

U. ADVERSE OR HOSTILE WITNESSES, RULE 611(c)

OVERVIEW:

[Fed. R. Evid. 611\(c\)](#) of the Federal Rules of Evidence, permits a party to call an “adverse or hostile” witness during that party’s own case and to examine such witness as if on cross-examination. Included under this rule are all persons who are identified with an adverse party.

OBJECTIVE:

To provide guidance concerning the criteria the Trial Attorney considers in determining whether to invoke Rule 611(c) in the questioning of a witness.

1. [RULE 611\(c\)](#): WHAT IT PROVIDES:


Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony. Ordinarily leading questions are permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

2. CRITERIA FOR USE OF [RULE 611\(c\)](#):

- The [611\(c\)](#) witness is most often used to set out definitively the Respondent’s defenses, particularly defenses to a discrimination allegation. The Trial Attorney uses this method to commit or “pin down” the witness in areas which are vulnerable to attack.

For example, once a selecting official who is called as a [611\(c\)](#) witness has testified that an alleged discriminatee was not selected for promotion solely because of poor work attendance, the Trial Attorney can present evidence to counter this assertion, and the selecting official will not be able to later testify credibly that the nonselection was also based on poor work performance.


- A [611\(c\)](#) witness is sometimes called early in the case to secure admissions. This can occur when, before other witnesses and evidence are presented, the [611\(c\)](#) witness is unaware of the significance of a particular fact or point of his/her testimony to the GC’s theory of the case.
- Use of a [611\(c\)](#) witness may be necessary if the information is peculiarly within the Respondent’s knowledge, or to identify exhibits such as letters or documents which can be identified only by the Respondent.

 *Caution is exercised in the use of [611\(c\)](#) witnesses. Where GC witnesses can establish particular facts, [611\(c\)](#) witnesses are not normally used. Unnecessary use of a [611\(c\)](#) witness can impair the advantage of discrediting a witness upon cross-examination or by rebuttal.*

3. THE OUTLINE FOR QUESTIONING A [611\(c\)](#) WITNESS:

- Is prepared in detail;
- Reflects a definite objective in calling the witness and shows how to obtain what testimony is desired of that witness; and

- Contains questions that are very explicit.

 For example, when asking for the reason for the discipline in a discrimination case, the Trial Attorney emphasizes that s/he is asking for all reasons for the discipline. Any attempts at evasive testimony are met directly by motions to strike and a repetition of the questions to get direct answers. The Trial Attorney does not ask about [7116\(a\)\(1\)](#) matters unless there are definite reasons for believing the witness will admit the actions which are alleged as [7116\(a\)\(1\)](#) violations. The Trial Attorney remembers that the [611\(c\)](#) witness is called for a limited purpose and quits when that purpose has been met.

4. HOW TO PUT A HOSTILE WITNESS ON THE STAND:

After calling the witness, there are two options:

- The Trial Attorney can declare the witness hostile under Rule [611\(c\)](#) and request permission from the ALJ to cross-examine the witness.
- The Trial Attorney can begin interrogation of the witness using direct examination techniques, and then gradually change to cross-examination of the witness.

In either case, whether or not the Trial Attorney can cross-examine a witness under [611\(c\)](#) is solely up to the discretion of the ALJ. The ALJ may not allow the Trial Attorney to declare the witness hostile or adverse at the beginning of the witness' testimony, and may require the Trial Attorney to demonstrate that the witness is hostile or adverse to the GC's case. In this situation, the Trial Attorney asks the witness questions in order to establish that the witness is an agent of an adverse party, or identified with an adverse party, or so unresponsive to the Trial Attorney's questions as to demonstrate hostility.

5. THE UNWILLING OR BIASED WITNESS:

After establishing that the witness is not responsive to your questions, request the ALJ to allow you to ask leading questions as if the witness were adverse or hostile.

This may occur, for example, when a person who is now a supervisor but was a unit employee when the alleged ULP occurred.

Q [Part 2, Chapter CC](#) concerning Impeachment of Respondent's Witnesses.

RESERVED