COMPETENCY AND EXAMINATION OF WITNESSES UNDER ARTICLE VI OF THE FEDERAL RULES OF EVIDENCE AND THE NEBRASKA EVIDENCE RULES

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INTRODUCTION

The Nebraska Unicameral has recently enacted a set of evidence rules which are closely patterned after the also recently enacted Federal Rules of Evidence. Each set of rules, federal and Nebraska, represents the first major codification of evidence law in

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1. "These rules may be known and cited as the Nebraska Evidence Rules." NEB. EVID. R. 1103, NEB. REV. STAT. § 27-1103 (1975 Supp.).


The Comments to the Proposed Nebraska Evidence Rules are published in the currently out-of-print Proposed Nebraska Rules of Evidence, August 1, 1973, prepared by the Nebraska Supreme Court Committee on Practice and Procedure [hereinafter cited as Proposed Nebraska Rules Booklet]. These Comments are not included in the annotations to Chapter 27 in the 1975 supplement to the Nebraska Revised Statutes.

Each of the Nebraska Evidence Rules is given a statutory section number and a rule number. Throughout this article Nebraska Evidence Rules are indicated by rule number. In each case the statutory section number is a hyphenated combination of, first, the chapter number and, second, the rule number. For example, the first rule, Rule 101, is § 27-101; the final rule, Rule 1103, is § 27-1103. Hereinafter this article shall refer only to the rule.

2. "These rules may be known and cited as the Federal Rules of Evidence." FED. R. EVID. 1103.

The Federal Rules of Evidence are found in Title 28 of the United States Code Annotated. The Advisory Committee's Notes on the Proposed Federal Rules of Evidence are set out with each rule. The Federal Rules of Evidence and the Advisory Committee's Notes can be found in a number of other sources. In this article the primary sources for quotations from the Federal Rules of Evidence and the Advisory Committee's Notes are Title 28 of the United States Code Annotated, and the multi-volume treatise entitled WEINSTEIN'S EVIDENCE, J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE (1975) [hereinafter referred to as WEINSTEIN].

the respective jurisdictions. Each set of rules works a number of important changes in the law and, when compared, contains a number of important differences.

Article VI of the evidence rules, both federal and Nebraska, deals with the general topic of witnesses. The fifteen rules in Article VI can be broken down into three general categories: Rules 601-606 deal with the competency of witnesses; Rules 611-615 deal with the form of the examination of witnesses generally; and Rules 607-610 and Rule 613 deal with the examination of witnesses for the more particular purpose of impeachment. This article will focus upon the first two of the above enumerated categories, i.e., competency and the form of the examination generally. Additionally, in connection with the discussion of the general witness rules, particularly the rules regarding the general use of prior statements of witnesses, this article will discuss perhaps the most important, or at least the most widely used, tool of impeachment, the prior inconsistent statement. The scope of this treatment of the rules will include the state of the law under these new rules, including a comparison with pre-existing federal and Nebraska law, and the differences, if any, between the federal and the Nebraska Rules.

RULE 601—GENERAL RULE OF COMPETENCY

Article 6 of the Nebraska Evidence Rules begins by removing all grounds of incompetency. "Every person is competent to be a witness except as otherwise provided in these rules." The rule then proceeds to reinstate certain familiar, and minimal, competency requirements. The net effect is that everyone is competent to be a witness in Nebraska courts except persons lacking personal knowledge, persons who refuse to take an oath or affirmation, the presiding judge, and the members of the jury.

3. The federal and Nebraska rules each consist of eleven "Articles." The articles are designated by Roman numerals in the Federal Rules of Evidence and by Arabic numerals in the Nebraska Evidence Rules. When speaking about an article of both the federal and Nebraska rules, I shall use the Roman numeral designation of the federal rules in the interest of convenience and uniformity.

The state of the law under Nebraska Rule 601 can best be demonstrated through a discussion of the rule's effect on prior Nebraska law. Rule 601 occasions two big changes. First is the repeal of Nebraska's general incompetency statute. Second is the repeal of the Dead Man's Statute. Nebraska's general incompetency statute read as follows:

Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: (1) Persons of unsound mind at the time of their production; (2) husband and wife, concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists or afterward, except as may be otherwise provided by law; (3) an attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court; and (4) a clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession.\(^1\)

The repeal of this section removes those statutory incompetencies. This does not mean, however, that there are no longer any checks on litigants who seek to compel testimony regarding communications between the husband and the wife, the attorney and the client, or the priest and the penitent. Such testimony may still be excludable upon the assertion of a privilege.\(^2\)

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\(^1\) Ch. 44, § 1, [1935] Laws of Neb. 163 (repealed, Laws 1975, L.B. 279, § 75).

\(^2\) NEB. EVID. R. 505 codifies the husband-wife privilege; NEB. EVID. R. 503, codifies the attorney-client privilege; and NEB. EVID. R. 506, codifies the communications to clergyman privilege.

Additional privileges under Article 5 of the Nebraska Evidence Rules include the physician-patient (Rule 504), political vote (Rule 507), trade secrets (Rule 508), government and other official information (Rule 509), and identity of informer (Rule 510) privileges.

The difference between classifying the witness as incompetent as opposed to classifying the testimony as privileged may be a matter of statutory housekeeping as much as anything else. Rules of incompetency are designed to further the truth by guarding against the receipt of highly unreliable, prejudicial or misleading evidence. The rules of privilege, on the other hand, are designed to promote a public policy in favor of confidentiality at the expense of reliable evidence. The confidentiality of the spouse, the client and the penitent is protected, but, in the process, what often is highly probative evidence is kept from the trier of fact. It makes sense, then, to recognize these rules as rules of privilege rather than rules of incompetency. See C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72, at 151-52 (2d ed., E. Cleary ed. 1972) [hereinafter cited as MCCORMICK];
Moreover, a witness' capacity to understand the obligation of the oath and his soundness of mind will continue to have a bearing upon whether his testimony will be received. If it were demonstrated, for example, that though the witness had personal knowledge he was completely unsound of mind, then the testimony of that witness would be irrelevant. It would not have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable then it would be without the evidence." The testimony of such a witness, therefore, would be inadmissible.

Secondly, as the witness' soundness of mind decreases, there is an increase in the danger that his testimony will result in "unfair prejudice, confusion of the issues, or misleading the jury . . . ." Though the witness' testimony is relevant and competent, if these dangers "substantially" outweigh his testimony's probative value, it should be excluded under Rule 403.

Pre-Rule 601 Nebraska law concerning the competency of children will serve to further illustrate the application of the rules. On the question of allowing a child to testify, pre-Rule 601 holdings of the Nebraska Supreme Court provided the trial judge with a good deal of discretion, reversible only upon a clear showing of abuse. This exercise of discretion was to be based upon the child's ability to remember, to communicate, and to understand his moral obligation to tell the truth. With the exception of the fact that the witness' competency will no longer be judged by his ability to understand his moral obligation to tell the truth, the results in these kinds of cases will probably continue to be pretty much

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13. Neb. Evid. R. 603, does provide that an oath or affirmation must be administered, but, unlike ch. 44, § 1, [1935] Laws of Neb. 163 (repealed, Laws 1975, L.B. 279, § 75) it is not keyed to the capacity of the witness to "understand the obligation of an oath." See, Part III infra.

14. These factors of course will bear upon the credibility of the witness if his testimony is received.


18. Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.


20. See Part III infra.
the same under both the federal and Nebraska rules. Rule 602 continues the requirement of perception. A complete failure of memory or communication would make the child's testimony irrelevant under Rules 401 and 402. Substantial, but not complete, failure of memory or communication would subject the child's testimony to possible exclusion under Rule 403.

The difference between the new rule and the pre-existing law is primarily one of emphasis, one of burden. Prior to the enactment of the new rules a trial court's ruling that a child was not competent to testify would not have been subject to reversal unless the proponent of the child witness demonstrated on the record that such a ruling was an abuse of discretion. The burden of coming forth with evidence in regard to the capacity of the child witness was on whichever party the trial court ruled against, the party claiming abuse of discretion. Under the new rules of evidence the child certainly must be presumed competent until the contrary is shown; the new rules require evidence that the child is incompetent; absent such evidence, the trial court's decision that a child is not competent would be error and, if substantial error, would lead to reversal.

21. See Part II infra.
22. See text accompanying note 15 supra.
23. See notes 17 and 18 and accompanying text supra. In regard to this subject generally, Weinstein says:

In such cases, since there are no longer artificial grounds for disqualifying a witness as incompetent, the traditional preliminary examination into competency is no longer required. But a trial judge still has broad discretion to control the course of a trial (Rule 611) and rule on relevancy (Rules 401 and 403). If competency is defined as the minimum standard of credibility necessary to permit any reasonable man to put any credence in a witness's [sic] testimony, then a witness must be competent as to the matters he is expected to testify about; it is the court's obligation to insure that he meets that minimum standard. In making this determination the court will still be deciding competency. It would, however, in view of the way the rule is cast, probably be more accurate to say that the court will decide not competency but minimum credibility. This requirement of minimum credibility is just one aspect of the requirement of minimum probative force—i.e., relevancy. Regardless of terminology, the trial judge may exclude all or a part of the witness' testimony on the ground that no one could reasonably believe the witness could have observed, remembered, communicated or told the truth with respect to the event in question. He may use the voir dire to make this determination. Thus the practice can—and probably will—even in non-state law cases, remain much as it has been in determining that the witness meets minimum credibility standards.

While not embodied directly in the rules, implied through Rules 401 to 403 is Rule 19 of the Uniform Rules of Evidence (1953) that

The Judge may reject the testimony of a witness that he perceived a matter if he finds that no trier of fact could reasonably believe that the witness did perceive the matter.

3 Weinstein ¶ 601[01], at 601-9 to 601-10.
Under the rules, absent evidence regarding the incompetency of the child, the court should let the child testify. The burden of bringing forth such evidence is now initially upon the party who wishes to keep the child off the stand. The opponent of the witness must overcome Rule 601's general rule of competency. The proponent of the child witness has no such burden unless and until his opponent produces evidence to be rebutted.

The second major change from prior Nebraska evidence law occasioned by Rule 601 is the abolition of the incompetencies of the Dead Man's Statute. A litigant no longer is deemed incompetent to testify by reason of the fact that the other party to the transaction sued upon is deceased. The death of the person who might have been in the best position to refute a party's testimony is now primarily considered by the judge in deciding, pursuant to Rule 403, whether to exclude the relevant testimony of this competent witness because

its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

If the court decides that the testimony is admissible, then the death of other parties to the transaction is considered by the jury in evaluating credibility. In any event, we no longer engage in the presumption that the death of the other parties to a litigated transaction will cause the surviving party to lie.

The above discussion of competency under the Nebraska Evidence Rules is equally applicable to the Federal Rules of Evidence with one caveat. Rules 601 of the federal and Nebraska rules each state: "Every person is competent to be a witness except as otherwise provided in these rules." While this is the entire Nebraska

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24. Ch. 184, § 1, [1969] Laws of Neb. 776 (repealed Laws 1975, L.B. 279, § 75), read as follows:

No person having a direct legal interest in the result of any civil action or proceeding, other than those arising upon unintentional tort after December 25, 1969, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation.

25. See note 18 supra.

rule, the federal rule adds this second sentence: “However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.” A principal effect of the additional sentence in the federal rule is that a state’s competency rules (including its Dead Man’s Statute, if any) will apply in diversity cases in a federal court sitting in that particular jurisdiction.

The principal reason for the addition of the second sentence to federal Rule 601 has been stated as follows:

Acknowledging that there is substantial disagreement as to the merit of Dead Man’s Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law.

27. FED. R. EVID. 601.

28. See 3 WEINSTEIN ¶¶ 601-1 through 601-5.

Professor Rothstein presents the following as an example of a non-diversity federal case in which a state’s competency rules would have some (though not total) application: “[A] case involving joined federal antitrust and state unfair competition claims, where a witness might be competent to testify concerning only the antitrust claim even though the same testimony bears on both claims.” Rothstein, The Proposed Amendment to the Federal Rules of Evidence, 62 GEO. L.J. 125 (1973).


In regard to Rule 601 generally, and Dead Man’s Statutes particularly, the Advisory Committee to the Nebraska Evidence Rules commented as follows: “The Federal Rule . . . takes the position that federal courts in diversity cases are not required to follow state law . . .” Proposed Nebraska Rules Booklet at 89. This statement was made in reference to Proposed Federal Rule 601, which did not contain the second sentence of the rule as finally adopted by Congress. (See the quotation of federal Rule 601 in the text at note 27 supra.) With the addition of that second sentence to federal Rule 601 it is no longer true that a federal court in a diversity case is not required to apply the Dead Man’s Statute of the state in which that federal court sits. In fact, the opposite is now true. However, as explained in the text accompanying note 30 infra, Nebraska’s repeal of its Dead Man’s Statute means that generally such a rule will not be applied in diversity cases arising in the federal district court in Nebraska.
with respect to elements of claims or defenses to which State law supplies the rule of decision.\textsuperscript{29}

In any event, Nebraska's competency rules are the same as the federal rules which apply in federal cases where state law does not supply the rule of decision. As a result, in almost every case there will be no difference between the competency rules applied in Nebraska courts and in federal courts sitting in Nebraska. In the federal district court for Nebraska the application of a second body of evidence law to determine competency would be limited to those cases in which the state law of a state other than Nebraska supplies the rule of decision.\textsuperscript{30}

Rule 601 (coupled with Rules 602-606) of the Federal Rules of Evidence does change pre-existing federal law in all cases in federal court where state law does not supply the rule of decision. In such cases common law incompetencies no longer apply;\textsuperscript{31} the only incompetencies are statutory—lack of personal knowledge,\textsuperscript{32} unwillingness to take an oath or affirmation,\textsuperscript{33} and the incompetency of the presiding judge\textsuperscript{34} or a member of the sitting jury.\textsuperscript{35}

The net result of the federal and Nebraska competency rules is a general rule in favor of competency. This general rules does not mean that the trial judge no longer has any power to keep a witness from testifying. It does mean that absent a situation described in Rules 602 through 606 the focus of the judge must shift

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\item \textsuperscript{30} E.g., Van Dusen v. Barrack, 376 U.S. 612, 626-40 (1964) (see particularly 639); Desjardins v. Desjardins, 308 F.2d 111, 115-16 (6th Cir. 1962) (a divorced wife brought a diversity action in federal court in Kentucky against the administratrix of her deceased husband. The action was based on an Ohio divorce decree. “Since the decree was rendered in Ohio, it is to the law of that state which we look to see if it is final.”); In re Air Crash Disaster Near Hanover, N.H., 314 F. Supp. 62, 63 (JPML 1970) (“[T]he transferee court must apply the law of the transfer forum.” Citing cases.); Ryer v. Harrisburg Kohl Bros., Inc., 307 F. Supp. 276, 281 (S.D.N.Y. 1969) (In regard to a transfer for the convenience of the parties between federal district courts sitting in different states, this court notes that the transferee district court must apply the state law that would have been applied had there been no change of venue.)
\item \textsuperscript{31} 3 WEINSTEIN ¶ 601[03] discusses these changes in more detail. For a general discussion of the common law incompetencies, many of which did not apply under pre-Rule 601 federal law, see also TRACY, HANDBOOK OF THE LAW OF EVIDENCE 120-33 (1952), quoted in D. LOUISELL, J. KAPLAN and J. WALTZ, CASES AND MATERIALS ON EVIDENCE 973-78 (2d ed. 1972).
\item \textsuperscript{32} FED. R. EVID. 602. See Part II infra.
\item \textsuperscript{33} FED. R. EVID. 603. See Part III infra.
\item \textsuperscript{34} FED. R. EVID. 605. See Part V infra.
\item \textsuperscript{35} FED. R. EVID. 606. See Part VI infra.
\end{itemize}
“from the proposed witness to the proffered testimony; instead of ruling on the basis of competency he must recast the problem in terms of relevancy.”

RULE 602—LACK OF PERSONAL KNOWLEDGE

Rule 602 of the Nebraska Evidence Rules, and Rule 602 of the Federal Rules of Evidence are virtually identical. They simply enact the familiar provision that a witness must have personal knowledge of that about which he testified—a provision familiar to both federal and Nebraska law. These rules provide that “a witness may not testify . . . unless evidence is introduced sufficient to support a finding” of personal knowledge. They provide further that “[e]vidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.” This foundational requirement is met once a reasonable juror could find that the witness perceived the facts to which he is testifying.

Rule 602 is, by its own terms, made subject to the provisions of Rule 703 which relates to opinion testimony by expert witnesses. The reference to Rule 703 is designed to avoid any question of conflict between the Rule 602 requirement of personal knowledge and the Rule 703 provision allowing an expert to express opinions based on facts of which he does not have personal knowledge.

Finally, in regard to Rule 602 generally, the Advisory Committee has stated:

36. 3 WEINSTEIN ¶ 601[04], at 601-26.
37. NEB. EVID. R. 602 reads as follows:
   A witness may not testify to a matter unless evidence is intro-
   duced sufficient to support a finding that he has personal knowl-
   edge of the matter. Evidence to prove personal knowledge may,
   but need not, consist of the testimony of the witness himself. This
   rule is subject to the provisions of section 27-703, relating to opinion
   testimony by expert witnesses.
38. 3 WEINSTEIN ¶ 602[02], at 602-5; P. ROTHSTEIN, UNDERSTANDING THE
   NEW FEDERAL RULES OF EVIDENCE 51 (1973). See 3 WEINSTEIN ¶ 601[01], at
   601-9, quoted in note 23 supra.
39. See Rule 602, quoted at note 37 supra. Rule 703 of the Nebraska
   Evidence Rules and Rule 703 of the Federal Rules of Evidence both read:
   The facts or data in the particular case upon which an expert
   bases an opinion or inference may be those perceived by or made
   known to him at or before the hearing. If of a type reasonably
   relied upon by experts in the particular field in forming opinions
   or inferences upon the subject, the facts or data need not be admis-
   sible in evidence.
40. Advisory Committee's Note, Federal Rule 602. The Comment to
   Nebraska Rule 602 quotes and adopts this part of the Federal Advisory
   Committee's Note, Proposed Nebraska Rules Booklet at 94.
This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 [defining hearsay] and 805 [regarding hearsay within hearsay] would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.\(^4\)

In other words, in the hearsay situation the personal knowledge required by Rule 602 may be satisfied by the witness’ personal knowledge of the statement itself; it need not be shown that the witness has personal knowledge of the facts contained in the out-of-court declaration so long as it is clear that the witness makes no claim to first-hand knowledge of anything other than that the out-of-court declaration was made.\(^4\) Once again, this means that in this situation the judge, instead of ruling on the basis of competency, must recast the problem, this time in terms of hearsay.\(^4\)

**RULE 603—OATH OR AFFIRMATION**

Rules 603 of the Nebraska and federal rules provides that a prospective witness cannot testify until he declares, by oath or affirmation, that he will testify truthfully. The rule requires that the oath or affirmation be administered in a form calculated to awaken the conscience of the witness and impress his mind with his duty to testify truthfully.\(^4\) The rule seems less designed to exclude incompetent witnesses, though in a few cases it might have that effect, than calculated to encourage the competent witness to tell the truth by impressing him with the solemnity of the occasion, calling to his mind whatever conscience he may have, forcing him

\(^{41}\) Proposed Nebraska Rules Booklet at 94, quoting the Advisory Committee’s Note, Fed. R. Evid. 602.


In this regard, however, it seems that some indication is required that the out-of-court declarant could have perceived the facts contained in his out-of-court declaration. The Advisory Committee’s Note to Federal Rule 803 states: “In a hearsay situation, the declarant [presumably the out-of-court declarant; see Rule 801(b)] is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of first-hand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602.” This quotation was added late to the Advisory Committee’s Note to Rule 803, and, perhaps for that reason, was not quoted in the Comment to Nebraska Rule 803.

\(^{43}\) Cf. note 36 supra.

\(^{44}\) Neb. Evid. R. 603, and Fed. R. Evid. 603. Nebraska and federal Rules 603 are identical. They read as follows: “Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.”
to commit himself to telling the truth and impressing him with his duty to do so. The emphasis is on form rather than substance.45

Prior to the adoption of the new rules, Nebraska law provided that a person was not competent to be a witness unless he had sufficient capacity to understand the obligation of an oath.46 Rule 603 changes this to the extent that it is not keyed to the capacity of the witness to understand the obligation of the oath but rather, first, his willingness to take the oath or affirmation and, second, the form of the oath or affirmation which is administered. Under the rules, if the court determines that a person, though willing to take a properly administered oath, cannot understand the obligation of the oath, then his testimony would be excludable as irrelevant under Rule 403, rather than under any general rule of competency.47 Again, this represents a shift in method for exclusion.

Prior Nebraska law also provided: “Before testifying, the witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as is most binding upon the conscience of the witness.”48 This statutory section, now repealed, was not the subject of much judicial interpretation. However, in light of Article I, § 4 of the Nebraska Constitution, which provides that no person shall “be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations”,49 it appears it would have been interpreted to allow much the same thing as allowed by Rule 603. In any event, as noted in the Comment to Nebraska Rule 603, “[i]t is probable that the rule . . . more clearly states what is expected of a witness than [did] the statute.”50

Rule 603 does not work any change in federal law. The common law requirement was that the witness take an oath. Modern federal cases had interpreted that common law requirement as allowing an oath or an affirmation.51 The United States Congress

45. Even though no particular words are required, the rule does require “a form calculated to awaken his conscience and impress his mind with his duty . . . .” Neb. Evid. R. 603, and Fed. R. Evid. 603.
46. See note 11 and accompanying text supra.
47. See notes 15 through 18 and accompanying text supra.
50. Proposed Nebraska Rules Booklet at 94.
51. E.g., United States v. Looper, 419 F.2d 1405 (4th Cir. 1969) where the court stated:

The common law . . . requires neither an appeal to God nor the raising of a hand as a prerequisite to a valid oath. All that the common law requires is a form or statement which impresses upon the mind and conscience of a witness the necessity for telling the
had previously provided that "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . 'oath' includes affirmation, and 'sworn' includes affirmed." At a minimum, it is clear that the trend was to allow the affirmation in every case, permitting "a witness to testify without any reference to theological belief."

RULE 604—INTERPRETERS

Rules 604 of the federal and Nebraska rules are the same. They simply state that an interpreter is subject to the rules of evidence in two particular regards: 1) he must declare, by oath or affirmation, that he will make a true translation; and 2) he must qualify as an expert under Rule 702. The Nebraska rule must be read in conjunction with Article 24 of Chapter 25 of the Nebraska statutes. Article 24, in addition to a definitional section, provides for the appointment of interpreters, their qualifications, truth. Thus, defendant's privilege to testify may not be denied him solely because he would not accede to a form of oath or affirmation not required by the common law.

Id. at 1407 (footnote omitted).


53. 3 WEINSTEIN §§ 603[01], at 603-2. Weinstein cites the following: See generally 6 Wigmore §§ 1815-1829 (3d ed. 1940). See United States v. Looper, 419 F.2d 1405, 1407 (5th Cir. 1969) [see note 56 supra]. Cf. United States v. Moore, 217 F.2d 428 (7th Cir. 1954), rev'd, 348 U.S. 966, 75 S. Ct. 530, 99 L. Ed. 753 (1955) (conscientious objector who had refused to submit to induction into armed forces refused to take oath or make "solemn" affirmation because of religious scruples; trial court refused to allow him and other members of his sect with same view on affirmation to testify; Court of Appeals affirmed; Supreme Court reversed and remanded finding per curiam that "there is no requirement that the word 'solemnly' be used in the affirmation.").

Id. at n.3.

54. FED. R. EVID. 604 and NEB. EVID. R. 604. The rule reads as follows: "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation."

55. See note 62 infra.

56. NEB. REV. STAT. §§ 25-2401 through 25-2406 (Cum. Supp. 1974). The Comment to Rule 604 of the Nebraska Evidence Rules states that this rule "implements and is consonant with Section 33-142 Neb. R.R.S. 1943." Proposed Nebraska Rules Booklet at 95. Subsequent to the drafting of that Comment, Section 33-142 was repealed. (Laws 1973, L.B. 116, § 7.) It was replaced by the above cited statutory sections. None of these most recent statutory sections regarding interpreters have been repealed.


their oath\textsuperscript{60} and their fees and expenses.\textsuperscript{61}

There are, then, two Nebraska statutory sections relating to the qualifications of an interpreter. He must qualify as an expert under Rule 702, and he also must meet the qualifications set out in § 25-2404 of the Nebraska Revised Statutes. The two provisions are consistent; each simply requires the ability to translate from spoken English into the appropriate foreign or non-verbal language and vice versa.\textsuperscript{62}

Only one section of Article 24 is arguably inconsistent with the Nebraska Evidence Rules. Section 25-2405 provides that every interpreter “shall take an oath that he will . . . make a true interpretation.”\textsuperscript{63} Rule 604 makes it clear that the interpreter may declare, either by oath or affirmation, that he will make a true translation. In any event allowing the interpreter to affirm rather than taking an oath appears to be required by Article I, § 4 of the Nebraska Constitution.\textsuperscript{64}

Rule 604 of the Federal Rules of Evidence must be read in conjunction with Rule 43 of the Federal Rules of Civil Procedure and Rule 28 of the Federal Rules of Criminal Procedure. These two rules simply supplement Rule 604, providing “that judges in their discretion may order the appointment and compensation of interpreters.”\textsuperscript{65}

Although Rule 604 does not provide when an interpreter must be appointed, the rule in federal and Nebraska courts appears to

\textsuperscript{62} \textit{Neb. Evid. R.} 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.


No person shall be appointed as an interpreter pursuant to the provisions of sections 25-2401 to 25-2406 unless such person is readily able to communicate with the deaf person or person unable to communicate the English language, translate the proceedings for him, and accurately repeat and translate the statements of such person to the jury, judge, and officials before whom such proceeding takes place.

The “specialized knowledge” which would “assist the trier of fact” (\textit{Neb. Evid. R.} 702) in this situation would be knowledge of the appropriate means of communication, whether it be a foreign language, sign language, or whatever interpretative skills are involved [\textit{Neb. Rev. Stat.} § 25-2404 (Cum. Supp. 1974)]. That requisite knowledge, under Rule 702, can have been acquired by “knowledge, skill, experience, training or education.”

\textsuperscript{64} \textit{Neb. Const.} art. I, § 4, quoted in text accompanying note 49 supra.
\textsuperscript{65} 3 \textsc{Weinstein} § 604[01], at 604-2.
be the same. Section 25-2403 of the Nebraska Revised Statutes gives the following guidance in regard to Nebraska courts: “In any proceeding the presiding judge shall appoint an interpreter to assist any deaf person or person unable to communicate the English language for preparation and trial of his case.”

“Proceeding” is defined as “any legal proceeding or any hearing preliminary thereto involving deaf persons or other persons who cannot communicate the English language.” In federal court “[t]he situations in which the services of an interpreter are required are left for case law determination although the Notes to Rule 28 [Fed. R. Crim. P.] indicate that interpreters may be needed in the case of deaf or non-English speaking witnesses or defendants.”

Once appointed, the interpreter has a duty to give a full translation. This means that to protect the rights of the defendant who does not understand spoken English the interpreter in a criminal action must translate not only questions and answers, but everything said by the judge, witnesses and attorneys.

RULE 605—COMPETENCY OF JUDGE AS WITNESS

Rule 605 is the same in both the federal and the Nebraska rules. “The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.”

The rule is absolute and automatic. In both elements it changes prior Nebraska law. Section 25-1205 of the Nebraska Revised Statutes, now repealed, provided that the presiding judge was a competent witness, but gave him the discretion to order that the trial be held before another judge. Rule 605 automatically makes the presiding judge incompetent, giving him no discretion in the matter. In fact not only is the judge completely divested of any

68. 3 WEINSTEIN ¶ 604[01], at 604-2 (footnotes omitted).
70. NEB. EVID. R. 605 and FED. R. EVID. 605. The quotation in the text is the rule, Nebraska and federal, in its entirety.
71. § 348 [1867] Code of Civ. P. 452 (repealed, 1975, LB 279, § 75) read:

The judge of the court is a competent witness for either party, and may be sworn upon the trial; but in such a case it is in his discretion to order the trial to be postponed or suspended, and to take place before another judge.

72. According to the Comment to the Nebraska Rule 605, “[p]rinciples of disqualification and mistrial provide adequate safeguard against the prospect of losing important information which the judge may possess, but he
discretion, but it would be improper for the parties to agree among themselves and with the judge that he should continue to preside while being a witness. Certainly a silent agreement, agreement by lack of objection, would not suffice.

Federal Rule 605 is the same as the Nebraska rule, but its effect on the federal law in force immediately prior to the effective date of the federal rules is quite different. In 1974, the United States Congress adopted a comprehensive statute concerning the disqualification of federal judicial officers. That statute, which has not

should not preside at the trial at which he is testifying.” Proposed Nebraska Rules Booklet at 95.

73. Such actions would constitute error, but would not necessarily be sufficiently prejudicial to necessitate reversal. McCormick § 68, at 147-48 n. 77. Of course, if no one complains of such a course of action, if the issue is not raised on appeal, then such an agreement would have the practical effect of getting around the rule. In light of the rule, however, judges should be unwilling to agree to such a course of action.

74. 28 U.S.C. § 455 (Supp. IV, 1974), effective in trials commencing on or after December 5, 1974, in pertinent part provides:

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(iv) Is to the judge’s knowledge likely to be a material witness in the proceeding.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification. [Emphasis added.]

Until December 5, 1974 the rule in federal court in regard to the presiding judge as a witness was as follows:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it im-
been repealed, provides that the presiding judge must disqualify himself if he has been or is likely to be a "material witness," or if he has "personal knowledge of disputed evidentiary facts concerning the proceeding." Further, it provides generally that he "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The latter disqualification is subject to waiver by the parties, upon full disclosure, while the first two mentioned disqualifications cannot be waived. To some extent this 1974 federal statute continues the distinction between the presiding judge as a material, as opposed to a non-material, witness. Rule 605 does away with that distinction and, to that extent, tightens the older statute.

Rules 605, federal and Nebraska, clearly do not allow the presiding judge to give testimony as a witness. Further, though the presiding judge has the general authority to question witnesses, he cannot testify indirectly through such questioning of a witness.

In that same vein, the judge may not testify indirectly through his proper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908. This was somewhere in between pre-Rule 605 Nebraska law and the law under Rule 605. It left the judge some discretion (". . . substantial interest . . . material witness . . . in his opinion . . . "), though certainly not as much as the old Nebraska statute. In addition to that range of discretion, the disability was subject to waiver by consent of the parties. Utz & Dunn Co. v. Regulator Co., 213 F. 315 (8th Cir. 1914); Neiman-Marcus Co. v. Lait, 107 F. Supp. 96 (S.D.N.Y. 1952). Contra, In re Eatonton Elec. Co., 120 F. 1010 (S.D. Ga. 1903).

75. 28 U.S.C. § 455(b), (2), (3) and (5) (iv) (Supp. IV, 1974).
76. 28 U.S.C. § 455(b) (1) (Supp. IV, 1974).
77. 28 U.S.C. § 455(a) (Supp. IV, 1974).
78. 28 U.S.C. § 455(e) (Supp. IV, 1974).
80. "The judge may interrogate witnesses, whether called by himself or by a party." NEB. EVID. R. 614(2). Rule 614(b) of the Federal Rules of Evidence is the same, except that where the Nebraska rule uses the word "judge," the federal rule uses the word "court."
81. See, Terrell v. United States, 6 F.2d 408 (4th Cir. 1925) (trial judge questioned defendant about a pre-trial interview between the judge and the defendant). Weinstein states:

Such behavior by a judge [assuming the role of a witness without being called to testify or taking the stand] is at variance with the policy expressed in Rule 605 and should be treated analogously to direct violation of the Rule. That is, the appellate court must examine the particular circumstances of the case to determine whether the judge's behavior was so prejudicial to the substantial rights of the parties to merit a reversal.

3 WEINSTEIN ¶ 605[04], at 605-13.
power to comment on the evidence to complete the record. 82 Finally, the judge may not “testify” or “comment” on the evidence through his nonverbal behavior. 83

As noted above, Rule 605 provides that the incompetency of the judge is preserved for appeal whether or not an objection is made at the trial. 84

The rule provides an “automatic” objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector. 85

The reasons for the rules absolutely prohibiting the testimony of the presiding judge are as clear as the rule itself. The Advisory Committee's Note to Rule 605 of the Federal Rules of Evidence states those reasons as follows:

The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he,

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82. Certainly the judge can comment on the evidence to complete the record. NBM. EVD. R. 103(2) and FED. R. EVD. 103(b). Regarding the impropriety of “testifying” through comment, see, e.g., 3 WEINSTEIN ¶ 605[04] at 605-13.

83. E.g., State v. Barron, 365 S.W.2d 523 (Mo. 1971), where appellant alleged that “when a brother of appellant testified that appellant was at home watching television on the night of the burglary, the trial judge 'placed his hands flat to the sides of his head, shook his head negatively once, leaned back and swiveled his chair 180° around.'” Id. at 527. The Missouri Supreme Court states that since no objection was made to his alleged conduct and no relief was requested at the time, it may not be successfully urged on appeal. The court does note, however, that “[t]he alleged action of the trial judge, if it occurred, would have the same effect as a remark or comment by the trial judge . . . .” Id. at 528.

One of the grounds of appeal by one of the defendants in the so-called Watergate trials was that during the defendant's testimony the judge “repeatedly made facial expressions and turned away from the witness in such a manner as to indicate to the jury that [the defendant] could not be believed.” Omaha World-Herald, July 20, 1974, at 5, col. 4.

Once again, such error, when it occurs, would have to be substantial error before it would lead to reversal. E.g., 3 WEINSTEIN ¶ 605[04], at 605-13.

For a good discussion of the problem of the judge's non-verbal behavior, the kinds of behavior involved, the effects of such behavior, and protection against it, see Note, Judges' Nonverball Behavior in Jury Trials: A Threat to Judicial Impartiality, 61 VA. L. Rev. 1266 (1975).

84. See note 70 and accompanying text supra.

85. Advisory Committee's Note, FED. R. EVD. 605.
in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality?  

86. *Id.* 

`Accord, Hart, Testimony By a Judge Or Juror, 44 MARQ. L. REV. 183 (1960)` which states:

The articulated objections to [the presiding judge's] testimony . . . are threefold. First, while he is assuming the role of witness, there is no available machinery to function as the court. This objection would be accentuated if a ruling were necessary as to some point of the judge's own testimony or when the judge claims a privilege, but the rationale seems to be based upon the wider ground of jurisdiction.

The second objection, originating from the fear that such testimony by the judge will unduly prejudice the jury, is grounded in the argument that it is impossible for a jury to weigh justly the testimony given by one who is fulfilling the auspicious role of judge in the case and to give it only as much importance as it deserves. . . . Even if his testimony is nothing more than a mechanical expression of a fact not in dispute, the psychological effect that his testimony, which inevitably must favor one party at least indirectly, might have on the jury could be an important factor in the disposition of the case. This danger exists no matter how much care the judge might take to impress upon the jurymen that his testimony is not to be regarded as indicating his sympathy with either party's position.

The third argument advanced is based upon the possibility that the judge may be required, even in a jury case, to weigh his own testimony if a motion for a directed verdict is made.

*Id.* at 184-88 (footnotes omitted).

*See, e.g., Texaco, Inc. v. Chandler,* 354 F.2d 655, 657 (10th Cir. 1965), *cert. denied,* 383 U.S. 936 (1966) (not only actual impartiality, but "the appearance of a detached impartiality" is important) (quoting *Rapp v. Van Dusen,* 350 F.2d 806, 812 (3rd Cir. 1965)) and *Tyler v. Swenson,* 427 F.2d 412, 415-16 (8th Cir. 1970) (citing cases).

But see 6 J. WIGMORE, EVIDENCE § 1909 (3d ed. 1940). Wigmore argues that a rule of automatic disqualification is akin to a military commander training a cannon on the garden gate. *Id.* at 592.

One generally unspoken element in the arguments in favor of automatic, nondiscretionary disqualification is the availability of another judge who can preside at the trial. The unavailability of another judge is mentioned by Wigmore as a reason against the automatic rule. *Id.* at 591-92 ("... nor, in the conditions everywhere prevailing, is another judge usually available on short notice for substitution."). The availability of a second judge would not be much of a problem in the federal system. It would seem, however, that as the states begin to consider adoption of a set of rules like the federal rules, states with remote judicial districts with only one judge should specifically approach the competency of the judge from a cost-benefit analysis. The benefits of automatic disqualification are discussed above. The costs of the automatic rule, *e.g.*, time, possible loss of the judge's evidence, and so forth, should be considered more carefully. The rules, in other words, put a great deal of trust in the judge. Many of the rules have the effect of granting him a good deal of discretion. Must we assume that the judge, and the parties, cannot be trusted with any discretion in this area? Would not the application of Rule 605 to the judicial systems in some states deny "[t]he underlying principles of the rules [,] . . . admissibility and flexibility." *Berger, An Introduction to the Federal Rules of Evidence,* 2 LITIGATION 8 (1975). *See also Fed. R. Evid. 102.*
To the Advisory Committee the only "satisfactory answer" to these questions is to keep them from being asked by disqualifying the judge from testifying.

RULE 606—COMPETENCY OF JUROR AS WITNESS

Nebraska and Federal Rules 606 are virtually identical. The first subdivision of Rule 606 provides that a juror will not be allowed to testify in the trial in which he is sitting as a juror. An objection must be made to preserve this point for appeal but "the opposing party shall be afforded an opportunity to object out of presence of the jury." Previous Nebraska law would have permitted the testimony of a juror, "at least where no objection has been made." Previous federal law seems consistent with the first subdivision of Rule 606.

The second subdivision of Rule 606 provides that in proceedings to impeach a verdict a juror cannot testify as to occurrences during the jury's deliberations or his emotions or mental processes in reaching his decision, except that a juror can testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

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87. NEB. EVID. R. 606, and FED. R. EVID. 606. For the text of the rule, see notes 88 and 92 infra.
88. NEB. EVID. R. 606(1), and FED. R. EVID. 606(a). This first subdivision of each rule reads as follows: "A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury." NEB. EVID. R. 606(1) and FED. R. EVID. 606(a). The objection is not "automatic" as it is in the case of the presiding judge witness. See notes 70 and 85 and accompanying text supra.

The Advisory Committee's Note to Rule 606(a) of the Federal Rules of Evidence (quoted and adopted in the Comment to Rule 606(1) of the Nebraska Evidence Rules, Proposed Nebraska Rules Booklet at 96) reads as follows:

The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however, in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605.

91. See 3 WEINSTEIN ¶ 606[02].
92. NEB. EVID. R. 606(2) and FED. R. EVID. 606(b). In this second sub-
The Rule's purpose is to protect freedom of deliberation, ensure stability of verdicts and protect jurors from harassment. In short, private deliberations should not be made the subject of public investigation. It would appear that the jury's conduct, for example, in reaching a quotient verdict would not be a proper subject of inquiry into the verdict's validity. On the other hand, any extraneous prejudicial information, such as a prejudicial newspaper article, or outside influence, such as bailiff's improper conduct, affecting the jury's deliberations would be a proper subject of inquiry.\footnote{3}

division of Rule 606 the text of the Nebraska and federal rules is somewhat different, though the result under either should be the same. Subdivision 2 of Nebraska Rule 606 reads as follows:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

The federal rule is identical except for a slight difference in the wording of the final sentence. The final sentence of Federal Rule 606 (b) reads as follows: "Nor may his affidavit or evidence of any statement by him concerning a matter about what (sic) he would be precluded from testifying be received for these purposes."


In regard to the reasons for the rule, the Supreme Court, in McDonald v. Pless, 238 U.S. 264 (1915), stated:

For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

... [L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was
This second subdivision of Rule 606 changes pre-existing Nebraska law to the extent that prior Nebraska cases seemed to approve of impeachment by a juror of a quotient verdict. Pre-Rule 606 federal law was that the juror could not impeach his own verdict. However, there were a number of different exceptions to this rule in a number of different jurisdictions. The result is that federal Rule 606 changes what continues to be referred to as the general rule in that it allows the juror to impeach the verdict influenced by “extraneous prejudicial information” or “outside influence improperly brought to bear upon any juror.”

intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference. Id., at 267-68. See 3 WEINSTEIN ¶ 606[03]; Advisory Committee’s Note, FED. R. EVID. 606, and authorities cited therein; Report of Senate Judiciary Committee, FED. R. EVID. 606, 28 U.S.C.A. (“Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.”).

“Absolute” privacy would not seem to be necessary. Neither would it be advisable. See generally United States v. Nixon, 418 U.S. 683 (1974). In any event the privacy protected by the rule is not “absolute.”

94. See, e.g., Haarberg v. Schneider, 174 Neb. 334, 117 N.W.2d 796 (1962), and the cases cited therein.

95. McDonald v. Pless, 238 U.S. 264, 267 (1915) (“[T]he weight of authority is that a juror cannot impeach his own verdict.” Affidavits as to quotient verdict excluded.) (See note 97 supra); MCCORMICK § 88 at 148; 3 WEINSTEIN ¶ 606[03]; Comment, Witnesses Under Article VI of the Proposed Federal Rules of Evidence, 15 WAYNE L. REV. 1236, 1253-54 (1969). See also, Jorgensen v. York Ice Machinery Corp., 160 F.2d 432, 435 (2d Cir. 1947), cert. denied, 332 U.S. 764 (1947) (It is “not improbable that when the question arises in the future, the testimony of the jurors may be held competent, and that we shall no longer hear that they may not ‘impeach their verdict,’ when it is ‘impeachable’ if what they say is true. Maybe not; judges again and again repeat the consecrated rubric which has so confused the subject; it offers an easy escape from embarrassing choices.”) But see Mattox v. United States, 146 U.S. 140, 149 (1892) (allowing juror to “testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.”) and Parker v. Gladden, 385 U.S. 363, 364 (1966) (bailiff communicating to at least one juror his opinion that defendant was guilty violated defendant’s sixth and fourteenth amendment right to trial “by an impartial jury. . . [and] be confronted with the witnesses against him. . .”) 96. McDonald v. Pless 238 U.S. 264, 267 (1915); MCCORMICK, § 68 at 148; Comment, Witnesses Under Article VI of the Proposed Federal Rules of Evidence, 15 WAYNE L. REV. 1236, 1253-54 (1969); 3 WEINSTEIN ¶ 606[03] supra note 100. See also Mattox v. United States, 146 U.S. 140, 149 (1892).

97. See note 92 and accompanying text supra. For a discussion of the procedures for impeaching the jury verdict, when allowed, see, e.g., Carlson, Impeaching Jury Verdicts, 2 LITIGATION 31, 33 (1975) (citing authorities).
RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

RULE 611(1)—CONTROL BY JUDGE

Rule 611(1) of the Nebraska Evidence Rules states in part: “The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence. . . .”\(^{98}\) The rule provides that this “reasonable control” shall be exercised “. . . so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment.”\(^{99}\) Federal Rule 611(a) is the same in all important respects.\(^{100}\)

This first subdivision of Rule 611 codifies the court’s control over, inter alia, free narrative testimony versus response to specific questions, requests by a party to reopen his case, when exhibits can be introduced into evidence, and the allowability (and perhaps the scope) of redirect and recross-examination.\(^{101}\) It does not attempt to change or limit the power of the trial judge in either Nebraska\(^{102}\) or federal\(^{103}\) courts; it simply codifies that power and

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99. Id.
100. Fed. R. Evid. 611(a) is exactly the same as the above quoted Nebraska Evidence Rule 611(1) except that where the Nebraska rule uses the word “judge”, the federal rule uses the word “court,” and the subdivision designations in the federal rule are alphabetic and the subdivision designations are numerical, as opposed to the numerical subdivisions and alphabetic sub-subdivisions (see text accompanying note 98 supra) in the Nebraska rule.
101. See generally 3 WEINSTEIN ¶ 611[01], at 611-15; P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 63 (1973).
102. See, e.g., § 337 [1867] Code of Civ. P. 450 [§ 25-1210] (“When the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in section 25-1214.” § 338 [1867] Code of Civ. P. 450 [§ 25-1214] concerned interrogation of a witness as to his previous conviction for a felony; it has been repealed (Laws 1975, LB 279, § 75) and replaced by Nebraska Evidence Rule 609.); State v. Smith, 192 Neb. 794, 797, 224 N.W.2d 537, 539 (1974) (“The general conduct of the trial rests largely in the sound discretion of the trial court. This includes the examination of witnesses. . . .”); State v. Fellman, 187 Neb. 767, 771, 193 N.W.2d 775, 777 (1972) (discretion to control “[t]he extent to which a witness on redirect examination may explain testimony elicited on cross-examination. . . . In a criminal prosecution where a State witness testified to hearsay on cross-examination, discretion over objection to permit hearsay on redirect examination is limited.” Citations omitted.); Ederer v. Van Sant, 184 Neb. 774, 777, 172 N.W.2d 96, 98 (1969) and State v. Adams, 181 Neb. 75, 83, 147 N.W.2d 144, 151 (1966) (discretion to control “[t]he manner in which a witness may be examined. . . .”) Chicago Lumber Co. v. Gibson, 179 Neb. 461, 465, 138 N.W.2d 832, 836 (1963) (discretion to limit repetition); South
then sets forth the ends toward which the court should exercise
the granted discretion. The criteria made applicable to the exercise
of discretion, truth, time consumption, and harassment or embar-
ishment of witnesses, are not particularly novel. In fact, they are
quite similar to Rule 102 (concerning the purpose and construction
of the rules generally)\textsuperscript{104} and Rule 403 (concerning exclusion of
relevant evidence because its probative value is outweighed by one
or more of a number of enumerated dangers).\textsuperscript{105} This first sub-
division of Rule 611 restates those principles, this time in terms
of witnesses.\textsuperscript{106} Furthermore, the delineated objectives are among

\begin{quote}
\textbf{v. State, 111 Neb. 383, 385-86, 196 N.W. 684, 685 (1923)} ("Some of the as-
signments of error are directed to the conduct of the trial judge in inter-
rupting counsel by interrogating the witness on the stand, by limiting the
examination of witnesses and by directing witnesses not to answer questions
to which no objections were made. An examination of a group of assign-
ments relating to these subjects fails to show any error. The criticised
questions, rulings and remarks of the trial judge were confined to orderly
procedure, to the proper ascertainment of issuable facts, to the exclusion
of testimony having no bearing on the issues, to the unnecessary repetition
of details already stated, and to the observance by counsel of recognized
rules of evidence.").\textit{ See also, Neb. Const. art. 1, § 12, and U.S. Const.
amend. V, which protect against self-incrimination.}

There are, however, limits on this discretion. \textit{E.g.,} Rimmer \textit{v. Chadron
Printing Co., 156 Neb. 533, 538, 56 N.W.2d 806, 809 (1953)} (Requiring wit-
ess to answer "question beginning . . . 'Even though you knew that you
had done this man a grievous wrong,'" was prejudicial error; the question
assumes facts not in evidence; additionally, however, had "the witness an-
swered the question there would be implicit in his answer an admission
that the defendant had done the plaintiff a grievous wrong.").

The court's discretion to control the scope of cross-examination and
leading questions, and relevant cases, are discussed in connection with sub-
divisions (2) and (3) of the Nebraska Rule 611, \textit{infra.}

\begin{quote}
\textbf{103. 3} \textbf{WEINSTEIN} \textit{¶ 611[01]}, at 611-14 and authorities cited therein.
Weinstein concludes that the Advisory Committee to the federal rules of
evidence believed that this "provision was consistent with existing federal
law which recognized that 'ultimate responsibility for the effective working
of the adversary system rests with the judge.'" \textit{Id.} (quoting Advisory
Committee's Notes, \textit{Fed. R. Evid.} 611(a)). More recently, the Supreme
Court has reaffirmed "the important role the trial judge plays in the fed-
eral system of criminal justice." \textit{Geders v. United States, — U.S. —, 44
L.W. 4420, 4422 (1976)}. The Supreme Court continued as follows:

The trial judge must meet situations as they arise and to do this
must have broad power to cope with the complexities and conti-
gencies inherent in the adversary process. To this end, he may
determine generally the order in which parties will adduce proof;
his determination will be reviewed for abuse of discretion. Within
limits, the judge may control the scope of rebuttal testimony, may
refuse to allow cumulative, repetitive or irrelevant testimony, and
may control the scope of examination of witnesses. If truth and
fairness are not to be sacrificed, the judge must exert substantial
control over the proceedings. \textit{[Citations omitted.]}\textsuperscript{107}
\end{quote}

\begin{quote}
\textbf{104. NEB. EVID. R. 102 and FED. R. EVID. 102.}
\textbf{105. NEB. EVID. R. 403 and FED. R. EVID. 403, quoted in note 18 supra.}
\textbf{106.} Weinstein in his treatise states:

those against which courts have always exercised this sort of discretion.

**RULE 611(2)—SCOPE OF CROSS-EXAMINATION**

The second subdivision of Nebraska’s Rule 611 reads as follows: “Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.”107 The second subdivision of Federal Rule 611 is exactly the same except for the substitution of the word “court” for the word “judge.”108

There are two general theories in regard to the scope of cross-examination. One theory says that the cross-examining attorney may inquire into any point which is relevant to the matter under litigation, that is, that the cross-examination is “wide open.”109 The second theory is that the cross-examination may only inquire into those points raised on direct examination, that is, that the cross-examination is “limited” to the scope of the direct examination.110 In regard to the second theory, the credibility of the witness is assumed to be raised on direct examination; hence cross-examination on credibility would always be within the scope of the direct examination. A sort of compromise is affected by the new rules, the net result of which is to leave a good deal of discretion with the trial judge. The rule provides that the scope of the cross-examination should ordinarily be governed by the scope of the direct examination, plus inquiry into the credibility of the witness, but, that the court may, in its discretion, enlarge the scope of the cross-examination.111 Three criteria set out in the first subdivi-
The proposed rule would have adopted the "wide open" rule of cross-examination, with discretion in the judge to narrow its scope. The rules as enacted, adopt the more traditional rule of limited cross-examination, with discretion in the judge to broaden its scope.

For the arguments in favor of one rule or the other see, e.g., 3 WENSTEIN ¶ 611[02], at 611-24 through 611-33 and authorities cited therein; MCCORMICK § 21; P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 64-65 (1973).

112. See text accompanying note 94 supra.

113. See note 106 supra.

114. Griffith v. State, 157 Neb. 448, 459, 59 N.W.2d 701, 707 (1953) ("a party should not be permitted to cross-examine a witness as to a matter foreign to the scope of his direct examination"); Brooks v. Thayer County, 126 Neb. 610, 614, 254 N.W. 413, 416 (1934) (litigant has no right to cross-examine witness, except as to circumstances connected with matters stated in direct examination, and litigant wishing to examine witness as to other matters must call him as his own witness); Farmer's Grain & Gen. Shipping Ass'n v. Jordan, 107 Neb. 537, 186 N.W. 528 (1922); Citizens' Bank v. Warfield, 85 Neb. 328, 123 N.W. 315 (1909); Hurlbut v. Hall, 39 Neb. 889, 58 N.W. 538 (1894).

115. Clark v. Smith, 181 Neb. 461, 149 N.W.2d 425 (1967) and Zimmerman v. Lindblad, 154 Neb. 453, 48 N.W.2d 415 (1951), both stand for the proposition that a party has no right to cross-examine a witness outside the scope of the direct examination, but that cross-examination is proper as to anything tending to affect the accuracy, veracity or credibility of the witness. See also, Scofield v. Haskell, 180 Neb. 324, 142 N.W.2d 597 (1966), which states that, even under the strict or limited rule cross-examination is proper as to anything tending to affect the accuracy, veracity or credibility of witnesses.

116. E.g., Holmes v. United States, 134 F.2d 125 (8th Cir. 1943), cert. denied, 319 U.S. 776 (1943); State v. Newte, 188 Neb. 412, 197 N.W.2d 403
held unless abuse of discretion is shown.117

In federal court, the general rule has been the restrictive or limited rule of cross-examination.118 However, the trial court was not completely without discretion to enlarge its scope. "Several inroads have already been made regarding this restrictive rule, thereby increasing the trial court's discretion in such matters."119 The real problem with assessing the state of pre-Rule 611 federal law is that the rule was inconsistent between jurisdictions and even within jurisdictions.120 Certainly now that has been changed by the consistency of the completed discretion in Federal Rule of Evidence 611(b).

RULE 611(3)—LEADING QUESTIONS

The third subdivision of Rule 611 provides that leading questions should not be used on direct examination except as necessary to develop testimony.121 By defining when leading questions will be allowed, this subdivision of the rule gives the court additional guidance as to how it should exercise the discretion granted


State v. Fellman, 187 Neb. 767, 193 N.W.2d 775 (1972) concerns the logical extension of this part of the rule, i.e., the discretion of the court in regard to redirect examination.

117. See e.g., the following cases, all cited in note 116 supra: State v. Franklin; Beranek v. Petracek; State v. Sukovaty; Pierce v. State; Garcia v. State.

118. E.g., McCormick § 21, at 47; M. Ladd and R. Carlson, Cases and Materials on Evidence 138 (1972); Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L. J. 125, 158-9 (1973); 3 Weinstein ¶611[02], at 611-24. In fact a third name for the restrictive or limited rule of cross-examination is the "federal" rule. Id.

119. United States v. Dillon, 436 F.2d 1093, 1096 (5th Cir. 1971) (citing cases).

120. McCormick § 21, at 48.

121. Neb. Evid. R. 611 (3) and Fed. R. Evid. 611(c). This third subdivision of Rule 611 of the Nebraska and the federal rules, in its entirety, reads as follows:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be 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.
under the first subdivision of the rule, i.e., the court's "reasonable control over the mode and order of interrogating witnesses and presenting evidence."  

Although the general rule has always been against the use of the leading question on direct examination, the trial court has always had the discretion to allow the leading question and that discretion has always been exercised when, for one reason or another, the leading question was necessary to develop testimony. The Advisory Committee's Note to this third subdivision of Rule 611 of the Federal Rules of Evidence states:

The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

The rule that leading questions should not be asked on direct examination except as necessary to develop testimony does not change prior Nebraska or federal law. The Nebraska Supreme Court has ruled that it is proper to permit leading questions on the direct examination of a witness who is immature, unaccustomed to court proceedings, inexperienced, agitated, terrified, embarrassed while on the stand, or lacking in comprehension of the questions asked. Leading questions also have been allowed on the direct examination of the hostile or unwilling witness. Furthermore,

122. See note 98 and accompanying text, supra.
123. The use of leading questions has always been allowed in regard to undisputed preliminary matters. In any event, even if such use of leading questions was error, in almost every case it would be harmless error and therefore insufficient to cause reversal.
124. Advisory Committee's Note, Fed. R. Evid. 611(c).
Rule 611(c) codifies the traditional mode of dealing with leading questions. It acknowledges that they are generally undesirable on direct examination, that they are usually permissible on cross-examination, and that there are exceptions to both these statements.
3 WEINSTEIN ¶ 611[05], at 611-54 (footnote omitted).
125. See note 121 supra.
127. Ainlay v. State, 89 Neb. 721, 132 N.W. 120 (1911); Hackney v. Ray-
the rule against leading questions ordinarily does not apply to ques-
tions to prove a self-contradiction in order to impeach.128 Prior
federal law is much the same.129

The second sentence of Nebraska Rule 611(3) (and Federal Rule
611(c)) states: "Ordinarily leading questions should be permitted
on cross-examination." This provision adopts the traditional rule
that leading questions may be asked as a matter of right on cross-
examination; that right, however, is not absolute.130 The qualify-
ing word "ordinarily" is designed to furnish the trial court "a basis
for denying the use of leading questions when the cross-examina-
tion is cross-examination in form only and not in fact, as for exam-
ple the 'cross-examination' of a party by his own counsel after being
called by the opponent (savoring more of a re-direct) or of an in-
sured defendant who proves to be friendly to the plaintiff."131

Leading questions are allowed by the final sentence of Ne-
braska Rule 611(3) (and Federal Rule 611(c)) where the witness is
"a hostile witness, an adverse party, or a witness identified with an
adverse party." Certain categories of witnesses are automatically
treated as hostile, by the rule thus liberalizing what was the rule
in many jurisdictions, i.e., before leading questions could be asked
on direct examination actual hostility on the part of the witness
had to be shown. These categories include not only the witness
who is actually hostile and the adverse party, but "a witness identi-
fied with an adverse party." Whatever the scope of this latter
phrase, it is clear that it includes witnesses who are not, or at least
are not shown to be, actually hostile. To interpret this phrase in
terms of actual hostility, which is provided for earlier in the same
rule, would render the phrase meaningless surplusage. Though the
actual scope of this final sentence of the rule will have to await
judicial interpretation, its provisions logically cover such classes of

128. Sheridan Coal Co. v. C.W. Hull Co., 87 Neb. 117, 127 N.W. 218
(1910).
129. E.g., 3 WEINSTEIN ¶ 611[05]; MCCORMICK § 6, at 9 (leading ques-
tions ordinarily forbidden on direct examination and ordinarily permitted
on cross-examination; but use of the leading question is in the judge's dis-
cretion). McClard v. United States, 386 F.2d 495, 501 (8th Cir. 1967), cert.
denied, sub nom. Usery v. United States, 393 U.S. 866 (1968), rehearing
denied, 393 U.S. 1045 (1969) ("Oftimes leading questions are asked on pre-
liminary and collateral matters to expedite the trial. In any event the con-
tral of leading questions is a matter left to the discretion of the trial
judge.").
130. E.g., 3 WEINSTEIN ¶ 611[05], at 611-54; MCCORMICK § 6, at 9.
131. Advisory Committee's Note, Fed. R. Evid. 611(c).
witnesses as any employee of an adverse party, a witness with a
close emotional association with an adverse party and sufficiently
close relatives and friends of an adverse party. This extends pre-
eexisting Nebraska\textsuperscript{132} and federal law.\textsuperscript{133}

**RULE 612—WRITING USED TO REFRESH MEMORY**

Rules 612 of the Nebraska\textsuperscript{134} and federal\textsuperscript{135} rules concern
writings used by a witness to refresh his memory. Neither rule
says anything about what writings may be used by the witness,
thereby retaining the familiar rule that (having shown he lacks
effective present recollection\textsuperscript{136}) a witness may look at any writing

\textsuperscript{132} The Nebraska Supreme Court has allowed leading questions in di-
rect examination of a witness who “clearly appears to be hostile or reluc-
tant.” Blair v. State, 72 Neb. 501, 511, 101 N.W. 17, 20 (1904). See also,
As noted in the text, under this third subdivision of Rule 611 actual hostil-
ity or reluctance no longer need be shown in the case of a witness “identi-
fied with” an adverse party.

\textsuperscript{133} See, e.g., 3 WEINSTEIN \& 611[05], at 611-57 through 611-59.

\textsuperscript{134} If a witness uses a writing to refresh his memory for the pur-
pose of testifying, either before or while testifying, an adverse
party is entitled to have it produced at the hearing, to inspect it,
to cross-examine the witness thereon, and to introduce in evidence
those portions which relate to the testimony of the witness. If it
is claimed that the writing contains matters not related to the sub-
ject matter of the testimony, the judge shall examine the writing
in camera, excise any portions not so related, and order delivery
of the remainder to the party entitled thereto. Any portion with-
held over objections shall be preserved and made available to the
appellate court in the event of an appeal. If a writing is not pro-
duced or delivered pursuant to order under this rule, the judge
shall make any order justice requires.

\textsuperscript{135} FED. R. EVID. 612 provides:

Except as otherwise provided in criminal proceedings by sec-
tion 3500 of title 18, United States Code, if a witness uses a writing
from which to refresh his memory for the purpose of testifying, either—

(1) while testifying, or
(2) before testifying, if the court in its discretion determines
it is necessary in the interests of justice, an adverse party is entitled
to have the writing produced at the hearing, to inspect it, to cross-
examine the witness thereon, and to introduce in evidence those
portions which relate to the testimony of the witness. If it is
claimed that the writing contains matters not related to the subject
matter of the testimony the court shall examine the writing in cam-
era, excise any portions not so related, and order delivery of the
remainder to the party entitled thereto. Any portion withheld over
objections shall be preserved and made available to the appellate
court in the event of an appeal. If a writing is not produced or
delivered pursuant to order under this rule, the court shall make
any order justice requires, except that in criminal cases when the
prosecution elects not to comply, the order shall be one striking
the testimony or, if the court in its discretion determines that the
interests of justice so require, declaring a mistrial.

\textsuperscript{136} E.g., 3 WEINSTEIN \& 612[01], at 612-9; MCCORMICK § 9.
for the purpose of refreshing his recollection,\textsuperscript{137} so long as he then testifies from his independent recollection.\textsuperscript{138}

Anything may be used to revive a memory—"a song, a scent, a photograph, an allusion, even a past statement known to be false." Thus, a "writing" in Rule 612 includes sound recordings and pictures of all kinds . . . "the only question is whether in fact it is genuinely calculated to revive the witness' recollection."\textsuperscript{139}

Rule 612 (Nebraska and Federal) codifies the familiar requirement that any writing used at a hearing to refresh a witness' recollection must be produced for an adverse party.\textsuperscript{140} However, the Nebraska rule further states that the adverse party also has a right to the production, at the hearing, of a writing used by the witness, before testifying, "to refresh his memory for the purpose of testifying."\textsuperscript{141} Production of such a writing is now mandatory in Nebraska. The only requirement is that the writing have been used by the witness to refresh his memory for the purpose of testifying. Now, in Nebraska, any writing used by any witness at any time to refresh his memory for the purpose of testifying must be produced at the hearing upon demand by an adverse party. This is true whether the writing is used while on the stand or prior to taking the stand.

Nebraska's rule is the same as the federal rule proposed by the United States Supreme Court, but substantially different than the federal rule enacted by Congress.\textsuperscript{142} As enacted, the federal rule

\textsuperscript{137} See 3 \textsc{Weinstein} ¶ 612[01], at 612-11; \textsc{McCormick} § 9.


\textsuperscript{139} \textsc{E.g.}, 3 \textsc{Weinstein} ¶ 612[01], at 612-12; \textsc{McCormick} § 9, at 15; cases cited supra 137; \textit{Gogna v. United States}, 377 F.2d 753, 760-61 (6th Cir. 1967).

\textsuperscript{139} 3 \textsc{Weinstein} ¶ 612[01], at 612-11 (footnotes omitted). \textsc{Weinstein} continues by noting that "[s]ince the Supreme Court's decision in \textit{Harris v. New York}, [401 U.S. 222 (1971)] it is unlikely that refreshing recollection would be barred merely because the matter used for that purpose was obtained in violation of an exclusionary rule." \textit{Id.} (footnotes omitted.)

\textsuperscript{140} \textsc{Neb. Evid. R.} 612 and \textsc{Fed. R. Evid.} 612, quoted at notes 134 and 135, supra.

\textsuperscript{141} \textsc{Neb. Evid. R.} 612.

\textsuperscript{142} 3 \textsc{Weinstein at} 612-2.
provides that a writing used by the witness while testifying, to refresh his memory for the purpose of testifying, must be produced, but a writing used by the witness before testifying, to refresh his memory for the purpose of testifying, must be produced only "if the court in its discretion determines it is necessary in the interests of justice."\textsuperscript{143} An important new avenue of discovery is provided by the Nebraska rule, while it seems unlikely that the discretion of the federal rule will be exercised in such a way as to effect much of a departure from previous practice in federal court. (This will result in a different rule in this regard in Nebraska state courts and in federal courts sitting in Nebraska.)

The principal objection to the Nebraska-type rule was stated by the Report of the House Committee on the Judiciary: "The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial."\textsuperscript{144} Additionally, there has been concern about the operation of the rule to require the production of privileged or classified documents or an attorney's work product.

Reasons for requiring production of a writing used to refresh recollection include the following: Counsel may test the witness' claim that he testifies from an independent, albeit revived, memory; counsel may be better able to help the witness distinguish between recollection and suggestion; and counsel is provided the opportunity to point out discrepancies between the testimony and the writing. These reasons apply not only to the writing used on the stand, but also to the writing used prior to taking the stand.\textsuperscript{145} In fact, the dangers involved in the use of a writing to refresh recollection can be substantially greater when the writing is used before the trial, at a time when good trial technique and the rules of evidence are not operating to restrict the suggestiveness of the attorney.\textsuperscript{146} And, finally, as Judge Burke has said: "Is there any reason why we should have one rule for a witness who refers to a writing on the witness stand to refresh his memory and a different rule for

\textsuperscript{143} \textit{Fed. R. Evid.} 612.


\textsuperscript{145} The comment to Nebraska Rule 612 reads in part: "Several inroads have already been made regarding this restrictive rule, thereby increasing the trial court's discretion in such matters." Proposed Nebraska Rules Booklet at 103-4.

\textsuperscript{146} \textit{Weinstein} ¶ 612[01], at 612-14.
a witness who refers to a writing on the courthouse steps for the same purpose.\footnote{147}

In response to the fishing expedition objection, there are definite limits. The writing must have been used to refresh memory and it must have been used for the purpose of testifying.\footnote{148} An expert witness who searches a party's files to form an expert opinion, for example, is not refreshing a memory, but forming an opinion. (Additionally, the first time he views the materials, at least, he has no memory to refresh.) A party who searches his files so that he may provide his attorney with the materials necessary to prepare his law suit, and whose memory is coincidentally jogged in the process, would not have been preparing his testimony. Counsel who wishes to refresh a witness' memory with a part of a writing without risking exposure of the entire writing can prepare a new writing, a second writing which contains only part of the other writing. When he refreshes his witness' memory with the second writing, it is this limited writing which is used to refresh memory and, therefore, becomes subject to production under Rule 612. Counsel may be able to avoid the application of the rule by reading to a witness from a writing without ever showing the writing itself to the witness. Clearly, counsel may ultimately control how far the "expedition" can go by his control over what his witnesses use to refresh their recollection.

The fear that the production of privileged or classified information could be required would seem to be unfounded. Privileges are protected in the same legislation that enacted this rule of production\footnote{149} and the two must be read together. The Report of the House Committee on the Judiciary explicitly states, in regard to the federal rule, that "the Committee intends that nothing in the rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory."\footnote{150}

Regarding the fear that production of work product could be required, it does seem that the attorney's work product is subject

\footnotesize{\begin{itemize}
\item \footnote{148} Neb. Evid. R. 612.
\item See, Rawlings v. Andersen, 195 Neb. 686, 696, — N.W.2d — (1976), where the rule was found inapplicable where the witness testified "that she just glanced at" the writing, that not being a sufficient showing that she had refreshed her recollection by means of the statement.
\item \footnote{149} Neb. Evid. R. art. 5, Rules 501-513. See also Fed. R. Evid. 501-513; 2 Weinsteiным \textsc{f} 501[01] - 513[02], at 501-1 through 513-7.
\end{itemize}}
Whether this is something to fear or not is the question. However, the rule does not apply to all work product or even to all work product shown to a witness; it only covers that work product shown to a witness to refresh that witness' memory for the purpose of testifying. Furthermore, if the work product were subject to one of the statutory privileges it would not be subject to production. Again the attorney retains ultimate control on how much of the protection of the work product rule he wishes to jeopardize.\footnote{151}{See note 164 and accompanying text, infra.}

The Nebraska rule demands production "[i]f a witness uses a writing." What constitutes use by the witness? Does this mean that the witness must actually see the writing? What if counsel, prior to the hearing and for the purpose of refreshing recollection preparatory to testifying, reads from a writing, but never shows or hands the writing itself to the witness? Has the witness used the writing as contemplated by Rule 612, or is the writing only subject to Rule 612 production when the witness is refreshed directly from the writing without the interposition of counsel? Clearly in either situation the writing \textit{has been} used to refresh recollection, but the rule does not apply to all writings used to refresh recollection; it only applies to writings \textit{used by the witness} to refresh his recollection. Is there a difference between these two or is it a distinction with no substantive difference?

Nebraska Rule 612 is written in such a way that the kind of "use" of a writing which will result in mandatory production is the same whether that use was before or during the trial. The operative word is the word "uses." The writing must be produced if a witness "uses" it to refresh his recollection for the purpose of testifying, regardless of whether that use occurs before or while testifying. Prior to the codification of the rules, a writing had to be shown to an adverse party if that writing was handed to the testifying witness. However, if the writing was not handed to the witness, but simply read from by counsel, then the adverse party did not have a right to see the writing. In this latter situation it was within the discretion of the trial court whether opposing counsel would be allowed to see the writing.\footnote{153}{United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233 (1939). In \textit{Socony-Vacuum}, the Supreme Court reversed the Circuit Court of Appeals statement to the effect that the rule requiring that adverse counsel}
612 or its legislative history to indicate that it was meant to change that rule regarding refreshing recollection during trial. That rule remaining unchanged and the rule regarding pretrial use being the same, lead to the conclusion that even in the pretrial situation the witness refreshing recollection for the purpose of testifying must actually look at the writing itself before its production will be mandatory. If the witness does not look at the writing, but counsel reads from it, to the witness, to refresh the latter's recollection for the purpose of testifying, production of the writing would be left to the sound discretion of the trial judge—the same rule which applies when a writing is read from during trial.

Such an interpretation seems to be the best resolution of the question and the interpretation most consistent with Rule 612 itself. The reasons behind a rule demanding production of writings used pretrial to refresh recollection, discussed supra, would seem best served by this interpretation. The trial judge could decide, in his discretion, whether justice requires the production of the writing from which counsel had read or if it is sufficient, for example, that adverse counsel be allowed to inquire of the witness as to what he was told. In connection with that decision, the judge might inspect the writing in camera to see whether the adverse party will be hampered in testing the accuracy of the witness' testimony if production is not ordered. Were the alternative interpretation adopted, requiring production when counsel reads from the writing, extremely difficult problems of interpretation would be encountered. Does counsel have to have the writing in hand and be reading directly from it? What if counsel read the writing, refreshing his recollection, then set the writing aside and refreshed the witness' recollection? The only way opposing counsel will know that the witness has used a writing is by asking him. In the latter situation, how would the witness know that a writing had been used to refresh his recollection? What about counsel who remembers seeing something somewhere, in some writing, and inquires of the witness about that? Has that writing been used by the witness?

We have seen what constitutes use of the writing by the witness for the purpose of Rule 612 production. The next question concerns when writings so used must be produced. The Nebraska rule demands production "at the hearing," when a witness uses a writing to refresh recollection for the purpose of testifying, that writing

be shown a writing handed to a testifying witness to refresh his recollection cannot be "avoided by the simple expedient of reading to the witness the memorandum." United States v. Socony-Vacuum Oil Co., 105 F.2d 809, 838 (7th Cir. 1939), rev'd, 310 U.S. 150 (1939).
is subject to production "at the hearing." The question then becomes what is a "hearing" for purposes of Rule 612. Outside of those in court proceedings which clearly are hearings, the question seems most relevant in regards to depositions. Does Nebraska Rule 612 demand production at the deposition of a writing used before the deposition by the deponent to refresh his memory for the purpose of testifying? While the answer to this question is not clear, there is authority indicating that the witness' use of a writing before or during a deposition should be treated the same as his use of a writing before or during the actual trial. Although this authority predates Rule 612, that theory would require Rule 612 production at the deposition to the same extent as at the trial. Clearly, no other rule would make sense at the deposition which will be used in lieu of testimony.

Once the writing is produced, the adverse party is entitled to "inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness." Inspection of the writing and its use on cross-examinations certainly are not novel propositions. However, the introduction into evidence of those portions which relate to the testimony of the witness could be novel, depending upon how this provision is interpreted. Weinstein states that except insofar as the writing might be admissible other than under Rule 612 this "introduction" is restricted to introduction for impeachment purposes, not as substantive evidence.

The Committee's Notes [to Federal Rule 612] are silent on the consequences of introducing the writing in evidence.

154. See 3 WEINSTEIN ¶ 612[03], at 612-29, citing Schwartz v. Broadcast Music, 16 F.R.D. 31, 33 (S.D.N.Y. 1954) and Petition of Massachusetts Trustees of Eastern Gas and Fuel Associates, 200 F. Supp. 625, 626 (E.D. Va 1962). The Schwartz case, finding no reason for applying a different rule at trial and during deposition, enforces counsel's right to inspect a writing used by a witness to refresh his memory during the taking of a deposition. Petition of Massachusetts Trustees of Eastern Gas and Fuel Associates states:

The rule in admiralty is or should be that if a witness refreshes his recollection from a statement (or any other writing or object) before taking the stand and relies on what was contained therein, the cross-examiner is entitled to inspect so much of the statement as bears directly on the testimony given on the stand. . . .

[This rule] should apply in the taking of depositions, [citing Schwartz, supra] with procedure and sanctions adapted to the particular situation.

See also Rawlings v. Andersen, 195 Neb. 686, 695-96, — N.W.2d — (1976) which finds the rule inapplicable in a situation involving a deposition, but because the witness had not used the writing to refresh her memory. The Court does not indicate that the rule would not apply during a deposition. In fact, they seem to infer the opposite.

155. NEB. EVID. R. 612 and FED. R. EVID. 612.
In the first published draft the first sentence ended with the phrase "for the purpose of affecting his credibility." This was eliminated in the second draft.

Clearly, the writing should not be given substantive effect in every instance. To allow otherwise would undermine the usual modes of introducing evidence and would permit bypassing of best evidence, authentication and hearsay rules in many instances. Rather, this provision must be understood as allowing the jury to examine the writing: (1) as a guide to assessing the credibility of the witness and (2), to the extent that it would otherwise have been admissible, for its normal evidential value. An instruction to that effect should be given. In the original draft the phrase "for the purpose of effecting his credibility" was too restrictive because it eliminated the second use.156

In deciding whether to avail himself of the right to introduce portions of the writing into evidence, the attorney must be aware that in doing so he exposes himself to the requirement of Rule 106 (of the Nebraska157 and federal158 rules) that the judge, in his discretion, may require the contemporaneous introduction into evidence of such other parts of the writing as "ought in fairness to be considered contemporaneously." Counsel, before exercising the Rule 612 right to introduce parts of a writing into evidence, should consider the effect of Rule 106. Is there anything in the remainder of the writing which counsel does not want introduced? Are the

156. 3 WEINSTEIN ¶ 612[05], at 612-36.
Further, Nebraska Rule 801(4), and Federal Rule 801 define certain prior statements out of the hearsay rule. This indicates that other prior statements, offered to prove the truth of the facts asserted, are to remain hearsay, the general provisions of Rule 612 notwithstanding, and therefore are not admissible as substantive evidence of the facts asserted without an exception to the hearsay rule.

157. (1) When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other. When a letter is read, all other letters on the same subject between the same parties may be given. When a detached act, declaration, conversation or writing is given in evidence, any other act, declaration or writing which is necessary to make it fully understood, or to explain the same, may also be given in evidence.

(2) The judge may in his discretion either require the party thus introducing part of a total communication to introduce at that time such other parts as ought in fairness to be considered contemporaneously with it, or may permit another party to do so at that time.
NEB. Evm. R. 106.

158. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.
FE. R. Evid. 106.
adverse parts of the writing otherwise admissible or might counsel be opening the door to the admission by his opponent of otherwise inadmissible evidence? Will the contemporaneous receipt of this evidence disrupt the flow of counsel’s case-in-chief? The risk of opening the door for the contemporaneous receipt of adverse evidence must be considered.

Finally, Rule 612 of the Nebraska Evidence Rules provides: If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the judge shall make any order justice requires.109

These final provisions are not particularly novel. Among the sanctions available for nonproduction are striking the testimony, contempt, dismissal, finding issues against the offender or, in appropriate and exceptional cases, granting a mistrial.109 In regard to the nonproduction of a writing subsequent to a Rule 612 order to produce, it should be noted that Rule 612 is not intended to be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.101

At this point we are better able to deal with the question whether or not Nebraska Evidence Rule 612 requires the attorney to produce his work product when it is used by a witness, before testifying, to refresh his recollection.102 Weinstein suggests that

159. NEB. EVID. R. 612. This part of Federal Rule 612 is exactly the same except where the Nebraska rule uses the word “judge,” the federal rule uses the word “court” and the federal rule adds the following clause onto the end of the final sentence as enacted in Nebraska: “[E]xcept that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.” FED. R. EVID. 612.

160. Advisory Committee’s Note, FED. R. EVID. 612. See also FED. R. EVID. 612, quoted, in pertinent part, at note 161, supra.

Under the federal rule as enacted the only sanctions available in a criminal case would be striking the testimony or in the exceptional case declaring a mistrial. See note 161, supra. The application of any other sanctions to a criminal defendant who fails to comply with Rule 612 could possibly amount to a denial of due process. 3 WEINSTEIN ¶ 612(05), at 612-40.

161. See text accompanying notes 149 and 150 supra. The House Judiciary Committee’s Note to Federal Rule 612 makes specific mention of this point, see text accompanying note 150 supra. It is obvious, though unstated, that the intention of the Nebraska Rule is the same.

162. See the text accompanying note 151 supra.
the solution to this question is unclear but that in federal court
the judge should examine the material in camera.

Unless the judge finds that the adverse party would be
hampered in testing the accuracy of the witness' testimony,
he should not order production of any writings which re-
fect solely the attorney's mental processes. In arriving in
his decision, the judge must weigh the significance of the
testimony, the availability of other evidence impeaching
the testimony and the degree to which the witness appar-
ently relied upon the writing. In other words, just as in
applying Rule 403, the judge will have to be governed in
his decision by the facts of the particular case before him.

Generally, privileged material used to refresh before
trial should not be shown unless the use in refreshing
waived the privilege.\textsuperscript{163}

Weinstein's analysis indicates that a mandatory rule of production
(like Nebraska's) would require that the attorney's work product
be produced if it was used by a witness to refresh his memory for
the purpose of testifying, whether used before or during the testi-
mony. Additionally, it does seem that Nebraska Evidence Rule 612
simply makes the pretestimony refreshing recollection rule the
same as the rule applied when recollection is refreshed while testi-
ifying. Counsel has always had the right to see the work product
used in the latter situation. It seems clear that work product, when
used in pretestimony refreshment, will have to be produced in Ne-
braska courts.\textsuperscript{164}

Nebraska Evidence Rule 612 may have a substantial effect on
what an attorney will want to show his witnesses to refresh their

\textsuperscript{163} 3 \textsc{Weinstein} ¶ 612[04], at 612-35. Rule 403 is quoted in note 23
supra.

\textsuperscript{164} The only way around this application of the rule would be to raise
the work product rule to a status which somehow gives it precedence over
Nebraska Evidence Rule 612. Such a construction of the work product rule
seems unwarranted, illogical, and unlikely; it seems particularly unlikely in
light of the Supreme Court's recent decision in \textit{Goldberg v. United States},
— U.S. —, 44 L.W. 4424 (1976) \textit{[Goldberg]}.

The Jencks Act, 18 U.S.C. § 3500, provides in part:

After a witness called [in any criminal prosecution] by the
United States has testified on direct examination, the court shall,
on motion of the defendant, order the United States to produce any
statement (as hereinafter defined) of the witness in the possession
of the United States which relates to the subject matter as to which
the witness has testified.

In \textit{Goldberg} the Court held that the Jencks Act applies to the government
attorney's work product. "We see nothing in the Jencks Act or its legisla-
tive history that excepts from production otherwise producible statements
on the ground that they constitute 'work product' of Government lawyers." \textit{Goldberg}, at —, 44 L.W. 4426. Similarly there is nothing in federal or
Nebraska Rules 612 or their legislative histories which would exclude
"work product."
memory for the purpose of testifying. At a minimum it should be considered in this light. Viewed from the other side, it would seem that one question the examining attorney might now ask any witnesses other than his own would be: “Have you used any writing, document or other materials to refresh your recollection in preparation for your testimony here today?” If the answer is yes, in Nebraska courts the production of those writings, documents or materials can be demanded, with the consequent inspection, cross-examination therefrom, and introduction into evidence. In federal court, if the answer is yes, the attorney can request that the court, in its discretion, order such production so that the attorney may avail himself of the attendant rights.

RULE 613—PRIOR STATEMENTS OF WITNESSES

RULE 613(1). EXAMINING WITNESSES CONCERNING PRIOR STATEMENTS

Rules 613 of the federal and Nebraska rules concern the foundational requirements for the use of prior statements. The first subdivision of each rule relates to all prior statements, consistent or inconsistent, written or unwritten; it provides: “In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown or its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.”

This subdivision of Rule 613 works no change in Nebraska law. In the 1975 case State v. Wilmore, the Nebraska Supreme Court, citing Rule 613 of the then Proposed Nebraska Rules of Evidence (1973) and Rule 6-13 of the Proposed Federal Rules of Evidence, held “that in examining a witness concerning prior inconsistent testimony of that witness, extrinsic evidence of such testimony need not be introduced into evidence at that time. This is clearly in conformity with modern thinking upon the problem. . . . So far as Cropsey v. Averill [8 Neb. 151 (1879)], . . . is in conflict with the rule we have adopted, it is hereby overruled.” In Wilmore, the Supreme Court stated that the rule under Cropsey v. Averill, that the witness must be shown a prior inconsistent statement before being interrogated in regard to the contents of the statement,

165. Neb. Evid. R. 613(1). The Federal Rule 613(1) reads exactly the same except where the Nebraska rule states “The statement need not be shown or its contents disclosed”, the federal rule states “The statement need not be shown nor its contents disclosed.” Probably there is no difference in meaning between the two.

166. 192 Neb. 807, 814-5, 224 N.W.2d 756, 760 (1975).
was limited to *written and signed* statements. Therefore, in Nebraska it was never necessary to advise the witness of the contents of a prior inconsistent *oral* statement before interrogating him in regard to the contents of the statement.167

This first subdivision of Rule 613 changes federal law. Pre-Rule 613 federal law was that counsel could not impeach with a prior inconsistent writing without first showing the writing to the witness.168 In fact, as foundation for impeachment by the statement, counsel was required to confront the witness with the substance of the statement (or the statement itself, if in writing), the time and place of the making of the statement, and the persons present when the statement was made.169 This is no longer required in regard to any prior inconsistent statement, written or oral, under Rule 613.

As noted, the first subdivision of Rule 613 provides that "on request the [prior statement] shall be shown or disclosed to opposing counsel." This requirement enables opposing counsel to protect his witness against unwarranted insinuations that an inconsistent statement has been made when in fact there has been no such statement and to protect his client against unwarranted insinuations that a prior consistent statement has been made by his opponent's witness where in fact there has been no such statement. It will

167. Id. at 811, 224 N.W.2d at 758 (citing cases).
168. The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment, to cross-examination. Advisory Committee's Note, Fed. R. Evid. 613(a).
169. See the general authorities cited note 168 supra.

The theory behind requiring this sort of foundation is that it avoids unfair surprise to the witness, giving him a chance to recall a fact before he is assailed as dishonest, and it saves time if the witness admits the statement in the face of the confrontation required by the foundational elements. The counter arguments are that impeachment without prior confrontation can be more effective, thereby making cross-examination more effective, thereby aiding in the truth. The old rule was designed, in part, to protect the honest but forgetful witness. However, in doing so it necessarily gave the same protection to the dishonest witness. "The main impact of the changes from the orthodox rule is to give greater weight to surprise than to warning as a technique for ferreting out the truth." 3 Weinstein ¶ 613[02], at 613-9.
also allow counsel to interpose any appropriate privilege or work product objections. Additionally, the Advisory Committee's Note to Federal Rule 613 makes it clear that this "rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved." Allowing counsel to see the statement, of course, will also allow him to interpose any such best evidence objections.

**Rule 613 (2)—Extrinsic Evidence of Prior Inconsistent Statements of Witnesses**

The second subdivision of Rule 613 refers only to prior inconsistent statements, written or unwritten. It provides: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interest of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in" Rule 801.

This changes prior Nebraska and federal law. The Nebraska Supreme Court had held:

"In order to lay a sufficient foundation for the introduction of evidence to contradict the statement of a witness, as to a statement alleged or denied by him, it is indispensable that the witness's attention be called to the declaration alleged or denied to have been made, and that the time and place, when and where, and that the person to whom such statement should have been made be cited.

\* \* \*

The difference between that prior law and Rule 613 of the Nebraska Evidence Rules is that it is no longer necessary for the impeaching attorney to lay that sort of foundation prior to producing extrinsic evidence. Under Rule 613 he need only, at some unspecified time, afford the witness an opportunity to explain or deny, while affording the opposite party an opportunity to interrogate the witness.

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171. Advisory Committee's Notes, Fed. R. Evid. 613(a).

172. Neb. Evid. R. 613(2) and Fed. R. Evid. 613(b). The Nebraska rule completes the final sentence as follows: "subdivision (4)(b) of section 27-801." The federal rule completes the final sentence as follows: "rule 801 (d)(2)." The referenced subdivision of Rule 801 changes prior Nebraska and federal law by defining admissions by a party-opponent out of the hearsay rule. Neb. Evid. R. 801 (4)(b) and Fed. R. Evid. 801 (d)(2).

thereon. Federal Rule 613(b) works the same sort of change in prior federal law. Pre-Rule 613 federal requirements were the same as those laid out by the Nebraska supreme court in the Wilmore case.\textsuperscript{174}

The second subdivision of Rule 613 governs the introduction of extrinsic evidence of a prior inconsistent statement by a witness. It codifies certain foundational requirements, while giving the judge the discretion to waive them in an appropriate case, i.e., where "the interests of justice" so require. It provides that extrinsic evidence will not be admissible "unless the witness is afforded an opportunity to explain or deny" the prior inconsistent statement "and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require."\textsuperscript{175} Extrinsic evidence of a prior inconsistent statement would be evidence outside of or external to the statement itself. It would be that evidence which would authenticate the prior inconsistent statement whether that statement was written, mechanically recorded, recorded in the memory of a witness to the statement, or in whatever form the statement was to be introduced to the trier of fact. Rule 613 does not mean that prior to using extrinsic evidence of the prior inconsistent statement, the impeaching attorney must ask the to be impeached witness questions designed to elicit his explanation or denial of the statement. It simply means that the impeaching attorney must see that the occasion or chance for such explanation or denial is available to the witness. The "opportunity" here is a function of the timeliness of the notification that extrinsic evidence of a prior inconsistent statement is to be used. Timely notice provides the "opportunity" for the witness to explain or deny and for opposing counsel to interrogate the witness in regard to the statement. This timely notice would be the minimal way in which to provide the necessary "opportunity."

If extrinsic evidence of a prior inconsistent statement is to be provided by the witness to be impeached, if he is to be the vehicle for authenticating the statement, then Rule 613 is complied with; notice is timely. The witness can explain or deny the statement, if not during his examination by impeaching counsel, then on cross or redirect examination by other counsel. If the witness being impeached admits to the prior inconsistent statement, then he has been impeached and further extrinsic evidence is neither necessary nor generally allowed.\textsuperscript{176}

\textsuperscript{174} Authorities cited in note 168 supra.
\textsuperscript{175} NEB. EVID. R. 613(2) and FED. R. EVID. 613(b) (emphasis added).
\textsuperscript{176} E.g., MCCORMICK § 37, at 73 (citing authorities); 3 WEINSTEIN ¶ 613[04], at 613-18 to -19 (citing authorities).
If extrinsic evidence of a prior inconsistent statement is to be provided by a witness other than the one to be impeached or if the statement is somehow self-authenticating, Rule 613 would require that the impeaching attorney actually notify his opponent of his intention to impeach with extrinsic evidence. The notification should come no later than the time that the witness to be impeached leaves the stand. This gives opposing counsel the opportunity to either keep the witness around for explanation or denial in rebuttal or ask the judge to require that the impeaching attorney put on his extrinsic evidence immediately so that the witness will be able to explain or deny, if such is desired. Notification at any time later than that runs the risk of being not timely and, therefore, not providing a real opportunity.

In regard to these foundational requirements for the introduction of extrinsic evidence of a prior inconsistent statement, the rule provides that they need not be provided if “the interests of justice otherwise require.” This gives the court the discretion to waive the otherwise required foundation. This discretion should be exercised when the impeaching statement comes to counsel’s attention after the witness to be impeached has testified and, through no fault of counsel, becomes unavailable. Further, this opportunity for the witness to explain or deny and for the opposite party to interrogate him on the inconsistent statement “does not apply to admissions of a party-opponent” as defined in Rule 801.

Finally, it should be noted that special Nebraska statutes relating to depositions and the production of documents may affect the operation of this rule in Nebraska.

178. See generally 3 Weinstein ¶ 613[04] and particularly at 613–16 and 613–24 to -25. In connection with the court ordering that the impeaching witness be called immediately, out of order, see Neb. Evid. R. 611(1) and Fed. R. Evid. 611(a), dealing with the judge’s control over the mode and order of interrogating witnesses and quoted in the text accompanying note 98 supra.
179. Advisory Committee’s Note, Fed. R. Evid. 613(b); 3 Weinstein ¶ 613[04], at 613–23. The trial court should also be mindful of Rule 403 (see note 18 supra) which provides for the exclusion of relevant evidence because its probative value is outweighed by the danger of prejudice, repetition, confusion or time consumption. Weinstein ¶ 613[04], at 613–23.
180. Neb. Evid. R. 613(2) and Fed. R. Evid. 613(b). The reference to Rule 801 is to Neb. Evid. R. 801(4) (b) and to Fed. R. Evid. 801(d) (2), which define admissions by a party-opponent out of the hearsay rule. Since such statements are not hearsay, they can be used as substantive evidence and do not have to be used for the limited purpose of impeachment.
181. “Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken.” (Neb. Rev. Stat. § 25–1267.07) (Reissue 1964).
182. No written, audio-visual, or videotape statement, other than a
RULE 614. CALLING AND INTERROGATION OF WITNESSES BY JUDGE

RULE 614 (1)—CALLING OF WITNESSES BY JUDGE

Rules 614 of the Nebraska and federal rules provide that a judge may call and interrogate witnesses and that objections to his doing so may be made at that time or at the next opportunity when the jury is absent.183 The first part of the rule is simply a codification of the common law right of the trial judge to call witnesses, a right which has never been seriously disputed either in federal court or in the courts of Nebraska.184 He may do so on his "own motion or at the suggestion of a party . . . and all parties are entitled to cross-examine witnesses thus called."185 Calling court's witnesses is a matter for the discretion of the trial judge and will

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deposition, of a person who when he gave the statement was or after giving the statement becomes a party to a civil action arising under the laws of the State of Nebraska or the common law recognized therein, may be used against the person giving the statement if such person shall have made a written request for a copy thereof and such copy shall not have been furnished within twenty days after the date of such request.

NEB. REV. STAT. § 25-1222.02 (1975 Supp.).

183. NEB. EVID. R. 614 and FED. R. EVID. 614.

184. See Advisory Committee's Note, FED. R. EVID. 614, and the authorities cited therein; 3 WEINSTEIN ¶ 614[02], at 614-5; P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 71-72 (1973); Comment, Witnesses Under Article VI of the Proposed Federal Rules of Evidence, 15 WAYNE L. REV. 1236, 1245 (1969) (the power to call witnesses is inherent in the judicial office) (citing cases).

The Eighth Circuit case of Smith v. United States, 331 F.2d 265 (8th Cir. 1964), is representative of pre-Rule 614 federal cases in regard to the court's witnesses. In Smith, the court stated:

The practice in criminal cases of calling someone as a court's witness, while seldom used and not particularly desirable, is recognized as proper in both state and federal courts. . . . The exercise of the right or rule is a discretionary matter with the trial court and only for an abuse of that discretion resulting in prejudice to the defendant will the trial court be judged in error and a conviction reversed. . . . The effect is that neither party to the suit may be held responsible for the testimony of the witness and both of course may exercise the privilege of cross-examination. . . . Judge Learned Hand, in United States v. Marzano, 2 Cir., 1945, 149 F.2d 923, said at page 925:

It is permissible, though it is seldom very desirable, for a judge to call and examine a witness whom the parties do not wish to call. . . . A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert. 331 F.2d at 273. [Citation omitted.]

Though the Eighth Circuit, in Smith, discusses criminal cases, the same principles are applicable in civil cases. See, 3 WEINSTEIN ¶ 614[02], at 614-5, citing Chalmette Petroleum Corp. v. Chalmette Oil Distrib. Co., Inc., 143 F.2d 828, 829 (5th Cir. 1944).

185. NEB. EVID. R. 614 (1) and FED. R. EVID. 614 (a).
be reversed on appeal only when an abuse of that discretion can be shown.

Though never in doubt, the right has been seldom exercised. Its principal use has been in the situation where a party wants to examine a witness but is reluctant to call the witness as his own because he does not trust him. In many jurisdictions a party vouches for the credibility of any witness whom he calls and, therefore, cannot impeach any such witness. Since the federal rules have abolished the rule against impeaching one's own witness, and since it had previously been abolished in Nebraska, requests by the parties that the court call a witness should be less frequent in those jurisdictions. There may still be reason, however, for a party to request that a judge call a witness as his own, in that through this process the party avoids the identification that jurors tend to make between witnesses and the party calling them. Additionally, the judge may wish to call his own witnesses "to obtain information which he deems essential to a just and proper decision but which the parties have failed to provide."

Note that the calling of expert witnesses by the judge is governed by Rule 706 of the Nebraska and federal rules.

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186. Rule 607 of the Nebraska and federal rules states: "The credibility of a witness may be attacked by any party, including the party calling him." NEB. EVID. R. 607 and FED. R. EVID. 607. Prior to the adoption of the Nebraska Evidence Rules, the Nebraska Supreme Court had already abandoned the rule against impeaching one's own witness, adopting a rule that was later to become Rule 607. State v. Fronning, 186 Neb. 463, 465, 183 N.W.2d 920, 921 (1971).


188. 3 WEINSTEIN ¶ 614[02], at 614-6. Weinstein goes on to suggest that "[s]uch use may be particularly desirable in bench trials or where the interest of others than the immediate parties may be at stake, as in class actions, or matters involving public policy, such as antitrust or patent litigation." Id. Professor Rothstein suggests that "[p]erhaps the primary reason for allowing the judge to call witnesses is that the trial judge and jury should not always be confined to making decisions based on the case as made by the parties." P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 72 (1973).

189. NEB. EVID. R. 706 and FED. R. EVID. 706. This Nebraska and federal rule are the same except that the federal rule uses alphabetic subdivision designations while the Nebraska uses numeric designations and where the Nebraska rule uses the word "judge", the federal rule uses the word "court", with the appropriate pronoun change from "his" to "its". The Nebraska rule reads as follows:

(1) The judge may on his own motion or on the motion of any party enter an order to show why expert witnesses should not be appointed, and may request the parties to submit nominations. The
RULE 614(2)—INTERROGATION OF WITNESSES BY THE JUDGE

Nebraska Rule 614(2) and Federal Rule 614(b) codify the common law right of the judge to interrogate witnesses, whether called by himself or by a party. Wigmore has referred to this power as “one of the natural parts of the judicial function.” Interrogation of witnesses by the judge is limited by his proper role as impartial arbiter. In other words, this right is abused when the interrogation is of such a character as to indicate the personal belief of the judge for or against a particular witness or a particular party—abused when the court’s interrogation evidences advocacy or bias. The Advisory Committee’s Note to Federal Rule 614 and the Comment to Nebraska Rule 614 make it clear that abuses by trial courts in their interrogation of witnesses are to continue to be controlled by reversal on appeal even though the rule itself makes no mention of limits on the scope of the court’s interrogation. The Advisory Committee states that reversal is to come “when the judge abandons his proper role and assumes that of advocate.”

As noted above, Rule 614 does not change prior law in either federal or Nebraska courts. Pre-Rule 614(2) law in the state

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190. NEB. EVD. R. 614(2) and FED. R. EVD. 614(b).
192. 3 WEINSTEIN ¶ 614[03], at 614-9, et seq.
193. Advisory Committee’s Note, FED. R. EVD. 614(b), and Comment, Proposed Nebraska Rules Booklet at 105.
194. Advisory Committee’s Note, FED. R. EVD. 614(b).
195. For a discussion of the law in federal court prior to the adoption of the Federal Rules of Evidence, see 3 WEINSTEIN ¶ 614[03], at 614-9 et seq. WEINSTEIN, id., nn. 3-6, 8-11, cites inter alia, the following cases:
of Nebraska was most recently stated in Coyle v. Stopak, wherein the court said:

“We see no impropriety in a trial court interrogating witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in nowise to influence the jury, save as the testimony will assist them to arrive at a correct conclusion on the questions of facts in issue.”

However, this right “* * * should be very sparingly exercised, and generally counsel for the parties should be relied on and allowed to manage and bring out their own case. The actions of the judge in this respect should never be such as to warrant any assertion that they were with a view to assistance of the one or the other party to the cause.”

However, “* * * the judge presiding at a trial must conduct it in a fair and impartial manner, he should refrain from making any unnecessary comments or remarks during the course of a trial which may tend to a result prejudicial to a litigant or are calculated to influence the minds of the jury. A remark or comment which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial; * * *.”

United States v. Ostendorf, 371 F.2d 729, 732 (4th Cir.), cert. denied, 386 U.S. 982 (1967) (the judge “has not only the right, but the duty to participate in the examination of witnesses when necessary to bring out matters that have been insufficiently developed by counsel”); United States v. Guglielmini, 384 F.2d 602, 605 (2d Cir. 1967) (“... the [judge's] persistent questioning ... together with his comments to defense counsel, conveyed to the jury far too strong an impression of his belief in the defendants' guilt.

Few claims are more difficult to resolve than the claim that the trial judge, presiding over a jury trial, has thrown his weight in favor of one side to such an extent that it cannot be said that the trial has been a fair one. Where there is any substance to such a claim the reviewing court must examine the entire record and attempt to determine whether the conduct of the trial has been such that the jurors have been impressed with the trial judge's partiality to one side to the point that this became a factor in the determination of the jury”); United States v. Ball, 428 F.2d 26, 30 (6th Cir.) pet. for cert. dismissed, 400 U.S. 801 (1970) (“not a "desirable practice"”); United States v. Green, 429 F.2d 754, 760 (D.C. Cir. 1970) (“power should be sparingly exercised”; court should err on the side of abstention); LaBarge Water Well Supply Co. v. United States, 325 F.2d 798, 802 (8th Cir. 1963) (Blackmun, J.) (“Our responsibility is only to see that the court has not stepped into the area of unfairness and prejudice.”)

196. 165 Neb. 594, 610, 86 N.W.2d 758, 770 (1957) (citations omitted).

In addition to the cases cited in the above quotation, see Maynard v. State, 81 Neb. 301, 116 N.W. 53, 56 (1908) (“... unless in case of urgent necessity, the presiding judge should refrain from interfering in any way with the progress of the trial; ... However, unless it is made to appear that the action of the court has in some way been to the prejudice of the party on trial, the judgment should not, on that ground and for that reason
Though several courts have stated that the questioning of witnesses by the court is not a desirable practice and that the exercise of the power is subject to review "reversals for improper interrogation are rare. Appellate courts ordinarily find either that the judge did not abuse his discretion, or that his actions while erroneous did not amount to reversible error."\(^{197}\)

In deciding whether a trial court's questioning of witnesses is reversible error, the appellate court may consider the following factors, \emph{inter alia}:

- whether the witnesses' testimony needed clarification,
- whether the witnesses were unusually hesitant and in need of assurance,
- whether the court used leading questions,
- whether the court interfered with cross-examination,
- whether the court's interruptions favored one side exclusively,
- whether the court instructed the jury to arrive at their own conclusions,
- whether the parties were being adequately represented, and
- whether an objection to the questioning was made.

In reaching its decision, the appellate court must bear in mind that the cold record does not alone, be reversed. While this is true, we all agree that the practice is wrong and, as a general thing, should not be indulged in. . . . It is not a question of the motives or purposes of the trial judge in asking the questions, but what was the effect of the court's action.

\(^{198}\) Weinstein goes on to suggest that the court dictate into the record its reasons for interrogating a witness when those reasons are not otherwise apparent on the face of the record. He concludes, at 614-15, by stating that "[a]mbiguities in the record will normally be resolved in favor of the trial court."

For a Nebraska case regarding curative instructions, see Omaha Brewing Ass'n v. Bullnheimer, 58 Neb. 387, 391-2, 78 N.W. 728, 729 (1899), where, after finding the trial court's interrogation of the witness, and its remarks to counsel upon his objection to have been prejudicial error, the Supreme Court refused to reverse, noting that the trial court "on the next day, admonished the jury that the matter was wholly one between it and the counsel and not to be considered by the jurors. This admonition was full and
Nebraska Rule 614(3) and Federal Rule 614(c) provide that objections to the trial court's actions under the first two subdivisions of the rule may be made either at the time of the court's calling or interrogation of a witness or "at the next available opportunity when the jury is not present." This does not change prior federal or Nebraska law. This subparagraph is, in a sense, an accommodation between the "automatic objection" and the "timely objection." An objecting attorney need not subject himself to the possible embarrassment attendant the objection in the presence of the jury. He may object outside the presence of the jury; but, he must do so at his first opportunity. Forcing the attorney to make the objection at the next opportunity serves the positive function of allowing the trial court to save the trial by taking curative measures when possible. "Since he need not object until the next opportunity when the jury is absent, there is no question of [the attorney's] forfeiting his rights by failing to object when the judge asks the first question. Rather, he can assess the judge's attitude towards the particular witness in its totality before deciding whether his client's rights have been prejudiced."

**RULE 615—EXCLUSION OF WITNESSES**

Federal and Nebraska Rules 615 are identical except for the federal rule's use of the word "court" rather than "judge", and the appropriate pronoun change. Nebraska Rule 615 reads as follows:

At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order on his own
motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.\textsuperscript{204}

Over the years, the general dispute in regard to the exclusion or sequestration of witnesses has been whether a party has a right to have witnesses sequestered or whether it is a matter for the court's discretion. The traditional rule was one of discretion.\textsuperscript{205} Rule 615 resolves this dispute by emphasizing sequestration as a matter of right but leaving exceptions and a great deal of discretion with the judge. The right is far from absolute.

A party has a right to have all witnesses excluded except those fitting into one of three categories. First, a party who is a natural person cannot be excluded. Second, if a party is not a natural person and the party's attorney has designated a witness who is an officer or employee of the party as the party's representative, then that witness cannot be excluded. Both of these exceptions to the right of exclusion are nondiscretionary and capable of mechanical application. The exception for the party who is a natural person is obvious and self-executing, and it may be required by due process, confrontation and assistance of counsel requirements.\textsuperscript{206} The non-natural person exception, while not self-executing, requires only the attorney's designation of an officer or employee of the non-natural party. Such designation of an appropriate witness automatically applies the exception. This will be a very useful tool for the attorney of the governmental, corporate or other non-natural party. In a criminal proceeding this exception can be used to keep the investigating officer in the courtroom as the designated representative of the governmental party prosecuting the action. In a civil action, for example, where an employee of a corporate defendant is allegedly responsible for an accident, but the corporation alone is named as defendant, the allegedly responsible employee could be designated the representative of the corporation and, therefore, not subject to

\textsuperscript{204} Nebr. Evid. R. 615.

\textsuperscript{205} E.g., 3 Weinstein ¶ 615(01), at 615-5 to -6 (1975) (citing authorities); Comment, Witnesses Under Article VI of the Proposed Federal Rules of Evidence, 15 Wayne L. Rev. 1236, 1248 & n. 72 (1969) (citing cases).

\textsuperscript{206} E.g., Advisory Committee's Note, FED. R. EVID. 615.

The overnight sequestration of the defendant in a criminal trial, preventing consultation with his attorney during an overnight recess, has been held to violate his Sixth Amendment right to assistance and guidance of counsel. \textit{Geders v. United States}, — U.S. —, 44 L.W. 4420 (1970).
exclusion. In this particular application of the rule it may actually lead to less sequestration than was the practice before its enactment, providing a protection for an allegedly responsible but non-defendant witness. (It seems clear that the rule contemplates that only one representative may be so designated for each non-natural party.)

The third and final exception to the “right” of exclusion is neither self-executing nor non-discretionary. “[A] person whose presence is shown by a party to be essential to the presentation of his cause”207 is not subject to Rule 615 exclusion. The court determines, in its discretion, what witnesses are “essential.”208 The drafters of federal and Nebraska Rule 615 have given the court some guidance in regard to the exercise of that discretion. “The category [persons whose presence is shown by a party to be essential to the presentation of his cause] contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation.”209

Prior Nebraska law was that while sequestration was not necessarily mandatory, it was to be favored except as to witnesses called as experts.210 In fact, the Nebraska Supreme Court had gone so far as to say that “an order excluding witnesses so that they may be examined out of hearing of each other is rarely withheld.”211 Now, under the Nebraska Evidence Rules, rather than

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207. NEB. EVID. R. 615 and FED. R. EVID. 615.
208. See, 3 WEINSTEIN ¶ 615[01].
209. Advisory Committee's Note, FED. R. EVID. 615. This statement has been quoted and adopted by the drafters of Nebraska Evidence Rule 615. Proposed Nebraska Rules Booklet at 106.

In many cases it will not be necessary to argue to the court that “an agent who handled the transaction being litigated” is “essential to the presentation” of a party's cause. If the party is not a natural person the agent could no doubt simply be designated the party’s representative, leaving the court no discretion. This would include the corporate agent, the FBI agent, etc. See the discussion in the text following note 215 supra.

Weinstein states:

This exception may perhaps most frequently be invoked in the case of expert witnesses. Certainly an expert who intends to base his opinion on “facts or data in the particular case” (Rule 703) will be unable to testify if he has been excluded. Experts needed to advise counsel on technical matters, as for instance in tax or patent litigation, might also qualify as essential persons. The court's decision to exempt persons from the exclusion order will depend on the facts of the particular case. The responsibility for demonstrating that a given witness is essential lies with the parties.

3 WEINSTEIN ¶ 615[01], at 615-8 to -9.
being discretionary but favored, sequestration is required with exceptions.\textsuperscript{212}

While Rule 615 is phrased in terms of a right to exclusion as opposed to the more traditional discretionary rule,\textsuperscript{213} its primary effect seems to be a change in the burden of persuasion. Prior to Rule 615 the party requesting sequestration often had to convince the judge to exercise his discretion in favor of excluding the witness. With Rule 615, when sequestration is requested opposing counsel must convince the court that, under Rule 615, this particular witness should not be excluded. To make a record for appeal in the former situation it was up to the party requesting sequestration to demonstrate an abuse of discretion.\textsuperscript{214} To make a record for appeal under the rules, it is up to the party opposing sequestration to show that the witness is a natural person party, that the witness who is an officer or employee of a party which is not a natural person has been designated as the representative of that party or that the witness is “essential to the presentation of his cause.”

\textbf{CONCLUSION}

Rules 601-606 of the Nebraska and federal rules, dealing with the competency of witnesses, and Rules 611-615, dealing generally with the examination of witnesses for purposes other than impeachment contain a number of particularly important, particularly note-

\textsuperscript{212} In regard to examination of witnesses before magistrates, Neb. Rev. Stat. § 29-505 (Reissue 1964) provides:

The magistrate, if requested, or if he sees good cause therefore, shall order that the witnesses on both sides be examined each one separate from all the others, and that the witnesses for may be kept separate from the witnesses against the accused during the examination.

\textsuperscript{213} See note 205 and accompanying text supra.

\textsuperscript{214} Though sequestration was “favored” prior to the adoption of the rules, if it was not granted, the burden to demonstrate an abuse of discretion was on the party who had requested sequestration or the trial courts ruling would not be reversed on appeal. See, Maynard v. State, 81 Neb. 301, 307, 116 N.W. 53, 56 (1908) wherein the Nebraska Supreme Court stated, in reference to requested exclusion of state’s witnesses:

There is no reason shown by the record why this request was refused. We are unable to find anything throwing light upon the action of the court, either of reasons for refusing the request or why it should have been granted. . . . That such a request, in cases of the importance of this one, should be granted cannot be questioned. . . . However, the ruling of the trial court refusing such a request does not call for a reversal of the judgment where an abuse of discretion is not apparent.

Under Rule 615 the result in Maynard would be just the reverse and for basically the same reasons. Under Rule 615 the burden shifts to the party opposing exclusion of the witness.
worthy provisions. The most important parts of those rules can be summarized as follows.

Rules 601 of the Nebraska and federal rules remove all incompetencies. Rules 602, 603, 605, and 606 reinstate those of the presiding judge, the members of the sitting jury, persons lacking personal knowledge and persons refusing to take an oath or affirmation. The major change here, no doubt, is the repeal of the Dead Man's Statute.

Rules 605 of the Nebraska and federal rules places an absolute prohibition on testimony by the presiding judge. It is further provided that no objection need be made to preserve any such error for appeal.

Rules 606 of the Nebraska and federal rules prohibit inquiry into the jury's verdict in regard to anything other than outside influences having been improperly brought to bear upon them or “extraneous prejudicial information” having been improperly received.

Federal and Nebraska Rules 611 provide that counsel may ask leading questions when examining, among others, “a witness identified with an adverse party.” The witness need not be actually hostile to the examining attorney but need merely have some close association with an adverse party. That association, for example, could be emotional, familial or the result of employment.

Rule 612 of the Nebraska rules provides a new tool of discovery. It requires production, upon request, of any writing (not otherwise privileged) used to refresh the recollection of a witness for the purpose of testifying even when that writing was used for that purpose prior to the actual trial of the case. This includes the mandatory production of the attorney's work product when it has been used by a witness for this purpose. As noted, this provides the trial attorney with a new tool of discovery and an additional consideration when deciding what to show his witnesses to refresh their recollection for the purpose of testifying. Additionally, once the writing is produced the adverse party is entitled to “inspect it, to cross-

215. Note 5, et seq., and accompanying text supra.
216. Note 24, et seq., and accompanying text supra.
217. Note 70, et seq., and accompanying text supra.
218. Note 87, et seq., and accompanying text supra.
219. Note 130, et seq., and accompanying text supra.
220. Note 134, et seq., and accompanying text supra. Federal Rule 612, on the other hand, makes the production of such a writing discretionary with the court. Id.
examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.\textsuperscript{221}

Rules 613 of the Nebraska and federal rules provide that in examining a witness regarding a prior statement, whether written or not and whether consistent or not, the attorney need neither first show the statement to the witness nor disclose its contents to him. While this does not change pre-existing Nebraska law, it does work a significant change in federal law and is contrary to the prevailing rule in most jurisdictions.\textsuperscript{222}

Finally, Rules 615, Nebraska and federal, provide for the exclusion or sequestration as a matter of right of all witnesses except those falling into one of three categories: the party who is a natural person; the witness who is an officer or employee of a non-natural party and who has been designated as that party's representative; and the person whose presence is shown by a party to be essential to the presentation of his cause.\textsuperscript{223}

\textsuperscript{221} Note 155 and accompanying text supra.
\textsuperscript{222} Note 165, et seq., and accompanying text supra.
\textsuperscript{223} Note 203, et seq., and accompanying text supra.