# FRE 614: Calling and Interrogation of Witnesses by Court

## 1 Text

**Rule 614. Calling and Interrogation of Witnesses by Court**

(a) Calling by court.—The court **may**, on its own motion or at the suggestion of a party, **call witnesses**, and **all parties are entitled to cross-examine** witnesses thus called.

(b) Interrogation by court.—The court **may interrogate witnesses**, whether called by itself or by a party.

(c) Objections.—Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the **next available opportunity** when the jury is not present.

## 2 Overview

At common law the so-called voucher rule[1] prohibited a party from impeaching his own witness, although various exceptions accumulated. The power of the court to call a witness thus served a critical salutary function regarding this rigid limitation. Rule 607, however, discarded the voucher rule. Rule 614, therefore, inherits only the more prosaic function

[1]The phrase itself seems very recent. Only in the late 20th century does the phrase appear in the literature; it may have been coined in the seminal case of *Chambers v. Mississippi*, 410 U.S. 284 (1973). Previously it was known for what it was, the inability to impeach your witness. The theory that the party who "vouches" for—guarantees—a witness should not be allowed to impeach him is but one of several theories regarding the murky origin of the rule. *See* Mason Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. Chi. L. Rev. 69 (1936).

of common law courts' powers to call and interrogate witnesses: "to elicit the truth more fully."[2]

The adversary system itself, no less than its rules, is not without pitfalls. Fierce competitors may generate more heat than light, leaving the fact finder in a poor position to competently consider the evidence. And especially in criminal cases this power to obscure could be highly prejudicial to a defendant. The court's power to call witnesses and to interrogate provide useful checks.[3] Similarly, in contrast to the implication in the phrase voucher rule, parties do not often get to choose their witnesses. The pool of witnesses available to a party is mostly a function of happenstance; for example, the particular street intersection or time of day an incident occurred.[4] Yet because of the nature of the adversarial system jurors often associate the character of the witness with the party on whose side they were first called.[5] It is necessary that courts possess the tools to address those issues which are beyond the control of the parties themselves.

Most importantly, however, practical necessity dictates that a judge have discretion to promote the smooth, orderly, and efficient progression of a trial. His power to interrogate *sua sponte*, in particular, gives the courtroom someone with the ability to press or restrain the pace and direction of witness questioning.

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[2] John Henry Wigmore, 1 A Treatise on the System of Evidence in Trials at Common Law § 784 (1st ed. 1904). Edmund Burke held an even stronger view—"A Judge is not placed in that high situation merely as a passive instrument of parties: He has a duty of his own, independent of them, and that duty is to investigate the truth." Edmund Burke, *Report of Committee on Warren Hastings' Trial*, 31 Parl. Hist. 348 (London 1818) (hyperbolic 1794 speech by Burke who, incidentally, initiated the impeachment against Hastings) *available at* http://books.google.com/books?id=ab8TAAAAYAAJ&pg=PT197.

[3] *See generally* Charles Alan Wright, et al, 29 Fed. Prac. & Proc. Evid. § 6233 (1st ed.).

[4] *See* Ladd, *supra.* note 1 at 77.

[5] *See* Fed. R. Evid. 614 advisory committee's note.

# 3 Elements

**may ... call witnesses** The common law power of courts to call witnesses has been split between Rule 614(a) and Rule 706. Rule 614(a) primarily concerns lay witnesses; Rule 706 expert witnesses. The power of the judge to call a lay witness *sua sponte* is exercised so that the court "is not imprisoned within the case as made by the parties."[6] This could happen either by oversight or design of one or both the parties, and the court has discretion to call a witness in either case.[7] The ability for parties to move the judge to exercise this power, of course, is necessary for a party to make his case to the court concerning the prejudice of negative association were he to call the witness.

While the limits of its discretion are often couched in the same terms as the discretion allowed judges in interrogation—cannot show partiality—the power to call witnesses seems susceptible to closer scrutiny. The prejudice of negative association with a witness can often be countered with cautionary instructions to the jury, or by allowing the party to lead, cross-examine, or impeach their witness.[8] Calling a witness would also seem to more seriously undermine the strategies of the parties.

**all parties are entitled to cross-examine** It would be patently unfair for the court to be able to call and interrogate a witness, eliciting facts on its own terms, while refusing to allow parties to address the testimony or impeach the witness. The language of the subsection thus grants a mandatory entitlement to the parties of cross-examination. This does not imply, however, that parties are restricted to the typical scope of cross-examination. The judge need not directly examine the witness at all.[9]

[6] Fed. R. Evid. 614 advisory committee's note.
[7] Charles Alan Wright, et al, 29 Fed. Prac. & Proc. Evid. § 6234 (1st ed.).
[8] United States v. Karnes, 531 F.2d 214, 217 (4th Cir. 1976).
[9] *See* United States v. Agajanian, 852 F.2d 56, 58 (2d Cir. 1988).

**may interrogate witnesses** This is perhaps the most important and certainly most frequently used power under Rule 614. Without it the court might be unable to question its own expert witnesses appointed under Rule 706, or meaningfully execute the mandates of Rule 611(a) or Rule 104(a). And the power to interrogate *sua sponte* can be used as a conduit for juror questions.[10]

Normally courts restrict themselves to (1) clarifying confused factual issues, (2) correcting inadequacies of direct or cross-examination, (3) aiding an embattled or embarrassed witness, and (4) insuring an efficient and fair process.[11] Towards these ends the court may elicit new facts and even interrupt counsel during questioning.[12]

Rule 614(b) contains the qualifier "may" specifically because, though the notion of an affirmative duty has been bandied about for centuries[13], the power has always been discretionary and substantially indeterminate[14].[15] The actual standards for what constitutes abuse appear to vary considerably from jurisdiction to jurisdiction, but invariably repeated is that the court maintain the appearance of impartiality. In some jurisdictions judges may expressly or impliedly (e.g. by demeanor) opine on the weight[16] of evidence, while in others this is disallowed.[17] Nonetheless, actions such as eliciting inadmissible evidence surely cross

[10] *See* United States v. Feinberg, 89 F.3d 333, 336-38 (7th Cir. 1996) (discussing federal courts practice and the propriety in the instant case, including a trial transcript excerpt showing a juror posing a question to the judge who in turn asks the witness); State v. Culkin, 35 P.3d 233, 253-54 (Haw. 2001) (surveying also state courts practice).

[11] Michael H. Graham, Handbook of Federal Evidence § 614:2 (6th ed.); *see also* Fed. R. Evid. 611(a).

[12] Moore v. United States, 598 F.2d 439, 442 (5th Cir. 1979).

[13] Doubtless it is incumbent upon the court to promote truth and justice, but to translate such a duty into definite actions would risk disrupting the arrangement of carrots and sticks of the adversarial system.

[14] *See, e.g.* Fed. R. Evid. 614 advisory committee's note ("The authority of the judge to question witnesses is also well established. The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule").

[15] *But see* Fed. R. Evid. 104(a), 611(a) (containing mandatory functions implicitly relying on the power to interrogate).

[16] As distinct from sufficiency as a matter of law.

[17] *Compare* United States v. Filani, 74 F.3d 378, 385 (2nd Cir. 1996) ("the trial court may actively participate and give its own impressions of the evidence or question witnesses, as an aid to the jury, so long as it does not step across the line and become an advocate for one side") *with* United States v. Tilghman,

the line. But because judges may make redress, such as with curative instructions, stepping over the line does not necessarily lead to a finding of prejudice.[18]

**next available opportunity** Rule 614(c) is an exception to the timeliness requirement of Rule 103(a)(1). Because of the heightened credibility a judge-called witness may have in the minds of jurors, it would be unfair to require the parties to register their objections when a jury is present. However, unlike Rule 605 it does not excuse other requirements, such as stating the basis of the objection. Neither does the fact that the judge is conducting the interrogation excuse the necessity of lodging proper objections, resting appeal of the issue on the peculiar standards applied to the courts exercise of its interrogation powers rather than the plain error standard of 103(d).[19]

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134 F.3d 414 (D.C. Cir. 1998) ("Because juries, not judges, decide whether witnesses are telling the truth, and because judges wield enormous influence over juries, judges may not ask questions that signal their belief or disbelief of witnesses").

[18] *See* United States v. Tilton, 714 F.2d 642, 645 (6th Cir. 1983) ("A trial court's intrusions are not to be measured merely in terms of volume, but are to be viewed with an eye toward their tendency to influence the verdict in the particular case").

[19] United States v. Godwin, 272 F.3d 659, 679 (4th Cir. 2001) (applying a plain error analysis to a forfeited judicial interference claim).