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Article I of the Wyoming Rules of Evidence: The Not-So-General Provisions

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COMMENTS

ARTICLE I OF THE WYOMING RULES OF EVIDENCE: THE NOT-SO-GENERAL PROVISIONS

INTRODUCTION

In the interest of uniformity with federal practice the Supreme Court of Wyoming recently adopted, with minor changes, the Federal Rules of Evidence. Article I of the Wyoming Rules is an exact replica of its federal counterpart, with the exception of Rule 101.[1]

The Article is entitled "General Provisions," and, as such, may escape the attention of the reader. Indeed, a cursory reading reveals nothing more than what everyone already knows about the law of evidence. However, the Rules are deceptive in their apparent simplicity, and their usefulness will often depend upon a clear understanding of their underlying principles and limitations. It is the purpose of this Comment to explain the functions of the Rules in Article I and to focus attention on the various problems which can arise under even the most rudimentary provisions.

RULE 102: PURPOSE AND CONSTRUCTION[2]

One might question the wisdom of an attempt to codify the myriad rules and standards which make up the law of evidence.[3] It would be unfortunate if a court's ability to arrive at a reasonable solution to unforeseen evidentiary problems were hampered by a mechanical and unthinking application of the Rules. Testimony at the committee hearings on the Federal Rules indicated some apprehension as to that possibility:

> MR. HUTCHINSON. There is one problem that occurs to me. Since in the past the rules of evidence have

1. WYO. R. EVID. 101 provides: "These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in rule 1101." Similarly, FED. R. EVID. 101 states: "These rules govern proceedings in the courts of the United States and before United States magistrates, to the extent and with the exceptions stated in rule 1101."
2. WYO. R. EVID. 102, Purposes and Construction, provides: These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.
3. Testimony before Congress at the Senate hearings on the Federal Rules indicated that the law of evidence had grown to some 1,500,000 cases. *Hearings on H. R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 20 (1974).

> evolved and changed over a period of time, I want to inquire as to what the effect of putting them into statutory form will be. Will this effectively freeze them so that there can be no changes in the rules of evidence henceforth except by coming back to Congress and asking Congress to amend the statute?[4]

The response to Congressman Hutchinson is found in the directive of Rule 102. The rules of evidence are to be construed to achieve the goals of "truth" and "justice" through application of the principles of "fairness", "efficiency", and "growth and development of the law." In this manner, Rule 102 establishes flexibility as the theme[5] without granting the court a "procedural 'wild card' the judge can use to trump another played by one of the parties at an inopportune moment."[6] Although the Rule is not an explicit grant of discretion,[7] other rules authorize considerable latitude of choice in particular situations.[8]

The rule of construction enunciated in Rule 102 is comparable to those stated in the Wyoming Rules of Civil Procedure[9] and the Wyoming Rules of Criminal Procedure.[10] Like its counterparts, Rule 102 should be construed as a direction to avoid defeating the overall purpose of the rules by rigid application of a particular mandate in an inappropriate situation.

RULE 103: RULINGS ON EVIDENCE[11]

Appellate courts ordinarily will not consider issues that were never raised at trial, or were not timely raised and there-

4. 120 CONG. REC. 1413 (1974) (remarks of Congressman Hutchison).
5. WEINSTEIN & BERGER, 1 WEINSTEIN'S EVIDENCE ¶102 [01] (1976) [hereinafter cited as WEINSTEIN].
6. WRIGHT & GRAHAM, 21 FEDERAL PRACTICE AND PROCEDURE § 5023, at 128 (1977) [hereinafter cited as WRIGHT & GRAHAM], *citing* Advisor's Note, MAINE R. EVID. 102:
   > The rule is a guide as to the principles by which the judge is to exercise his discretion, but not of course a license to disregard the rules to reach a result he believes to be just.
7. WRIGHT & GRAHAM § 5023, at 129.
8. *See, e.g.*, Rules 103(b), 201(c), 403, 608(b), 611(a), 614, 706.
9. WYO. R. CIV. P. 1. "[T]hese rules shall be construed to secure the just, speedy and inexpensive determination of every action."
10. WYO. R. CRIM. P. 2. "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."
11. WYO. R. EVID. 103 is as follows:
    Rulings on Evidence
    (a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affect-

fore not considered by the trial court. Rule 103 makes specific this rule regarding objections to the admission or exclusion of evidence. Two major points are made: (1) the responsibility for providing evidence and invoking the rules of exclusion rests with the parties and not the court, and (2) reversals on purely technical grounds not affecting substantial rights are to be avoided.[12] The basic policy underlying both these points "is that the rules of evidence are only to be enforced where enforcement is a matter of importance."[13]

Objections

Under our adversary system of justice the burden of producing evidence and objecting to its introduction is imposed on the parties. Because they are usually represented by counsel "who are presumed to be vigilant in the protection of their clients' rights, it is the general practice of the courts to receive whatever may be offered as evidence unless objection is made to its introduction."[14] Rule 103(a)(1) continues this tradition by placing the initiative on the party to inform the court promptly of contentions that evidence should be excluded.[15] Failure to make a timely objection or motion to

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ed, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) *Record of offer and ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Plain error.* Nothing in this rule precludes taking notice of plain error affecting substantial rights although they were not brought to the attention of the court.

Wyoming Committee Note: Under Rule 103(a), it is not necessary to reoffer evidence which has been suppressed by action of the court on a pretrial motion, such as a motion in limine or a motion to suppress, or to make a further objection at the time of trial to evidence which has previously been ruled admissible on such a pretrial motion.

12. WEINSTEIN ¶ 103[01], at 103-5.
13. WRIGHT & GRAHAM § 5032, at 161.
14. JONES, 4 THE LAW OF EVIDENCE § 975, at 1834 (5th ed. 1958).
15. This is in accord with the generally accepted practice in Wyoming. *See* WYO. R. CIV. P. 46:

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a

strike stating the specific grounds precludes assignment of error on the erroneous admission of that evidence.[16] The evidence received will then be allowed its natural probative value in the litigation.[17]

Specificity: Grounds and Reference

The purpose of a rule which requires objections at the trial court level is to "expedite finality and economy in litigation" by giving both the offering party and the trial judge an opportunity to make corrections "which may obviate the need for further proceedings."[18] In addition, the appearance of an objection on the record is essential to enable review by the appellate court. Objections can serve the functions of alerting the proponent and judge of the nature of the challenge and preserving the issue for an intelligent review on appeal only if the grounds of the objection are stated with specificity. Rule 103(a)(1) embodies this notion by requiring the "specific ground" to appear on the record if it was not "apparent from the context."[19]

Because the rule does not define the degree of specificity required, it may be difficult for counsel to determine how to choose the words which will protect his client's rights on appeal.[20] The only black-letter law is that the overworked litany

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ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

WYO. R. CRIM. P. 48 is to the same effect.

16. This too is consistent with Wyoming practice and procedure. Weber v. Johnston Fuel Liners, Inc., 519 P.2d 972, 976 (Wyo. 1974). An exception to the rule may exist where testimony is presented in violation of the parol evidence rule. The Supreme Court of Wyoming has held that since the parol evidence rule is a matter of substantive law, the reviewing court may consider the propriety of admitting the evidence even where a timely objection has not been made. State v. Cheever, 71 Wyo. 303, 257 P.2d 337, 340 (1953); *but see*, Lansen v. Sjogren, 67 Wyo. 447, 226 P.2d 177, 186 (1951) in which the court found a waiver of the parol evidence rule objection where the testimony as to the oral modification of the contract "was admitted without objection and a good deal of it was brought out by cross-examination on the part of counsel for appellants."
17. However, a verdict cannot be based upon irrelevant evidence received without objection. Hirsch v. Immigration and Naturalization Service, 308 F.2d 562, 567 (9th Cir. 1962) ("Failure to object may make incompetent evidence competent, but it cannot make irrelevant evidence relevant.").
18. WEINSTEIN ¶ 103[02], at 103-11.
19. The Wyoming Supreme Court has agreed that general objections are insufficient to preserve an issue for appeal. Murdock v. State, 351 P.2d 674, 679 (Wyo. 1960). However, if evidence is inadmissible for any purpose a general objection may be sufficient. Thex v. Shreve, 38 Wyo. 285, 267 P. 92, 94-95 (1928).
20. It should be noted that Rule 103 does not forbid the use of general objections at trial. The rule is directed toward the creation of grounds for appealing an adverse ruling. A trial court may sustain a general objection and will be upheld on appeal if any basis for the ruling can be found. On the other hand, a trial court's action in overruling a general objection will also be affirmed. MCCORMICK, EVIDENCE § 52, at 116 (2d ed. 1972) [hereinafter cited as MCCORMICK].

of "incompetent, irrelevant and immaterial" is insufficient to preserve an objection for review. As stated by one commentator, "the trial judge is justified in treating it as a confession of ignorance and is not required to stop the trial to see if any real grounds for objection exist."[21]

The Advisory Committee to the Federal Rule has defined the objective of the requirement as "to alert [the court] to the proper course of action and enable opposing counsel to take proper corrective measures."[22] An objection which serves this purpose should be sufficient to preserve the point for review. However, it is not always possible to predict the way in which a court will view the specificity (or lack thereof) of a particular objection.

Weinstein discusses two federal cases, *Een v. Consolidated Freightways*[23] and *Blair v. United States*,[24] to illustrate how appellate courts can use either a technical or flexible approach in assessing the specificity of an objection.[25] In *Een v. Consolidated Freightways*, a personal injury action arising from a motor vehicle collision, defendants called a law enforcement officer who had investigated the scene of the accident as a witness. After he had testified about his investigation and observations, the officer was asked if he had formed an opinion as to the point of impact. Plaintiff objected to the question as "incompetent, irrelevant, immaterial, calling for speculation, guess and conjecture, obviously invading the province of the jury, calling for a conclusion." This objection was overruled, and in affirming the action of the trial judge, the appellate court noted:

> The general objection that the question was "incompetent, irrelevant, immaterial, calling for speculation, guess and conjecture" was too general to call anything sharply to the attention of the court and no error could be predicated on the ruling on such objection.[26]

Evidently, an objection which either questioned the qualification of the witness or suggested that the question propound-

21. WRIGHT & GRAHAM § 5036, at 179.
22. FED. R. EVID. 103, Adv. Comm. Note, subdivision (a).
23. 220 F.2d 82 (8th Cir. 1955).
24. 401 F.2d 387 (D.C. Cir. 1968).
25. WEINSTEIN ¶ 103[02], at 103-24 to 103-26.
26. Een v. Consolidated Freightways, *supra* note 23, at 87.

ed was not a proper subject for expert testimony would have been sufficient.[27] However, the appellate court chose not to stretch the objection to include these grounds.

A less technical approach is illustrated by *Blair v. United States*,[28] an appeal from a conviction for armed robbery. Defense counsel had objected to the introduction of statements made by the accused:

> My objection, if it please the Court, is based upon the reason for getting this interrogation, the man wasn't advised of his rights. . . . I think if you are eliciting by the policeman statements from Suggs or any other defendant, there are certain rights.[29]

The trial court overruled the objection and on appeal the government argued that defense counsel had failed to object to the evidence "with adequate clarity." The Court of Appeals disagreed, and reversed the conviction on the basis of a *Miranda* violation:[30]

> Where the question is as fundamental as admissibility in a criminal trial of a pre-trial statement by a defendant, counsel may properly assume that even a brief objection presenting the essence of his contention will receive the considered attention of the trial judge without need for a detailed particularization and citations.[31]

The precedential value of the *Een* and *Blair* cases is minimal for predicting the degree of specificity required. Weinstein suggests evidence rulings are often a "peg to hang a reversal on" where the court "feels an injustice has been done."[32] Indeed, in the *Een* case, the court indicated the verdict was clearly correct on the state of the evidence,[33] while in *Blair* the constitutional rights of the defendant were at stake.

An aspect of the rule of specificity is that an appeal of an adverse ruling may be taken only to the extent of the grounds

27. *Id.* at 87-88.
28. Blair v. United States, *supra* note 24.
29. *Id.* at 391.
30. Miranda v. Arizona, 384 U.S. 436 (1966), had been decided several months prior to the trial.
31. Blair v. United States, *supra* note 24, at 391.
32. WEINSTEIN ¶ 103[02], at 103-24.
33. Een v. Consolidated Freightways, *supra* note 23, at 88.

stated in the objection.[34] Examples of this principle include: (1) an objection to a proper question will not reach an improper answer,[35] (2) an objection to the foundation for expert testimony will be insufficient to challenge the "education, training and experience of the witness,"[36] and (3) a hearsay objection to testimony with respect to custom will not preserve an objection to the foundation of the testimony.[37] The reasonableness of this requirement is apparent when the consequences of the alternative are considered. Without such a rule, litigants would be able to appeal on grounds which were never asserted at trial and the finality of judgments would always be in question.

In addition to stating the grounds of the objection with specificity, counsel must also be explicit with reference to the particular evidence sought to be excluded. If part of the evidence is admissible and the opponent does not separate the objectionable from the competent, a trial court's decision to receive all the evidence will rarely be disturbed.[38] "It is not the judge's duty to sever the bad parts if some are good." [39] Moreover, if evidence received is admissible for one purpose but not for another, it is the responsibility of the objecting party to bring this to the attention of the court. A general objection will normally not suffice.[40] The reason is the same: specificity of reference is necessary to allow the proponent and the judge an opportunity to cure the problem at trial, and, if necessary, to provide the appellate court with an adequate record on review.

Timeliness

Rule 103(a)(1) also requires an objection to be "timely" if error is to be predicated on the ruling of the trial court. An objection is timely if it is made when the grounds to object first become apparent.[41]

The justification for the rule of timeliness is a consideration of fairness. A party should not be allowed to gamble on

34. LOUISELL & MUELLER, 1 FEDERAL EVIDENCE § 8, at 41 (1977) [hereinafter cited as LOUISELL & MUELLER].
35. Henderson v. Coleman, 19 Wyo. 183, 115 P. 439, 449 (1911), *rehearing denied*, 115 P. 1136 (1911).
36. State Highway Comm'n v. Newton, 395 P.2d 606, 607 (Wyo. 1964).
37. Murdock v. State, 351 P.2d 674, 679 (Wyo. 1960).
38. Meade v. Commonwealth, 225 Ky. 177, 7 S.W.2d 1052 (1928).
39. MCCORMICK § 52, at 117.
40. *Id.*
41. LOUISELL & MUELLER § 8, at 33-34; WEINSTEIN ¶ 103[02], at 103-16.

the possibility of a favorable answer to an improper question, and then object only if the response proves to be harmful.[42] The Wyoming Supreme Court has expressed a similar view:

> We do not intend to put a stamp of approval on trial tactics which have the effect of allowing a party to speculate on the verdict with error tucked in his brief case unless the verdict be favorable. In such a case, the party will be deemed to have waived the irregularity.[43]

An objection to testimony will usually be made as soon as the question is asked and before an answer is given. Situations arise, however, when a prompt objection is not possible. For example, a proper question may elicit an unanticipated and improper response, or an eager witness may blurt the answer to an improper question before the opponent has had an opportunity to object.[44] Under these circumstances the grounds for objection does not appear until after the testimony is received, and an objection and motion to strike should suffice if it is made as soon as the error is manifest.[45]

Rule 103 is addressed to trial objections, but there are several situations in which pretrial action is necessary to exclude evidence.[46] First, a motion to exclude evidence illegally obtained must ordinarily be made before trial.[47] Second, with regard to deposition testimony in civil cases, an objection on grounds "which might have been obviated or removed" if presented at the time the deposition was taken is deemed to have been waived if not made at that time.[48] Finally, a motion in limine is sometimes appropriate in civil litigation. This practice is neither required nor precluded by Rule 103.[49]

Offer of Proof

If the trial court excludes evidence upon an objection the

42. MCCORMICK § 52, at 113.
43. Joly v. Safeway Stores, Inc., 502 P.2d 362, 364 (Wyo. 1972), *quoting with approval*, Herren v. Hawks, 139 Mont. 440, 365 P.2d 641, 644-45 (1961).
44. MCCORMICK § 52, at 113.
45. Where evidence is admitted conditionally under Rule 104(b) and the condition is never fulfilled, a motion to strike must be made when the failure of the connection becomes apparent. This will ordinarily be at the close of the proponent's case, or at least before the case goes to the jury. LOUISELL & MUELLER § 8, at 38-39.
46. LOUISELL & MUELLER § 8, at 34-35.
47. WYO. R. CRIM. P. 49(e); *see* Blakely v. State, 542 P.2d 857, 859 (Wyo. 1975) where it is stated: "The motion shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion."
48. WYO. R. CIV. P. 32(d)(3)(A).
49. LOUISELL & MUELLER § 8, at 35.

proponent will ordinarily make an "offer of proof."[50] Rule 103(a)(2) requires such an offer for the purpose of appeal unless the nature of the excluded evidence "was apparent from the context within which the questions were asked."[51]

The offer of proof serves essentially the same function as the objection. It advises the trial court of the nature and character of the offered evidence so that a proper ruling may be made, and it provides a sufficiently detailed record for the reviewing court in the event of an appeal.

Read literally, the language of the rule seems to suggest that an offer of proof is sufficient if it simply makes known to the court the substance of the proffered evidence. Unlike the subsection governing objections, there is no mention of timeliness, statement of grounds, or appearance on the record.[52] However, if the rule is to satisfy the objectives it was designed to accomplish, these requirements seem equally applicable to offers of proof.[53] Moreover, Rule 46 of the Wyoming Rules of Civil Procedure[54] and Rule 48 of the Wyoming

50. *See* Ladd, *The Need in Iowa of an Offer of Excluded Testimony for Appeal*, 18 IOWA L. REV. 304, 318 n.28 (1932). Four methods of offering excluded testimony have been recapitulated by Dean Ladd:

> Summary of Methods of Making Offer: (1) Dictation of statement into the record of the testimony anticipated from the excluded question. This is the most common procedure. . . . This statement is properly made at the reporter's desk so that it may be heard by the court and opposing counsel, if he desires, but not heard by the jury or witness. In the latter respects this procedure is frequently abused. . . . (2) Introduction of statement written by examining counsel containing the answer the witness would give, in the opinion of the questioner, if permitted to testify. (3) A written statement of the witness's testimony signed by the witness and offered as part of the record. This would occur principally when witness was friendly and available before trial and the testimonial issue is known as a pivotal problem during preparation for trial. It is desirable when matter of competency or privilege of witness is an issue, for then the excluded testimony may be easily presented in the record. It would probably not be available on cross-examination. It is suggested in using this and the preceding method that the writing be marked as an exhibit and introduced into the record for proper identification on appeal. (4) Request the court to excuse the jury temporarily, examine the witness before the court, and have the answers reported in the record. If it were not for the inconvenience, this would be by far the most desirable method. It is the only method of demonstrating the actuality of the error of exclusion of real testimony given under oath in the trial. It is especially desirable on cross-examination where it is indeed presumptive for counsel to dictate a statement of what an unfavorable witness will say. This and the preceding method of offer are the only methods that truly approximate meeting the imaginary error theory of offers.

51. This has always been the rule in Wyoming, *see, e.g.*, Watson v. Klindt, 73 Wyo. 402, 280 P.2d 282, 283 (1955); Taylor v. McDonald, 409 P.2d 762, 763 (Wyo. 1966).
52. WRIGHT & GRAHAM § 5040, at 209.
53. Marchessini & Co. v. Robinson, 287 F. Supp. 728, 731-32 (S.D.N.Y. 1967); Commonwealth Edison Co. v. Allis Chalmers Mfg. Co., 40 F.R.D. 96, 100 (N.D. Ill. 1966).
54. WYO. R. CIV. P. 46. Exceptions Unnecessary.

> Formal exceptions to rulings or orders of the court are unnecessary; but

Rules of Criminal Procedure[55] each require timeliness and statement of grounds for any offer of proof in response to a ruling excluding evidence. There is no reason to believe Rule 103(a)(2), even if construed narrowly, would change these requirements.[56] Of course, if the offer of proof does not appear of record, there is no way for an appellate court to discern whether or not "a substantial right of the party is affected."

Several additional points should be noted with respect to offers of proof. First, under Wyoming law a party has an absolute right to make an offer.[57] There is no need to request permission of the court.[58] Second, as with objections, an offer of proof must be specific. If a party offers an exhibit as a whole which contains both admissible and inadmissible evidence, the judge may properly reject it in its entirety.[59] The court is not required "to separate the wheat from the chaff." [60] Third, an offer of conditionally relevant evidence must be accompanied by an offer to prove the connecting fact.[61] Finally, the requirement of an offer of proof is usually relaxed on cross-examination where the response to the question cannot be anticipated by counsel.[62]

Error: Harmless, Prejudicial, Plain

Rule 103(a) leaves intact the "harmless error" rule developed by the courts by providing that error may not be predicated on an evidentiary ruling unless a substantial right of the party is affected. The Advisory Committee to the Federal

for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

55. WYO. R. CRIM. P. 48. Exceptions Unnecessary.
Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.
56. *See* LOUISELL & MUELLER § 13.
57. Vanover v. Vanover, 75 Wyo. 55, 307 P.2d 117, 122 (1957).
58. Jones v. Clark, 418 P.2d 792, 799 (Wyo. 1966).
59. Estate of Carey v. Smith, 504 P.2d 793, 799 (Wyo. 1972).
60. *Id.*
61. *In re* Patrick's Estate, 397 P.2d 273, 278 (Wyo. 1964).
62. MCCORMICK § 51, at 110. However, an offer of proof may be required where the questions propounded are not truly exploratory. LOUISELL & MUELLER § 12, at 70.

Rules of Evidence noted that "[t]he rule does not purport to change the law with respect to harmless error."[63] The law of harmless error as it stands in this jurisdiction will similarly survive implementation of Rule 103.[64]

The leading United States Supreme Court decision on the subject is *Kotteakos v. United States*.[65] *Kotteakos* involved a conspiracy prosecution in which only one conspiracy was charged but eight separate ones were proved. The schemes were related in kind and connected by the fact that one man participated in all of them. The pattern was characterized by the Court as " 'separate spokes meeting at a common center' . . . without the rim of the wheel to enclose the spokes."[66] Despite this variance in proof, the jury was instructed that if they found from the evidence the existence of a conspiracy "then the acts or the statements of *any* of those whom you so find to be conspirators . . . may be considered by you in evidence as against *all* of the defendants whom you so find to be members of *the* conspiracy."[67] The issue before the court was whether the error in this instruction was harmless, as urged by the government, or prejudicial to the defendant.

Justice Rutledge, writing for the majority, recognized the futility of attempting to formulate a precise standard which

63. FED. R. EVID. 103, Adv. Comm. Note, Subdivision (a). *Compare*, MODEL CODE OF EVIDENCE Rule 6 (1942) which defines the standard by which harmless and prejudicial error are determined as follows:

> A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless
>
> . . . .
>
> (b) the court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and probably had a substantial influence in bringing about the verdict or finding.

64. Under Wyoming law, harmless error is defined generally as that which does not affect the "substantial rights" of the party.

WYO. R. CIV. P. 61. Harmless Error.

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

WYO. R. CIV. P. 72(g) Immaterial Errors Disregarded.

> No judgment or final order shall be reversed or affected by reason of any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party.

WYO. R. CRIM. P. 49(a) Harmless Error.

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

65. 328 U.S. 750 (1946).
66. *Id.* at 755.
67. *Id.* at 770 (emphasis by the court).

would accurately define the border between harmless and prejudicial error. "By its very nature no standard of perfection can be attained. But one of fair approximation can be achieved."[68] The test, as concluded by the Court, is whether the appellate court can say with "fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by error."[69] The reviewing court is not to decide on the basis of the "correctness" of the judgment or speculate on the probable result of a new trial, but must examine the *effect* of the error on the proceedings below. Although *Kotteakos* was a criminal trial, the reasoning and approach of the Supreme Court also seems to be an appropriate guideline in civil cases.[70]

Wyoming case law sheds little additional light on the elusive boundary between harmless and prejudicial error. However, there are at least two kinds of error which will almost certainly be deemed harmless. First, if the evidence erroneously excluded in a jury trial would have been merely cumulative, the error will not be grounds for reversal.[71] Second, if evidence is erroneously admitted in a non-jury trial, the decision will not be disturbed if there is sufficient admissible evidence to support the findings.[72] In other situations, the definition of prejudicial error remains vague.[73] Undoubtedly, the analysis of *Kotteakos* is as precise as can be made. The determination of whether a substantial right of the party has been affected will have to be made on a case-by-case basis, as well it should.

Harmless Constitutional Error

Constitutional error presents a different problem. The *Kotteakos* court hinted that constitutional error might be reversable per se.[74] This is not the rule, but the standard for de-

68. *Id.* at 761.
69. *Id.* at 765.
70. This is especially true considering a further refinement of the opinion:
> Necessarily the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole, are material factors in judgment. *Id.* at 762.
71. X v. Y, 482 P.2d 688, 691 (Wyo. 1971); Colwell v. Anderson, 438 P.2d 448, 451 (Wyo. 1968).
72. *In re* Shreve, 432 P.2d 271, 273 (Wyo. 1967); York v. Torbert, 355 P.2d 205, 209 (Wyo. 1960).
73. *See, e.g.*, State Highway Comm'n v. Triangle Dev. Co., 369 P.2d 864, 869 (Wyo. 1962); Logan v. Pac. Intermountain Express Co., 400 P.2d 488, 494 (Wyo. 1965); State v. Spears, 76 Wyo. 82, 300 P.2d 551, 557 (1956).
74. Kotteakos v. United States, *supra* note 65, at 764.

termining the degree of prejudice necessary for a reversal is less than clear. *Chapman v. California*[75] is cited by the Advisory Committee to the Federal Rules as the controlling decision on the subject of constitutional error.[76] *Chapman* provides a two part test for making the determination. The first question is "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." If this possibility exists, the court must conclude that the error is prejudicial unless it can "declare a belief that it was harmless beyond a reasonable doubt."[77]

Despite the reference made by the Advisory Committee, the status of the *Chapman* rule is in doubt in view of a subsequent Supreme Court decision. The issue in *Harrington v. California*[78] was the effect of the erroneous admission of the confessions of two codefendants who did not take the stand.[79] The court purported to follow *Chapman* in holding the error to be harmless, but based the decision upon its conclusion that the weight of the evidence apart from the confessions was overwhelming.[80] The analysis is not the same as that of the *Chapman* decision. In *Chapman* the focus was on the impact of the evidence received in error. The test was whether the appellate court could determine beyond a reasonable doubt that it had no effect on the verdict. The approach of the *Harrington* court, on the other hand, was to look at the remainder of the evidence which, if overwhelming, would render the constitutional error harmless beyond a reasonable doubt.

The difference between the two decisions is significant, and the consequence of the change in focus may be demonstrated by applying the *Chapman* test to the error in *Harrington*. It would be difficult, if not impossible, to decide beyond a reasonable doubt that the introduction of a confession had no effect on a jury verdict. A strict application of the *Chapman* rule would appear to require a reversal in *Harrington*. By its scrutiny of the effect of the evidence erroneously received apart from the weight of the remainder of the evidence, the

75. 386 U.S. 18 (1967).
76. FED. R. EVID. 103, Adv. Comm. Note, Subdivision (a).
77. Chapman v. California, *supra* note 75, at 23-24.
78. 395 U.S. 250 (1969).
79. *See* Bruten v. United States, 391 U.S. 123 (1968).
80. Harrington v. United States, *supra* note 78, at 254.

Chapman test creates a strong presumption that constitutional error is prejudicial. Under the *Harrington* approach a court can more readily find an otherwise serious constitutional error to be harmless where the remainder of the evidence is overwhelming. To this extent the rigorous test of *Chapman* seems to have been modified by *Harrington*.

Plain Error

Rule 103(d) makes it clear that despite failure to comply with the directives of Subdivision (a), reversal may be possible under the "plain error" doctrine. The trial court may, sua sponte or in response to a tardy request, take corrective action either during or after the trial. An appellate court may take notice of plain errors not questioned below whether or not they are asserted on appeal.[81] Although the doctrine is theoretically applicable to both civil and criminal cases, as a practical matter it is rarely invoked in civil actions.[82]

Various attempts have been made to define the magnitude of error that warrants reversal despite failure to comply with the usual procedures for preserving the right to appeal.[83] It has been described as "error both obvious and substantial," [84] "serious and manifest,"[85] "seriously prejudicial error,"[86] or "grave errors which seriously affect substantial rights of the accused."[87] The Wyoming Supreme Court has described plain error as "fundamental error,"[88] or error that would "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[89] The descriptions do not provide much guidance, but rather "give the distinct impression that 'plain error' is a concept appellate courts find impossible to define, save that they know it when they see it."[90] The Wyoming Court does not see it very often and this should not change under the new Rules of Evidence.

81. LOUISELL & MUELLER § 21, at 117-119; *see also*, WYO. R. CRIM. P. 49(b) which provides:
> Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

82. In Wyoming civil cases the plain error doctrine may be limited to situations in which the lower court lacked jurisdiction. Guggenmos v. Tom Searl-Frank McCue, Inc., 481 P.2d 48, 51 (Wyo. 1971).
83. LOUISELL & MUELLER § 21, at 119-21.
84. Sykes v. United States, 353 F.2d 607, 612 (5th Cir. 1966), *cert. denied*, 386 U.S. 977.
85. Freutralle v. United States, 209 F.2d 159, 163 (5th Cir. 1954).
86. Cleaver v. United States, 238 F.2d 766, 770 (10th Cir. 1957).
87. Wright v. United States, 301 F.2d 412, 414 (10th Cir. 1962).
88. Pixley v. State, 406 P.2d 662, 669 (Wyo. 1965).
89. Hays v. State, 552 P.2d 1004, 1007 (Wyo. 1974).
90. WRIGHT, 3 FEDERAL PRACTICE AND PROCEDURE § 856, at 373 (1969).

RULE 104: PRELIMINARY QUESTIONS[91]

Rule 104 is the Pandora's box of Article I. Its innocuous and lucid appearance provides an effective camouflage for a number of unresolved issues. Before these problems are confronted, however, a brief overview of the scope of the rule is appropriate.

Admissibility of evidence often depends upon the resolution of a preliminary question of law or fact. Rule 104 divides these into questions of competency and questions of relevancy, and the responsibility for their resolution is allocated between judge and jury.

Subdivision (a) designates questions of competency as issues to be determined by the judge. These include questions as to the qualifications of a witness, the existence of a privilege, and any other question concerning the admissibility of evidence which is not referred to the jury by another provision. In making these determinations, the court is "not bound by the rules of evidence except those with respect to privileges."[92]

There are at least three reasons why questions of competency should be decided by the judge alone. First, a jury of laymen does not have the legal acumen necessary to view the evidence in two different lights and decide both ultimate

91. WYO. R. EVID. 104 is as follows:
Preliminary Questions
(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
(b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
(c) *Hearing of jury.* Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.
(d) *Testimony by accused.* The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.
(e) *Weight and credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

92. The supposition is that the trial judge, unlike the jury, can be relied upon to take into account the inherent weaknesses of evidence which does not measure up to the standards governing admissibility. On the other hand, "[p]rivileged communications while clearly relevant, are excluded because of a legislative determination that any benefit derived from obtaining the truth is substantially outweighed by the social charm resulting from their disclosure. Obviously, any disclosure will defeat the purpose of the exclusionary rule. . . ." WEINSTEIN ¶ 104[01], at 104-20.

questions and questions of competency. Second, it is highly probable that a jury would find it impossible to disregard the inadmissible evidence even if they were able to keep separate the preliminary and ultimate questions. Third, the administrative problems would be insurmountable if the jury were responsible for deciding preliminary questions of competency.[93]

Preliminary questions of conditional relevancy do not present such problems; thus, their determination is left to the jury under Subdivision (b) of the rule.[94] These questions arise whenever the probative value of proffered evidence depends upon the existence of another fact. For example, if A sues C corporation on a promissory note executed by B, and introduces evidence of the note executed by B, the relevance of the note depends upon a showing that B is the agent of C corporation. Under Rule 104(b), evidence of the note will be introduced upon, or subject to the introduction of evidence sufficient to support a finding of the agency. As with most questions of conditional relevancy, the existence of the agency is a simple factual matter which the jury is quite competent to determine. This leaves the difficulty of expunging evidence from the minds of the jurors when the burden of proof has not been met, but it is felt that the jury can understand concepts of relevancy and there is no great danger that irrelevant evidence will be misused.[95]

Subdivisions (c) and (d) of Rule 104 are concerned primarily with protection of criminal defendants in the determination of preliminary issues. Because of the obvious danger of prejudice, hearings on the admissibility of confessions must always be conducted out of the hearing of the jury.[96]

93. LOUISELL & MUELLER § 26, at 157.

94. The jury is the final arbiter on questions of admissibility under several other rules governing specific instances of conditional relevancy. *See* WYO. R. EVID. 602 (Lack of Personal Knowledge), Rule 901 (Requirement of Authentication or Identification), Rule 1008 (Functions of Court and Jury).

95. The Supreme Court of Wyoming has recognized the dichotomy between incompetence and irrelevance, the need to keep incompetent evidence from the jury, and the relative harmlessness of introducing irrelevant evidence in Holm v. State, 404 P.2d 740, 743 (Wyo. 1965). "Matters that are irrelevant or immaterial may only unnecessarily encumber trial proceedings. Incompetent evidence on the contrary brings before the trier of fact evidence which is unauthenticated and therefore unworthy of belief."

Rule 103(b) does not limit the discretion of the judge to control the order of presentation under Rule 611(a) or to exclude relevant evidence under Rule 403 where the probative value is "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

96. *See* Jackson v. Denno, 378 U.S. 368, 388 (1964), where the United States Supreme

Hearings on other matters must be likewise conducted in two situations: (1) Where the "accused is a witness, if he so requests," and (2) where, as determined by the court, the "interests of justice" so require.

If the accused decides to testify on a preliminary matter, subdivision (d) provides that he does not thereby "subject himself to cross-examination as to other issues in the case."[97] However, as noted by the Advisory Committee to the Federal Rule, the provision "is not . . . intended to immunize the accused from cross-examination where, in testifying about a preliminary issue, he injects other issues into the hearing."

Preliminary Questions and Ultimate Issues

Despite the sound reasoning behind the division of authority in Rule 104 and the sensible results which ordinarily follow, there remain a number of unsolved problems. One troublesome situation arises when a preliminary question to be determined by the judge coincides with an ultimate issue in the case. Consider the dilemma of the court faced with the following facts: In a murder trial it is known that the crime was commited by X and the sole issue before the jury is the identity of the defendant with X. Defense counsel calls Mrs. X to the stand for the purpose of testifying that the defendant is not her husband. Objection is made on the grounds that a wife cannot testify for or against her husband. The court must now decide the question of competency, but if the testimony is excluded, the ruling on the preliminary question becomes a determination by the judge that the accused is in fact X, and therefore guilty of the crime. On the other

Court held unconstitutional a New York practice whereby the preliminary question of the voluntariness of a confession was submitted for a determination by the jury:

> Under the New York procedure, the fact of a defendant's confession is solidly implanted in the jury's mind, for it has not only heard the confession, but it has been instructed to consider and judge its voluntariness and is in position to assess whether it is true or false. If it finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful [but coerced] confession?

97. This safeguard is particularly essential considering the wide sphere of cross-examination authorized under WYO. R. EVID. 611(b):

> Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

hand, if the testimony is admitted, the evidentiary ruling has the effect of a decision by the court that the defendant is not X and did not commit the crime. In the actual case the judge ruled the testimony inadmissible, resulting in the conviction of the defendant.[98]

Admittedly, the case is unusual, but the problem which it so graphically illustrates is not extraordinary. It recurs in a conspiracy trial every time a declaration of an alleged coconspirator is offered as an admission of a party opponent under Rule 801(d)(2)(E).[99] There must be a determination that a conspiracy exists of which the defendant is a part before the statement may be introduced. If the defendant is found to be a part of the conspiracy, then he is guilty of the conspiracy charge. This coincidence of preliminary and ultimate issues raises grave questions as to the proper coordination of the roles of judge and jury.

The question can logically be described as one of conditional relevancy, but presenting the issue to the jury for their determination raises a further problem. If the testimony is admitted conditionally and the jury is instructed to disregard it unless they are satisfied the defendant's role in the conspiracy has been proved, the jury will, in effect, have been instructed not to consider the evidence unless they first find the defendant guilty of the charge.[100]

The better resolution is that the question is one for the judge under Rule 104(a).[101] Although by making the preliminary determination the court is also passing upon an ultimate issue in the case, it is not necessarily invading the province of the jury. The jury is still free to weigh the evidence, and the "parties are not deprived of a jury trial on the ultimate issue."[102] The judge is merely determining the admissibility of evidence, and so long as the basis for his decision is not communicated to the jury, it should not unduly affect their deliberations.

98. State v. Lee, 127 La. 1077, 54 So. 356 (1911).
99. WYO. R. EVID. 801(d) Statements which are not hearsay. (2) Admission by party-opponent. (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.
100. Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963).
101. *See* United States v. Martorano, 557 F.2d 1, 11 (1st Cir. 1977); United States v. Calabro, 449 F.2d 885, 889 (2d Cir. 1971); United States v. Herrera, 407 F. Supp. 766, 771 (N.D. Ill. 1975).
102. WEINSTEIN ¶ 104[02], at 104-23.

Preliminary Questions: Standard of Proof

When preliminary questions of fact are deemed to be matters of competency for the court, the question arises as to the standard of proof required to establish admissibility of the proffered evidence. Rule 104 provides no guideline on this matter and the answer must be gleaned from other sources.

Because criminal convictions require proof beyond a reasonable doubt, it has been suggested that a similar standard of proof should be adopted for the resolution of preliminary questions of fact in a criminal trial.[103] This has been almost universally rejected by the courts, which have adopted standards described as a "preponderance"[104] of the evidence, "sufficiency" of the evidence,[105] or evidence that "prima facie" establishes the existence of the preliminary fact.[106] With respect to the admission of out-of-court statements of a coconspirator, at least one court has made a distinction between the standard of proof necessary to submit a conspiracy charge to the jury and the standard of proof necessary to admit the statement, holding that the evidentiary ruling does not require a showing sufficient to support a guilty verdict on a conspiracy charge.[107]

The effect of Federal Rule 104(a) upon the standard of proof required for a preliminary question has been discussed by several courts.[108] The Court of Appeals for the First Circuit is of the opinion that Rule 104(a), by requiring the judge to *determine* questions of admissibility, demands a higher standard of proof than the *prima facie* standard.[109] By contrast, the Wyoming Supreme Court has adhered to the *prima facie* standard, at least on the question of the admissibility of declarations of a coconspirator.[110]

103. *See* Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 274 (1974).
104. United States v. Matlock, 415 U.S. 164, 177 (1974); Lego v. Twomey, 404 U.S. 477, 489 (1972); Dryden v. State, 535 P.2d 483, 495 (Wyo. 1975).
105. United States v. Herrera, *supra* note 101, at 770.
106. Jasch v. State, 563 P.2d 1327, 1334 (Wyo. 1977).
107. United States v. Stanchich, 550 F.2d 1294, 1299 (2d Cir. 1977).
108. *Id.* at 1299 n.4; United States v. Petrozziello, 548 F.2d 20, 22-23 (1st Cir. 1977).
109. United States v. Petrozziello, *supra* note 108, at 23. "[F]inding a prima facie case is not the same as 'determining' that a conspiracy existed. A higher standard is implicit in the judge's new role."
110. Jasch v. State, *supra* note 106, at 1334.

Court Is Not Bound by the Rules of Evidence

A further difficulty is presented by the provision in Rule 104(a) which allows the court, in making its determination, to hear any relevant evidence unhampered by the exclusionary rules. The judge may consider hearsay and other inadmissible evidence for the purpose of determining the preliminary question before it.[111] Normally, this will present no difficulties because the trial judge, with his legal training and experience, can be relied upon to "be fully cognizant of the inherent weakness of evidence by affidavit or hearsay and will take such weakness into account when evaluating its weight on the preliminary question."[112]

The problem arises, once again, within the context of preliminary questions on the admissibility of the declaration of coconspirators. The question is whether Rule 104(a) means that the admissibility of the declarations may be based upon evidence contained within the declaration without independent proof of the existence of a conspiracy. The traditional rule articulated by the Supreme Court in *United States v. Glasser* is that the declaration is admissible against a defendant only if there is "proof *aliunde* that [the defendant] is connected with the conspiracy. Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."[113]

If the standard of proof required in the preliminary determination is something lower than the preponderance standard, it is conceivable that the authority vested in the court to consider hearsay makes it possible to admit the evidence solely upon the basis of the declaration itself. This, of course, is assuming the declaration appears to be trustworthy. One court has taken the position that Rule 104(a) has overruled *United States v. Glasser* to the extent it held that the declaration itself could not be used to prove the conspiracy.[114] However, the court added, *Glasser* "still stands as a warning to trial judges that such statements should ordinarily be given little weight."[115] Nonetheless, it is possible the rule will per-

111. United States v. Lee, 541 F.2d 1145, 1146 (5th Cir. 1976).
112. WEINSTEIN ¶ 104[02], at 104-24.
113. Glasser v. United States, 315 U.S. 60, 74 (1942).
114. United States v. Martorano, *supra* note 101, at 12.
115. *Id.*

mit admission of such declarations upon a less substantial showing of independent evidence than was formerly required. Considering the ease with which the Wyoming Supreme Court is able to discern the existence of a conspiracy,[116] Rule 104 may serve to diminish further the protection of a defendant against the admission of hearsay evidence.

RULE 105: LIMITED ADMISSIBILITY[117]

The situation often arises wherein proffered evidence is competent and relevant for one purpose but inadmissible for another. The usual practice of the courts is to admit the evidence and, if the opponent so requests, instruct the jury of its limited purpose.[118] Rule 105 continues this tradition. The justification for this liberal rule of admissiblity is a belief that "the more information available to the trier of fact, the greater will be its knowledge of the events in question and the more likely will it be that resolution of the factual disputes will approximate the truth."[119]

Limiting instructions, however, may not always be sufficient to restrict the use of the evidence to its proper purpose. This is especially true in a criminal trial where two or more defendants are joined and damaging evidence is introduced against one which is inadmissible against the other. Under these circumstances, Rule 105 should be read in connection with Rule 403 which grants the trial court discretion to exclude the evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Exclusion of evidence may in fact be required rather than permissive where the risk of pre-

116. *See* Note, *Criminal Procedure—The Coconspirator Exception to the Hearsay Rule*, 13 LAND & WATER L. REV. 629 (1978).

117. WYO. R. EVID. 105 is as follows:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

118. Valerie v. State, 429 P.2d 317, 318 (Wyo. 1967); Acme Cement Plaster Co. v. Westman, 20 Wyo. 143, 122 P. 89, 93 (1912); MCCORMICK § 59, at 135-36. *See also*, LOUISELL & MUELLER § 45, at 342-43:

> There are sound reasons for requiring the opponent to request the trial judge to limit the scope of the evidence by instructing the jury. . . . This manner of proceeding appropriately leaves to the opposing trial counsel the option of concluding that, as a matter of strategy, he is better off without an instruction than with one, in that an instruction would serve only to remind the jury of what it has heard or to re-emphasize the evidence in the minds of the jurors, and perhaps to suggest to the jury a use for the evidence which is best left unmentioned.

119. WEINSTEIN ¶ 105[02], at 105-10.

judice is high.[120] Severance may be the appropriate remedy in some of these situations, and Rule 105 does not limit the discretion of the judge to order separate trials.[121]

One situation where the danger of prejudice is great is where evidence is introduced for the limited purpose of impeaching the defendant in a criminal trial. The United States Supreme Court in *Harris v. New York*[122] held that statements obtained in violation of the defendant's *Miranda* rights may be used to impeach the accused when he takes the stand in his defense.[123] Although the decision was limited to statements which were characterized as voluntary, uncoerced and trustworthy,[124] the significance of this limitation is doubtful in view of a subsequent Supreme Court decision. In *Oregon v. Hass*,[125] the statement used to impeach the defendant was obtained upon repeated questioning of the defendant after his request for a lawyer had been denied by the police. It is possible to view this statement as falling somewhat short of the "uncoerced and trustworthy" standard enunciated in *Harris*. Nonetheless, the court found the limited use of the statement to be proper, at least by constitutional standards.[126]

The *Harris* decision did not address the issue of whether silence of the defendant in the face of post-arrest questioning could be used for impeachment purposes. The better argument is against the use of such evidence for at least two reasons. First, the silence of the accused is likely to have little relevance to his credibility, especially after *Miranda* warnings have been given. Remaining silent while in custody is sensible behavior for a defendant and should have no bearing on his truthfulness at trial. Second, it is inconsistent with the basic

120. *See* Bruton v. United States, 391 U.S. 123, 129 (1968) in which the court held that a limiting instruction was insufficient to remove the prejudice of a confession of the codefendant which implicated the defendant.
> The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.

121. WYO. R. CRIM. P. 13. Relief from Prejudicial Joinder.
> If it appears that a defendant or the State is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

122. 401 U.S. 222 (1971).
123. *Id.* at 226.
124. *Id.* at 224.
125. Oregon v. Hass, 420 U.S. 714 (1975).
126. *Id.* at 723.

philosophy of *Miranda* to offer the accused the right to remain silent and then penalize him for asserting that right.[127]

The issue was presented to the Supreme Court in *Doyle v. Ohio*.[128] After their arrest for selling marijuana to an informant, the defendants in this case were given *Miranda* warnings and elected to remain silent. At their separate trials the defendants claimed they had been framed by the narcotics agents. For impeachment purposes the prosecution was allowed to ask them why they had not told the frameup story to the arresting officer at the scene. The Supreme Court held such use of a defendant's post-arrest silence to be impermissible:

> Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.[129]

RULE 106: REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS[130]

When portions of writings or recorded statements are introduced there is a danger that admitting only a portion will distort its meaning by pulling it out of context.[131] Limiting the opponents remedy to putting the remainder in evidence upon cross-examination is often inadequate for two reasons. First, cross-examination is generally limited to the subject matter of direct examination,[132] so protection in this regard is limited. Second, even if the opponent is able to introduce the remainder of the evidence at a later point in the trial, this will often be insufficient to eradicate the distorted first impression.[133]

127. LOUISELL & MUELLER § 43, at 325-36.
128. 426 U.S. 610 (1976).
129. *Id.* at 617. The court added in a footnote that the holding does not prevent the use of post arrest silence "to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *Id.* at 619 n.11.
130. WYO. R. EVID. 106 provides:
> Remainder of or Related Writings or Recorded Statements
> 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.
131. Kamp v. Kamp, 36 Wyo. 310, 254 P. 689, 690 (1927).
132. WYO. R. EVID. 611(b), *supra* note 97.
133. MCCORMICK § 56, at 130; LOUISELL & MUELLER § 49, at 352.

Rule 106 remedies the situation by allowing the opponent to require the offering party to introduce other parts of the writing or recording "which ought in fairness to be considered contemporaneously with it." The trial court retains the power to determine whether "fairness" requires the introduction of the remainder.[134] If the additional evidence would merely encumber the proceedings with irrelevant material, it may properly be excluded despite the demand for its introduction.

Rule 106 may only be invoked by the adversary. The proponent may not claim the right to introduce otherwise inadmissible evidence by characterizing it as a writing related to one which he has introduced.[135]

One important application of this "rule of completeness" occurs when admissions or confessions of the accused are introduced in a criminal case.[136] Thus, if the prosecution offers the inculpatory portion of a written or recorded statement, the defendant is entitled to have the exculpatory or self-serving parts introduced at the same time if they "ought in fariness to be considered contemporaneously." Although the rule does not expressly apply to unwritten and unrecorded statements, the same principle should apply.[137] Indeed, Wyoming case law indicates that "where part of a conversation is put in evidence the adverse party is entitled to prove the remainder of the conversation."[138] However, in the context of a criminal trial the accused may be forced to take the witness stand in order to prove the remainder of the unrecorded statement. It may be a violation of the defendant's due process and fifth amendment rights if he is compelled in this manner to take the stand.[139]

CONCLUSION

Article I does not represent a departure from the law of evidence as it stands today in Wyoming. The real benefit of the Rules is in the precedential value of the readily accessible body of case law under the Federal Rules, especially in the problem areas which are as yet unlitigated in Wyoming. In

134. WEINSTEIN ¶ 106[01], at 106-4.
135. LOUISELL & MUELLER § 49, at 353.
136. *See* LOUISELL & MUELLER § 51.
137. *Id.* at 372.
138. State v. Riggle, 76 Wyo. 1, 298 P.2d 349, 361 (1956).
139. LOUISELL & MUELLER § 51, at 373-74.

those difficult areas, where no completely satisfactory answers can be found, the Rules provide a mechanism for dealing with the problems, and the attendant case law brings into focus the various consequences of the choices to be made.

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