

R 612

New Hampshire
RULES OF EVIDENCE

Annotations

1. Discretion

Control of order of witness interrogations and admissibility of evidence is committed to sound discretion. *State v. Hopkins* (1992) 186 N.H. 272, 616 A.2d 916.

2. Leading questions

It is permissible to ask leading questions on direct examination of a very young witness. *State v. Mills* (1992) 186 N.H. 46, 611 A.2d 1104.

Cited

Cited in *State v. Isaacson* (1987) 129 N.H. 433, 529 A.2d 923; *State v. Duff* (1987) 129 N.H. 781, 532 A.2d 1381; *State v. Cox* (1990) 133 N.H. 261, 575 A.2d 1320.

Rule 612. Writing or Object Used To Refresh Memory

(a) *While testifying.* If, while testifying, a witness uses a writing or object to refresh his or her memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

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

(c) *Terms and conditions of production and use.* A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony the court shall examine the writing or object *in camera*; excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the Supreme Court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Federal Rule: Writing Used to Refresh Memory

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, 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 produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any

portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Reporter's Notes

This Rule is identical to the Uniform Rule.

The usual manner in which to refresh a witness' memory by a writing is to show it to him and see if it can awaken a present recollection of the facts in his mind. *State v. Chickering*, 97 N.H. 363 (1952). When writings are used to test or refresh recollection in New Hampshire, they are not required to be made exhibits.

An opponent's right of access when the writing is used prior to the witness' taking the stand is in accord with New Hampshire practice although no New Hampshire cases are on point. It should be noted that the Rule gives the Court discretion to allow or not to allow access where the writings were used prior to testimony.

The consequences of non-production by the government in a criminal case are those of the Jencks statute, striking the testimony or in exceptional cases a mistrial. The Rule with respect to civil cases appears to be similar to the remedy imposed by the New Hampshire Supreme Court in *Hubbard v. Panneton*, 121 N.H. 526 (1981). In *Hubbard*, where the plaintiffs filed a motion to compel defendant to produce information which bore directly on defendant's only defense to negligence actions, and the defendant did not produce this information until the morning of trial, verdicts for the defendant were set aside and the case was remanded for a new trial.

The Rule requiring that the court strike testimony or declare a mistrial in a criminal case where the writing or object is not produced by the prosecution when so ordered by the court appears to be a departure from current practice in New Hampshire. The Rule, however, was deemed appropriate by the committee. If the object or writing were honestly misplaced, lost or even stolen, no order to strike testimony or declare a mistrial should probably issue. The committee felt that there appeared sufficient latitude under Section (b) for the court to deny an order under the circumstances.

The use of the phrase in Section (b) "for the purpose of testifying" is to safeguard against using the Rule as a pretext for wholesale exploration of an opposing party's files and to assure 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. *Federal Advisory Committee Notes to Rule 612*.

The situation where the witness still has no independent memory after reviewing a writing, and the attorney seeks to introduce the writing instead of the live testimony, is referred to as past recollection recorded. *See* Rule 803(5). Here a foundation showing necessity and reliability must be laid. The witness must testify that he or she was in a position to observe the event; that he or she did observe the event; that he or she recorded it on a piece of paper; that he or she recorded the information accurately and soon after the event; and that he or she has no independent memory of the event.

Library References

For article, "Prosecution Issues in Domestic Assault Cases: Trying a Case Without Victim Cooperation," see 35 N.H.B.J. 42 (1994).

Annotations

Cited

Cited in *State v. Cochran* (1990) 132 N.H. 670, 569 A.2d 766.

Rule 613. Prior Statements of Witnesses

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

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not