

## **Credibility of Witnesses**

As judges of the facts, you alone determine the truthfulness and accuracy of the testimony of each witness. You must decide whether a witness told the truth and was accurate, or instead, testified falsely or was mistaken. You must also decide what importance to give to the testimony you accept as truthful and accurate. It is the quality of the testimony that is controlling, not the number of witnesses who testify.<sup>1</sup>

### **Accept in Whole or in Part (Falsus in Uno)**

If you find that any witness has intentionally testified falsely as to any material fact, you may disregard that witness's entire testimony. Or, you may disregard so much of it as you find was untruthful, and accept so much of it as you find to have been truthful and accurate.<sup>2</sup>

### **Credibility factors**

There is no particular formula for evaluating the truthfulness and accuracy of another person's statements or testimony. You bring to this process all of your varied experiences. In life, you frequently decide the truthfulness and accuracy of statements made to you by other people. The same factors used to make those decisions, should be used in this case when evaluating the testimony.

### **In General**

Some of the factors that you may wish to consider in evaluating the testimony of a witness are as follows:

Did the witness have an opportunity to see or hear the events about which he or she testified?

Did the witness have the ability to recall those events accurately?

Was the testimony of the witness plausible and likely to be true, or was it implausible and not likely to be true?

Was the testimony of the witness consistent or inconsistent with other testimony or evidence in the case?

Did the manner in which the witness testified reflect upon the truthfulness of that witness's testimony?

To what extent, if any, did the witness's background, training, education, or experience affect the believability of that witness's testimony?

Did the witness have a bias, hostility or some other attitude that affected the truthfulness of the witness's testimony?<sup>3</sup>

## **Motive**

You may consider whether a witness had, or did not have, a motive to lie.

If a witness had a motive to lie, you may consider whether and to what extent, if any, that motive affected the truthfulness of that witness's testimony.

If a witness did not have a motive to lie, you may consider that as well in evaluating the witness's truthfulness.<sup>4</sup>

*[Add if appropriate:*

## **Benefit**

You may consider whether a witness hopes for or expects

to receive a benefit for testifying. If so, you may consider whether and to what extent it affected the truthfulness of the witness's testimony.<sup>5</sup> ]

### **Interest/Lack of Interest<sup>6</sup>**

You may consider whether a witness has any interest in the outcome of the case, or instead, whether the witness has no such interest.

*[Note: Add if appropriate:*

A defendant who testifies is a person who has an interest in the outcome of the case.]

You are not required to reject the testimony of an interested witness, or to accept the testimony of a witness who has no interest in the outcome of the case.

You may, however, consider whether an interest in the outcome, or the lack of such interest, affected the truthfulness of the witness's testimony.

### **Previous Criminal Conduct<sup>7</sup>**

You may consider whether a witness has been convicted of a crime or has engaged in criminal conduct, and if so, whether and to what extent it affects the truthfulness of that witness's testimony.

You are not required to reject the testimony of a witness who has been convicted of a crime or has engaged in criminal conduct, or to accept the testimony of a witness who has not.

You may, however, consider whether a witness's criminal conviction or conduct has affected the truthfulness of the witness's testimony.

*[Note: Add if appropriate:*

With respect to the defendant, such prior convictions or criminal conduct are not evidence of defendant's guilt in this case, or evidence that defendant is a person who is disposed to commit crimes. You are permitted to consider such convictions or conduct only to evaluate the defendant's truthfulness.]

### **Inconsistent Statements<sup>8</sup>**

You may consider whether a witness made statements at this trial that are inconsistent with each other.

You may also consider whether a witness made previous statements that are inconsistent with his or her testimony at trial.

*[Add if appropriate:*

You may consider whether a witness testified to a fact here at trial that the witness omitted to state, at a prior time, when it would have been reasonable and logical for the witness to have stated the fact. In determining whether it would have been reasonable and logical for the witness to have stated the omitted fact, you may consider whether the witness' attention was called to the matter and whether the witness was specifically asked about it. <sup>9]</sup>

If a witness has made such inconsistent statements [or omissions], you may consider whether and to what extent they affect the truthfulness or accuracy of that witness's testimony here at this trial.

The contents of a prior inconsistent statement are not proof of what happened. You may use evidence of a prior inconsistent statement only to evaluate the truthfulness or accuracy of the witness's testimony here at trial.<sup>10</sup>

## Consistency

You may consider whether a witness's testimony is consistent with the testimony of other witnesses or with other evidence in the case.

If there were inconsistencies by or among witnesses, you may consider whether they were significant inconsistencies related to important facts, or instead were the kind of minor inconsistencies that one might expect from multiple witnesses to the same event?

## Police Testimony

In this case you have heard the testimony of (a) police officer(s). The testimony of a witness should not be believed solely and simply because the witness is a police officer. At the same time, a witness's testimony should not be disbelieved solely and simply because the witness is a police officer. You must evaluate a police officer's testimony in the same way you would evaluate the testimony of any other witness.<sup>11</sup>

[*Note: Add if appropriate:*

## Witness Pre-trial Preparation<sup>12</sup>

You have heard testimony about (*specify: the prosecutor, defense lawyer, and/or investigator*) speaking to a witness about the case before the witness testified at this trial. The law permits a (*specify*) to speak to a witness about the case before the witness testifies, and permits a (*specify*) to review with the witness the questions that will or may be asked at trial, including the questions that may be asked on cross-examination.<sup>13</sup>

[You have also heard testimony that a witness read or reviewed certain materials pertaining to this case before the witness testified at trial. The law permits a witness to do so.]

Speaking to a witness about his or her testimony and permitting the witness to review materials pertaining to the case before the witness testifies is a normal part of preparing for trial. It is not improper as long as it is not suggested that the witness depart from the truth.]

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1. See generally *People v Ward*, 282 AD2d 819 (3d Dept 2001); *People v Love*, 244 AD2d 431 (2d Dept 1997); *People v Turton*, 221 AD2d 671, 671-672 (2d Dept 1995); *People v Jansen*, 130 AD2d 764 (2d Dept 1987).

2. This portion of the charge was revised in January, 2008 to make it clear that the jury may accept so much of testimony as they find to have been truthful "and accurate." See *People v Perry*, 277 NY 460, 467-468 (1938); *People v Laudiero*, 192 NY 304, 309 (1908); *Hoag v Wright*, 174 NY 36, 43 (1903); *People v Petmecky*, 99 NY 415, 422-423 (1885); *Moett v People*, 85 NY 373 (1881); *People v Johnson*, 225 AD2d 464 (1<sup>st</sup> Dept 1996).

3. See *People v Jackson*, 74 NY2d 787, 790 (1989); *People v Hudy*, 73 NY2d 40, 56 (1988).

4. See *People v Jackson*, *supra* at 790; *People v Hudy*, *supra* at 56.

5. See *People v Jackson*, *supra* at 790; See also *Caldwell v Cablevision Sys. Corp.*, 20 NY3d 365, 372 (2013), holding as follows: "Supreme Court should have instructed the jury that fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness's time from work or business. Should the jury find that the compensation is disproportionate, it should then consider whether it had the effect of influencing the witness's testimony (see PJI 1:90.4)."

6. See *People v Agosto*, 73 NY2d 963, 967 (1989).

7. See *People v Jackson*, *supra* at 790; *People v Sherman*, 156 AD2d 889, 891 (3d Dept 1989); *People v Smith*, 285 AD 590, 591 (4<sup>th</sup> Dept 1955). Compare *People v Coleman*, 70 AD2d 600 (2d Dept 1979).

8. See *People v Duncan*, 46 NY2d 74, 80 (1978).

9. See *People v Bornholdt*, 33 NY2d 75, 88 (1973); *People v Savage*, 50 NY2d 673 (1980); *People v Medina*, 249 AD2d 166 (1<sup>st</sup> Dept 1998); *People v Byrd*, 284 AD2d 201 (1<sup>st</sup> Dept 2001).

10. See CPL 60.35 (2).

11. See *People v Freier*, 228 AD2d 520 (2d Dept 1996); *People v Graham*, 196 AD2d 552, 552-553 (2d Dept 1993); *People v Allan*, 192 AD2d 433, 435 (1<sup>st</sup> Dept 1993); *People v McCain*, 177 AD2d 513, 514 (2d Dept 1991). Compare *People v Rawlins*, 166 AD2d 64, 67 (1<sup>st</sup> Dept 1991).

12. Revised in September, 2018 to conform to the same instruction in the General Applicability section and in the Model Charges, Final Instructions section.

13. See *People v Townsley*, 20 NY3d 294, 300 (2012) (“The [prosecutor’s] argument suggested to the jury that there was something improper in a lawyer’s interviewing a witness in the hope of getting favorable testimony. That is not in the least improper. It is what good lawyers do.”); *People v Liverpool*, 262 AD2d 425 (2d Dept 1999) (“[W]here the defense counsel argued in summation that the prosecutor improperly coached his witnesses to ‘clean ... up’ problematic information in a police report, it was proper for the court to instruct the jury that there is nothing wrong with a prosecutor speaking to his or her witnesses before trial.”); *People v Fountain*, 170 AD2d 414, 415 (2d Dept 1991) (“This court finds no error in the trial court’s charge to the jury that it is usual, and not illegal, for a prosecutor to talk to his witnesses, in light of the clear and continued suggestion by the defense through cross-examination by defendant’s counsel of the People’s witnesses and summation, that the prosecutor improperly coached the People’s witnesses to effect a ‘cover-up’ of the mistaken arrest of defendant.”).