

BIAS is Not Harmless

By: Monte E. Hester; March 2004

Who is telling the truth is a fact of consequence in any criminal case. I have experienced too often a judge sustaining a prosecutor's objections to a question which is designed to demonstrate the bias of a witness for the state. The claim most often used as a basis for the objection is that the question deals with a matter that is collateral.

The law has always been per the Sixth Amendment's confrontation clause that an accused is permitted to cross-examine a witness for bias. USCA Const. Amend. 6. Such evidence is absolutely irrefutably and fundamentally admissible under the Constitution and the Rules of Evidence. See US v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). Abel cites Federal Evidence Rule 401, which is the same as our State Rule 401.

The recently decided case of State v. Dolan, 118 Wash. App. 323 (2003), provides a very clear analysis of evidentiary facts that go to the bias of a witness. In Dolan the evidence of a custody dispute at the time of the criminal trial was the focus of cross-examination. The court, in no uncertain terms, indicated that cross-examination to evidence bias is a Sixth Amendment constitutional right. The purpose of impeachment (showing bias) is to provide information that the jury can use during deliberations to test the witness' accuracy and truthfulness. Moreover, WPIC 6.01 provides:

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe the witness' memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

In Dolan, the trial court refused to allow the defense attorney to go into matters which would have demonstrated bias. The appellate court reversed the conviction because the evidence regarding bias was not harmless.

The Dolan case should always be available to enlighten the trial court should you be found with objections while attempting to impeach a witness.

End