

## ARTICLE VI. WITNESSES

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**Rule 601. Competency.**

(a) *General Rule.* Every person is competent to be a witness except as otherwise provided by statute or in these Rules.

(b) *Disqualification for Specific Defects.* A person is incompetent to testify if the Court finds that because of a mental condition or immaturity the person:

- (1) is, or was, at any relevant time, incapable of perceiving accurately;
- (2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
- (3) has an impaired memory; or
- (4) does not sufficiently understand the duty to tell the truth.

**Comment—2007**

Pa.R.E. 601 differs from F.R.E. 601 and is intended to preserve existing Pennsylvania law abolishes all existing grounds of incompetency except for those specifically provided in later rules dealing with witnesses and in civil actions governed by state law.

Pa.R.E. 601(a) is consistent with Pennsylvania statutory law. 42 Pa.C.S.A. §§ 5911 and 5921 provide that all witnesses are competent except as otherwise provided. Pennsylvania statutory law provides several instances in which witnesses are incompetent. See, e.g., 42 Pa.C.S.A. § 5922 (persons convicted in a Pennsylvania court of perjury incompetent in civil cases); 42 Pa.C.S.A. § 5924 (spouses incompetent to testify against each other in civil cases with certain exceptions set out in 42 Pa.C.S.A. §§ 5925, 5926, and 5927); 42 Pa.C.S.A. §§ 5930—5933 and 20 Pa.C.S.A. § 2209 (“Dead Man’s statutes”).

At one time Pennsylvania law provided that neither a husband nor a wife was competent to testify to non-access or absence of sexual relations if the effect of that testimony would illegitimize a child born during the marriage. See *Commonwealth ex rel. Leider v. Leider*, 434 Pa. 293, 254 A.2d 306 (1969). That rule was abandoned in *Commonwealth ex rel. Savruk v. Derby*, 235 Pa. Super. 560, 344 A.2d 624 (1975).

Pa.R.E. 601(b) has no counterpart in the Federal Rules and is consistent with Pennsylvania law concerning the factors for determining competency of a person to testify, including persons with a

mental defect and children of tender years. See *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976) (standards for determining competency generally); *Commonwealth v. Goldblum*, 498 Pa. 455, 447 A.2d 234 (1982) (mental capacity); *Rosche v. McCoy*, 397 Pa. 615, 156 A.2d 307 (1959) (immaturity). In *Commonwealth v. Delbridge*, 578 Pa. 641, 855 A.2d 27 (2003), the Supreme Court reiterated concern for the susceptibility of children to suggestion and fantasy and held that a child witness can be rendered incompetent to testify where unduly suggestive or coercive interview techniques corrupt or “taint” the child’s memory and ability to testify truthfully about that memory. See also *Commonwealth v. Judd*, 897 A.2d 1224 (2006).

The application of the standards in Pa.R.E. 601(b) is a factual question to be resolved by the Court as a preliminary question under Rule 104. The party challenging competency bears the burden of proving grounds of incompetency by clear and convincing evidence. *Commonwealth v. Delbridge*, 578 Pa. at 664, 855 A.2d at 40. In *Commonwealth v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998), a case involving child witnesses, the Supreme Court announced a per se rule requiring trial courts to conduct competency hearings outside the presence of the jury. Expert testimony has been used when competency under these standards has been an issue. E.g., *Commonwealth v. Baker*, 466 Pa. 479, 353 A.2d 454 (1976); *Commonwealth v. Gaertner*, 355 Pa. Super. 203, 484 A.2d 92 (1984).

Pa.R.E. 601(b) does not address the admissibility of hypnotically refreshed recollection. In *Commonwealth v. Nazarovitch*, 496 Pa. 97, 436 A.2d 170 (1981), the Supreme Court rejected hypnotically refreshed testimony, where the witness had no prior independent recollection. Applying the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for scientific testimony, the Court was not convinced that the process of hypnosis as a means of restoring forgotten or repressed memory had gained sufficient acceptance in its field. *Commonwealth v. Nazarovitch*, *supra*; see also *Commonwealth v. Romanelli*, 522 Pa. 222, 560 A.2d 1384 (1989) (when witness has been hypnotized, he or she may testify concerning matters recollected prior to hypnosis, but not about matters recalled only during or after hypnosis); *Commonwealth v. Smoyer*, 505 Pa. 83, 476 A.2d 1304 (1984) (same). Pa.R.E. 601(b) is not intended to change these results. For the constitutional implications when a defendant in a criminal case, whose memory has been hypnotically refreshed, seeks to testify, see *Rock v. Arkansas*, 483 U.S. 44 (1987).

#### Source

The provisions of this Rule 601 amended November 2, 2007, effective December 14, 2007, 37 Pa.B. 6200. Immediately preceding text appears at serial pages (245757) to (245758).

### Rule 602. Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness’ own testimony. This Rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

#### Comment

This rule is identical to F.R.E. 602. It is consistent with Pennsylvania law.

Firsthand or personal knowledge is a universal requirement of the law of evidence. See *Johnson v. Peoples Cab Co.*, 386 Pa. 513, 514-15, 126 A.2d 720, 721 (1956) (“The primary object of a trial in our American courts is to bring to the tribunal, which is passing on the dispute involved, those persons who know of their own knowledge the facts to which they testify.”). Pa.R.E. 602 refers to Pa.R.E. 703 to make clear that there is no conflict with Rule 703, which permits an expert to base an opinion on facts not within the expert’s personal knowledge.

It is implicit in Pa.R.E. 602 that the party calling the witness has the burden of proving personal knowledge. This is consistent with Pennsylvania law. *Carney v. Pennsylvania R.R. Co.*, 428 Pa. 489, 240 A.2d 71 (1968). As the Advisory Committee's Notes to F.R.E. 602 state, "the rule is a specialized application of the provisions of Rule 104(b) on conditional relevancy." Thus, the issue of personal knowledge is a question to be decided by the jury, and the judge may do no more than determine if the evidence is sufficient to support a finding of such knowledge. 27 Wright & Gold, *Federal Practice and Procedure* § 6027 (1990). This appears to be consistent with Pennsylvania law. See *Commonwealth v. Pronkoskie*, 477 Pa. 132, 383 A.2d 858 (1978).

A witness having firsthand knowledge of a hearsay statement who testifies to the making of the statement satisfies Pa.R.E. 602; the witness may not, however, testify to the truth of the statement if the witness has no personal knowledge of the truth of the statement. Whether the hearsay statement is admissible is governed by Pa.R.E. 801 through 805. Generally speaking, the firsthand knowledge requirement of Rule 602 is applicable to the declarant of a hearsay statement. See, e.g., *Commonwealth v. Pronkoskie*, *supra* and *Carney v. Pennsylvania R.R. Co.*, *supra*. However, in the case of admissions of a party opponent, covered by Pa.R.E. 803(25), personal knowledge is not required. See



*Salvitti v. Throppe*, 343 Pa. 642, 23 A.2d 445 (1942); *Carswell v. SEPTA*, 259 Pa. Super. 167, 393 A.2d 770 (1978). Moreover, Pa.R.E. 804(b)(4) explicitly dispenses with the need for personal knowledge for statements of personal or family history. In addition, Pa.R.E. 803(19), (20) and (21) impliedly do away with the personal knowledge requirement for statements dealing with reputation concerning personal or family history, boundaries or general history, and a person's character.

### **Rule 603. Oath or Affirmation.**

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

#### **Comment**

This rule is identical to F.R.E. 603, which was designed to be flexible enough to cover persons with any or no religious beliefs, persons with mental defects, and children. F.R.E. 603 advisory committee notes. The rule is consistent with Pennsylvania law. See *Dunsmore v. Dunsmore*, 309 Pa. Super. 503, 455 A.2d 723 (1983) (holding that it was error to allow a witness to testify without oath or affirmation); *Commonwealth ex rel. Freeman v. Superintendent*, 212 Pa. Super. 422, 242 A.2d 903 (1968) (same). Pennsylvania law requires both the mentally impaired and children to understand the obligation to tell the truth. See *Commonwealth v. Mazzoccoli*, 475 Pa. 408, 380 A.2d 786 (1977); *Commonwealth v. Kosh*, 305 Pa. 146, 157 A. 479 (1931).

Pa.R.E. 603 is also consistent with 42 Pa.C.S.A. § 5901. Although § 5901 provides that every witness "shall take an oath in the usual or common form by laying the hand upon an open copy of the Holy Bible or by lifting up the right hand and pronouncing or assenting to" a specific incantation set forth in the statute, it also permits affirmation by a witness who desires to do so. See also 42 Pa.C.S.A. § 5902 (providing that a person's capacity to testify "shall not be affected by his opinions on matters of religion" and that no witness shall be questioned "concerning his religious beliefs"). Religious belief as a ground for impeachment is treated in Pa.R.E. 610.

### **Rule 604. Interpreters.**

An interpreter is subject to the provisions of Rule 702 (relating to qualification as an expert) and Rule 603 (relating to the administration of an oath or affirmation).

#### **Comment**

This rule adopts the substance of F.R.E. 604; the only change is the explicit reference to Pa.Rs.E. 702 and 603, rather than the general reference to "the provisions of these rules" in F.R.E. 604.

The need for an interpreter whenever a witness' natural mode of expression or the language of a document is not intelligible to the trier of fact is well settled. 3 Wigmore, *Evidence* § 911 (Chadbourn rev. 1970). Under Pa.R.E. 604, an interpreter is treated as an expert witness who must have the necessary skill to translate correctly and who must promise to do so by oath or affirmation.

Pa.R.E. 604 is consistent with those Pennsylvania statutes providing for the appointment of interpreters for the deaf. See 42 Pa.C.S.A. § 7103 (deaf party in a civil case); 2 Pa.C.S.A. 505.1 (deaf party in hearing before Commonwealth agency); 42 Pa.C.S.A. § 8701 (deaf defendant in criminal case); see also *Commonwealth v. Wallace*, 433 Pa. Super. 518, 641 A.2d 321 (1994) (applying § 8701). Under each of these statutes, an interpreter must be "qualified and trained to translate for or communicate with deaf persons" and must "swear or affirm that he will make a true interpretation to the deaf person and that he will repeat the statements of the deaf person to the best of his ability."

There is little statutory authority for the appointment of interpreters, but the practice is well established. See Pa.R.Crim.P. 231(B) (authorizing presence of interpreter while investigating grand jury is in session if supervising judge determines necessary for presentation of evidence); 51 Pa.C.S.A. § 5507 (under regulations prescribed by governor, convening authority of military court may appoint interpreters). The decision whether to appoint an interpreter is within the discretion of the trial court. See *Commonwealth v. Pana*, 469 Pa. 43, 364 A.2d 895 (1976) (holding that it was an abuse of discretion to fail to appoint an interpreter for a criminal defendant who had difficulty in understanding and expressing himself in English).

**Official Note:** Adopted May 8, 1998, effective October 1, 1998; Comment revised March 29, 2001, effective April 1, 2001.

*Committee Explanatory Reports:*

Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

**Source**

The provisions of this Rule 605 amended March 29, 2001, effective April 1, 2001, 31 Pa.B. 1993. Immediately preceding text appears at serial pages (245759) to (245760).

**Rule 605. Competency of Judge as Witness.**

The judge presiding at a trial or other proceeding may not testify as a witness in that trial or proceeding.

**Comment**

This rule differs from F.R.E. 605. Pa.R.E. 605 departs from the first sentence of F.R.E. 605 to clarify the meaning of the rule. The second sentence of F.R.E. 605 which provides, "no objection need be made in order to preserve the point," has not been adopted.

Pa.R.E. 605 makes a judge absolutely incompetent to be a witness on any matter in any proceeding at which the judge presides. Cf., *Municipal Publications, Inc. v. Court of Common Pleas*, 507 Pa. 194, 489 A.2d (1985) (applying Canon 3C of the Pennsylvania Code of Judicial Conduct, and holding that at a hearing on a motion to recuse a judge, the judge himself could not testify on the issues raised in the motion and continue to preside at the hearing).

There is no Pennsylvania authority on the meaning of "testify as a witness." However, based upon the legislative history of F.R.E. 605, a judge may be said to "testify" even if he has not been called to the witness stand. See 27 Wright & Gold, *Federal Practice and Procedure* § 6063 (1990) (citing *United States v. Lillie*, 953 F.2d 1188 (10th Cir. 1992) (judge in bench trial taking a view without knowledge or presence of counsel and parties)); *Jones v. Beneficial Trust Life Ins. Co.*, 800 F.2d 1397 (5th Cir. 1986) (introduction at trial of judge's pretrial ruling); *United States v. Pritchett*, 699 F.2d 317 (6th Cir. 1983) (judge's comments from bench).

Pa.R.E. 605 does not include the final sentence of F.R.E. 605, which provides, in effect, an "automatic" objection to testimony by the presiding judge. The Federal Rule includes the "automatic" objection to free the opponent of the testimony from having to choose between waiving a challenge to the testimony by not objecting and risking offense to the judge by objecting. F.R.E. 605 advisory committee notes. This puts undue emphasis on the sensibilities of trial judges. Moreover, since courts have applied F.R.E. 605 to situations where the trial judge has not been called to the stand, the "automatic" objection precludes the only means of alerting the trial judge to the need for corrective action before it is too late. For these reasons, Pa.R.E. 605 takes the opposite approach—an objection must be made to preserve the issue of violation of the Rule. This is consistent with the provisions of Pa.R.E. 103 that error may not be predicated on a ruling admitting evidence in the absence of a timely

objection, motion to strike, or motion in limine. Of course, the court should provide an opportunity for the making of the objection out of the presence of the jury.

**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 the juror is sitting. If the juror 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.* Upon an inquiry into the validity of a verdict, including a sentencing verdict pursuant to 42 Pa.C.S.A. § 9711 (relating to capital sentencing proceedings), 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 that or any other juror's mind or emotions in reaching a decision upon the verdict or concerning the juror's mental processes in connection therewith, and a juror's affidavit or evidence of any statement by the juror about any of these subjects may not be received. However, a juror may testify concerning whether prejudicial facts not of record, and beyond common knowledge and experience, were improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

**Comment**

Pa.R.E. 606(a) is identical to F.R.E. 606(a). Section (a) is contrary to the traditional common law rule and Pennsylvania law. See 6 Wigmore, *Evidence* § 1910 (Chadbourn rev. 1976); 1 McCormick, *Evidence* § 68 (4th ed. 1992); *Howser v. Commonwealth*, 51 Pa. 332 (1866) (jurors are competent witnesses in both civil and criminal cases); *Commonwealth v. Sutton*, 171 Pa. Super. 105, 90 A.2d 264 (1952). Since the adoption of the Federal Rules, most states have enacted or promulgated provisions consistent with the substance of section (a). See 27 Wright & Gold, *Federal Practice and Procedure* § 6071 nn. 59-73 (1990). Of course, the calling of a juror as a witness will be a rarity; voir dire will generally expose a juror's knowledge of facts relevant to a case, which will usually mean disqualification of the juror for cause.

Note that section (a) bars a jury member from testifying "before that jury in the trial of the case in which the juror is sitting." The phrase "before that jury" did not appear in the preliminary draft of F.R.E. 606(a); its addition leads to the conclusion that a juror may testify outside the presence of the rest of the jury on matters occurring during the course of the trial. 3 Weinstein & Berger, *Evidence* ¶ 606[02], at 606-18; see also *United States v. Robinson*, 645 F.2d 616 (8th Cir. 1981) (holding that on motion for mistrial, F.R.E. 606 did not bar juror from testifying, out of presence of other jurors, concerning his observation of accused being escorted from court house under guard); *United States v. Day*, 830 F.2d 1099 (10th Cir. 1987) (stating that during course of trial, juror could have been called to testify regarding whether bias arose from remarks between juror and investigating F.B.I. agent). Current Pennsylvania law is in accord. See *Commonwealth v. Santiago*, 456 Pa. 265, 318 A.2d 737 (1974) (jurors permitted to testify at hearing in chambers during trial on question of whether they received improper prejudicial information).

Pa.R.E. 606(b) is based upon F.R.E. 606(b) with certain language and organizational changes that do not alter substance. The reference to sentencing verdicts in capital cases does not appear in the Federal Rule; it reflects existing Pennsylvania law. See *Commonwealth v. Williams*, 514 Pa. 62, 522 A.2d 1058 (1987). The word "indictment," which is in the Federal Rule, has been removed throughout Pa.R.E. 606(b) because the indicting grand jury has now been abolished throughout Pennsylvania pursuant to Article I, § 10 of the Pennsylvania constitution and 42 Pa.C.S.A. § 8931(b).

For simplification, the Federal Rule language "as influencing the juror to assent to or dissent from," used in connection with effects upon a juror's mind or emotions, has been deleted in favor of the phrase "in reaching a decision upon." No substantive change is intended.

The sentence structure of the Federal rule has been changed. The two exceptions to juror incompetency appear as the second sentence of Pa.R.E. 606(b), and the provision concerning juror affida-

vits and evidence of juror's statements, with minor language differences, has been moved from the end of the section and placed at the end of the first sentence, since it is to the subjects thereof that it is relevant.

Finally, the words "extraneous prejudicial information" in the first exception of the Federal Rule have been replaced by the phrase "prejudicial facts not of record and beyond common knowledge and experience." This makes clear that the exception is directed at evidence brought before the jury which was not presented during the trial, and which was not tested by the processes of the adversary system and subjected to judicial screening for a determination of admissibility. The qualification of "common knowledge and experience" is a recognition that all jurors bring with them some common facts of life. See generally, 27 Wright and Gold, *Federal Practice and Procedure: Evidence*, § 6075 (1990).

Like its Federal counterpart, the first sentence of Pa.R.E. 606(b), making jurors incompetent to testify about the matters referred to therein, is designed to protect all "components of [a jury's] deliberations, including arguments, statements, discussions, mental and emotional reactions, votes and any other feature of the process." See F.R.E. 606(b) advisory committee notes. This is consistent with Pennsylvania law. See *Commonwealth v. Pierce*, 453 Pa. 319, 309 A.2d 371 (1973); *Commonwealth v. Zlatovich*, 440 Pa. 388, 269 A.2d 469 (1970); *Commonwealth v. Patrick*, 416 Pa. 437, 206 A.2d 295 (1965).

Pennsylvania cases have also recognized the first two exceptions to juror incompetency set forth in the second sentence of Pa.R.E. 606(b). *Pratt v. St. Christopher's Hospital*, 866 A.2d 313 (Pa. 2005); *Commonwealth v. Williams, supra*; *Welshire v. Bruaw*, 331 Pa. 392, 200 A.2d 67 (1938). Note that when jurors are permitted to testify about facts not of record and outside influences, they may not be questioned about the effect upon them of what was improperly brought to their attention. See 3 Weinstein & Berger, *Evidence* ¶ 606[5] at pp. 606-53—606-55. Pa.R.E. 606(b) does not recognize the third exception to juror incompetency that appears in F.R.E. 606(b)—permitting juror testimony about whether there was a mistake in entering the verdict onto the verdict form. Pennsylvania law deals with possible mistakes in the verdict form by permitting the polling of the jury prior to the recording of the verdict. If there is no concurrence, the jury is directed to retire for further deliberations. See Pa.R.Crim.P. 648(G); *City of Pittsburgh v. DiNardo*, 410 Pa. 376, 189 A. 2d 886 (1963); *Barefoot v. Penn Central Transportation Co.*, 226 Pa. Super. 558, 323 A.2d 271 (1974). Pa.R.E. 606(b) does not purport to set forth the substantive grounds for setting aside verdicts because of an irregularity.

#### Source

The provisions of this Rule 606 amended September 17, 2007, effective October 17, 2007, 37 Pa.B. 5247. Immediately preceding text appears at serial pages (276581) to (276582).

### Rule 607. Impeachment of Witness.

(a) *Who May Impeach.* The credibility of any witness may be attacked by any party, including the party calling the witness.

(b) *Evidence to Impeach.* The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these Rules.

#### Comment

Pa.R.E. 607(a) is identical to F.R.E. 607. The Federal Rules have no provision similar to section (b).

*Section (a)*—Pa.R.E. 607(a) abolishes completely the common law rule that prohibited a party from impeaching a witness called by that party. The common law rule, which applied to all forms of impeachment, has been criticized. See *Chambers v. Mississippi*, 410 U.S. 284 (1973); 3A Wigmore, *Evidence* §§ 897-99 (Chadbourn rev. 1970); 1 McCormick, *Evidence* § 38 (4th ed. 1992). To the extent that there are any vestiges of the "no impeachment" prohibition remaining in Pennsylvania, Pa.R.E. 607(a) sweeps them away.

Pa.R.E. 607(a) allows impeachment by all of the methods provided for in Pa.R.E. 607(b), 608, 609 and 613.

*Section (b)*—The methods that may be used to impeach credibility are subject to Pa.R.E. 401, which defines relevant evidence. For example, the United States Supreme Court held that the Federal Rules clearly contemplated that evidence of bias could be used to impeach credibility even though nothing in those Rules specifically covered the subject. *United States v. Abel*, 469 U.S. 45 (1984). The Court pointed to F.R.E. 401, defining relevancy, and F.R.E. 402, providing for the admissibility of all relevant evidence, in support of its holding. *Id.* The Court commented that “[a] successful showing of bias . . . would have a tendency to make the facts to which [the witness] testified less probable in the eyes of the jury than it would be without such testimony.” *Id.* at 51.

Pa.R.E. 401 and 402 are similar to their Federal counterparts, and they, too, support the impeaching of credibility by any means having any tendency to cast doubt on the witness’ testimony. However, the words “except as otherwise provided by statute or these Rules” in Pa.R.E. 607(b) incorporate a number of provisions that circumscribe the breadth of the Rule. See, e.g., 18 Pa.C.S.A. § 3104 (the Rape Shield Law). Impeachment evidence is also subject to Pa.R.E. 403, which provides that relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. Similarly, Pa.R.E. 501, which preserves all privileges “as they now exist or may be modified by law,” would exclude any evidence relevant to credibility that might be covered by existing or later developed privileges, including those created by case law. In addition, Pa.R.E. 607(b) is limited and supplemented by Pa.R.E. 608 (dealing with evidence of character and conduct of a witness), Pa.R.E. 609 (relating to impeachment by evidence of conviction of crime), Pa.R.E. 610 (covering religious beliefs or opinions) and Pa.R.E. 613 (regarding prior statements of witnesses).

Pa.R.E. 607(b), however, is not curtailed by 42 Pa.C.S.A. § 5918, which prohibits, with certain exceptions, the questioning of a defendant who testifies in a criminal case for the purpose of showing that the defendant has committed, been convicted of or charged with another offense or that the defendant has a bad character or reputation. In *Commonwealth v. Bigham*, 452 Pa. 554, 307 A.2d 255 (1973), this statute was interpreted to apply only to cross-examination. Hence, it affects only the timing and method of impeachment of a defendant; it does not bar the impeachment entirely.

Since the credibility of any witness depends upon his or her powers of perception, capacity to remember, ability to communicate accurately and honesty or integrity, it may always be attacked by showing shortcomings in any of those areas. See *Commonwealth v. Gwaltney*, 497 Pa. 505, 442 A.2d 236 (1982); *Commonwealth v. Hamm*, 474 Pa. 487, 378 A.2d 1219 (1977); (McCormick, *Evidence*, § 44 (4th ed. 1992).

### **Rule 608. Evidence of Character and Conduct of Witness.**

(a) *Reputation Evidence of Character.* The credibility of a witness may be attacked or supported by evidence in the form of reputation as to character, but subject to the following 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 reputation evidence or otherwise.

(b) *Specific Instances of Conduct.* Except as provided in Rule 609 (relating to evidence of conviction of crime),

- (1) the character of a witness for truthfulness may not be attacked or supported by cross-examination or extrinsic evidence concerning specific instances of the witness’ conduct; however,
- (2) in the discretion of the court, the credibility of a witness who testifies as to the reputation of another witness for truthfulness or untruthfulness may

be attacked by cross-examination concerning specific instances of conduct (not including arrests) of the other witness, if they are probative of truthfulness or untruthfulness; but extrinsic evidence thereof is not admissible.

#### Comment

Pa.R.E. 608(a)(1) and (2) differ from F.R.E. 608(a) in that they permit character for truthfulness or untruthfulness to be proven only by reputation evidence. Opinion evidence is not admissible. This approach is consistent with Pennsylvania law. See *Commonwealth v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967), vacated on other grounds, 392 U.S. 647 (1968); see also Pa.R.E. 405(a) and Pa.R.E. 803(21). Pa.R.E. 608(a)(1) and (a)(2) are also consistent with Pennsylvania law to the effect that evidence of character for untruthfulness is admissible to attack credibility. See *Commonwealth v. Payne*, 205 Pa. 101, 54 A. 489 (1903). Evidence to support or bolster a witness' character for truthfulness is admissible only if there has first been an attack on that trait of character. See *Commonwealth v. Fowler*, 434 Pa. Super. 148, 642 A.2d 517 (1994); *Commonwealth v. Smith*, 389 Pa. Super. 626, 567 A.2d 1080 (1989).

Pa.R.E. 608(b) differs from F.R.E. 608(b). Both ban all use of extrinsic evidence of specific instances of conduct for the purpose of attacking or supporting a witness' credibility, except for evidence of conviction of crime (Pa.R.E. 609 and F.R.E. 609). The two rules diverge, however, in their treatment of cross-examination concerning specific instances of conduct.

Under the F.R.E. 608(b), the court has discretion to permit cross-examination of a witness about specific instances of conduct in two situations: when the specific instances are probative of the witness' own character for truthfulness and when they concern the character for truthfulness of another witness and the witness being cross-examined has testified about the truthfulness of that witness. In the latter case, cross-examination about specific instances of conduct may undermine the credibility of the witness being cross-examined (the "character witness") and the credibility of the other witness (the "principal witness"). See 28 Wright and Gold, *Federal Practice and Procedure* § 6120 (1993).

Unlike F.R.E. 608(b), Pa.R.E. 608(b)(1) prohibits the use of specific instances of a witness' own conduct for the purpose of attacking the witness' character for truthfulness. This follows existing Pennsylvania law. See *Commonwealth v. Taylor*, 475 Pa. 464, 381 A.2d 418 (1977); *Commonwealth v. Coyle*, 281 Pa. Super. 434, 422 A.2d 547 (1980).

Like F.R.E. 608(b), however, Pa.R.E. 608(b)(2) permits a character witness to be cross-examined, in the discretion of the court, concerning specific instances of conduct of the principal witness. However, unlike the Federal Rule, Pa.R.E. 608(b)(2) makes it clear that although the cross-examination concerns the specific acts of the principal witness, those specific acts affect the credibility of the character witness only. This is in accord with Pennsylvania law. See *Commonwealth v. Peterkin*, 511 Pa. 299, 513 A.2d 373 (1986); *Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993). In addition, it excludes the use of arrests; this, too, is consistent with Pennsylvania law. See *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981). Because cross-examination concerning specific incidents of conduct is subject to abuse, the cross-examination is not automatic; rather, its use is specifically placed in the discretion of the court, and like all other relevant evidence, it is subject to the balancing test of Pa.R.E. 403. Moreover, the court should take care that the cross-examiner has a reasonable basis for the questions asked. See *Adams*, *supra*.

Finally, Pa.R.E. 608 does not include the last paragraph of F.R.E. 608(b), which provides that the giving of testimony by an accused or any other witness is not a waiver of the privilege against self-incrimination when the examination concerns matters relating only to credibility. Pa.R.E. 608(b)(1) bars cross-examination of any witness concerning specific acts of the witness' own conduct; thus, the provision is not needed.

**Rule 609. Impeachment by Evidence of Conviction of Crime.**

(a) *General Rule.* For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, shall be admitted if it involved dishonesty or false statement.

(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 substantially outweighs its 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 or Other Equivalent Procedure or Successful Completion of Rehabilitation Program.* Evidence of a conviction is not admissible under this rule if the conviction has been the subject of one of the following:

(1) a pardon or other equivalent procedure based on a specific finding of innocence; or

(2) a pardon or other equivalent procedure based on a specific finding of rehabilitation of the person convicted, and that person has not been convicted of any subsequent crime.

(d) *Juvenile Adjudications.* In a criminal case only, evidence of the adjudication of delinquency for an offense under the Juvenile Act, 42 Pa.C.S.A. §§ 6301 et seq., may be used to impeach the credibility of a witness if conviction of the offense would be admissible to attack the credibility of an adult.

(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.

**Comment**

Pa.R.E. 609(a) differs from F.R.E. 609(a). Pa.R.E. 609(a), subject to the time limitations in Pa.R.E. 609(b), is similar to F.R.E. 609(a)(2) because it permits impeachment of any witness by evidence of conviction of a crime involving dishonesty or false statement, regardless of what the punishment for that crime may be. However, Pa.R.E. 609(a) does not permit use of evidence of conviction of a crime punishable by death or imprisonment for more than one year, which is allowed under F.R.E. 609(a)(1), subject to certain balancing tests. This limitation on the type of crime evidence admissible is consistent with prior Pennsylvania case law. See *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987); *Commonwealth v. Bigham*, 452 Pa. 554, 307 A.2d 255 (1973). Moreover, Pa.R.E. 609(a), unlike F.R.E. 609(a)(2), specifically provides that a conviction based upon a plea of nolo contendere may be used to impeach; this, too, is consistent with prior Pennsylvania case law. See *Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962).

As a general rule, evidence of a jury verdict of guilty or a plea of guilty or nolo contendere may not be used to impeach before the court has pronounced sentence. See *Commonwealth v. Zapata*, 455 Pa. 205, 314 A.2d 299 (1974). In addition, evidence of admission to an Accelerated Rehabilitative

Disposition program under Pa.Rs.Crim.P. 310-320 may not be used to impeach credibility. See *Commonwealth v. Krall*, 290 Pa. Super. 1, 434 A.2d 99 (1981).

Where the target of impeachment is the accused in a criminal case, 42 Pa.C.S.A. § 5918 again comes into play. See Comment to Pa.Rs.E. 607, 608 pointing out that § 5918's prohibition against questioning defendant who takes stand about conviction of any offense other than the one for which he is on trial applies only to cross-examination. Hence, evidence of conviction of a crime may be introduced in rebuttal after the defendant has testified. See *Commonwealth v. Bigham*, 452 Pa. 554, 307 A.2d 255 (1973).

Pa.R.E. 609(b) differs slightly from F.R.E. 609(b) in that the phrase "supported by specific facts and circumstances," used in the latter with respect to the balancing of probative value and prejudicial effect, has been eliminated. Pa.R.E. 609(b) basically tracks what was said in *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). Where the date of conviction or last date of confinement is within ten years of the trial, evidence of the conviction of a *crimen falsi* is per se admissible. If more than ten years have elapsed, the evidence may be used only after written notice and the trial judge's determination that its probative value substantially outweighs its prejudicial effect. The relevant factors for making this determination are set forth in *Binhum, supra*, and *Commonwealth v. Roots*, 482 Pa. 33, 393 A.2d 364 (1978). For the computation of the ten-year period, where there has been a reincarceration because of a parole violation, see *Commonwealth v. Jackson*, 526 Pa. 294, 585 A.2d 1061 (1991).

Pa.R.E. 609(c) is similar to F.R.E. 609(c). There are no Pennsylvania cases dealing squarely with the matters covered by section (c). Where a pardon is based upon a finding that a defendant was in fact innocent, the conviction is a nullity and has no probative value; accordingly, there is no basis to permit its use. A pardon based upon a finding of rehabilitation is an indication that the character flaw which gave rise to the inference of untruthfulness has been overcome and so should no longer be taken into account. A subsequent conviction of any crime, whether or not it involves dishonesty or false statement, casts substantial doubt on the finding of rehabilitation and justifies use of the evidence. In the case of both types of pardon, the instrument embodying the pardon must set forth the finding of innocence or rehabilitation. A pardon granted to restore civil rights or to reward good behavior does not make evidence of the conviction inadmissible under Pa.R.E. 609(c), but is admissible in rebuttal if the conviction is used to impeach. *Commonwealth v. Quaranta*, 295 Pa. 264, 145 A.2d 89 (1926).

Pa.R.E. 609(d) differs from F.R.E. 609(d). Under the latter, evidence of juvenile adjudications is generally inadmissible to impeach credibility, except in criminal cases against a witness other than the accused where the court finds that the evidence is necessary for a fair determination of guilt or innocence. Pa.R.E. 609(d), to be consistent with 42 Pa.C.S.A. § 6354(b)(4) permits a broader use; a juvenile adjudication of an offense may be used to impeach in a criminal case if conviction of the offense would be admissible if committed by an adult. Juvenile adjudications may also be admissible for other purposes. See 42 Pa.C.S.A. § 6354(b)(1), (2), and (3).

Moreover, under the confrontation clause of the United States Constitution, the accused in a criminal case has the right to use the juvenile record of a witness to show the witness' possible bias, regardless of the type of offense involved. See *Davis v. Alaska*, 415 U.S. 309 (1974); *Commonwealth v. Simmons*, 521 Pa. 218, 555 A.2d 860 (1989).

Pa.R.E. 609(e) is identical to F.R.E. 609(e). There is no Pennsylvania law on this issue. According to the Advisory Committee Notes to F.R.E. 609(e), a witness may be impeached by evidence of a prior conviction regardless of a pending appeal because of the "presumption of correctness that ought to attend judicial proceedings." This is the predominant view. 1 McCormick, *Evidence*, § 42 (4th ed. 1992).

**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 the witness' credibility is impaired or enhanced.

**Comment**

This Rule is identical to F.R.E. 610. It is consistent with 42 Pa.C.S.A. § 5902, which provides that religious beliefs and opinions shall not affect a person's "capacity" to testify, that no witness shall be questioned about those beliefs or opinions, and that no evidence shall be heard on those subjects for the purpose of affecting "competency or credibility." This is also consistent with Pennsylvania decisional law. See *Commonwealth v. Greenwood*, 488 Pa. 618, 413 A.2d 655 (1980); *Commonwealth v. Mimms*, 477 Pa. 553, 358 A.2d 334 (1978).

Pa.R.E. 610 bars evidence of a witness' religious beliefs or opinions only when offered to show that the beliefs or opinions affect the witness' truthfulness because of their nature. Pa.R.E. 610 does not bar such evidence introduced for other purposes. See *McKim v. Philadelphia Transp. Co.*, 364 Pa. 237, 72 A.2d 122 (1950); *Commonwealth v. Riggins*, 373 Pa. Super. 243, 542 A.2d 1004 (1988).

**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 of a witness other than a party in a civil case should be limited to the subject matter of the direct examination and matters affecting credibility; however, the court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. A party witness in a civil case may be cross-examined by an adverse party on any matter relevant to any issue in the case, including credibility, unless the court, in the interests of justice, limits the cross-examination with respect to matters not testified to on direct examination.

(c) *Leading Questions.* Leading questions should not be used on the direct or redirect examination of a witness except as may be necessary to develop the witness' 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; a witness so examined should usually be interrogated by all other parties as to whom the witness is not hostile or adverse as if under redirect examination.

**Comment**

Pa.R.E. 611(a) is identical to F.R.E. 611(a). It places responsibility for the conduct of the trial squarely within the discretion of the trial judge and spells out guidelines for the exercise of that discretion. It is consistent with Pennsylvania law. See *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246 (1988); see also Pa.R.Civ.P. 223 (relating to the conduct of civil jury trials); Pa.R.Civ.P. 224 (relating to the order of proof in civil cases).

Pa.R.E. 611(b) differs from F.R.E. 611(b). F.R.E. 611(b) limits the scope of cross-examination of all witnesses to matters testified to on direct and matters bearing on credibility, unless the court in its discretion allows inquiry into additional matters as if on direct examination. This has been the traditional view in the Federal courts and many State courts. The cross-examiner does not lose the opportunity to develop the evidence because, unless the witness is the accused in a criminal case, the cross-examiner may call the witness as his or her own. Therefore, the introduction of the evidence is merely deferred.

Pa.R.E. 611(b), which is based on Pennsylvania law, applies the traditional view in both civil and criminal cases to all witnesses except a party in a civil case. See *Woodland v. Philadelphia Transportation Co.*, 428 Pa. 379, 238 A.2d 593 (1968); *Commonwealth v. Cessna*, 371 Pa. Super., 89, 537 A.2d 834 (1988). In applying the rule of limited cross-examination, the Supreme Court said in *Conley v. Mervis*, 324 Pa. 577, 188 A.350 (1936) that “cross-examination may embrace any matter germane to the direct examination, qualifying or destroying it or tending to develop facts which have been improperly suppressed or ignored by the [witness]”. See also *Commonwealth v. Lopinson*, 427 Pa. 300, 234 A.2d 562 (1961).

Under Pa.R.E. 611(b), a party in a civil case may be cross-examined on all relevant issues and matters affecting credibility. See *Agate v. Dunleavy*, 398 Pa. 26, 156 A.2d 530 (1959); *Greenfield v. Philadelphia*, 282 Pa. 344, 127 A.768 (1925). However, in both of those cases, the Court stated that the broadened scope of cross-examination of a party in a civil case does not permit a defendant to put in a defense through cross-examination of the plaintiff. The qualifying clause in the last sentence of Pa.R.E. 611(b) is intended to give the trial judge discretion to follow this longstanding rule.

When the accused in a criminal case is the witness, there is an interplay between the limited scope of cross-examination and the accused’s privilege against self-incrimination. When the accused testifies generally as to facts tending to negate or raise doubts about the prosecution’s evidence, he or she has waived the privilege and may not use it to prevent the prosecution from bringing out on cross-examination every circumstance related to those facts. See *Commonwealth v. Green*, 525 Pa. 424, 581 A.2d 544 (1990). However, when the accused’s testimony is more selective or limited, the waiver of the privilege is only coextensive with the permissible scope of cross-examination relative to the accused’s direct testimony; it is not a general waiver. See *Commonwealth v. Camm*, 443 Pa. 253, 277 A.2d 325 (1971); *Commonwealth v. Ulen*, 414 Pa. Super. 502, 607 A.2d 77 (1992), rev’d on other grounds, 359 Pa. 51, 650 A.2d 416 (1994).

Pa.R.E. 611(c) makes two changes in the comparable section of the Federal Rule. First, Pa.R.E. 611(c) includes the words “or redirect,” which do not appear in the first sentence of the Federal Rule. The additional words should remove any doubt that the rule on leading questions applies to redirect as well as direct examination. See *Commonwealth v. Reidenbaugh*, 282 Pa. Super. 300, 422 A.2d 1126 (1980). Second, the last sentence of section (c) includes a clause providing that when the court gives permission to use leading questions to a party who has called a hostile witness, an adverse party or one identified with an adverse party, the court should not extend that permission to other parties to whom the witness is not hostile or adverse.

Pa.R.E. 611(c) is consistent with Pennsylvania law. A leading question has been defined as one which indicates or suggests the answer desired by the examiner. See *Commonwealth v. Chambers*, 528 Pa. 558, 599 A.2d 630 (1991); *Commonwealth v. Dreibelbis*, 493 Pa. 466, 426 A.2d 1111 (1981). Leading questions may be used on cross-examination, but not on direct. See *Rogan Estate*, 404 Pa. 205, 171 A.2d 177 (1961). As in the Federal Rule, Pa.R.E. 611(c) qualifies the right to lead a witness on cross-examination by the word “ordinarily.” That qualification permits the court to bar the use of leading questions when the cross-examination is in form only, such as when a party’s own attorney questions the party after the party was called by an opponent, or when the plaintiff’s attorney cross-examines an insured defendant who is friendly to the plaintiff. See F.R.E. 611 advisory committee notes.

Leading questions may be put to a hostile witness, *Commonwealth v. Settles*, 442 Pa. 159, 275 A.2d 61 (1978), and to an adverse party, *Agate, supra*. Pa.R.E. 611(c) is also consistent with 42 Pa.C.S.A. § 5935, which authorizes the calling and cross-examination of an adverse party or a person having an adverse interest. This authorization implies the use of leading questions.

A party who calls a hostile witness, adverse party or one identified with an adverse party may use leading questions because these witnesses are “unfriendly” to the party calling them and there is little risk that they will be susceptible to any suggestions inherent in the questions. The risk of susceptibility to suggestion is present, however, when a party to whom the witness is “friendly” (i.e. to whom the witness is not hostile, an adverse party or one identified with the an adverse party) interrogates the witness. The last clause of Pa.R.E. 611(c) restricts the use of leading questions by a party to whom the witness is “friendly.” The word “usually,” however, was included to give the court discretion to permit leading questions in an appropriate case. For example, leading questions may be appropriate when the testimony of a witness who was called and examined as a hostile witness by one party substantially harms the interest of another party with whom the witness is neither friendly nor unfriendly.

### **Rule 612. Writing or Other Item Used to Refresh Memory.**

(a) *Right to Refresh Memory and Production of Refreshing Materials.* A witness may use a writing or other item to refresh memory for the purpose of testifying. If the witness does so, either—

- (1) while testifying, or
- (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing or other item produced at the hearing, trial or deposition, to inspect it, to cross-examine the witness on it and to introduce in evidence those portions that relate to the testimony of the witness.

(b) *Redaction of Writing or Other Item and Sanctions.* If it is claimed that the writing or other item contains matters not related to the subject matter of the testimony, the court shall examine it in camera, excise any portion not so related and order delivery of the remainder to the party entitled to it. 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 other item is not produced or delivered pursuant to an order under this section, the court shall make any order justice requires, except that in criminal cases when the prosecution does not 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, or the court may use contempt procedures.

#### **Comment**

Pa.R.E. 612 and F.R.E. 612 are substantively equivalent, but differ somewhat in language and structure:

1. Pa.R.E. 612 covers the same subject matter as F.R.E. 612, but does so in two sections rather than one lengthy paragraph. The organization of Pa.R.E. 612 is derived, in part, from the Uniform Rules of Evidence, Rule 612 (1974).

2. Pa.R.E. 612 explicitly sets forth the right to refresh memory, which is implicit in the Federal Rule.

3. Pa.R.E. 612 does not include the reference to 18 U.S.C. § 3500 (the Jencks Act) appearing in the Federal Rule, because it is inapposite.

4. Pa.R.E. 612 uses the phrase “writing or other item” where the Federal Rule uses the term “writing.”

5. Pa.R.E. 612(a) includes the words “trial or deposition” after the word “hearing” primarily to make clear that the rule applies to depositions. The addition of “trial” is for completeness.

6. The last sentence of Pa.R.E. 612(b) uses the phrase “prosecution does not” instead of the phrase “prosecution elects not to,” which appears in the Federal Rule. Additionally, Pa.R.E. 612(b) adds “contempt procedures” to the sanctions usable in criminal cases listed in the Federal Rule.

Section (a) The right to refresh a witness’ memory is well established in Pennsylvania. See *Commonwealth v. Payne*, 455 Pa. 503, 317 A.2d 208 (1974). Although usually the witness’ memory is refreshed by a writing, most courts recognize that many other things, such as photographs, can spur the memory. 1 McCormick, *Evidence* § 9 (4th ed. 1992) (“any memorandum or other object may be used as a stimulus to present memory, without restriction by rule as to authorship, guarantee of correctness or time of making.”) The addition of the words “or other item” in section (a) takes this into account.

This is consistent with Pennsylvania law. See *Dean Witter Reynolds, Inc. v. Genteel*, 346 Pa. Super. 336, 499 A.2d 637 (1985); *Commonwealth v. Fromal*, 202 Pa. Super. 45, 195 A.2d 174 (1963). An item may be used to refresh memory even though it is inadmissible in evidence. See *Commonwealth v. Weeden*, 457 Pa. 436, 322 A.2d 343 (1974); *Panik v. Didra*, 370 Pa. 488, 88 A.2d 730 (1952); *Dean Witter*, 346 Pa. Super. at 344, 494 A.2d at 641.

The procedures for refreshing a witness’ memory are reviewed in *Commonwealth v. Proctor*, 253 Pa. Super. 369, 385 A.2d 383 (1978).

Pa.R.E. 612(a) gives the adverse party access to the item used to refresh the witness’ memory while the witness is testifying. This is consistent with Pennsylvania law. See *Commonwealth v. Proctor*, supra; see also *Commonwealth v. Allen*, 220 Pa. Super. 403, 289 A.2d 476 (1972). The rule protects against the risk that the item used to refresh memory may suggest testimony to the witness instead of refreshing present recollection. Production of the item to the adverse party is discretionary with the court, however, when it is used to refresh memory before testifying. See *Commonwealth v. Samuels*, 235 Pa. Super. 192, 340 A.2d 880 (1975); *Commonwealth v. Fromal*, 202 Pa. Super. 45, 195 A.2d 174 (1963).

Pa.R.E. 612(a), like F.R.E. 612(a), specifically provides that the adverse party may use the item in cross-examination and may introduce the item into evidence. There is no prior Pennsylvania authority on the issue of the item’s admissibility. By admitting the item into evidence, the trier of fact can put the whole matter—what the witness was shown, how the witness testified on direct and cross examination—in proper context. The evidence is received for impeachment purposes only unless it comes within one of the exceptions to the hearsay rule in Pa.R.E. 803, 803.1 and 804(b).

Pa.R.E. 612(a) is not intended to change the rule that in a criminal case, written statements made by a witness to police prior to trial must be given to the defendant following the testimony of the witness on direct examination, even if the statements were not used to refresh memory. *Commonwealth v. Kantos*, 442 Pa. 343, 276 A.2d 830 (1971).

Pa.R.E. 612(a), unlike the Federal Rule, explicitly applies to deposition testimony. Most of the cases have applied the Federal Rule to depositions based upon Fed.R.Civ.P. 30(c), which states: “Examination and cross-examination of witnesses [at a deposition] may proceed as permitted at trial under the provisions of the Federal Rules of Evidence.” 28 Wright & Gold, *Federal Practice and Procedure* § 6183 (1993); see, e.g., *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985).

There are no Pennsylvania cases on this point and the Pennsylvania Rules of Civil Procedure do not have a provision similar to Fed.R.Civ.P. 30(c). In Pennsylvania, however, an adverse party’s need

for access to the item used to refresh memory is as great at a deposition as at trial because Pennsylvania statutes and procedural rules provide in certain circumstances for the introduction of deposition testimony at trial. Moreover, because the rule allows deposition testimony to be challenged, any suggestion arising from the refreshing can be exposed immediately and eliminated at the time of trial.

Pa.R.E. 612(a), like F.R.E. 612, applies to the use of a writing or other item to refresh memory “for the purpose of testifying.” In the Federal Rule, the phrase was intended “to safeguard against using the rule as a pretext for 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.” F.R.E. 612 advisory committee notes; see, e.g., *Sporck v. Peil*, *supra* (deposition witness examined large number of documents, selected by counsel, in preparation for testifying at deposition).

*Section (b)*—Except for the changes concerning sanctions in criminal cases when the prosecution fails to comply with an order to produce, Pa.R.E. 612(b) is the same as the last three sentences of F.R.E. 612. An adverse party has rights only to those parts of any materials used to refresh memory that bear upon the witness’ testimony. When the party who did the refreshing contends that some part of what the witness was shown goes beyond the scope of the testimony, Pa.R.E. 609(b) requires the court to make an in camera inspection and to remove any extraneous matter. Of course, what is excised must be preserved in the event that the redaction is challenged on appeal. This is a well recognized technique.

The last sentence of Pa.R.E. 612(b) targets what will likely be the rare case of a failure to comply with an order to produce. In a civil case, the court is given broad discretion. The problem is akin to the failure of a party to comply with discovery orders, for which Pa.R.Civ.P. 4019 provides a wide range of sanctions. Similarly, under Pa.R.E. 609(b), the court may employ a sanction best calculated to remedy the harm caused by the failure to produce.

**Official Note:** Adopted May 8, 1998, effective October 1, 1998; amended March 23, 1999, effective immediately.

*Committee Explanatory Reports:*

Final Report explaining the March 23, 1999 technical amendments to paragraph (a) published with the Court’s Order at 29 Pa.B. 1714 (April 3, 1999).

**Source**

The provisions of this Rule 612 amended March 23, 1999, effective immediately, 29 Pa.B. 1712. Immediately preceding text appears at serial pages (245769) to (245771).

**Rule 613. Prior Statements of Witnesses.**

(a) *Examining Witness Concerning Prior Inconsistent Statement.* A witness may be examined concerning a prior inconsistent statement made by the witness, whether written or not, and the statement need not be shown or its contents disclosed to the witness at that time, but on request the statement or contents shall be shown or disclosed to opposing counsel.

(b) *Extrinsic Evidence of Prior Inconsistent Statement of Witness.* Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is admissible only if, during the examination of the witness,

- (1) the statement, if written, is shown to, or if not written, its contents are disclosed to, the witness;

(2) the witness is given an opportunity to explain or deny the making of the statement; and

(3) the opposing party is given an opportunity to question the witness.

This section does not apply to admissions of a party-opponent as defined in Rule 803(25) (relating to admissions by a party opponent).

(c) *Evidence of Prior Consistent Statement of Witness.* Evidence of a prior consistent statement by a witness is admissible for rehabilitation purposes if the opposing party is given an opportunity to cross-examine the witness about the statement, and the statement is offered to rebut an express or implied charge of:

(1) fabrication, bias, improper influence or motive or faulty memory and the statement was made before that which has been charged existed or arose; or

(2) having made a prior inconsistent statement, which the witness has denied or explained, and the consistent statement supports the witness' denial or explanation.

#### Comment

Pa.R.E. 613 differs from F.R.E. 613 both in organization and substance. Both Pa.R.E. 613 and F.R.E. 613 cover impeachment by prior inconsistent statements, but only Pa.R.E. 613 deals with rehabilitation by prior consistent statements.

*Section (a).*—This section of the rule is basically the same as F.R.E. 613(a), except that the word “inconsistent” does not appear in the federal rule. Its inclusion makes clear that both sections (a) and (b) involve attacks on credibility through prior inconsistencies. It has been suggested that its omission from the federal rule was a “drafting oversight.” Charles A Wright & Victor J. Gold, *Federal Practice & Procedure* § 6203, n. 13 (1993); J. Weinstein, 3 *Weinstein's Evidence* § 613.02[1], n. 1 (1991). By dispensing with the need to show the prior statement or disclose its contents to the witness before proceeding with examination about it, section (a) repudiates the decision in the Queen's Case, 129 Eng. Rep. 9761 (1928). Pa.R.E. 613(a) resolves the ambiguity in the scant Pennsylvania authority on this point. Compare *Kann v. Bennett*, 72 A. 342 (Pa. 1909) (before witness may be cross-examined about prior inconsistent statement, witness must be shown the statement and asked if he wrote it) with *Commonwealth v. Petrakovich*, 329 A.2d 844 (Pa. 1974) (overlooking *Kann* case, court stated it had never considered question of showing statement to witness, and found no need to resolve question under facts of case).

*Section (b).*—The first sentence of section (b) of Pa.R.E. 613 differs from F.R.E. 613(b). Like the federal rule, Pa.R.E. 613(b) permits introduction of extrinsic evidence of a prior inconsistent statement only if the witness was confronted with or informed of the statement, thus providing the witness with a chance to deny or explain the statement. Pa.R.E. 613(b), however, requires that the witness be confronted or informed during the examination; the federal rule sets no particular time or sequence. F.R.E. 613 advisory committee notes.

Pa.R.E. 613(b) follows the traditional common law approach. It establishes that the witness must be shown or made aware of the prior inconsistent statement before extrinsic evidence of the statement may be introduced, unless relaxation of the rule would serve the interests of justice. This is a departure from Pennsylvania authority, which gives the trial court discretion whether to require showing or disclosure of the statement. See, e.g., *Commonwealth v. Manning*, 435 A.2d 1207 (Pa. 1981); *Commonwealth v. Dennison*, 272 A.2d 180 (Pa. 1971).

The rationale for the last sentence of section (b), which exempts admissions of a party-opponent, is that “parties have ample opportunities to testify and explain or deny statements attributed to them.”

28 Wright & Gold, *Federal Practice and Procedure* § 6205 (1993). The exemption is in accord with Pennsylvania law. *Commonwealth by Truscott v. Binestock*, 57 A.2d 884 (Pa. 1948); *Commonwealth v. Dilworth*, 137 A. 683 (Pa. 1927).

Finally, as noted in the Comment to Pa.R.E. 607(a), a prior inconsistent statement may be used only for impeachment purposes and not substantively unless it is an admission of a party opponent under Pa.R.E. 803(25), the statement of a witness other than a party-opponent within the hearsay exception of Pa.R.E. 803.1(1), or a statement of prior identification under the hearsay exception of Pa.R.E. 803.1(2).

*Section (c)*. Pa.R.E. 613(c) does not appear in F.R.E. 613. F.R.E. 801(d)(1)(B) provides that the prior consistent statement of a testifying witness is not hearsay, and that the statement is admissible substantively if it is consistent with the witness' testimony and "is offered to rebut an express or implied charge of recent fabrication, or improper influence or motive." Pa.R.E. 613(c) adds "bias," "faulty memory," and "prior inconsistent statement" to the kind of charges that may be rebutted by a consistent statement. In addition, it specifically provides in subsection (c)(1) that the consistent statement must have been made before the fabrication, bias, etc. Although F.R.E. 801(d)(1)(B) is silent on this point, the Supreme Court held that it permits the introduction of consistent statements as substantive evidence only when they were made before the challenged fabrication, influence, or motive. See *Tome v. United States*, 513 U. S. 150 (1995). Unlike the federal rule, under Pa.R.E. 613(c), a prior consistent statement is always received for rehabilitation purposes only and not as substantive evidence.

Pa.R.E. 613(c)(1) is in accord with Pennsylvania law. See *Commonwealth v. Hutchinson*, 556 A.2d 370 (Pa. 1989) (to rebut charge of recent fabrication); *Commonwealth v. Smith*, 540 A.2d 246 (Pa. 1988) (to counter alleged corrupt motive); *Commonwealth v. Swinson*, 626 A.2d 627 (Pa. Super, 1993) (to negate charge of faulty memory); *Commonwealth v. McEachin*, 537 A.2d 883 (Pa. Super. 1988), appeal denied, 553 A.2d 965 (Pa. 1988) (to offset implication of improper influence). All of these cases require that the consistent statement must have been made before the fabrication, bias, etc.

Pa.R.E. 613(c)(2) is arguably an extension of Pennsylvania law, but is based on the premise that when an attempt has been made to impeach a witness with an alleged prior inconsistent statement, a statement consistent with the witness' testimony should be admissible to rehabilitate the witness if it supports the witness' denial or explanation of the alleged inconsistent statement. Where there has been a denial of the alleged inconsistent statement, the consistent statement should almost invariably be admitted, regardless of its timing. When the witness admits and explains the inconsistent statement, the use of the consistent statement will depend upon the nature of the explanation and all of the circumstances that prompted the making of the consistent statement; the timing of that statement, although not conclusive, is one of the factors to be considered. If the witness acknowledges making the inconsistent statement and offers no explanation, a consistent statement, whether made earlier or later, should not be admitted.

Usually, evidence of a prior consistent statement is rebuttal evidence that may not be introduced until after witness has testified on direct examination and an express or implied attack has been made on the witness' testimony in one of the ways set forth in Pa.R.E. 613(c). But in at least two situations, Pennsylvania Courts have upheld the admission of a prior consistent statement in anticipation of an attack on the witness. See *Commonwealth v. Smith*, 540 A.2d 246 (Pa. 1988) (prior consistent statements by prosecution witness admitted on direct examination where defense counsel's opening statement suggested that the witness had motives to fabricate evidence against the defendant to obtain a lenient sentence for herself); *Commonwealth v. Freeman*, 441 A.2d 1327 (Pa. Super. 1982) (evidence of prompt complaint of rape by alleged victim may be introduced in prosecution's case in chief because alleged victim's testimony is "automatically vulnerable to attack by the defendant as recent fabrication in the absence of evidence of hue and cry on her part.").

**Official Note:** Adopted May 8, 1998, effective October 1, 1998; amended March 23, 1999, effective immediately.

*Committee Explanatory Reports:*

Final Report explaining the March 23, 1999 technical amendments to paragraph (b)(3) published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 amendments adding "inconsistent" to section (a) published with the Court's Order at 30 Pa.B. 1645 (March 25, 2000).

**Source**

The provisions of this Rule 613 amended March 23, 1999, effective immediately, 29 Pa.B. 1712; amended March 10, 2000, effective immediately, 30 Pa.B. 1639. Immediately preceding text appears at serial pages (254217) to (254220).

**Rule 614. Calling and Interrogation of Witnesses by Court.**

(a) *Calling by Court.* Consistent with its function as an impartial arbiter, the court, with notice to the parties, 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.* Where the interest of justice so requires, the court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections.* An objection to the calling of a witness by the court must be made at the time of the court's notice of an intention to call the witness. An objection to a question by the court must be made at the time the question is asked; when requested to do so, the court shall give the objecting party an opportunity to make objections out of the presence of the jury.

**Comment**

Pa.R.E. 614(a) and (b) differ from F.R.E. 614(a) and (b) in several respects. The phrase relating to the court's "function as an impartial arbiter" and the provision for notice have been added in Pa.R.E. 614(a), and the clause regarding "interest of justice" has been added in Pa.R.E. 614 (b). The additions dealing with the court as an "impartial arbiter" and the "interest of justice" are consistent with Pennsylvania law. See *Commonwealth v. Crews*, 429 Pa. 16, 239 A.2d 350 (1968); *Commonwealth v. DiPasquale*, 424 Pa. 500, 230 A.2d 449 (1967); *Commonwealth v. Myma*, 278 Pa. 505, 123 A. 486 (1924).

The provision requiring notice of the court's intention to call a witness will give all parties an opportunity to be heard regarding the need for this, to object and to prepare for the cross-examination of the witness.

Unlike F.R.E. 614(c), Pa.R.E. 614(c) does not permit objection to the court's calling or interrogating witnesses "at the next available opportunity when the jury is not present." The Federal Rule permits this to relieve counsel of "the embarrassment" which might arise by objecting to the judge's questions in the jury's presence. F.R.E. 614(c) advisory committee notes. This rationale is comparable to the rationale for the "automatic" objection when the judge is called as a witness in F.R.E. 605. Under the Pennsylvania rules, the appropriate time for objecting to the calling of a witness by the court is when the court gives notice of its intention as required by Pa.R.E. 614(a). The court's notice should always take place out of the presence of the jury. When the court's questions to a witness are thought to be objectionable, the issue must be raised when the questions are put. In this way, the jury will not hear the evidence sought if the objection is sustained.

**Rule 615. Sequestration of Witnesses.**

At the request of a party or on its own motion, the court may order witnesses sequestered so that they cannot learn of the testimony of other witnesses. This section does not authorize sequestration of the following:

- (1) a party who is a natural person or the guardian of a party who is a minor or an incapacitated person;
- (2) an officer or employee of a party which is not a natural person (including the Commonwealth) 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 the party's cause.

**Comment**

Pa.R.E. 615 differs from F.R.E. 615. Pa.R.E. 615 uses the term "sequestration" instead of "exclusion" and substitutes "learn of" for "hear" in the first sentence. It also puts sequestration within the discretion of the court rather than making it mandatory upon motion of a party. Finally, Pa.R.E. 615 adds the guardian of a minor or incapacitated person to the first category of persons whom the court may not sequester.

Sequestration, i.e., barring a witness from the courtroom during the testimony of other witnesses and prohibiting direct and indirect communication both in and out of the courtroom is designed to discourage and expose fabrication, collusion, inaccuracies and inconsistencies. 1 McCormick, *Evidence*, § 50 (4th ed. 1992). Placing it within the discretion of the trial court is in conformity with Pennsylvania law. See *Commonwealth v. Albrecht*, 510 Pa. 603, 511 A.2d 764 (1986) (the decision of the trial court on whether or not to sequester a witness will not be reversed absent a clear abuse of discretion). Examples of abuse of discretion may be found in *Commonwealth v. Fant*, 480 Pa. 586, 391 A.2d 1040 (1978) and *Commonwealth v. Turner*, 371 Pa. 417, 88 A.2d 915 (1952) (refusal to sequester detectives who allegedly witnessed inculpatory statement).

The three categories of persons listed in Pa.R.E. 615 whom the court may not sequester are akin to those in the Federal Rule, with some slight differences. Clause (1) covers natural persons who are parties; their exclusion would raise constitutional problems of confrontation and due process. The inclusion of guardians of parties who are minors or incapacitated persons is consistent with Pa.R.-Civ.P. 2027 (minors) and 2053 (incapacitated persons), which place the conduct of actions on behalf of those parties under the supervision and control of their guardians. Clause (2) applies to the designated representatives of a party that is not a natural person. The parenthetical phrase relating to the Commonwealth does not appear in F.R.E. 615(2); it is meant to make clear that in a criminal case, the prosecution has a right to have the law enforcement agent primarily responsible for investigating the case at the counsel table to assist in presenting the case, even though the agent will be a witness. See Notes of the Committee on the Judiciary, Senate Report No. 93-1274, and Advisory Committee Notes to F.R.E. 615(2). Clause (3) refers to persons such as the one who handled the transaction involved in the case or an expert relied upon by counsel for advice in managing the litigation.

The trial court has discretion in choosing a remedy for violation of a sequestration order. See *Commonwealth v. Smith*, 464 Pa. 314, 346 A.2d 757 (1975). Remedies include ordering a mistrial, forbidding the testimony of the offending witness, or an instruction to the jury. *Commonwealth v. Scott*, 496 Pa. 78, 436 A.2d 161 (1981).

The provisions of Pa.R.E. 615 are subject to the control of the trial court under Pa.R.E. 611(a).

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