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METHODS OF PROOF

A. FACTS

Facts are the building blocks of every case. Theories of liability and defense, expert opinions, demonstrative evidence and opening and closing statements all must be built from the facts.

The "facts" of a case are the facts that are proved. It is not enough to collect information through investigation and discovery and somehow manage to get that information into the record. In order to prove a fact, it is necessary to persuade the jury that it is true. Otherwise, the most impressive expert witness, elaborate demonstrative evidence and eloquent closing statement will all fall flat.

How facts are proved is therefore central to an effective trial strategy. If the first question a trial lawyer has about a case is "what are the facts?" the second question is "how do I prove them?"

The Rules of Evidence show the way. The Rules not only set forth the technical requirements that must be met in order to get evidence into the record. They also provide a guide as to how facts may be proved persuasively. The technical requirements that must be met for evidence to be admissible – such as the foundation that must be established in order for a fact or document to be admissible, or for a witness to testify as to certain facts or opinions – are the product of common law evolution that has selected the criteria for relevance and reliability that are now incorporated in the Rules. The more reliable the evidence is, the more persuasive.

1. Direct Testimony

Direct testimony is how facts are proved. It is through direct testimony that each side's story is told. Although not as dramatic as cross-examination, direct testimony is the most important part of each party's case. An effective direct examination blunts the cross-examination, and diminishes its importance and impact.

Therefore, trial planning and strategy starts with direct testimony. What facts must be proved? What facts can be proved? How?

The Rules provide wide boundaries for who may testify, as to what facts, and how. Virtually any person, of any age, of any level of intelligence, may testify as to any facts of which he or she has personal knowledge, so long as the fact might prove or disprove an allegation in the case.

Given such wide latitude, the practical issues are the credibility of the witnesses and the weight of the evidence. But first, the fundamental question of the outer limits of admissibility.

(a) Witnesses: General Rule of Competency. *N.J.R.E.* 601

Almost anyone who can speak can testify. The "General Rule of Competency" set forth in *N.J.R.E.* 601 provides that "every person is competent to testify" unless the trial judge makes a specific finding that the witness is not competent. *N.J.R.E.* 601 provides:

> **RULE 601. GENERAL RULE OF COMPETENCY**
> **Every person is competent to be a witness unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation, or (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth, or (c) except as otherwise provided by these rules or by law.**

This Rule rarely comes into play, except in certain types of cases where young children or mentally disabled adults are witnesses: transactions in which a mentally disabled adult is a party; sexual abuse prosecutions or intentional tort cases where the victim or plaintiff is either a child or a mentally disabled adult; child abuse and neglect cases; and custody and visitation matters.

In all such cases, the issue of the witness's competency falls under *N.J.R.E.* 601(b): is the witness incapable of understanding the duty to tell the truth? This issue is to be decided by the Court, pursuant to a *N.J.R.E.* 104(a) hearing.[1] The ruling is discretionary.[2]

Since "every person is competent to be a witness" under the Rule unless the Court makes a finding that one of three grounds for incompetency has been shown, the burden of persuasion is on the party opposing the witness.

The fact that the party opposing the witness has the burden of persuasion gives the proponent of the witness a tactical advantage. The proponent can exercise control over the witness and can determine whether to have the witness undergo a psychiatric examination, and by whom. In cases where the witness does not stretch the limits of the Rule – such as children over the age of five years, or adults with only mild mental disabilities, mild cognitive deficits or early Alzheimer's Disease – the best strategy may be not to obtain an examination at all. In such cases, an examination will probably be unnecessary in order for the witness to testify, and may serve only to provide the adversary material that may be used to attack the witness's credibility.[3] While a witness may not be incapable of understanding the duty to tell the truth, other mental limitations – to observe, recall, understand and recount an event accurately – may be used to attack the witness's credibility, not only by a careful and delicate cross-examination, but also by extrinsic evidence.[4]

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1 *State v. G.C.*, 188 *N.J.* 118, 124-126, 133 (2006).

2 *State v. G.C.*, 188 *N.J.* 118, 132-33 (2006); *State v. Savage*, 120 *N.J.* 594, 632 (1990).

3 *State v. Butler*, 27 *N.J.* 560, 605 (1958); *State v. Mohr*, 99 *N.J.L.* 124, 127 (E. & A. 1923).

4 *See N.J.R.E.* 607 and discussion below at Section III; *see also State v. Butler*, 27 *N.J.* 560, 605 (1958).