

CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

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*This month we focus on the standard CJI “Interested Witness” charge that the court will inevitably give when your client testifies. We propose that you lodge an objection to the standard charge (and certainly any prejudicial elaborations) as undermining due process and the presumption of innocence, based on a recent Second Circuit case, **United States v. Mehta**. A little legal background, set forth below, will help you to understand why, despite prior rejections of this claim by New York courts, the time is ripe to preserve this challenge.*

We also provide suggestions for framing your objection, and the charge to request instead.

The Relevant Law

In 1989, the Court of Appeals in People v. Agosto, 73 N.Y.2d 963, approved the lower court’s “standard” interested witness charge under the CJI. The court’s instruction included that the defendant was an interested witness as a matter of law. The Court found that the charge was “balanced” and did not address federal or state due process and presumption of innocence implications.

Judge Bellacosa (joined in his dissent by Judges Kaye and Titone) criticized the “one-sided interested witness instruction,” stating that the court “spotlighted the defendant and his wife as interested witnesses while blinking the significant personal and professional interests of the police officers.” In Agosto’s wake, the Appellate Divisions routinely rejected challenges to the interested witness charge.

On March 21, 2019, the Second Circuit, in United States v. Mehta, reversed the defendants’ convictions for marriage fraud and immigration fraud, finding plain error due to an interested witness charge that stated:

You may consider the fact that a defendant’s interest in the outcome of the case creates a motive for false testimony, but it by no means follows that a defendant is not capable of telling the truth

The Court held that this charging error undermined the presumption of innocence, and contributed to undermining the fairness integrity, and public reputation of the judicial proceedings. **The interested witness charge in Mehta, though not identical, can be analogized to our standard charge (see box below).**

The current CJI charge, CJI2d[NY] - Interest/Lack of Interest, provides:

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.

Framing Your Objection

If your client testifies and the court plans to deliver the standard CJI charge on Interest/Lack of Interest, object on due process (federal and state) and Fifth Amendment grounds, citing Mehta, that the charge **undermines the presumption of innocence and the right to a fair trial**. Here are specific points to make:

- the standard charge allows a jury to conclude that a testifying defendant's interest in the outcome of the case creates a motive to testify falsely. The charge's omission of the specific phrase "motive to testify falsely" doesn't avoid the problem. By segregating out the defendant as an interested witness, and telling the jury it can consider whether that interest "affected truthfulness," the instruction clearly connects the defendant's interest with untruthfulness.
- **The instruction undermines the presumption of innocence because an interest in the outcome of the case will affect the truthfulness of the testimony only if the defendant is guilty.** An innocent defendant also has an interest in the case but has a motive to testify truthfully, not falsely. Therefore, connecting the defendant's interest to his truthfulness subverts the presumption of innocence by implicitly assuming the defendant's guilt. The issue isn't whether the charge may be accurate, but its impact on the presumption of innocence.
- Telling the jury that it's not "required to reject the testimony of an interested witness" doesn't cure the problem, as it doesn't undo the assumption of guilt created by the charge and sends the message that, while occasionally a guilty person may be truthfully denying the charges, that's not the norm.
- It is further unfair to identify the defendant alone has having an interest when arresting officers as Judge Bellacosa recognized back in 1989. See also United States v. Gaines,

457 F.3d 238, 249, n.7 (2d Cir. 2006)(arresting officers “have an indisputable interest in the outcome of cases they testify in”).

- Further point out that the CJI inserts **Interest/Lack of Interest** in the general Credibility of Witnesses Charge right before **Previous Criminal Conduct** — a factor again affecting many clients. This juxtaposition exacerbates the risk to the presumption of innocence.

Request a Different Charge

Request that instead of giving the “Interest/Lack of Interest Charge, the court should include the witness’s interest only as an additional factor affecting credibility, e.g.,:

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

If the defendant has testified, all the court should say is that

The jury should evaluate the defendant’s testimony in the same way it judges the testimony of other witnesses.

If the court insists on referencing the defendant’s interest in some way, the above sentence can be modified to say

The jury should evaluate the defendant’s testimony in the same way it judges the testimony of any witness with an interest in the outcome of the this case.

Nothing more is needed to communicate the valid point that interest can impact credibility. Anything more will dilute the presumption of innocence.

Reminder of the Month

If you are litigating a 30.30 issue, you must do a reply to preserve any issue as to a contested period.