 4514)." *Jordan v Parrinello,* 144 AD2d 540, 534 NYS2d 686 (2d Dept. 1988). The general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing. *Fox v. Tedesco,* 15 AD3d 538, 789 NYS2d 742 (2d Dept. 2005); *Ferri v. Ferri*, 60 AD3d 625, 878 NYS2d 67(2d Dept. 2009)

2. Proper for plaintiff to impeach defendant, whom plaintiff called as a witness, with prior consistent statements made at examination before trial and at other trials (pursuant to CPLR 4514), but error to permit plaintiff to impeach defendant with a prior criminal conviction and by attacking his qualifications. *Skerencak v. Fischman*, 214 AD2d 1020, 626 NYS2d 337 [4th Dept. 1995]).

3. No foundation necessary

a. Where witness sought to be discredited with a prior inconsistent statement is a party, the laying of a foundation is unnecessary, as the party's statements are treated as admissions and, as such, are received as primary evidence against him or her. (*Viera v. NYC Transit Auth.*, 221 AD2d 625, 634 NYS2d 168 [2d Dept. 1995]).

C. Collateral Evidence Rule

1. The collateral evidence rule limits the ability of the cross-examiner to contradict the witness by introduction of extrinsic evidence. It holds that:

> "the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility. (citations omitted) This rule is premised on sound policy considerations for if extrinsic evidence which is otherwise inadmissible is allowed to be introduced to contradict each and every answer given by a witness solely for the purpose of impeaching that witness, numerous collateral minitrials would arise involving the accuracy of each of the witness's answers. The resulting length of the trial would by far outweigh the limited probative value of such evidence." (*Peo. v. Pavao*, 59 NY2d 282, 288, 464 NYS2d 458 [1983])

2. Whether extrinsic proof of the prior inconsistent statement may be adduced depends upon the substance of the statement. If it bears upon a material issue in the case, then it is not collateral and extrinsic proof is not permitted. *People v. McCormick*, 303 NY 403, 103 NE2d 529 (1952).

3. Even where a particular subject is proper impeachment upon cross-examination, it is collateral unless it is relevant to some issue in the case other than credibility or is independently admissible in order to impeach the witness. Such collateral matter, while proper cross-examination because relevant to the witness's credibility, may not be used to impeach the witness by extrinsic evidence. *Badr v. Hogan*, 75 NY2d 629, 634, 555 NYS2d 249 (1990); *People v. Schwartzman*, 24 NY2d 241, 245, 299 NYS2d 817 (1969); *Peo. v. Jackson*, 165 AD2d 724, 564 NYS2d 259 (1st Dept. 1990); *Peo. v. Israel*, 161 AD2d 730, 732, 555 NYS2d 865 (2d Dept. 1990).

4. Where defense counsel on cross examination asked plaintiff whether she had failed an employment-related drug test, a collateral issue relevant only to plaintiff's credibility, and plaintiff testified that the test result was a "false positive" that was proven false upon retesting, it was error to permit defense counsel to refer to the lack of evidence supporting plaintiff's assertion and introduce the drug test result in evidence in an attempt to impeach plaintiff's credibility. *Dunn v. Garrett,* 138 AD3d 1387, 31 NYS3d 326 (4th Dept. 2016)

5. Court properly precluded plaintiff from using the verified answer of the defendant to impeach her credibility with respect to a collateral matter which had no relevance to any issue in the case. *Perkins v. Murphy*, 7 AD3d 500, 775 NYS2d 591 (2d Dept. 2004); *Goldman v. Goldman*, NYLJ, 9/28/87, p.13 col.5,(S.Ct., N.Y. Co., Glen, J.).

6. Not Collateral - Subjects of impeachment which are not collateral and with respect to which independent or extrinsic evidence may be produced are:

a. Parole officer's rebuttal testimony flatly contradicting the alibi testimony offered at trial – *Cade v Cade*, 73 NY2d 904, 905, 539 NYS2d 287 [1989].

b. the witness's bias or hostility - *Badr v. Hogan*, 75 NY2d 629, 635, 555 NYS2d 249 [1990].

c. the witness's impaired ability to perceive - *Badr v. Hogan*, 75 NY2d 629, 635, 555 NYS2d 249 [1990]

D. Interplay of Collateral Evidence Rule and Cross Examination of Prior Bad Acts

1. In personal injury action, error for trial court to refuse to let defendant's attorney question plaintiff as to why she filed tax returns as head of household when she was married and living with her husband at the time,

and the number of dependents she claimed, as the questions raised the possibility of tax fraud which has some tendency to show moral turpitude and thus was relevant on the credibility issue. However, defendant's attorney would have been bound by plaintiff's answers and could not resort to extrinsic evidence or other witnesses to refute plaintiff's answers because of the collateral evidence rule. *Young v. Lacy*, 120 AD3d 1561, 993 NYS2d 222 (4th Dept. 2014)

IV. EXPERT OPINION BY ADVERSE PARTY

A. A party in a civil suit may be called as a witness by his adversary and, as a general proposition, questioned as to matters relevant to the issues in dispute. A plaintiff in a medical malpractice case can call the defendant-doctor as his/her witness as to both "fact" and "opinion". *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 255 NYS2d 65 (1964)

V. READING FROM DEPOSITION OF ADVERSE PARTY

A. STATUTE – CPLR 3117 - GENERAL - CPLR 3117(A)(1)

1. All or part of a deposition may be used by any party to contradict or impeach the testimony of the deponent as a witness.

a. CPLR 3117 (subd [a], par 2) is clear in its direction that upon trial, "the deposition of a party * * * may be used for any purpose by any adversely interested party". The rule is not restricted in its application to situations where the party previously deposed is physically present in the courtroom. Nor is it at all relevant that the portion of the deposition could have been read while defendant was on the stand. The CPLR places no such restriction on the use of an adverse party's deposition transcript. To the contrary, the rule provides for the use of such transcript "for any purpose" and the failure to permit a party to use an adverse party's deposition transcript has been held to be error *(Rodford v Sample*, 30 AD2d 588, *supra; Murphy v Casella*, 263 App Div 1001). *Gonzalez v Medina*, 69 AD2d 14, 21 [1st Dept 1979])

2. CPLR 3117(a)(2) - All of part of a deposition of a party may be used for any purpose (including evidence in chief of the facts in the deposition testimony) by any party having an adverse interest to the deponent. Trial judge has the discretion to determine when the deposition may be read.

a. Plaintiff did not make Defendant his witness by reading into evidence Defendant's deposition; since Defendant was a party to the action, plaintiff was entitled to use Defendant's deposition as evidence in chief and

plaintiff did not become bound by Defendant's version of the facts. *Spampinato v. A.B.C. Consol. Corp.,* 35 NY2d 293 (1974)

3. CPLR 3117(a)(3) - Unavailability situations - Deposition of any person (including own party) may be used by any party for any purpose if:

a. Witness is dead;

b.. Witness is at a greater distance than 100 miles from the place of trial or is out of the state (unless collusively out of state);

(1)*Dailey v. Keith*, 1 NY3d 586, 774 NYS2d 105 (2004) – Not error in refusing to allow introduction of defendant's deposition testimony at trial as evidence-in-chief as defendant, by voluntarily leaving the state and refusing to return for trial, procured her own absence and thus failed to satisfy CPLR 3117(a)(3)(ii).

c. Witness is unable to attend or testify because of age, sickness, infirmity or imprisonment;

(1)*Beth M. v Susan T.,* 81 AD3d 1396, 917 NYS2d 466 (4th Dept. 2011) - The court erred in admitting in evidence the transcripts of testimony from witnesses at the prior proceedings without first determining whether those witnesses were presently unavailable (see CPLR 4517), although under the facts of this case, the error was harmless.

d. Party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or

4. On motion or notice, the use is justified due to special circumstances in the interests of justice.

B. Pursuant to CPLR 3116(a), before its use, the transcript of a deposition of a deponent must be provided to the deponent for review and signature and any changes in form or substance desired by the deponent shall be recorded. If a deponent refuses or fails to sign his or her deposition under oath within 60 days, it may be used as if fully signed. The party seeking to use an unsigned deposition transcript bears the burden of demonstrating that a copy of the transcript had been submitted to the deponent for review and that the deponent failed to sign and return it within 60 days. *Grant v. Fadhel*, NYLJ, 3/31/16, Supreme Court, Kings Co.

1. Where defendants demonstrated that the deposition transcript of the witness was submitted to the witness and she failed to sign and return it within 60 day, the transcript can be used by the defendants as fully as though signed. *Baptiste v. Ditmas Park, LLC*, 171 AD3d 1001, 98 NYS3d 280 (2d Dept. 2019)

C. Rebutting Deposition Testimony

1.*Yeargans v. Yeargans*, 24 AD2d 280, 265 NYS2d 562 (1st Dept. 1965) – "It was also prejudicial error to exclude the motor vehicle report offered by the defendant when the report tended to contradict the version of the

accident given by the defendant in a deposition before trial. CPLR 3117(d) specifically provides "at the trial, any party may rebut any relevant evidence contained in a deposition, whether introduced by him or by any other party." It may be noted that the deposition was first used by the plaintiff in his case in chief and was not used to contradict or impeach the defendant deponent who had not yet testified. (See CPLR 3117, subd. [d].)"

D. Reading only part of a deposition

1. If a party reads only part of the deposition testimony, the other party may read in other parts that are of importance to them and which reflect on the matter read in by the first party. CPLR 3117(b)

2. The court has broad discretion over controlling this procedure. *Reape v. City of New York*, 228 AD2d 659, 645 NYS2d 499 (2d Dept. 1996)

E. A party seeking to cross-read his own deposition should await his own case to do so and is not ordinarily be permitted to do it on the heels of adversary's reading of his deposition in the middle of the adversary's case. See *Villa v. Vetuskey*, 50 AD2d 1093, 376 NYS2d 359 (4th Dept. 1975)

1.CPLR 3117(b) thus permits a party to read in relevant portions of his own deposition only after an adverse party has made use of it.

F. The failure to raise a substantial evidentiary objection to a question at a deposition session is not a waiver of the objection. (CPLR 3115(a),(d))

G. Inconsistent deposition testimony of a party

1. A party is not bound by the contents of his deposition testimony and may introduce evidence at trial inconsistent with such testimony.

2. Converse is not permitted, i.e., a party may not use his own deposition testimony to impeach his trial testimony. *Mravlja v. Hoke*, 22 AD2d 848, 254 NYS2d 162 (3d Dept. 1964)

VI. AUTHENTICATION – DISCOVERY FROM ADVERSE PARTY

A. CPLR 4540-a: (effective January 1, 2019)

> Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic and shall not preclude any other objection to admissibility.

B. Incorporates the "doctrine of authentication by production", which recognizes that documents are authenticated when produced by the party against whom they are offered. The provision covers not only documents in

written form but also digital records, as well as photographs and tangible items.

C. The requirement that the material is "authored or otherwise created" by the producing party. This means that a party's production of material created by a third party as, e.g., an email received by the producing party in the ordinary course of business and kept in its files, would not qualify for the statute's presumption. Then, common-law rules of authentication would be necessary to establish its authentication.

D. The statute does not apply when the producing party offers into evidence the material the party produced in response to a demand.

E. Rebuttable presumption – for example, the parties response to discovery may require that party to produce an unauthentic item, such as a forged document, in the parties files, and production under these circumstances would not be deemed a concession of authentication.

F. To rebut the presumption, the producing party has to establish the material produced "is not authentic". This can be done by evidence of forgery, fraud or some other defect in the materials purported authenticity.

VII. CRIMINAL, IMMORAL OR VICIOUS ACTS

A. Basis

1. Counsel must present a good faith basis for inquiring.

a. Although a witness may be questioned about prior bad acts which bear upon his [or her] credibility, the questions must be asked in good faith and must have a basis in fact. *People v. Spirles*, 136 AD3d1315, 25 NYS3d 462 (4th Dept. 2016)

b. Cross-examination relative to specific misconduct must be based upon reasonable grounds and pursued in good faith. *People v. Greer*, 42 NY2d 170 (1977); *People v. Schwartzman*, 24 NY2d 241, 245, 299 NYS2d 817 (1969), cert den 396 US 846 (1969); *People v. Alamo*, 23 NY2d 630, 298 NYS2d 681 (1969)

c. Specific allegations that are relevant to the credibility of the witness must be identified.

d. The trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead the jury or create a substantial risk of undue prejudice to the parties.

e. Witness may not be asked about conduct which was the subject of criminal charges when those charges resulted in an acquittal. *People v. Santiago*, 15 NY2d 640, 255 NYS2d 864 (1964).

B. Limitation

1. Specifically, where a lawsuit has not resulted in an adverse finding against the witness, cross-examination is precluded insofar as asking the witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if criminal charges related to plaintiffs in those actions were dismissed. However, subject to the trial court's discretion, the husband's attorney should be permitted to ask questions based on the specific allegations of the lawsuits if the allegations are relevant to the credibility of the witness. *People v. Crupi,* 172 AD3d 898 (NY, 2d Dept. 2019). There is no prohibition against cross-examining a witness, for impeachment purposes, about prior bad acts that have never been formally proven at a trial. *People v. Smith*, 27 NY3d 652 (2016).

C. Adverse party or a hostile witness

1. An adverse witness or a hostile party may not be impeached on direct examination by evidence of his or her criminal conviction. *Morency v. Horizon Transp. Servs., Inc.,* 139 AD3d 1021, 33 NYS3d 319 (2d Dept. 2016)*; Miller v. Galler*, 45 AD3d 1325, 846 NYS2d 493 (4th Dept. 2007)

D. A witness may be cross-examined with respect to specific immoral, vicious or criminal acts which bear upon the witness's credibility. Generally, the nature and scope of such cross-examination is discretionary with the trial court. *Carr v. Atchison*, 166 AD2d 172, 564 NYS2d 67 (1st Dept. 1990). However, the inquiry must have some tendency to show moral turpitude to be relevant to credibility issue. *Badr v. Hogan*, 75 NY2d 629, 634, 555 NYS2d 249 (1990). cf. *People v. Smith*, 27 NY3d 652, 36 NYS3d 861 (2016), holding that a witness can be cross-examined regarding a broad array of conduct even if not criminal or immoral so long as it affected the witness' credibility. Thus, the conduct need not necessarily be suggestive of a lack of moral turpitude.

E. Domestic Violence

1. Prior bad acts in domestic violence situations are more likely to be considered relevant and probative evidence because the aggression and bad acts are focused on one particular person, demonstrating the defendant's intent and motive. *People v. Pham*, 118 AD3d 1159, 987 NYS.2d 687 (3d Dept. 2104), leave to appeal denied, 24 NY3d 1087 1 NYS3d 14 (2014)

2. Evidence of prior uncharged crimes or prior bad acts may not be admitted solely to demonstrate a defendant's bad character or criminal propensity but may be admissible if linked to a specific material issue or fact relating to the crimes charged, and if their probative value outweighs their prejudicial impact. In cases involving domestic violence prior bad acts are more likely to be relevant and probative because the aggression and bad acts are focused on one particular person, demonstrating the defendant's intent,

motive, identity and absence of mistake or accident. *People v. Conklin*, 158 AD3d 973, 975, 71 NYS3d 703 (3d Dept. 2018)

F. Juvenile Delinquency; Youthful Offender

1. Although it is impermissible to use a youthful offender or juvenile delinquency adjudication for impeachment purposes because those adjudications are not convictions of a crime, the illegal or immoral acts underlying such adjudications may nevertheless be utilized for impeachment purposes. *People v. Lucius,* 289 AD2d 963, 737 NYS2d 717 (4th Dept 2001)

G. Civil *Sandoval* Application

1. In a personal injury action, plaintiff was precluded from impeaching defendant with evidence of his 25-year-old convictions of certain sex crimes, apparently committed against minors. CPLR 4513 does not deprive a trial court of all discretion in controlling the use of a criminal conviction for impeachment. The potential for the unfairness in the admission of prior crimes may be as great for a civil litigant, who has no control over the use of a criminal conviction and has no right not to testify, as for a criminal defendant. Here, due to the long passage of time since the convictions and the lack of evidence that the crimes involve forcible conduct, the probative value of the convictions was outweighed by the potential for prejudice to the defendant. The principles articulated in Sandoval, 34 NY2d 371, are applicable to civil, as well as criminal, actions. *Tripp v. Williams,* 39 M3d 318, 959 NYS2d 412 (Supreme Court, Kings Co., 2013, Battaglia, J.)

2. There is no bright-line rule of exclusion based upon age of conviction. *People v. Martin,* 136 AD3d 1218, 26 NYS3d 382 (3d Dept. 2016)

H. Perjury

1. "We reject plaintiff's contention that Supreme Court erred in allowing cross-examination of her expert regarding an out-of-state conviction of contempt. That conviction was based upon lies told by the expert to a judge during the course of the expert's trial testimony. Although the conviction was in 1983, " '[c]ommission of perjury or other acts of individual dishonesty, or untrustworthiness . . . will usually have a very material relevance, whenever committed' " (*Donahue v Quikrete Cos.* [appeal No. 2], 19 AD3d 1008, 1009 [2005], quoting People v Sandoval, 34 NY2d 371, 377 [1974]). *Towne v. Burns,* 125 AD3d 1471, 3 NYS.3d 844 (4th Dept. 2015)

I. Civil Judgments

1. Civil judgments cannot be characterized as bad or immoral ... acts involving moral turpitude that would allow them to be used to question

the defendant's credibility. *Quiroz v. Zottola*, 129 AD3d 698, 698, 11 NYS3d 194 (2d Dept. 2015)

J. Lawsuits

1. While a witness may be cross-examined with respect to any immoral, illegal or vicious act, there are limitations to the rule. Specifically, where a lawsuit has not resulted in an adverse finding against the witness, cross-examination is precluded insofar as asking the witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if criminal charges related to plaintiffs in those actions were dismissed. However, subject to the trial court's discretion, the husband's attorney should be permitted to ask questions based on the specific allegations of the lawsuits if the allegations are relevant to the credibility of the witness. *People v. Crupi,* 172 AD3d 898, 100 NYS3d 56 (2d Dept. 2019)

VIII. CRIMINAL CONVICTION

A. CPLR 4513 – "A person who has been convicted of a crime is a competent witness, but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such persons answer."

1. Notwithstanding CPLR 4513, the trial court in a civil action may preclude such impeachment on account of the risk of prejudice but only after balancing the probative worth of the conviction and the risk of prejudice, and then concluding the prejudicial effect from the use of the conviction would far outweigh any probative value. *Tripp v. Williams*, 39 M3d 319, 959 NYS2d 412 (Supreme Court, Kings Co., 2013, Battaglia, J.; *Peo. v. Sandoval*, 34 NY2d 371, 314 NYS2d 413 (1974)

B. Not Collateral - Where the witness's conduct, which is the subject of impeachment, has resulted in a criminal conviction, extrinsic evidence of the conviction is admissible, and the cross-examiner may inquire as to the underlying acts upon which the conviction rests. *People v. Zabrocky*, 26 NY2d 530, 535, 311 NYS2d 892 (1970); *Able Cycle Engines, Inc. v. Allstate Insurance Co.,* 84 AD2d 140, 445 NYS2d 469 (2d Dept. 1981)

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