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Article VII of the Wyoming Rules of Evidence Witnesses

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COMMENTS

ARTICLE VI OF THE WYOMING RULES OF EVIDENCE: WITNESSES

Article VI of the recently adopted Wyoming Rules of Evidence deals with the subject of witnesses and the evidentiary rules and procedures which govern witnesses at trials and hearings. It is patterned after and largely follows Article VI of the Federal Rules of Evidence. However, several changes have been made from the Federal Rules for use in Wyoming. One of the purposes of this Comment is to explore and analyze those changes. This Comment also relates the practice in Wyoming prior to the adoption of Article VI and attempts to show how that practice will be different under the new rules and how significant the changes are likely to be.

RULE 601: GENERAL RULE OF COMPETENCY¹

Introduction and Scope

The purpose of Rule 601 is to eliminate all grounds rendering persons incompetent to testify not specifically recognized in the other rules. The modern philosophy is that few persons are incapable of testifying in a manner that is at least potentially useful to the trier of fact.² Thus, any person is competent to testify as an ordinary witness unless there is insufficient evidence to show personal knowledge of the matter involved (Rule 602); the witness refuses to take an oath or affirmation to testify truthfully (Rule 603); he or she is the presiding judge in the case (Rule 605); or he or she is a member of the jury hearing the case (Rule 606). Also, not all witnesses are competent to testify as experts under Rule 702 and Rule 703. Furthermore, Rule 601 does not prevent the exclusion of witnesses upon relevancy concerns under Rule 401; or upon concerns of confusion, prejudice, or consumption of time pursuant to Rule 403.³

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1. RULE 601. GENERAL RULE OF COMPETENCY

Every person is competent to be a witness except as otherwise provided in these rules.

2. LOUISELL & MUELLER, 3 FEDERAL EVIDENCE § 250 (forthcoming) [hereinafter cited as LOUISELL & MUELLER].

3. *Id.* at § 252.

Effect on Wyoming Law

The adoption of Rule 601 has varying effects on Wyoming statutes relating to competency. Section 1-12-101 of the 1977 Wyoming Session Laws,⁴ renumbering Section 1-138 of the Wyoming Statutes, provided that all persons are competent to testify except those of unsound mind and those under ten years of age who appear incapable of receiving just impressions of the facts on which they are examined. Despite the statutory language of Section 1-12-101, and the fact that Rule 1102 supercedes Section 1-12-101 the Rule 601 appears to simply codify existing Wyoming case law. The Wyoming Supreme Court in affirming a case finding a ten-year old child competent to testify, stated that the trial judge must determine that the child be capable of receiving and remembering just impressions of facts testified to, that she be able to relate them intelligently and accurately, and that she possess a sense of moral responsibility to tell the truth. Although the child was prima facie competent to testify under the statute, the court reasoned that if a child could meet the requirements, he or she could testify regardless of his or her age.⁵ Similarly, the Wyoming Supreme Court has held a prosecutrix ten and one-half years of age competent to testify. In addition to being prima facie competent to testify, the court found the witness was examined in the usual way about matters tending to show she was a competent witness, and whether or not she should testify was a matter of discretion for the trial judge.⁶

Whereas the cases mentioned concern situations in which the child was prima facie competent to testify the court indicated, in each case, children under ten would be competent to testify if it was shown the child was capable of receiving just impressions of the matters on which they are to testify and the child understood the obligation to testify truthfully.⁷ In *United States v. Spoonhunter*,⁸ a Tenth Circuit case, the court in upholding a decision allowing a seven year old girl to testify, found that although the Wyoming statute would not

4. 1977 WYO. SESS. LAWS Ch 12, § 1-12-101: All persons are competent witnesses except those of unsound mind and children under ten (10) years of age who appear incapable of receiving just impressions of the facts and transactions on which they are examined or of relating them truthfully.

5. *Burt v. Burt*, 48 Wyo. 19, 41 P.2d 524, 525 (1935).

6. *Strand v. State*, 36 Wyo. 78, 252 P. 1030 (1927); See also *Gregg v. Gregg*, 469 P.2d 406 (Wyo. 1970); *State v. Franklin*, 70 Wyo. 306, 249 P.2d 520 (1952).

7. *State v. Franklin*, *supra* note 6; *Strand v. State*, *supra* note 6.

8. 476 F.2d 1051 (10th Cir. 1973).

apply because the crime charged was a federal offense, there was no inconsistency in the Wyoming statute and the federal rule. The court stated that "the capacity of a person offered as a witness is presumed, and in order to exclude a witness on the grounds of mental incapacity, the existence of the incapacity must be made to appear."⁹

It is therefore apparent, that even though Wyoming's statute was restrictive as to age, a child under ten would be competent to testify if the requisite criteria are met. Furthermore, under previous Wyoming law, it was always in the discretion of the trial judge whether or not a witness was competent to testify. Obviously, Rule 601 terminates all age restrictions. However, Rule 601 arguably should not preclude a judge from excluding child witnesses if they are incapable of accurately relating the facts to which they are to testify or incapable of understanding the difference between truth and falsehood.

Under the early common law insane persons, idiots, and inebriates were totally disqualified because the testimony of such persons was considered completely untrustworthy.¹⁰ Later, judges conducted inquiries as to the witness's competency, focusing on whether the witness had the capacity to observe at the time of the event, to recollect the facts at the time of the trial, and to testify so as to make himself understood. Eventually, although courts continued to insist upon their right to exclude witnesses on grounds of incapacity, in practice virtually all witnesses were allowed to testify.¹¹ The rationale is that a witness wholly without capacity would be difficult to imagine, and that each witness's testimony should be taken for what it seems to be worth.¹²

There have been no cases in Wyoming involving the issue of whether a mentally deficient person is competent to testify. However, in a case involving a witness who used drugs the Wyoming Supreme Court found that "the fact that the witness was an addict was a matter to be considered in connec-

9. *Id.* at 1054.

10. WEINSTEIN & BERGER, 3 WEINSTEIN'S EVIDENCE ¶ 601 [04] (1976) [hereinafter cited as WEINSTEIN].

11. *Id.* at ¶ 601 [04].

12. 2 WIGMORE, EVIDENCE § 493 (3d ed. 1940).

tion with his credibility and the weight which should be given to his testimony but not his competency."¹³

Rule 601 contains no provision requiring any measure of mental capacity as a condition precedent to the giving of testimony. However, it is at least arguable that under Rule 601, inquiry into the capacity of a witness, who is known to be a user of drugs, to accurately observe, recollect, and recount is appropriate. Furthermore, courts should give instructions to the jury cautioning it to weigh the possible effect of drug use upon the capacity of the witness.¹⁴ Under Rule 601 it is important to remember that factors such as age, psychological and mental disability, and use of drugs and alcohol should be viewed as affecting the credibility of the witness and not his competency.

There are several other Wyoming Statutes which deal indirectly with competency of witnesses. Although an extensive analysis of these statutes is beyond the scope of this Comment, they do merit a brief discussion.

At common law persons were disqualified from testifying if they possessed an interest in the case. Originally this restriction applied to parties in civil proceedings, defendants, co-defendants, and co-indictes in criminal cases, and persons other than parties, having an immediate legal interest in the action.¹⁵ This ground of incompetency is now abolished in virtually all jurisdictions, including Wyoming.¹⁶ Consequently, Rule 601 merely codifies previous practice with respect to interest. However, it is permissible to impeach a witness by showing his interest in the proceeding. An exception to the general rule on interest is the so-called Wyoming "Dead Man's Statute". Section 1-12-102 of the 1977 Wyoming Statutes¹⁷

13. *Sims v. State*, 496 P.2d 185, 189 (Wyo. 1972).

14. LOUISELL & MUELLER § 252.

15. WEINSTEIN at ¶ 601 [03].

16. WYO. STAT. § 1-12-103 (1977) provides in part: "[N]o person is disqualified as a witness in any action, civil or criminal, because of his interest in the same as a party or otherwise. Every person is a competent witness except as otherwise provided by law, but his interest in the action may be shown to affect the credibility of the witness."

17. WYO. STAT. § 1-12-102 (1977): "In an action or suit by or against a person who from any cause is incapable of testifying, or by or against a trustee, executor, administrator, heir or other representative of the person incapable of testifying, no judgment or decree founded on uncorroborated testimony shall be rendered in favor of a party whose interests are adverse to the person incapable of testifying or his trustee, executor, administrator, heir or other representative. In any such action or suit, if the adverse party testifies, all entries, memorandum and declarations by

recodifies Section 1-140 of the 1957 Wyoming Statutes,¹⁸ and is not superseded under Wyoming Rule of Evidence 1102. Section 1-12-103 substantially changes the old statute and requires simply that no judgment founded on uncorroborated testimony may be rendered in favor of a party whose interests are adverse to a person incapable of testifying. Furthermore, any declarations or memorandum made by the party incapable of testifying while he was competent may be received into evidence if it is relevant. Acts such as Section 1-12-103 are designed to prevent perjury or at least reflect a policy of protecting decedent's estates and other parties unable to testify against fraudulent claims. Although this is a viable reason for implementing the statute, such statutes often cut off meritorious claims.¹⁹ However, the "Dead Man's Statute" has survived in Wyoming and is not affected by Rule 601.

Under the common law one spouse was incompetent to testify for the other. The rationale was that the marital relation vested in both spouses an interest in the other's activities. This disqualification has disappeared in practically all jurisdictions, including Wyoming.²⁰ Wyoming's law also provides that no husband or wife shall be a witness against the other except in criminal proceedings for a crime committed by one against the other or in civil actions by one against the other.²¹

In federal jurisdictions there is no indication of an intent by Congress to limit or abolish the marital privilege by the enactment of Rule 601,²² and correspondingly in Wyoming there is no indication by the court that Rule 601 or Rule 501²³ is to have any effect on the marital privilege. Similarly,

the party incapable of testifying made while he was capable, relevant to the matter in issue, may be received in evidence."

18. WYO. STAT. § 1-12-102 (1977).

19. WEINSTEIN ¶ 601 [03] at 601-18.

20. *Id.* at 601-21; see also WYO. STAT. § 1-12-104 (1977); *State v. Spears*, 76 Wyo. 82, 300 P.2d 551, 562 (1956); (a husband and wife "[m]ay in all civil and criminal cases be witnesses for each other the same as though the marital relation did not exist.").

21. WYO. STAT. § 1-12-104 (1977); see also *Pike v. State* 495 P.2d 1188, 1189 (Wyo. 1972); (Admission of wife's testimony in criminal cases where husband is defendant is error per se unless it is within the statutory exception, and circumstances determine whether it is prejudicial.); *Fox v. Fox*, 75 Wyo. 390, 296 P.2d 252, 256 (1956); (One spouse, is incompetent to testify against the other irrespective of whether testimony relates to a confidential communication, but duration of bar against matters not confidential does not continue after termination of relationship).

22. LOUISELL & MUELLER § 252.

23. RULE 501. GENERAL RULE

Except as otherwise required by constitution or statute or by these or other rules promulgated by the Supreme Court of Wyoming, the privilege of a witness,

other privileges which survive include those covering communication between an attorney and his client, a doctor and his patient, and a clergyman or priest concerning a confession given to him in his professional character.²⁴

Pursuant to the common law a person who has been convicted of treason, a felony, or an offense which involved fraud or deceit was incompetent as a witness.²⁵ However, in 1918 the United States Supreme Court held that a former conviction was no longer grounds for incompetency in criminal cases.²⁶ By 1953 all state jurisdictions had abolished use of felony convictions to disqualify witnesses, although a few jurisdictions hold conviction of perjury still renders a witness incompetent. Wyoming takes the position that the conviction for a felony will not render a witness incompetent, but it does allow evidence of a prior conviction for impeachment purposes and to test credibility.²⁷ (Future use of evidence of conviction of a crime for impeachment purposes must comply with Wyoming Rule of Evidence 609 and is discussed at length later in the article.) Thus, Rule 601 merely codifies existing Wyoming law in this area.

Conclusion

Competency is defined as the minimum standard of credibility necessary to permit any reasonable man to put any credence in a witness's testimony. Thus, a witness must be competent as to matters he is expected to testify about and it is the court's obligation to insure witnesses meet the minimum standard.²⁸ Furthermore, it is arguable that "Rule 601 should not preclude a judge from excluding certain witnesses upon grounds closely akin to those underlying some of the now discarded competency barriers."²⁹ Therefore, in rare cases the trial judge might exclude a witness where severe incapacity subverts credibility to the point that questions of basic relevance are raised or questions of prejudice or lack of

person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the State of Wyoming in the light of reason and experience.

24. WYO. STAT. § 1-12-101 (1977).

25. 2 WIGMORE, EVIDENCE § 488 (3d ed. 1940).

26. *Rosen v. United States*, 245 U.S. 467, 471 (1918).

27. *Janski v. State*, 538 P.2d 271 (1975); *Heberling v. State* 507 P.2d 1 (1973), cert. denied, 414 U.S. 1022.

28. WEINSTEIN ¶ 601 [01].

29. LOUISELL & MUELLER § 252.

personal knowledge become apparent. Finally, it suffices to say, in light of the above-mentioned analysis, that Rule 601 renders everyone competent to be a witness except as otherwise provided in the rules and, therefore, examination of individuals as to competency is no longer required unless it is made to appear that minimum credibility is in doubt.

RULE 602: LACK OF PERSONAL KNOWLEDGE³⁰

General Provisions and Purpose

Wyoming Rule 602, which is identical to Federal Rule 602, requires each witness to have personal knowledge of matters on which he is to testify. The necessary knowledge may be shown by the testimony of the witness himself or by extrinsic evidence. Hence, personal knowledge is not absolute, but may consist of what the witness thinks he knows from personal perception. The reference to Rule 703 was incorporated to avoid any question of conflict between Rule 602 and the provisions of Rule 703 allowing an expert to express opinions relying on facts of which he does not have personal knowledge.³¹

The rule is an extension of the common law's insistence that decisions be based on the best evidence available. It therefore follows that personal knowledge actually means firsthand knowledge which has come to the witness through his own senses.³² The burden of laying a foundation by displaying the witness had personal knowledge, is on the party offering the testimony. If the opposing party fails to object for inadequate foundation he waives the preliminary proof, however, if it later appears the witness lacked opportunity to observe or did not actually observe the fact, his testimony will be stricken.³³

The personal knowledge requirement is closely related to the hearsay doctrine and is based on the premise that "a wit-

30. RULE 602. LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge 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 Rule 703, relating to opinion testimony by expert witnesses.

31. FED. RULE EVID. 602, Adv. Comm. Note.

32. LOUISELL & MUELLER § 259.

33. MCCORMICK, EVIDENCE § 10, at 21 (2d ed. 1972) [hereinafter cited as MCCORMICK].

ness may testify to an event or occurrence which he has seen himself, but not one which he knows only from the description of others.”³⁴ However, if a witness is to testify to out-of-court statements, whether or not the statement is admissible under the exceptions to the hearsay rules, the personal knowledge requirement is satisfied if the witness has first-hand knowledge concerning the making or preparation of the statement itself, regardless of his knowledge concerning the events reported in the statement.³⁵ Although Rule 602 prevents witnesses from testifying to the subject matter of the statement as he has no personal knowledge of it, Judge Weinstein reasons there is no inconsistency between Rule 602 and the hearsay rules because the matters to which the witness is testifying is what he heard rather than the event described by the hearsay declarant.³⁶

The effect of the language of Rule 602 is to compel admission of the witness's testimony if the proponent of the evidence makes a prima facie showing of the qualifying characteristics. However, the judge retains the power to reject evidence if as a matter of law the trier of fact could not possibly find the witness actually perceived the matter about which he is testifying.³⁷

Despite the above-mentioned rule, the judge must admit testimony even though the witness is not certain about what he perceived, providing the witness had the opportunity to observe and obtained some impressions from his observation.³⁸ Thus a witness who has observed the matter in question with his own senses should be allowed to testify to what he believes he saw although his testimony reflects uncertainty.³⁹ Similarly, if reasonable men could differ as to whether the witness had adequate opportunity to observe, then the testimony of the witness should come in and the trier of fact will evaluate the opportunity of the witness in reviewing the testimony.⁴⁰ It is worth noting that the nature of the matter to be proved may require a sustained period of observation by the witness to satisfy the personal knowledge require-

34. *Supra* note 32.

35. LOUISELL & MUELLER § 260.

36. WEINSTEIN ¶ 602 [01] at 602-3.

37. *Id.* at ¶ 602 [02].

38. 3 WIGMORE, EVIDENCE § 658 (3d ed. 1940).

39. *United States v. Evans*, 484 F.2d 1178, 1181 (2d Cir. 1973).

40. MCCORMICK § 10, at 21.

ment.⁴¹ For example, a longer period of observation would be necessary to allow testimony concerning a person's insanity or a personal view of character of another, than for most other matters.

Rule 602 is also important because Rule 701, governing opinion testimony by lay witnesses, incorporates the knowledge requirement of Rule 602. Therefore, when reading Rule 602 in conjunction with Rule 701 the witness before giving his opinion is required first to have made observations supporting the opinion, and second to have reported the observation by giving as much data as possible.⁴² The essential question, then, is whether the witness had an opportunity to observe facts upon which the opinion is based. If the above requirements are met the witness may then give opinion testimony if it is rationally based on the perception of the witness and helpful to a clear understanding of a fact in issue.⁴³

Effect on Wyoming Law

The Wyoming Supreme Court, in a case involving a witness called to give the testimony of a deceased stated:

The rule is that it is sufficient if the witness is able to state the substance of what was sworn on the former trial. But, he must state in substance the whole of what was said on the particular subject which he was called to prove.⁴⁴

Because the witness was unable to remember and did not undertake to state in substance all of the testimony of the deceased witness, he was incompetent to testify because he lacked personal knowledge. Similarly, in *Rosencrance v. State*⁴⁵ a justice of the peace was held incompetent to testify as to the testimony of another witness in a preliminary hearing, of which he was judge, in the absence of a showing that he remembered the substance of the testimony.

These cases demonstrate that Wyoming required personal knowledge by the witness on matters to which he is to testify prior to the enactment of Rule 602.

41. LOUISELL & MUELLER § 260.

42. WEINSTEIN ¶ 602 [03].

43. Tait, *The New Federal Rules of Evidence: A Summary of the Differences Between the Rules and the Connecticut Law of Evidence*, 9 CONN. L. REV. 1, 20 (1976).

44. *Foley v. State*, 11 Wyo. 464, 72 P. 627, 630 (1903).

45. 33 Wyo. 360, 239 P. 952 (1925).

RULE 603: OATH OR AFFIRMATION⁴⁶*General Provisions and Purpose*

Wyoming Rule 603, which is identical to Federal Rule 603, requires that before a witness be allowed to testify he must declare he will testify truthfully. The rule is designed to afford flexibility in dealing with problems encountered in swearing witnesses with unpopular religious beliefs or who are atheists, agnostics, or conscientious objectors, and problems raised when the witness is mentally defective or a child.⁴⁷ The purpose of the rule is to further the cause of truth by inducing in the witness a feeling of obligation to speak only the truth and to impress upon the witness the danger of criminal prosecution for perjury for deliberately giving false testimony.⁴⁸ The rule will be satisfied by either an oath, which invokes devine power, or an affirmation, which is a solemn declaration. The oath or affirmation may be given in any manner designed to impress the witness with the duty to tell the truth.

If a witness fails to satisfy the requirement of the oath it should be immediately brought to the attention of the trial judge, because failure to object at the time that the witness was not sworn will constitute a waiver of that objection.⁴⁹

At common law, athiests, agnostics, and children could not testify, the rationale being that a pre-requisite of taking an oath was belief in a devine being who would punish false swearing.⁵⁰ However, the modern trend has been to allow witnesses to testify without any reference to religious belief. Consequently, it has been held reversible error for a court to refuse to let an accused testify because he would not take an oath with God's name in it.⁵¹ The court, emphasizing that the common law did not require an appeal to God as a pre-

46. RULE 603: OATH OR AFFIRMATION

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.

47. FED. RULE EVID. 603, Adv. Comm. Note.

48. LOUISELL & MUELLER § 265.

49. *Thomas v. Dad's Root Beer & Canada Dry Bottling Co.*, 225 Ore. 116, 357 P.2d 418 (1960); *State v. Doud*, 190 Ore. 218, 225 P.2d 400 (1950); however, see *U.S. v. Fiore*, 443 F.2d 112 (2d Cir. 1971), (in a situation where there is no opportunity to object, for example, a proceeding before a grand jury, it is error even to question a witness who refuses to take an oath).

50. MCCORMICK § 63, at 141.

51. *United States v. Loopier*, 419 F.2d 1405 (4th Cir. 1969).

requisite to a valid oath, found the defendant's privilege to testify may not be denied him because he would not accede to a form of oath or affirmation not required by common law.

As previously mentioned, another problem is the swearing of witnesses with unpopular religious beliefs. Because there may be a tendency towards jury prejudice because of the manner in which a witness chooses to be sworn,⁵² the better practice is to permit the witness to affirm and have any questions on the subject of his religion asked out of the presence of the jury.⁵³ This procedure would also be in accord with Wyoming Rule 610 which provides that a witness cannot be impeached on the basis of religious belief.

Effect on Wyoming Law

Although there are no relevant Wyoming cases concerned with the validity of an oath or affirmation, Wyoming prior to the adoption of Rule 603 enacted several statutes consistent with the modern trend. Prior to 1977 Wyoming required a specific verbal formula in administering an oath.⁵⁴ However, the statute has been superseded and replaced by Section 1-2-101 of the 1977 Wyoming Statutes, which provides that a person may be sworn by any form he deems binding on his conscience. Section 1-2-103 of the Wyoming Statutes⁵⁵ allows for an affirmation in lieu of an oath to persons conscientiously opposed to taking an oath. And Wyoming Rule of Civil Procedure 43(d) provides that when under the rules of civil procedure an oath is required, an affirmation may be accepted in lieu thereof. It necessarily follows that the adoption of Rule 603 does very little to change pre-existing Wyoming law. Furthermore, there is no indication under Wyoming Rule 1102⁵⁶ or any indication by the Wyoming court that Rule 603 was to have any effect on the above-mentioned statutes. Thus, Rule 603 appears to simply codify previous Wyoming law.

52. LOUISELL & MUELLER § 266.

53. United States v. Rabb, 394 F.2d 230 (3d Cir. 1968).

54. WYO. STAT. 1-153 (1957).

55. See also WYO. STAT. § 1-2-102 (1977): Officers Authorized to Administer Oaths.

56. RULE 1102. STATUTES SUPERCEDED.

RULE 604: INTERPRETERS⁵⁷*Introduction and General Provisions*

Rule 604 provides specifically that an interpreter must qualify as an expert in the skill of interpreting under Article VII and make an oath or affirmation to translate truthfully. The rule must be read in conjunction with Wyoming Rule of Civil Procedure 43(f) and Wyoming Rule of Criminal Procedure 29(b), both of which provide that the judge in his discretion may order the appointment and compensation of interpreters.

Whenever a party or witness utterly lacks the ability to comprehend English, the service of an interpreter is essential during litigation.⁵⁸ Wigmore suggests that interpreters may be used for three classes of persons: (1) persons organically unable to speak words; (2) persons speaking exclusively or more naturally a language foreign to the tribunal; and (3) persons unable, through diffidence or illness, to speak loud enough for the tribunal to hear.⁵⁹

Comprehension and fluency in both English and the foreign tongue is all that is required to qualify an interpreter, the trial judge having discretion in assessing the interpreters qualifications.⁶⁰ If the witness does not understand English the better practice is to have the interpreter translate all that is being said by the judge, attorney, and other witnesses. The translated non-English version of matters never become part of the court record, and for this reason the interpreter should not edit or inject personal judgment or advice in the process of relating what has transpired.⁶¹

Application of the Rule

The general rule, which is followed by Wyoming,⁶² is that whether or not an interpreter should be appointed is within the discretion of the trial judge.⁶³

57. RULE 604. INTERPRETERS

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.

58. LOUISELL & MUELLER § 271.

59. 3 WIGMORE, EVIDENCE § 811 (3d ed. 1940).

60. LOUISELL & MUELLER § 272.

61. *Id.* at § 271.

62. *Casciato v. Rennick*, 380 P.2d 122, 123 (Wyo. 1963); *Thompkins v. Byrtus*, 72 Wyo. 537, 267 P.2d 753, 756 (1954).

63. *Fairbanks v. Cowan*, 551 F.2d 97, 99 (6th Cir. 1977); *Suarez v. United States*, 309 F.2d 709, 712 (5th Cir. 1962).

However, in criminal cases some courts recognized that when the accused or a witness on his behalf cannot understand or speak English the accused has the right to an interpreter and this right is of constitutional proportions.⁶⁴ The rationale given is that the right to confront adverse witnesses, as guaranteed by the sixth amendment, would be meaningless if the accused could not understand their testimony. In *United States v. Carrion*⁶⁵ the court emphasized that because the determination of whether to appoint an interpreter rested upon various factors, considerations of judicial economy dictated that the trial court be granted wide discretion in this matter. Despite this, the court made it clear that the trial court within its discretion should make unmistakably clear to a defendant who may not understand the language that he has the right to a court appointed interpreter, if upon inquiry the court ascertains that one is needed. Therefore, it is advisable that an interpreter be appointed any time it appears a party or a witness has difficulty apprehending what is being said during the court proceeding.

One commentator suggests that persons related to or aligned with the defendant, plaintiff, prosecution, or victim, or those who have an interest in the action should not be appointed as an interpreter even though they would not necessarily fail as experts. However, in some instances it may be necessary to appoint such persons where they are the only ones who can understand the testimony of the particular party involved.⁶⁶ This proposition is supported by both federal and Wyoming case law.⁶⁷

Conclusion

Under Rule 604 the only requirements are that the interpreter qualify as an expert and that he take an oath to interpret truthfully. It appears the appointment of an interpreter is within the discretion of the trial judge, however, there is some authority that whenever an accused or interested party to the action is unable to understand the proceeding because of language difficulties an interpreter should be appointed as

64. *United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973), *cert. denied*, 416 U.S. 907; *see also* *Negron v. New York*, 434 F.2d 386 (2d Cir. 1970).

65. *Id.*

66. LOUISELL & MUELLER § 272.

67. *Fairbanks v. Cowan*, *supra* note 63; *Casciato v. Rennick*, *supra* note 62.

a matter of right. Finally, there is nothing in Rule 604 which would suggest any change in pre-existing Wyoming law.

RULE 605: COMPETENCY OF JUDGE AS WITNESS⁶⁸

Introduction

Rule 605 unequivocally disqualifies a judge from testifying in a trial over which he presides and provides for an "automatic objection" if the judge does testify. Thus, there is no need for a party to raise the issue at trial to preserve his rights on appeal. The reason for allowing an automatic objection is that to require an actual objection confronts the opponent with a choice of not objecting and allowing the testimony, or objecting and causing the judge to feel his integrity has been attacked.⁶⁹

Allowing a judge to testify necessarily places him in a conflicted role. It is obvious that "[w]hen a judge is called as a witness in a trial before him, his role as witness is manifestly inconsistent with his customary role of impartiality in the adversary system of trial."⁷⁰ Moreover, a judge would be placed in the awkward position of weighing his own testimony, and passing on the competency thereof. Furthermore, allowing testimony by a judge may inject an unwarranted risk of unfair prejudice and place the party opposing the testimony in the untenable position of cross examining the judge.⁷¹

Rule 605 also reaches any equivalent of testimony by the judge. Hence, under Wyoming Rule of Evidence 614 although a judge is allowed to question a witness, he should not be allowed to ask questions which impart to the jury information not previously put into evidence. He should not use questions which reveal information gathered by him in the course of ruling on objections, offers of proof, motions to suppress, and motions in limine.⁷² A judge should also not be allowed to take improper notice of adjudicative facts. Wyoming Rule of Evidence 201 allows a judge to take notice of facts gener-

68. RULE 605. COMPETENCY OF JUDGE AS WITNESS

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.

69. FED. RULE EVID. 605, Adv. Comm. Note.

70. MCCORMICK § 68, at 147.

71. LOUISELL & MUELLER § 280.

72. *Id.*

ally known within the jurisdiction or facts capable of verification. Facts that are known personally to the judge do not come within the scope of judicially noticeable facts and, therefore, notice of these facts should be considered violative of Rule 605.⁷³

Rule 605 does not speak to situations where a judge presides at a suppression hearing or a motion in limine and later presides at trial, where a judge presides at trial and thereafter decides a post-trial motion, or where a judge presides at trial and later presides over a sentencing hearing. In these cases a judge should employ information he has obtained during the proceedings in making the ruling.⁷⁴

Effect on Wyoming Law

Under the traditional view a judge was regarded as competent to testify in trials over which he presided. Later, several jurisdictions found judges were disqualified from testifying to material facts, but held they could testify to merely formal and undisputed matters. The modern approach, which is in accord with Rule 605, is that a judge is incompetent to testify in a case which he is trying.⁷⁵ There is no case law or statutes in Wyoming concerning this issue, therefore, it is impossible to ascertain what rule Wyoming adhered to in the past.

Under federal law a judge must disqualify himself when he has personal knowledge of disputed evidentiary facts, when he is or has been a material witness, or when his impartiality may reasonably be questioned.⁷⁶ A judge's obligation to excuse himself for reasons of personal knowledge arise only when knowledge has been acquired from extrajudicial sources. Accordingly, knowledge officially gathered by a judge during pretrial stages does not require a judge to disqualify himself.⁷⁷

Wyoming has no statute similar to federal statute 28 U.S.C. § 455. Consequently, there is no requirement that a judge disqualify himself when he possesses personal knowl-

73. *Id.*

74. *Id.*; see also *Terrell v. United States* 6 F.2d 498 (4th Cir. 1925).

75. Annot., 22 A.L.R.3d 1198 (1968).

76. 28 U.S.C. § 455 (1948).

77. LOUISELL & MUELLER § 278.

edge. However, the Wyoming Supreme Court has held that a member of a judicial or quasi-judicial body who is interested either directly or indirectly in the outcome of a proceeding is under an obligation to disqualify himself.⁷⁸ One may be able to argue by analogy, that personal knowledge of the matter necessarily vests the judge with an interest in the outcome and he should therefore excuse himself.

The mere calling of a judge as a witness, even though he refuses to testify, may result in prejudice. This would require the reviewing court to decide whether requesting the judge's testimony was sufficiently prejudicial to require a reversal. Factors which would need to be considered are: what was said in the jury's presence; the importance of the testimony and the other witnesses' knowledge of the event. Moreover, if a judge has critical information and refuses to testify, reversal for exclusion of vital evidence may be warranted.⁷⁹ The above analysis demands the conclusion that Wyoming judges follow a practice consistent with the federal statute in order to avoid the problems which will necessarily arise if they attempt to try cases in which there is a substantial likelihood they will be called as a witness.

There is no indication that Rule 605 raises any barriers to an action by a judge based on in court observation.⁸⁰ This result is supported by Wyoming Rule of Criminal Procedure 41(a) which authorizes summary punishment via criminal contempt if the judge certifies he saw or heard conduct constituting the contempt and that it was committed in the actual presence of the court. In this situation, the judge will be acting both as chief witness and trier of fact. Rule 41(b) does disqualify a judge from presiding at proceedings to punish contempt if the contempt charge involves disrespect or criticism of the judge himself. This rule is premised on grounds of possible prejudice, rather than a disqualification for personal knowledge.

Finally, if a judge with personal knowledge decides to recuse himself after trial has commenced it is necessary to com-

78. *Lake De Smet Reservoir Co. v. Kaufman*, 75 Wyo. 87, 292 P.2d 482 (1956).

79. WEINSTEIN ¶ 605 [02].

80. *Ungar v. Sarafite*, 376 U.S. 575 (1964) (this decision is based on Federal Rule of Criminal Procedure 42(a) which is identical to Wyoming Rule 41(a)).

ply with Wyoming Rule of Civil Procedure 63⁸¹ or Wyoming Rule of Criminal Procedure 26.⁸² Briefly, Rule 63 provides that in case of death, sickness or other disability (which has been held to include personal knowledge)⁸³ of the trial judge, after a verdict is returned or findings of fact and conclusions of law are filed, then his successor may perform the duties of the original trial judge. There is no provision in the rule which authorizes reassignment of the case when the trial judge becomes disabled before a verdict has been returned or findings and conclusions filed. Thus, Judge Weinstein argues that Rule 63 does not apply if a judge is disqualified in the midst of trial, and if he is at that point, a new trial must be granted.⁸⁴ Professor Mueller reaches a contrary result, reasoning that:

If it is constitutional to permit reassignment after verdict or findings and conclusions, when post trial motions may still be made, it is hard to see why it is unconstitutional to reassign the cause during trial when the presiding judge must recuse himself.⁸⁵

Wyoming Rule of Criminal Procedure 26 is substantially the same as Rule 63, but in addition it allows for substitution during trial, before a verdict or finding of guilt.⁸⁶

Conclusion

Rule 605 absolutely disqualifies a judge from testifying in a trial at which he presides. Furthermore, Wyoming should follow federal statute 28 U.S.C. § 455 and require judges to disqualify themselves if they possess personal knowledge of evidentiary facts or there is a likelihood they will be called as a witness in the proceeding. Finally, a judicial officer called to the stand in a case over which he is not presiding is competent to testify.

81. WYO. R. CIV. P. 63 DISABILITY OF A JUDGE.

82. WYO. R. CRIM. P. 26 JUDGE DISABILITY.

83. *Bennett v. United States*, 285 F.2d 567, 572 (5th Cir. 1960), cert. denied, 366 U.S. 911.

84. WEINSTEIN ¶ 605 [02]; see also *Arrow-Hart, Inc. v. Phillip Carey Co.*, 552 F.2d 711 (6th Cir. 1977) (New trial required where judge died before making findings of fact; where one party refused to stipulate that new judge could decide the case on the record).

85. LOUISELL & MUELLER § 278, at 55; for a detailed discussion of Federal Rule of Civil Procedure 63 see LOUISELL & MUELLER § 278; WEINSTEIN ¶ 605 [02].

86. For an in depth analysis of the constitutional problems of Federal Rule of Criminal Procedure 25, which is in material aspects the same as Wyoming Rule 26, see WEINSTEIN ¶ 605 [03]; LOUISELL & MUELLER § 278.

RULE 606: COMPETENCY OF JUROR AS WITNESS⁸⁷

Wyoming Rule of Evidence 606(a) provides that a juror may not testify as a witness at the trial in which he is sitting. It is a broad rule of incompetency and one in which the discretion of the judge has no role.⁸⁸ The rationale for not allowing jurors to testify is that cross-examination and impeachment would be inhibited because of the fear of offending the juror-witness. Further, such a juror may lose his impartiality either by identifying with the party calling him⁸⁹ or by giving excessive weight to his own testimony. There is also the concern that a juror who has expressed his opinions on the witness stand may cling to them unyieldingly on his return to the jury box.⁹⁰

Not all commentators however, prescribe to the drafters' reasoning. Wigmore, for example, supported testimony by jurors on the basis that proper voir dire of the jury would eliminate many of the problems by excluding persons from the jury who have personal knowledge or material facts. It was also his contention that the impartiality of the remaining jurors would neutralize any bias created in a juror due to his testifying.⁹¹ Moreover some state jurisdictions, by virtue of either case law or statute permitted a juror to be called to the witness stand.⁹² It should further be noted that both federal⁹³ and Wyoming case law is void on this subject.

87. RULE 606. COMPETENCY OF JUROR AS WITNESS

(a) *At the trial.* 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.

(b) *Inquiry into validity of verdict or indictment.* 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 his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received, but a juror may testify on the questions 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.

88. The rule, however, does permit the judge to interrogate the jurors as to what effect publicity concerning the case has had on them and about attempted tampering. WEINSTEIN ¶ 606 [02], at 16.

89. *Id.* at 17.

90. WIGMORE, EVIDENCE § 1910, at 770 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE].

91. *Id.* at 771.

92. *Id.* at 771; MCCORMICK § 68, at 148; JONES § 20:57, at 725. It should be noted, however, that a juror's testimony was not allowed if the purpose was impeachment of the verdict. MCCORMICK § 68, at 148.

93. WEINSTEIN ¶ 606 [02], at 20.

Rule 606(a) also provides that it is necessary to object if a juror is called to testify, since the rule does not operate automatically to exclude such testimony. When and if an objection is made, it should be done out of the presence of the jury to avoid any possible prejudice to the objecting party.⁹⁴

A related matter which is likewise banned by Rule 606(a) is the communication of personal knowledge about material facts by one juror to the others in the jury room. The incidence may arise when the voir dire examination of the jury has been less than adequate. In essence, the juror who discloses his personal knowledge concerning a defendant to the other jurors is being a witness against him under circumstances which preclude the defendant from confronting the juror as a witness.⁹⁵ Wigmore views such disclosure as hearsay and notes that such "testimony" against the defendant is particularly bad because it is not subject to cross-examination.⁹⁶ In *Owen v. McMann*,⁹⁷ two jurors communicated to the other jurors their personal knowledge of defendant's misdeeds which were unrelated to the charge. The court stated that not all discussion of extra-record matters makes the jurors "unsworn witnesses" but that the court must look at the nature of the matter and the probability that prejudice will result.⁹⁸ It was held that in that instance there was such a probability of prejudice that the verdict was lacking in due process.⁹⁹ This is not to say that jurors may not inject their own philosophies and wisdom into their deliberations.¹⁰⁰ In this regard, Wyoming law recognizes the propriety of allowing jurors to consider the knowledge and experience which they possess in common with mankind.¹⁰¹

In the event a judge discovers that a juror has personal knowledge which he has not yet relayed to the others, the judge is left with several options depending upon the circumstances of the case. In a civil case where the information is not necessary, the judge could discharge the juror and use an

94. WRE 606(a).

95. U.S. CONST. amend. VI, amend. XIV.

96. WIGMORE § 1800, at 333.

97. 435 F.2d 813 (2d Cir. 1970).

98. *Id.* at 818.

99. *Id.*

100. *United States v. McKinney*, 429 F.2d 1019, 1022-23 (5th Cir. 1970).

101. *Brown v. State*, 80 Wyo. 12, 336 P.2d 794, 798 (1959); *Shikany v. Salt Creek Trans. Co.*, 48 Wyo. 190, 45 P.2d 645, 655 (1935).

alternate juror or seek a stipulation permitting a jury of less than twelve.¹⁰² Rule 606(a) forecloses the alternative of simply putting the juror on the stand and allowing him to testify. If the juror's testimony is important, the judge must declare a mistrial in either a civil or a criminal case since it would become impossible to reconcile the requirements for full disclosure of all relevant evidence and the requirement of a disinterested trier of fact.¹⁰³

Although the possibility of improper communication in the jury room will never be eliminated, the chances of its occurrence can be substantially reduced by a thorough voir dire examination of the jury panel which would result in the exclusion from the jury those persons possessing such personal knowledge. Rather than asking merely whether the juror knows the defendant, it would be well to inquire whether he knows anything about the defendant.¹⁰⁴

Rule 606(b)

Wyoming Rule 606(b), which is identical to its federal counterpart, offers an accommodation between policies designed to safeguard the institution of trial by jury and policies designed to insure a just result in an individual case.¹⁰⁵ The rule accomplishes its purpose by disallowing juror testimony as to any matter or statement occurring during the course of the jury's deliberations; however, there are two exceptions to the rule. First, the rule does not foreclose testimony by jurors concerning prejudicial extraneous information. Secondly, the rule does not preclude juror testimony as to outside influences injected or brought to bear upon the deliberative process. Consequently, Rule 606(b) is a rule of incompetency barring jurors from testifying to the motives, methods, or mental processes by which they reached their verdict.¹⁰⁶ The rule was given support as early as 1892 when the United States Supreme Court found that "a juror may 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."¹⁰⁷

102. WYO. R. CIV. P. 48; WEINSTEIN ¶ 606 [02], at 21.

103. WEINSTEIN ¶ 606 [02], at 22.

104. Owen v. McMann, *supra* note 97.

105. FED. RULE EVID. 606(b), Adv. Comm. Note, subdivision (b).

106. WEINSTEIN ¶ 606 [04], at 606-27.

107. Mattox v. United States 146 U.S. 140, 148-49 (1892).

One reason often given to justify the rule is that it is necessary to prevent jurors from being harassed by the defeated party in an effort to secure evidence of facts which might establish misconduct sufficient to set aside a verdict. Also, the rule is viewed as being necessary to prevent what was intended to be a private deliberation from becoming subject to constant public scrutiny "to the destruction of all frankness and freedom of discussion and conference."¹⁰⁸ In addition, allowing unrestricted attacks by jurors on their verdicts would so undermine the finality of verdicts as to threaten the system itself.¹⁰⁹ On the other hand, allowing proof of extraneous and outside information satisfies those critics who argue that a rule putting verdicts beyond the effective reach of the parties only promotes irregularity and injustice.¹¹⁰

Operation of the Rule

Rule 606(b) would exclude, for example, testimony that a juror misunderstood or disregarded evidence or the judge's instructions. Also precluded is testimony to the effect a juror thought the jury would be kept out indefinitely. Testimony that a juror had held the failure to take the stand against the accused or that the juror stated a desire to return home could not be admitted under Rule 606(b).¹¹¹

As previously mentioned, the rule would allow impeachment of a jury's verdict by any sort of information which might have affected the jury's verdict if it was conveyed to the jury through extraneous sources, unless the information was commonly known.¹¹² Consequently, if a juror acquired specific personal knowledge about a party or the controversy prior to trial and such knowledge might affect the verdict, testimony to that effect is permissible.¹¹³ On the other hand testimony would be allowed where one or more jurors conducted during deliberations extra-record investigations of the parties or the controversy,¹¹⁴ the jury used or took to its de-

108. McDonald and Unites States Fidelity & Guar. Co. v. Pless 238 U.S. 264, 268 (1915).

109. LOUISELL & MUELLER § 286.

110. FED. RULE EVID. 606(b), Adv. Comm. Note, subdivision (b).

111. WEINSTEIN ¶ 606 [04], at 606-30; For an extensive list of matters and statements excludable under Rule 606(b), see LOUISELL & MUELLER § 287.

112. LOUISELL & MUELLER § 288.

113. United States v. Howard, 506 F.2d 865, 868 (5th Cir. 1975).

114. Gafford v. Warden, 434 F.2d 318, 320 (10th Cir. 1970).

liberations unauthorized objects,¹¹⁵ or information, which may have affected the verdict, made its way into the jury room through the media.¹¹⁶ Generally, the party seeking to set aside a verdict cannot succeed unless it appears that such information had a prejudicial impact upon the jury.¹¹⁷ Also, the rule would prohibit inquiry into the effect the abovementioned irregularities had on the minds of the jurors.

The second exception in Rule 606(b) permits impeachment of verdicts by evidence of outside influence improperly brought to bear upon any juror. The purpose of the exception is to permit proof of external pressures which might affect the verdict and is most often invoked in cases involving improper extrajudicial contacts between third persons and one or more jurors.¹¹⁸ For example, exposure of a juror or his family to threats,¹¹⁹ acceptance of bribes,¹²⁰ or communication between a juror and witnesses¹²¹ are all instances of outside influence, concerning which testimony is proper. The exception does not reach the case of coercion of a juror by a fellow juror because it does not qualify as an outside influence.

Various types of conduct may present difficulties under Rule 606(b). Problems arise in situations where a juror makes statements that are biased or prejudicial, derogatory of one party or his witness, contain racial overtones. The essential question in these situations is whether proof of these statements can be separated from the effect the statements had on the jury. The line is a difficult one to draw and Judge Weinstein argues it is better to decide in favor of jury privacy.¹²² Judge Weinstein reasons further that many statements are made during the jury's deliberations which have little or no effect on the outcome. Hence, the trial judge should have discretion to determine the significance of the remarks and if he finds the statements inseparable from their effect should declare them improvable.¹²³

115. *Paz v. United States*, 462 F.2d 740, 746 (5th Cir. 1972), *cert. denied*, 414 U.S. 820.

116. *United States v. Thomas*, 463 F.2d 1061, 1064 (7th Cir. 1972).

117. *LOUISELL & MUELLER* § 288.

118. *Id.* at § 289.

119. *Miller v. United States*, 403 F.2d 77 (2d Cir. 1968).

120. *Remmer v. United States*, 347 U.S. 227 (1953).

121. *Romo v. State*, 500 P.2d 678 (Wyo. 1972).

122. *WEINSTEIN* ¶ 606 [04], at 606-36.

123. *Id.*

The restrictions imposed by Rule 606(b) do not apply to testimony or affidavits by jurors relating to matters occurring before or after deliberations, nor do they apply to false answers given during voir dire.¹²⁴ Furthermore, the restrictions do not operate to disqualify a judge from questioning a jury that returns with an ambiguous or inconsistent verdict, and the rule does not bar testimony by a juror, that all jurors agree that through inadvertance, oversight, or mistake the verdict announced was not the verdict on which agreement had been made.¹²⁵ Finally, the rule does not prohibit the polling of the jury. If the requisite number of votes are not present to support the verdict, the jury should be sent back to continue deliberations or a new trial should be granted.¹²⁶ This latter rule has been followed in Wyoming by statute.¹²⁷

Rule 606(b) is silent as to whether evidence should be permitted that jurors reached a verdict by an improper method such as majority vote, quotient, or lots. Arguably, it is better to treat such proof as incompetent because it amounts to an indication of the jury's mental processes. Furthermore, it is hard to imagine that the jury did not deliberate prior to deciding to reach a verdict in such a manner. It simply represents a mode of compromising after disagreement and should not be singled out from the other instances where jurors adjust initial positions to reach unanimity.¹²⁸

Procedure for Impeaching Jury Verdicts

The party seeking a new trial because of jury misconduct must generally make a preliminary showing, on the basis of affidavits, that misconduct sufficient to impeach the verdict may have occurred.¹²⁹ If jury misconduct sufficient to warrant a new trial comes to the attention of a party during trial, he must call it to the court's attention. If he does not, he risks waiving any right to relief. That is, he cannot sit silently by and hope for a favorable verdict.¹³⁰ A motion for a new trial because of jury misconduct must be made within ordi-

124. LOUISELL & MUELLER § 290.

125. WEINSTEIN ¶ 606 [04], at 606-34.

126. *Bruce v. Chestnut Farms—Chevy Chase Dairy*, 126 F.2d 224 (D.C. Cir. 1942).

127. WYO. STAT. § 1-11-213 (1977); WYO. STAT. § 7-11-501 (1977).

128. WEINSTEIN ¶ 606 [04], at 606-42.

129. *United States v. Eagle* 539 F.2d 1166, 1169 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977).

130. LOUISELL & MUELLER § 291.

nary time limits. However, if facts of misconduct are discovered after the time for the motion has expired, limits do not apply and a party may make his motion by collateral attack upon the judgment.¹³¹

A party who makes a proper preliminary showing is entitled to an evidentiary hearing on the alleged jury misconduct, and in criminal cases the entitlement is of constitutional dimension.¹³² Also, in criminal cases contact between jurors and witnesses or jurors and prosecutors is presumptively prejudicial and the government is obliged to show the absence of prejudice.¹³³

Effect on Wyoming Law

Prior to the enactment of Rule 606(b) Wyoming allowed a verdict by lot or chance to be inquired into by means of a juror's affidavit.¹³⁴ Otherwise, prior Wyoming law is consistent with the new rule. For example, the Wyoming Supreme Court has found that submission to the jury of papers or exhibits not received into evidence at trial is a proper subject for inquiry, and constitutes prejudicial error absent a showing to the contrary.¹³⁵ In addition, the court has held a losing party cannot, in order to secure a new trial, use testimony of jurors to impeach their verdict thus, affidavits of jurors in regard to what was said or considered during their deliberations must be disallowed.¹³⁶ Finally, the court has found improper communications between a juror and a witness in a criminal trial is presumably prejudicial to the defendant.¹³⁷ Once such a communication has been shown to have taken place, the burden is upon the prosecutor to demonstrate its harmless effect.¹³⁸ Consequently, Rule 606(b) will have very little effect on existing Wyoming practice.

131. *Id.*

132. Gafford v. Warden, *supra* note 114.

133. Remmer v. United States, *supra* note 120; Romo v. State, *supra* note 121.

134. Elite Cleaners & Tailors, Inc. v. Gentry, 510 P.2d 784, 787 (Wyo. 1973).

135. Hays v. State, 522 P.2d 1004 (Wyo. 1974).

136. York v. North Cent. Gas Co., 69 Wyo. 98, 237 P.2d 845, 852 (1951); Morris v. State, 39 Wyo. 24, 270 P. 415 (1928); Bunce v. McMahon, 6 Wyo. 24, 42 P.23 (1895).

137. Romo v. State, *supra* note 121; Nicholson v. State, 18 Wyo. 298, 106 P. 929 (1910).

138. Romo v. State, *supra* note 121.

RULE 607: WHO MAY IMPEACH¹³⁹*Introduction and Application*

Rule 607 abrogates the traditional rule against impeaching one's own witness and specifically provides that a witness may be attacked by any party, including the party calling him. Several reasons have been advanced in support of the conventional rule, the most prevalent being that a party by calling a witness vouches for his trustworthiness. The theory rests on the false assumption that a party exercises a free choice in selecting his witnesses. Though the "voucher" rule may have been logical under the common law because witnesses were chosen by a party to affirm his veracity, under the modern adversary system parties are rarely able to select their witnesses, but must take them where and how they find them.¹⁴⁰ Consequently, the United States Supreme Court in *Chambers v. Mississippi*¹⁴¹ concluded that the voucher rule could not be used to preclude a defendant from cross-examining his own witness for purposes of impeachment where the witness's statement was seriously adverse to the defendant, and inconsistent with prior statements he had made under oath.¹⁴² Therefore, in criminal cases Rule 607 is merely an extension of existing law with respect to impeaching one's own witness by the use of prior inconsistent statements.

A second reason advanced in support of the traditional rule was that if impeachment was allowed, the witness could be coerced into testifying favorably under an implied threat that his character would be disparaged if he did not. However, forbidding attack by the calling party still leaves the witness at the mercy of the witness and his adversary. For example, if truth is on the side of the calling party but the witness's character is bad, the witness may be attacked by the adversary if

139. RULE 607. WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling him.

140. WEINSTEIN ¶ 607 [01].

141. 410 U.S. 284, 298 (1973).

142. In *Chambers v. United States*, witness McDonald made a sworn confession prior to trial and then at the time of trial repudiated his confession. The defendant was forced to call McDonald to the stand because the prosecutor chose not to do so. Under Mississippi law a party could not impeach his own witness and under hearsay rules the defendant was unable to present witnesses in his behalf who would discredit McDonald's repudiation and demonstrate his complicity in the crime. The Court held that the "voucher" rule as applied plainly interfered with Chambers' constitutional right to defend against the state's charges.

he speaks the truth. But, if he lies opposing counsel will not attack and the calling party is precluded from attacking.¹⁴³

Finally, proponents of the old rule express the fear the jury may accept impeaching evidence as substantive proof. Although the jury may in fact accept the evidence as substantive, one must consider this danger exists no matter who brings the evidence into court.

Under Rule 607 the calling party may impeach his own witness by any of the five modes of impeachment recognized at common law. The five methods include: (1) proof of bias, (2) mental incapacity, (3) contradiction, (4) prior inconsistent statements, and (5) bad character involving conviction of a crime.¹⁴⁴

Bias rests on the assumptions that certain relationships and circumstances impair impartiality of the witness, and the witness who is not impartial may sometimes intentionally or unintentionally shade his testimony in favor of or against one of the parties. Several limitations are placed on the use of evidence to show bias. Furthermore, the judge has discretion to control the extent of proof by excluding evidence relevant to bias because of the operation of constitutional exclusionary rules such as the privilege against self-incrimination. Also, the judge may exclude evidence if the probative value of the evidence does not outweigh factors of prejudice, confusion, and waste of time under Rule 403.¹⁴⁵

To impeach through the use of mental incapacity one must show the witness's capacity to observe, narrate, and remember is impaired. The reason for allowing this mode of impeachment, is to impress upon the jury the possibility that a witness who is incapable of accurate observation, recollection, or communication, may be incapable of testifying truthfully despite his best intentions.¹⁴⁶

Impeachment by contradiction is accomplished by showing specific errors in the witness's testimony. It rests on the inference that if a witness lied or was mistaken on one fact

143. MCCORMICK § 38.

144. WEINSTEIN ¶ 607 [02].

145. *Id.* at ¶ 607 [03].

146. *Id.* at ¶ 607 [04].

perhaps he lied or made mistakes on other facts and, therefore, all his testimony may be untrustworthy.¹⁴⁷

Before the enactment of the rules, prior inconsistent statements could be used to impeach one's own witness where the testimony surprised the party and was harmful to his case.¹⁴⁸ The prior inconsistent statement could only be used for purposes of impeachment and not as substantive evidence because they were considered to be hearsay. However, with the enactment of the rules a prior statement is not hearsay if the declarant testifies at a trial or hearing, the statement is subject to cross-examination, the statement is inconsistent with the witness's testimony, and the statement was given under oath subject to the penalty of perjury.¹⁴⁹ Furthermore, under Rule 607 there appears to be no requirement of surprise or actual harm before a prior inconsistent statement can be introduced to impeach.¹⁵⁰

Despite the favorable aspects of Rule 607, disposing of the requirements of harm and surprise as prerequisites to the use of prior inconsistent statements may result in misuse of the rule as a vehicle to get hearsay before the jury. Because Wyoming Rule 801(d)(1)(A) does not cover prior statements not made under oath, they are still considered hearsay, and while they may be used to impeach a witness, they may not be considered for the truth of the matter asserted. Consequently, a party who expects unfavorable testimony should not be allowed to put a witness on the stand and then, under the guise of impeachment, get before the jury an *ex parte* statement of the witness in hopes that the jury will consider the contents substantively.¹⁵¹ Similarly, if the witness does not injure a party's case, but merely fails to give assistance, there is no damage to refrain. Without such damage, a pro-

147. *Id.* at ¶ 607 [05].

148. *United States v. Allsup*, 485 F.2d 287 (8th Cir. 1973); *United States v. Coppola*, 479 F.2d 1153 (10th Cir. 1973); *United States v. Watson*, 450 F.2d 290 (8th Cir. 1971), *cert. denied*, 405 U.S. 993 (1972); *United States v. Hicks*, 420 F.2d 814 (5th Cir. 1970) (party may impeach his own witness in the event he was surprised and he can show affirmative damage); *Mares v. State*, 500 P.2d 530 (Wyo. 1972); *Horn v. State*, 12 Wyo. 80, 73 P. 705 (1903).

149. WRE 801(d)(1)(A).

150. *United States v. Palacios*, 556 F.2d 1359, 1363 (5th Cir. 1977) (The court, citing Rule 607, held the government can impeach own witness by its prior inconsistent statement without showing surprise).

151. *Bershaw v. United States*, 353 F.2d 477, 481 (9th Cir. 1965); *see also* *Bartley v. United States*, 319 F.2d 717 (D.C. Cir. 1963); *Foitaine v. Patterson*, 305 F.2d 124 (5th Cir. 1962); (a witness may not be called in order that he might be impeached).

ponent could offer a prior inconsistent statement only for one reason: to expose to the jury its contents in anticipation that they would accept the statement as substantive evidence.¹⁵² Thus, the argument can be made that the elements of surprise and harm must still be present under Rule 607 before prior inconsistent statements, which do not qualify as not hearsay under Rule 801(d)(1)(A), can be used to impeach one's own witness. On the other hand, the psychological tendency of a jury to connect a witness with the party calling him should deter wholesale subversion of Rule 607's intended purpose. For example, it is difficult to imagine a situation where a party would seriously attempt a complete impeachment of a chosen witness because of the inherent danger that the impression on the jury would be totally adverse.

Finally, impeachment through the use of character and conduct is allowed and is discussed in detail under Rule 608. And impeachment by showing conviction of a crime is discussed under Rule 609.

Effect on Wyoming Law

Under existing law, Wyoming, by statute and case authority allows impeachment by prior inconsistent statements if certain criteria are met. Section 1-12-106 of the 1977 Wyoming Session Laws¹⁵³ deals with impeachment of witnesses in civil and criminal cases. In pertinent part it provides a party may not impeach his own witness by evidence of bad character, but may contradict him by other evidence including prior inconsistent statements, provided the circumstances of the statement sufficient to designate the particular occasion are mentioned to the witness, the witness is asked whether he made such statements, and if so the witness is allowed to explain them. Similarly, the Wyoming Supreme Court has found that the prosecution has the right to prove a witness produced by it has made at other times statements inconsistent with his present testimony. But before the witness may be impeached he must be told the circumstances of the prior statement, and he must be asked whether or not he made the statement.¹⁵⁴

152. *Peeples, Prior Inconsistent Statements and the Rule Against Impeachment of One's Own Witness: The Proposed Federal Rules*, 52 TEX. L. REV. 1383 (1974).

153. WYO. SESS. LAWS § 1-12-106 (1977). This provision recodified WYO. STAT. § 1-143 (1957). The statutes are the same with regard to their content, with only slight changes in the 1977 version).

154. *Mares v. State*, 500 P.2d 530 (Wyo. 1972); *Horn v. State*, 12 Wyo. 80, 73 P. 705 (1903).

Rule 607 expressly supersedes Section 1-12-106 and consequently raises some doubt whether any foundation as to the circumstances of the statement need be presented before it can be used for purposes of impeachment. Federal cases applying Rule 607¹⁵⁵ have not reached the point and because there is no mention of this requirement in the rule it appears that a foundation is no longer necessary as a prerequisite to the use of prior inconsistent statements.

Wyoming Rule of Civil Procedure 32(a)(1) provides that any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of a deponent as a witness. This rule is consistent with Rule 607 and is not affected by it.

Conclusion

Rule 607 changes existing Wyoming law to the extent that it allows for impeachment by any party, by any means recognizable under the common law. Consequently, Wyoming's prior adherence to the traditional doctrine that a party could not impeach his own witness through the use of bad character is invalid. Furthermore, it appears that pursuant to Rule 607 there is no longer any requirement of surprise or harm before prior inconsistent statements can be used.

RULE 608: EVIDENCE OF CHARACTER AND CONDUCT¹⁵⁶

Wyoming Rule of Evidence 608 is an impeachment rule involving evidence of character and conduct of a witness. It is one of the exceptions to the general rule stated in Wyoming

155. *United States v. Alvarez*, 548 F.2d 542 (5th Cir. 1977; *United States v. Morgan*, 555 F.2d 238 (9th Cir. 1977).

156. **RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS**

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule of Evidence 404(a) forbidding the use of character evidence to prove a person acted in conformity therewith on a particular occasion.¹⁵⁷ Specifically, the rule allows one to prove that a witness did not testify truthfully by showing evidence of his untruthful character. Likewise, a witness' character for truthfulness may be used to prove his testimony is believable, but only after his credibility has been attacked. The rule is grounded on the premise that an honest person will testify truthfully¹⁵⁸—and that a liar's testimony is suspect.¹⁵⁹ Character is a propensity for a certain kind of conduct or a pattern of conduct and the character of a witness for truthfulness is relevant circumstantial evidence on the question of the truth of his testimony.¹⁶⁰ Such character evidence has long been sanctioned by the common law,¹⁶¹ and is recognized in Wyoming as a customary method of impeachment.¹⁶² Evidence of bad or immoral character in general is not admissible, as Rule 608 authorizes only evidence which bears on veracity.¹⁶³ The character of a witness for truthfulness may be shown by testimony as to reputation, by testimony in the form of opinion or by inquiry into specific instances of conduct.¹⁶⁴ The rule applies in civil and criminal cases and permits the introduction of the pertinent character evidence on the direct-examination or cross-examination¹⁶⁵ of either the witness whose credibility is in question (hereinafter sometimes called the principal witness) or a character witness *i.e.*, one familiar with the character of the principal witness.

The dangers associated with character evidence are that it may result in prejudice, confusion of the issues, protraction of the trial and the possibility that the jury will not limit such evidence to the issue of credibility. Due to these dangers, the trial judge is vested with considerable discretion to exclude relevant character evidence if the dangers outweigh the probative value of the evidence.¹⁶⁶

157. WRE 404(a).

158. MCCORMICK § 191, at 454.

159. WEINSTEIN ¶ 608 [01], at 608-8.

160. MOORE § 608.10, at 84.

161. WIGMORE § 986, at 855-862.

162. *Huber v. Thomas*, 45 Wyo. 440, 19 P.2d 1042, 1044 (1933).

163. WEINSTEIN ¶ 608 [03], at 608-18.

164. WRE 405.

165. WEINSTEIN ¶ 608 [01], at 608-10.

166. WRE 403.

Reputation

Presenting evidence of reputation is the traditional way to prove the principal witness' character for untruthfulness. Wyoming Rule of Evidence 608, in accord with the prevailing view,¹⁶⁷ limits the inquiry to reputation for truth and veracity. A character witness is qualified to state the reputation of the principal witness if he knows "the general speech of people concerning the [principal] witness and the common repute which the latter enjoys among those who know him."¹⁶⁸ Since the principal witness's credibility is relevant only at the time he testified, proper inquiry on impeachment should elicit only his present reputation for truthfulness.¹⁶⁹ The source of the reputation evidence is no longer restricted to the community where the principal witness lives, but rather may come from any place where he is well known,¹⁷⁰ such as his place of work,¹⁷¹ so long as the reputation is general and established.¹⁷² It should be noted that when qualifying a reputation witness it is improper to ask whether he knows of specific instances of conduct upon which the reputation is based, as such specific instances are properly elicited only on cross-examination.¹⁷³

Opinion

Opinion has been described as a generalization from observation of a person's actions.¹⁷⁴ In permitting the use of opinion evidence to prove character for truthfulness or untruthfulness, Rule 608 deviates markedly from the common-law exclusion of such evidence. Evidence of opinion based on observation was excluded because the courts believed it would provoke distracting side-issues concerning the grounds for the opinion.¹⁷⁵ This exclusion has been criticized as "misguided,"¹⁷⁶ "historically unsound" and "unfortunate".¹⁷⁷ Witnesses

167. MCCORMICK § 44, at 90; JONES, 4 THE LAW OF EVIDENCE § 26:18, at 212 (6th ed. 1972) [hereinafter cited as JONES].

168. JONES § 26:18, at 213.

169. The practice, however, has been to allow substantial remoteness on the theory that character is slow to change. JONES § 26:17, at 210.

170. Craven v. State, 22 Ala. App. 39, 111 So. 767, 769 (1927).

171. State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677, 682 (1956), cert. denied, 353 U.S. 938 (1957).

172. MCCORMICK § 44, at 92.

173. WRE 405(a).

174. MCCORMICK § 191, at 457 n.74.

175. MCCORMICK § 44, at 91.

176. *Id.* at 90.

177. 7 WIGMORE, §§ 1981-1986.

who claimed to be giving the reputation of the principal witness' character may have actually been giving their opinion of that character. An exception developed which allowed questioning of an impeachment witness as to whether he would believe the principal witness when testifying under oath,¹⁷⁸ which in essence called for an opinion.¹⁷⁹ The new rule expressly authorizes opinion evidence subject to the same restrictions which apply to reputation evidence, *i.e.*, the evidence must refer only to character for veracity and evidence of truthful character is admissible only after it has been attacked.¹⁸⁰ The opinion witness need not have known the principal witness a long time nor have recent information about him.¹⁸¹ One commentator believes the new rule will particularly affect the use of psychiatrists who, after observing the principal witness testifying, are called to give their opinion as to his credibility.¹⁸² The consequence he foresees is an increase in this practice since the new rule makes it unnecessary to comply with the technical opinion evidence rule. The old rule formerly required an expert to couch his opinion in terms of art relating to mental capacity.¹⁸³ Regardless of the change in rules, the lack of scientific certainty concerning the criteria involved in such opinions, is likely to remain a restraint on any such expansion.¹⁸⁴

Specific Instances of Conduct

Specific instances of conduct are generally not admissible to attack or support the credibility of a witness. However, if the trial judge believes they are probative of veracity, a witness may be cross-examined as to specific instances of conduct which reflect on his character for truthfulness or on the character of the principal witness. But, in order to be admitted, the witness's testimony on direct-examination must have touched upon the particular witness's character for truthfulness. The primary purpose for allowing this type of cross-examination is to test the credibility of a character witness by determining whether he is truly familiar with the back-

178. *Held v. United States*, 260 F. 932, 933 (5th Cir. 1919); *United States v. Walker*, 313 F.2d 236, 239 (6th Cir. 1963).

179. WEINSTEIN ¶ 608, at 608-5.

180. WRE 608(a).

181. WEINSTEIN ¶ 608 [04], at 608-20.

182. *Id.* at 608-21.

183. *Id.*

184. MOORE § 608.10, at 84.

ground of the principal witness. For example, if the character witness testifies on direct that the principal witness is a truthful person but cross-examination reveals that the character witness is not aware of a perjury conviction, his testimony may be viewed as untrustworthy by the jury.

Using a false name¹⁸⁵ and falsification of an employment application¹⁸⁶ are other examples of specific instances of conduct which are admissible under the federal counterpart of Rule 608.¹⁸⁷ The Wyoming Supreme Court has held that acts or occurrences which show the witness' general bad character are not admissible to discredit him¹⁸⁸ unless they involve moral turpitude,¹⁸⁹ nor is previous criminal activity which did not result in a conviction.¹⁹⁰ Most jurisdictions limit such cross-examination to acts which have some relation to the credibility of the witness.¹⁹¹ Federal courts view forgery, tax fraud, bribery and false statement as acts of conduct bearing on a person's character for truthfulness.¹⁹² State courts add such things as false pretenses, cheating, embezzlement and bad checks to the list.¹⁹³ Inadmissible for purposes of impeachment in Wyoming, are excessive drinking habits¹⁹⁴ and conviction of the misdemeanor of carrying a concealed weapon since such evidence is not probative of moral turpitude or a lack of veracity.¹⁹⁵

Rule 608 further provides that these specific instances of conduct may be put into evidence only through cross-examination. Extrinsic proof of these instances of conduct is not allowed¹⁹⁶ due to considerations of time, surprise and prejudice.¹⁹⁷ In other words, the "examiner must take his answer."¹⁹⁸ Other witnesses may not be called to refute an answer given by the witness but the rule does not prevent the cross-examiner from continuing to press the witness for an admission.¹⁹⁹

185. *Lyda v. United States*, 321 F.2d 788, 793 (9th Cir. 1963).

186. *Lewis v. Baker*, 526 F.2d 470, 475 (2d Cir. 1975).

187. FED. R. EVID. 608.

188. *Gabrielson v. State*, 510 P.2d 534, 536 (Wyo. 1973).

189. *State v. Pinkston*, 33 Wyo. 428, 240 P. 219, 220 (1925) (operating a house of ill-fame); *Espy v. State*, 54 Wyo. 291, 92 P.2d 549, 556 (1939) (professional gambler).

190. *Janski v. State*, 538 P.2d 271, 274 (Wyo. 1975).

191. MCCORMICK § 42, at 82.

192. WEINSTEIN ¶ 608 [05], at 608-28.

193. *Id.*

194. *State v. Sorenson*, 34 Wyo. 90, 241 P. 707, 708 (1925).

195. *Eads v. State*, 17 Wyo. 490, 101 P. 946, 951 (1909).

196. Evidence of a criminal conviction is an exception. WRE 609.

197. 3 WIGMORE, § 979.

198. WEINSTEIN ¶ 608 [05], at 608-22.

199. *Lewis v. Baker*, 526 F.2d 470 (2d Cir. 1975).

Discretion

The trial judge is granted broad discretion under Rule 608 to decide which specific instances of conduct may be brought out on cross-examination. His function is to strike a balance between the needs of the judicial system and the needs of the witness.²⁰⁰ He may exclude relevant specific instances of conduct if their probative value is outweighed by the dangers of unfair prejudice, confusion of the issues or waste of time.²⁰¹ Further, the judge has at his disposal Wyoming Rule of Evidence 611(a) which enables him to exclude evidence when necessary to protect a witness from undue embarrassment or harrassment.²⁰² Although impeachment matters by their very nature will be embarrassing or prejudicial to the witness, exclusion occurs only when the judge determines that the embarrassment or prejudice has risen to an unacceptable level.²⁰³ Moreover, certain evidence may be considered temporally too remote to have any probative worth.

In *State v. Koch*,²⁰⁴ the Wyoming Supreme Court affirmed an exercise of discretion excluding evidence of bad character for chastity which the defendant offered for impeachment of credibility. Reversals occur when the judge exceeds the bounds of his discretion, such as when he erroneously permits the prosecution to examine a defendant as to his recent contacts with two known murderers, a highly prejudicial line of questioning.²⁰⁵

Self-Incrimination

The last sentence of Wyoming Rule of Evidence 608(b) declares that the giving of testimony does not operate as a waiver of the witness' privilege against self-incrimination when questioned about matters of credibility. For example, a defendant who is charged with robbery and who takes the stand to deny his guilt may invoke this privilege when asked whether he committed a previous murder for which he has not been tried. The underlying reason is that, by testifying, he has exposed himself to cross-examination only as to the material

200. *United States v. Burch*, 490 F. 2d 1300 (8th Cir. 1973).

201. WRE 403.

202. WRE 611(a).

203. MOORE § 608.02, at 81.

204. 64 Wyo. 175, 189 P.2d 162 (1948).

205. *Johnson v. State*, 8 Wyo. 494, 58 P. 761, 764 (1899).

and consequential issues of the case which were covered on direct examination, and not to questions concerning potentially incriminating past conduct which bears only on his credibility.

Rule 608(b) is a sensible way to encourage disclosure to the fact-finder without costing the witness his Fifth Amendment rights.²⁰⁶ To view the act of testifying as a waiver of these rights would leave little practical substance in the right to testify in one's own behalf.²⁰⁷

RULE 609: IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME²⁰⁸

Wyoming Rule of Evidence 609 tracks its federal counterpart²⁰⁹ verbatim, approving the practice of impeachment by evidence of convictions²¹⁰ for felonies²¹¹ and crimes involving

206. MOORE § 608.22, at 93.

207. Griffin v. California, 380 U.S. 609 (1965).

208. RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs the prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

209. FED. R. EVID. 609.

210. The convictions need not have originated in the local jurisdiction, as they may have occurred in other states or in the federal courts. MCCORMICK § 43, at 86; this policy is not a change in the Wyoming law. State v. Velsir, 61 Wyo. 476, 159 P.2d 371 (1945).

211. "Offenses which may be punished by death or imprisonment in the penitentiary are felonies." WYO. STAT. § 6-1-102 (1977) "The minimum term of imprisonment

dishonesty and false statement. The underlying theory being that such a convict may be less believable when giving testimony²¹² and that a jury has a right to and a need for this relevant background information in assessing the witness' credibility. The rule is firmly rooted in the common law²¹³ and recognized by Wyoming case law.²¹⁴ When the witness is the accused, an improper inference that he is more likely to have committed the offense may arise due to the conviction evidence.²¹⁵ However, safeguards are incorporated into the rule to minimize this danger. The evidence can only be elicited during cross-examination and only for the purpose of impeachment. Although any type of felony conviction may be offered, it will be admitted only if the trial judge determines that its' probative value outweighs the prejudice it may engender. Misdemeanor convictions are excluded unless they involve dishonesty or false statement, sometimes referred to as *crimen falsi*.²¹⁶

The Wyoming Supreme Court in *Eads v. State*,²¹⁷ recognized that not all types of misconduct indicate an untruthful witness, such as carrying a concealed weapon. The Court has stated that the only proper impeachment evidence of this sort would be crimes tending to show moral turpitude²¹⁸ or lack of veracity.²¹⁹ This terminology is displaced by Wyoming Rule of Evidence 609(a) which provides a more definite and less arbitrary description of proper impeachment evidence.²²⁰ Further, overly prejudicial evidence of felony conviction of

in the penitentiary shall in no case be less than one year." WYO. STAT. § 6-1-106 (1977).

212. *United States v. Harding*, 525 F.2d 84 (7th Cir. 1975); Curran, *Federal Rule of Evidence 609(a)*, 49 TEMP. L. Q. 890 (1976).

213. Earlier in the common law, a witness was rendered incompetent to testify if he had been convicted of a misdemeanor involving dishonesty or a felony such as treason, fraud or deceit. This absolute ban was set aside in *Rosen v. United States*, 245 U.S. 467 (1917), and the rule evolved into an impeachment device. MCCORMICK § 43, at 84; *State v. Velsir*, 61 Wyo. 476, 159 P.2d 371, 375 (1945).

214. *Heberling v. State*, 507 P.2d 1 (Wyo. 1973), *cert. denied*, 414 U.S. 1022 (1973); *Kennedy v. State*, 470 P.2d 372, *reh. denied*, 474 P.2d 127 (Wyo. 1970), *cert. denied*, 401 U.S. 939 (1971); *State v. Hines*, 79 Wyo. 65, 331 P.2d 605 (1958) *cert. denied*, 366 U.S. 972 (1961); *State v. Velsir*, 6 Wyo. 476, 159 P.2d 371 (1945); *Eads v. State*, 17 Wyo. 490, 101 P. 946 (1909).

215. *United States v. Harding*, 525 F.2d 84, 89 (7th Cir. 1975).

216. *Crimen falsi* are crimes that by their nature tend to cast doubts on the veracity of the ones who commit them. *Commonwealth v. Gold*, 155 Pa. Super. 364, 38 A.2d 486, 489 (1944).

217. 17 Wyo. 490, 101 P. 946 (1909).

218. Which crimes involve moral turpitude is not clear. In *State v. Velsir*, 6 Wyo. 476, 159 P.2d 371 (1945), the court held that even burglary is a crime involving moral turpitude.

219. *Eads v. State*, 17 Wyo. 490, 101 P. 946, 951 (1909).

220. WRE 609(a).

any witness may be excluded in the discretion of the judge.²²¹ But it is only prejudice to the defendant which is considered, as the rule does not protect other witnesses.²²² The trial judge is accorded flexibility in interpreting Rule 609 to effect the congressional intention of protecting a testifying defendant without awarding him a windfall or impeding the search for truth.²²³ An example of this flexibility can be seen in Judge Weinstein's opinion in *United States v. Jackson*.²²⁴ There, an agreement was entered into between the court and the defendant whereby an assault conviction of the defendant was excluded in return for defendant's promise to not project to the jury a spotless background and that he himself would not use assault convictions to impeach the government witnesses. In any event Rule 609 will not protect a defendant who has denied a conviction, distorted its nature or stated an unwillingness to engage in such crimes.²²⁵

In exercising his discretion over the admissibility of felony convictions, the judge may wish to consider the impeachment value of the prior conviction, the witness's subsequent history, the nearness or remoteness of the conviction, the similarity between the two crimes and the importance of credibility issue.²²⁶

Rule 609 places the burden of persuasion to establish the probative value of the proffered conviction evidence on the one who offers it.²²⁷ In order to meet this burden it will be necessary in most instances to show the date, nature, place and circumstances of the conviction. The extent he can delve into the details once a conviction is admitted will be subject to the discretion of the court. The defendant, however, is permitted to rebut by providing evidence of the prejudicial effect on the jury which would result if the conviction were admitted.²²⁸ Naturally these arguments should take place out of the hearing of the jury but it is important for appellate review that they be on record, as well as the court's explicit findings as to its balancing process.²²⁹

221. MOORE § 609.14, at 145.

222. MOORE § 609.14 [4], at 148.

223. Curran, *Federal Rule of Evidence 609(a)*, 49 TEMP. L. Q. 890, 896 (1976).

224. 405 F. Supp. 938 (E.D.N.Y. 1975).

225. *United States v. Johnson*, 542 F.2d 230, 234-35 (5th Cir. 1976).

226. *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967).

227. *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976).

228. *Gordon v. United States*, *supra* note 226, at 939.

229. *United States v. Mahone*, *supra* note 227, at 929.

The discretion which the court holds to exclude evidence in some areas does not extend to the admission into evidence of conviction of crimes involving dishonesty or false statement²³⁰ such as fraud²³¹ or forgery.²³² The federal rulemakers believed that these crimes will always be highly probative on the issue of credibility.²³³ These convictions are admissible whether felonies or misdemeanors and regardless of who is testifying. This category of crime covers perjury, false statement, criminal fraud, embezzlement, false pretense and other crimes in the nature of *crimen falsi*, the commission of which involves an element of deceit, untruthfulness or falsification which would bear on the convict's veracity.²³⁴ Robbery, attempted robbery²³⁵ and other crimes involving force do not come under the definition,²³⁶ nor does narcotics possession, possession of a pistol without a license,²³⁷ or petit larceny.²³⁸

Appellate Review

On review, an improper admission of evidence may be viewed as harmless error²³⁹ and like most states Wyoming has adhered to that proposition. In the case of *Heberling v. State* the Wyoming Supreme Court held that the error in improperly excluding evidence may be harmless if the witness was thoroughly discredited by the other evidence.²⁴⁰

In *United States v. Brown*²⁴¹ the district court of New York discussed the strength of the prosecution's case as bearing on the seriousness of the error in improperly admitting evidence, *i.e.*, whether it is prejudicial or harmless. The position is that where the government has a strong case, the error may not be prejudicial whereas if the case turns on the defendant's credibility as a witness, the error is likely to be prejudicial. Various standards have been voiced by the courts. One such test is that a conviction should be reversed unless

230. *United States v. Smith & Gartrell*, 551 F.2d 348, 365 (D.C. Cir. 1976).

231. *United States v. Brashier*, 548 F.2d 1315, 1326-27 (9th Cir. 1976).

232. *United States v. Dixon*, 547 F.2d 1079, 1083 (9th Cir. 1976).

233. H.R. REP. NO. 1597, 93d Cong., 2d Sess. 9, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7098, 7103.

234. *Id.*

235. *United States v. Smith & Gartrell*, *supra* note 230, at 362.

236. *Id.*

237. *United States v. Millings*, 535 F.2d 121, 122 (D.C. Cir. 1976).

238. *Gov't of Virgin Is. v. Toto*, 529 F.2d 278, 281 (3d Cir. 1976). *Contra*, *United States v. Carden*, 529 F.2d 443, 446 (5th Cir. 1976).

239. *Carlsen v. Javurek*, 526 F.2d 202, 210 (8th Cir. 1975).

240. *Heberling v. State*, 507 P.2d 1 (Wyo. 1973), *cert. denied*, 414 U.S. 1022 (1973).

241. 409 F. Supp. 890, 892 (W.D.N.Y. 1976).

it is highly probable that an error did not effect the judgment.²⁴² Also relevant is whether the appellate court can state with assurance that the error did not influence the jury or that it had only a slight effect on the deliberations.²⁴³

Stale Convictions

Under the new rule, conviction evidence is not admissible more than ten years after the date of conviction or release from confinement, whichever is later. Interests of fairness and relevancy demanded a change²⁴⁴ from the common law rule which did not set any concrete time periods for determining when a conviction would be deemed stale.²⁴⁵ An exception is made for convictions older than ten years if the court finds that the probative value, as supported by specific facts and circumstances, substantially outweighs the prejudicial quality.²⁴⁶ The rulemakers of the federal counterpart intended that this discretion would be used rarely, and only in exceptional circumstances.²⁴⁷ The court must express its findings on the record which justified its exceptional decision.²⁴⁸ To prevent surprise, advance written notice to the adverse party is required by the rule when convictions older than ten years will be used. The notice requirement may present practical problems because a party does not know which witness his opponent will call and which ones he will have to impeach, as witness lists are privileged work product.²⁴⁹

Pardon

Wyoming Rule of Evidence 609(c) excludes conviction evidence if a pardon, annulment or other procedure has been granted upon a finding of rehabilitation, unless there has been a subsequent felony conviction. The theory is that the rule should not apply when the underlying justification for it is no longer present. A pardon or annulment based on a finding of innocence also operates to exclude the conviction but

242. *Gov't of Virgin Is. v. Toto*, *supra* note 238, at 284.

243. *Kotteaks v. United States*, 328 U.S. 750, 764 (1946); *United States v. Harding*, *supra* note 215, at 91.

244. Ladd, *Credibility Tests—Current Trends*, 89 U. OF PA. L. REV. 166 (1940).

245. Most states do not have time limits. See MOORE § 609.01, at 130.

246. WRE 609(b).

247. Federal Rules of Evidence—Advisory Committee Notes—FED. R. EVID. 609, *citing* Report of the Senate Committee on the Judiciary, subdivision (b).

248. *Id.*

249. ROTHSTEIN, RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 246.5 (1975).

in this instance a subsequent felony conviction will not revive the admissibility of the earlier conviction, since such a pardon has the effect of nullifying the conviction *ab initio*.²⁵⁰

Juvenile Adjudications

Wyoming Rule of Evidence 609(e) continues the proscription against the use of juvenile adjudications for impeachment purposes.²⁵¹ This rule of exclusion is based on the belief that juvenile proceedings lack the precision and general probative value of a criminal conviction due to their informal nature, the lesser standard of proof required and other variations from adult trial standards. *In re Gault*²⁵² eliminates some of these objectionable characteristics, as the United States Supreme Court mandated that juveniles be extended the same standards of due process as apply to adults. Nevertheless, it is still unclear what effect the decision will have on the exclusionary rule.²⁵³

In *Davis v. Alaska*,²⁵⁴ the United States Supreme Court held that an accused's right of confrontation is paramount to the policy of protecting a juvenile offender in some situations. There a conviction of grand larceny and burglary was reversed because the defendant was not allowed to cross-examine a witness concerning a juvenile proceeding in which he had been adjudicated a delinquent for burglarizing two cabins. Defendant argued such evidence showed a bias in the witness based on his fear that due to his past record he himself may be a suspect. In *Connor v. State*,²⁵⁵ the Wyoming Supreme Court was also confronted with the conflict between the confidentiality of juvenile proceedings and the right to effective cross-examination. There the court recognized the validity of the *Davis* exception but was unable to apply it since defense counsel had failed to object and make known to the trial court the evidence he sought.

The new rule allows a judge in a criminal case to admit "evidence of a juvenile adjudication of a witness other than

250. MOORE § 609.01, at 131.

251. *Cotton v. United States*, 355 F.2d 480, 482 (10th Cir. 1966); MCCORMICK § 43, at 86.

252. 387 U.S. 1 (1966).

253. JONES § 26.20, at 223.

254. *Davis v. Alaska*, 415 U.S. 308 (1974).

255. *Connor v. State*, 537 P.2d 715 (Wyo. 1975).

the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." It should be noted that this discretion to make an exception to the general rule of exclusion does not apply in civil cases.

Appeal

The new evidence rule restates the majority view that an appeal does not render evidence of the underlying conviction inadmissible.²⁵⁶ An appeal is viewed as insufficient grounds to attack the presumption of correctness that attends judicial proceedings.²⁵⁷ The pendency of an appeal, however, may be admitted as a qualifying circumstance.

RULE 610: RELIGIOUS BELIEFS OR OPINIONS²⁵⁸

Wyoming Rule of Evidence 610 proscribes the use of religious beliefs and opinions to impair or enhance the credibility of a witness. The matter has not been raised in a Wyoming case, but the new rule is consistent with the prevailing practice elsewhere.²⁵⁹ The old common law belief that an atheist was incompetent to testify because he was incapable of taking the oath had been abandoned in most jurisdictions prior to the enactment of the Wyoming Rules of Evidence.²⁶⁰ In the few jurisdictions which still permit impeachment by evidence of religious beliefs, the cases are old and the doctrine has not been recently tested.²⁶¹ The notion behind the common law rule of incapacity was that an oath before testifying would mean nothing to a person unless he believed in a divine being who would punish false swearing.²⁶² Consequently, the only test of religious belief which was relevant under the common law was whether the witness believed in a God who would punish untruthful statements.²⁶³

256. *United States v. Soles*, 482 F.2d 105 (2d Cir. 1973), *cert. denied*, 414 U.S. 1027 (1973).

257. *Newman v. United States*, 331 F.2d 968, 972 (8th Cir. 1964).

258. RULE 610. RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

259. Annot., 95 A.L.R. 723 (1935).

260. MCCORMICK § 48, at 100.

261. Annot., 95 A.L.R. 723 (1935); MCCORMICK § 48, at 101.

262. MCCORMICK § 61, at 141.

263. MCCORMICK § 48, at 102.

Under the new rule, evidence of religious beliefs is inadmissible to test credibility as well as competency.²⁶⁴ This is harmonious with many state constitutions and statutes which provide that witnesses are not rendered incompetent due to their religious beliefs.²⁶⁵ These provisions not only make religious beliefs irrelevant to competency but also prevent examination into such matters for purposes of impeachment.²⁶⁶ The Constitution of the State of Wyoming provides that "no person shall be rendered incompetent . . . to serve as a witness . . . because of his opinion on any matter of religious belief whatever."²⁶⁷

The common law rule of incapacity would no doubt run into serious obstacles today with the freedom of religion provisions of the First Amendment to the United States Constitution and the due process and equal protection provisions of the Fourteenth Amendment.²⁶⁸ Today we recognize that even an atheist may have the strictest sense of moral obligation to speak the truth.²⁶⁹ Thus, religious beliefs are not relevant to credibility because there is no reason to believe that a lack of faith in God's avenging wrath for untruths reflects in any way on the veracity of a witness.²⁷⁰ The new rule of evidence is consistent with the prior Wyoming law on this topic.²⁷¹

Evidence of religious beliefs to show bias or interest of a witness, however is admissible,²⁷² as well as evidence which bears on a substantial issue in the case. The sole restraint is that the judge must determine that the relevance of such evidence outweighs the interest of privacy and the danger of prejudice.²⁷³

264. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 63 (1973).

265. Annot., 95 A.L.R. 723 (1935).

266. *Id.*

267. WYO. CONST. art. I, § 18.

268. MCCORMICK § 63, at 141.

269. WIGMORE § 936, at 722.

270. MCCORMICK § 48, at 102. Some commentators feel the new rule is overbroad as some religious beliefs may be relevant to credibility such as when a fundamental tenet is that the government is a false God which should be fought and disobeyed. Clearly, under these circumstances, the trustworthiness of the witness' testimony would be in doubt. REDDEN & SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 89 (Supp. 1976).

271. WYO. CONST. art. I, § 18.

272. *Tucker v. Reil*, 51 Ariz. 357, 77 P.2d 203, 206 (1938).

273. MCCORMICK § 48, at 101.

RULE 611: MODE AND ORDER OF INTERROGATION AND PRESENTATION²⁷⁴

Discretion is the keynote in matters concerning the mode and order of interrogation and the presentation of evidence under Wyoming Rule of Evidence 611. The new rule is harmonious with prior Wyoming practice,²⁷⁵ and it vests extensive discretion in the trial judge to determine the extent of cross-examination, the scope of rebuttal and surrebuttal, who shall open and close and when narrative answers are permissible.²⁷⁶ Further, there is room for innovative rulings by the judge so long as no prejudice results to a party or witness.²⁷⁷ The objectives expressed in Rule 611(a) are the ascertainment of truth, the efficient use of time and protection of witnesses from harrassment and undue embarrassment. Although the trial judge will be reversed only where he has abused his discretion, he should never lightly rule on the mode and order of interrogation or the presentation of evidence.²⁷⁸

Wyoming decisions prior to the enactment of the new rules of evidence demonstrate the wide discretion vested in the trial judge over such matters as reopening a trial²⁷⁹ admitting rebuttal evidence²⁸⁰ and deviations from the normal order of presenting evidence.²⁸¹ In the normal case, the manner and order of presenting evidence is determined by legal conven-

274. RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(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.

(c) *Leading questions.* 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.

275. *Benham Const. Co. v. Rentz*, 69 Wyo. 176, 238 P.2d 927 (1951); *New Hampshire Fire Ins. Co. of Manchester v. Boler*, 55 Wyo. 530, 102 P.2d 39 (1940); *Boyle v. Mountford*, 39 Wyo. 141, 270 P. 537 (1928); *Hunt v. City of Laramie*, 26 Wyo. 160, 181 P. 137 (1919).

276. *ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE* 63 (1973).

277. *WEINSTEIN* ¶ 611 [01], at 16.

278. *Id.* at 20.

279. *Wyoming Stockmen's Loan Co. v. Johnston*, 33 Wyo. 457, 240 P. 449, 452 (1925).

280. *State v. Alexander*, 78 Wyo. 324 P.2d 831 (1958), *cert. denied*, 363 U.S. 850 (1960); *Hunt v. City of Laramie*, 26 Wyo. 160, 181 P. 137 (1919).

281. *New Hampshire Fire Ins. Co. of Manchester v. Boler*, 55 Wyo. 530, 102 P.2d 39 (1940).

tions and the trial strategy of the parties.²⁸² The judge's discretionary power is typically exercised only when triggered by unusual circumstances or a request from a party for a ruling.²⁸³ His role is neither that of an advocate nor that of an observer. Rule 611(a) aids him in controlling the trial by giving him flexibility over evidentiary matters, thereby promoting the efficient ascertainment of truth and fair treatment of witnesses.

Scope of Cross-Examination

Rule 611(b) retains the traditional rule restricting cross-examination to the scope of the preceding direct examination but accords the trial judge wide latitude in permitting additional inquiry if warranted. This is a modification of the so-called "restrictive view" of cross examination, wherein only matters that have been "opened-up" or inquired into on direct examination may be explored on cross-examination. Under the "restrictive view," inquiry into matters outside the scope of the direct must wait until it is the opposing party's turn to call witnesses. The "restrictive view" of cross examination prevailed in the federal courts and in numerous state jurisdictions prior to the enactment of the Federal Rules of Evidence.²⁸⁴ The alternative view of cross examination, the so-called "wide-open" view, permits cross examination as to any admissible evidence within the knowledge of the witness.²⁸⁵

The discretion accorded to the trial judge to permit cross-examination into matters beyond the scope of the direct examination is not a change in prior law.²⁸⁶ Such discretion is designed to prevent confusion, complication and protection of the case.²⁸⁷ When such additional inquiry is allowed, the examiner must proceed as if on direct examination, meaning he cannot use leading questions.

The value of the "restrictive view" of cross-examination is that it promotes the orderly presentation of evidence and allows a party to control his own case.²⁸⁸ The value of the

282. WEINSTEIN ¶ 611 [01], at 15.

283. *Id.*

284. Federal Rules—Advisory Committee Notes—FED. RULE EVID. 611, Adv. Comm. Note, subdivision (b).

285. ROTHSTEIN, *supra* note 7, at 65.

286. REDDEN & SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL, at 198 (1975).

287. *Id.* at 201.

288. *Finch v. Weiner*, 145 A. 31, 32 (Conn. 1929).

"wide-open" view, on the other hand, is that it permits freer developments of relevant evidence.²⁸⁹ It is more economical in time and energy, since there is little opportunity for dispute in its application, as compared to the "restrictive view" which engenders frequent objection and dispute on the question of what points were actually raised on direct-examination.

Although Rule 611(a)(3) requires the trial judge to protect witnesses from questions which go beyond the scope of proper cross-examination merely to harass, annoy or humiliate, the judge cannot foreclose questions designed to discredit the witness.²⁹⁰ Curtailment of cross-examination is a matter of discretion with the court, but in criminal cases he must keep in mind the defendant's right to confront witnesses against him as guaranteed by the sixth amendment to the United States Constitution²⁹¹ and by section eleven of article one of the Wyoming Constitution.²⁹² In civil cases, curtailment of cross-examination may amount to abuse of discretion if the excluded evidence was highly probative.²⁹³

In Wyoming, the trial judge is vested with substantial discretion in controlling the manner and latitude of cross-examination and will be reversed only for flagrant abuse of that discretion.²⁹⁴ Generally, wide latitude is given to a cross-examiner when questioning an adverse witness.²⁹⁵ The trial judge has control over cross-examination and decides which tactics are improper.²⁹⁶

The extent to which a defendant waives his privilege against self-incrimination by taking the stand is not specified in Rule 611, although Wyoming Rule of Evidence 104(d) provides that an accused who testifies only as to preliminary matters may not be cross-examined as to other issues.²⁹⁷ When the defendant testifies on the merits of one of the issues, it is not clear whether he may be cross-examined on any relevant facts of the case or only on those related to the issues opened

289. Federal Rules—Advisory Committee Notes—FED. RULE EVID. 611, *citing* Report of the Senate Committee on the Judiciary, subdivision (b).

290. *Alford v. U.S.*, 282 U.S. 687, 694 (1931).

291. U.S. CONST. amend. VI.

292. WYO. CONST. art. I, § 10.

293. *Reilly v. Pinkens*, 338 U.S. 269, 275 (1949).

294. *Benham Const. Co. v. Rentz*, *supra* note 18.

295. *In re Morton*, 428 P.2d 725, 733 (Wyo. 1967).

296. *Valdez v. Glenn*, 79 Wyo. 53, 330 P.2d 309, 311 (1958), *reh. denied*, 332 P.2d 1119 (1958).

297. WRE 104(d).

up on direct. *Tucker v. United States*²⁹⁸ stands as support for the later view, i.e., that each party has the right to restrain cross-examination to the subjects brought up on direct-examination. However, a contrasting view has been expressed in *Johnson v. United States*,²⁹⁹ where the United States Supreme Court, citing Wigmore,³⁰⁰ said defendants' " 'voluntary offer of testimony upon any fact is a waiver as to *all other relevant facts*, because of the necessary connection between all.' " ³⁰¹ Under either view, however, the defendant, before taking the stand, should be entitled to a ruling on the extent to which the court will find that he waived his privilege against self-incrimination by testifying to less than all of the issues on direct.³⁰²

When a witness is not a party in the litigation, the rule is somewhat different. Since a non-party witness must take the stand when called, it cannot be said that he thereby waives his privilege against self-incrimination. Waiver will be found only if he fails to claim his privilege³⁰³ and answers the cross-examiner's incriminating questions.

Leading Questions

A leading question is one which suggests or indicates to the witness the answer which the questioner wants.³⁰⁴ Wyoming Rule of Evidence 611(c) reaffirms the prior Wyoming law which viewed the suggestive powers of leading questions as undesirable on direct examination, except for preliminary matters³⁰⁵ where necessary to develop a witness' testimony. For example, leading questions may be put to a child witness on direct-examination,³⁰⁶ particularly if she is timid and embarrassed by the nature of the questions.³⁰⁷

Rule 611(c) conforms to traditional practice³⁰⁸ in making the use of leading questions on cross-examination a matter of

298. 5 F.2d 818, 824 (8th Cir. 1925); see also *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1900).

299. 318 U.S. 189 (1943).

300. 8 WIGMORE § 2276(2).

301. *Johnson v. United States*, 318 U.S. 189, 195 (1943).

302. WEINSTEIN ¶ 611 [03], at 42.

303. *Brown v. United States*, 356 U.S. 148 (1958).

304. MOORE § 611.31, at 189.

305. *Jenkins v. State*, 22 Wyo. 34, 134 P. 260 (1913), *reh. denied*, 135 P. 749 (1913).

306. *Rhodes v. State*, 462 P.2d 722 (Wyo. 1969).

307. *Antelope v. United States*, 185 F.2d 174 (10th Cir. 1950).

308. Federal Rules—Advisory Committee Notes—FED. RULE EVID. 611, Adv. Comm. Note, subdivision (c).

right in most cases. The underlying rationale is that witnesses are usually uncooperative towards the cross-examiner, and therefore the proponent needs to be able to lead in order to obtain the relevant facts known to the witness. The term "ordinarily" found in the rule qualifies its scope and makes it possible for a judge to disallow leading questions when the inquiry is cross-examination in form only. One example would be the case of an insured who is named as the defendant in a subrogation action but who proves to be friendly to the plaintiff. If he is cooperative and helpful to the plaintiff, the underlying justification for leading questions on cross-examination is gone. The new rule perpetuates prior Wyoming law which allowed one to call the opposing party³⁰⁹ in civil cases and to examine him as if on cross-examination, *i.e.*, by means of leading questions. The Wyoming courts have stated that the true test of the right to cross-examine the adverse party is whether the party is in fact adverse to the one calling him.³¹⁰ Similarly, one commentator argues that an express finding of hostility is necessary when the examiner wants to lead a witness under the hostile witness exception of Rule 611(c).³¹¹ Control over the use of leading questions was placed largely in the discretion of the Wyoming courts even before the adoption of the new rules of evidence.³¹²

In permitting a party to lead any "witness identified with an adverse party",³¹³ the new rule expands the group which formerly consisted of the officers, directors, agents, and employees of the adverse party.³¹⁴

RULE 612: WRITING OR OBJECT USED TO REFRESH MEMORY³¹⁵

Rule 612 of the Wyoming Rules of Evidence is patterned after the federal rule. The rule codifies the settled doctrine,

309. WYO. STAT. § 1-12-103 (1977).

310. *Husted v. French Creek Ranch, Inc.*, 79 Wyo. 307, 333 P.2d 948, 953 (1959); *Huber v. Thomas*, 45 Wyo. 440, 19 P.2d 1042, 1045 (1933); *State Bank v. Bagley Bros.* 44 Wyo. 244, 11 P.2d 572 (1932).

311. ROTHSTEIN, RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 252 (1975).

312. *DeBaca v. State*, 404 P.2d 738, 739 (Wyo. 1965); *Husted v. French Creek Ranch, Inc.*, *supra* note 53, at 953; *Huber v. Thomas*, *supra* note 53, at 1045.

313. WRE 611(c).

314. WYO. R. CIV. P. 43(b).

315. RULE 612. WRITING OR OBJECT USED TO REFRESH MEMORY

(a) *While testifying.* If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object pro-

both at the federal level³¹⁶ and in Wyoming,³¹⁷ that a witness may use writings or other documents to refresh his memory while he is testifying. When interrogating a witness, counsel may hand him a writing to inspect for the purpose of refreshing his recollection so that his testimony is based upon his present memory revived and not upon the writing used to revive it.³¹⁸ It is discretionary with the trial judge whether a witness is allowed to use a memorandum to revive his memory.³¹⁹ Generally the trial judge will accept the witness' claim of a lapse in memory to allow the use of a writing.³²⁰ However, the trial judge will not allow the witness to testify from a prepared script.³²¹

The purpose of Rule 612 is to promote the credibility and memory of a witness.³²² Traditional doctrine held that the opponent had no right of access to the writing when it was used before a witness took the stand.³²³ This practice, however, was thought by some commentators to be too re-

duced at the trial, hearing, or deposition in which the witness is testifying.

(b) *Before testifying.* If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) *Terms and conditions of production and use.* A party entitled to have a writing or object produced under this rule 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. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing, or object *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 or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if 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.

316. MCCORMICK § 9, at 15.

317. See *Opie v. State*, 389 P.2d 684, 691 (Wyo. 1964); *Jenkins v. State*, 22 Wyo. 34, 134 P. 260, 264 (1913), *reh. denied*, 22 Wyo. 34, 135 P. 749 (1913); *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 P. 1059 (1893).

318. MCCORMICK § 9, at 15.

319. *Id.* at 19; see also *United States v. Morlang*, 531 F.2d 183, 191 (4th Cir. 1975).

320. WEINSTEIN ¶ 612 [01], at 612-10, notes that since counsel will have interviewed the witness before calling him to testify and such interview may have revived his memory by the use of memoranda, it is often difficult for the judge to determine if the witness remembers something of his own recall or based on pretrial preparation. Therefore, most trial judges will allow claims of loss of memory and let witnesses rely on writings to refresh their memory.

A typical situation where writings are commonly used to refresh memory is where considerable time has elapsed between the occurrence of the event and the trial, or where numerous details are involved. See, e.g., *Kahn v. Traders' Ins. Co.*, *supra* note 317.

321. *N.L.R.B. v. Fed. Dairy Co.*, 297 F.2d 487, 489 (1st Cir. 1962); *Goings v. United States*, 377 F.2d 753 (8th Cir. 1967).

322. WRE 612, Wyo. Comm. Note.

323. MCCORMICK § 9, at 17.

strictive³²⁴ and today acceptance of that view can be seen in the increasing number of courts which are allowing production when a writing is used to refresh recollection before testifying.³²⁵ When a writing is used while testifying, production for the benefit of the opponent is mandatory.³²⁶ Use of a writing before testifying on the other hand does not automatically require that access be afforded to the opponent. The trial judge is given discretion in this regard and only upon a determination that the "interests of justice so require" and if practicable will he order the writing produced.³²⁷

Procedure Pursuant to Rule 612

The procedure necessary to implement Rule 612 is substantially the same as that practiced in the federal courts. When a writing is used to refresh a witness' memory, the adverse party may have the writing produced at the hearing,³²⁸ inspect the writing, cross-examine the witness on it and introduce into evidence those portions of the writing that relate to the witness' testimony.³²⁹ While the adverse party may introduce portions of the writing as evidence, the party whose witness has used the writing to refresh his memory may not.³³⁰ Portions of the writing may be read to the jury if it is deemed pertinent and non-prejudicial. The better practice, however, is to have the witness read to himself those parts of the document necessary to revive his memory. This prevents the jury from hearing evidence which is ordinarily inadmissible.³³¹

The federal rule does not say what qualifies as a "writing" under the rule. However, it is well established that practically anything may qualify.³³² Also absent in the federal rule is any

324. WIGMORE § 762, at 140; MCCORMICK § 9, at 17-18.

325. FED. R. EVID. 612, Adv. Comm. Note.

326. FED. R. EVID. 612; WRE 612(b). For a discussion of this in criminal cases see *infra* under subheading *Application in Criminal Cases*.

327. WRE 612(b). The reason the rule is discretionary with the trial judge and not mandatory is that permitting the adverse party to require the production of writings used before testifying could result in "fishing expeditions" among the papers of the party calling the witness. FED. R. EVID. 612, Report of House Comm. on the Jud.

It should be noted that both the federal rule and the Wyoming rule use the phrase "for the purpose of testifying." This is to safeguard against using the rule as a "wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness." FED. R. EVID. 612, Adv. Comm. Note.

328. WRE 612(a) & (b).

329. WRE 612(c).

330. Markel Service, Inc. v. Nat'l Farm Lines, 426 F.2d 1123, 1128 (10th Cir. 1970).

331. New Mexico Sav. & Loan Ass'n v. U.S. Fidelity & Guar. Co., 454 F.2d 328, 336-37 (10th Cir. 1972).

332. MCCORMICK § 9, at 16. See FED. R. EVID. 1001(1) and WRE 1001(1) for the broad definition of "writings." See also *United States v. Faulkner*, 538 F.2d 724,

indication whether "objects" are included within the definition of "writings"; nevertheless, the rule has generally been interpreted to include them.³³³ To make it clear that "objects" are permissible to stimulate present memory, the Wyoming rule specifically incorporates the term "object." The memory of a witness may be refreshed by writings or papers which themselves are inadmissible.³³⁴ The writings need not have been written or prepared by the witness himself³³⁵ nor must the document be an original or be prepared contemporaneously with the event testified to.³³⁶ This liberal practice on what constitutes a writing for purposes of refreshing recollection is justified on the basis that the writing itself is not offered as evidence. The testimony elicited by the witness who used the writing to jog his memory is the proffered evidence.³³⁷ It is also justified on the ground that the opposing party can demand to inspect it.

An important distinction must be made between "present recollection revived" and "past recollection recorded." Letting a witness revive his present recollection is the proper aim of Rule 612. The phrase "past recollection recorded" refers to testimony which is based on what the writing says and not on the present memory of the witness. Such "past recollection recorded" may not be introduced into evidence under Rule 612, because the evidence consists of what the writing says and not what the witness says. If the witness' memory is not revived by a writing, the document may be admitted into evidence if it meets the test of recorded recollection as required in Wyoming Rule of Evidence 803(5).³³⁸ It should be noted that the line between using the writing to aid memory and relying on it as a correct record of past events is sometimes fuzzy.³³⁹ The distinction between these two uses of a writing is important. In the instance of "present recollection

727 (6th Cir. 1976), *cert. denied*, 429 U.S. 1023 (1976). The kinds of writings permissible to refresh memory are not without limit, however. For example, a witness should not be allowed to use testimonial notes on the stand so that he reads his answers rather than responds freely from memory to the questions asked. *N.L.R.B. v. Fed. Dairy Co.*, *supra* note 321.

333. MCCORMICK § 9, at 16.

334. *United States v. Baratta*, 397 F.2d 215, 222 (2d Cir. 1968), *cert. denied*, 393 U.S. 1045 (1969).

335. *Jenkins v. State*, *supra* note 317.

336. *Johnston v. Earl*, 313 F.2d 686, 688 (9th Cir. 1962).

337. 10 MOORE'S FEDERAL PRACTICE § 612.03, at 204 (2d ed. 1976) [hereinafter cited as MOORE].

338. *See also* FED. R. EVID. 803(5).

339. MCCORMICK § 9, at 18.

revived" the witness can be cross-examined as to his perception, ability to remember and whether his memory is consistent with the instrument used to revive it. Opposing counsel cannot, however, cross-examine the writing when the witness relies on it as an accurate representation of the events in question.³⁴⁰

Two safeguards exist which help prevent a witness from claiming revived memory when in fact he has none. First, the trial judge has broad discretion in the matter. He may reject a witness' claim that the writing revives his memory or that he lacks sufficient recollection,³⁴¹ or the judge may decide that the danger of undue suggestion outweighs any value the writing has in stimulating a witness' memory.³⁴² Second, the adverse party may have the writing produced for his inspection, cross-examine the witness on it and present it to the jury if he so desires.³⁴³

Under the new Wyoming rule, if production of the writing or object at the trial, hearing or deposition is impracticable, the court may order it made available for inspection.³⁴⁴ The federal rule does not explicitly state this, but the requirement in the rule that production be made upon request of an adverse party implies that if production is not convenient the judge, in his discretion, may order it made available for inspection. This difference between the Wyoming Rule and federal rule is minor, but it does demonstrate Wyoming's attempt to be more complete in spelling out the terms of the rule. In cases of doubt, trial judges may be more inclined to construe the Wyoming rule broader than the federal rule on this detail because the procedure is more specific under Wyoming's version of Rule 612.

Another feature of the procedure under Rule 612 is the *in camera* examinations by the judge of a document objected to on the grounds that it does not relate to the subject matter of the testimony.³⁴⁵ If an adverse party does not think a writing relates to the testimony being elicited, he can demand

340. MOORE § 612.02, at 199.

341. MCCORMICK § 9, at 19.

342. *Id.* at 17.

343. WEINSTEIN ¶ 612 [01], at 612-13.

344. WRE 612(c).

345. WRE 612(c).

that the judge view it in chambers before the witness is allowed to use it in court. The judge has no discretion in this demand, he must comply under the rule. If the judge determines that any portions of the writing do not relate to the testimony, he is required to excise those portions and return the remainder to the party entitled to it.³⁴⁶ If an excised portion is objected to it is to be preserved and made available to the appellate court in case of appeal.³⁴⁷

Rule 612 leaves to the trial judge's discretion what measures to take when a writing is not produced as ordered. The rule only requires that the judge "make any order justice requires."³⁴⁸ An exception to this exists in criminal cases when the prosecution elects not to comply. In such case the order shall be one striking the testimony or declaring a mistrial, if the court, in its discretion, determines that the interests of justice so require.³⁴⁹ The reason for the exception stems from the Jencks Act³⁵⁰ which finds application in the production of documents relied on by witnesses in criminal cases.

Application in Criminal Cases

The most significant difference between Wyoming Rule of Evidence 612 and the federal rule is the limitation of federal Rule 612 by the Jencks Act.³⁵¹ The Wyoming version of Rule 612 does not so limit the rule's application.

In 1957, the United States Supreme Court decided the case of *Jencks v. United States*,³⁵² where it held that a criminal defendant had the right to inspect reports of government witnesses and that it was not necessary for the defendant to show that the reports were inconsistent with the witness' testimony, as long as they were shown to relate to the same subject matter. The opinion was highly criticized as giving to a criminal defendant too much access to government files. Con-

346. WRE 612(c).

347. WRE 612(c).

348. WRE 612(c). Cf. *Killian v. United States*, 368 U.S. 231 (1961), *reh. denied*, 368 U.S. 979 (1962). See also WEINSTEIN ¶ 612 [05]. FED. R. EVID. 612, Adv. Comm. Note, suggests available sanctions are contempt, dismissal and finding issues against the offender. It is also suggested that Rule 37(b) of the Wyoming Rules of Civil Procedure and Rule 18(h) of the Wyoming Rules of Criminal Procedure be consulted for appropriate sanctions.

349. WRE 612(c).

350. 18 U.S.C. § 3500 (1970).

351. 18 U.S.C. § 3500 (1970).

352. 353 U.S. 657, 666 (1957).

gress responded by passing the Jencks Act. This Act provides that in a criminal prosecution brought by the United States the defendant cannot require the production of government statements until after the government's witnesses have testified on direct examination in the trial concerning the subject matter which relates to those statements.³⁵³ This rule is a reflection of the traditional view that in criminal cases little discovery is allowed. The Act further provides that the term "statement" means a written statement made by a government witness which is signed, adopted or otherwise acknowledged by him, a recorded record of a substantially verbatim recital of an oral statement made by the government witness which was made contemporaneously with the oral statement, or a statement of a government witness made to a grand jury.³⁵⁴ Since the purpose of the Jencks Act is limited to making available only those statements which a criminal defendant may use to impeach a government witness, it was necessary, therefore, that the term "statement" be defined narrowly.³⁵⁵

A troublesome question is presented: if federal Rule 612 does not, by its language, allow an adverse party the right to have a writing used to refresh memory before testifying produced until "at the hearing", why bother to restrict Rule 612's application by the Jencks Act? One possible answer is that the language "to have the writing produced at the hearing" should not literally apply, so that an adverse party in a civil action is entitled to production *before* trial when the witness uses it to refresh his memory before trial. This interpretation would clearly make the Jencks Act restrictive on the federal rule's application in criminal cases. However, this explanation is unsupported by the language of the rule itself or its legislative history.³⁵⁶

Protection of a criminal defendant's right to see statements at trial which a government witness relied on before trial is a better explanation of why federal Rule 612 is subject to the Jencks Act. The Act states that a criminal defendant *shall* be allowed access to such statements.³⁵⁷ Rule 612

353. 18 U.S.C. § 3500(a) & (b) (1970).

354. 18 U.S.C. § 3500(e) (1970).

355. *Palermo v. United States*, 360 U.S. 343, 349 (1959).

356. *FED. R. EVID. 612*, Report of House Comm. on the Jud. See also *Goldman v. United States*, 316 U.S. 129, 132 (1942), *overruled on other grounds*, 389 U.S. 347 (1967).

357. 18 U.S.C. § 3500(b) (1970).

makes such production discretionary with the trial judge. In this aspect the exception of the Jencks Act to federal Rule 612 actually broadens the rule in criminal cases.

Wyoming Rule 612 was drafted without the exception imposed by the Jencks Act. The Committee Note states that the purpose of Wyoming Rule 612 is the same as Rule 18(c) of the Wyoming Rules of Criminal Procedure—to promote credibility and memory.³⁵⁸ Rule 18(c) is Wyoming's version of the Jencks Act.³⁵⁹ Since Wyoming's Rule 612 does not embody the Jencks Act exception, it would appear that it is narrower in application than the federal rule.

The Jencks Act exception to federal Rule 612 also acts to broaden the federal rule in criminal cases by requiring production when statements, used for any purpose, relate to a witness' testimony.³⁶⁰ Rule 612 only allows production when the statements are used to refresh memory. Again, it appears that the absence of the Jencks Act exception to Wyoming Rule 612 serves to restrict the rule in Wyoming. It may be argued, though, that the omission of the Jencks Act exception from the Wyoming rule was intended to broaden the rule's applicability, not restrict it. The Committee Note bears evidence to such a proposition.³⁶¹ If this was the intent, then Rule 612 should supersede those portions of Rule 18(c) of the Wyoming Rules of Criminal Procedure which restrict Rule 612's broadening effects but not those portions which are broader than 612's language. The omission of the Jencks Act exception indeed does broaden the Wyoming Rule with regard to *what* may be produced, since it is not restrained by the qualified definition of the term "statement" found in the Jencks Act.³⁶² In addition, the language of Rule 612 states only that production cannot be required until the hearing or trial. It may be argued then that production can be demanded once the trial or hearing begins even though the witness, whose writing is sought to be produced, has not yet testified. Hence, if on the first day of trial, a party demands production of a writing which a particular witness intends to use when he testifies on the fourth day of trial, the party is entitled to

358. WRE 612, Wyo. Comm. Note.

359. *DeLuna v. State*, 501 P.2d 1021, 1023 (1972).

360. 18 U.S.C. § 3500(b) (1970).

361. WRE 612, Wyo. Comm. Note.

362. 18 U.S.C. § 3500(e) (1970).

have it produced. The Jencks Act would not allow production until the witness had already testified.³⁶³ This represents another area in criminal cases where the Wyoming rule would be broader than the federal rule.

RULE 613: PRIOR STATEMENTS OF WITNESSES³⁶⁴

The new Wyoming Rule 613 is a verbatim copy of Rule 613 of the Federal Rules of Evidence. The rule is designed to test the veracity of a witness' testimony given at trial by allowing the cross-examiner to question the witness about prior statements he made without first showing the statement to the witness.³⁶⁵ The only requirements the cross-examiner must comply with are to let opposing counsel see the prior statement on request and give the witness a chance to explain or deny it.³⁶⁶

When a witness testifies in a case, he may say things on the stand that contradict or do not mesh with what he may have previously said orally or in a writing. Under traditional practice, opposing counsel could always use such discrepancies to impeach the witness even though the prior statement would be inadmissible as hearsay.³⁶⁷ If opposing counsel did make use of a prior inconsistent statement to impeach the witness, he had to lay a proper foundation before doing so.³⁶⁸ This requirement was based on the so-called *Queen's Case* rule, dating back to 1820.³⁶⁹ Under that rule, the statement had to be revealed to the witness and the cross-examiner had to ask him whether he remembered making it by describing the time, place and circumstances under which the alleged statement had been made—all before the cross-examiner could use the statement to impeach the witness. The purposes for the rule

363. 18 U.S.C. § 3500(b) (1970).

364. RULE 613. PRIOR STATEMENTS OF WITNESSES

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) *Extrinsic evidence of prior inconsistent statement of witness.* 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 interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

365. WRE 613(a).

366. WRE 613(b).

367. MCCORMICK § 34, at 67.

368. *Sims v. State*, 530 P.2d 1176, 1178-79 (Wyo. 1975).

369. 2 Brod. & Bing. 284, 129 Eng. Rep. 976 (1820).

were to refresh the witness' memory, to avoid unfair surprise, to save time (as an admission by the witness, so that further independent proof would be unnecessary), and to give the witness a chance to explain the inconsistency.³⁷⁰ However, a clever witness could use this forewarning to good effect and modify his story by the degree necessary to save his testimony.

This advantage given to a witness presented a serious obstacle to the cross-examiner. It was so menacing that England abolished the rule only thirty-four years after its introduction.³⁷¹ The *Queen's Case* rule has not been so easy to overcome in the United States, however. It is still in effect in a majority of jurisdictions.³⁷² Wyoming was included in the list of states that adhered to the *Queen's Case* rule until the adoption of the Wyoming Rules of Evidence and Rule 613. Beginning in 1875, the Wyoming Supreme Court pronounced that a foundation had to be laid by asking the witness about the prior inconsistent statement before he could be impeached by it.³⁷³ This rule has been followed ever since in Wyoming, being explicitly affirmed as the correct practice as recently as 1975.³⁷⁴ The foundation requirement even found expression in Section 1-143 of the Wyoming Statutes.³⁷⁵ With the adoption of Rule 613 in Wyoming, though, this procedure is no longer required. Rule 1102 of the new Wyoming Rules of Evidence specifically states that all statutes in conflict with the new rules are superseded, including Section 1-143.

Procedure Pursuant to Rule 613

The procedure to be followed under Wyoming Rule 613 should be the same as that under the federal rule. Rule 613 governs the fundamental requirements for the introduction of evidence of prior inconsistent statements for impeachment purposes. As has already been seen, Rule 613 abolishes the *Queen's Case* rule.³⁷⁶ It declares that a prior statement by a

370. MCCORMICK § 37, at 72. This rule was also thought to be necessary as part of the "best evidence" rule, requiring production of the original document when its contents were sought to be proved. However, McCormick explains that this notion was wrong for two reasons. See MCCORMICK § 28, at 56.

371. MCCORMICK § 28, at 56.

372. WEINSTEIN ¶ 613 [02], at 613-8.

373. *Dayton v. Wyoming Nat'l Bank*, 1 Wyo. 263, 266 (1875).

374. *Sims v. State*, *supra* note 368; see also *Mares v. State*, 500 P.2d 530, 536 (Wyo. 1972); *Hawkins v. B. F. Walker, Inc.*, 426 P.2d 427, 430 (Wyo. 1967); *Friesen v. Schmelzel*, 78 Wyo. 1, 318 P.2d 368, 370 (1957).

375. WYO. STAT. § 1-143 (1957), (superseded by WRE 1102).

376. FED. R. EVID. 613, Adv. Comm. Note, subdivision (a).

witness, whether oral or written, need not be shown to the witness at the time he is cross-examined on the prior statement.³⁷⁷ To protect against unwarranted insinuations that a statement has been made when the fact is to the contrary, disclosure of the statement to opposing counsel at his request is required,³⁷⁸ thereby allowing counsel to object to the statement at the time it is sought to be introduced.³⁷⁹

It is further provided that the witness be given an opportunity to explain or deny the prior inconsistent statement and the party who called the witness be given an opportunity to interrogate him on it.³⁸⁰ This procedure does not outline a time sequence to be followed, and the trial judge may allow the procedure to unfold as he deems appropriate.³⁸¹ If, however, the trial judge determines that the "interest of justice otherwise require," he can deny the witness an opportunity to explain and opposing counsel the right to interrogate him.³⁸²

The change from the old practice in Wyoming to the new practice under Rule 613 shifts the focus from warning the witness to surprising him. In civil cases, where discovery is fully utilized, the changes will probably not be appreciable, because presumably the witness will be cognizant of any past inconsistent statements.³⁸³ In criminal cases, however, the change increases the chance that examination with prior inconsistent statements before disclosure will expose collusive witnesses to the jury.³⁸⁴

It has been argued that Rule 613 gives too great a club to the cross-examiner, since he can delay connecting the witness to the prior inconsistent statement so that, by the time he exposes the inconsistency, the effect on the witness' credibility is devastating.³⁸⁵ It has also been said that if the witness has a

377. WRE 613(a).

378. WRE 613(a). See FED. R. EVID. 613, Adv. Comm. Note, subdivision (b).

379. WEINSTEIN ¶ 613 [03], at 613-15. The objection would be that authentication and best evidence requirements have not been met.

380. WRE 613(b).

381. MCCORMICK § 37, at 75 n.64.

382. WRE 613(b); WEINSTEIN ¶ 613 [02], at 613-9, notes that:

[T]he "interests of justice" clause permits the admission of statements which under the orthodox rule were completely barred if the party did not learn of the prior inconsistent statement until after the witness ceased being amenable to the court's jurisdiction since the foundation questions could not then be asked.

383. WEINSTEIN ¶ 613 [02], at 613-19.

384. FED. R. EVID. 613, Adv. Comm. Note, subdivision (b).

385. Note, *Modification of the Foundational Requirement for Impeaching Witnesses: California Evidence Code Section 770*, 18 HASTINGS L.J. 210, 219 (1966).

legitimate explanation, any attempt he makes to explain the incongruity will be looked upon as suspect by the jury.³⁸⁶ These objections to the operation of Rule 613 are not well founded. Any danger that the cross-examiner's effective use of a prior statement may unduly hurt the witness's credibility is outweighed by the freedom given to the cross-examiner to get at the truth of the witness' assertions. Rule 613 safeguards the dangers of an overzealous cross-examiner by allowing the other side to see the statement and rehabilitate the witness. The witness himself can revive any lost credibility by truthfully explaining any seeming discrepancy, especially if the witness is believable and the jury has no reason to think he is being less than totally honest. Finally, the argument against the application of Rule 613 hinges on the assumption that the jury is simple enough to put less reliance on a witness' testimony solely because of a mix-up in his story, without taking other factors into consideration. If the cross-examiner tries to unduly discredit the witness on a past statement he has made, the jury is apt to react unfavorably to the cross-examiner rather than to the witness. If the witness's story is weak, then, in the interests of truth-seeking, the cross-examiner should be allowed to cast doubt on his story without first warning him.

Limitations of Rule 613

Rule 613 is expressly made inapplicable to admissions of a party-opponent.³⁸⁷ It is also to be distinguished from other situations where other rules of evidence apply. For example, Rule 613 does not apply to impeachment of a witness by prior inconsistent conduct.³⁸⁸ Nor does the rule defeat the application of the "best evidence" rule in Rule 1002 of the Wyoming Rules of Evidence.³⁸⁹ Rule 613 is designed to allow prior inconsistent statements to be used to impeach a witness and is not intended to allow the statement itself to be admitted as substantive evidence which is the aim of Rule 1002. While Rule 613 governs the admission of prior inconsistent statements used for impeachment purposes, such statements

386. WEINSTEIN ¶ 613 [02], at 613-11.

387. WRE 613(b). The provision governing party-opponent admissions is WYO. R. EVID. 801(d)(2).

388. FED. R. EVID. 613, Adv. Comm. Note, subdivision (b).

389. FED. R. EVID. 613, Adv. Comm. Note, subdivision (a).

may be independently admitted to prove the truth of the matter asserted under Rule 801(d)(1).³⁹⁰

The Advisory Committee Note accompanying Rule 613 of the federal rules states that Rule 613 does not defeat the application of Rule 26(b)(3) of the Federal Rules of Civil Procedure.³⁹¹ Rule 26(b)(3) of the Wyoming Rules of Civil Procedure is identical to Federal Rule 26(b)(3). That rule says that upon request, a witness may obtain a copy of "a statement concerning the action or its subject matter previously made by that person,"³⁹² without a showing of good cause. Rule 26(b)(3) would appear to allow discovery of a prior inconsistent statement in the possession of the opponent, thus defeating the opponent's ability to use it to surprise the witness at trial.³⁹³ However, the apparent conflict between Rule 613 and Rule 26(b)(3), is not so great when the purpose for each rule is examined. Rule 26(b)(3) is designed to allow broad discovery in civil cases, so that the trial is a more orderly process and so that cases are more likely to be won on the merits rather than on surprise tactics.³⁹⁴ The aim of Rule 613 is not to limit the wide discovery tools provided by the Rules of Civil Procedure, but to see that a witness does not later change his story to the advantage of the party he is testifying for. Normally, a witness will know that he may be impeached by a prior statement of his if he tries to modify his story at trial. The pretrial discovery utilized will warn him of that. Rule 613 merely aids the opponent in keeping the witness straight in case he attempts to change his story or the discovery did not uncover a prior inconsistent statement. Hence, while it might at first appear that the new Rule 613 overrides Rule 26(b)(3) of the Wyoming Rules of Civil Procedure, a closer look reveals that it does not. If, during the discovery stage of a case, a party asserts that he is privileged from re-

390. WRE 801(d)(1).

391. FED. R. EVID. 613, Adv. Comm. Note, subdivision (a).

392. WYO. R. CIV. P. 26(b)(3).

393. A similar situation is presented in criminal cases when the defendant wants to see prior statements he has made. See WYO. R. CRM. P. 18(a).

394. In MOORE § 613.02, at 212-13, it is noted that if a witness requests a copy of his prior statement before trial, he may get it under FED. R. CIV. P. 26(b)(3). But, at the trial itself, the adverse party may, under FED. R. EVID. 613(a), cross-examine without showing the prior statement to the witness. Consequently, the time of requesting the prior statement becomes very important. Some federal courts have solved this problem by ordering that the adverse party may depose the witness before giving him the prior statement. See, e.g., *Parla v. Matson Navigation Co.*, 28 F.R.D. 348 (S.D.N.Y. 1961); *Straughan v. Barge M.V.L. No. 802*, 291 F. Supp. 282, 12 F.R.Serv.2d 34.13, Case 5 (S.D. Tex. April 10, 1968).

vealing a prior statement of his opponent's witness by virtue of Rule 613, the court should deny the assertion and require production, unless it would in some way be clearly unfair to do so. If the party wishes, though, he should be allowed to depose the witness before disclosing the statement.³⁹⁵

RULE 614: CALLING AND INTERROGATION OF WITNESSES BY COURT³⁹⁶

The long-established practice of letting the trial judge call and question witnesses, if in his discretion he deems it desirable or necessary, has been codified in the new Rule 614 of the Wyoming Rules of Evidence. The Wyoming rule is patterned after Rule 614 of the Federal Rules of Evidence, the language being exactly the same in both rules. The right of the trial judge to call and question witnesses stems from the nature of the judicial function in American courts.³⁹⁷ "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."³⁹⁸ Rule 614 is divided into three parts: 614(a) allows the court to call a witness; 614(b) permits interrogation of a witness by the court; and 614(c) deals with objections to the calling or questioning of a witness by the court.

The Calling of Witnesses by the Court

Subdivision (a) of Rule 614 allows the court, on its own motion or at the suggestion of a party, to call witnesses and further provides that all parties may cross-examine such witnesses. This prerogative is well established in the federal courts.³⁹⁹ While no case law exists in Wyoming saying a judge may call a witness, the practice of questioning witnesses has been acknowledged.⁴⁰⁰ Under the old rules of evidence when

395. MOORE § 613.02, at 212-13.

396. RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) *Calling by Court.* The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court.* The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

397. WEINSTEIN ¶ 614 [01], at 614-3.

398. *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945).

399. *See United States v. Liddy*, 509 F.2d 428, 438 (D.C. Cir. 1974).

400. *See Town of Douglas v. Nielsen*, 409 P.2d 240, 242 (Wyo. 1965). Since a judge could question witnesses, it may be assumed he had authority to call them, too.

a party could not impeach his own witness, the judge was sometimes requested by that party to call the witness so that he could be impeached by the party originally intending to call him.⁴⁰¹ There are good reasons for allowing the judge to call witnesses. For one, a party avoids the association of a witness with his side if the judge calls the witness, and in addition, the judge is not confined to the development of a case as conceived by the parties.⁴⁰² Fairness is assured by the right of each party to cross-examine the witness.⁴⁰³ The rule also allows the judge to call witnesses not called or requested to be called by either side, to ensure that all the relevant facts of a case are brought out.⁴⁰⁴

The trial judge's authority to call his own witness has generally been viewed as a matter of judicial discretion rather than a duty⁴⁰⁵ and that exercise of discretion has rarely been overturned on appeal.⁴⁰⁶ Rule 614(a) seems to be in accord with this position because it states that the court "may" call witnesses.

Interrogation of Witnesses by the Court

Rule 614(b) provides that the court may interrogate witnesses, whether called by itself or by a party. This rule exists to help insure the complete disclosure of all pertinent facts which the parties themselves may have failed to bring out. A judge may exercise his power to question witnesses when a witness's testimony is unclear, inaccurate or misleading.⁴⁰⁷ This was the rule in Wyoming even before the adoption of Rule 614.⁴⁰⁸ It has also been said that the judge has a duty to question witnesses to bring out undisclosed facts, but the general

401. The old rule no longer exists by virtue of WRE 607.

402. FED. R. EVID. 614, Adv. Comm. Note, subdivision (a).

403. FED. R. EVID. 614, Adv. Comm. Note, subdivision (a).

404. WEINSTEIN ¶ 614 [02], at 614-6, notes that the judge's right to call witnesses whom both sides fail to call may be particularly desirable in bench trials or where the interests of others than the immediate parties are at stake, such as in class actions or matters involving public policy decisions. However, judges are reluctant to call witnesses without a request from a party because they know little of a case below the surface and rely on the parties themselves to expedite the case in a thorough manner.

Another use of the power to call witnesses is to have the judge appoint an expert witness of his own choosing or one agreed upon by the parties, so that the possibility of partisan experts is avoided. This power is governed by WRE 706 rather than Rule 614.

405. WEINSTEIN ¶ 614 [02], at 614-7. In *Johnson v. United States*, 333 U.S. 46, 54 (1948), Justice Frankfurter argued that federal judges have a duty to call witnesses not otherwise called who may have important knowledge about a case.

406. See, e.g., *Smith v. United States*, 331 F.2d 265, 273 (8th Cir. 1964).

407. See, e.g., *United States v. Green*, 429 F.2d 754, 760 (D.C. Cir. 1970).

408. See *Town of Douglas v. Nielsen*, *supra* note 390.

view and Rule 614(b)'s position is that it is entirely discretionary with the trial judge.

The right to question witnesses by the judge is not unlimited. The judge must maintain an appearance of impartiality at all times during the course of a trial. The judge is not to abandon his judicial role and assume the role of advocate or prosecutor in a criminal case.⁴⁰⁹ He must be careful in questioning witnesses, for even if the questions are impartial, if they are too extensive he may have infringed on a party's right to a fair trial.⁴¹⁰ The trial judge must let the jury reach its own conclusions, and overzealous participation by a judge during the course of a trial may prevent this.⁴¹¹ In addition to the limits imposed upon the trial judge in questioning witnesses, general comments made by the judge should be impartial and kept to a minimum.⁴¹² If the judge's remarks or conduct favor one side of a case, it could result in prejudicial error.⁴¹³

Reversals for improper interrogation by a judge are rare⁴¹⁴ since a trial judge's discretion in this area is broad. Ordinarily, appellate courts will find that the judge did not abuse his discretion⁴¹⁵ or that his actions, if erroneous, did not amount to reversible error.⁴¹⁶ But, if the appellate court finds that the trial judge over-stepped his bounds as judicial arbiter and assumed the role of advocate, the judgment will be reversed.⁴¹⁷

An interesting ancillary question regarding the application of Rule 614(b) is whether or not the word "court" as used in the rule means "judge" or "judge and jury"? The fed-

409. See *United States v. Barbour*, 420 F.2d 1319, 1321 (D.C. Cir. 1969).

410. See, e.g., *United States v. Brandt*, 196 F.2d 653 (2d Cir. 1952).

411. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 586 (10th Cir. 1961), cert. dismissed, 371 U.S. 801 (1962).

412. *Deeter v. State*, 500 P.2d 68, 70 (Wyo. 1972).

413. *Cf. State v. Riggle*, 76 Wyo. 1, 300 P.2d 349, 368 (1956), reh. denied, 76 Wyo. 1, 300 P.2d 567 (1956), cert. denied, 352 U.S. 981 (1957); see also *Anderson v. State*, 27 Wyo. 345, 196 P. 1047, 1057-58 (1921), where the judge's remark to the jury that "any attempt on the part of the defendant to settle this matter or to return the money or the notes is no defense at all. . . ." was held error, requiring remand.

414. 2 WRIGHT, FEDERAL PRACTICE & PROCEDURE § 415, at 177 (1969).

415. See, e.g., *United States v. Carabbia*, 381 F.2d 133, 139 (6th Cir. 1967), cert. denied, 389 U.S. 1007 (1967).

416. See *Deeter v. State*, *supra* note 412, in which the trial judge had made various remarks throughout the trial. The Supreme Court indicated that a trial judge should limit his comments to the "bare essentials" of rulings and should avoid gratuitous comments which can lead to prejudice. While the comments were out of place, the court found that no prejudice resulted.

417. See, e.g., *United States v. Guglielmini*, 384 F.2d 602, 605 (2d Cir. 1967), cert. denied, 400 U.S. 820 (1970).

eral rule conforms to the United States Supreme Court version of Rule 614 except that the word "court" is substituted for the word "judge" so that 614(b) reads "[t]he court may interrogate witnesses . . ." Wyoming copies the federal rule version. Does this mean jurors as well as the judge may question a witness? The questioning of witnesses by members of the jury has been allowed in some jurisdictions.⁴¹⁸ The determination whether to let jurors ask questions has been left to the trial judge's discretion in these jurisdictions. In any event, jurors are usually reluctant to interrogate a witness and consequently it is rare that the subject ever reaches appellate review.⁴¹⁹ The adoption of Federal Rule 614 in 1975 and Wyoming Rule 614 in 1977 may change the discretionary character of allowing jurors to ask questions to witnesses. The Advisory Committee's Note to the federal rule refers to the "judge" as having authority to question witnesses. But, it nowhere states that jurors are prohibited from asking questions. The rule itself is silent on the issue and has yet to be resolved by judicial opinion. In the past, when courts have defined the term "court" they have defined it to mean both "judge" and "judge and jury" depending on the way the term was used.⁴²⁰

Objections

Subdivision (c) of Rule 614 permits counsel to object to the calling or interrogation of witnesses by the court. Objection may be made at the time of calling or interrogation or at a later time when the jury is not present. If a later time is utilized, the rule specifies that it must be the "next available opportunity" when the jury is not present. This procedure is designed to relieve counsel of the embarrassment of objecting to a judge's question in the presence of the jury.⁴²¹ It still requires timely objections, though, to afford the opportunity to employ corrective measures if need be.⁴²² These features combine the automatic objection aspect of Wyoming Rule of

418. WIGMORE § 784(a), at 199-200. For cases that say it is within the discretion of the trial judge see *United States v. Witt*, 215 F.2d 580 (2d Cir. 1954), *cert. denied*, 348 U.S. 887 (1954); *Ferrara v. State*, 101 So.2d 797, 801 (Fla. 1958); *Carter v. State*, 250 Ind. 13, 234 N.E.2d 650 (1968); *People v. Justice*, 50 Mich. App. 59, 212 N.W.2d 762 (1973); *Nelson v. State*, 513 S.W.2d 496 (Ark. 1974).

419. WIGMORE § 784(a), at 199-200. For an excellent annotation on the subject, see Annot., 31 A.L.R.3d 872 (1970).

420. See 10 WORDS & PHRASES, *Court* (1968).

421. FED. R. EVID. 614, Adv. Comm. Note, subdivision (c).

422. FED. R. EVID. 614, Adv. Comm. Note, subdivision (c).

Evidence 605 with the provision in Wyoming Rule of Evidence 103 of putting the responsibility for objecting on the parties.

RULE 615: EXCLUSION OF WITNESSES⁴²³

Rule 615 of the recently adopted Wyoming Rules of Evidence codifies the practice of excluding witnesses from the courtroom while other testimony is being taken. The rule is justified on the theory that if one witness is excluded while another witness is testifying, any collusive plan to fabricate evidence is foiled.⁴²⁴ Before Rule 615, the decision whether or not to exclude a witness was left to the discretion of the trial judge both in Wyoming⁴²⁵ and at the federal level.⁴²⁶ Under the new rule of evidence, however, this discretion is eliminated.⁴²⁷

Upon request, the court must order witnesses excluded so that they cannot hear the testimony of other witnesses. The court may, on its own motion, exclude witnesses, also. The rule is silent on the question of when the request is to be made and on what instructions, if any, the court may give to the excluded witnesses. A proper instruction for the court to give might be to tell the witnesses excluded not to discuss the case with each other.⁴²⁸ In a criminal case, if an instruction is given, it should be worded such that the excluded witnesses are not left with the impression that they cannot discuss the case with anyone, because of the possibility that such an instruction could be held to be a deprivation of a defendant-witness' sixth amendment right to effective assistance of counsel.⁴²⁹

Three categories of persons are excepted from the general rule of exclusion of witnesses under Rule 615. The first ex-

423. RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its 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.

424. FED. R. EVID. 615, Adv. Comm. Note; see, e.g., *Taylor v. United States*, 388 F.2d 786, 788 (9th Cir. 1969).

425. *Whiteley v. State*, 418 P.2d 164, 167 (Wyo. 1966). In *Martinez v. State*, 80 Wyo. 325, 342 P.2d 227, 229 (1959), the court stated that the better practice was to exclude the witness at the beginning of the trial.

426. See, e.g., *United States v. Eastwood*, 489 F.2d 818, 821 (5th Cir. 1973).

427. FED. R. EVID. 615, Adv. Comm. Note.

428. WEINSTEIN ¶ 615 [01], at 615-9, where it is noted that a failure to give such an instruction has not been considered reversible error.

429. *United States v. Leighton*, 386 U.S. 1025 (1968).

ception allows a party who is a natural person to remain in the courtroom.⁴³⁰ This exception is designed to prevent problems of confrontation and due process.⁴³¹ The second exception allows an officer or employee who is the designated representative of a party who is not a natural person, such as a corporation, to remain in court. The rationale for this exception is the same as the first. A common example of a representative of a non-natural person is a police officer who has been in charge of an investigation. Such an agent for the government has been allowed to stay in court even though he was also a witness.⁴³² The third exception allows a person, whose presence is shown by a party to be essential to the presentation of his cause, to remain in court. It is contemplated that this exception will allow an agent who handled the transaction being litigated⁴³³ or an expert needed to advise in the management of the suit to remain in court throughout the trial.⁴³⁴

It might be noted that Rule 615 eliminates a judge's discretion in whether he may exclude a witness, but he still has discretion in whether the witness qualifies under one of the exceptions to the exclusion rule. The burden of proof has shifted. Before Rule 615, a party wishing exclusion had to convince the trial judge to exclude. Now, exclusion will automatically be granted unless the party whose witness is ordered excluded can convince the judge that the witness falls within one of the three excepted categories.⁴³⁵

The consequences for noncompliance of an exclusion order are not outlined in Rule 615. Contempt has been invoked under prior practice and may still be used under the rule.⁴³⁶ Other possible remedies are: permitting comment on the witness' noncompliance in order to reflect on his credibility, refusing to let the witness testify and striking his testimony.⁴³⁷ The latter two sanctions are harsh ones and courts have gen-

430. The practice in Wyoming before the adoption of Rule 615 seems to have given the trial judge discretion to exclude all witnesses, including a party witness. See *Pixley v. State*, 406 P.2d 662, 668 (Wyo. 1965), and *Whiteley v. State*, *supra* note 425. The first exception to the witness exclusion rule in Rule 615 no longer allows this practice.

431. FED. R. EVID. 615, Adv. Comm. Note.

432. FED. R. EVID. 615, Adv. Comm. Note; see also FED. R. EVID. 615, Report of Senate Comm. on the Jud.

433. Such witness also qualifies under the second exception.

434. FED. R. EVID. 615, Adv. Comm. Note, and Report of Senate Comm. on the Jud.

435. WEINSTEIN ¶ 615 [01], at 615-8.

436. See, e.g., *Shoemaker v. K-Mart, Inc.*, 294 F. Supp. 260, 262 (E.D. Tenn. 1968).

437. WEINSTEIN ¶ 615 [01], at 615-10.

erally avoided using them where a party was in no way responsible for the witness' noncompliance.⁴³⁸

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438. *See* *Hollywood v. State*, 19 Wyo. 493, 122 P. 588 (1912).