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Witness Rules Change, Codify Nebraska Law

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Like a piece of ice on a hot stove, the poem must ride on its own melting.

—Robert Frost
Preface, Collected Poems

INTRODUCTION

It is appropriate to examine the meltings of the Proposed Nebraska Rules of Evidence (hereinafter "Nebraska Rule[s]," "Nebraska proposal" or "Rule[s]") for each proposed rule, not unlike the poem described by Frost, "must ride on its own melting."

Every experienced producer knows that a change of pace is essential to the success of any worthwhile production and I suspect that the law review editors had this principle in mind when they invited a trial judge, in sharp contrast to the contributing Thayer-Wigmore-Morgan scholars, to comment on the practical effect in the courtroom of the Nebraska proposal covering witnesses.

Rule 601

GENERAL RULE OF COMPETENCY

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

Under this Rule, all witnesses are competent, unless otherwise specified in the Rules. (See, for example, Article V). No mental or moral qualifications are specified.[1]

The Rule's practical effect is to remove the question of the witness' competency from the trial judge, permit the witness to testify without undergoing a voir dire examination and allow the witness' weight and credibility to be tested on cross-examination.

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1. *Compare* NEB. REV. STAT. § 25-1201 (Reissue 1964).

The trial judge would retain limited control of the witness under Rules 403 and 602. The judge also would rule on the sufficiency of the evidence.

The Rule's most controversial aspect concerns elimination of the so-called dead man's statute governing the competency of witnesses in actions involving a deceased person's representative.[2] The debate continues, but many have observed that while invoking privilege statutes and dead man statutes sometimes results in justice, more often the statutes impede the truth.

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.

This Rule states the usual requirement that a lay witness must have firsthand knowledge of the matter about which he is to testify.[3] The trial judge makes the finding as to whether or not the foundation requirements have been met. For example, if the witness is unintelligible because of infancy or senility and the foundation requirements of firsthand knowledge cannot otherwise be supplied, the judge would not allow further testimony by the witness.

The first hand knowledge requirement carries over to Rules 803 and 804 covering exceptions to the hearsay rule.

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.

This Rule allows the judge to select the form of oath or affirmation to be administered and, if he so desires, to depart from the ritual recitation required by the present statute.[4]

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2. NEB. REV. STAT. § 25-1202 (Cum. Supp. 1972).
3. Peake v. Omaha Cold Storage Co., 158 Neb. 676, 64 N.W.2d 470 (1954).
4. NEB. REV. STAT. §§ 25-1237, 25-2220 (Reissue 1964); NEB. CONST. art. I, § 4.

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.

Under this Rule, the interpreter would be appointed by the judge and would be subject to Rule 702. This is consistent with Nebraska law covering persons who because of hearing or speaking impairments are unable to communicate the English language.[5]

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.

This Rule would advance the existing law in Nebraska. Under existing Nebraska law, the judge is a competent witness for either party and in his "discretion" may disqualify himself.[6] The Rule properly restricts the judge; counsel need not object to preserve the error on appeal.

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, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

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5. NEB. REV. STAT. §§ 25-2401 to -2406 (Supp. 1973); Prokop v. State, 148 Neb. 582, 28 N.W.2d 200 (1947).
6. NEB. REV. STAT. § 25-1205 (Reissue 1964).

(a) **At the Trial.** This subdivision would advance Nebraska's existing law. A juror, as a judge of the facts, would be disqualified from testifying before the jury in the trial of the case in which he is sitting as a juror. This is consistent with Rule 605.

Under existing Nebraska law, a juror is a qualified witness to testify in a case in which he is sitting as a juror, at least where no objection has been made.[7]

(b) **Inquiry Into Validity of Verdict or Indictment.** This subdivision would change existing Nebraska law.[8] If this Rule were passed, in proceedings to impeach a verdict, a juror could not testify about matters or statements occurring during the jury's deliberations. A juror also could not testify about his emotions or mental processes in reaching the decision, but he could testify on whether extraneous prejudicial information or outside influence was improperly brought to bear upon any juror.

The Rule's purpose is to protect freedom of deliberation, ensure stability of verdicts and protect jurors from harassment. In short, private deliberations should not be made the subject of public investigation.[9] It would appear that the jury's conduct, for example, in reaching a quotient verdict would not be a proper subject of inquiry into the verdict's validity. On the other hand, any extraneous prejudicial information, such as a prejudicial newspaper article, or outside influence, such as a bailiff's improper conduct, affecting the jury's deliberations would be a proper subject of inquiry. Whether a flask smuggled into the jury room by a juror would amount to an "outside influence" presents an interesting question.

Rule 607

WHO MAY IMPEACH

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

This Rule is consistent with Nebraska law.[10] The fact that a party calls a particular person as a witness does not mean that such party necessarily holds out such witness as worthy of belief in everything he says.

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7. *See* NEB. REV. STAT. § 25-1201 (Reissue 1964); Richards v. State, 36 Neb. 17, 53 N.W. 1027 (1893); Wood River Bank v. Dodge, 36 Neb. 708, 55 N.W. 234 (1893).
8. Haarberg v. Schneider, 174 Neb. 334, 117 N.W.2d 796 (1962).
9. McDonald v. Pless, 238 U.S. 264 (1915).
10. State v. Fronning, 186 Neb. 463, 183 N.W.2d 920 (1971).

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 reputation or opinion, 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, if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness.

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.

(a) Opinion and Reputation Evidence of Character. This Rule would change existing Nebraska law.[11] Under this Rule, a witness could give his personal "opinion" as to the truthfulness or untruthfulness and reputation of another witness. Heretofore, questions were couched in terms of "reputation in the community," but answers were most likely based upon personal opinon.

(b) Specific Instances of Conduct. The first sentence of the Rule is consistent with existing Nebraska law.[12] The remainder of the Rule covers the cross-examination of the witness to test credibility. With respect to specific instances of conduct, the Nebraska rule heretofore has required that questions propounded to a character witness on cross-examination be in the form "have you heard?" rather than "do you know?" to be consistent with the hearsay testimony concerning reputation on direct examination.[13]

Now that the witness can give his personal opinion of the other witness' truthfulness or untruthfulness, the testifying witness may be asked on cross-examination if he doesn't "know" of specific instances of conduct. If the witness answers in the negative, the cross-examiner is, of course, bound by the answer.

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11. Lee v. State, 147 Neb. 333, 23 N.W.2d 316 (1946); Faulkner v. Gilbert, 61 Neb. 602, 85 N.W. 843 (1901).
12. Boche v. State, 84 Neb. 845, 122 N.W. 72 (1909); Myers v. State, 51 Neb. 517, 71 N.W. 33 (1897).
13. State v. Newte, 188 Neb. 412, 197 N.W.2d 403 (1972); Basye v. State, 45 Neb. 261, 63 N.W. 811 (1895).

The practical application of the Rule allowing specific instances of conduct to be inquired into has the potential for unfair prejudice since the mere asking of the question concerning misdoings carries with it the suggestion that it is true. The trial judge should not be hesitant to invoke the provisions of Rule 403 to prevent unfair prejudice. Other recommended procedures for coping with the problem are outlined in *Michelson v. United States.*[14]

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 is admissible 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 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 his most recent conviction or of the release of the witness from confinement, whichever is the later date.

(c) **Effect of Pardon or Annulment.** Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, or other equivalent procedure which was based on innocence.

(d) **Juvenile Adjudications.** Evidence of juvenile adjudications is not admissible under this rule.

(e) **Pendency of Appeal.** Pendency of an appeal renders evidence of a conviction inadmissible.

This Rule would change existing Nebraska law.[15]

(a) General Rule. This subdivision provides that evidence of a conviction of a felony or a crime involving dishonesty or false statement, even though a misdemeanor, would be admissible for impeachment purposes.

(b) Time Limit. Under this subdivision, a time limit of ten years "since the date of his most recent conviction or of the release of the witness from confinement, whichever is the later date" is placed upon this type of evidence. The qualification "since the date of his most recent conviction" was added to the final draft of the Proposed Federal Rules of Evidence (hereinafter "Federal Rule[s]" or "federal proposal") at the suggestion of the Department of Justice. This qualification would allow evidence of a crim-

14. 335 U.S. 469 (1948).
15. NEB. REV. STAT. §§ 25-1214, 29-2011 (Reissue 1964). But as to (d), defendant was held entitled to show juvenile probation of a government witness. Davis v. Alaska, 94 S.Ct. 1105 (1974).

inal conviction 20 or 30 years before trial if the witness has been convicted of a crime, felony or misdemeanor involving dishonesty, within ten years prior to trial. Although the federal drafters intended a more restrictive rule governing the admissibility of the evidence covered by this Rule, they ended up with a pro-prosecution broadened Rule.

Under H.R. 5463 passed by the United States House of Representatives on February 6, 1974, evidence of a criminal conviction for the purpose of attacking credibility would be admissible only if the crime involved dishonesty or false statement.[16] The House also placed a ten-year limitation on such evidence without the qualification contained in the Rule. The House action would appear to represent the more enlightened view on the subject and is consistent with Rule 21 of the Uniform Rules of Evidence and Rule 106 of the Model Code of Evidence. A conviction for motor vehicle homicide, for example, has little, if any, bearing on credibility and by limiting the evidence to crimes involving dishonesty or false statement, the true purpose of the impeaching process is fulfilled.

(e) **Pendency of Appeal.** This subdivision provides that the pendency of an appeal renders evidence of a conviction inadmissible. This is the reverse of the federal proposal. Perhaps there is a greater presumption of correctness attendant to trials and jury verdicts in federal courts than in Nebraska courts.

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.

This Rule is consistent with the law in this country that religious beliefs or opinions are irrelevant on the issues of credibility or incompetency.

Rule 611

MODE AND ORDER OF INTERROGATION AND PRESENTATION

> (a) **Control by Judge.** The judge 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

16. 120 CONG. REC. H550, H570 (daily ed. Feb. 6, 1974).

needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to 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. In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.

(a) Control by Judge. The responsibility for conducting a proper trial rests with the trial judge and this subdivision of the Rule merely provides the judge discretionary tools with which to meet his responsibility.

(b) Scope of Cross-Examination. This subdivision of the Rule changes Nebraska law[17] and adopts the "wide open" or English rule with respect to cross-examination subject to discretionary control by the judge.

It has been argued that the existing Nebraska rule ensures that the customary order for the production of evidence is preserved by preventing the cross-examiner from grabbing the ball, so to speak, and running away with it. The order of presenting evidence is important to counsel and the jury; the trial judge will have to be alert to exercise his discretion if the Rule is disruptive of the orderly presentation of evidence.

On the other side of the coin, the Rule will prevent delay in recalling witnesses and will eliminate many quibbling objections.

(c) Leading Questions. This subdivision appears to be consistent with Nebraska law and should not present any serious problems for counsel or the trial jduge.

Rule 612

WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh his memory for the purpose of testifying, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If

17. Clark v. Smith, 181 Neb. 461, 149 N.W.2d 425 (1967); Griffith v. State, 157 Neb. 448, 59 N.W.2d 701 (1953).

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

This Rule would appear to change existing Nebraska law.[18] Under present trial procedure, if a witness refers to a document on the witness stand to refresh his memory, an adverse party may inspect the document and cross-examine concerning its contents. Under this Rule, if a witness uses a writing to refresh his memory for the purpose of testifying "either before or while testifying," the adverse party is entitled to have it produced at the hearing, to cross-examine the witness thereon and to introduce in evidence those portions which relate to the witness' testimony. This Rule applies to all witnesses in civil and criminal trials and to all writings used to refresh the memory of the witness for the purpose of testifying.

It has been argued that this Rule's application will lead to protracted cross-examination, fishing expeditions and numerous trial delays while documents are located and brought to court. This may be true, but is there any reason why we should have one rule for a witness who refers to a writing on the witness stand to refresh his memory and a different rule for a witness who refers to a writing on the courthouse steps for the same purpose?

One thing is certain; lawyers will be coming to court with larger briefcases.

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 or 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

18. Echert v. United States, 188 F.2d 336 (8th Cir. 1951); State v. Adams, 181 Neb. 75, 147 N.W.2d 144 (1966).

of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801 (d) (2).

Subdivision (a) of this Rule refers to the examination of the witness concerning a prior statement, while subdivision (b) refers to the admissibility into evidence of a prior inconsistent statement of the witness.

(a) Examining Witness Concerning Prior Statement. This subdivision repudiates the Rule of *The Queen's Case*[19] which found some favor in this country even after it was repudiated in England by legislation.

There are times when counsel would like to test the credibility of the witness by asking him generally about a prior statement, consistent or inconsistent, without actually confronting him with the precise statement. This would be permitted under the Rule. Unwarranted insinuations by counsel are protected aganst by the Rule and are precluded by the Code of Professional Responsibility.

Subdivision (b) of this Rule covers proof by extrinsic evidence of a prior inconsistent statement and appears to be in accord with existing Nebraska law.[20] It should be noted that special statutes relating to depositions[21] and the production of documents[22] affect the operation of the Rule. Of course, admissions by an adverse party are not affected by the Rule.

Rule 614

CALLING AND INTERROGATION OF WITNESSES BY JUDGE

(a) **Calling by Judge.** The judge may, on his 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 Judge.** The judge may interrogate witnesses, whether called by himself or by a party.

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

This Rule appears to be consistent with Nebraska law.[23] The need for a judge to call a witness is diminished by Rule 607 allowing a party to impeach a witness which he has called. Judges should

19. 129 Eng. Rep. 976 (H.L. 1820).
20. Bartek v. Glasers Provisions Co., 160 Neb. 794, 71 N.W.2d 466 (1955).
21. NEB. REV. STAT. § 25-1267.07 (Reissue 1964).
22. NEB. REV. STAT. § 25-1222 (Reissue 1964).
23. Coyle v. Stopak, 165 Neb. 594, 86 N.W.2d 758 (1957).

be reluctant to interrogate witnesses and should do so only to develop the truth and prevent misconception.

Rule 615

EXCLUSION OF WITNESSES

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

Under existing Nebraska law, the sequestration of witnesses is discretionary with the district courts.[24] This Rule would provide for the sequestration of witnesses as a matter or right and, thereby, make the practice uniform in all districts in the state.

CONCLUSION

The federal proposal is the result of more than a decade of research, study, writings and debate. The Nebraska proposal has been the subject of study and debate since 1969. Far from being hurriedly thrust upon the Bench and Bar, the Rules have evolved with medicine ball swiftness.

While the wisdom of a particular Rule may be subject to a reasonable difference of opinion, it would appear that the Rules, taken as a whole, represent a concise codification of solid thinking in the law of evidence.

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24. State v. Goff, 174 Neb. 548, 118 N.W.2d 625 (1962).