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## The Ohio Rules of Evidence: Part III

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# PUBLIC DEFENDER REPORTER

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## THE OHIO RULES OF EVIDENCE PART III

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This is the third in a series of articles examining the Rules of Evidence as they apply in criminal cases.

### RULE 501: PRIVILEGES

Rule 501 is the only provision governing the law of privilege in the Rules of Evidence. Rule 501 does not create any privileges; instead, it provides that the law of privilege is governed by statute enacted by the General Assembly and by the common law. Consequently, the Rules of Evidence do not change the Ohio law of privilege. Although not specifically enumerated in Rule 501, constitutionally-based privileges also apply in Ohio trials. See *Malloy v. Hogan*, 378 US 1 (1964) (5th Amendment applicable in state trials); Ohio Const., art. I, § 10.

### RULE 601: COMPETENCY OF WITNESSES

Rule 601 provides that "[e]very person is a competent witness." There are five exceptions to this general provision, three of which are important in criminal cases.

#### Persons of Unsound Mind

Rule 601(A) provides that persons of unsound mind who appear incapable of receiving or relating impressions are incompetent. This provision is based on RC 2317.01. The Staff Note employs the term "insane persons" in describing this rule. This description is misleading. The tests for insanity and competency are not the same. In *State v. Wildman*, 145 OS 379, 61 NE(2d) 790 (1945), the Supreme Court commented:

Under the trend of modern decisions the fact that a witness is insane does not necessarily exclude him from the witness stand . . .

Ordinarily the presumption is that persons who are called as witnesses are competent . . . , but this pre-

sumption may be overcome by a proper showing. According to the general rule, the question of competency lies in the sound discretion of the trial judge, and, if he permits a witness of unsound mind to testify, his action in so doing is not a ground of reversal at the behest of an aggrieved party, unless there is an abuse of discretion . . .

A person who is able to correctly state matters which have come within his perception, with respect to the issues involved, and appreciates and understands the nature and obligation of an oath is a competent witness notwithstanding some unsoundness of mind. *Id.* at 385-86.

### Children Under Ten Years of Age

Rule 601(A) provides that children under ten years of age who appear incapable of receiving or relating impressions are incompetent. This provision is based on RC 2317.01.

If the witness' capacity to *perceive* is in issue, it is the age at the time of the transaction about which the witness testifies that is controlling and not the age at the time of trial. In *Huprich v. Paul W. Varga & Sons, Inc.*, 3 OS(2d) 87, 209 NE(2d) 390 (1965), the Court held: "Where a witness is over ten years of age when he testifies but was under ten at the time of the happenings about which he proposes to testify, the capability of such witness to receive 'just impressions' of such happenings must necessarily be determined as of the time of those happenings." *Id.* (syllabus, para. 1). The court went on to state that "it was the duty of the trial court to determine, after examination, the competency of the proffered witness . . . [B]oth counsel are entitled to present relevant evidence subject to the control of the trial court as to the mental capacity of the witness to observe accurately and recollect, including expert witnesses and testimony." *Id.* at 90-91. *Accord*, *City of Berea v. Petcher*, 119 App 165, 188 NE(2d) 605 (1963) (court must hold hearing on competency of child under

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ten years of age).

### **Spouses in Criminal Cases**

Rule 601(B) provides that a witness-spouse is incompetent to testify against a defendant-spouse in a criminal case unless the charged offense involves a crime against the testifying spouse or the children of either spouse. This testimonial privilege or disqualification must be distinguished from the privilege relating to confidential communications between spouses. The confidential communication privilege is recognized in RC 2317.02(C) and RC 2945.42, and is governed by Rule 501.

On January 14, 1981 the Supreme Court promulgated an amendment to Rule 601. See 54 Ohio Bar 175 (1981). The amendment abolishes the testimonial spousal privilege in criminal cases. If not disapproved by the General Assembly, the amendment becomes effective on July 1, 1981. See Ohio Const., art. IV, § 5(B).

### **Law Enforcements Officers in Traffic Cases**

Rule 601(C) provides that a law enforcement officer is incompetent as a witness if (1) on duty exclusively or for the "main purpose" of enforcing traffic laws, (2) arrests or assists in the arrest of a misdemeanor offender, and (3) is not in a properly marked vehicle or legally distinctive uniform as prescribed by statute. This provision is based upon RC 4549.14 and RC 4549.16. The term "traffic laws" includes municipal ordinances. *City of Dayton v. Adams*, 9 OS(2d) 89, 223 NE(2d) 822 (1967). *Adams* involved the use of radar. Although the "chase vehicle" was properly marked, the vehicle in which the radar unit was located was not properly marked. The Court held the officer in the radar car was not competent under the statute.

Whether the arresting officer's "main purpose" involved enforcing traffic laws has been the subject of several decisions. In *City of Columbus v. Stump*, 41 App(2d) 81, 322 NE(2d) 348 (1974), the court upheld the competency of an arresting officer who was not in a distinctively marked vehicle and who was working undercover at the time of the arrest:

"Main purpose" must involve the complete assignment of duty for the . . . police officer for the "trick" he worked as a whole. If that assignment included narcotics control efforts and the patrolling of the city for protection against the many forms of law breaking, then it cannot be said that traffic control was the "main purpose" of his assignment that night . . . . The entire duty of the officer, be multiple or single, must be respected and to do otherwise flies in the face of the intent of the legislature . . . *Id.* at 84-85.

See also *State v. Thobe*, 91 Ohio L Abs 92, 191 NE(2d) 182 (Ct App 1961); *State v. Maxwell*, 60 Misc. 1, 395 NE(2d) 531 (Mun Ct 1978).

### **RULE 602: LACK OF PERSONAL KNOWLEDGE**

Rule 602 codifies the firsthand knowledge rule. The rule is subject to Rule 703 which specifies the bases for expert opinion testimony. Under that provision an expert may base his opinion on either

personal knowledge or evidence admitted at the trial or proceeding. A lay witness also may give an opinion, but Rule 701 requires such opinions be based on firsthand knowledge.

In *Cleveland, Terminal and Valley R. Co. v. Marsh*, 63 OS 236, 58 NE 821 (1900), the Court explained the firsthand knowledge requirement as follows:

It is error to allow a witness to testify, over the objection of the other side, as to the identity of a person, without first qualifying himself by showing he has some knowledge on the subject. (syllabus, para. 1)

A witness should testify in accordance with the knowledge he has at the time of testifying, and is not confined to the knowledge he may have had at a previous time. (syllabus para. 2)

Because it is often difficult to distinguish between what a witness knows and what a witness thinks he knows, Rule 602 alters the trial judge's traditional function in applying the firsthand knowledge rule. The trial judge does not decide whether or not a witness has firsthand knowledge, but only whether sufficient evidence to support a finding of firsthand knowledge has been introduced. If sufficient evidence has been adduced, the witness may testify and the jury decides whether or not the witness had firsthand knowledge.

### **RULE 603: OATH OR AFFIRMATION**

Rule 603 requires witnesses to swear or affirm to the truthfulness of their testimony prior to testifying. Several constitutional and statutory provisions also cover the subject of oaths. Ohio Constitution, article I, § 7 provides: "No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmation." See also RC 2317.30; RC 3.20; RC 3.21.

The Advisory Committee's Note to Federal Rule 603 contains the following comment: "The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required." Failure to administer an oath over objection was held reversible error in *State v. Ballou*, 21 App(2d) 59, 254 NE(2d) 697 (1969): "We hold that to adduce evidence through one not under oath . . . over objection in a criminal case constitutes error prejudicial to the defendant." *Id.* at 61.

### **RULE 604: INTERPRETERS**

Rule 604 governs the use of interpreters. In effect, an interpreter is a type of expert witness. Consequently, the rule provides that interpreters are subject to the "rules relating to qualification as an expert." See Rule 702. Rule 604 also provides that an interpreter is subject to the oath or affirmation requirement. See Rule 603. Unlike other

witnesses, however, an interpreter does not swear or affirm that he will testify truthfully, but rather that he will translate accurately.

The rule does not control the appointment of interpreters or their compensation. The appointment and compensation of interpreters is governed by statute. For example, RC 2311.14(A) provides: "Whenever because of a hearing, speech or other impairment a party to or witness in a legal proceeding cannot readily understand or communicate, the court shall appoint a qualified interpreter to assist such person."

Several cases have recognized a constitutional right to an interpreter in criminal cases, including the appointment of an interpreter for an indigent defendant. For example, in *United States v. Carrion*, 488 F(2d) 12 (1st Cir 1973), *cert. denied*, 416 US 907 (1974), the court stated:

Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered . . . If the defendant takes the stand in his own behalf, but has an imperfect command of English, there exists the additional danger that he will either misunderstand crucial questions or that the jury will misconstrue crucial responses. The right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment. *Id.* at 14.

#### **RULE 605: COMPETENCY OF JUDGE AS WITNESS**

Rule 605 provides that a judge is incompetent as a witness at a trial at which he is presiding. No objection is required to preserve the issue for appeal.

The rule should be invoked only in a rare case. If the trial judge knows in advance of trial that he may be a witness, the judge should recuse himself prior to trial. See Ohio Code of Judicial Conduct, Canon 3(C)(1). Moreover, testifying as a witness in a case in which the judge is presiding should require disqualification. In *State v. Barber*, 100 App(2d) 71, 121 NE(2d) 438 (1954), the court stated, "The very nature of the judicial office . . . preclude one who is a material witness in a case from sitting as an impartial judge." *Id.* at 73. See also *McMillan v. Andrews*, 10 OS 112 (1859).

#### **RULE 606: COMPETENCY OF JUROR AS WITNESS**

##### **During Trial**

Rule 606(A) prohibits a juror from testifying in a case in which that juror is serving as a member of the jury. An opportunity to object to the competency of a juror on this ground must be provided outside the presence of the jury. Rule 606(A) should be invoked only in a rare case because a person called as a juror may be challenged for cause if he has been "subpoenaed in good faith as a witness in the case." Crim. R. 24(B)(8); see also RC 2945.25(G). In addition, RC 2945.36(C) provides that a jury may be discharged without prejudice to the prosecution in a criminal case if "it appears after the jury has been sworn that one of the jurors

is a witness in the case."

#### **Impeachment of Verdicts and Indictments**

Rule 606(B) governs the impeachment of verdicts and indictments. Under the rule a juror is not competent to testify about the internal operations or thought-processes of the jurors during the course of deliberations. The federal drafters provided the following explanation of the types of evidence that would be excluded under the rule:

[T]he central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict . . . ; a quotient verdict . . . ; speculation as to insurance coverage . . . ; misinterpretation of instructions . . . ; mistake in returning the verdict . . . ; interpretation of guilty plea by one defendant as implicating others . . . Advisory Committee's Note, Fed. R. Evid. 606.

A juror, however, is competent to testify about extraneous prejudicial information that has been introduced into the jury deliberation process. In addition, a juror is competent to testify about outside influences that have been improperly brought to bear on the deliberation process. "Thus, a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room . . ." Advisory Committee's Note, Fed. R. Evid. 606.

Unlike the federal rule, however, extrinsic evidence of extraneous information or influence must first be introduced before a juror is permitted to testify about such matters. This has been described as the *aliunde* rule. In *State v. Adams*, 141 OS 423, 48 NE(2d) 861 (1943), the Supreme Court explained the rule as follows: "The so-called *aliunde* rule . . . is to the effect that the verdict of a jury may not be impeached by the evidence of a member of the jury unless foundation for the introduction of such evidence is first laid by competent evidence *aliunde*, i.e., by evidence from some other source." *Id.* at 427. Rule 606(B) recognizes one exception to *aliunde* rule. The rule does not apply in cases in which threats, bribes, attempted threats, attempted bribes, or other improprieties involve an officer of the court. This exception is based upon *State v. Adams*, 141 OS 423, 48 NE(2d) 861 (1943), and *Emmert v. State*, 127 OS 235, 187 NE 862 (1933), which involved communications to the jury by bailiffs.

#### **RULE 607: WHO MAY IMPEACH**

Rule 607 permits a party to impeach his own witnesses, thus abolishing the Ohio voucher rule. See *State v. Adams*, 62 OS(2d) 151, 157, 404 NE(2d) 144, 148 (1980).

Unlike Federal Rule 607, the Ohio rule imposes a limitation on the impeachment of a party's own witness by means of a prior inconsistent statement. In such a case, impeachment is permitted

only upon a showing of surprise and affirmative damage. This limitation was intended to prevent the circumvention of the hearsay rule. Except as provided in Rule 801(D)(1)(a), prior inconsistent statements constitute hearsay evidence, and thus are admissible only for the purpose of impeachment. Without the surprise and affirmative damage requirements, a party could call a witness for the sole purpose of disclosing the prior inconsistent statement (hearsay) to the jury. An instruction limiting the use of the statement to impeachment probably would be ineffective. See Staff Note ("Otherwise, the party would be entitled to call a known adverse witness simply for the purpose of getting a prior inconsistent statement into evidence by way of impeachment, thus doing indirectly what he could not have done directly.")

The Ohio rule was taken verbatim from an article by Professor Michael Graham. Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 Mich. L. Rev. 1565, 1617 (1977). This article provides guidance on how Rule 607 should be applied. In particular, Professor Graham notes: "The requirement of surprise may be inappropriate in criminal cases where impeachment is by the criminal defendant: it could impede the defendant's right to confront the witnesses, to present a defense, and to produce witnesses on his own behalf." *Id.* at 1617.

The Ohio cases have recognized that when a party is "surprised" by the testimony of his own witness, that party may question the witness about a prior inconsistent statement in an effort to *refresh the witness's recollection*. See *State v. Dick*, 27 OS(2d) 162, 271 NE(2d) 797 (1971); *State v. Minneker*, 27 OS(2d) 155, 271 NE(2d) 821 (1971); *State v. Springer*, 165 OS 182, 134 NE(2d) 150 (1956).

## **RULE 608: EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS**

### **Opinion and Reputation Evidence**

Rule 608(A) permits the use of opinion and reputation evidence to show a witness' character for untruthfulness. This type of impeachment is an exception to the general prohibition of the use of character evidence. See Rule 404(A)(3). Because the rule is limited to impeachment, it applies only after the witness whose character is subject to attack has testified. In this context, character is used circumstantially; a person with a poor character for truth and veracity is more likely to testify untruthfully than a person with a good character for truth and veracity. See *also* Rule 803(20) (recognizing a hearsay exception for reputation evidence concerning character).

The rule limits the type of evidence that may be used to impeach to the character trait of untruthfulness. See Staff Note ("only evidence relating to veracity is admissible."). This limitation is imposed in order "to sharpen relevancy, to reduce surprise,

waste of time, and confusion, and to make the lot of the witness somewhat less unattractive." Advisory Committee's Note, Fed. R. Evid. 608. This aspect of Rule 608 is consistent with prior Ohio law. In *State v. Scott*, 61 OS(2d) 155, 400 NE(2d) 375 (1980), the Supreme Court held: "In impeaching the credibility of a witness, inquiry into general reputation or character should be restricted to reputation for *truth and veracity*." (syllabus, para 3) (emphasis in original). *Accord*, *Craig v. State*, 5 OS 605 (1854).

A foundation showing that the character witness is acquainted with the reputation of the principal witness must be laid before the character witness is permitted to state his opinion of that reputation. The Supreme Court described this foundational requirement in *Radke v. State*, 107 OS 399, 140 NE 586 (1923):

[T]he impeaching witness must show on preliminary examination either that he has for some time lived in that community or done business in that community, or some other relation to that community that would qualify him to speak as to the community's general opinion touching the reputation of the party sought to be impeached. The preliminary qualifications of the impeaching witness must be such as to advise the court and the jury that he has the means of knowing such general reputation of the witness sought to be impeached in the community in which the witness lives. *Id.* (syllabus, para. 1)

Rule 608(A) also provides that once a witness' character for truth and veracity has been attacked, opinion and reputation evidence showing that the witness has a good character for truth and veracity is admissible. The principal issue in applying this rule is determining what types of impeachment constitute attacks on character. The federal drafters provided the following guidance: "Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not." Advisory Committee's Note, Fed. R. Evid. 608. See *Wick & Co. v. Baldwin*, 51 OS 51, 36 NE 671 (1894) (evidence of good character for truthfulness after witness impeached with evidence of prior conviction admitted).

### **Specific Instances of Conduct**

Rule 608(B) provides that a witness on cross-examination may be asked, subject to the trial court's discretion, about specific instances of conduct if clearly probative of the witness' character for truthfulness. Extrinsic evidence of conduct, however, is inadmissible. Specific instances of conduct that have resulted in a conviction are governed by Rule 609, not Rule 608.

As the Advisory Committee's Note to Federal Rule 608 indicates, the trial court's decision to admit such evidence is governed generally by Rule 403. "[T]he overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment." In this con-

text, however, Rule 403 must be read in light of Rule 608. Only evidence relevant to truth and veracity is admissible. In addition, unlike Rule 403, Rule 608 requires the evidence to be "clearly" probative. The word "clearly" does not appear in the federal version of Rule 608, although it did appear in the revised draft of the Federal Rules. See 51 F.R.D. 389 (1971). The word "clearly" was inserted in the Ohio rule in order to "require a high degree of probative value of instances of prior conduct as to truthfulness or untruthfulness of the witness..." Staff Note.

#### **RULE 609: EVIDENCE OF PRIOR CONVICTIONS**

Rule 609 governs the admissibility of evidence of prior convictions offered for the purpose of impeachment.

##### **Types of Convictions**

Rule 609(A) limits the types of convictions that are admissible for the purpose of impeachment to convictions of (1) crimes punishable by death or imprisonment in excess of one year and (2) crimes of dishonesty and false statement, including ordinance violations. These limitations were not recognized under prior Ohio law. See RC 2945.42. In *State v. Murdock*, 172 OS 221, 174 NE(2d) 543 (1961), the Supreme Court interpreted RC 2945.42 as permitting the admission in evidence of all prior convictions, including misdemeanors. The court also held, however, that an ordinance violation was not a "crime" within the meaning of the statute. See *State v. Arrington*, 42 OS(2d) 114, 326 NE(2d) 667 (1975); *Harper v. State*, 106 OS 481, 140 NE 364 (1922).

The rule differs from Federal Rule 609(A)(1) in one important respect. The federal rule contains an additional requirement. Prior convictions falling within this category are admissible only if the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." Thus, a federal judge has discretion to exclude the evidence even if the prior conviction involves a crime punishable by death or imprisonment in excess of one year.

In contrast, Rule 609(A) would appear to provide that convictions falling within this category are *automatically* admissible. Nevertheless, the Staff Note includes language that indicates that a trial court retains discretion to exclude prior convictions that fall within this category. The Staff Note, after referring to the discretion recognized in the federal rule, states: "In limiting that discretionary grant, Rule 609(A) is directed to greater uniformity in application subject only to the provisions of Rule 403. The removal of the reference to the defendant insures that the application of the rule is not limited to criminal prosecutions." This passage suggests that the drafters were not concerned with eliminating discretion but rather were concerned with its uniform application.

Rule 609(A)(2) provides that evidence of prior convictions involving crimes of dishonesty and false statement is admissible for the purpose of

impeachment. Convictions falling into this category are *automatically* admissible; the trial judge has no discretion to exclude these convictions. The principal issue in applying this rule is determining what types of crimes involve "dishonesty" and "false statement." The Conference Report contains the following comment: "By the phrase 'dishonesty and false statement' the conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." H.R. Rep. No. 1597, 93d Cong. 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 7098, 7103. Although theft offenses typically are thought of as involving dishonesty, it is uncertain whether they are admissible under this provision in light of the legislative history of the rule. See 3 D. Louisell & C. Mueller, *Federal Evidence* 336-42 (1979); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶609[03] (1978).

##### **Time Limit**

Rule 609(B) provides that evidence of a prior conviction that satisfies the criteria of Rule 609(A) is nevertheless inadmissible if more than ten years has elapsed since the date of (1) conviction, (2) release from confinement, or (3) termination of probation, shock probation, parole, or shock parole, "whichever is the later date." The rule does recognize an exception. Such convictions may be admissible if the proponent provides sufficient advance written notice to the adverse party and the court determines, based upon "specific facts and circumstances," that the probative value of the evidence substantially outweighs its prejudicial effect. See Annot., 43 ALR Fed 398 (1979).

##### **Effect of Pardon and Expungement**

Rule 609(C) provides that evidence of a prior conviction is inadmissible if the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a "finding of rehabilitation," provided the witness has not been convicted of a subsequent crime punishable by death or imprisonment in excess of one year. In addition, evidence of a prior conviction is inadmissible if the conviction has been the subject of a pardon, annulment, expungement, or other equivalent procedure "based on a finding of innocence."

Except for the addition of the term "expungement," the rule is identical to Federal Rule 609(C). This addition was made because several Ohio statutes contain expungement provisions. See RC 2953.31-36 (first offenders); RC 2151.358 (juveniles); Comment, *Expungement in Ohio: Assimilation into Society for Former Criminal*, 8 Akron L. Rev. 480 (1975). RC 2953.32(E), however, provides that a first offender conviction subject to expungement is nevertheless admissible in a criminal proceeding. As the Staff Note recognizes, the "rule conflicts with the provision of the statute."

## Juvenile Adjudications

In contrast to the federal rule, Rule 609(D) provides that evidence of juvenile adjudications offered to impeach a witness is not admissible "except as provided by statute enacted by the General Assembly." RC 2151.358(H) governs the admissibility of juvenile adjudications. It provides, in part:

The disposition of a child under the judgment rendered or any evidence given in court is not admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of such child may be considered by any court only as to the matter of sentence or to the granting of probation.

The courts, however, have recognized several exceptions to the statute. See *State v. Cox*, 42 OS(2d) 200, 327 NE(2d) 639 (1975); *State v. Marinski*, 139 OS 559, 41 NE(2d) 387 (1942); *State v. Hale*, 21 App(2d) 207, 256 NE(2d) 239 (1969).

## Pendency of Appeal

Rule 609(E) provides that the pendency of an appeal does not affect the admissibility of a prior conviction. Nevertheless, evidence of the pendency of an appeal is admissible as affecting the weight to be accorded the prior conviction. According to the Staff Note, Rule 609(E) "is in accord with prior Ohio law."

## RULE 611: MODE AND ORDER OF INTERROGATION AND PRESENTATION

### Control by the Court

Rule 611(A) provides that the trial court shall exercise reasonable control over the conduct of the trial, including the mode and order of examining witnesses and presenting evidence. In exercising this control, the court is to be guided by several objectives: ascertaining the truth, avoiding needless consumption of time, and protecting witnesses from harassment and undue embarrassment. The rule "covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, . . . the order of calling witnesses and presenting evidence, . . . the use of demonstrative evidence, . . . and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances." Advisory Committee's Note, Fed. R. Evid. 611.

The rule is consistent with prior Ohio law. For example, RC 2945.03 provides: "The judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and effective ascertainment of the truth regarding the matters in issue." The Ohio cases also recognized a trial court's authority to control harassing and embarrassing examinations of witnesses. In *Smith v. State*, 125 OS 137, 180 NE 695 (1932), the Supreme Court held that questioning should be prohibited "when a disparaging course of examination seems unjust to the witness and uncalled for

by the circumstances of the case." *Id.* (syllabus, para. 2); *accord*, *Wroe v. State*, 20 OS 460 (1870).

## Scope of Cross-Examination

Rule 611(B) provides that the scope of cross-examination may encompass "all relevant matters and matters affecting credibility." This rule is sometimes referred to as the wide-open or English rule. C. McCormick, *Evidence* 47 (2d ed. 1972). In contrast, Federal Rule 611(b) adopts the American or restrictive rule on the scope of cross-examination. Under that rule, cross-examination is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness."

Although it is clear that the prior Ohio cases did not follow the restrictive view of the scope of cross-examination, they also did not fully endorse the wide-open view. According to McCormick, Ohio followed an intermediate view. See C. McCormick, *Evidence* 48 n. 43 (2d ed. 1972). In *Legg v. Drake*, 1 OS 286 (1853), the Supreme Court expressed this view as follows:

[A] party is not limited, in his cross-examination to the subject matter of the examination in chief, but may cross-examine [the witness] as to all matters pertinent to the issue on the trial; limited, however, by the rule, that a party can not, before the time of opening his own case, introduce his distinct grounds of defense or avoidance, by the cross-examination of his adversary's witness. *Id.* (syllabus, para. 5).

## Leading Questions

Rule 611(C) follows the traditional view of prohibiting leading questions on direct examination. The rule, however, recognizes a number of exceptions. Leading questions are permitted when "necessary to develop [a witness'] testimony" and when a party calls "a hostile witness, an adverse party, or a witness identified with an adverse party." The exceptions include the "witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters." Advisory Committee's Note, Fed. R. Evid. 611. As the Note also recognizes, this "matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command." See *also* *Evans v. State*, 24 OS 458, 463 (1873) ("The allowing or refusing of leading questions in the examination of a witness must very largely be subject to the control of the court, in the exercise of sound discretion.").

An adverse party and a witness identified with an adverse party are automatically considered "hostile" witnesses. See Advisory Committee's Note, Fed. R. Evid. 611 ("The final sentence deals with categories of witnesses automatically regarded and treated as hostile.").

## RULE 612: WRITING USED TO REFRESH MEMORY

Rule 612 governs the use of writings used to refresh a witness' recollection. A different rule gov



erns the hearsay exception for past recollection recorded. See Rule 803(5).

### During Trial

The production and inspection of writings used by a witness to refresh recollection *during trial* is mandatory. The language of Rule 612 making production discretionary relates only to *pretrial* refreshment. The Ohio cases have recognized the right of inspection. For example, in *State v. Taylor*, 83 App 76, 77 NE(2d) 279 (1947), the court held that "by not allowing the defendant the right of inspection of the document used by the witness [to refresh recollection at trial], he was deprived of a fair trial . . ." *Id.* at 83. *Accord*, *State v. Moore*, 74 Ohio L Abs 116, 139 NE(2d) 381 (CP 1956).

### Prior to Trial

Rule 612 provides that production of a writing used *prior to trial* to refresh a witness' recollection may be required "if the court in its discretion determines it is necessary in the interests of justice . . ." As proposed by the U.S. Supreme Court, Federal Rule 612 did not contain this limitation; production was mandatory. See 56 F.R.D. 276 (1973). Congress, however, added the provision granting the trial court discretion. This amendment was intended as a limitation. The House Judiciary Report contains the following comment on the amendment: "The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial." H.R. Rep. No. 650, 93d Cong., 1st Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 7075, 7086.

### Criminal Rule 16

Rule 612 contains an important exception. The rule does not apply to writings that are governed by Criminal Rule 16(B)(1)(g) and 16(C)(1)(d). Criminal Rule 16(B)(1)(g) provides for the inspection and use of prior written and recorded statements of prosecution witnesses. Such statements are subject to an in camera inspection after the witness has testified on direct examination. If the prior statements contain parts that are inconsistent with the witness' trial testimony, they may be used by the defense counsel for the purpose of impeachment. Criminal Rule 16(C)(1)(d) contains a comparable provision governing prior statements of defense witnesses other than the defendant.

Criminal Rule 16 statements are limited to prior written and recorded statements of the witness. Consequently, if a witness refreshes his recollection with other types of documents, Criminal Rule 16 would not apply; Rule 612 would apply. Rule 612 would not apply if a witness does not refresh his recollection with a prior written or recorded statement. Nevertheless, Rule 16 may require production. Finally, in contrast to Criminal Rule 16, Rule 612 does not require that the statement be inconsistent with the witness' trial testimony.

## RULE 613: PRIOR STATEMENTS OF WITNESSES

Rule 613 governs the foundational requirements for the *impeachment* use of prior inconsistent statements. Ohio has followed the traditional view of admitting prior inconsistent statements only for impeachment. Under this view, the prior statement is offered to show the inconsistency between the witness' trial and pretrial statements and not to show the truth of the assertions contained in the pretrial statement. If offered for the latter purpose, the statement is hearsay. See *McKelvey Co. v. General Casualty Co.*, 166 OS 401, 405 142 NE(2d) 854, 856 (1957); *State v. Duffey*, 134 OS 16, 24, 15 NE(2d) 535, 539 (1938).

The Rules of Evidence generally follow this view. There are, however, a number of exceptions. For example, under Rule 801(D)(1)(a) prior inconsistent statements taken under oath, subject to cross-examination at the time made, and subject to penalty of perjury may be admitted as substantive evidence. Moreover, prior inconsistent statements that qualify as admissions of a party-opponent under Rule 801(D)(2) also are admissible as substantive evidence.

### Foundational Requirements

Rule 613(A) provides that a prior written statement need not be shown to a witness as a prerequisite to an examination on that statement. Thus, the rule abolishes the requirement imposed by *Queen Caroline's Case*, 2 Brod & Bing 284, 129 Eng Rep 976 (1820). According to the Staff Note, this "represents a departure from prior Ohio law." See Stern & Grosh, *A Visit With Queen Caroline: Her Trial and Its Rule*, 6 Cap. U. L. Rev. 165 (1977). The rule does provide that the opposing counsel has a right to inspect the statement upon request.

Rule 613(B) requires a witness be afforded an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of that statement is admissible. The rule follows prior Ohio law. In *King v. Wicks*, 20 Ohio 87 (1851), the Supreme Court held: "Before a witness can be contradicted by proving statements out of Court at variance with his testimony, he must first be inquired of, upon cross-examination, as to such statements, and the time, place and person involved in the supposed contradiction." *Id.* (syllabus). *Accord*, *State v. Osborne*, 50 OS(2d) 211, 217-18, 364 NE(2d) 216, 221 (1977), *vacated on other grounds*, 438 US 911 (1978).

A foundation, however, is not required if the trial court finds that the "interests of justice" would be defeated by imposition of the foundational requirements. The Advisory Committee's Note to Federal Rule 613 provides the following explanation of this provision: "In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered a measure of discretion is conferred upon the judge."

## RULE 614: CALLING AND INTERROGATION OF WITNESSES BY COURT

### Calling Witnesses by the Court

Rule 614(A) recognizes the authority of the trial



court to call witnesses on its own motion or at the behest of one of the parties. This includes the authority to call expert witnesses. The Ohio cases have recognized the trial court's authority to call witnesses. See *State v. Adams*, 62 OS(2d) 151, 404 NE(2d) 144 (1980); *State v. Weind*, 50 OS(2d) 224, 364 NE(2d) 224 (1977), *vacated on other grounds*, 438 US 911 (1978).

### Interrogation by the Court

Rule 614(B) recognizes the trial court's authority to question witnesses. The rule is consistent with prior Ohio law. See *State ex rel Wise v. Chand*, 21 OS(2d) 113, 119, 256 NE(2d) 613, 617 (1970); *C.A. King & Co. v. Horton*, 116 OS 205, 211, 156 NE 124, 126 (1927), *dismissed*, 276 US 600 (1928).

In contrast to Federal Rule 614(B), the rule specifically provides that interrogation of witnesses by the court must be conducted "in an impartial manner." This requirement is implicit in the Federal rule. See Advisory Committee's Note, Fed. R. Evid. 614 ("The authority is, of course, abused when the judge abandons this proper role and assumes that of advocate . . ."). The impartiality requirement is based on prior cases. In *State ex rel Wise v. Chand*, 21 OS(2d) 113, 256 NE (2d) 613 (1970), the Supreme Court held: "In a trial before a jury, the court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness." *Id.* (syllabus, para. 3)

### RULE 615: EXCLUSION OF WITNESSES

Rule 615 governs the sequestration or exclusion of witnesses. The rule provides that witnesses may be excluded *sua sponte* by the trial judge or upon the request of a party, in which case exclusion is mandatory. The rule recognizes three exceptions.

A party who is a natural person may not be excluded from the trial even though that party will be called as a witness. As the federal drafters noted, the "[e]xclusion of persons who are parties would raise serious problems of confrontation and due process." Advisory Committee's Note, Fed. R. Evid. 615. Excluding a defendant from a criminal trial, in the absence of a waiver, is a violation of the right of confrontation. See *Taylor v. United States*, 414 US 17 (1973); *Illinois v. Allen*, 397 US

337 (1970).

An officer or employee of a party which is not a natural person designated as its representative by its attorney may not be excluded from the trial even though that person will be called as a witness. The Advisory Committee's Note to Federal Rule 615 contains the following explanation of this provision: "As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness . . ." The Senate Judiciary Committee construed this exception to permit an "investigative agent" to remain during trial notwithstanding the possibility that he may be called as a witness. "The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty." S. Rep. No. 1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051, 7072.

In *In re United States*, 584 F(2d) 666 (5th Cir 1978), the court held that the trial judge had the authority under Federal Rule 611(a) to require the investigative agent to testify "at an early stage of the government's case if he remains the government's designated representative under Rule 615." *Id.* at 667. A court, however, does not have the same authority with respect to the testimony of a criminal defendant. See *Brooks v. Tennessee*, 406 US 605 (1972).

A person whose presence is essential to the presentation of the case may not be excluded even though that person will be called as a witness. The party seeking the person's presence during trial has the burden of showing that the person is essential to the presentation of its cause. This exception "contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation." Advisory Committee's Note, Fed. R. Evid. 615. See *also* 6 J. Wigmore, *Evidence* § 1841, at 475 n. 4 (Cadbourn rev. 1976).