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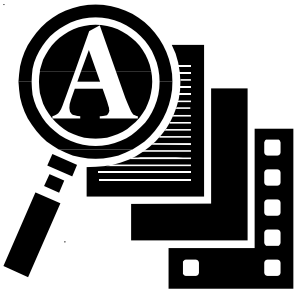
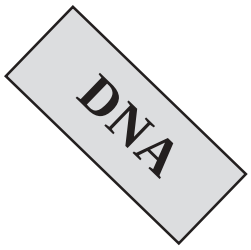
EVIDENCE MANUAL
5th Edition





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Summary of Table of Contents

Introduction to 5th Edition by J. David Niehaus 5

Article 1: General Provisions 6

Article II: Judicial Notice 16

Article III. Presumptions in Civil Actions and Proceedings 18

Article IV. Relevancy and Related Subjects 19

Article V: Privileges 36

Article VI. Witnesses 48

Article VII. Opinion and Expert Testimony 65

Article VIII. Hearsay 75

Article IX. Authentication and Identification 92

Article X. Contents of Writings, Recordings, and Photographs 97

Article XI. Miscellaneous Rules 101

Table of Cases 104

Topics/Translation Table 107

Take nothing on its looks; take everything on evidence. There's no better rule.

- Charles Dickens, *Great Expectations*

The Advocate: Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

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FROM THE EDITOR...

Jeff Sherr

"Read the rules. Read the rules. Read the [insert descriptive word or phrase of your choice here] rules!" This is the mantra of Evidence professors and litigation coaches across the nation and it remains true no matter how much experience an attorney obtains.

This manual is designed to be a briefcase companion for the busy criminal defense attorney. It contains the Kentucky Rules of Evidence themselves with commentary to provide quick insight into their use and the current caselaw. Unlike other publications about the rules of evidence, this manual focuses on criminal case issues. The time-strapped public defender is not forced to wade through citations to tort and domestic relations cases before stumbling upon a lone citation to a criminal case.

This manual also provides space on each page, where the user can record notes and information about updates, as well as a table of cases at the back. It is a tool to be used over and over until its covers are soiled and worn, not just a volume to gather dust on a library shelf.

The manual was first created in 1992 and is now in its 5th edition. All across the Commonwealth, public defenders pull this manual out with confidence when they need to cite authority on the proper application of an evidence rule. Courtroom veterans, (even those sitting on the other side of the bench and those sitting at opposing counsel's table), know this publication to be an authoritative voice on the Kentucky Rules of Evidence. The primary authors are J. David Niehaus, Chris Polk, and Susan Balliet. Special thanks to David Niehaus for the countless hours he has put in to preparing this gift for Kentucky's public defenders and their clients. ■

TABLE OF CONTENTS

Introduction to 5th Edition 5

Article I General Provisions 6-15
Rule 101 Scope 6
Rule 102 Purpose and construction 6
Rule 103 Rulings on evidence 7
Rule 104 Preliminary questions 10
Rule 105 Limited admissibility 13
Rule 106 Remainder of or related writings or recorded statements 14
Rule 107 Miscellaneous provisions 15

Article II Judicial Notice 16-17
Rule 201 Judicial Notice of Adjudicative Facts 16

Article III Presumptions in Civil Actions and Proceedings 18
Rule 301 Presumptions in general in civil actions and proceedings 18
Rule 302 Applicability of federal law or the law of other states in civil actions and proceedings 18

Article IV Relevancy and Related Subjects 19-35
Rule 401 Definition of "relevant evidence 19
Rule 402 General rule of relevancy 19
Rule 403 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time 19
Rule 404 Character evidence and evidence of other crimes ... 22
Rule 405 Methods of proving character 28
Rule 406 (Number not yet utilized.) 29
Rule 407 Subsequent remedial measures 29
Rule 408 Compromise and offers to compromise 30
Rule 409 Payment of medical and similar expenses 30
Rule 410 Inadmissibility of pleas, plea discussions, and related statements 31
Rule 411 Liability insurance 32
Rule 412 Rape and similar cases - Admissibility of victim's character and behavior 33

Article V Privileges 36-47
Rule 501 General rule 36
Rule 502 (Number not yet utilized.) 37
Rule 503 Lawyer-client privilege 37
Rule 504 Husband-wife privilege 40
Rule 505 Religious privilege 41
Rule 506 Counselor-client privilege 42
Rule 507 Psychotherapist-patient privilege 44
Rule 508 Identity of informer 45
Rule 509 Waiver of privilege by voluntary disclosure 47
Rule 510 Privileged matter disclosed under compulsion or without opportunity to claim privilege 47
Rule 511 Comment upon or inference from claim of privilege — Instruction 47

Article VI Witnesses 48-64
Rule 601 Competency 48
Rule 602 Lack of personal knowledge 49
Rule 603 Oath or affirmation 50
Rule 604 Interpreters 51
Rule 605 Competency of judge as witness 51
Rule 606 Competency of juror as witness 52
Rule 607 Who may impeach 53
Rule 608 Evidence of character 54
Rule 609 Impeachment by evidence of conviction of crime .. 56
Rule 610 Religious beliefs or opinions 57
Rule 611 Mode and order of interrogation and presentation 57
Rule 612 Writing used to refresh memory 60
Rule 613 Prior statements of witnesses 61
Rule 614 Calling and interrogation of witnesses by court 63
Rule 615 Exclusion of witnesses 64

Article VII Opinions and Expert Testimony 65-74
Rule 701 Opinion testimony by lay witnesses 65
Rule 702 Scientific Evidence & Experts 66
Rule 703 Bases of opinion testimony by experts 71
Rule 704 (Number not yet utilized.) 73
Rule 705 Disclosure of facts or data underlying expert opinion 73
Rule 706 Court appointed experts 74

Article VIII Hearsay 75-91
Rule 801 Definitions 75
Rule 801A Prior statements of witnesses and admissions 76
Rule 802 Hearsay rule 80
Rule 803 Hearsay exceptions availability of declarant immaterial 82
Rule 804 Hearsay exceptions declarant unavailable 88
Rule 805 Hearsay within hearsay 91
Rule 806 Attacking and supporting credibility of declarant 91

Article IX Authentication and Identification 92-96
Rule 901 Requirement of authentication or identification 92
Rule 902 Self-authentication 94
Rule 903 Subscribing witness' testimony unnecessary 96

Article X Contents of Writings, Recordings, and Photographs 97-100
Rule 1001 Definitions 97
Rule 1002 Requirement of original 97
Rule 1003 Admissibility of duplicates 98
Rule 1004 Admissibility of other evidence of contents 98
Rule 1005 Public records 99
Rule 1006 Summaries 99
Rule 1007 Testimony or written admission of party 100
Rule 1008 Functions of court and jury 100

Article XI Miscellaneous Rules 101-103
Rule 1101 Applicability of rules 101
Rule 1102 Amendments 102
Rule 1103 Evidence rules review commission 103
Rule 1104 Use of official commentary 103

Table of Cases 104-106
Topics/Translation Table 107-108

Introduction to 5th Edition

J. David Niehaus
Louisville Metro Public Defender's Office

The short answer to the question of "Why a new Advocate manual?" is that commercially-published treatises, such as the *Evidence Law Handbook* and the *Courtroom Evidence Manual*, are simply too comprehensive for on-the-spot answers to questions that arise unexpectedly. Such books are invaluable for research in the office and for learning the law of evidence. But even the best prepared attorneys can be taken by surprise and need a basic yes or no answer to an evidence problem in a hurry. The first Advocate Evidence Manual was designed to meet this need. This is the goal of the current edition as well.

In the almost 5 years since the Manual was last updated, the Kentucky Supreme Court and Court of Appeals have issued literally hundreds of rulings on evidence questions. And, of course, the U. S. Supreme Court has rendered important constitutional decisions bearing on evidence questions, most important *Crawford v. Washington*, which upset the conventional wisdom about hearsay exceptions. In contrast to earlier versions of this Manual, where the editors had to rely extensively on federal cases and textbooks, the biggest problems in the preparation of this edition have been winnowing through the Kentucky opinions and editing the text to keep the Manual brief enough to fulfill its mission as a trial notebook on evidence.

Chapters 7 and 8 are built on the work of Susan Balliet and Chris Polk respectively. The large number of new rulings has compelled major editorial changes, but the bases of these chapters are the work of those two attorneys, who of course, should not be held responsible for what the current editor has done to them.

In 1992, Ed Monahan conceived the idea for the manual and, until his retirement, he provided enough encouragement to produce three revisions. It is only fitting that this 5th edition be dedicated to him. ■

Abbreviations Used

KRE	Kentucky Rules of Evidence
KRS	Kentucky Revised Statutes
CR	Kentucky Rules of Civil Procedure
RCr	Kentucky Rules of Criminal Procedure
SCR	Rules of the Kentucky Supreme Court
RPC	Rules of Professional Conduct [SCR 1.030]
CJC	Code of Judicial conduct [SCR 4.300]
Commentary	1989 Final Draft, Kentucky Rules of Evidence
Revised Commentary	1992 Revised Commentary

ARTICLE 1: GENERAL PROVISIONS

NOTES

Rule 101 Scope.

These rules govern proceedings in the courts of the Commonwealth of Kentucky, to the extent and with the exceptions stated in KRE 1101. The rules should be cited as "KRE," followed by the rule number to which the citation relates.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 1; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PREMISE/PURPOSE:
Most codifications begin with a provision like this. It states that the Rules of Evidence apply to all proceedings in the Court of Justice unless an explicit exception is stated in KRE 1101. The rule also dictates a uniform method of citation.
(a) In cases where no particular Rule applies, Sections 116 and 233 of the Constitution mandate application of the common law of evidence. *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883 (1997). However, such instances are rare.

Rule 102 Purpose and Construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 2; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PREMISE/PURPOSE: This rule is a general background statement of the drafters' intent as well as a directive to interpret the rules liberally to achieve the stated goals. It encourages a broad-minded approach to construction when new evidence questions arise. In *Miller v. Marymount Medical Center*, Ky., 125 S. W. 3d 274 (2004), the court observed that a trial is essentially a search for the truth. The rules should be interpreted to help achieve this goal.

(a) Section Two of the Kentucky Constitution governs the conduct of every agent of government, including judges. *Kroger Company v. Kentucky Milk Marketing Comm.*, Ky., 691 S.W.2d 893 (1985). Section 2's prohibition against arbitrariness therefore applies to the application of evidence rules by judges. Although it is never mentioned in the rules, *Section Two* is always a consideration in the interpretation of any rule or statute.

(b) The language of Rules 102, 403 and 611 gives the judge substantial authority to admit or exclude evidence. The proponent of evidence may well have to show more than relevance or qualification under a hearsay exception. The judge is charged by these "rules of economy" to decide whether the probative value of evidence is worth the cost in terms of time, expense, or jury confusion. However, these considerations cannot deprive a party of the right to present evidence that is substantial.

(c) The Supreme Court of Kentucky applies the "plain language" principle to statutes and court rules. Since adoption in 1992, none of the Rules of Evidence has been successfully challenged as ambiguous. And since 1992, the Supreme Court has been diligently publishing cases explaining the rules. The principles stated in this Rule should be considered only in cases where the rules and precedents do not provide a clear answer.

(d) "Growth and development of the law of evidence" is not an invitation to trial level judges to make up law. Section 116 of the Constitution assigns exclusive authority for court rules to the Supreme Court. The growth and development of evidence law is to come primarily from the Supreme Court through appellate opinions on the meaning and applicability of rule language and through the rules creation and amendment machinery established by KRE 1102 and 1103. *Weaver v. Alexander*, Ky., 955 S. W. 2d 722 (1997).

(e) But court rules do not trump constitutional rights. A criminal defendant has a Sixth Amendment right to present evidence and mount a complete defense. The U.S. Supreme Court has recognized a federal due process right for defendants to present "reliable" evidence even when current state evidence law does not allow it. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

(f) Because of the similarities between the federal evidence rules and the Kentucky rules, Kentucky courts will look to federal precedents to aid in construction of the Kentucky rules. *Roberts v. Commonwealth*, Ky., 896 S.W.2d 4 (1995).

(g) In general, it is best not to consider or cite Kentucky appellate opinions rendered before June, 1992. In almost every instance, there is a more recent opinion construing rule language.

(i) The issue of admissibility of evidence is procedural. *Commonwealth v. Alexander*, Ky., 5 S.W.3d 104 (1999). Therefore, court opinions construing evidence questions may be applied retroactively in criminal cases as long as the rule announced does not lessen the Commonwealth's burden of proof.

(j) *Alexander* also holds that the constitutional requirement of separation of powers prevents enactment of statutes that purport to declare evidence admissible.

Rule 103 Rulings on evidence.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, and upon request of the court stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, upon request of the examining attorney, the witness may make a specific offer of his answer to the question.

(b) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.

(e) Palpable error. A palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered by a trial court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 3; amended 1992 Ky. Acts ch. 324, sec. 1; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

NOTES

COMMENTARY

PREMISE/PURPOSE:
To advise appellate courts, and trial level courts hearing new trial or RCr 11.42 motions, of the conditions under which relief may be granted. The language speaks of an erroneous "ruling" which presumes that the judge was given an opportunity to rule on a question of admission or exclusion. Subsection (e) deals with palpable error. Neither rule authorizes relief for errors that do not affect a "substantial right" of the complaining party. *God's Center Foundation v. LFUCG*, Ky. App., 125 S. W. 3d 295 (2002).

103(a)

(a) Litigation is based on three premises. Courts assume that if a party does not like what is happening, he will object immediately. Courts also assume that if a party wants something, she will ask for it immediately. Conversely, courts assume that if a party fails to object or fails to ask for relief, the omission is intentional and on this basis will conclude on appeal that the party did not want any sort of relief.

(b) A litigant complies with this rule by telling the judge what he or she wants. The rule does not require a statement of the ground of the objection unless the judge asks. However, in practice, reversal on appeal will require there having been a motion to strike, a request for admonition, or a motion for mistrial. In any event, a judge is unlikely to entertain a request for relief without knowing the legal basis of the objection.

(c) If the objected-to evidence is admissible only for a limited purpose, *e.g.*, other bad acts to show identity, the attorney may request a limiting instruction telling the jury that the evidence may not be used to conclude that the other act is evidence of propensity and that the defendant is guilty because of this propensity. See KRE 105.

(d) In at least 10 opinions over the last four years, the appellate courts have stated unequivocally that failure to make an avowal, that is, an offer of proof made out of the jury's hearing in which the attorney asks a witness questions and obtains the witness's answers, precludes appellate review. An attorney's summary of the expected testimony is not adequate. *Caldwell v. Commonwealth*, Ky., 133 S. W. 3d 445 (2004). In *Commonwealth v. Ferrell*, Ky., 17 S. W. 3d 520 (2000), the court posited three reasons for avowal: to give the attorney a fair opportunity to address the issue with the judge; to provide the judge with adequate information on which to make a ruling; and to provide an adequate record for appellate review. The reasoning for the latter point is that the appellate court cannot reverse on the basis of speculation. *Varble v. Commonwealth*, Ky., 125 S. W. 3d 246 (2004).

(e) The avowal requirement also applies to excluded physical evidence. *Hart v. Commonwealth*, Ky., 116 S. W. 3d 481 (2003). The attorney must move to admit the item as an avowal exhibit.

(f) There are two exceptions to the avowal requirement. The last phrase of KRE 103(a)(1) indicates that the appellate court should consider an issue where the substance of the testimony or evidence is obvious. Also, the Supreme Court will consider an imperfectly preserved issue in a death penalty case where the failure to make an avowal does not appear to be "trial strategy." *Johnson v. Commonwealth*, Ky., 103 S. W. 3d 687 (2003).

(g) Judges have been cautioned about granting continuing objections. The reason is that a series of questions and answers usually presents slightly or greatly different circumstances, and a blanket ruling is unlikely to take these changes into account. *Lickliter v. Commonwealth, Ky.*, 142 S. W. 3d 65 (2004). Attorneys should be cautious in asking for continuing objections.

(h) No objection is required when a judge or juror testifies at trial. KRE 605; 606. Delayed objections are allowed when the judge calls a witness or a juror asks a question and the lawyer cannot make an objection before it is answered. KRE 614(d). If a judge takes judicial notice before an objection can be made, KRE 201(e) allows a belated objection.

(i) Occasionally the appellate court will address an issue on appeal because it is likely to recur on a retrial, *e.g.*, *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694 (1995). The court does this to preclude error at a retrial that is going to take place for other reasons.

(j) On appeal, the standard of review for almost every kind of evidence issue is abuse of discretion. *Cook v. Commonwealth*, Ky., 129 S. W. 3d 351 (2004). For a denial of the constitutional

NOTES

right of confrontation, the beneficiary of the error must prove it harmless beyond reasonable doubt. *Quarels v. Commonwealth,* Ky., 142 S. W. 3d 73 (2004).

(k) In *Commonwealth v. English*, Ky., 993 S.W.2d 941, 945 (1999), the court defined "abuse of discretion" as an arbitrary, unreasonable or unfair decision or one unsupported by "sound legal principles."

103(b)

PREMISE/PURPOSE:

This rule allows the judge to comment on the objection or the avowal. There is no role for the attorney unless the judge misstates the evidence or makes some other objectionable comment. This rule is not intended as an alternative to the avowal rule. The "offer of proof" by the attorney as a substitute for the testimony of the avowal witness, permitted by some other jurisdictions, does not exist in Kentucky.

103(c)

PREMISE/PURPOSE:

Along with KRE 104(c) this rule tries to prevent jurors from hearing evidence of contested admissibility until the judge has decided whether and under what limiting instructions the jury can hear it. It is based on the sensible belief that it is easier to keep a jury from hearing improper information than it is to come up with a corrective admonition or to try the case again after mistrial.

(a) Use of the phrase "proceeding shall be conducted" places primary responsibility for insulating jurors from improper information on the judge, the person responsible for conducting the proceedings. KRE 611. So called "side bars," avowals or witness voir dires obviously should be conducted in a way that prevents jurors from overhearing. Whether this requires whispering or recess of the jury is left up to the judge.

(b) Attorneys have an ethical duty to help the judge discharge her duty under the rule. SCR 3.130(3.4) prohibits alluding to any matter not reasonably relevant or believed to be supported by admissible evidence and prohibits disobedience to court rules except through open and clear refusal based on a claim that no obligation to obey exists. Rule 3.5(a) prohibits any attempt to influence a juror through means prohibited by law. Put simply, lawyers may not try to present evidence of dubious admissibility without conferring with the judge.

(c) The judge has a legal duty under KRE 611(a) and an ethical duty under SCR 4.300(3)(A)(3) and (4) to give attorneys a reasonable opportunity to make arguments on the admissibility of evidence.

103(d)

PREMISE/PURPOSE:

Another economical feature of the rules is the provision for pretrial determination of admissibility questions. Kentucky's rule differs from others because under most circumstances the pretrial ruling is binding throughout trial and preserves the issue for appeal without the necessity of a contemporaneous objection. Use of the *in limine* motion lowers the danger of inadvertent violation of KRE 103(c) or 104(c) and, because the parties know what will and will not come in, allows a more definite commitment to trial strategy before the trial begins.

(a) The procedural requirements must be followed. If the motion does not result in an "order of record" the issue is not preserved and the opposing party must object when the problematic evidence is introduced at trial. Excluded evidence requires an avowal that complies with KRE 103(a)(2). An "order of record" is a written order signed by the judge and entered by the clerk in accordance with CR 58(1). *Cook v. Commonwealth,* Ky., 129 S. W. 3d 351 (2004).

(b) The rule can be used to obtain pretrial exclusion of evidence of prior acts or convictions KRE 404(b); 609, to test the foundation under KRE 804, to question the qualifications of an expert KRE 702, to examine authenticity KRE 901 or to deal with best evidence or summary questions. KRE 1004; 1006.

(c) An unsuccessful pretrial motion for severance under RCr 9.16 must be renewed when the prejudice of joint trial becomes evident. Because this motion is often closely associated with

NOTES

questions of admissibility of evidence as to one or more co-defendants, it is probably advisable to renew the evidence objection at the same time.

(d) In *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181(1996), the Supreme Court stated its policy that "an objection made prior to trial will not be treated in the Appellate Court as raising any question for review which is not strictly within the scope of the objection made, both as to the matter objected to and as to the grounds of the objection. It must appear that the question was fairly brought to the attention of the trial court." This policy was recently affirmed in *Garland v,. Commonwealth*, Ky., 127 S. W. 3d 529 (2004).

(e) *Cook v. Commonwealth*, Ky., 129 S. W. 3d 351 (2004), distinguishes between agreement as to the means of presenting information and waiver of an objection. In this case a party who had lost an in limine motion agreed to stipulate the evidence but never formally withdrew the objection. The Court held that the defendant had adequately preserved he objection.

103(e)

PREMISE/PURPOSE:

The function of all appellate courts is to correct error. KRE 102 makes discovery of truth and just disposition of the case the main goals of the evidence rules. Reviewing courts need a way to deal with error of record that clearly affected the case in a way that cannot be tolerated. KRE 103(e) provides the means to do so. However, the rule is applied grudgingly.

(a) In *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 157 (1995), the Supreme Court observed that where there was no objection to the introduction of evidence or where the objection was insufficient, "to require exclusion without an objection, we would have to conclude as a matter of law that there were no facts or circumstances which would have justified admission of the evidence."

(b) *White v. Commonwealth*, Ky. App., 132 S. W. 3d 877 (2003), requires a showing that a party's "substantial rights" have been affected by the erroneous admission or exclusion of evidence.

(c) A different rule obtains in death penalty cases. The Supreme Court uses a three part analysis which asks whether error was committed, whether there was a reasonable justification for failure to object, including trial tactical reasons, and, regardless of justification for failure to object, whether the error was so prejudicial that in its absence the defendant might not have been found guilty or sentenced to death. *Perdue*, 916 S.W.2d 148 (1995).

Rule 104 Preliminary questions.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) of this rule. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions or the fruits of searches conducted under color of law shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility, including evidence of bias, interest, or prejudice.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 4; amended 1992 Ky. Acts ch. 324, sec. 2; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

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COMMENTARY

NOTES

PREMISE/PURPOSE:
This subsection makes the judge responsible for deciding whether evidence will be admitted or excluded. This is a preliminary determination. Subsection (a) of this rule and KRE 1101(d)(1) expressly provide that the Rules of Evidence, except for privileges, do not apply when the judge makes this determination. Although the judge is not required to follow the rules of evidence, *Section 2* of the Kentucky Constitution prohibits arbitrary action by the judge and, at minimum, requires that the evidence be reliable enough that a rational person could make a decision based upon it.

104(a)

(a) A judge decides admissibility of evidence or qualifications of a witness under a preponderance standard. *R. C. v. Commonwealth,* Ky. App., 101 S. W. 3d 897 (2002).

(b) A prior acquittal on a criminal charge does not necessarily preclude introduction of evidence about the conduct giving rise to the charge in a later proceeding. *Hampton v. Commonwealth,* Ky., 133 S. W. 3d 438 (2004). The theory is that the prior acquittal was based on failure to find the facts beyond reasonable doubt. Under Rule 104, the judge must only find the occurrence of the prior acts by a preponderance. Thus, depending on the evidence, the judge may still find that the jury would be reasonable in concluding that the prior acts occurred. Of course, the judge must weigh such evidence under KRE 403.

(c) The determination of consent to search in a suppression hearing is a preliminary question of fact to be decided by the judge. *Talbott v. Commonwealth,* Ky., 968 S.W.2d 76 (1998).

(d) Because a suppression hearing under RCr 9.78 is a preliminary proceeding, the Rules of Evidence, except for privileges, do not apply. Therefore, hearsay testimony may be considered by the judge. *Kotila v. Commonwealth,* Ky., 114 S. W. 3d 226 (2003).

(e) The determination of reliability in a *Daubert* hearing is a preliminary question of fact not binding on the jury. *Johnson v. Commonwealth,* Ky., 12 S.W.2d 258 (1999).

104(b)

PREMISE/PURPOSE:
This rule works together with KRE 611(a) to give the judge flexibility in the presentation of evidence where witness schedules prevent a logical sequence that would show the relevance of particular testimony or evidence. Under this rule, the judge may allow introduction of testimony or evidence that may appear irrelevant or insufficiently authenticated in reliance on the proponent's promise that all will become clear later. A more substantive application arises in instances where jurors must find the existence of one fact before another fact is relevant. An often-cited example of this application is the situation in which the jury must believe that property was stolen before the second inference, commission of a prior bad act, theft, occurred. *Huddleston v. U.S.*, 485 U.S. 681 (1988). The judge decides whether jurors reasonably could believe the first fact either upon proof introduced by the proponent or the promise that such proof is forthcoming. In *Johnson v. Commonwealth,* Ky., 134 S. W. 3d 563 (2004), the Supreme Court observed that the Kentucky rule is identical to the federal rule and relied on a federal evidence treatise to construe the Kentucky rule.

(a) Failure to "connect up" the evidence is grounds for an instruction to disregard the testimony or perhaps even a mistrial. However, KRE 103(a)(1) places the burden of making a motion to strike on the opponent of the evidence. Unless the opponent acts, the jury may consider such evidence for any purpose.

(b) KRE 104(b) issues are particularly susceptible to KRE 403 and 611(a)(2) objections for needless consumption of time and potential to confuse or mislead the jury. The judge may allow disjointed presentation of evidence but is not required to do so to suit the convenience of the parties or witnesses.

NOTES

104(c)

PREMISE/PURPOSE:

While KRE 103(c) covers all aspects of a jury trial, KRE 104(c) deals specifically with arguments and hearings about the admission or exclusion of evidence. The same ethical considerations govern both situations. The decision to excuse the jury while arguments are going on is left to the judge except in cases involving suppression of confessions or the products of searches and seizures or in which the defendant testifies and asks for exclusion. The recent amendment of RCr 9.78 to include eyewitness identification questions does not mean that the judge is required to excuse the jury for those hearings. Rule 103(c) was not amended to conform to the change in RCr 9.78.

(a) Pretrial motions under RCr 9.78 and KRE 103(d) can eliminate many of the occasions in which this rule might be invoked.

(b) It is important to realize that this rule applies to anything from a full-blown suppression hearing to a routine hearsay objection. The rule says "out of the hearing of the jury," not out of its presence. In theory, therefore, except for the three required instances, a judge can hear argument and evidence about the admissibility of evidence in open court with the jurors observing and wondering what the arguing is all about. In practice, most judges require argument at the bench about any preliminary issue.

(c) This rule allows the judge to hear evidence of the qualifications of an expert witness in the presence of the jury or in a hearing from which the jury is excluded. If the witness is a state police laboratory chemist with whose credentials the judge is familiar, there is probably not much danger of jury contamination because the witness is quite likely to be qualified. Conversely, a psychologist talking about a little known theory that explains an obscure point of the case should not be heard by the jury until both the witness and the theory are deemed admissible.

104(d)

PREMISE/PURPOSE:

This rule permits a defendant to testify on the limited issue of admissibility of evidence without being subjected to cross-examination on other subjects. It does not govern later use of that testimony. But by limiting the subject matter of the testimony to the facts bearing on admissibility of evidence, the rule leaves to the defendant how much exposure to later use of his statements he wishes to face. Later use of the statement for substantive purposes is prevented by considerations of relevancy rather than by any protection found in this rule.

(a) *Harris v. New York*, 401 U.S. 222 (1971) and *Simmons v. U.S.*, 390 U.S. 377 (1968), forbid the use of the defendant's suppression hearing testimony as part of the Commonwealth's case in chief but allow use as impeachment/rebuttal testimony if the defendant testifies inconsistently at trial..

(b) In a non-suppression case, *e.g.*, child witness competency, KRE 801A would allow introduction of the defendant's preliminary hearing testimony if he testifies inconsistently at trial because the out of court statement would be "offered against" the defendant and therefore not subject to exclusion as hearsay. The importance of limiting defendant testimony at preliminary hearings is apparent.

(c) The preliminary testimony of a defendant at a non-suppression hearing might also be admissible under KRE 804(a)(1) and 804(b)(1) but for the limitation on cross examination and the limited nature of the testimony because this precludes a finding that the defendant had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

104(e)

NOTES

PREMISE/PURPOSE:
This rule precludes use of pretrial or preliminary judicial rulings on the admissibility of evidence to limit attacks on the weight or credibility of evidence or on the witnesses presenting evidence. *Primm v. Isaac,* Ky., 127 S. W. 3d 630 (2004). The last phrase referring to bias, interest or prejudice was added to insure that a party has the opportunity fully to confront the case presented against him. The rule works in favor of any party. *Commonwealth v. Hall,* Ky.App., 4 S.W.3d 30 (1999).

(a) Keep in mind that the language only clarifies the limited effect of the judge's preliminary decision to admit or exclude under KRE 104(a) or (b). It does not prescribe the means by which bias, interest or prejudice are to be shown. Some methods are prescribed in KRE 608, 609 and 613. Some are not. KRE 607 is an open rule that does not limit the ways in which impeachment can be accomplished. Therefore, common law decisions such as *Adcock v. Commonwealth,* Ky., 702 S.W.2d 440 (1986), have not been superseded.
(b) Of course, any impeachment can open the door to rebuttal evidence. The type and scope of impeachment evidence requires careful consideration.

Rule 105 Limited admissibility.

(a) When evidence which is admissible as to one (1) party or for one (1) purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly. In the absence of such a request, the admission of the evidence by the trial judge without limitation shall not be a ground for complaint on appeal, except under the palpable error rule.
(b) When evidence described in subdivision (a) above is excluded, such exclusion shall not be a ground for complaint on appeal, except under the palpable error rule, unless the proponent expressly offers the evidence for its proper purpose or limits the offer of proof to the party against whom the evidence is properly admissible.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 5; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PREMISE/PURPOSE:
One of the fundamental premises of the rules is that evidence of dubious value may be presented to the jury if the judge gives the jury a clear instruction as to the proper and limited use of the evidence. This rule provides for limiting instructions and explains the consequences of failing to ask for instructions.
(a) The first sentence tells the judge to determine the limits of evidence in cases where it is admissible as to some but not all parties or admissible only for some limited purpose. *Thomas v. Greenview Hospital,* Ky. App., 127 S. W. 3d 663 (2004).
(b) Admonitions must be requested. The judge is under no obligation to give admonitions on her own motion. *Caudill v. Commonwealth,* Ky., 120 S. W. 3d 635 (2003).
(1) An admonition is presumed to cure most problems that arise at trial. *Mills v. Commonwealth,* Ky., 996 S.W.2d 473 (1999).
(2) There are two situations in which this general presumption of efficacy is rebutted. The first is when an "overwhelming probability" exists that the jury could not follow the instruction and a there is a strong likelihood that the "impermissible inference" would be "devastating" to the objecting party. The second is where the question was not premised on fact and was "inflammatory or highly prejudicial." *Johnson v. Commonwealth,* Ky., 105 S. W. 3d 430 (2003).
(3) The appellate courts defer to the trial judge's decisions on (a) the need to give an admonition, (b) its contents, if given, and (c) the time when it is given. *Baze v. Commonwealth,* Ky., 965 S.W.3d 817 (1997); *Tamme v. Commonwealth,* Ky., 973 S.W.2d 13 (1998); *St. Clair v. Commonwealth,* Ky., 140 S. W. 3d 510 (2004).

NOTES

(c) *Bell v. Commonwealth*, Ky., 875 S.W.2d 882 (1994), strongly suggested that a limiting instruction will be required in most cases. More recently, in *Hampton v. Commonwealth,* Ky., 133 S. W. 3d 438 (2004), the Supreme Court commented only that limiting instructions are proper in "other acts" cases under KRE 404(b), if requested. Failure to give a requested instruction is subject to harmless error analysis. *Soto v. Commonwealth,* Ky., 139 S. W. 3d 827 (2004).

(d) A limiting instruction to the jury has two positive effects: (a) the jury may well use the evidence for its proper purpose; and (b) the prosecutor will not be allowed to misuse the evidence in closing argument.

(e) The Commentary states that this rule will often be used in conjunction with KRE 403 which requires a balancing of the danger of jury misuse of evidence and its probative value. KRE 403 analysis requires consideration of the effectiveness of a limiting instruction as part of the balancing process.

(f) The second sentence of KRE 105(a) codifies the common law principle that unobjected-to evidence is admissible for any purpose. In the absence of a request for admonition, the appellate courts will not consider a claim of improper use unless it rises to the level of palpable error as described in KRE 103(e).

(g) If limited purpose evidence is excluded, the appellate courts will not review a claim of error unless the proponent has expressly stated the limited purpose for which the evidence was to be entered, subject only to palpable error review under KRE 103(e).

Rule 106 Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 6; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PREMISE/PURPOSE:

This is a procedural rule that explicitly allows disruption of the order of presentation of evidence where writings or recorded statements are introduced. Under KRE 611 (a), the judge could permit interruption of the party's presentation of evidence so the adverse party could introduce other parts of the writing or recording. This rule gives the adverse party, rather than the judge, the right to choose when the other parts of a statement or document will be dealt with. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845 (1997). This rule recognizes that the proper time for dealing with the document or recorded statement is when the witness is on the stand, not later on cross-examination or recall

(a) The key to determining whether "completeness" requires interruption is whether "in fairness" other parts of the statement or any other writing or recorded statement should be introduced at this point. The idea is keep the jury from being misled. Additional statements are admitted only to explain or put in context the statements relied upon by the original proponent. *Young v. Commonwealth,* Ky., 50 S. W. 3d 148 (2001).

(b) Under the plain language of the rule, any other writing or recorded statement can be used. This means that if the defendant has two other confessions that explain away the damaging impression created by the Commonwealth's evidence, they can be introduced in the middle of the prosecutor's presentation so that the jury does not get the wrong impression. This can be done even if other witnesses must be called to authenticate these writings or statements.

(c) However, the Supreme Court has cautioned that Rule 106 is a rule of "limited" admissibility. *Soto v. Commonwealth,* Ky., 139 S. W. 3d 827 (2004). The rule permits introduction of only that part of the statement or recording necessary to correct any misimpression created by the adverse party. *Young v. Commonwealth,* Ky., 50 S. W. 3d 148 (2001).

(d) The rule is limited to writings or recorded statements. Its language does not permit introduction of unrecorded statements.

(e) The admission of oral statements may be justified under the claim that the adverse party is misleading the jury. Admissibility under these circumstances is justified under the rule of "curative admissibility" under KRE 401-403, not "completeness" under Rule 106. Typically, the curative statements would be brought up in cross examination or during the defendant's case in chief.

(f) The Kentucky Supreme Court has not decided whether otherwise inadmissible evidence may be introduced under this rule. The U. S. Supreme Court avoided the question in *Beech Aircraft Corp. v, Rainey,* 488 U. S. 153 (1988), and the federal courts are divided on the question.

(f) Because introduction of evidence under KRE 106 can be complicated and can lead to introduction of otherwise inadmissible evidence, in many cases the smart move may be to exclude a writing or recorded statement in the first place. KRE 403.

Rule 107 Miscellaneous provisions.

(a) Parol evidence. The provisions of the Kentucky Rules of Evidence shall not operate to repeal, modify, or affect the parol evidence rule.

(b) Effective date. The Kentucky Rules of Evidence shall take effect on the first day of July, 1992. They shall apply to all civil and criminal actions and proceedings originally brought on for trial upon or after that date and to pretrial motions or matters originally presented to the trial court for decision upon or after that date if a determination of such motions or matters requires an application of evidence principles; provided, however, that no evidence shall be admitted against a criminal defendant in proof of a crime committed prior to July 1, 1992, unless that evidence would have been admissible under evidence principles in existence prior to the adoption of these rules.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 7; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

(a) Parol evidence is not much of a consideration in criminal cases except where written or oral contracts might come up in fraud or theft cases. The Commentary notes that the parol evidence rule is not really a rule of evidence, but is rather a determination by the legislature that a contract would not be useful if it was subjected to oral modifications occurring after execution. [p. 12].

(b) Subsection (b) applies primarily to persons facing retrial. The rule is that any trial or proceeding that began on or after July 1, 1992 is supposed to follow the Rules of Evidence. For offenses committed before July 1, 1992, the defendant has the option to follow older rules of evidence if evidence admissible under the new rules would not have been admissible under the old law. *St. Clair v. Commonwealth,* Ky., 140 S. W. 3d 510 (2004). Any appeal of a case tried under the previous common law evidence rules will be decided on that basis. Any retrials of cases originally prosecuted or begun before July 1, 1992 must be considered under the previous evidence law.

(c) When a rule is amended, the Supreme Court has determined that the principle of KRE 107 should apply. In *Blair v. Commonwealth, Ky.,* 144 S. W. 3d 801 (2004), the court held that the original version of KRE 608 must apply to a retrial occurring after the rule was amended. ■

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ARTICLE II: JUDICIAL NOTICE

NOTES

Rule 201 Judicial Notice of Adjudicative Facts.

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
(1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or
(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
(c) When discretionary. A court may take judicial notice, whether requested or not.
(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.
(g) Instructing the jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 8; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE:
Some facts are so obviously true that it is a waste of time to introduce evidence or witnesses to establish them and a perversion of the trial process to allow cross examination to try to disprove them. This rule deals with facts relevant to issues in a particular case. Although it is still common for judges to "take notice" of laws and regulations, they do not do so under this rule. *Burton v. Foster Wheeler Corp*., Ky., 72 S. W. 3d 925 (2002).

(a) The Commentary says those "adjudicative facts" spoken of in subsection (a) are those that must be proved formally because they are part of the controversy being tried, bearing on who performed the acts and the actors' culpable mental state.

(b) It is important to note that Rule 201 does not govern recognition of law. The existence of and the subject matter of regulations are noticed pursuant to KRS 13A.090(2). Current statutes are noticed under KRS 7.138(3). Superseded statutes and codes are noticed under KRS 447.030.

(c) Subsection (f), on the time of taking notice, excepts Rule 201 from the limitations on applicability set out in KRE 1101(d). Any court, including an appellate court, can, at any time, take judicial notice under this rule. *Newburg v. Jent*, Ky.App., 867 S.W.2d 207 (1993). The Commentary suggests that appellate courts should be reluctant to take judicial notice on appeal if a request for notice was not made at the trial level. This is not what the language of the rule says. A party may, by its actions, waive its right to ask for judicial notice or may be estopped from requesting notice in certain situations, but this is related to the requesting party's misconduct, not the rule language. Courts should not read requirements or policies into a rule unless the language of the rule will support them. Notice is taken because a fact is indisputably true, not because it was raised at the earliest possible moment.

(1) Recently, the appellate courts have taken notice of teenage drinking, *Commonwealth v. Howard*, Ky., 969 S.W.2d 700 (1998), the purpose of seatbelts in automobiles, *Laughlin v. Lamkin*, Ky.App., 979 S.W.2d 121 (1998), the facts stated in a Bill of Particulars,

Jackson v. Commonwealth, Ky., 3 S.W.3d 718 (1999), the reliability of certain forms of expert/scientific evidence. *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258 (1999), the layout and equipment in the Warren County Judicial Center, *Commonwealth v. M. G., Ky App.*, 75 S. W. 3d 714 (2002), and statistics obtained from a U. S. government website. *Polley v. Allen*, Ky. App., 132 S. W. 3d 223 (2004).

(2) In *Samples v. Commonwealth*, Ky., 983 S.W.2d 151, 153 (1998), the court refused to take notice of a document not included in the record on appeal. The court held that the document could not be authenticated otherwise. However, in *McNeeley v. McNeeley*, Ky. App., 45 S. W. 3d 876 (2001), the Court of Appeals took notice of a judgment of conviction that did not appear of record.

(d) A fact is "not subject to reasonable dispute" if it is generally known in the county from which the jury is summoned or if it is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. The judge's personal knowledge is not an officially recognized basis for judicial notice but it will be a conscious or unconscious factor in the judge's determination of whether a fact is generally known in a county.

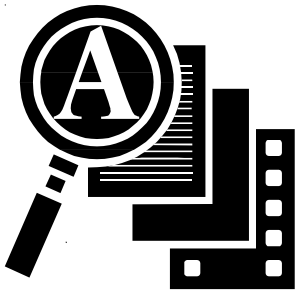
(e) The language of the rule requires a high level of certainty although the rule does not demand the exclusion of any possibility of error.

(f) To encourage use of the rule, Subsection (d) requires the judge to take notice upon request of a party that presents sufficient information upon which to make the determination required by Subsection (b).

(g) The judge can take notice on her own motion, whether asked to or not. KRE 611 (a) instructs the judge to regulate the presentation of evidence to make it effective for the ascertainment of the truth and to avoid needless consumption of time. Judicial notice of a fact certainly achieves these purposes. However, the judge must avoid any appearance of supporting one side over the other. KRE 605; 614 (a) & (b).

(h) Subsection (g) provides that, if the judge takes notice of a fact, she must instruct the jury to accept it as conclusively established. In criminal cases every element of the case, (*i.e.*, identity of the actor, venue and elements of the offense), must be proved beyond a reasonable doubt. KRS 500.070. Under Sections 7 and 11 of the Constitution, only the jury can make these findings. On the surface, the rule conflicts with the Constitution. However, there has been no reported problem with this subsection and the problem may be more theoretical than real.

(i) Because the fact noticed is conclusive, the adverse party is not allowed to introduce contradictory evidence. A party facing this situation is entitled to be heard upon timely request and must be given a chance to introduce evidence. *Johnson v. Commonwealth*, Ky., 12 S. W. 3d 258 (1999). Judicial notice is addressed to the judge as a preliminary issue of admissibility of evidence and therefore the judge is entitled to rely on any reliable information to make the determination. Fairness to the adverse party suggests that a request for judicial notice is made before trial but this is not a requirement. ■



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ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

Rule 301 Presumptions in general in civil actions and proceedings.

In all civil actions and proceedings when not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 9; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

Rule 302 Applicability of federal law or the law of other states in civil actions and proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which the federal law or the law of another state supplies the rule of decision is determined in accordance with federal law or the law of the other state.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 10; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY TO 301 & 302

PURPOSE/PREMISE:
The due process clause of the 14th amendment prohibits shifting any portion of the burden of proof from the prosecution to the defense. *Mullaney v. Wilbur,* 421 U. S. 684 (1973). KRS 500.070(1) & (3) assign the burden of proof (of persuasion) to the Commonwealth on every element of the case except for certain mistake defenses and insanity. *Grimes v. McAnulty*, Ky., 957 S.W.2d 223 (1997). Rules 301 and 302 deal only with civil actions and therefore do not affect criminal practice.

Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.

- John Adams,
'Argument in Defense of the Soldiers in the Boston Massacre Trials,' December 1770

NOTES

ARTICLE IV.
RELEVANCY AND RELATED SUBJECTS

Rule 401 Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 General rule of relevancy.

All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by other rules adopted by the Supreme Court of Kentucky. Evidence which is not relevant is not admissible.

Rule 403 Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.

COMMENTARY

PURPOSE/PREMISE:
These three rules are usually considered together and are, along with KRE 601 and 602, the fundamental principles by which the admissibility of evidence is determined. If evidence is not relevant, KRE 402 says unequivocally that it is not admissible. If it is not admissible, it is unnecessary to consider any other objection to the evidence. If evidence is relevant, the judge may, pursuant to KRE 403 or 611(a), exclude it if the jury is likely to be misled or confused to the point that it might decide the case on improper grounds. The judge may have to apply special principles of admissibility under Rules 404-412 as well. Relevancy is the first question to ask in every problem of evidence analysis.

KRE 401, 402, and 403 indicate a clear intent to admit all evidence that can help produce a fair and accurate determination of factual issues. Judges are encouraged by KRE 403 to resolve their doubts about admitting evidence on the side of admission.

Step One: Relevance Defined
Evidence is relevant if it has any tendency to make a fact "of consequence" to the determination of the case more or less probable than it would be without the evidence. If the evidence is a "link in the chain" of proof, it is relevant. *Parson v. Commonwealth*, Ky., 144 S. W. 3d 775 (2004). Evidence that is even slightly probative satisfies the KRE 401 definition of relevancy. *Blair v. Commonwealth*, Ky., 144 S. W. 3d 801 (2004). Evidence that tends to prove or disprove an element of an offense or defense in criminal cases will be deemed relevant. *Harris v. Commonwealth*, Ky. 134 S. W. 3d 603 (2004). Determining relevancy is the first step in analyzing any evidence question.

Step Two: KRE 402
If evidence is relevant, it is admissible, unless excluded by statutes, court rules, or policies established by federal and state constitutions. Relevant evidence can be excluded for a number of public policy reasons ranging from constitutionally mandated exclusionary rules, to procedural exclusionary rules like RCr 7.24 (9), to evidence rules like KRE 403. However, the fact that evidence

was obtained in violation of a statute, standing alone, is not a ground for exclusion. *Cook v. Commonwealth*, Ky., 129 S. W. 3d 351 (2004).

If evidence is not relevant within the meaning of KRE 401, it is not admissible. KRE 402 makes no exceptions. It is an absolute prohibition.

Step Three: KRE 403 balancing
In *Partin v. Commonwealth*, Ky., 918 S.W.2d 219, 222 (1996), the Supreme Court adopted Professor Lawson's method for determining whether relevant evidence should be excluded under KRE 403:

- Assess probative value of evidence;
- Assess harmful effects of evidence; and
- Determine whether prejudice substantially outweighs probative value.

A useful example of balancing is shown in *Parson v. Commonwealth*, Ky., 144 S. W. 3d 775 (2004). In that case, the court commented that proof of a trace amount of cocaine in the defendant's system met the minimal KRE 401 definition of relevance in a vehicular homicide case. But, the court also observed, the judge might exclude such evidence if the government was unable to establish a degree of impairment resulting from the cocaine trace.

Prejudice defined
The legitimate probative force of the evidence does not count as prejudice. You must show harmful effects above and beyond any legitimate probative value. *Partin, p. 223*.

Availability of other evidence
The availability of other means to prove the same point weighs against admission. *U.S. v. Merriweather*, 78 F.3d 1070 (6th Cir. 1996). Similarly, a judge may exclude on the ground that the proposed evidence is cumulative, that is, the same point has been established through introduction of other evidence. *F.B. Ins. Co. v. Jones*, Ky. App., 864 S.W.2d 929 (1993).

Effect of limiting instruction
However, in all KRE 403 cases, the judge must consider whether the limiting instruction authorized by KRE 105 may temper anticipated prejudice. If the instruction is unlikely to confine the evidence to its proper use, the judge may exclude the evidence entirely.

Too much time; collateral issues
The time it will take to present the evidence and the likelihood that it will lead the jury off to collateral issues are legitimate reasons for exclusion.

Specific Applications of Rule 402

Motivation to testify
Evidence tending to show the bias or interest of a witness in the outcome of the case is always relevant and admissible. *Primm v. Isaac*, Ky., 127 S. W. 3d 630 (2004).

Victim Humanization Evidence
The Supreme Court continues to maintain that such evidence is relevant and admissible in homicide cases despite the absence of a satisfactory explanation of how personal information about a victim bears on an issue of consequence to the litigation. In *Wheeler v. Commonwealth*, Ky., 121 S. W. 3d 173 (2003), the Court said that it helped explain the identity of the victim. In *Soto v. Commonwealth*, Ky., 139 S. W. 3d 827 (2004), the Court merely held that it was relevant as "background information." Neither explanation makes sense. In homicide cases, the government is required to prove that a "person" was wrongfully killed. A "person" is a "human being." KRS 500.080(12). It does not matter who the person was. The only identity question in a criminal case is the identity of the person who committed the crime. Also, KRS 532.055(1) requires the jury to find guilt or innocence only in the first phase of a trial. All information about the personality of the deceased should be reserved for a sentencing phase. If the defendant attacks the character of the

NOTES

deceased during the guilt phase, the door to adulatory evidence may well be opened. But it should not be opened by a case law exception to the Rules. KRE 102.

Opening the Door/Curative Admissibility

In *Thomas v. Greenview Hospital,* Ky. App., 127 S. W. 3d 663 (2004), the court held that a party who introduces incompetent evidence cannot complain if an opponent does the same to rebut it. *Also Johnson v. Commonwealth,* Ky., 105 S. W. 3d 430 (2003). In *Norris v. Commonwealth,* Ky., 89 S. W. 3d 411 (2002), the court noted that a party did not have to object to the opponent's introduction of incompetent evidence in order to employ the curative admissibility rule to introduce rebuttal evidence.

Whether Another Witness is Lying

A witness cannot be asked if another witness is lying. *St. Clair v. Commonwealth,* Ky., 140 S. W. 3d 510 (2004). In many cases, the veracity of another witness may well bear on an issue of consequence as required by KRE 401. However, KRE 607, 608 and 609 already prescribe the means to attack another witness's credibility. In any event, this question solicits an opinion that the witness is not qualified to give and which is not helpful to the jury, rendering it an inadmissible opinion excluded by KRE 701.

Alternate perpetrators / Somebody else did it

In two recent cases, *Beaty v. Commonwealth,* Ky., 125 S. W. 3d 196 (2003), and *Blair v. Commonwealth,* Ky., 144 S. W. 3d 801 (2004), the Supreme Court recognized the validity of the alternative perpetrator defense. The theory is that the identity of the criminal actor is an essential element of every case. *St. Clair v. Commonwealth,* Ky., 140 S. W. 3d 510 (2004). Because identity is an issue of consequence to the outcome of the case, KRE 401, and because Kentucky follows the slight probative value approach to admissibility under KRE 402, any evidence tending to show that the defendant was not the perpetrator is relevant and therefore admissible, subject to KRE 403 balancing. *Beaty* and *Blair* impose limitations on this defense, requiring a showing that there is some likelihood that another person could have committed the offense charged.

Flight

Flight after the occurrence of a crime is deemed "always to be some proof of guilt." *Rodriguez v. Commonwealth,* Ky., 107 S. W. 3d 215 (2003). Obviously, the government must be able to show a link between the crime and the defendant to allow an inference that the defendant departed because of his realization that he had violated the law and his wish to avoid capture.

Co-defendant's guilty plea

It is improper to introduce evidence of a co-defendant's guilty plea during the prosecutor's case in chief at another defendant's trial. *St. Clair v. Commonwealth,* Ky., 140 S. W. 3d 510 (2004)

Specific Applications of Rule 403

Gruesome photos

Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 704-05 (1994). Relevant photographs that depict the scene of the offense, illustrate the testimony of a witness, or have some other legitimate evidentiary purpose, are relevant and therefore admissible unless their gruesome nature will so incense or revolt the jury that it may decide the case on the basis of its anger or revulsion. This rule assumes that the subject of the photo was not substantially altered. *Adkins v. Commonwealth,* Ky., 96 S. W. 3d 779 (2003).

Even if the photos are admissible, the judge may limit the number and content of the photos that are admitted as exhibits and shown to the jury. KRE 611(a); KRE 403.

Crime scene videos are not considered intrinsically more prejudicial than still photos. *Mills v. Commonwealth,* Ky., 996 S.W.2d 473 (1999); *Wheeler v. Commonwealth,* Ky., 121 S. W. 3d 173 (2003).

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Offers to stipulate, and prior convictions

In *Chumbler v. Commonwealth*, Ky., 905 S.W.2d 488 (1995), the court held that a defendant cannot stipulate away the parts of the Commonwealth's case he does not want the jury to hear. The theory is that the government is permitted to present a complete and unfragmented picture of the crime and of the investigation of the crime. *Adkins v. Commonwealth*, Ky., 96 S. W. 3d 779 (2003). In *Old Chief v. United States*, 519 U.S. 172 (1997), the court held that a judge abused his discretion by refusing to allow a defendant to stipulate to a prior conviction (a status element of the charge against him) and instead admitting evidence of the prior conviction. The offer to stipulate does not make the evidence irrelevant under KRE 402, but may render it more prejudicial than probative under Rule 403. *Old Chief* is not a constitutional opinion and therefore is not binding on Kentucky courts.

The Kentucky Supreme Court has little patience for this argument. *Johnson v. Commonwealth*, Ky., 105 S. W. 3d 430 (2003). It is unlikely to prevail on appeal because of the double hurdles imposed by the abuse of discretion standard of review and the appellate requirement of showing that admission of the complained of evidence unfairly influenced the jury's verdict. The place to make and win this argument is at the trial level.

McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 938 (1994). At jury sentencing, *KRE 403* may preclude introduction of an undisturbed prior conviction only if the defendant can show the conviction was without benefit of counsel.

Doubtful evidence

Occasionally judges say that evidence can be introduced "for whatever it's worth." The judge has a duty to know the worth of any evidence that might be admitted as well as the potential for its misuse by the jury. The jury is never supposed to hear any evidence that has not been carefully analyzed. KRE 103 (c). KRE 403 requires careful balancing, and KRE 611 (a) requires the judge to make the presentation of evidence effective for the ascertainment of the truth.

Rule 404 Character evidence and evidence of other crimes.

A. Character evidence generally.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character or of general moral character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim generally. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, other than in a prosecution for criminal sexual conduct, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witnesses. Evidence of the character of witnesses, as provided in KRE 607, KRE 608, and KRE 609.

B. Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:

(1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

(2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

C. Notice requirement.

In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

COMMENTARY

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PURPOSE/PREMISE:
Rule 404 prohibits evidence tending to illustrate character for the purpose of proving a person acted in keeping with that character. The rule acknowledges that jurors may tend to give character evidence too much weight, disregarding or discounting more probative evidence. Where liberty is at stake, it is considered better public policy to exclude this type of evidence even though character evidence may have some probative value.

Character is a less probative form of habit evidence, which most jurisdictions —but not Kentucky— recognize. Character evidence is less reliable than habit evidence because it describes a tendency rather than an invariable response. Character indicates to the jury that action in conformity is more likely, but does not afford a reasonable basis for determining how much more likely. Thus, there are strict limitations on its use.

With the exception of KRE 405, which details how character is to be proved when permitted, KRE 404 and the remainder of Article IV are public policy judgments by the Supreme Court and the General Assembly that certain types of evidence need special handling, even when this evidence is relevant.

Rule 404(a)

The plain language of the rule identifies it as a blanket prohibition against using character evidence to prove an act. Rule 404 applies only to the accused and the "victim."

Rule 404 applies only when the character of the accused or the purported victim is relevant. If the character of some other witness or person is relevant, this rule does not apply. The character of a witness other than the accused or the victim may be attacked by the methods in KRE 607, 608 and 609.

The accused may always introduce evidence of her own character or trait of character, when relevant, to convince the jury she is not the type of person who would perform the acts charged, or at least not with the culpable mental state alleged. *Johnson v. Commonwealth*, Ky., 885 S.W.2d 951, 953 (1994).

Prosecutor may not attack defendant's character except to rebut
If, and only if, the defendant has put his character in issue, the prosecutor is allowed to rebut by introduction of other evidence bearing on the defendant's character. *LaMastus v. Commonwealth*, Ky. App., 878 S.W.2d 32 (1994), is wrong to the extent it holds a defendant who appears as a witness is subject to character attack whether he puts his character at issue or not. Though KRE 608 and 609 allow attacks on credibility in general, it is extremely unlikely the drafters intended KRE 405(a) to apply only to non-testifying defendants.

The accused may present relevant traits of the victim
The accused may also present evidence of a relevant trait of the "victim" of the crime except in prosecutions for sexual offenses in which KRE 412 governs. The prosecution is entitled to rebut the defendant's attack. *Hampton v. Commonwealth,* Ky., 133 S. W. 3d 438 (2004). The general character of the "victim" is not admissible under *KRE 404 (a)(2)*. *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 892 (1997).

Okay to rebut self-defense with peacefulness of victim
In homicide cases, if the defendant claims self-defense or that the victim was the first aggressor, the prosecution may introduce evidence of the trait of peacefulness to rebut the claim made by the defendant. The Commonwealth ordinarily should not be permitted to engage in "anticipatory rebuttal" by introduction of such evidence in the government's case in chief. It becomes relevant only when the defendant attacks the deceased's character through cross examination of prosecution witnesses or introduction of evidence during the defense case. *Saylor v. Commonwealth*, Ky., 144 S. W. 3d 812 (2004); *Caudill v. Commonwealth,* Ky., 120 S. W. 3d 635 (2003).

Methods of proving character when permitted

Opinion and reputation are the only methods by which the character of the accused or the victim may be established under KRE 405. *Blair v. Commonwealth,* Ky., 144 S. W. 3d 801 (2004). Character of the deceased must be distinguished from the defendant's fear of the deceased because in the second instance particular incidents or threats of which the defendant has knowledge are relevant to support the claim of fear and belief in the necessity of self defense. Because the evidence is addressed to a different point, the defendant's state of mind, KRE 405 does not apply. *Saylor v. Commonwealth,* Ky., 144 S. W. 3d 812 (2004).

404(b)

PURPOSE/PREMISE:

In *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694, 703 (1994), the court held that other acts evidence is usually important on questions of corpus delicti, identity, or mens rea. However, proof that the defendant has done other similar bad acts is deemed more likely to mislead or overpersuade the jury than reputation or opinion character evidence. Therefore, Kentucky KRE 404(b) is a rule of general exclusion with only certain specific exceptions. *Sherroan v. Commonwealth*, Ky., 142 S. W. 3d 7 (2004). Uncharged misconduct evidence is presumed inadmissible unless the proponent meets each part of a three-part test first set out in *Bell v. Commonwealth,* Ky., 875 S. W. 3d 882 (1994). In *Norris v. Commonwealth,* Ky., 89 S. W. 3d 411 (2002), the court cautioned judges to follow *Bell* in every case and to "include in the record the reasons for its finding on admissibility."

Three-part balancing test for admission of 404(b) evidence

1. Is the other crime evidence relevant for some acceptable purpose other than to show criminal disposition of the accused? There must be a legitimate issue which the other acts evidence addresses, such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Vires v. Commonwealth,* Ky., 989 S.W.2d 946, 948 (1999). *Commonwealth v. Maddox,* Ky., 955 S.W.2d 718, 721 (1997) (cannot admit evidence on mere assertion it meets the rule). The evidence must address a "fact of consequence" to the disposition of the case. *Bell v. Commonwealth,* Ky., 875 S.W.2d 882, 889 (1994); *Daniel v. Commonwealth,* Ky., 905 S.W.2d 76, 78 (1995).

2. Is there sufficient proof the defendant committed the other act? *Bell*, p. 890.

   The standard is relatively low. The question is whether the jury can reasonably conclude that the act occurred and that the defendant was the actor. *Huddleston v. United States*, 485 U.S. 681 (1988). In *Hampton v. Commonwealth,* Ky., 133 S. W. 3d 438 (2004), the court observed that it had adopted the standard of *Dowling v. United States*, 493 U.S. 342, (1990), thus permitting use of acts for which the defendant may previously have been tried and acquitted. This is allowed because of the different standards of proof. A person is acquitted because a jury cannot find beyond a reasonable doubt. Under KRE 104, the judge has only to consider the preponderance standard. *Parker v. Commonwealth*, Ky., 952 S.W.2d 209 (1997), holds that an uncharged crime need not be proved by direct evidence.

   Evidence of a prior conviction may not be used if a direct appeal is still pending. *Commonwealth v. Duvall*, Ky., 548 S.W.2d 832 (1977); *St. Clair v. Commonwealth,* Ky., 140 S. W. 3d 510 (2004).

3. Finally, does the potential for unfair prejudice substantially outweigh probative value? *Bell, p. 890.* In *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694, 703 (1994), the court held such evidence should be admitted only where the probative value and *the need* for the evidence outweigh its unduly prejudicial effect.

   Where value is slight and prejudice is great, the other acts should be excluded entirely. *Chumbler v. Commonwealth,* Ky., 905 S.W.2d 488, 494, (1995). The effectiveness of a limiting instruction figures in the balancing process. *Bell, p. 890.*

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Remoteness in time

The judge ordinarily must consider the effect of temporal remoteness under the rule. *Soto v. Commonwealth,* Ky., 139 S. W. 3d 827 (2004).

Too much detail

Because of the potential for unfair prejudice, the evidence of other acts should be limited to showing that the other act occurred and that the defendant probably did the act. *Brown v. Commonwealth,* Ky., 983 S.W.2d 516 (1999), holds that excessive presentation of details is unduly prejudicial.

Relevance for some acceptable purpose: the forbidden inference

Evidence that shows nothing more than criminal propensity is not admissible. *Harris v. Commonwealth,* Ky., 134 S. W. 3d 603 (2004). The "forbidden inference" is a chain that goes like this: the prior act shows bad character; the defendant committed the prior act; a person of bad character is likely to commit crimes; therefore the defendant, who committed the other act, also must have committed the crime he is currently on trial for. The proponent of the evidence must show a legitimate purpose for the evidence or it cannot be adduced before the jury.

Effect of stipulation

If a defendant stipulates one or more elements of the prosecutor's case, *i.e.*, admits identity or admits a culpable mental state, the need for other acts evidence is greatly reduced, perhaps to the point that there is no material issue as to the conceded point. However, the Kentucky Supreme Court has invariably held that a defendant is not entitled to "stipulate away" a part of the prosecutor's case. *e.g., Furnish v. Commonwealth,* Ky., 95 S. W. 3d 34 (2002). To some extent, the policy is justified by the prosecution's burden of proof and the double jeopardy prohibition of retrial after acquittal. However, there are other policy statements, notably KRE 102, KRE 403 and KRE 611, that encourage evidence rulings based on considerations of time and fairness rather than unjustified fears that a jury will acquit because the prosecutor was not allowed to present a "live" witness to establish what a stipulation would do equally well. Trial level judges should make their decisions on a fair assessment of the need for evidence presented in a certain way in the particular case.

A stipulation is a party admission under KRE 801A(b)(2), (3) or (4). The judge may treat the admission as an adequate substitute for prejudicial other acts evidence because an admission is more probative than an inference from previous conduct.

Inextricably interwoven acts

Inextricably intertwined acts are not excluded by 404(b) when other acts evidence is so interwoven with the charged crime that mention of the other acts is unavoidable. *Funk v. Commonwealth,* Ky., 842 S.W.2d 476 (1993). An example is where a defendant bought crack cocaine with money taken from the deceased in a murder case. To show that the defendant had recently come into money, it was necessary to show where the money went. The drug buy was deemed sufficiently interwoven. *Furnish v. Commonwealth,* Ky., 95 S. W. 3d 34 (2002). However, the interwoven acts must be intertwined with evidence that is "essential" to the case so that exclusion of the other acts would have a "serious adverse effect on the offering party." [KRE 404(b)(2)]. Again the proponent of the other acts evidence must show the relationship of the acts and how its case will suffer serious adverse effects from exclusion.

"Reverse" 404(b) evidence

Where the defense is that someone other than the defendant on trial is guilty of the crimes charged ("alleged alternate perpetrator" defense), the court has held that the standard for admission under Rule 404(b) should be lower. The main reason for exclusion is the enhanced danger of unfair prejudice to the defendant. This is less of a concern where the other acts evidence tends to implicate someone not on trial. *Blair v. Commonwealth,* Ky., 144 S. W. 3d 801 (2004).

Specific Applications

NOTES

Absence of mistake or accident

Parker v. Commonwealth, Ky., 952 S.W.2d 209 (1997): injuries suffered by child victim prior to charged offense, at times when left in defendant's custody, admissible when defendant testified he did not know how injuries occurred.

Habit

Pre-Rules Kentucky law excluded habit evidence and this, together with the failure to adopt proposed rule 406 authorizing habit evidence, has been used to argue that habit is never admissible. In *Johnson v. Commonwealth*, Ky., 885 S.W.2d 951 (1994), the court held that habit questions should be considered under KRE 404(b). In *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 892 (1997), the Court has stated the failure to adopt a habit rule means the question of habit should be addressed under KRE 401, 402, and 403. There is further discussion under KRE 406.

Flight

Flight can indicate consciousness of guilt when there is some link between the defendant's removal and the offense sufficient to allow a reasonable inference that the defendant left because he feared detection or capture. *Rodriguez v. Commonwealth*, Ky., 107 S. W. 3d 215 (2003).

Threats

In *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 154 (1995), the defendant's threats against a witness indicated his consciousness of guilt. Threats before the charged act may bear on motive as well. *Sherroan v. Commonwealth*, Ky., 142 S. W. 3d 7 (2004). In *Jarvis v. Commonwealth*, Ky., 960 S.W.2d 466, 471-472 (1998), evidence of prior threats within 3-4 weeks of the killing were "not too remote" and qualified for admission.

Intent

Obviously, there must be a specific issue regarding intent for this exception to apply. Certainly, offenses that require showing of the intentional culpable mental state, KRE 501.020(1), and defenses tending to negate this culpable mental state *(e.g.*, intoxication), give rise to evidence on this point.

Motive

Other acts may illustrate motive. *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181, 183 (1996), upheld introduction of evidence of a prior robbery to show motive to kill a clerk in the charged robbery. In *Caudill v. Commonwealth*, Ky., 120 S. W. 3d 635 (2003), and in *Adkins v. Commonwealth*, Ky., 96 S. W. 3d 779 (2003), the court has said that evidence of a drug habit, together with evidence of lack of funds, tends to show a motive to commit robberies or burglaries. Temporal remoteness of the other acts is, of course, a consideration. *Soto v. Commonwealth*, Ky., 139 S. W. 3d 827 (2004).

Marital infidelity/unconventional sex acts

Such evidence is a character smear with little probative value. *Smith v. Commonwealth*, Ky., 904 S.W.2d 220, 222 (1995); *Chumbler v. Commonwealth*, Ky., 905 S.W.2d 488, 492 (1995).

Identity, Modus Operandi

Evidence that reveals identity of the perpetrator by showing peculiar and striking similarities between prior and current acts and by showing the acts are the "trademark" of the defendant. Modus operandi evidence is subject to a "high" standard" for admission. *Blair v. Commonwealth*, Ky., 144 S. W. 3d 801 (2004). Temporal remoteness is less of a concern in M. O. cases because the basis for admission is the distinctive character of the acts. *Commonwealth v. English*, Ky., 993 S.W.2d 941, 944 (1999). *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997), holds that for identity, proponent must show "reasonable similarity" between acts.

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Knowledge
In *Muncy v. Commonwealth*, Ky., 132 S. W. 3d 845 (2004), the court held that evidence of two prior drug buys was admissible to rebut the defendant's claim that he did not know there were drugs in his sofa and that someone must have planted them.

Opportunity
A means to prove identity, by proving defendant had opportunity to commit the charged crime, *e.g.*, that he committed another offense at the same location shortly before or after the charged crime. No published Kentucky case satisfactorily illustrates this exception.

Plan
This is the most misunderstood purpose for other acts evidence. It should not be confused with "common plan or scheme" which appears in RCr 6.18 which governs the types of offenses that may be joined in an indictment. RCr 6.18 applies only to the grand jury.

In *Commonwealth v. English*, Ky., 993 S.W.2d 941, 944 (1999) the court explained the common scheme or plan exception, and pointed out that proximity in time is more essential to show common plan than to show modus operandi.

Plan, as used in KRE 404(b)(1), refers to two situations: (1) where several crimes are constituents of a larger plan, the existence of which is proved by evidence other than the acts offered; and (2) where a person devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.

Preparation
United States v. Nolan, 910 F.2d 1553 (7th Cir.1990) (stealing car to use as getaway car in robbery); *United States v. Hill*, 898 F.2d 72 (7th Cir. 1990) (obtaining marijuana seeds as preparation for conspiracy to manufacture marijuana). There are no Kentucky cases on point.

Pattern of conduct, prior abuse
Bell v. Commonwealth, Ky., 875 S.W.2d 882, 889 (1994) discussed a pattern of conduct as a ground of admission if the proponent shows that the acts are so similar as to indicate a reasonable probability that the crimes were committed by the same person. How this differs from M.O. is unclear. In *Jarvis v. Commonwealth*, Ky., 960 S.W.2d 466, 470 (1998), the court held the Commonwealth may show evidence of a pattern of abuse in homicide cases if incidents are not too remote, and prior threats within 3-4 weeks of killing qualified.

List of uses is illustrative only
The list of purposes is not exhaustive. Any legitimate non-propensity purpose can justify admission of other acts evidence.

404(c)

Reasonable notice required
The defendant must have time to investigate proposed other acts evidence before, rather than during, trial. *Daniel v. Commonwealth*, Ky., 905 S.W.2d 76, 77 (1995).

The rule does not specify a time before trial for notification. Reasonableness will vary with the type of evidence. If the proposed evidence involves acts outside the county that did not result in official records, more time will be required than if the other act produced a felony conviction entered in the same court two months before trial.

What qualifies as notice
The rule does not require written notice. In *Soto v. Commonwealth*, Ky., 139 S. W. 3d 827 (2004), the court made this point. A letter from the prosecutor is sufficient notice, but a police report in a discovery response is not. *Gray v. Commonwealth*, Ky., 843 S.W.2d 895 (1992); *Lear v. Commonwealth*, Ky., 884 S.W.2d 637 (1994); *Daniel v. Commonwealth*, Ky., 905 S.W.2d 76, 77 (1995).

NOTES

Actual notice
A defense motion in limine to exclude demonstrated that the defendant had actual notice of 404(b) evidence. *Bowling v. Commonwealth*, Ky., 942 S.W.2d 293 (1997).

Exclusion
Exclusion is not the only remedy provided for by the rule. But in the absence of a satisfactory excuse for failure to give notice exclusion should be the standard remedy.

Opening the door, rebuttal
The notice requirement is expressly limited to other acts evidence intended for the case-in-chief. If the defendant opens the door during cross-examination, or by introducing evidence, the Commonwealth may rebut by putting on evidence to deny or explain, but only to the extent necessary to counter the defendant's evidence.

Reminder
Do not rely on a general motion in limine to preserve 404(b) objections. *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181 (1996). A continuing objection is also risky. *Lickliter v. Commonwealth*, Ky., 142 S. W. 3d 65 (2004). Be specific.

Rule 405 Methods of proving character.

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to general reputation in the community or by testimony in the form of opinion.
(b) Inquiry on cross-examination. On cross-examination of a character witness, it is proper to inquire if the witness has heard of or knows about relevant specific instances of conduct. However, no specific instance of conduct may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of the inquiry.
(c) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

COMMENTARY

PURPOSE/PREMISE:
Prejudice inevitably flows from the selective presentation of negative incidents from a person's past. The purpose of Rule 405 is to define and limit the methods of proving character in order to limit that prejudice.

(a) Under KRE 405(a), character may be proved by two methods, reputation or opinion. In *Purcell v. Commonwealth*, Ky., 149 S. W. 3d 382, 399 (2004), the court adopted Lawson's observation that adoption of only two methods of proving character amounted to an implied prohibition of introduction of particular acts to prove action in conformity with character. However, when the issue is first aggressor or self defense, specific instances are permitted under KRE 404(a). *Saylor v. Commonwealth*, Ky., 144 S. W. 3d 812 (2004).

(b) Both reputation and opinion are forms of lay opinion evidence that might otherwise be governed by KRE 402 and KRE 701. Reputation is the witness's estimate of what other people in the community think. Opinion under this rule is personal opinion. Obviously, a jury is not going to be impressed by either form of evidence if an adequate basis of personal knowledge is not laid. Thus, while neither KRE 405 nor KRE 602 requires a formal foundation showing the basis of knowledge, this is one instance in which the foundation should be laid carefully and thoroughly. "Community" means those persons likely to know something about the person whose character is at issue. The word does not necessarily describe a geographical location.

(c) Cross examination under Subsection (2) is limited to "relevant" specific instances of conduct. The questioner must have a "factual basis" for the subject matter of the inquiry. This requirement parallels the attorney's ethical duty under SCR 3.130(3.4)(e).

NOTES

(d) Specific incident cross examination is to "test the knowledge and credibility of the witness" to show whether the witness knows enough about the person for the jury to credit his opinion. *U.S. vs. Monteleone*, 77 F.3d 1086, 1089 (8th Circuit, 1996).

(e) The cross examiner must have a good-faith belief that the incident occurred and that the witness would probably have known about it. Questions about events essentially private in nature cannot test the accuracy, reliability, or credibility of a witness. Such incidents are irrelevant. *Monteleone*, p. 1090.

(f) Particularly when the character of the defendant is under examination, introduction of prior negative acts creates the same type of prejudice condemned by KRE 404(b). Although KRE 405(b) allows this type of cross-examination, the jury must be admonished to limit its use to the proper purpose - reflection on the credibility of the witness.

(g) If the witness has not heard of the specific incident, there is no legitimate basis for further impeachment by proving the event occurred or the witness is lying about not hearing about it. Such an inquiry is "collateral" as an attempt to impeach an answer to an impeachment question, which may or may not bear on an issue in the case.

(h) In *Sherroan v. Commonwealth*, Ky., 142 S. W. 3d 7 (2004), the court held that in criminal cases it is almost unheard of for character to be an element in the charge or a defense. Thus, KRE 405(c) should not figure in too many criminal cases.

Rule 406 (Number not yet utilized.)

PURPOSE/PREMISE:
This number was assigned in the 1989 draft to a rule authorizing introduction of habit evidence. The rule was not adopted in 1992. However, the failure to adopt a habit rule means the question of habit might be addressed under KRE 401, 402, and 403. *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 892 (1997).

(a) Habit is defined as a person's regular conduct in response to a particular situation. *Sherroan v. Commonwealth*, Ky., 142 S. W. 3d 7 (2004). Kentucky common law excludes the introduction of habit evidence to prove action in conformity with the habit. *Thomas v. Greenview Hospital*, Ky. App., 127 S. W. 3d 663 (2004).

(b) Recently, a number of cases have discussed habit. In *Burchett v. Commonwealth*, Ky., 98 S. W. 3d 492 (2003), a plurality of the court retained the traditional ban on habit evidence. *St. Clair v. Commonwealth*, Ky., 140 S. W. 3d 510 (2004). In *Brooks v. LFUCG*, Ky., 132 S. W. 3d 790 (2004), the court felt constrained to note that the ban on habit evidence did not preclude reliance on business custom in cases involving introduction of records under KRE 803(6).

(c) There are some rules that informally permit habit evidence. The "signature/M.O." exception to KRE 404(b) comes to mind immediately, as does the prior sexual relationship exception in KRE 412(b)(1)(A). However, they differ from habit as historically understood because they involve specific examples of repetitive activity. Habit evidence is undesirable because it usually devolves to a witness's opinion that the defendant or the prosecuting witness invariably acted a certain way in certain situations. In practice, the large number identical responses needed to establish a basis for the jury's inference of an invariable response would run afoul of the KRE 403 or KRE 611(a) ban on excessive consumption of time.

Rule 407 Subsequent remedial measures

When, after an event, measures are taken which, if taken previously, would have made an injury or harm allegedly caused by the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence in connection with the event. This rule does not require the exclusion of evidence of subsequent measures in products liability cases or when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

NOTES

COMMENTARY

PURPOSE/PREMISE:
This rule reflects a policy judgment that it is more advantageous to society to encourage repair or improvement measures by excluding mention of them at trial than to allow a party to argue the repair or improvement is an admission the item or premises were dangerous. The rule can apply in cases in which a failure to perceive a risk [reckless/wanton culpable mental state] is an element. An example: repairs made to a car's brakes after involvement in an accident resulting in a death. The action need not occur immediately after the event. *Metropolitan Property and Casualty Insurance v. Overstreet,* Ky., 103 S. W. 3d 31 (2003).

Ownership or control, impeachment: A party may use subsequent repair, improvement, or change to show "ownership or control." The inference is that only the owner or person in control would undertake to repair the car.

Another possible use is impeachment. Of course, these matters must be "at issue" and also must be "of consequence to the determination of the action."

A limiting instruction will be necessary in the case of impeachment.

Rule 408 Compromise and offers to compromise.

Evidence of
(1) Furnishing or offering or promising to furnish; or
(2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

COMMENTARY

PURPOSE/PREMISE:
The rule seeks to encourage compromise and settlement by preventing later use of an offer to compromise (or discussions leading up to the offer) as an admission of guilt or liability. However, the rule does not preclude admission for some other purpose. *God's Center Foundation v. LFUCG,* Ky. App., 125 S. W. 3d 295 (2003). Thus, such evidence is available to show the bias or prejudice of a witness [the inference being the witness is testifying because not offered enough to compromise the claim] or an attempt to obstruct criminal investigation or prosecution [an attempt to buy off the witness]. The rule operates much like KRE 410 does for plea bargaining.

Rule 409 Payment of medical and similar expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

COMMENTARY

PURPOSE/PREMISE:
This rule insulates an offer or attempt to ameliorate harm from being used against the party by creating an inference of guilty knowledge. The rule protects offers to pay, or payment of, medical or similar expenses which may or may not include payment for pain and suffering.

Rule 410 Inadmissibility of pleas, plea discussions, and related statements.

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;
(2) A plea of nolo contendere in a jurisdiction accepting such pleas, and a plea under *Alford v. North Carolina*, 394 U.S. 956 (1969);
(3) Any statement made in the course of formal plea proceedings, under either state procedures or Rule 11 of the Federal Rules of Criminal Procedure, regarding either of the foregoing pleas; or
(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible:
(a) In any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it; or
(b) In a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

COMMENTARY

PURPOSE/PREMISE:
To facilitate the necessary preliminary discussions, Rule 410 insulates the defendant from later use of withdrawn guilty pleas, nolo contendere, and *Alford* pleas, statements made at the entry of such pleas, and statements made in bargaining for a plea that did not take place or was later withdrawn. Obviously, pleas that are never withdrawn are not exempted by this rule. *Porter vs. Commonwealth*, Ky., 892 S.W.2d 594, 597 (1995).

Plea discussions are defined as discussions in advance of the time of pleading "with a view toward agreement" under which the defendant enters a plea in exchange for charge or sentencing concessions. *Roberts vs. Commonwealth*, Ky., 896 S.W.2d 4, 5 (1995). The test to determine when plea discussions take place focuses first on the accused's actual and subjective expectations that he was negotiating a bargain at the time of the discussion and second on whether the defendant's expectations were reasonable in light of all the objective circumstances. *Roberts*, p.6. The rule applies to discussions held before or after formal charges are filed. *Roberts*, p.6.

With a county attorney
Literal reading of the rule limits plea discussions to those conducted between the accused and "an attorney for the prosecuting authority." Because KRS 15.700 provides for a unified prosecutorial system, discussions with a county attorney in a felony case should be protected because both county and commonwealth attorneys are attorneys for the prosecuting authority.

With a police detective
In *Roberts vs. Commonwealth*, Ky., 896 S.W.2d 4, 6 (1995), the Supreme Court held that a defendant's statements during plea discussions with a police detective acting with the express authority of the commonwealth attorney would be protected by this rule.

Specific Applications

Admissions against interest
The rule precludes use of pleas and discussions as admissions against interest which might otherwise be authorized under *KRE 801A(b)*. *Pettiway vs. Commonwealth*, Ky., 860 S.W.2d 766, 767 (1993).

Statements made during withdrawn or *Alford* pleas
The rule excludes the defendant's statements during the taking of a withdrawn guilty plea or an entered *Alford* or nolo plea. *LFUCG v. Smolic*, Ky., 142 S. W. 3d 128 (2004).

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During a PSI investigation
In *Roberson vs. Commonwealth*, Ky., 913 S.W.2d 310, 316 (1994), the court suggested that statements made to officers conducting PSI investigations might be covered by the rule if the plea is later withdrawn.

***KRS 532.055* or *KRS 532.080* hearings**
The rule does not preclude the use of *Alford* or nolo contendere pleas as evidence of prior convictions in KRS 532.055 or KRS 532.080 hearings. The rule is addressed to statements made by the defendant, not to criminal convictions.

Sentencing
Pettiway vs. Commonwealth, 860 S.W.2d at p.767 and *Whalen vs. Commonwealth*, Ky.App., 891 S.W.2d 86, 89 (1995) authorize use in sentencing, despite the fact such use is certainly an admission, as well as evidence of the judgment of the court which entered them [KRE 801 A(b)(1) and KRE 803(22)].

Perjury
If the defendant is tried for perjury, false statements made under oath, on record, and in the presence of counsel, plea statements may be admitted.

Police and prosecutors not protected
This rule exists for the protection of the criminal defendant only. The rule provides no exemption for statements by agents of the commonwealth either in plea discussions or at the pleas themselves. Statements by the police or prosecutors, if relevant, could be introduced as party admissions pursuant to KRE 801 A(b)(2), (3) or (4). However, KRE 410 (4)(a), a special application of the rule of completeness, would allow the prosecution to introduce other parts of the plea or plea discussions that "ought in fairness be considered contemporaneously with it." Use of prosecution statements is an available but risky tactic.

Rule 411 Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

COMMENTARY

PURPOSE/PREMISE:
This rule primarily supports the public policy of mandatory insurance for automobiles and encourages insurance for other purposes. It does so by denying a party the inference that the adverse party's insurance or failure to insure against a possible risk is evidence of negligent or wrongful conduct.

Can apply in criminal case
Justice v. Commonwealth, Ky., 987 S.W.2d 306, 314 (1998) The rule applies in criminal cases.

Exceptions
Ownership, agency, or control of property: Proof of insurance is circumstantial evidence of ownership, agency, or control of property because KRS 304.99-060 requires the owner or operator of a motor vehicle to maintain insurance on it or face criminal penalties. However, if there is other evidence to prove these points, the policies underlying this rule and KRE 403 counsel exclusion.

Bias or prejudice
Proof that a person is insured may be circumstantial evidence of bias or prejudice of that person as a witness on the theory that the insured person will testify as he believes his insurable interest dictates.

Limiting instruction
If evidence of insurance is introduced over *KRE 403* objection, a limiting instruction is necessary.

NOTES

Rule 412 Rape and similar cases -
Admissibility of victim's character and behavior.

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):
- **(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.**
- **(2) Evidence offered to prove any alleged victim's sexual predisposition.**

(b) Exceptions:
- **(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:**
  - **(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;**
  - **(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and**
  - **(C) any other evidence directly pertaining to the offense charged.**
- **(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.**

(c) Procedure to determine admissibility.
- **(1) A party intending to offer evidence under subdivision (b) must:**
  - **(A) file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and**
  - **(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.**
- **(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.**

COMMENTARY

PURPOSE/PREMISE:

The purpose of this rule is to make sure that the prosecuting witness is not put on trial by the defense through admission of evidence that is largely irrelevant to the ultimate issue in the case, whether the defendant is guilty or innocent of the charge. *Anderson v. Commonwealth*, Ky., 63 S. W. 3d 135 (2001). It was adopted to break the hold of a vestigial practice, primarily in rape cases, in which the chastity of an adult female was deemed relevant to "the reasonableness of her story" and in which instances of prior "unchastity" were considered powerful evidence bearing on this point. *Roberson's New Kentucky Criminal Law and Procedures*, 2 Ed., p.779-784 (1927). However, the drafters of the rule also had to recognize that the credibility of the prosecuting witness in a sex offense case must be tested. A defendant also has a constitutional right to present evidence. The rule attempts to strike a balance between the defendant's right to confront the witness and to present a defense and the need to shield the jury from a parade of salacious details about the prosecuting witness that may distract them from the issues of the case. At bottom, the rule is a tacit recognition that, even in the 21st Century, a jury's repugnance at the sexual activities of the purported "victim" may be more persuasive than the other evidence that may be adduced.

NOTES

A rule of exclusion
The rule prescribes rigid procedural steps which must be taken to introduce evidence on the limited subjects which the rule permits. Like *K*RE 404 and KRE 802, Rule 412 is a rule of general exclusion, subject to three exceptions. *Garrett v. Commonwealth*, Ky., 48 S. W. 3d 6 (2001). Thus, the proponent of evidence bearing on the sexual history of the prosecuting witness must show that the proposed evidence meets the conditions of one or more of the three exceptions.

Witness reputation, others' opinion
KRE 412(a) explicitly precludes introduction of evidence of prior sexual behavior or predisposition. This necessarily includes reputation and opinion evidence as well as specific acts.

Identification of semen, cause of injuries
KRE 412(b)(1)(A) authorizes introduction of evidence at a criminal trial of past sexual behavior with others for specific purposes, i.e., identification of the donor of the semen and other physical evidence and to show a cause of injuries not attributable to the defendant.

Sex with the accused, consent
KRE 412(1)(B) permits proof of specific acts of sexual behavior with the accused as evidence of consent. In cases where the prosecuting witness is deemed legally incapable of giving consent, such evidence would be irrelevant.

Other evidence directly pertaining
KRE 412(b)(1)(3) is a catch-all that allows introduction of other sexual behavior pertaining directly to the act charged. Other acts must be "directly" relevant. One obvious example is mistake of age, an affirmative defense established by KRS 510.030. Presumably, knowledge of the sexual history of the prosecuting witness with others could be the basis of a defendant's reasonable belief that the witness was capable of consent or was of age.

Rape shield does not always apply
A defendant was denied the right to a fair trial and the right to present a defense when the trial court excluded evidence of prior sexual contact between the complaining witness, who was under age, and her brother without first determining the relevance of such evidence. *Barnett v. Commonwealth*, Ky., 828 S.W.2d 361 (1992). If the physician in *Barnett* had known of the victim's ongoing sexual conduct with her brother, the physician might not have branded the defendant as the assailant. A medical finding of frequent sexual activity by the child victim in *Barnett* established the relevance of evidence that the perpetrator was one other than the person charged.

When a child is concocting, fabricating, or transferring
Where there is a substantial possibility that a child victim may be "concocting" a charge related to sexual behavior or "transferring" an accusation of something that may have actually happened but with someone else, due process and fundamental fairness require that a defendant is entitled to present evidence to show fabrication. *Mack v. Commonwealth*, Ky., 860 S.W.2d 275, 277 (1993). In other words where it appears a child victim may be fantasizing or fabricating a story, or accusing the wrong person, the victim's rights (in the *Mack* case, privacy rights) must give way to the defendant's rights under the state and federal Constitutions to a fair trial, including the right to confront witnesses.

Prior false allegations
The rule in Kentucky is that accusations made by the prosecuting witness against others are admissible in a sex offense trial only if they are "demonstrably false." If this first condition is met, the judge must engage in KRE 403 balancing. *Berry v. Commonwealth*, Ky. App., 84 S. W. 3d 82 (2001).

Rebuttal of inference of child's ignorance
Many jurisdictions agree that prior sexual experience of a youthful victim is relevant and admissible to rebut the inference that a victim could not describe the sexual crime alleged if the defendant had not committed the acts in question. *State v. Budis*, 593 A.2d 784, 791-792 (N.J. 1991)(citing cases with similar holdings from Arizona, Maine, Massachusetts, Nevada, New Hampshire, New York and Wisconsin as well as numerous law review articles)

Personal Knowledge Required
A witness with no personal knowledge of any prior consensual acts cannot testify under the rule. *Hall v. Commonwealth*, Ky., 956 S.W.2d 224, 226 (1997).

Timing and contents of motion
KRE 412(c)(1)(A) requires a defendant wishing to introduce evidence of prior sexual conduct to file a *written* motion 14 days before the scheduled first day of trial, although the judge may allow later filing for new evidence not discovered by due diligence or the raising of a new issue. In the motion, the defendant must specifically describe the evidence sought to be admitted and must identify the purpose for which introduction is sought.

Notice
The moving party must serve the motion on all other parties to the action and must serve a copy on the witness or the witness's guardian. Service of the motion is not a substitute for a subpoena. If you want a witness at the hearing, you must comply with RCr 7.02.

Hearing
KRE 412 (c)(2). The judge must conduct a hearing before admitting any evidence that might come under this Rule. The alleged victim and the parties must be given the opportunity to attend and to be heard. Presumably, the prosecuting witness may appear with counsel at the hearing.

Subsection (2) does not prescribe any particular procedure at the hearing. Therefore, the defendant may call the prosecuting witness or any other witness.

If the judge finds that the evidence qualifies under the rule and that the probative value is not outweighed by the danger of unfair prejudice, the evidence is admissible. *Berry v. Commonwealth*, Ky. App., 84 S. W. 3d 82 (2001).

Because in most cases the admissibility of evidence will be determined pre-trial, it may be well to ask the judge for a written ruling. KRE 103(d).

In criminal cases, ordinary KRE 403 balancing applies. Once the proponent qualifies relevant evidence under this rule, KRE 403 favors admission unless the potential for misuse substantially outweighs the probative value of the evidence.

Using record of hearing for impeachment, substantive evidence
KRE 412(c)(2) mandates sealing of the record of the hearing unless the judge rules otherwise. Obviously, the record of the hearing in chambers could be used to impeach the prosecuting witness at trial. [KRE 801 A(a)(1); 106] If the prosecuting witness suffers loss of memory at trial but testified on that subject at the hearing, the video tape or transcript might be introduced as substantive evidence under KRE 801 A(a)(1), 804(a)(3), and 804(b)(1). However, until the judge authorizes such use, the record remains unavailable.

Role of the attorney for the Commonwealth
It is important to keep in mind that the attorney for the Commonwealth represents the government in criminal cases. KRS 15.725; SCR 3.130 (1.13). Therefore, the prosecutor is not the lawyer for the prosecuting witness at the hearing prescribed by Subsection (c)(2). The government's lawyer should be limited to explaining how the introduction of the proposed evidence will deny his client, the government, a fair trial, not how it will affect the prosecuting witness. ■

NOTES

ARTICLE V: PRIVILEGES

NOTES

This is the most involved article of the rules because of the number of exceptions that are contained in each of the privileges that follow. Not every privilege has been incorporated into the Rules of Evidence. Article V privileges are meant to apply in proceedings in the Court of Justice, and therefore privileges that are found outside the rules, while applicable to court proceedings, will also be applicable in any other government proceeding. Privileges may be found throughout the Kentucky Revised Statutes, KRS Chapter 421, and Chapter 194 for CHR records or Chapter 61 for records not falling under the open records law.

Privileges are construed narrowly because they are exceptions to the KRE 501 duty to testify and because they often keep relevant evidence from the jury. However, the enactment of privileges in the first place is a recognition both by the Supreme Court and by the General Assembly that there are some areas of communication that should be private. The General Assembly and the Supreme Court, by adopting rules of privilege, already have balanced the pros and cons of keeping certain evidence from juries. Neither attorneys nor trial judges should attempt to undermine the policy expressed in the privileges. In many instances, there will be no question that a claimed privilege applies or does not apply. However, for the many instances in which there may be a question, courts should not presume against the claimant. Rather, the court should make an even-handed determination and should require the opponent of the privilege to show why it should not be indulged. *Stidham v. Clark*, Ky., 74 S. W. 3d 719 (2002).

Rule 501 General rule.

Except as otherwise provided by Constitution or statute or by these or other rules promulgated by the Supreme Court of Kentucky, no person has a privilege to:

- **Refuse to be a witness;**
- **Refuse to disclose any matter;**
- **Refuse to produce any object or writing; or**
- **Prevent another from being a witness or disclosing any matter or producing any object or writing.**

COMMENTARY

PURPOSE/PREMISE:
Any person properly summoned to the witness stand under RCr 7.02 or KRS 421.190 cannot lawfully refuse to be a witness, refuse to disclose any "matter" or refuse to produce any object or writing unless that person claims a privilege under the Federal or Kentucky Constitutions or Kentucky statute or court rule. The rule clearly implies that the courts cannot create common law privileges. *Stidham v. Clark*, Ky., 74 S. W. 3d 719 (2002). No person may prevent another from being a witness or disclosing any matter or producing any object or writing unless that person is privileged to do so. Although there is no penalty attached to this rule, KRS Chapter 524 provides criminal penalties for tampering with, intimidating, or bribing a witness. KRE 804(b)(5), effective July 1, 2004, authorizes introduction of hearsay statements of a witness who is unavailable at trial because of a party's interference.

(a) Keep in mind this rule applies only when the rules apply, that is, in proceedings in the Court of Justice. KRE 101; KRE 1101(a)(c). Production of evidence is still governed by the discovery and subpoena duces tecum provisions of Chapter 7 of the Criminal Rules. However, the privileges set out in the rest of Article V apply at any point of any proceeding, including disclosure of information in discovery.

NOTES

(b) KRE 501 does not apply to court proceedings in which the Rules of Evidence do not apply. KRE 1101(c) provides that privileges are available at all court proceedings, while KRE 1101(d) provides that the rules other than privileges do not apply in non-trial settings. KRE 501 can hardly be considered a privilege. Therefore, KRE 501 does not apply except at trial in chief or in those proceedings, like jury sentencing, in which the rules apply. RCr 7.02 provides the means of getting a person before the court to testify at a pretrial or sentencing hearing. Once the person is in the courtroom, KRS 421.190 authorizes the judge to compel testimony. Therefore, a person who does not wish to testify at a proceeding where the Rules of Evidence do not apply still has to do so. The legal authority for compulsion comes from a different source.

(c) This analysis does not apply to grand jury testimony because RCr 5.12 expressly authorizes the grand jury to seek a court order to compel testimony.

(d) Because depositions under RCr 7.12 are not excluded from the application of the Rules of Evidence under KRE 1101(d), KRE 501 applies and a witness may be compelled to testify at a deposition, absent a privilege.

(e). *Morrow v. B, T, & H,* Ky., 957 S.W.2d 722 (1997), discusses the work product privilege. CR 26.02

(f). *Weaver v. Commonwealth*, Ky., 955 S.W.2d 722, 727 (1997), disallowed a claim that a surveillance privilege exists in favor of the Commonwealth. KRE 501 precludes the creation of any "common law" privileges.

(g). There is a legitimate argument that a criminal defendant does not have a right to testify under Section 11 of the Constitution because the common law at the time the language was first adopted deemed the defendant an incompetent witness. However, the constitutional issue is unimportant because there is a federal constitutional right and because KRE 601 makes "every person" who satisfies the four requirements of KRE 601(b) a competent witness. Also, KRS 421.225 permits the defendant to testify upon his request to do so. In *Florence v. Commonwealth,* Ky., 120 S. W. 3d 699 (2003), the court held that if a judge has reason to believe that a defendant's waiver of the right to testify is not knowing and voluntary, the judge must inquire on his own motion.

(g). Occasionally, courts conflate privilege with immunity. In *Overstreet v. Overstreet,* Ky. App., 144 S. W. 3d 834 (2003), the court identified a "judicial privilege" in a tort case. The plain language of KRE 501 forbids creation of common law privileges. It is clear that the court was describing a form of immunity from tort liability rather than a true privilege.

Rule 502 (Number not yet utilized.)

PURPOSE/PREMISE:
The so-called **"honest eavesdropper rule"** was dropped from the proposal in 1992. It would have allowed a person who overheard privileged communications to testify. More important, it would have allowed an adverse party to compel testimony by the eavesdropper concerning the communication as long as the communication was obtained "legally."

The failure to adopt this rule in 1992 does not mean evidence inadvertently overheard is necessarily excluded: KRE 509 imputes a waiver of privilege to a person who intentionally or carelessly permits a third party to overhear an otherwise privileged conversation. And the requirement of "confidentiality," written into the privileges, presumes that the claimant did not intend for others to hear the communication.

Rule 503 Lawyer-client privilege.

A. Definitions, As used in this rule

1. **"Client" means a person, including a public officer, corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.**
2. **"Representative of the client" means:**
   - **(A) A person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client; or**
   - **(B) Any employee or representative of the client who makes or receives a confidential communication:**
     - **(i) In the course and scope of his or her employment;**
     - **(ii) Concerning the subject matter of his or her employment; and**
     - **(iii) To effectuate legal representation for the client.**
3. **"Lawyer" means a person authorized, or reasonably believed by the client to be authorized to engage in the practice of law in any state or nation.**
4. **"Representative of the lawyer" means a person employed by the lawyer to assist the lawyer in rendering professional legal services.**
5. **A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.**

B. General rule of privilege

A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

(1) Between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(2) Between the lawyer and a representative of the lawyer;

(3) By the client or a representative of the client or the client's lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) Between representatives of the client or between the client and a representative of the client; or

(5) Among lawyers and their representatives representing the same client.

C. Who may claim the privilege

The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

D. Exceptions

There is no privilege under this rule:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; and

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two (2) or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

NOTES

Rule 503

COMMENTARY

NOTES

PURPOSE/PREMISE:
This protects most communications between clients and attorneys. Subsection A.5 defines a confidential communication as one made in the furtherance of rendition of legal services not intended to be disclosed to third persons. Communication is given a broad definition as either words or actions intended to communicate some meaning to the attorney or the attorney's assistants. But where acts may be interpreted as "non-communicative" the attorney may be compelled to testify. *St Clair v. Commonwealth*, Ky., 140 S. W. 3d 510 (2004).

Under subsection (b), communications may be between the client, the client's representative, the attorney, or the attorney's representative, in any combination as long as the communication was not intended for disclosure to others and concerns some sort of rendition of legal services. This means that communications to **investigators, secretaries and clerks** fall under the privilege. *Wal-Mart Stores, Inc. v. Dickinson*, Ky., 29 S.W.3d 796 (2000). The claimant must show that an attorney client relationship existed at the time of the communication. This can be inferred from conduct as well from the existence of a contract or a court appointment. *Lovell v. Winchester*, Ky., 941 S. W. 2d 466 (1997).

Practice of law, defined

SCR 3.020 defines the practice of law as "any service rendered involving legal knowledge or legal advice" which involves "representation, counseling, or advocacy in or out of court and which concerns the rights, duties, obligations, liabilities or business relations of the one requiring the services." If the communication is about one of these topics, it should fall under the attorney-client privilege. If it does not, for example where the attorney is acting as a business advisor, the privilege does not apply. *Lexington Public Library v. Clark*, Ky., 90 S. W. 3d 53 (2002).

Rule covers only disclosure a court can force
This rule is not the only mandate of client confidentiality. SCR 3.130(1.6) prohibits an attorney from disseminating "information" about a client or case unless compelled to by law. KRE 503 deals only with the question of what a court may require an attorney, a client, or a representative of either to disclose in a court proceeding. All other situations are governed by SCR 3.130(1.6). The Commentary to Rule 1.6 says that a lawyer has an ethical duty to invoke the attorney-client privilege until the client says otherwise. KRE 503(c) says the lawyer may claim the privilege, but only on behalf of the client, not himself.

Client may refuse, and prevent others
The privilege as set out in subsection (b) is that a client may refuse to disclose confidential communications and may prevent any other person from disclosing these communications as long as they were made for the purpose of facilitating rendition of professional legal services to the client. As you can see from the rule, this involves a number of fact scenarios which are listed.

Erroneous forced disclosure
Under KRE 510(1) a privilege is not lost forever if it is compelled erroneously. The thinking behind this rule is that the attorney must submit to the lawful order of the court (mistaken or not) but that the privilege which ordinarily would be lost upon disclosure can be restored on appeal or reconsideration.

Exceptions to the privilege
In subsection (d) the drafters list the exceptions to the privilege. In keeping with the ethical rule, if the lawyer knows that the client consulted him for the purpose of committing or assisting anyone to commit or to plan "what the client knew" or should have known was a crime or fraud the privilege does not apply. It is not what the attorney knew or reasonably should have known, it is what the client knew or should have known.

Where the lawyer and client are adverse parties, there is no point having a privilege because information that would be privileged would also be essential to the disposition of the case. In *Rodriguez v. Commonwealth*, Ky., 87 S. W. 3d 8 (2002), the court held that the privilege is waived

"automatically" when a client testifies adversely to her attorney. However, the court also held that the waiver was limited to the matters raised by the client and could not be deemed a "blanket" waiver.

Likewise, where an attorney's only relationship was as an attesting witness, the lawyer is not acting in the capacity as a counselor or advocate, and therefore the privilege does not apply. Where there are clients who have a joint interest, in certain instances there would be no point in having the privilege because the clients could not reasonably expect the attorney not to let the other side know. In such instances, it would not be reasonable to keep this information out of evidence if the clients later have an adversary relationship.

Successor counsel
The client's file belongs to the client, not the attorney. A lawyer must surrender the client's case file to successor counsel or to the client acting *pro se*, even if not reimbursed for the trouble of providing it. KBA Opinion E-395 (March 1997)

Work product
Work product belongs to the attorney, not the client. Disclosure cannot be compelled against the attorney's wishes. *Morrow v. B, T, & H*, Ky., 957 S.W.2d 722 (1997) contains a discussion of the work product privilege in Kentucky. However, the work product rule does not apply to bar a client from obtaining her entire file. *Spivey v. Zant*, 683 F.2d 881, 885 (5th Cir. 1982).

Rule 504 Husband-wife privilege.

1. Spousal testimony. The spouse of a party has a privilege to refuse to testify against the party as to events occurring after the date of their marriage. A party has a privilege to prevent his or her spouse from testifying against the party as to events occurring after the date of their marriage.

2. Marital communications. An individual has a privilege to refuse to testify and to prevent another from testifying to any confidential communication made by the individual to his or her spouse during their marriage. The privilege may be asserted only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative. A communication is confidential if it is made privately by an individual to his or her spouse and is not intended for disclosure to any other person.

3. Exceptions. There is no privilege under this rule:
(a) In any criminal proceeding in which sufficient evidence is introduced to support a finding that the spouses conspired or acted jointly in the commission of the crime charged;
(b) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:
- **The other;**
- **A minor child of either;**
- **An individual residing in the household of either; or**
- **A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals previously named in this sentence. The court may refuse to allow the privilege in any other proceeding if the interests of a minor child of either spouse may be adversely affected; or**

(c) In any proceeding in which the spouses are adverse parties.

NOTES

COMMENTARY

NOTES

PURPOSE/PREMISE:
Subsection (a) allows the spouse of a party to refuse to testify against party-spouse concerning "events occurring after the date of their marriage." This is usually characterized as the "spousal privilege." The party-spouse may also prevent the spouse from testifying concerning the same events. This second aspect of the privilege is usually referred to as the "adverse testimony privilege" because it allows one spouse to forbid the other to testify.

(a) Either privilege must be asserted in a timely fashion by the party holding the privilege. *White v. Commonwealth,* Ky. App. 132 S. W. 3d 877 (2003).
(b) A wife cannot assert the husband's "spousal" privilege and vice versa. *Pate v. Commonwealth,* Ky., 134 S. W. 3d 593 (2004).
(c) Subsection (b) protects confidential communications "made privately by an individual to his or her spouse," but only those not meant to be divulged. *Slaven v. Commonwealth,* Ky., 962 S.W.2d 845, 853 (1997). In *White v. Commonwealth,* Ky. App., 132 S. W. 3d 877 (2003), the court held that statements made in the presence of others indicated that they were not intended to be confidential.
(d) The marital privilege is given to the maker of the statement or the person's guardian, conservator or personal representative.
(e) Subsection (c) denies the privilege if the Commonwealth introduces a *prima facie* case that the spouses are conspirators or accomplices in a crime that is the subject matter of the case. *Pate v. Commonwealth,* Ky., 134 S. W. 3d 593 (2004).
(f) Also, if one of the spouses is charged with wrongful conduct against the other spouse, a minor child of either, an individual residing in the household of either, or a third person injured during the course of wrongful acts against the spouse, child, or other individual, then the privilege does not exist. *Lester v. Commonwealth,* Ky., 132 S. W. 3d 857 (2004). The judge also may refuse to allow the privilege "in any other proceeding" if the interest of a minor child of either spouse may be adversely affected. Obviously, if the spouses are adverse parties it would be unfair to afford either of them a privilege.
(g) KRS 620.030 imposes a duty on practically every adult to report child abuse to police, or to the commonwealth's and county attorneys. KRS 620.050(2) expressly states that the husband/wife and any professional/client/patient privileges except the attorney/client and clergy/penitent privileges do not excuse a person from the duty to report. These privileges will not apply "in any criminal proceeding in district or circuit court regarding a dependent, neglected or abused child." *Mullins v. Commonwealth,* Ky., 956 S. W. 2d 210 (1997), points out the privilege exists to preserve marital harmony, and is subject to exceptions, including KRS 620.050 where a child is involved. In *Carrier v. Commonwealth,* Ky., 142 S. W. 3d 670 (2004), a case involving KRE 507, the court held that the existence of a privilege is not a ground for failing to comply with the statute. The court appears to make a distinction between the simple fact of reporting and the disclosure of any other information

But note: These statutes predate the privileges set out in the Rules of Evidence, so there is a legitimate question as to their viability. The rules are intended "to govern proceedings in the courts of the Commonwealth." [KRS 101]. If there is any conflict, the protection afforded by the rules should prevail.

Rule 505 Religious privilege.

1. Definitions. As used in this rule:
- **(a) A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.**
- **(b) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.**

NOTES

2. General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication between the person and a clergyman in his professional character as spiritual adviser.

3. Who may claim the privilege. The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The person who was the clergyman at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

COMMENTARY

PURPOSE/PREMISE:
In subsection (a), the key concept is that the communication between the person and the spiritual adviser does not have to be in the nature of confession or absolution. The communication must simply be confidential, that is, not intended for further disclosure except to other persons who might be necessary to accomplish the purpose. The privilege allows the person to refuse to disclose and to keep another person from disclosing this confidential communication made between the person and a clergyman (read as either bona fide minister or a person reasonably appearing to be a clergyman) "in his professional character as spiritual adviser." *Sanborn v. Commonwealth*, Ky., 892 S.W.2d 542 (1994).

If the person makes a statement in the course of seeking spiritual advice, counsel, or assistance, it falls under the privilege. The privilege may be claimed by the person making the communication, his guardian, his conservator, or his personal representative. The clergyman may claim the privilege, but only on behalf of the person making the statement. There are no exceptions to this privilege.

Rule 506 Counselor-client privilege.

A. Definitions. As used in this rule

(1) A "counselor" includes:

(a) A certified school counselor who meets the requirements of the Kentucky Board of Education and who is duly appointed and regularly employed for the purpose of counseling in a public or private school of this state;

(b) A sexual assault counselor, who is a person engaged in a rape crisis center, as defined in KRS Chapter 421, who has undergone forty (40) hours of training and is under the control of a direct services supervisor of a rape crisis center, whose primary purpose is the rendering of advice, counseling, or assistance to victims of sexual assault;

(c) A certified professional art therapist who is engaged to conduct art therapy pursuant to KRS 309.130 to 309.1399;

(d) A certified marriage and family therapist as defined in KRS 335.300 who is engaged to conduct marriage and family therapy pursuant to KRS 335.300 to 335.399;

(e) A certified professional counselor as defined in KRS 335.500;

(f) An individual who provides crisis response services as a member of the community crisis response team or local community crisis response team pursuant to KRS 36.250 to 36.270;

(g) A victim advocate as defined in KRS 421.570 except a victim advocate who is employed by a Commonwealth's attorney pursuant to KRS 15.760 or a county attorney pursuant to KRS 69.350; and

(h) A certified fee-based pastoral counselor as defined in KRS 335.600 who is engaged to conduct fee-based pastoral counseling pursuant to KRS 335.600 to 335.699.

(2) A "client" is a person who consults or is interviewed or assisted by a counselor for the purpose of obtaining professional or crisis response services from the counselor.

NOTES

(3) A communication is "confidential" if it is not intended to be disclosed to third persons, except persons present to further the interest of the client in the consultation or interview, persons reasonably necessary for the transmission of the communication, or persons present during the communication at the direction of the counselor, including members of the client's family.

B. General rule of privilege
A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of counseling the client, between himself, his counselor, and persons present at the direction of the counselor, including members of the client's family.

C. Who may claim the privilege
The privilege may be claimed by the client, his guardian or conservator, or the personal representative of a deceased client. The person who was the counselor (or that person's employer) may claim the privilege in the absence of the client, but only on behalf of the client.

D. Exceptions
There is no privilege under this rule for any relevant communication:
(1) If the client is asserting his physical, mental, or emotional condition as an element of a claim or defense; or, after the client's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.
(2) If the judge finds:
(a) That the substance of the communication is relevant to an essential issue in the case;
(b) That there are no available alternate means to obtain the substantial equivalent of the communication; and
(c) That the need for the information outweighs the interest protected by the privilege. The court may receive evidence in camera to make findings under this rule.

COMMENTARY

PURPOSE/PREMISE:
This rule originally dealt with school counselors, sexual assault counselors, drug abuse counselors, and alcohol abuse counselors. Amendments have added certified professional art therapists, certified marriage and family therapists, members of certain crisis teams, certain (but not all) victim advocates, and fee-based pastoral counselors to the definition of "counselor."
(a) The rule provides that a person who consults or interviews the counselor for the purpose of obtaining "professional services" may refuse to disclose and prevent any other person from disclosing a confidential communication, that is, one not intended to be disclosed to third persons except persons who were present at the time to "further the interest of the client" in the consultation or interview. Typically, counselors work in group sessions and in the case of school counselors, probably need to have the parents present many times during the course of advising and assisting students. Therefore, the privilege is written widely enough to cover all these situations.
(b) Under subsection (c) the client, his guardian, conservator or personal representative may claim the privilege. The counselor or the counselor's employer may claim the privilege on behalf of the client.
(c) This rule has more exceptions than the others. If the client asserts a physical, mental or emotional condition as an element of a claim or defense, the client cannot claim the privilege.
(d) If the client has died and if any party to the litigation raises the client's mental, physical or emotional condition, the privilege does not apply.
(e) In any case, if the judge finds the communication is relevant to an essential issue and there is no alternate means to obtain the "substantial equivalent" of the communication, and the need for information outweighs the interests protected by the privilege, then the privilege may be overcome. The rule provides that the court may receive evidence *in camera* to make findings under this rule. *Barroso v. Commonwealth*, Ky., 122 S. W. 3d 554 (2003).

Rule 507 Psychotherapist-patient privilege.

A. Definitions, As used in this rule

(1) A "patient" is a person who, for the purpose of securing diagnosis or treatment of his or her mental condition, consults a psychotherapist.

(2) A "psychotherapist" is:

(a) A person licensed by the state of Kentucky, or by the laws of another state, to practice medicine, or reasonably believed by the patient to be licensed to practice medicine, while engaged in the diagnosis or treatment of a mental condition;

(b) A person licensed or certified by the state of Kentucky, or by the laws of another state, as a psychologist, or a person reasonably believed by the patient to be a licensed or certified psychologist;

(c) A licensed clinical social worker, licensed by the Kentucky Board of Social Work; or

(d) A person licensed as a registered nurse or advanced registered nurse practitioner by the board of nursing and who practices psychiatric or mental health nursing.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are present during the communication at the direction of the psychotherapist, including members of the patient's family.

(4) "Authorized representative" means a person empowered by the patient to assert the privilege granted by this rule and, until given permission by the patient to make disclosure, any person whose communications are made privileged by this rule.

B. General rule of privilege

A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

C. Exceptions

There is no privilege under this rule for any relevant communications under this rule:

(1) In proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

(2) If a judge finds that a patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of an examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental condition; or

(3) If the patient is asserting the patient's mental condition as an element of a claim or defense, or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

COMMENTARY

PURPOSE/PREMISE:

Any confidential communication as defined in subsection (a)(3) made to a psychotherapist as defined in subsection (a) is privileged, and the patient or his authorized representative may refuse to disclose and keep any other person from disclosing the confidential communication that was made for the purpose of diagnosis or treatment of mental condition. The 1994 Amendment expanded the definition of "psychotherapist" to include registered nurses and nurse practitioners. The privilege applies despite the presence of other persons who may be participating in the diagnosis or treatment. (Subsection (b)).

(a) The psychotherapist may assert the privilege on behalf of the patient as the patient's "authorized representative." Any authorized person who is privy to a communication may be an "authorized representative." In the absence of a formal appointment of a guardian or conservator, it appears that an appointed or retained attorney might fall under the definition of authorized representative.

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(b) The exceptions under the rule involve involuntary hospitalization proceedings and statements made in interviews concerning competency or responsibility. By creating an issue of mental condition, the patient creates the need for evidence concerning it. In *Bishop v. Caudill,* Ky., 118 S. W. 3d 159 (2003), the court noted that the defendant has only a limited privilege for statements made in examinations. As noted in *Myers v. Commonwealth,* Ky., 87 S. W. 3d 243 (2002), a defendant's statements made during a court ordered examination could also be used as impeachment evidence to attack his credibility.

(c) Also, if the patient is dead at the time of the proceeding, if any party relies on the condition as an element or claim of a defense, the plain language of the rule excepts any communications that would have fallen under this rule from the rule of privilege.

(d) *Commonwealth v. Barroso,* Ky., 122 S. W. 3d 554 (2003), deals with the conflict between the defendant's Sixth Amendment compulsory process right to evidence and a prosecuting witness's privilege concerning statements made to a therapist. The court ruled that the defendant's constitutional right outweighs the witness's privacy interest where the witness's mental condition may affect credibility. Unlike other rules, KRE 507 does not have a "need" exception. None of the exceptions listed in the rule applies to this situation. Under these circumstances, the privilege is absolute. However, the privilege must give way to a superior right under the Constitution.

(e) *Barroso* has superseded the procedure formerly authorized by *Eldred v. Commonwealth,* Ky., 906 S. W. 2d 694 (1994). Now, the movant must produce evidence sufficient to create a reasonable belief that records contain exculpatory evidence of some kind before the records must be produced and reviewed by the judge. The judge may examine the records with counsel for neither side present.

(f) One point that is often overlooked in mental health records cases is that the attorney for the Commonwealth is not the attorney for the prosecuting witness. KRS 15.725(1) and SCR 3.130(1.13) clearly state that the prosecutor represents the government in criminal prosecutions. In the initial stages, the matter of witness records should be limited to the judge and defense counsel in an *ex parte* proceeding. If the judge decides that the records cannot be used, the government has suffered no prejudice from being excluded from the review process. If the judge deems the records admissible, the prosecutor will receive notice through reciprocal discovery, RCr 7.24(3)(A)(ii), and will be able to argue against their use in a pretrial *in limine* motion or when the witness is called. Defense counsel is entitled to prepare a case without input from the lawyer for the other side.

Rule 508 Identity of informer.

A. General rule of privilege

The Commonwealth of Kentucky and its sister states and the United States have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

B. Who may claim

The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

C. Exceptions

(1) Voluntary disclosure; informer as a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed by the holder of the privilege or by the informer's own action, or if the informer appears as a witness for the state. Disclosure within a law enforcement agency or legislative committee for a proper purpose does not waive the privilege.

(2) Testimony on relevant issue. If it appears that an informer may be able to give relevant testimony and the public entity invokes the privilege, the court shall give the public entity an opportunity to make an in camera showing in support of the claim of privilege. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavits. If the court finds that there is a reasonable probability that the informer can give relevant testimony, and the public entity elects not to disclose this identity, in criminal cases the court on motion of the

defendant or on its own motion shall grant appropriate relief, which may include one (1) or more of the following:

(a) Requiring the prosecuting attorney to comply;
(b) Granting the defendant additional time or a continuance;
(c) Relieving the defendant from making disclosures otherwise required of him;
(d) Prohibiting the prosecuting attorney from introducing specified evidence; and
(e) Dismissing charges.

D. In civil cases, the court may make any order the interests of justice require if the informer has pertinent information. Evidence presented to the court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity.

NOTES

COMMENTARY

PURPOSE/PREMISE:

The Commonwealth of Kentucky may refuse to disclose the identity of a person who has furnished information relating to an investigation of a possible violation of law or who has assisted in that investigation. The government of the United States or any other state government may also refuse. This rule applies where the information was given to a law enforcement officer or a member of a legislative committee or its staff conducting an investigation.

(a) Subsection (a) of the Rule grants a general privilege without specifying the type of case in which it may be claimed. It therefore applies in both civil and criminal cases. KRE 101; 1101.

(b) Subsection (b) authorizes the "appropriate representative of the public entity to which the information was furnished" to invoke the privilege. Thus, in Kentucky prosecutions involving the FBI or the DEA, the federal agents may invoke the rule regardless of the desires of the Commonwealth's Attorney. After this point, however, the rule is rather unclear as to exactly what the phrase "public entity" means. A state police trooper is employed by the Commonwealth directly. If the Commonwealth is considered to be the "public entity," the County or Commonwealth's attorney, the government's lawyer in criminal cases, should be able to invoke or waive the privilege. But if the "public entity" is the Kentucky State Police, some representative of that organization would be the only person authorized to invoke or waive the privilege.

(c) It is essential to note what the government may refuse to disclose. Subsection (a) says that the government may refuse to disclose "the identity" of an informant. This means that the government ordinarily does not have to tell the defense who the informant is. Nothing else is privileged. However, in *Thompkins v. Commonwealth*, Ky., 54 S. W. 3d 147 (2001), the court held that questions that "might lead to the identity of the informant" would also infringe on the privilege.

(d) Relying on *Roviaro v. United States*, 353 U.S. 53 (1957), Kentucky holds that a "mere tipster" need not be disclosed. *Taylor v. Commonwealth*, Ky., 987 S.W.2d 302, 304 (1998). The "tipster" in *Taylor* was not present when the charged crime was committed. It was mere speculation that the informant could have provided any testimony about what occurred.

(e) Often, the defendant will have some idea that an informant may be able to give testimony that would be helpful and in these situations, if the Commonwealth invokes the privilege, the trial court must conduct an *in camera* hearing to allow the Commonwealth to support its claim of privilege.

(f) If the informant possesses exculpatory evidence, the federal constitution requires the Commonwealth to disclose enough information about the informant and his information to prepare a defense. *United States v. Bagley*, 473 U.S. 667 (1985). This rule only applies to other situations. The proof may be in the form that the court desires.

(g) If the court finds that there is a "reasonable probability" that the informant can give relevant testimony, then the Commonwealth must decide whether or not to disclose identity voluntarily.

(h) If the Commonwealth does not disclose in a criminal case, the defendant may move for an order requiring disclosure, or the court may enter one on its own motion. If the Commonwealth does not comply, the judge has a number of options, culminating in an order of dismissal. Obviously, dismissal is not going to be the first thing a judge thinks of. The options listed in subsection (c)(2) are not the only options available to a judge.

NOTES

Rule 509 Waiver of privilege by voluntary disclosure.

A person upon whom these rules confer a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privilege matter. This rule does not apply if the disclosure itself is privileged. Disclosure of communications for the purpose of receiving third-party payment for professional services does not waive any privilege with respect to such communications.

PURPOSE/PREMISE:
If a party voluntarily gives up a significant part of privileged matter, there is not much reason to keep the other side from learning the rest of it. *St. Clair v. Commonwealth*, Ky., 140 S. W. 3d 510 (2004). This is an example of the rule of completeness that permeates evidence law. However, KRE 509 is cast in terms of waiver, and compelled disclosures or disclosures made *in camera* as authorized by law do not result in waiver. See KRE 510.

Rule 510 Privileged matter disclosed under compulsion or without opportunity to claim privilege.

A claim of privilege is not defeated by a disclosure which was:
(1) Compelled erroneously; or
(2) Made without opportunity to claim the privilege.

COMMENTARY

PURPOSE/PREMISE:
This rule provides that a claim of privilege is not lost forever if a judge erroneously compels disclosure of confidential information or the disclosure was made without an opportunity to claim the privilege. In *Barroso v. Commonwealth*, Ky., 122 S. W. 3d 554 (2003), the circuit judge ordered the prosecuting witness to testify about her mental health history during a hearing on the issue of disclosure of records. Under these circumstance, the court held, the witness's claim of privilege was not defeated.

Rule 511 Comment upon or inference from claim of privilege — Instruction.

(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom.
(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the assertion of claims of privilege without the knowledge of the jury.
(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

COMMENTARY

PURPOSE/PREMISE:
(a) Both the judge and the attorneys who know a claim of privilege is likely to be made must ensure the jury does not learn of it.
(b) Subsection (a) makes clear that no one may make a comment about a lawfully invoked privilege. On this matter, the prosecutor, by virtue of her office, is under a strict obligation not to comment on silence. *Niemeyer v. Commonwealth*, Ky., 533 S. W. 2d 218 (1976). No inference concerning any issue may be drawn from it. This part applies to juries and to judges making rulings on motions for directed verdict.
(c) Subsection (c) entitles any party, upon request, to an instruction that no inference may be drawn from a claim of privilege. ■

ARTICLE VI. WITNESSES

NOTES

Rule 601 Competency.

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

(b) Minimal qualifications. A person is disqualified to testify as a witness if the trial court determines that he:

(1) Lacked the capacity to perceive accurately the matters about which he proposes to testify;

(2) Lacks the capacity to recollect facts;

(3) Lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or

(4) Lacks the capacity to understand the obligation of a witness to tell the truth.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 34; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE:

Five rules, KRE 401, 402, 403, 601, and 602 form the fundamental basis for admission or exclusion of evidence. Before enactment of the Rules, the common and statutory law of Kentucky declared all sorts of persons, (criminal defendants, wives, takers under a will) incompetent. Under Rule 601(a) every person is legally competent unless some other provision of law declares them otherwise. It is important to note that Rules *605* and *606* declare the trial judge and the jury incompetent, but only as to the trial at which they are performing these functions. *Marrs v. Kelly,* Ky., 95 S. W. 3d 856 (2003). Ethical rules may prevent the judge from testifying at all. Competency under **Subsection (a)** is a legal policy question dealing with types of witnesses.

Subsection (b) prescribes the minimum abilities that a legally competent witness must possess in order to "testify as a witness." In *Price v. Commonwealth*, Ky., 31 S. W. 3d 885 (2000), the court held that KRE 601 presumes witnesses competent and authorizes disqualification only upon proof of incompetency. Subsection (b) deals with the capacity of the individual. There is no minimum age for witnesses in Kentucky. *Pendleton v. Commonwealth,* Ky., 83 S. W. 3d 522 (2002). The determination of qualifications is left to the discretion of the trial judge at a hearing that should be held outside the presence of the jury. *Jarvis v. Commonwealth,* Ky., 960 S.W.2d 466, 468 (1998).

(a) A defendant in a criminal case is a competent witness because KRE 601(a) and KRS 421.225 make him so. At common law the defendant could not appear as a witness in his own case. *KRS 421.225* now is more of a privilege exempting the defendant from the KRE 501(1) requirement to testify than it is a witness competency statute. Under the statute, the defendant testifies only at his own request. *Riley v. Commonwealth,* Ky., 91 S. W. 3d 560 (2002) and *Lickliter v. Commonwealth,* Ky., 142 S. W. 3d 65 (2004), posit a constitutional right to testify as well.

(b) A lawyer is a competent witness for any purpose although a lawyer who may be called as a "necessary" witness is bound by *S*CR 3.130(3.7)(a) to disqualify herself as counsel and by SCR 3.130(1.6) and KRE 503 to maintain confidentiality of any information falling under those rules. *Caldwell v. Commonwealth,* Ky., 133 S. W. 3d 445 (2004).

(c) A child is presumed competent to testify under Subsection (a). In *Pendleton v. Commonwealth,* Ky., 83 S. W. 3d 522 (2002), the court observed that "[t]he competency bar is low with a child's competency depending on her level of development and upon the subject matter at hand." However, the dissent in *Pendleton* makes a compelling case that interviewing tech-

niques may play a decisive part in determining whether the child is reporting from memory or reacting to cues and hints by the interviewer.

(d) A witness who undergoes hypnosis as part of an effort to recall may be disqualified under the totality of circumstances test adopted in *Roark v. Commonwealth*, Ky., 90 S. W. 3d 24 (2002). Some considerations are whether the hypnosis was part of the investigation, whether there was a pre-hypnosis description, whether the hypnotist was a "forensic" hypnotist and whether the session was recorded. None is determinative and the list is not exhaustive.

(e) If a judge determines under KRE 601(b) that the person lacks capacity to testify, the judge must disqualify that person. It is not a matter of discretion, because a person lacking capacity *is* disqualified. The only area of judicial discretion is in determination of capacity which will be reviewed under the usual deferential standard.

(e) To disqualify a witness a party must demonstrate that the witness (1) was unable to perceive accurately the matters about which he proposes to testify, (2) presently lacks the ability to recall these facts, (3) cannot, in some meaningful way, communicate these facts to the jury, or (4) does not understand the obligation to tell the truth.

(f) A witness who is drunk, insane, or mentally incompetent at the time of an incident or at the time of testifying may or may not be disqualified as a witness. The judge must determine whether the witness so "lacked" capacity to perceive or to remember that no jury could rely on what the person had to say.

(g) "Lack" is defined as "the state of being without or not having enough of" something. *Oxford American College Dictionary, p. 748 (2002)***.** A person who is entirely without or just barely possesses one or more of the required capacities is disqualified on practical grounds. Nothing the witness says is reliable enough to be used by the jury. If the witness cannot communicate to the jury the problem is that the jury will not be able comprehend what the witness has to say.

(g) If the person demonstrates marginal capacity, the judge must decide questions of the likely relevance of his testimony and the potential for misleading or confusing the jury under KRE 401-403. However, in *Price v. Commonwealth*, Ky., 31 S. W. 3d 885 (2000), the court, relying on the Commentary to the rule, cautioned that the rule should be applied "grudgingly" and only against an "incapable" witness rather than the merely "incredible" witness.

(h) In the federal courts, *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988), is still cited for the proposition that a hearsay declarant's incompetency does not necessarily preclude introduction of that person's hearsay statements. The federal policy should not apply in Kentucky because the federal rule does not have a counterpart to KRE 601(b). The federal rule consists of KRE 601(a) language plus a provision about choice of law. KRE 601(b) states unequivocally who may be disqualified. This is a critical difference.

(i) In Kentucky, a witness who lacks capacity is disqualified. In hearsay analysis, the declarant is the real witness. The person testifying about the declarant's out of court statements is merely a conduit for the statements. If the declarant would be disqualified to testify in open court, surely that same person as a hearsay declarant cannot be heard. The statements of that witness do not become reliable because they were told to someone else earlier out of court, absent a showing that the declarant became incompetent after the out of court statement was made and that the declarant was competent when the statement was made or the event was perceived.

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 KRE 703, relating to opinion testimony by expert witnesses.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 35; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

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COMMENTARY

PREMISE/PURPOSE:

A rational decision making process must be based on highly reliable information. One way to insure reliability is to require that witnesses actually know what they are talking about. Witnesses who have heard, seen, smelled, felt, or tasted, that is, who have used their five senses to gain information, are more reliable than persons who are merely passing on what someone else told them. Even in hearsay cases, a witness must show personal knowledge of the making of the out of court statement. However, the foundation need not formally be laid before the witness testifies unless the opponent objects and forces the issue.

(a) Testimony that is not based on personal knowledge is always inadmissible. *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 157 (1995). But if the adverse party does not object, it will be used by the jury and the prosecutor for any purpose they desire.

(b) Although it is good practice to establish the basis for the witness's personal knowledge before the witness testifies to important facts, the rule does not require it. Generally, adverse counsel must object to force establishment of personal knowledge. The judge has no duty to intervene simply because foundation is not shown. But if the basis of the witness's knowledge is unclear, KRE 611(a) allows the judge to intervene to ask the lawyer to establish the basis. Under KRE 614(b) the judge can ask the foundation questions himself.

(c) The second sentence of the rule excuses a formal foundation established through the testimony of the witness. For example, if a videotape from a store shows the witness standing behind the counter looking at the robber, any further testimony as to personal knowledge of the witness is superfluous.

(d) KRE 703(a) modifies, but does not do away with, the personal knowledge requirement. This rule allows a qualified expert witness to rely on hearsay testimony if this is considered proper in her field of expertise, or to rely on hypothetical facts provided before or during the trial as a basis for the opinion. But the personal knowledge rule is relaxed only to this extent.

(e) A lay witness is required by KRE 701 to base his opinion on facts or circumstances perceived by the witness. *Young v. Commonwealth*, Ky., 50 S. W. 3d 148 (2001).

(f) The judge determines personal knowledge as a KRE 104(b) question, that is, by asking whether the jury reasonably could believe the offered facts (*i.e.*, presence at the event) so that personal knowledge is possible. Credibility is not part of this or any other KRE 104 determination. The only question is whether there is testimony or evidence establishing the predicate facts to allow the jury to make a rational inference of personal knowledge.

(g) *Roark v. Commonwealth*, Ky., 90 S. W. 3d 24 (2002), holds that hypnotically refreshed testimony of a witness can be admitted under a totality of circumstances analysis. The obvious danger with such testimony is the potential for suggestion to supplant the memory of the witness. See comments in KRE 601.

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.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 36; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PREMISE/PURPOSE:

Section 5 of the Constitution prohibits diminution of the rights, privileges or capacities of a person on the basis of religious belief or unbelief. To accommodate this constitutional mandate, KRE 603 allows a witness to promise to testify truthfully either by oath or affirmation. The distinction between the two historically has been based on a biblical injunction not to swear oaths. The only important point is that the rule requires the judge to be satisfied that the witness at least is aware of the obligation to tell the truth.

(a) The efficacy of this rule for its stated purpose is open to doubt. The theory is that the promise will "awaken" the witness's conscience and notify the witness of the duty to tell the truth.

NOTES

The notice is a veiled threat that lies may be punished as perjury. KRS 523.020(1). The "conscience awakening" part of the rule is undercut by the existence of rules like KRE 613, 801A, and 804 which anticipate willful refusal to testify truthfully by providing remedies for untruthful testimony.

(b) In some courts the judge ends the oath with the phrase "so help you God." While this is not offensive to a great majority of witnesses, it may create a problem in some cases. If a witness does not wish to swear by reference to God, the witness has a constitutional right not to. To avoid embarrassing the witness and potentially prejudicing the party calling the witness, judges either should inquire beforehand how that witness wishes to comply with the rule or simply ask each witness to swear or affirm without any further embellishment.

Rule 604 Interpreters.

An interpreter is subject to the provisions of these rules relating to qualifications of an expert and the administration of an oath or affirmation to make a true translation.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 37; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE:
One of the capacities required by KRE 601(b) is the ability to communicate with the jury either directly or through an interpreter. This rule requires a person wishing to appear as an interpreter to qualify as an expert, by training, experience or education, and to take an oath.

(a) An interpreter qualifies to appear in court upon compliance with administrative standards prescribed by the Supreme Court and by demonstrating ability to interpret "effectively, accurately, and impartially." KRS 30A.405(1) and (2); Administrative Procedures of the Court, Part 9.

(b) *KRS 30A.425* lists the circumstances in which the interpreter may be employed including any and all meetings and conferences between client and attorney.

(c) Interpreted conversations between attorney and client are privileged by *K*RE 503(a)(2)(B) because the interpreter may be considered the representative of the client. KRS 30A.430 provides further protection by prohibiting examination of interpreters concerning such privileged conversations without the consent of the client. The interpreter can not be required to testify to any other privileged communication (*e.g.*, religious privilege) without the permission of the client.

Rule 605 Competency of judge as witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 38; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PREMISE/PURPOSE:
Under the Rules, a judge is something more than an umpire waiting to be called upon to resolve an evidentiary dispute. KRE 611(a) makes the judge ultimately responsible for the quality of the evidence heard by the jury and KRE 614(a) and (b) give the judge the means to make the presentation of evidence effective for the ascertainment of the truth. KRE 605 exists to prevent an overeager judge from intruding too far into the adversarial process. This rule precludes the judge from testifying as a witness at a trial over which she is presiding. *Marrs v. Kelly,* Ky., 95 S. W. 3d 856 (2003). The second sentence of the rule makes an objection unnecessary if this occurs.

(a) This situation does not arise often. It is possible to imagine some scenarios in which a judge might be the best, and perhaps the only witness. A judge might overhear the defendant

threaten the life of a witness or overhear the prosecuting witness tell the prosecutor that he really can't say that the defendant is the person who robbed him. This obviously would be potent evidence and, if adduced through the presiding judge, would be nearly unimpeachable. But this is just the reason for the rule: the adversary party's cross-examination would be so difficult and so unlikely to counteract the judge's testimony, that the drafters have decided that the presiding judge's testimony must be unavailable at the trial.

(b) Note carefully that this rule only precludes testimony. The presiding judge is bound by KRE 501(2) and (3) to disclose and to produce tangible items.

(c) Unless presiding over the trial, a judge is just another witness.

(d) This rule is most often mentioned in regard to predecessor judges testifying for a party. In *Bye v. Mattingly*, Ky. App., 975 S.W.2d 459 (1996), a judge who had recused himself appeared as a character witness in a will case. The court recognized the potential for prejudice but declined to disturb the trial judge's balancing under KRE 403.

(e) Even if the presiding judge testifies, there is no indication in the rule language that this would always be reversible error. KRE 103(a) precludes reversal except upon showing that the error affected a substantial right of a party.

(f) However, the appellate courts should presume that any testimony by a presiding judge is reversible. A judge is forbidden by SCR 4.300(2) to testify voluntarily as a character witness and is prohibited from lending the prestige of his office to advance the private interests of private parties. The moral position of the presiding judge makes anything he says too prejudicial to the party against whom the testimony is introduced.

Rule 606 Competency of juror as witness.

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. No objection need be made in order to preserve the point.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 39; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PREMISE/PURPOSE:

This rule prevents a member of the jury from testifying as a witness at the trial of a case in which the juror is sworn to be the finder of fact. The considerations underlying KRE 605 also underlie this rule.

(a) The federal rule has a second section that governs juror testimony upon an inquiry into the validity of a verdict or an indictment. Kentucky has no such language. RCr 10.04 prohibits examination of a petit juror except to establish that the verdict was decided by lot.

(b) Nothing in this rule prohibits a grand juror from testifying as to the proceedings by which an indictment was returned. RCr 5.24(1) enjoins secrecy on all participants of a grand jury proceeding "subject to the authority of the court at any time to direct otherwise." A party cannot just subpoena a grand juror and rely on KRE 501 to force that grand juror to testify. The party must first apply to the grand jury presiding judge, the chief judge of the circuit, or to the judge presiding over the action in order to obtain grand juror testimony.

(c) The rule does not apply to grand jury witnesses. In *Purcell v. Commonwealth*, Ky., 149 S. W. 3d 382 (2004), the prosecutor played the defendant's grand jury testimony during the government's case in chief. While the statement qualified as a party admission under KRE 801A, the opinion is silent as to how the secrecy barrier of RCr 5.24(1) was avoided. Presumably the prosecutor applied to the grand jury judge for permission to use the statement.

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Rule 607 Who may impeach.

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

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 40; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE:
This rule was included in the federal rules to supersede the common law rule that the proponent of the witness implicitly vouched for the credibility of the witness by calling him. If the witness turned on the proponent, the common law forbade impeachment. Under the Civil Code [Section 596] the proponent usually could not impeach, but could contradict with other evidence. After 1953, CR 43.07 allowed impeachment by any means except evidence of particular wrongful acts. CR 43.07 was abrogated by the Supreme Court as of January 1, 2005. KRE 607, however, was designed to work in concert with former CR 43.07 and authorizes impeachment of any witness by any party by any method authorized by law.

(a) Credibility may be attacked in any number of ways, as reference to *K*RE 104(e), KRE 608, KRE 609, and case precedent shows. Impeachment is the process of showing the jury why it should disbelieve or discount what the witness is testifying to.

(b) **Bias-interest-prejudice** - These terms describe evidence that allows the jury to conclude that the witness has a reason for not telling the truth or not telling the whole truth. Typically this is accomplished by introducing evidence that the witness has a grudge or a reason to hold a grudge against a party, that the witness has something to gain or a bad result to avoid by testifying in a certain way, or that for personal reasons the witness is not being square with the jury. This is never a collateral issue. *Motorists Mutual Ins. Co. v. Glass, Ky.*, 996 S.W.2d 437, 447 (1997)*; Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 720-721 (1997); *Weaver v. Commonwealth*, Ky., 955 S.W.2d 722, 725 (1997); *Miller v. Marymount Medical Center*, Ky., 125 S. W. 3d 281 (2003).

(c) **Character for (un)truthfulness** - By using the methods permitted by KRE 608, the party may demonstrate that no one else believes the witness which leads to the inference that the jury should not believe the witness either.

(d) **Prior convictions** - Proof of a prior felony conviction allows an inference that the witness cannot be trusted. KRE 609.

(e) **Inconsistent statements** - These must be preceded by the foundation prescribed by KRE 613. Inconsistent statements create the inference that the jury cannot trust someone who says different things at different times. If the inconsistent statements are introduced for impeachment only, an instruction limiting the evidence to that use is required. However, because KRE 801A and 804 allow substantive use of out of court statements, limited impeachment is rarely given as a reason to introduce out of court statements.

(f) **Contradiction** - Evidence introduced through other witnesses may establish that while the witness testified A, B, and C, all other witnesses agree that what really happened was D, E, and F. Circumstantial evidence of the witness's ability to perceive or recall also may be used to impeach under this heading.

(g) The standard rule is that a witness cannot be impeached on a "collateral issue." *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694, 706 (1994); *Bratcher v. Commonwealth*, Ky., 151 S. W. 3d 332 (2004). A matter is considered collateral when it has no substantial bearing on an issue of consequence, that it, when it has no purpose other than contradiction of testimony. *Simmons v. Small*, Ky.App., 986 S.W.2d 452, 455 (1998); *Neal v. Commonwealth*, Ky., 95 S. W. 3d 843 (2003).

(h) Nothing in Article 6 precludes the introduction of evidence to impeach. If a witness denies making a deal with the Commonwealth for a good disposition on a plea bargained case, the impeaching party has the right to prove otherwise through stipulation of the Commonwealth or introduction of testimony. Obviously, tape recordings or testimony by witnesses who heard out of court statements are necessary to impeach by this method. The judge has authority under KRE 403 and 611(a) to place limits on how much evidence will be produced and when it can be produced.

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(i) *Olden v. Kentucky*, 488 U.S. 227 (1988), reversed a decision to exclude evidence of interracial sexual relations that the proponent wanted to introduce to show a reason to lie. Although KRE 403 and 611(a) give a judge discretion to limit the extent of relevant cross- examination and production of relevant evidence, the 6th Amendment of the U.S. Constitution gives the defendant a right to confront witnesses and to present a defense. Courts must give the defendant a fair chance to undermine the evidence presented against him. *Commonwwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997).

(j) The rule does not prohibit a party from impeaching his own witness before the other side has a chance to do so. The credibility of any witness may be attacked by any party. For example, the witness's prior conviction might be elicited by the proponent to create a "not hiding anything" rapport with the jury.

(k) But the proponent cannot rehabilitate a witness in advance. The credibility of the witness is to come from demeanor and objective indications that the witness knows what he is talking about. "Bolstering" evidence is irrelevant until the adverse party makes an attack on the witness. *Samples v. Commonwealth*, Ky., 983 S.W.2d 151, 154 (1998). The fact that a witness said the same thing out of court and in court is equally irrelevant. See Rule 801A.

(l) A party cannot use supposed impeachment to introduce otherwise inadmissible evidence. *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997); *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 858 (1997). The Supreme Court has stopped short of adopting the federal "primary purpose test," but has made it clear that it will not stand for subterfuge in this area. *Thurman v. Commonwealth*, Ky., 975 S.W.2d 888, 893 (1998). Such subterfuge is forbidden by SCR 3.130(3.4)(e) in any event.

(m) In *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997)**,** the court noted that the judge may limit impeachment as long as the jury gets a "reasonably complete" picture of the witness' interest, bias and motivation. The court also commented that a party should be given greater latitude in impeachment of a non-party witness. However, in *Caudill v. Commonwealth*, Ky., 120 S. W. 3d 635 (2003), the court noted that limitation on impeachment impinges on the fundamental right of confrontation. Therefore, a judge should err on the side of allowing impeachment.

(n) When a defendant testifies at trial, he is subject to the same impeachment as any other witness. *Caudill v. Commonwealth*, Ky., 120 S. W. 3d 635 (2003).

608 Evidence of character.

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

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry.

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

COMMENTARY

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PREMISE/PURPOSE:
KRE 404(a)(3) provides that evidence of a witness's character or a trait of character may not be introduced to prove action in conformity with character except when introduced as authorized under KRE 607, 608, and 609. KRE 608 tells the attacking party how to attack character. It may be done by opinion or reputation testimony. As of January 1, 2005, it may be done by cross-examination about specific instances reflecting on credibility as well.

(a) **Subsection (a)** allows a witness to comment on another witness's reputation in the community for untruthfulness. Alternatively, the witness may give a personal opinion on this subject. Truthfulness is the only matter that can be discussed. A witness cannot speak about the witness's general moral character. *Purcell v. Commonwealth*, Ky., 149 S. W. 3d (2004).

(b) If, and only if, a witness's veracity is attacked under this rule, the proponent of that witness may rebut by introduction of reputation or opinion evidence that the witness is truthful.

(c) It is important to note the difference between an opinion that a witness is a liar as a general rule and an opinion that the witness is lying about something in that particular case. The former is permitted by this rule. The latter is forbidden by KRE 401-403 and KRE 702. A witness cannot be asked if another witness is lying about some matter.

(d) The judge may limit the number of witnesses put on to attack or to vouch for the truthful character of the witness. KRE 403; KRE 611(a).

(e) **Subsection (b)** begins with a blanket exclusion of extrinsic evidence of specific incidents to attack or support the credibility of the witness. The only exception stated is prior felony conviction under KRE 609.

(f) However, the rule says that a judge may, in the exercise of her discretion, allow a party to cross-examine a witness by asking if the witness knows about specific incidents that may bear on truthfulness or untruthfulness.

(g) Under the rule, a witness on direct examination cannot be asked about specific incidents. Such incidents can be raised only on cross examination.

(h) Subsection (b) involves a three part analysis. First, the specific incident must relate to the veracity of the witness. Second, the attorney must have a factual basis for believing that the incident occurred and that the witness has some reason to know about it. Third, the proponent must convince the judge to permit the cross examination.

(i) If the witness denies knowledge of the specific incident raised on cross, the matter ends there. The rule expressly prohibits introduction of extrinsic evidence for any purpose. *Blair v. Commonwealth*, Ky., 144 S. W. 3d 801 (2004).

(j) A witness may be asked about a specific act that is a crime that he might otherwise have a privilege to refuse to talk about. The last sentence of the rule protects the witness from the KRE 509 waiver rule by stating that response to specific acts cross-examination will not constitute a waiver if the question and answer relate "only to credibility."

Rule 609 Impeachment by evidence of conviction of crime.

(a) General rule. For the purpose of reflecting upon the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record if denied by the witness, but only if the crime was punishable by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 42; amended 1992 Ky. Acts ch. 324, sec. 15; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

NOTES

COMMENTARY

PURPOSE/PREMISE:
The premise of the rule is that a person who suffers a felony conviction of any type is less deserving of belief because of that conviction.

(a) If a party desires to impeach by use of evidence of a prior felony conviction that is less than 10 years old, Subsection (a) provides that it "shall be admitted." Ordinary KRE 401-403 balancing and analysis does not apply to these convictions.

(b) Remoteness is the only consideration for exclusion. If a conviction is more than ten years old, Subsection (b) says that it is not admissible unless the judge determines that probative value of proof of the conviction substantially outweighs its prejudicial effect. This is the reverse of ordinary KRE 403 balancing. *Miller v. Marymount Medical Center,* Ky., 125 S. W. 3d 274 (2004). The burden of showing this is on the party desiring to use the conviction. *McGinnis v. Commonwealth*, Ky., 875 S.W.2d 518, 528 (1994).

(c) Remote convictions are excluded on the ground that the jury "might associate prior guilt with current guilt." *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 167 (1995).

(d) The Kentucky rule does not permit identification of the crime unless (1) the witness under cross-examination has denied the conviction or (2) the witness wishes to identify the nature of the conviction for tactical reasons. *Blair v. Commonwealth*, Ky., 144 S. W. 3d 801 (2004); *Caudill v. Commonwealth*, Ky., 120 S. W. 3d 635 (2003); *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 859 (1997).

(e) There are two ways to prove prior conviction: (1) an admission from the witness, and (2) an introduction of a public record if the witness denies conviction.

(f) Any crime punishable by death or by a penalty of one year or more under the law of the jurisdiction in which the conviction was had may be used. Any felony, not just those dealing with honesty, may be used.

(g) Kentucky misdemeanor convictions can never be used. However, a misdemeanor from another state may still be considered a felony for Rule 609 purposes. The determining factor is the potential length of sentence. If the foreign conviction could have resulted in a sentence of one year or more in prison or jail, it is a felony for Rule 609 purposes, regardless of what the other state calls it.

(h) A conviction cannot be used if it was pardoned, annulled, or otherwise set aside because the witness was innocent of the crime. Reversal on appeal or dismissal for insufficient evidence would satisfy the last requirement of the rule. A pardon from the governor under Section 77 of the Constitution would qualify, but a restoration of rights under Section 145 will not.

(i) KRS 532.055(2)(a)(6), which purported to allow the use of juvenile adjudications of felony as impeachment evidence was declared invalid as a violation of separation of powers in *Manns v. Commonwealth,* Ky., 80 S. W. 3d 439 (2002).

(j) KRS 610.320(4), a juvenile statute that allows use of prior juvenile adjudications to impeach, has not been ruled on. In *Barroso v. Commonwealth*., Ky., 122 S. W. 3d 554 (2003), the court observed that the Commonwealth conceded that use of an adjudication to impeach under this statute was reversible error.

(k) Because of the highly prejudicial nature of prior conviction evidence, an admonition is called for. The standard admonition given in the circuit judge's book is verbose and confusing. Nothing prevents an attorney from suggesting a simpler admonition like: *Members of the jury: The witness has admitted conviction of a crime in the past. You must decide if this conviction affects your estimate of his credibility and, if it does, how much effect it has. This is the only purpose for which you can use this evidence.*

NOTES

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.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 43; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE:
Section Five of the Constitution prohibits diminution of civil rights, privileges or capacities because of religious belief or disbelief. Many cases cite this Constitutional right as the basis of rules that a witness is not disqualified to testify and cannot be cross examined as to religious beliefs for the purpose of discrediting the witness. *L & N R. Co. v. Mayes*, Ky., 80 S.W. 1096 (1904). Rule 610 is the positive enactment of this constitutional principle.

(a) It is important to follow the rule's plain language. Evidence of beliefs or opinions on matters of religion is not admissible to show that the beliefs or opinions undermine or bolster the credibility of the witness. Evidence of religious beliefs or opinions to prove other matters is admissible if it satisfies other evidence rules.

(b) For example, it is permissible for a judge at a competency hearing to ask a child witness if Jesus wants us to tell the truth because the purpose of the evidence is to decide the preliminary question of whether the child can distinguish between truth and lies and understands the obligation to tell the truth. It is not alright for a lawyer to ask the same question on direct or cross-examination of the witness in the hope that the answer will bolster or undermine the child's credibility with the jury.

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. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination, but only upon the subject matter of the direct 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.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 44; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE:
The Rule has three (3) loosely related sections although **Subsection (a)** is by far the most important for evidence analysis. This subsection imposes a duty on the trial judge to exercise reasonable control over the introduction of evidence. It is not intended to supersede the order of proceedings set out in RCr 9.42 or to supersede other Rules of Evidence. This Rule, along with KRE 102, 106, and 403, gives the judge some guidance on what to do when evidence questions are not clearly governed by the Rules. **Subsections (b)** and **(c)** of the Rule deal with cross-examination, a critical subject for criminal defense attorneys.

Subsection a

(a) Comments made in Rules 102, 106 and 403 inform the understanding of KRE 611 (a)'s purpose. The judge shall intervene to make the interrogation of witnesses and the presentation of evidence "effective for the ascertainment of the truth." This language is so broad that it can cover small problems like objections to compound questions or claims of "asked and answered" to sweeping questions like introduction of oral statements to explain portions of written statements when used in conjunction with KRE 106, 612, 803 or 804.

(1) Courts generally say that such matters are left to the sound discretion of the judge. Trial decisions will be overturned only upon showing that the discretion was abused. *Soto v. Commonwealth*, Ky., 139 S. W. 3d 827 (2004).

(2) In *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997), the court suggested that judges use the considerations set out in *KRE 403* to guide their decisions under this rule.

(b) Section Eleven of the Constitution and the Sixth Amendment of the U.S. Constitution preserve a criminal defendant's right to confront witnesses. *Moseley v. Commonwealth*, Ky., 960 S.W. d 460, 462 (1997); *Rogers v. Commonwealth*, Ky., 992 S.W.2d 183, 185 (1999). However, KRE 611(a) gives judges authority to limit cross examination for any of the three purposes specified by the Rule. *Caudill v. Commonwealth*, Ky. 120 S. W. 3d 635 (2003). However, denial of effective cross-examination is error that is reversible without showing of any additional prejudice. *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694, 702 (1994).

(c) Finding the line where limitation ceases to be reasonable and becomes an imposition on the right to confront is dependent on the circumstances of each case. *Weaver v. Commonwealth*, Ky., 955 S.W.2d 722, 726 (1997) held that where the jury is given enough information to make the desired inference the right of confrontation is upheld. In *Bratcher v. Commonwealth*, Ky., 151 S. W. 3d 332 (2004), the court held that as long as cross examination creates a reasonably complete picture of the witness's veracity, the constitutional confrontation requirement has been met. However, in *Beaty v. Commonwealth*, Ky., 125 S. W. 3d 196 (2003), the court noted that the defendant has a constitutional right to "reasonable" cross examination that includes questions tending to show the witness's bias, animosity or any other reason that the witness would testify falsely.

(d) The concepts of "invited error" and "opening the door" are often associated with KRE 611(a). Courts allow inadmissible as well as admissible evidence in rebuttal where a party has introduced inadmissible evidence (*i.e.*, irrelevant or excluded for other reasons). This is to "neutralize or cure any prejudice incurred from the introduction of evidence." *Commonwealth v. Alexander*, Ky., 5 S.W. 3d 104, 105 (1999); *Commonwealth v. Gaines*, Ky., 13 S.W. d 923, 924 (2000).

(e) "Opening the door" can result from intentional or inadvertent blurts by a witness or inquiry into subjects previously ruled irrelevant or otherwise inadmissible. The latter situation is often problem for inexperienced attorneys who wish to press the line but do not know where it is.

(f) KRE 611(a) is often applied after a bad situation arises. KRE 103(a) and (d) and KRE 401-403 are expected to resolve problems before the jury is exposed to improper information. KRE 611(a) can be used as a justification for preemptive action. But often it is used when a problem has arisen and the judge must decide what steps short of mistrial might be taken to correct the problem.

(g) KRE 611(a) and KRE 105 can be read together to impose a duty on the judge to give limiting instructions on his own, without request of a party. Certainly the Rule authorizes the judge to do so. Presentation of evidence of limited admissibility can be effective for the ascertainment of the truth only when properly limited by admonition. However, the second sentence of KRE 105(a) is a penalty on appeal, not a restriction on the actions that a trial judge can take.

(h) **Subsection (a)(2)** permits the judge to control the presentation of evidence to avoid needless consumption of time. This presumes that the judge will heed her ethical duty under SCR 4.300(3)(A)(4) to accord every person "and his lawyer" full right to be heard according to law. KRE 611(a)(2) does not authorize the judge to practice the case for the parties or to exclude evidence because production of the evidence might delay proceedings. The rule does not permit an order prohibiting an attorney from speaking with a witness during a recess. *St. Clair v. Commonwealth*, Ky., 140 S. W. 3d 510 (2004).

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(i) This subsection may figure in a determination of whether a party should be allowed to introduce extrinsic evidence under KRE 106. If the presentation of such evidence would involve delays to obtain witnesses, the judge has authority under this section to require introduction of the evidence at a later time.

(j) **Subsection (a)(3)** at its simplest level authorizes the judge to stop bickering between a witness and a lawyer or to end a lawyer's "browbeating the witness." SCR 3.400(3)(A)(8) has placed a burden on the judge to control proceedings so that lawyers refrain from "manifesting bias or prejudice against parties, witnesses, counsel or others unless race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status or other similar factors are issues in the proceeding."

(k) The audibility of tape recordings has been a subject of interest under this Rule. Pursuant to KRE 611 (a) and 403, the judge decides whether the technical problems with a tape resulting in inaudible portions are serious enough that the jury would be misled as to their content or are such that the tape would be untrustworthy. *Gordon v. Commonwealth*, Ky., 916 S.W.2d 176, 180 (1995); *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 155 (1995); *Norton v. Commonwealth*, Ky.App., 890 S.W.2d 632 (1994).

(l) The judge may consider the use of an accurate transcript of a recording or testimony of one of the participants to supplement or substitute for a tape. The judge may use these devices to fill in the inaudible portions. However, the witness cannot be an "interpreter" of the tape. He must testify from memory. *Gordon*, p. 180. Federal practice authorizes the use of such composite tapes. *U.S. v. Scarborough*, 43 F.3d 1021, 1024 (6th Cir. 1994).

Subsection b

(m) Kentucky permits wide open cross-examination which means that the cross-examiner may go into any relevant issue, including credibility, subject to reasonable control by the judge. *DeRossett v, Commonwealth*, Ky., 867 S.W.2d 195, 198 (1993).

(n) There are two limitations on cross. The judge may preclude cross-examination on matters not raised on direct "in the interests of justice" and the judge may prohibit leading questions except when cross examination is on the subject matter of direct examination. Both *KRE* 611(a) and 403 authorize the judge to place "reasonable" limits on the timing and subject matter of cross-examination.

(o) In 1996, the General Assembly amended KRS 431.350 yet again to try to make it possible to have an upset child in a sexual offense prosecution examined and cross examined "in a room other than the courtroom," and outside the presence of the defendant who can only look on via TV. The statute was upheld in *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 886 (1997). Also, *Commonwealth v. M. G.*, Ky., App., 75 S. W. 3d 714 (2002). Section 11 of the Constitution gives a criminal defendant the right to "meet the witnesses face to face." The statute does not square with the Kentucky Constitution and should be declared invalid.

Subsection c

(p) A leading question is one that suggests the answer to the witness. CR 43.05, repealed effective January 1, 2005. This contrasts with the open-ended questions with which direct examination is to be made. For example, "You were robbed on March 15th, weren't you?" is leading. "Did anything happen to you on March 15th?" is not a leading question.

(q) Foundation or set-up questions are not leading: *e.g.*, "Were you in the Kroger on March 15th? Did something happen? Did you see what happened? What happened?" The first three questions require yes or no answers but they are not leading. They are foundation questions required by KRE 602 to show personal knowledge and are unobjectionable. The old rule of thumb that leading questions require yes or no answers is too unreliable to be used.

(r) The Rule permits leading questions "to develop the testimony," which is another way of saying that if a little leading will get an excited, confused or verbose witness settled down and testifying, the practice should not be discouraged. This portion of the Rule permits leading of child witnesses or persons with communication problems. *Humphrey v. Commonwealth*, Ky., 962 S.W.2d 870, 874 (1998).

(s) A hostile witness may be led on direct examination when his answers or lack of answers show that the witness will not testify fairly and fully in response to open-ended questions. A

witness is not hostile simply because he or she is associated with the other side in a case. Hostility must be shown by refusal to answer fully and fairly before the request to use leading questions is made.

(t) The lead officer or detective in a case particularly, if identified as the representative of the Commonwealth or as a person essential to the presentation of the Commonwealth's case under KRE 615 , is "a witness identified with an adverse party" and can be led on direct examination by the defendant.

Rule 612 Writing used to refresh memory.

Except as otherwise provided in the Kentucky Rules of Criminal Procedure, if a witness uses a writing during the course of testimony for the purpose of refreshing memory, an adverse party is entitled to have the writing produced at the trial or hearing or at the taking of a deposition, 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.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 45; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE:
This is a special version of the rule of completeness that is used when a witness "uses a writing during the course of testimony for the purpose of refreshing memory." If the writing was not provided in pretrial discovery, the adverse party, in fairness, should have a chance to see the complete document. Otherwise, jurors might be misled. The rule does not describe what "refreshment" is. It at least implies that refreshing is permitted, however. *Purcell v. Commonwealth*, Ky., 149 S. W. 3d 382 (2004).

(a) Refreshment of memory is often a prelude to introduction of out of court statements as a hearsay exception under KRE 803(5). Formerly, a party had to fail to refresh the memory of the witness before introducing the record as substantive evidence, but this is no longer the case. If the witness cannot remember, the proponent can try leading questions, KRE 611(a), a writing, a photograph or some other prompt to jog the witness's memory. Because the other matter is used only to refresh, there is no requirement that it be prepared by the witness or that the witness even know of its existence.

(b) Refreshment is not specifically provided for in the rules. KRE 601(b) and 602 establish oral testimony from personal memory as the norm, but if the witness's memory is not up to the task and the jury will thereby get less than the full truth, the judge may allow refreshment under the general authority to avoid waste of time and to make the presentation effective for discerning the truth. KRE 611

(c) There is no set procedure for refreshment. At minimum the proponent should be able to show the judge that the witness had cause to know the subject matter of the desired testimony but that for some reason, (stage fright, passage of time, illness, etc.), the witness cannot recall or cannot recall well enough to testify coherently or effectively about it. The judge may require the proponent to get permission to refresh or may leave it to the adverse party to object.

(d) If the witness's memory is refreshed, the writing or other prompt should be taken away from the witness so she can testify from memory. Leading questions should be discontinued at this point.

(e) If the refreshment fails, the witness is disqualified to testify for lack of personal knowledge, KRE 602, and cannot testify. Whether the witness is disqualified from testifying at all or only disqualified as to certain subject matters is a judgment call pursuant to KRE 403 and 611(a). If the witness has already testified to some facts, the adverse party may have to make a motion to strike, KRE 103(a), or a motion for mistrial, depending on the party's estimate of the effectiveness of an instruction to the jury to ignore the testimony.

NOTES

(f) If the witness cannot testify from memory, he may still be the conduit for recorded recollection under KRE 803(5), if he can testify as to the foundation requirements of that rule.

(g) "Use" of the memory prompt is the key concept for determining whether the adverse party is entitled to examine the writing. Prosecutors sometime mail transcripts of statements or other notes to witnesses weeks before trial. Sometimes witnesses review these prompts just before going into the courtroom to testify. In either case, because the prompt was "used" to refresh memory, the adverse party is entitled to look at the writing. The adverse party may ask about use of prompts as a pretrial motion or may elicit this information on cross-examination. KRE 612 differs from the federal rule which contains a specific subsection which allows the judge to order access to statements. The Kentucky language mandates access if the prompt is "used."

(h) The first phrase of the rule, "except as otherwise provided in the Kentucky Rules of Criminal Procedure," subordinates the relief available in this rule to the relief provided for in RCr 7.24 and 7.26.

(i) The rule applies to a witness testifying at a trial, deposition, or any other proceeding at which the rules apply. KRE 102.

(j) If the proponent of the witness claims that parts of the writing do not relate to the subject matter of the refreshment, the judge is required to make an in camera inspection of the writing to determine if some parts should be deleted before the writing is turned over to the adverse party. Presumably this is a KRE 401-403 determination.

(k) KRE 509 provides that a party may waive a privilege by voluntarily disclosing or consenting to disclose "any significant part" of the privileged matter. If the writing that the proponent wants to use to refresh has privileged matter in it, the proponent must assert the privilege before using the writing as a prompt.

(l) Police officers as witnesses are a particular problem. Officers often will say that because the investigation took place several months ago and because they have had several other cases in the meantime, they do not remember all of the details of the subject matter of their testimony. They then proceed to testify, ostensibly from memory, but actually using their case file as a crib sheet. Clearly this hybrid form of testimony is not personal knowledge, refreshed memory or recorded recollection. The judge has authority to allow this hybrid form of testimony under KRE 611(a) & (b) if he finds that it will contribute toward ascertainment of the truth and avoid wasted time. But the judge must consider the likelihood that the jury might be misled. The judge should require the proponent to show the following before allowing this hybrid form of testimony:

1. That the officer's testimony is actually needed. Much of an officer's testimony concerns irrelevant details of a police investigation.
2. That the officer cannot testify coherently from memory alone.
3. That a reading of recorded recollection is not a sufficient substitute for the officer's testimony. KRE 803(5).
4. That the officer's testimony will be based mostly on present personal knowledge and that the writing or prompt will be used only to fill in occasional details.
5. That the jury will be able to distinguish the portions of testimony that come from personal knowledge from the portions derived from other sources.

Rule 613 Prior statements of witnesses.

(a) Examining witness concerning prior statement. Before other evidence can be offered of the witness having made at another time a different statement, he must be inquired of concerning it, with the circumstances of time, place, and persons present, as correctly as the examining party can present them; and, if it be in writing, it must be shown to the witness, with opportunity to explain it. The court may allow such evidence to be introduced when it is impossible to comply with this rule because of the absence at the trial or hearing of the witness sought to be contradicted, and when the court finds that the impeaching party has acted in good faith.

(b) This provision does not apply to admissions of a party-opponent as defined in KRE 801A.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 46; amended 1992 Ky. Acts ch. 324, sec. 16; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

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COMMENTARY

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PURPOSE/PREMISE:

The language was copied from CR 43.08 which rule has since been repealed. Its purpose is to fix the foundation requirements for impeachment by introduction of out of court statements. The fact of different statements together with the judge's admonition limiting the jury's use only to reflection on the credibility of present testimony constitutes "strict" or "straight" impeachment. This use has survived enactment of the evidence rules.

However, for years Kentucky has allowed introduction of prior inconsistent statements as substantive evidence as well, *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969), upon compliance with *CR 43.08* foundation requirements. *James v. Wilson*, Ky., 95 S. W. 3d 875 (2002). Not surprisingly, substantive use of out of court statements has eclipsed straight impeachment. KRE 801A(a)(1) is the rule enactment of the Jett case and a rejection of the more limited federal rule approach to substantive use.

Subsection b of this rule exempts party admission under KRE 801A(b) from the foundation requirement.

(a) Substantive use of prior statements is discussed in detail in Rule 801A. The foundation for both uses is discussed here.

(b) The rule requires the examiner (KRE 607 allows a party to impeach his own witness), to notify the witness of the time, place and circumstances of the other statement, essentially to refresh his recollection as to the making and substance of the other statement. If the witness recalls the statement, the witness may admit that the other statement is more accurate than in court testimony or may try to reconcile the statements. The witness may deny making the other statement.

(c) The foundation is not elaborate as the following example shows:

- **1.** Witness testifies that defendant is the person who robbed him.
- **2.** Examiner asks the following questions:
  - **A.** *"Do you recall talking about this case with Officer X on March 15, 2005 at LMPD Headquarters?" "Yes."*
  - **B.** *"Were Detectives Y and Z there also?" "Yes."*
  - **C.** If the other statement is in writing it is presented to the witness to review.
  - **D.** If not in writing, the examiner asks *"Did you tell them that you could not identify the robber because he wore a mask?"*
  - **E.** If in writing, the examiner reads exactly what is on the page: *"Did you tell them "I, uh, I could not say because, um, um, he had like a mask that he was wearing'."*

(d) The witness will answer "yes, no, or I don't know." If the answer is yes, the witness then must be allowed to explain apparent differences. If the witness admits that the other statement is more accurate, there is no need to examine further because the witness has adopted the other statement.

(e) If the witness denies or cannot recall making the statement or cannot recall the substance of the other statement, this rule anticipates introduction of other evidence to show that the other statement was made, that it was different from trial testimony, that a witness who has made two different statements is untruthful, and that the testimony of such a witness should be disregarded. The adverse party may request a limiting admonition.

(f) KRE 801A(a)(1) exempts the different statement from the hearsay exclusionary rule, KRE 802. Because the statement is relevant, it may be introduced as evidence that the truth is something other than the witness's trial testimony.

(g) The plain language of this rule and of KRE 801A(a) presume that the maker of the different statement will be present and subject to questioning about the circumstances of the statement and how it came to be made. *Thurman v. Commonwealth*, Ky., 975 S.W.2d 888, 893 (1998). The second sentence of KRE 613 allows introduction of the different statement when the witness is not present and when the judge finds that the "impeaching party has acted in good faith."

(h) KRE 613 uses the word "different." KRE 801(a)(1) uses the word "inconsistent" to describe the types of statements that trigger impeachment. Both words imply that the in court testi-

mony differs from the out of court statement by adding or deleting some details. It is not necessary for the statements to be outright contradictory of each other.

(i) The judge must decide whether the difference or inconsistencies in the statements are sufficient to justify impeachment. Impeachment on "collateral" matters is not encouraged. KRE 403; 611(a)(2).

(j) The proponent of a witness does not have an absolute right to rehabilitate the witness by showing other statements consistent with the trial testimony. KRE 801A(a)(2) limits the use of consistent statements.

(k) Party admissions do not require a foundation because they are admissible on the ground that a party and the persons associated with the party should know about them. Thus, the party has no reason to complain when they are introduced.

Rule 614 Calling and interrogation of witnesses by court.

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

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

(c) Interrogation by juror. A juror may be permitted to address questions to a witness by submitting them in writing to the judge who will decide at his discretion whether or not to submit the questions to the witness for answer.

(d) Objections. Objections to the calling of witnesses by the court, to interrogation by the court, or to interrogation by a juror may be made out of the hearing of the jury at the earliest available opportunity.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 47; amended 1992 Ky. Acts ch. 324, sec. 17; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PREMISE/PURPOSE:

The 1989 Commentary, p. 66, says that the authority of the judge and the jury to question witnesses is well established in Kentucky law. This rule formalizes the procedure by which questions may be asked. The Commentary suggests that judge and juror questions should be used sparingly.

(a) The obvious danger of judge questioning of witnesses is that the judge will become, in fact or in the jury's view, an advocate for one side. KRE 611 (a)(1) charges the judge to help the jury to find the truth of the case. But Kentucky has always followed a particularly strict rule of adversary presentation of evidence to avoid undue influence of the trial judge on the fact-finding process. *Whorton v. Commonwealth*, Ky., 570 S.W.2d 627, 634 (1978), dissent. The judge has the duty to make sure that the jury is not misled. KRE 403. In *M. J. v. Commonwealth*, Ky. App., 115 S. W. 3d 830 (2002), the court upheld the action of a judge in recessing a hearing for two weeks until a witness could be called and examined. However, the judge must be careful not to cross the line between judge and advocate.

(b) Jurors, as the sole fact finders in a criminal trial, must know all relevant and admissible facts about the case. But the jury is not usually sophisticated enough to discern the difference between what it wants to know and what it is allowed to know. **Subsection (c)** allows jurors to submit written questions to the judge who will decide whether the questions may be asked. The requirement of written questions must be enforced as a means of avoiding juror "blurts" that may precipitate motions for mistrial.

As with judge questions, the danger with juror questions is that jurors may be transformed from neutral fact finders to inquisitors or advocates. They may become either one in the jury room after the case is submitted for deliberation, but not before.

(c) To avoid problems of diplomacy, **Subsection (d)** allows delayed objection.

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Rule 615 Exclusion of witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion. This rule does not authorize exclusion of:

(1) A party who is a natural person;

(2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or

(3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 48; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE:

To prevent intentional or unwitting modification of testimony, the judge always has had authority to exclude witnesses from the courtroom during the testimony of other witnesses. Under this rule the judge must exclude witnesses upon the request of a party. The judge may exclude witnesses on her own motion. The rule does not specify a sanction for violation of the rule. Penalties can range from contempt for the one violating the separation order to prohibition of that witness's testimony. The severity of the sanctions is left to the discretion of the judge.

(a) Subsection 1 of the rule is unnecessary in a criminal case because Section 11 of the Constitution entitles the defendant to meet the witnesses face to face. RCr 8.28 (1) mandates the defendant's presence "at every critical stage of the trial" Thus, Subsection 1 is written primarily for civil cases.

(b) The power to exclude is so firmly established that it is easy to overlook the constitutional infringement that exclusion necessarily entails. All trials on the merits in criminal cases are public proceedings. Both the defendant and the general public have constitutional rights to demand admission of relatives, friends and the general public to all criminal trials. Section 11; First Amendment. The basis for the rule is that exclusion of witnesses is necessary to protect the integrity of the fact finding process. If that purpose is not served by exclusion in a particular situation, the constitutional right of openness should prevail.

(c) In *Justice v. Commonwealth*, Ky., 987 S.W.2d 306, 315 (1998) and *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377, 381 (1999), the court held that the prosecutor may designate a police officer as the representative of the state to be exempted from a separation order. The theory is that the Commonwealth is not a "natural person" and therefore an individual involved in the investigation may qualify as its employee or agent. The alleged victim of a crime cannot be designated as a representative. *Mills v. Commonwealth.*, Ky., 95 S. W. 3d 838 (2003).

(d) Any party can use **Subsection (c)**. Often a party will have an expert witness sit at counsel table or in the courtroom as a prelude to the expert's testimony based on observations made during trial or what the expert has heard in court. An expert is not exempted from separation because she is an expert witness. The party wishing to excuse the expert from separation must obtain the judge's permission under S**ubsection (3)**.

(e) The rule does not limit the number of persons who can be exempted from the separation order.

(f) If a police officer is exempt from separation under **Subsection 2**, his relevant out of court statements are also exempted from the hearsay exclusionary rule because they are statements of the party's agent or servant concerning a matter within the scope of employment. KRE 801A(b)(4). This means that relevant statements of the officer designated as a representative can be introduced without any showing of inconsistency or the KRE 613(a) foundation. ■

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ARTICLE VII.
OPINION AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

(a) Rationally based on the perception of the witness; and

(b) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Premise/Purpose

At common law, lay opinion testimony was presumptively inadmissible because its low probative worth created an unnecessary risk of improper influence on the jury. KRE 701 rejects the common law presumption against admissibility. If the proponent can meet the requirements of the Rule and the probative value of the lay opinion is not substantially outweighed by its potential to mislead the jury, KRE 403, the opinion may be presented to the jury. The Kentucky Supreme Court has characterized the Rule as "more inclusory than exclusory." *Clifford v. Commonwealth*, Ky., 7 S. W. 3d 371, 374 (1999).

Analyzing Lay Opinion Issues

a. Under KRE 701, the proponent must show that the witness "perceived" facts or an event such that the witness could draw a reasonable inference from the facts or event.

Unlike an expert witness, a lay witness may not rely on hearsay or on hypothetical premises posed by counsel. *Young v. Commonwealth*, Ky., 50 S. W. 3d 148 (2001); *Mondie v. Commonwealth*, Ky., ____S. W. 3d ____ (2005).

b. The Rule, obviously, applies only to a witness not testifying as an expert. If the person relies on special knowledge or experience as a basis of the opinion, he must be qualified as an expert before giving the opinion. KRE 701 is not a halfway house for failed expert witnesses. *Griffin Industries, Inc. v. Jones*, Ky., 975 S. W. 2d 100 (1998).

c. The opinion must be "helpful" to determining a fact in issue or understanding the witness' testimony. "Helpfulness" is determined first by ordinary considerations of relevancy under KRE 401 and 402. The opinion must bear on a matter of "consequence to the determination of the action." Assuming that this showing of relevancy is made, the opinion is admissible, subject to KRE 403 balancing.

The Collective Facts Rule

d. A lay witness may use conclusory language to describe an observed phenomenon where there is no other feasible way in which to communicate the observation to the jury. *Fulcher v. Commonwealth*, Ky., 149 S. W. 3d 363, 372 (2004).

e. An obvious example of the need for this so-called corollary is the difficulty attendant to describing a smell. It is almost impossible to describe smell without saying that "it smelled like _____." (gasoline, rotten eggs, Old Spice After Shave).

Typical Lay Opinion Subjects

f. Speed, age, degree of intoxication, smell. *Clifford v. Commonwealth*, Ky., 7 S. W. 3d 371, 374 (1999); *Motorists Mutual ins. Co. v. Glass*, Ky., 996 S. W. 2d 437 (1997).

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g. Sanity of another. *Brown v. Commonwealth*, Ky., 932 S. W. 2d 359 (1996).

h. Whether a substance looked like blood. *Crowe v. Commonwealth*, Ky., 38 S. W. 3d 379 (2001).

i. The demeanor of another. *Garland v. Commonwealth*, Ky., 127 S. W. 3d 529 (2004); *Caudill v. Commonwealth*, Ky., 120 S.W. 3d 635 (2004).

j. The similarities of signatures by a bank manager who knows what the valid signature looks like. *Hampton v. Commonwealth*, Ky., 133 S. W. 3d 438 (2004).

Inadmissible Lay Opinion Subjects

k. Whether or not another person is lying. *Blair v. Commonwealth*, Ky., 140 S. W. 3d 510 (2004).

l. As to guilt or innocence. *Meredith v. Commonwealth*, Ky., 959 S. W. 2d 87 (1997).

Caution: Amendment of Federal Rule 701

m. In 2000, the federal rule was amended by addition of a subsection (c) that specifies that the lay witness may testify if the inference is "not based on scientific, technical or other specialized knowledge within the scope of Rule 702." It appears that this addition was made because of gamesmanship rather than any need to spell out the differences between lay and expert opinions. *Rice and Katriel, Evidence: Common Law and Federal Rules of Evidence, 5th ed.*, p. 1033 (2005). Unethical litigants developed a practice of leaving expert witnesses off their discovery responses with the intention of calling these persons as lay witnesses under Rule 701 when, as a discovery sanction, they were denied permission to call the witnesses as experts.

n. KRE 701 does not have a subsection (c). However, the matter is addressed in SCR 3.130(3.4)(c). This ethical rule prohibits intentional or knowing disregard of rules like RCr 7.24 "except for an open refusal based on an assertion that no valid obligation exists." Prosecutors are ethically bound as "ministers of justice" to obey the rules. SCR 3.130(3.8), Comment 1.

Rule 702. Scientific Evidence & Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Premise/Purpose

This Rule authorizes testimony upon satisfaction of three criteria. It is important to note that this is not just an opinion rule. Experts often are called to do nothing more than provide scientific, medical or technical information from which jurors can draw their own conclusions. Much of the scientific, medical and technical information provided by experts at criminal trials is based on techniques, processes and studies that have long-standing acceptance in the respective disciplines and in the Kentucky Court of Justice. *Daubert* comes into play where there is some doubt as to the validity or reliability of proposed expert testimony. KRE 702 permits introduction of expert evidence if it bears on an issue of consequence, that is, if it is relevant to the outcome of the trial.

Analyzing Expert Witness Issues: Level 1

a. "assist the trier of fact": In most instances, expert testimony should be limited to subjects about which the average juror cannot be expected to know very much. *Dixon v. Commonwealth*, Ky., 149 S. W. 3d 426 (2004). The core concept is assistance to the jury that does not take up too much time [KRE 403] or give undue prominence to certain points of evidence. [KRE 611]. Obviously, the relevance of the proposed evidence to an issue "of consequence" to the outcome of the proceeding is an essential consideration. If the proposed evidence does not meet the KRE 401 definition of relevance, it is excluded by the last sentence of KRE 402.

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b. "qualified as an expert": This part of the Rule looks for "adequate" qualifications rather than "outstanding" qualifications. *Thomas v. Greenview Hospital*, Ky.App., 127 S. W. 3d 663 (2004). Qualification, like other preliminary questions, is determined under KRE 104(a). The question is whether the jury rationally could conclude that the witness knows what she is talking about. The Rules presume that the jury will disregard or discount testimony by a witness it considers insufficiently qualified. *Butcher v. Commonwealth*, Ky., 96 S. W. 3d 3 (2002). A witness may be qualified by formal education or training, self-education, or experience.

c. "scientific, technical or other specialized knowledge": Many topics familiar to defense practitioners have been accepted by the courts for quite some time. Fingerprints, ABO blood grouping, ballistics, medical and psychological evidence, and the two generally recognized methods of DNA typing, have had general acceptance in the disciplines in which they are used. The methods used by police labs for identifying various controlled substances have been used for years without challenge. The same is true for the principles underlying breathalyzers. Other "knowledge" like the practices of drug dealers and users is learned through experience. The Rule language does not impose any limit on the kind of information that can be presented through experts.

Analyzing Expert Witness Issues: Level 2

d. *Dixon v. Commonwealth*, Ky., 149 S.W. 3d 426 (2004) recognizes that the trial judge is the 'gatekeeper" responsible for determining the reliability of evidence under KRE 702. But it also notes that the judge has "wide latitude in deciding how to test an expert's reliability." If there is any doubt as to admissibility, a judge should hold a formal hearing before making the decision. But if the proposed testimony concerns a well established subject matter and the witness's credentials are satisfactory, little would be gained by a hearing. Under these circumstances, the judge may dispense with a formal hearing, but must take care to establish on the record her basis for admission or exclusion. *City of Owensboro v. Adams*, Ky., 136 S. W. 3d 446 (2004).

e. *Johnson v. Commonwealth*, Ky., 12 S. W. 3d 258 (1999), excuses a trial judge from the obligation to hold a formal hearing on reliability if a subject matter has been held reliable by a published Kentucky appellate decision. This case does not compel a judge to forego the hearing. It merely states that the judge may do so. The judge will usually do so if the objecting party does not introduce some evidence casting doubt on the reliability of the objected-to evidence. The party opposing admission bears a burden similar to that imposed by KRS 500.070(3) – the party must introduce some evidence raising doubt as to the reliability of the process or method. If he does so, the proponent of the evidence must ultimately convince the judge that the evidence should be admitted.

Analyzing Expert Witness Issues: Level 3(a)

f. If a scientific or technical method is unproved or there is some new question about an "established" method, the judge must hold a *Daubert* hearing. The "central inquiry" at this point is "an assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Toyota Motor Corporation v. Gregory*, Ky., 136 S. W. 3d 35, 39 (2004).

g. Usually, the trial court will consider four factors:

whether the theory or technique has been tested
whether it has been subjected to peer review and publication
the error rate for the technique and
whether the technique has found acceptance within the relevant scientific or technical community

The list is not binding and does not preclude consideration of any other evidence bearing on reliability. *Brown-Forman Corporation v. Upchurch*, Ky., 127 S. W. 3d 615, 621 (2004).

h. The goal is to protect the jury from undue influence of "junk science" while not giving too much effect to "scientific orthodoxy that would inhibit the search for the truth." *Upchurch*, p. 620.

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i. Reliability is a KRE 104(a) determination. The judge is being asked to determine whether the jury reasonably could rely on the information the witness proposes to present. *Daubert* is a specific approach to making this determination.

j. Even if the witness qualifies as an expert and the method or technique is reliable enough for a reasonable juror to consider, the judge must still apply the balancing provisions of KRE 403 and KRE 611(a). If the probative value of the proposed evidence is slight or merely so-so, and the potential for undue influence, confusion, or waste of time is significant, the judge can and should exclude the testimony, even though it has been qualified under KRE 702. The purpose of expert evidence is to assist the jury, not confuse or mislead it.

Analyzing Expert Witness Issues: Level 3(b)

k. Experts may also qualify through training, experience, or a combination of the two. In criminal practice, the most common witness of this type is a law enforcement officer. For example, in *Fulcher v. Commonwealth*, Ky., 149 S. W. 3d 367 (2004), the court held that an officer could give an opinion that an odor smelled like ammonia, based on his training and experience. In another drug case, the court upheld testimony as to the meaning of entries in a drug dealer's papers. *Dixon v. Commonwealth*, Ky., 149 S. W. 3d 426 (2004).

l. Under this heading, the witness qualifies by saying in effect that "I have seen, heard, or smelled something like this many times before. That's how I know what it is."

Analyzing Expert Witness issues: Level 4

m. A qualified expert witness may rely on facts provided by others. *Parrish v. Kentucky Board of Medical Licensure*, Ky.App., *145* S. W. 3d 401 (2004). Thus, an expert may answer hypothetical questions that are based on facts in evidence or made known under KRE 703.

Analyzing Expert Witness Issues: Level 5

n. If the judge determines that the witness is qualified to testify about a subject matter that is reliable, the witness and the evidence are subject to all of the usual forms of impeachment and contradiction. KRE 607 allows cross examination to show bias. This includes asking the expert whether and how much he is being compensated for appearing to testify. *Miller v. Marymount Medical Center*, Ky., 125 S. W. 3d 281 (2004). The witness may be contradicted by the testimony of another expert or by the learned treatise method. KRE 803(18).

o. The expert's opinion must be based on the standard relied on by other experts in that particular field. *Parrish v. Kentucky Board of Medical Licensure*, Ky.App., 145 S. W. 3d 401 (2004).

Alphabetical Listing of "Scientific" Areas

Accident & crime scene reconstruction

Though not listed in *Johnson*, and thus ripe for a *Daubert* challenge, accident reconstruction "science" is not generally questioned by Kentucky courts. In *Allgeier v. Commonwealth*, Ky., 915 S.W.2d 745, 747 (1996), the Court upheld a decision to allow a police officer, who was not qualified as a reconstructionist, to give an opinion. And the Court of Appeals has held that a witness need not have practical experience in a given industry to qualify as an expert. *Murphy v. Montgomery Elevator Co*., Ky.App., 957 S.W.2d 297, 298 (1997). *Gorman v. Hunt*, Ky., 19 S.w.3d 662 (2000) (Doctor was qualified to give opinion as to point of impact between pedestrian and automobile, even though doctor did not consider himself an accident reconstructionist); *Commonwealth v. Alexander*, Ky., 5 S.W.3d 104 (1999) (Sergeant Simms' opinion concerned a subject specifically within the knowledge of a trained accident reconstruction expert and was likely to assist the jury); *Woodall v. Commonwealth*, Ky., 63 S.W.3d 103 (2001) (serologist testimony concerning blood-spatter was admissible despite defendant's contention that the serologist improperly engaged in crime scene reconstruction).

Ballistics

In *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999) Kentucky held (in dicta) that trial courts may take judicial notice that ballistics is a reliable science. This is highly suspect, however, and defense counsel should demand *Daubert* hearings to challenge any possibly unreliable ballistics testing. Reported Kentucky cases since *Johnson* mention ballistics experts, but still do not address the reliability of ballistics. *Foley v. Commonwealth*, Ky., 55 S.W.3d 809 (2000); and *Lewis v. Commonwealth*, Ky., 42 S.W.3d 605 (2001). On June 6, 2003, DPA attorney Marguerite Thomas won an (unpublished) appeal ordering remand for evidentiary hearing on the issue of whether it was ineffective assistance of counsel **not** to get a defense ballistics expert to cross-examine the state's expert.

Bite mark evidence

In *Wheeler v. Commonwealth*, Ky., 121 S. W. 3d 173, 183 (2004), the court held that a physician was qualified to testify that an injury on the defendant's arm was not a bite mark. The doctor qualified through medical training.

Blood spatter evidence

A physician can be qualified by training and "on-the-scene observations" to testify about blood spatters at a crime scene. *Wheeler v. Commonwealth*, Ky., 121 S. W. 3d 173, 183 (2004). In *Woodall v. Commonwealth*, Ky., 63 S.W.3d 103 (2001) the court disregarded the defendant's contention that a serologist relied on assumptions and improperly engaged in crime scene reconstruction in testifying that one bloodstain was made by victim's face being mashed into the seat. Serologist testimony concerning blood-spatter was admissible based upon photographs taken of the interior of the victim's van and supported by physical evidence. However, a witness need not qualify as an expert to testify about his observation of blood spatters. *Thompson v. Commonwealth*, Ky., 147 S. W. 3d 22 (2004).

Breath testing

In *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999) Kentucky held (in dicta) that trial courts may take judicial notice that breath testing is a reliable science. This is suspect. Defense counsel should demand *Daubert* hearings to challenge any possibly unreliable breath testing. In *Commonwealth v. Davis*, Ky., 25 S.W.3d 106 (2000) (breath tests admissible if machinery was "properly checked and in proper working order at the time of conducting the test."), the defense challenge was not to the underlying reliability of breath tests, but to the working order of a particular machine.

Causation

Kentucky appears to consider that there is nothing "novel" about a medical doctor's testimony on causation, and hence no *Daubert* hearing is required. An unreported Court of Appeals case decided in February 2003 held that the trial court erred in ruling that causation testimony of two doctors failed to meet the *Daubert* test. *Scott v. David L. Grimes, P.S.C.* Ky.App., Not Reported in S.W.3d, (2003).

Other experts are not so readily allowed to testify as to causation. *E.g.*, an accident reconstruction expert invades the province of the jury by opining on the cause of an accident or the fault of drivers. *Renfro v. Commonwealth*, Ky., 893 S.W.2d 795 (1995).

Child sex abuse syndrome

In *R.C. v. Commonwealth*, Ky.App., 101 S.W.3d 897 (2002), a social worker's opinion, that a child exhibited signs of being sexually abused, was inadmissible, and the child's hearsay statements regarding alleged abuse were not admissible as excited utterances. Also, in *Miller v. Commonwealth*, Ky., 77 S.W.3d 566 (2002), the testimony of a police sergeant specializing in child sexual abuse investigations, that in 90 percent of the cases she investigated, there was a delay between the sexual abuse and the child's report of the sexual abuse, was improper evidence of the habits of others.

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Crime re-enactment

Woodall v. Commonwealth, Ky., 63 S.W.3d 103 (2001) (serologist testimony concerning crime re-enactment admissible); *Price v. Commonwealth*, Ky., 59 S.W.3d 878 (2001) (reenactment of crime during closing argument was improper, but harmless) Cf. *Wilhite v. Rockwell Intern Corp.*, Ky., 83 S.W.3d 516 (2002) (exclusion of empirical model, constructed for this case and untested in any other forum). *See also Price v. Commonwealth*, Ky., 59 S.W.3d 878 (2001) (victim's participation in reenactment of the crime, for first time during prosecutor's closing argument, was improper, but not prejudicial).

Eyewitness identification

Kentucky has ruled that expert testimony on eyewitness identification may be admissible. *Commonwealth v. Christie*, Ky., 98 S.W.3d 485 (2002), overruling *Pankey v. Commonwealth*, Ky., 485 S.W.2d 513 (1972), and *Gibbs v. Commonwealth*, 723 S.W.2d 871 (1986). *Christie* holds that the court's, in refusing to consider the defense expert's testimony on the reliability of eyewitness identification before excluding it, was not harmless. Held: trial judges have discretion to allow opinion testimony from experts regarding the reliability of eyewitness testimony. Case reversed and remanded for a hearing to determine "the relevancy and reliability of expert eyewitness-identification testimony under KRE 702 based upon a proper record."

False Confession / mental retardation

In *Rogers v. Commonwealth*, Ky., 86 S.W.3d 29 (2002), the trial court prohibited a physician from testifying to her opinion that Rogers' limited mental capacity could have caused him to confess falsely. Held: the trial court erred by excluding this testimony on grounds it addressed the "ultimate issue" of guilt. The case was reversed, and is now set for re-trial.

Fiber analysis

In *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999) it was held (in dicta) that trial courts may take judicial notice that fiber analysis is a reliable science. This is highly suspect, and defense counsel should demand *Daubert* hearings to challenge any possibly unreliable fiber analysis. See Michael J. Saks, "Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science," *Hastings Law Journal*, Vol. 49, No. 4, pp. 1069 – 1141.

Fingerprint analysis

In *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999), it was held (in dicta) that trial courts may take judicial notice that fingerprint comparison is a reliable science. There has never been testing to prove the reliability of fingerprint comparison techniques. Some courts distinguish between "rolled" fingerprints, taken under controlled circumstances at a police station and "latent" fingerprints, which are those lifted in the field and which may or may not be complete samples. *U. S. v. Sanchez-Birruetta*, 2005 WL 662655 (9th Cir, 2005), unpublished.

Handwriting analysis

Florence v. Commonwealth, Ky., 120 S. W. 3d 699, 701 (2004), holds that, under the *Johnson* rule, handwriting analysis need not be subjected to a *Daubert* procedure. The case holds that the burden is on the opposing party to show unreliability.

Hair analysis

Kentucky has judicially noticed hair analysis by microscopic comparison as a reliable science. *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999) However, courts outside Kentucky have firmly rejected **hair analysis** due to a complete lack of evidence this is a reliable technique. Moreover, since *Johnson*, a Jefferson County defendant, William Gregory, was freed when DNA analysis proved it was not, after all, his hair at the crime scene. A so-called expert had testified that it was, based on eye-balling the hair under a microscope.

Hypnosis

Roark v. Commonwealth, Ky., 90 S.W.3d 24 (2002). Without addressing or deciding scientific validity under *Daubert*, the Court holds that admission of post-hypnotic identification and testimony in this case was neither clearly erroneous, nor an abuse of discretion. Unfortunately, the

defendant had agreed to admissibility of an audiotape of the victim's hypnosis session Held: "totality of circumstances" approach is the soundest approach for evaluating the admissibility of evidence that is the product of a hypnotically induced, refreshed, or enhanced recollection.

Law
A witness may not express and opinion as to the law. Legal questions are reserved exclusively for the judge. RCr 9.58; *Rockwell International Corp. v. Wilhite,* Ky.App., 143 S. W. 3d 604, 623 (2003).

Ligature/Strangulation
A witness with extensive Army training and experience in garroting people was deemed qualified to render an opinion on how a person was strangled. *Bratcher v. Commonwealth,* Ky., 151 S. W. 3d 332, 352 (2004).

Medical causation
Daubert applies to medical testimony about causation of injury. *City of Owensboro v. Adams,* Ky., 136 S. W. 3d 446, 450-451 (2004).

Pedophile profile
In *Tungate v. Commonwealth,* Ky., 901 S.W.2d 41, 42-44 (1995), the court upheld exclusion of a psychiatrist's "profile" or list of "indicators" of pedophilia by saying that "it will require much more by way of scientific accreditation and proof of probity" to justify admission.

Polygraph
Evidence obtained as a result of a polygraph examination is still inadmissible in Kentucky. *Garland v. Commonwealth,* Ky., 127 S. W. 3d 529 (2004).

Voiceprint analysis
The FBI, after conducting post-*Daubert* testing on the reliability of voiceprint analysis, has determined that it is not at all reliable. As a result, FBI policy now precludes the use of voiceprint analysis in prosecuting its cases. Michael J. Saks, "Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science," *Hastings Law Journal,* Vol. 49, No. 4, pp. 1069 – 1141. *U. S. v. Angleton,* 269 F. Supp. 2d 892 (S. D. Tex., 2003), thoroughly reviews the failings of this method.

Rule 703 Bases of opinion testimony by experts.

(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
(b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.
(c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

COMMENTARY

PURPOSE/PREMISE:
The Commentary says "trial judges should take an active role in policing the content of the expert witness' direct testimony." An expert is excused, in some circumstances, from the KRE 602 requirement of personal knowledge and may rely on information that ordinarily could not be mentioned in front of the jury. KRE 703(a). The witness may also let the jury know the basis of his conclusions, even if the basis consists of evidence that would ordinarily be inadmissible. KRE 703(b).

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a. Under KRE 703(a), an expert may base an opinion on facts or data either perceived by the witness or "made known" to her. Obviously the witness may speak from personal knowledge as in the case of a chemist testifying about a chemical analysis that she conducted. Subject to KRE 615(3), the witness also may sit in the courtroom to hear the facts or data introduced into evidence. In addition, the witness can be given a list of facts either before or during trial and, on those facts, give a hypothetical opinion. The witness may rely on hearsay or other evidence not necessarily admissible under the rules "if of a type reasonably relied upon by experts in the field."

b. Subsection (a) requires the judge to decide whether the inadmissible information actually is "of a type reasonably relied upon in the particular field in forming opinions or inferences..." This is a KRE 104(a) determination. In *Parrish v. Kentucky Board of Medical Licensure*, Ky.App., 145 S. W. 3d 401 (2004), the court held that "the law of Kentucky does not unduly restrict the evidence on which an expert witness bases his testimony."

c. Because the range permitted by this Rule is so broad, it is necessary to contact the witness before trial to obtain some idea of what will be relied on.

d. Under KRE 703(b), if the expert relies on facts made known to him but not introduced into evidence, those facts may be introduced "at the discretion of the court," but only for the purpose of explaining or "illuminating" the testimony by the witness. These facts may be otherwise inadmissible under the Rules of Evidence but can be introduced for the limited purpose of explaining why the witness reached the conclusion or opinion.

e. Subsection (b) requires the judge to decide first whether the facts or data meet the definition in subsection (a). If so, the judge must decide under (b) whether the information is (1) trustworthy, (2) necessary to illuminate the testimony, and (3) unprivileged. If so, and if the judge believes an admonition will cause the jury to use the evidence properly, the witness may be allowed to speak about the inadmissible facts or data.

f. The Commentary indicates that Subsection (b) is to be used sparingly and only when "necessary to a full presentation of the experts' testimony."

g. Because Subsection (b) allows introduction of otherwise inadmissible evidence, the drafters included a final sentence requiring the judge, upon request of any party, to admonish the jury to limit its use of these facts to "evaluating the validity and probative value of the experts' opinion or inference."

h. Even if the evidence qualifies under Subsections (a) or (b), the judge must subject it to KRE 403 balancing. The Commentary notes that "under proper circumstances, a portion of the basis of an experts' opinion might be excluded even though independently admissible as evidence." Obviously, the drafters intend for very limited introduction of otherwise inadmissible evidence under Subsection (b).

i. KRE 703(c) is a precautionary rule which precludes use of Subsections (a) or (b) to limit cross examination. The apparent underlying theory is that if the adverse party is willing to go into otherwise inadmissible matters to attack the witness' opinion, this can be allowed although it would be unwise, except in special cases, to allow the proponent of the expert to do so on direct examination.

j. It is proper to call an expert witness to criticize the method or theory which underlies the adverse party's expert testimony. *U.S. v. Velasquez*, 64 F.3d 844 (3rd Cir. 1995).

k. One of the obvious concerns of the drafters is that Subsection (b) might be misused to allow expert witnesses to bootleg hearsay into the case. This problem commonly arises in sexual abuse/assault cases in which a physician testifies that the prosecuting witness described the assault, the identity of the assailant, the emotional and physical pain associated with the incident, and other details. Usually, such out of court statements are excludable on relevance or hearsay grounds. KRE 401; 801A(a)(2). But if the doctor relied on the statements in forming a diagnosis,

KRE 703(b) could be a ground for relating these statements to the jury. If the judge decides the statements are necessary on direct examination or if cross examination brings them out, it is essential to obtain an admonition limiting the statements to only non-substantive use, as an explanation of the reason that the witness reached a particular conclusion.

NOTES

Rule 704 (Number not yet utilized.)
"Ultimate Issue" Testimony

PURPOSE/PREMISE:
The rule as originally proposed in 1989 paralleled the language of KRE 704. The rule was not adopted, and for several years, Kentucky's common law continued to preclude opinion testimony on an "ultimate issue." However, in *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 890-891 (1997), the Kentucky Supreme Court adopted the principle of KRE 704 thus abrogating the "ultimate issue" prohibition.

a. Under *Stringer*, expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies *Daubert*, (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

b. The ultimate issue in a criminal case is guilty or not guilty. *Commonwealth v. Alexander*, Ky., 5 S. W. 3d 104 (1999). Opinions or testimony as to guilt or innocence are excluded because they are not helpful. *KRE 702*. Necessarily, opinions or testimony short of opinions of guilt or innocence are not excluded by *Stringer*. They must be considered under the framework set out in Paragraph (a) of this section.

Rule 705 Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

COMMENTARY

PURPOSE/PREMISE:
This rule permits the proponent of an expert witness some flexibility in the presentation of the expert's opinion or inference. Under this rule, the expert may give the opinion or make the inference before discussing the thought process that led to it or the factual basis for it. This is acceptable because RCr 7.24(1)(b) and RCr 7.24(3)(A)(i) provide for pre-trial discovery of reports of scientific tests and experiments and of physical or mental examinations. Thus, in theory, the adverse party knows of the opinion in advance and can object to the inference or opinion even before the witness testifies.
a. The rule is designed to give some leeway to the proponent of the expert, but leaves the final decision as to how the expert testifies to the judge. The judge can always "require otherwise."

b. The second sentence of the rule insures the right of the adverse party to establish the facts or data on cross-examination if they are not brought out by the proponent of the witness. *Hart v. Commonwealth*, Ky., 116 S.W. 3d 481 (2003).

c. The Commentary notes that this rule changes the procedure by which hypothetical questions are propounded and makes them less necessary.

d. When possible, the adverse party should file a pretrial *in limine* motion if the expert will not consent to an interview or will not provide adequate information before trial begins. Discovery responses are only the beginning in planning the cross examination of an expert witness.

Rule 706 Court-appointed experts.

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may require the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. Except as otherwise provided by law, the compensation shall be paid by the parties in such proportions and at such time as the court directs, and thereafter charged in like manner as other costs.

COMMENTARY

PURPOSE/PREMISE:
This rule is rarely used because the parties may hire their own experts, and even indigents may apply for funds to hire an expert pursuant to KRS 31.185. A criminal defendant's rights of compulsory process, under the U.S. Constitution's Sixth Amendment and the Kentucky Constitution's Section Eleven, guarantee that the defendant may call witnesses who have something relevant and important to say. So, the need for this rule in criminal cases is unclear. A court-appointed expert who testifies in a way that damages one or all parties to a litigation would create a problem analogous to that foreseen by KRE 605 and 606.

A standard form of cross examination involves impeachment of an expert by questions about identification with the party, retention on behalf of a class or type of plaintiff or defendant, and the amount and contingency of payment for services. This kind of cross-examination would backfire when addressed to a "court appointed" expert who would be perceived as the judge's witness with no axe to grind in the case. It is best that this procedure never be used. ■

There is no surer way to misread any document than to read it literally. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, evidence of what they would have done, they are by no means final.

- Learned Hand

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ARTICLE VIII. HEARSAY

NOTES

COMMENTARY

KRE 802 excludes "hearsay" by declaring it inadmissible unless it falls under an exception established by a court rule. Rule 802 does not supersede other rules. Rather, hearsay issues require at minimum a three-step analysis. The proponent first must show relevance, KRE 401-402, and overcome any objections of the opponent [typically Article IV or VI objections], before the hearsay question can be considered. If the evidence is irrelevant or the witness is incompetent, the hearsay nature of the evidence really does not matter. But if the proponent makes the first required showing, then he must show that the proposed hearsay evidence falls under one of the recognized hearsay exceptions. If the proponent makes the first two showings, the opponent of the evidence may still argue under KRE 403 that the evidence should be excluded. This analysis applies to all hearsay issues.

Rule 801 Definitions.

(a) Statement. A "statement" is:
(1) An oral or written assertion; or
(2) Nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.
(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 55; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE

Article 8 is organized according to a plan in which hearsay is (1) identified and defined, (2) prohibited in most instances, and (3) permitted in certain well-delineated circumstances. *KRE 801* defines hearsay.

(a) Hearsay deals first of all with a "statement." It does not deal with several assertions lumped together and considered as a group because a person made them at one time out of court. In *Williamson v. U.S.*, 512 U. S. 594 (1994), the Court interpreted the same definitional language for the federal court system, and held that a hearsay "statement" means a "single declaration or remark" rather than a "report or narrative." When considering a hearsay issue like a confession or a witness interview, the judge must consider each individual statement, line by line and phrase by phrase. Each individual hearsay statement must qualify under a hearsay exception. *Osborne v. Commonwealth*, Ky., 43 S. W. 3d 234 (2001).

(b) A "statement" is an assertion — oral, written, or nonverbal. Nonverbal conduct ordinarily does not assert anything, but it can do so in some instances. A timely nod or gesture can be an answer to a question as much as an oral response. However, a witness's observation of conduct and his conclusion of what it means is not hearsay. *Partin v. Commonwealth*, Ky., 918 S.W.2d 219, 222 (1996); *Wheeler v. Commonwealth*, Ky., 121 S. W. 3d 173 (2003).

(c) An assertion is "a positive statement or declaration." And, "positive" in this context implies a statement explicitly or openly expressed. *American Heritage Dictionary, 4th ed., p. 108; 1369 (2000)*.

(d) The Commentary states that the party claiming that nonverbal conduct is an assertion has the burden of showing that it is. This is a KRE 104(a) decision for the judge. (Commentary to 1989 Final Draft, Kentucky Rules of Evidence, p. 76)

(e) Hearsay is customarily equated with "out of court" statements. This is correct in most but not all cases. The language of Subsection(c) describes hearsay as a statement made at a time

that the declarant is not "testifying at the trial or hearing." Under this definition, unsworn statements made in the courtroom but not from the stand as a witness are subject to hearsay analysis. Although depositions are sworn, cross-examined statements, they nevertheless are hearsay.

(f) To be hearsay under Subsection (c), out of court statements must also be offered in evidence "to prove the truth of the matter asserted." Both conditions must be met before the statement is subject to the hearsay exclusionary rule. *Perdue v. Commonwealth,* Ky., 916 S.W.2d 148, 156 (1995); *Garland v. Commonwealth*, Ky., 127 S. W. 3d 529 (2004).

(g) If an out of court statement is introduced simply to show that it was made or to show the effect it had on the person who heard it, (assuming that these matters are relevant in the first place), it is not considered hearsay. It is not being offered for the truth of the matter asserted. *Caudill v .Commonwealth,* Ky., 120 S. W. 3d 635 (2003)*; Miller v. Marymount Medical Center,* Ky., 125 S. W. 3d 274 (2004); *Turner v. Commonwealth,* Ky., 153 S.W. 3d 823 (2005).

(h) If the proponent claims a non-hearsay use for the statement, he must satisfy the judge that the non-hearsay purpose is legitimate and that the jury will not be misled or confused as to the proper use of the statement. KRE 403. *Moseley v. Commonwealth*, Ky., 960 S.W.2d 460, 461-462 (1997).

(i) **"Investigative hearsay"** is still a problem. Part of the trouble may arise from the phrase itself, which is a misnomer. If statements on which the officer relied are properly admissible under this concept, they are not hearsay because they are not offered to prove the truth. They are introduced only to explain the officer's actions. Additionally, it is relatively clear that this exception/restriction applies to all witnesses, not just police officers. *See, Stringer v. Commonwealth,* Ky., 956 S.W.2d 883, 887 (1997); *Slaven v. Commonwealth,* Ky., 962 S.W.2d 845, 859 (1997).

(j) But the actions of the officer must be at issue in the case for the statements to be relevant in the first place. KRE 401; *Daniel v. Commonwealth,* Ky., 905 S.W.2d 76, 79 (1995); *Stringer v. Commonwealth,* Ky., 956 S.W.2d 883, 887 (1997). The actions of the officer are rarely relevant on direct examination by the prosecutor. The Commonwealth must meet its burden of proof by showing the identity of the actor, commission of prohibited actions or omissions, and culpable mental state. Unless the officer's actions bear directly on one of these points her actions are irrelevant and it does not matter what the officer was told.

(k) *Gordon v. Commonwealth*, Ky., 916 S.W.2d 178, 179 (1995), correctly points out that "information as to the motivation" of police actions may be needed in some cases "to avoid misleading the jury." The court also noted that this information "is fraught with danger of transgressing the purposes underlying the hearsay rule."

(l) The danger of misleading the jury is usually a reason to exclude evidence, not to admit it. KRE 403. Claims that the jury will want to know how the officer got involved in the case *Gordon, p.179,* ignore the burden of proof. On direct examination the actions of the officer are irrelevant and therefore inadmissible. KRE 402. For example, an officer cannot relate the details of the radio dispatch that caused him to pull the defendant's car over, unless the defendant "opens the door" by claiming an improper motive in the stop. *White v. Commonwealth,* Ky., 5 S.W.3d 140, 142 (1999).

(m) If the defendant "opens the door" by attacking the officer or the investigation, the officer's actions are relevant and the reasonableness of those actions can be shown by revealing the information conveyed to the officer. This is the only legitimate basis for introduction of statements on which the officer relied. A limiting instruction should be given. KRE 105.

(n) Occasionally a party will claim that statements made in the presence of the other party either aren't hearsay or fall under some exception to the hearsay exclusionary rule. This idea was rejected in *Perdue v. Commonwealth,* Ky., 916 S.W.2d 148, 157 (1995). The court noted that such statements might be adoptive admissions under KRE 801A(b)(2), but otherwise are just hearsay.

(o) Sometimes evidence is a mix of admissible information and hearsay. In *Fulcher v. Commonwealth*, Ky., 149 S. W. 3d 363 (2004), the court observed that a sound video showing how methamphetamine is manufactured contained both admissible evidence (the video) and inadmissible hearsay evidence (the sound track).

NOTES

NOTES

Rule 801A Prior statements of witnesses and admissions.

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613 and the statement is:
- **(1) Inconsistent with the declarant's testimony;**
- **(2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or**
- **(3) One of identification of a person made after perceiving the person.**

(b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:
- **(1) The party's own statement, in either an individual or a representative capacity;**
- **(2) A statement of which the party has manifested an adoption or belief in its truth;**
- **(3) A statement by a person authorized by the party to make a statement concerning the subject;**
- **(4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or**
- **(5) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.**

(c) Admission by privity:
- **(1) Wrongful death. A statement by the deceased is not excluded by the hearsay rule when offered as evidence against the plaintiff in an action for wrongful death of the deceased.**
- **(2) Predecessors in interest. Even though the declarant is available as a witness, when a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is not excluded by the hearsay rule when offered against the party if the evidence would be admissible if offered against the declarant in an action involving that right, title, or interest.**
- **(3) Predecessors in litigation. Even though the declarant is available as a witness, when the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is not excluded by the hearsay rule when offered against the party if the evidence would be admissible against the declarant in an action involving that liability, obligation, duty, or breach of duty.**

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 55; amended 1992 Ky. Acts ch. 324, sec. 20; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE

The three Subsections of this Rule deal with principles that are well established: statements of witnesses, admissions of parties, and admissions by privity. Admissions by privity (Subsection (c)) do not often figure in criminal cases and therefore they are not discussed here. The Federal Rule flatly declares that these types of statements are not hearsay. Kentucky excepts them from the Hearsay Exclusionary Rule. Kentucky also differs markedly from the Federal Rule on the types of statements that can be qualified under KRE 801A(a)(1). This Rule provides that statements formerly admissible only as impeachment may also be admitted as substantive evidence.

(a) Subsection (a) allows any party to question a witness about prior statements as long as the witness (1) is the declarant of the statement, (2) testifies at trial, (3) is examined about the prior statement pursuant to KRE 613, and (4) the previous statement is (a) inconsistent with the witness/declarant's testimony, or (b) consistent with testimony and offered to rebut an allegation of recent fabrication or corrupt motive, or (c) one identifying a person after the witness/declarant has "perceived" the person.

NOTES

(b) Subsection (a)(1) continues long-standing Kentucky practice and is based on the belief that, as long as the declarant is present and subject to cross examination, "there is simply no justification for not permitting the jury to hear, as substantive evidence, all they [the declarant and the person testifying to the prior statement] have to say on the subject and to determine wherein lies the truth." *Porter v. Commonwealth*, Ky., 892 S.W.2d 594, 596 (1995). However, this applies only when the witness being impeached has "personal knowledge" of the issue inquired about. *Askew v. Commonwealth*, Ky., 768 S.W.2d 51 (1989); *Meredith v. Commonwealth*, Ky., 959 S.W.2d 87, 91 (1997). Where the supposed maker of the statement denies making the statement, which contains admissions by a third party, it is permissible to then call a witness to relate that the witness did make the statement. *Thurman v. Commonwealth*, Ky., 975 S.W.2d 888, 893 (1998). It is also improper to introduce the prior inconsistent statement through the police officer prior to the witness being called and examined about the supposed statement: it is improper to "predict" that the witness will say something inconsistent. *White v. Commonwealth*, Ky., 5 S.W.3d 140, 141 (1999).

(c) Kentucky rejects the Federal Rule language that limits prior statements to only those given "under oath" at legal proceedings or depositions. *Thurman v. Commonwealth*, Ky., 975 S.W.2d 888, 893-894 (1998).

(d) If the declarant/witness admits the other statement was made, no further examination is necessary. If the declarant/witness cannot remember or denies making the statement, other evidence showing that it was made, and its substance, may be introduced.

(e) Consistent statements may be used upon proper foundation but only for purposes of rebutting an express or implied charge against the declarant/witness of (1) recent fabrication or (2) improper influence or motive. Prosecutors in particular have often overlooked the limitation to rebuttal use and the limited issues for which the Rule provides exemption from the Hearsay Exclusionary Rule.

(f) In *Smith v. Commonwealth*, Ky., 920 S.W.2d 514, 516-517 (1995) and *Fields v. Commonwealth*, Ky.App., 904 S.W.2d 510, 512-513 (1995), the courts discussed Subsection (a)(2) and properly limited its use. In *Fields*, the court noted that the Rule "preserves the concept that the problems admitting [prior consistent] testimony outweigh its cumulative probative effect except in certain instances."

(g) The Court recognized that where a party claims that "collateral events or motives" have caused a witness's testimony to become untrustworthy, a consistent statement made at a time when the motive or influence could not have been a factor is (1) relevant to answer the charge of untrustworthiness and (2) reliable enough to qualify for exemption from the Hearsay Exclusionary Rule.

(h) The *Fields* Court pointed out that prior consistent statements cannot be used to "buttress testimony called into issue as a result of faulty memory, inability to observe or any of the host of reasons for challenging testimony." However, introduction of a portion of a prior written statement during cross-examination may allow the opponent to require the balance of the writing to be introduced pursuant to *KRE 106*, even if portions are consistent and otherwise inadmissible under *KRE 801A(a)(2)*. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 858 (1997).

(i) The *Smith* Court identified the danger of bolstering and noted the Supreme Court's record of condemning testimony of social workers and police officers as to consistent statements. The court held that, in addition to improper bolstering, such testimony "lacked probative value" and was unnecessary. This would include portions of the tape-recorded confession of the defendant in which the arresting officer repeats portions of the prior consistent accusations of the accuser – those portions must be redacted. *Belt v. Commonwealth*, Ky., 2 S.W.3d 790, 792 (1999). The audio portion of a crime scene video containing the statements of the investigating officer, consistent with his testimony at trial, is also considered a prior consistent statement excluded by this rule and must be redacted. *Fields v. Commonwealth*, Ky., 12 S.W.3d 275, 280-281 (2000).

(j) Kentucky has followed the U.S. Supreme Court analysis set out in *Tome v. U.S.*, 513 U. S. 150 (1995), which limits consistent statements to those made before the motive for fabrication existed. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 858 (1997).

NOTES

(k) Subsection (a)(3) addresses the problem of a witness who once identified or failed to identify and who later, in trial testimony, either cannot identify the person or now identifies the person. This Rule deals primarily with a witness who has forgotten what the defendant looks like.

(l) Because of the definition of "statement" in KRE 801(a), the inconsistency could be dealt with under KRE 801A(a)(1). As a policy matter, however, the drafters chose to adopt the Federal Rule language to cover this subject.

(m) The statement of identification can be oral or written, or it can be the act of picking the defendant's photograph out of a photopack. KRE 801(a). The witness describing the identification may also opine that the declarant showed no hesitation in making the identification. *Wheeler v. Commonwealth*,, Ky., 121 S. W. 3d 173 (2003).

(n) The Commentary makes it clear that this is an exemption from the Hearsay Exclusionary Rule only for the person who made the identification. (Commentary to 1989 Final Draft, Kentucky Rules of Evidence, p. 78)

PARTY ADMISSIONS

(o) Subsection (b) lists five instances in which a statement attributable in some way to a party may qualify as an exemption to the general Hearsay Exclusionary Rule. The common first requirement of all five is that the statement be offered against a party. What is often called "self-serving" hearsay, that is, a statement that is actually favorable to the party, cannot qualify. *Caudill v. Commonwealth*, Ky., 120 S. W. 3d 635 (2003). This requirement should not be confused with the statement against interest that is governed by KRE 804(b)(3).

(p) A party's own statement may be introduced against her whether the party appears to testify or not. In criminal cases the defendant's "statement" to police is often introduced by the Commonwealth during its case in chief. It is important to remember the constitutional limitations on the use of the defendant's statements to the authorities. Involuntary statements may never be used. Statements taken without *Miranda* warnings cannot be used in chief but may be used to contradict the testimony of the defendant. *Canler v. Commonwealth*, Ky., 870 S.W.2d 219, 221 (1994).

(q) Refusal to answer can be a non-verbal statement. Failure to respond to an accusation traditionally has been considered a manifestation of the accused person's belief that the accusation is true. In Kentucky, however, there is no legal duty to speak with police either before or after arrest or *Miranda* rights are given. KRS 519.040, 523.100 and 523.110 only prohibit false statements by a person who chooses to speak to police or other authorities. Thus, silence in the face of an accusation by police never should be construed as a non-verbal statement that might qualify under this rule. Nobody has to talk to the police.

Silence in the face of an accusation by an ordinary citizen may or may not be a non-verbal statement although in a society influenced by the knowledge that "anything you say may be used against you" it is perhaps becoming unreasonable to expect anyone to respond to accusations. *Perdue v. Commonwealth*, Ky., 916 S.W.2d 148, 158 (1995); *Blair v. Commonwealth*, Ky., 144 S.W. 3d 801, 806 (2004).

The foundation for "admission by silence" requires proof that the party heard the statement, understood what the statement was, and remained silent. *Blair v. Commonwealth*, Ky., 144 S.W. 3d 801, 806 (2004); *Terry v. Commonwealth*, Ky., 153 S. W. 3d 794 (2005).

(r) Obviously, a nod or an oral indication that a party believes that another's statement is true can qualify another person's statement as an exception under Subsection (b)(2).

(s) An indigent criminal defendant will rarely have a spokesperson and therefore Subsection (b)(3) is unlikely to play a prominent part in criminal defense practice.

(t) Subsection (b)(4) applies to statements made by the attorney for the Commonwealth, police officers or defense counsel. See: Comment to KRE 615(2). Attorneys appearing on behalf of a party are agents. *Clark v. Burden*, Ky., 917 S.W.2d 574, 575 (1996). Thus, any disclosure of damaging information by the attorney may be introduced against the client under this Subsection of KRE 801A.

(u) Subsection (b)(5) deals with statements made by other participants in a conspiracy that are introduced against the defendant who was part of the conspiracy. If such statements qualify,

NOTES

they may be used as substantive evidence against the defendant. The analysis for such statements is as follows:

1. Obviously, the judge must first determine that a conspiracy existed and that the defendant was involved. KRE 104(a); *Gerlaugh v. Commonwealth*, Ky., 156 S. W. 3d 747, 753 (2005).
2. The judge may consider the proffered statement as evidence that the conspiracy existed because the Rules of Evidence do not apply to KRE 104(a) determinations. KRE 1101(d)(1); *Gerlaugh, p. 754*.
3. But Kentucky requires additional independent proof of an existing conspiracy before the finding can be made. *Gerlaugh, p. 754*.
4. The judge must also find that the proffered statement was made while the conspiracy was going on and that it was "in furtherance" or served some purpose for the success of the conspiracy.
5. If the proponent meets the requirements and KRE 403 does not justify exclusion, co-conspirator statements may be introduced.

Rule 802 Hearsay rule.

Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 57; amended 1992 Ky. Acts ch. 324, sec. 21; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE

Sections 7, 11, and 233 of the Constitution prescribe a certain form of trial in criminal cases. The common law aspects of trial under Section 233 can be changed by the Supreme Court. [Constitution, Sections 116; 124]. But the features guaranteed by Sections 7 and 11 are not subject to change. A criminal trial in Kentucky requires sworn testimony, [Section 7;KRE 603], by a witness with personal knowledge of the subject matter of the testimony, [Section 233;KRE 602], subject to cross examination. [Section 11;KRE 611 (b)]. The witness who lacks personal knowledge and relates what the declarant told her is only passing along what she heard. The witness can be sworn and cross-examined about the circumstances in which the statement was made but the witness does not have personal knowledge of the truthfulness of the declarant's statement. Under these circumstances, cross-examination does not reach the really important part of the testimony. KRE 802 excludes such testimony except in certain specific situations defined in Rules 801A, 803 and 804.

(a) This rule makes the admissibility of hearsay the exclusive responsibility of the Supreme Court which is the only agency of government authorized to make rules for the Court of Justice. *Constitution, S*ec. 116. The General Assembly cannot authorize the use of hearsay without the concurrence of the Supreme Court pursuant to KRE 1102 (b). For this reason, KRS 421.350 (3), as amended in 1996, is void because it purports to authorize use of prerecorded testimony in child sexual abuse trials.

(b) RCr 3.14(2) permits hearsay in adult felony probable cause hearings. *White v. Commonwealth*, Ky.App., 132 S. W. 3d 877 (2003). The exceptions in *KRE 801A, 803 and 804* also permit hearsay.

(c) KRE 802 does not apply to the proceedings exempted from the rules by KRE 1101 (d). Hearsay is permitted in these proceedings.

(d) The right of confrontation protected by the 6th Amendment and by Section 11 is an important consideration in any hearsay case. The federal Supreme Court has long held that the 6th Amendment does not necessarily prohibit admission of hearsay against a criminal defendant. *Idaho v. Wright*, 497 U.S. 805 (1990).

(e) In 2004, however, *Crawford v. Washington*, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), held that the 6th Amendment confrontation clause prohibits admission of an out of court "testimonial" statement at a criminal trial except (1) where the declarant appears as a witness and can be cross examined about the statement or (2) where the declarant does not

appear as a witness but the adverse party had an opportunity to cross examine the declarant at an earlier proceeding.

(f) *Ohio v. Roberts*, 448 U. S. 56 (1980), the long-standing precedent dealing with firmly rooted hearsay exceptions and particularized guarantees of trustworthiness, is certainly limited by *Crawford*. It may still be a valid approach for analyzing "non-testimonial" out of court statements. [*Crawford*, 124 S. Ct., p. 1374].

(g) *Crawford* does not give a comprehensive definition of what a "testimonial" statement is. It does give some examples of the "core class" of testimonial statements on page 1364 of the opinion. There the Court observes that *ex parte* in-court testimony, and its functional equivalent, are prohibited. It also says that (1) affidavits, (2) custodial interrogations by police, (3) prior testimony that the adverse party had no opportunity to cross examine and (4) similar pretrial statements that a declarant would reasonably expect to be used by the prosecution, are in the class.

(h) Also, statements made at preliminary hearings, grand jury proceedings, trials, and other similar proceedings fall under the "testimonial" heading. [*p. 1374*].

(i) The opinion does recognize that there were some "well-established" hearsay exceptions at common law at the time the 6th Amendment was adopted, such as business records and conspirator's statements. [*p. 1367*].

(j) But where testimonial evidence is at issue, the 6th Amendment demands what the common law required: unavailability of the witness and a prior opportunity to cross examine.

(k) For the next year or two at least, hearsay law will be unsettled as each of the exceptions authorized by the Rules is considered in light of *Crawford*. One good way to keep up with developments on this point is to consult "The Confrontation Blog" at "confrontationright.blogspot." This site is run by Professor Richard Friedman whose work was cited by the court in *Crawford*. It is "devoted to reporting and commenting on developments related to Crawford v. Washington." It also has a link to an outline of post-*Crawford* cases authored by Jeffrey Fisher, lead counsel for Crawford in the Supreme Court.

(l) *Crawford* should not be read as a complete overthrow of conventional hearsay law. There are some obvious examples of rules that *Crawford* won't change. KRE 801A(a) expressly conditions admission of hearsay on the presence of a testifying declarant who can be cross examined. The party statement exception, KRE 801A(b), is premised on estoppel rather than reliability. And the conspirator statement exception, KRE 801A(b)(5), was mentioned in *Crawford* as an exception that existed at the time the Sixth Amendment was adopted.

(m) But other exceptions will have to be analyzed to determine if the out of court assertions authorized by them are "testimonial."

(n) **Analyzing Hearsay Issues:** the admissibility of each individual remark is determined by considering the following:

1. Is the statement relevant? Does it have any tendency to make a fact of consequence to the determination of the action more probable or less probable...? [KRE 401]. If not, KRE 402 makes it inadmissible and there is no need to consider the hearsay issue.
2. If relevant, is it hearsay as defined in KRE 801?
   a. A statement
   b. Other then one made while testifying at trial
   c. Offered to prove the truth of the matter asserted.
3. If not, the statement is not hearsay and KRE 802 does not exclude it.
4. If so, KRE 802 excludes it from evidence unless the proponent qualifies it as an exception under KRE 801A, 803 or 804 **and** the exception does not violate the confrontation clause of the 6th Amendment as interpreted in *Crawford*.
5. If the statement is not hearsay or the proponent qualifies it under a valid exception, the judge must balance probative value against prejudicial potential. [KRE 403].

NOTES

Rule 803 Hearsay exceptions: availability of declarant immaterial.

The following are not excluded by the hearsay rules, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical treatment or diagnosis. Statements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(A) Foundation exemptions. A custodian or other qualified witness, as required above, is unnecessary when the evidence offered under this provision consists of medical charts or records of a hospital that has elected to proceed under the provisions of KRS 422.300 to 422.330, business records which satisfy the requirements of KRE 902(11), or some other record which is subject to a statutory exemption from normal foundation requirements.

(B) Opinion. No evidence in the form of an opinion is admissible under this paragraph unless such opinion would be admissible under Article VII of these rules if the person whose opinion is recorded were to testify to the opinion directly.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or other data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:

(A) Investigative reports by police and other law enforcement personnel;

(B) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; and

NOTES

Rule 802

NOTES

(C) Factual findings offered by the government in criminal cases.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements or law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with KRE 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationships by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices or a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty (20) years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment under the law defining the crime, to prove any fact

essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 58; amended 1992 Ky. Acts ch. 324, sec. 22; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34. Amended 803 (18) 1994 ch. 279, §5, eff. 7-15-94 by adding "published treatises, periodicals."

COMMENTARY

PURPOSE/PREMISE

This rule represents a series of policy judgments which share the premise that the potential usefulness of cross examination is insufficient to justify the cost, in time and inconvenience, of bringing the declarant to testify. These exemptions from the hearsay exclusionary rule are premised on the belief that there is some circumstantial reason to believe that the statements are true or accurate at the time they are made and that cross examination is unlikely to show otherwise. Keep in mind that the opponent is authorized by KRE 806 to call any declarant as a witness if the opponent thinks that cross-examination of the declarant will be useful.

In criminal cases, *Crawford v. Washington,* 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), calls into question the validity of some parts of this Rule. The majority opinion declares unambiguously that the confrontation clause of the 6th Amendment requires, as to "testimonial" out of court statements, proof that the declarant is unavailable and that the adverse party had some opportunity before trial to cross examine the declarant about the statement. If the party cannot make this threshold showing, the out of court statement cannot be admitted without violating the right of confrontation. KRE 803, as written, says that availability is irrelevant. Thus, if a KRE 803 exception deals with "testimonial" statements, it must be tested against the *Crawford* rule. The key determination here is whether the statement authorized by each exception is 'testimonial" within the meaning established in *Crawford*. This may well turn on the identity of the person to whom the statement is made and the circumstances of its making. If the statement is "testimonial," the offering party must show that the witness is unavailable and that the opposing party had an opportunity to cross examine the absent declarant before trial.

KRE 803(1)

This exception requires that the statement be made contemporaneously with, or immediately after, an event or condition. The declarant's statement of pain upon being shot would be an obvious use of this exception as would the declarant's perception of the defendant as the shooter. A person's inquiry as to the source of blood, under the circumstances qualifies as an explanation of a condition made while the witness was perceiving the incident. *Caudill v. Commonwealth,* Ky., 120 S. W. 3d 635 (2004). The Commentary states that the underlying rationale for this exception is the lack of opportunity to fabricate. (Commentary to 1989 Final Draft, Kentucky Rules of Evidence, p. 83). If this is so, the time requirement for this exception is critical. Only a "slight lapse" of time is permitted. The proponent of the evidence must establish this by more than "generally" questioning witnesses as to the circumstances: the testimony as to time and circumstances must be rather detailed. *Jarvis v. Commonwealth,* Ky., *960* S.W.2d 466, 469-470 (1998); *Fields v. Commonwealth,* Ky., 12 S.W.3d 275, 279-280 (2000).

KRE 803(2)

This is similar to the present sense exception, except that it does not have the strict time limitation that the other exception has. In this situation, the statement must relate to a "startling" event or condition and must be made while the declarant is still "under the stress of excitement" caused by that event or condition. The requirements are what the rule says. The event must be of a startling

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nature, there must be evidence that the declarant actually was placed under stress by the event, and that the statement flowed from that. The key is the "duration of the state of excitement," although it is not the only consideration. The Court in *Jarvis v. Commonwealth*, Ky., 960 S.W.2d 466, 470 (1998), set out eight (8) factors that are guidelines for determining admissibility. In *Soto v. Commonwealth*, Ky., 139 S. W. 3d 827, 860 (2004), cautioned that *Jarvis* did not establish a bright-line test for admissibility.

KRE 803(3)

This allows the declarant's statement of his "then existing state of mind," his emotion, sensation or physical condition, to be related. The rule gives examples of legitimate purposes of such statements, to prove intent, plan, motive, design, mental feeling, pain or bodily health. *DeGrella v. Elsten*, Ky., 858 S.W.2d 698, 708-709 (1993); The statement must relate to things being presently observed or felt at the time the statement is made, not merely relating to a recollection of the event. *Blair v. Commonwealth*, Ky., 144 S. W. 3d 801 (2004)*; Bratcher v. Commonwealth*, Ky., 151 S. W. 3d 332, 348 (2004).

KRE 803(4)

(a) This rule is often misapplied in child sexual abuse cases where the prosecutor introduces statements of the child made to a physician. The first challenge to this practice is under KRE 401-402. Unless the defense has claimed fabrication or delusion, the number of times the child told a consistent story before the trial is irrelevant. Unless statements to the physician are intended to rebut a charge of recent fabrication or improper motive to testify, they do not qualify as hearsay exceptions either. KRE 801A (a)(2).

(b) The statements made to a physician may properly be used to explain of the basis of the doctor's diagnosis or opinion regarding injury under KRE 703 (b). However, statements admitted under this rule cannot be used as evidence of the truthfulness of the statements and the judge must admonish the jury of this limitation upon request of the opponent.

(c) In *Fields v. Commonwealth*, Ky.App., 905 S.W.2d 510 (1995) and *Smith v. Commonwealth*, Ky., 920 S.W.2d 514 (1995), Kentucky adopted the U. S. Supreme Court's analysis of the 801A (a)(2) language and affirmed long-standing common law precedent that statements of the child to the physician can be exempted from the hearsay exclusionary rule only to the extent that a charge of fabrication or improper motive has been made. Put simply, the child's (or patient's) statements are irrelevant bolstering until they address the issues listed in KRE 801A (a)(2).

(d) It is not difficult to use this rule properly. The statements must be made to a physician or some medical worker for the purpose of assisting the physician to make an accurate diagnosis or to render appropriate treatment. The motive of the declarant is paramount because the presumed desire to be treated effectively is the circumstantial guarantee of trustworthiness for this exemption. The motive or beliefs of the physician are irrelevant.

(e) Unless the declarant legitimately believes that a statement identifying the perpetrator will assist the doctor to diagnose or treat the declarant, statements of identification cannot be exempted by this subsection. In light of KRS 216B.400, which requires a physician conducting a rape examination to obtain informed consent for the examination, (which includes gathering of evidence for possible prosecution), statements of identification are more likely to be motivated by a desire to make sure that the perpetrator is identified for purposes of criminal prosecution rather than for purposes of medical treatment.

(f) In some cases, prosecutors claim that statements of the declarant contained in medical records can qualify for exemption because KRE 803 (4) and 803 (6) meet the independent admissibility requirement of KRE 805. This is wrong. The doctor has a legal duty to note and report abuse under KRS 620.030 (1) & (2). But the declarant has no business or legal duty to report the abuse. Thus, the report of activity prong of the analysis fails.

(g) However, if the declarant appears and testifies, if the KRE 613 foundation is laid, and if there is a legitimate purpose for the introduction of additional evidence of identification, the prior statement of identification is exempted by KRE 801A (a) (3).

NOTES

(h) This exception may be invalid under *Crawford v. Washington*. KRS 216B.400(2) establishes a state-wide plan for medical investigations to diagnose and treat victims of sexual assault and, at the same time, to gather evidence for prosecution. If the patient is informed that the medical history is being taken for evidence gathering under the statutory protocol, statements of the patient will be considered "testimonial" within the *Crawford* definition and therefore subject to its rule. There will have been no opportunity to cross examine the patient at the hospital. Therefore, the government will not be able to meet the "prior opportunity to cross" prong of *Crawford* and the exception will be unavailable.

KRE 803(5)

This is a standard hearsay exception which may be used once the proponent of the past recollection has shown that the witness has "insufficient recollection" to testify fully and accurately to matters which the witness once knew. If the "memorandum or record" was made or adopted by the witness when the subject matter was fresh in the witness' memory and the memorandum or record reflects that knowledge correctly, it may be used by the witness as a basis either for refreshment or as the testimony of the witness. Note that this exception only allows use of a memorandum or record. These documents may be read into evidence, but only the adverse party may introduce them as exhibits. *See*: *Hall v. Transit Authority*, Ky.App., 883 S.W.2d 884, 887 (1994).

KRE 803(6)

The last of the major KRE 803 exceptions is for records of regularly conducted activity. As the text of the rule shows, the type of business is not important. The proponent of the evidence must show that the record was created as part of a "regularly conducted business activity" and that it was the "regular practice" of that business entity to make records of its activities. These two requirements exist to keep out records created for the purpose of influencing later litigation. The rule permits records in "any form" of acts, events, conditions, opinions or diagnoses made in the course of the business activity "at or near the time" of occurrence, or from information transmitted by a person with knowledge. The record maker need not have any personal knowledge about the information. *Welsh v. Galen of Virginia*, Ky.App., 128 S. W. 3d 41 (2001). Almost any regular activity can qualify as a business under the rule. For example, in *Kirk v. Commonwealth*, Ky., 6 S.W.3d 823, 828 (1999), a deceased medical examiner's autopsy report, including his opinions, was admissible. However, opinions and findings contained in the records are not admissible if the maker of the record would not be allowed to testify about the result if he/she were present to testify. In the case of physical evidence where authentication evidence is lacking, the fact that the results are stored in the business records does not make those results admissible. *Rabovsky v. Commonwealth*, Ky., 973 S.W.2d 6, 9 (1998);*Fields v. Commonwealth*, Ky., 12 S.W.3d 275, 280, 284 (2000). Both the maker of the record and the person providing the information must have been acting under a business duty for the observation/statement to be admissible. *Thacker v. Commonwealth*, Ky.App., 115 S. W. 3d 834 (2003). If either the maker or the recorder is not under such a duty, the business record is not admissible. The rule also requires, even if the recorder is under some duty to record the information, that it must be the organization's normal business to do so – it may not be some isolated decision to record that type of data. *Brooks v. LFCUCG*, Ky., 132 S. W. 3d 790 (2004). The rule makes a provision for hospital records that will still be obtained and presented to the court under KRS 422.300 et. seq.

KRE 803(7)

This rule deals with the absence of information that would usually be found in well-kept records of the particular business or other operation. The inference is that the absence of a specific entry indicates that an act was not done. To introduce evidence under the rule, the party must satisfy the foundation requirement set out in KRE 803(6), and must authenticate the records either through the testimony of the keeper of the records, or under KRE 902.

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KRE 803(8), (9), & (10)

Public records are treated like business records, but they have their own rule numbers. This record exception is important because it allows the introduction of public records without cumbersome foundation requirements. However, it is important to note that under KRE 803(8) no one may introduce investigative reports by police or other law enforcement officers under this exception. They might be admissible under KRE 106 or KRE 612. But they may not be introduced under this rule. The government is prohibited from introducing its own investigative reports and fact-findings under this rule. These excluded matters may become relevant and therefore admissible due to an action of the adverse party, but they may not be introduced as a matter of course as an exception to the hearsay rule. *Skeans v. Commonwealth*, Ky., 915 S.W.2d 455 (1995); *Prater v. CHR*, Ky., 954 S.W.2d 954, 958 (1997); *Skimmerhorn v. Commonwealth*, Ky.App., 998 S.W.2d 771, 776 (1998).

Recent opinions like *Commonwealth v. Roberts*, Ky., 122 S. W. 3d 524 (2003), which hold that the service technician for breathalyzer machines need not be present at DUI trials, may be invalid under *Crawford v. Washington.* The only purpose for the technician's certificate is to provide the foundation for admissibility of the blood alcohol reading recorded by the machine. This is "testimonial" within the meaning of *Crawford.* It is intended for presentation at trial. Because the defendant does not have an opportunity to cross examine the BA technician before trial, he must be given an opportunity to do so at trial.

KRE 803(10)

This provision fills the same purpose as KRE 803(7) has for business records. Where a record is expected to be found, but is not found, a party may introduce the statement of the keeper of the record that a diligent search has failed to disclose the record, report or statement. If such a statement is filed in accordance with the authentication provisions of KRE 902, the statement is substantive evidence of the non-existence of an item or the non-occurrence of an event.

KRE 803(18)

In *Harman v. Commonwealth*, Ky., 898 S.W.2d 486, 490 (1995), the court upheld introduction of statements from a medical treatise upon a foundation that established it as "a reliable authority on the subject."

KRE 803 (22)

This rule is used to excuse calling the court clerk when evidence of a final judgment is relevant. The judgment must, of course, be authenticated under KRE 902 or some other rule or statute. *Pettiway v. Commonwealth*, Ky., 860 S.W.2d 766 (1993); *Skimmerhorn v. Commonwealth*, Ky.App., 998 S.W.2d 771, 777 (1998).

Rule 803(22)

Rule 804 Hearsay exceptions: declarant unavailable.

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(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the declarant's statement;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a criminal prosecution or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statements of personal or family history.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 59; amended 1992 Ky. Acts ch. 324, sec. 23; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.; Amended by S. Ct. Order 2004-1, eff. 7-1-04.

COMMENTARY

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PURPOSE/PREMISE

These exceptions to the hearsay exclusionary rule are policy judgments that recognize that sworn, in-court testimony of a witness is not always going to be available, regardless of the provisions for production of evidence and compulsion of testimony in KRE 501, the Kentucky Constitution's Section 11 and the Sixth Amendment to the federal constitution. The rule reveals a premise that, in some instances, it is more important to have evidence than to exclude hearsay.

(a) The final paragraph of subsection (a) is an indication that the drafters of the rule were aware that the rule could encourage "unavailability" of a witness brought about by the actions of a party rather than by the witness himself. All attorneys are bound by SCR 3.130(3.4)(a) and (8.3)(e) to refrain from interfering with the appearance of a witness. Also, KRS 524.050 (1) (a) makes it a crime to engage in improper interference. KRE 803(b)(5) expressly permits hearsay when it is shown that a party, or someone acting on behalf of a party, procures the absence of a witness.

(b) But witnesses will refuse to testify whether they have a lawful reason or not.

1. KRE 804 (a) (1) recognizes lawful privileges as grounds for unavailability.

2. KRE 804 (a) (2) recognizes that some witnesses will, because of corrupt motives or honest belief, refuse to testify. This subsection prevents an intransigent witness from defeating the policy of requiring evidence from every person.

A) The witness cannot refuse in advance. The refusal must follow an explicit order to testify.

3. If the witness appears but "testifies" that she lacks "memory of the subject matter of the declarant's statement" the witness is unavailable under KRE 804 (a)(3).

A) This decision is one for the judge under KRE 104(a.) The judge may disbelieve and refuse to find the witness unavailable.

4. The death of the declarant, or serious physical or mental illness at the time testimony is desired, present obvious problems of unavailability. This is a preliminary question to which the rules do not apply. KRE 1101 (d)(1). Although the judge may accept the attorney's representation as to death or illness, prudence dictates a more convincing showing through a death certificate or a letter from a physician.

5. A party wishing to rely on Subsection (a)(5) should be able to show that a subpoena was timely issued and that good faith efforts to serve it failed. U.S. Supreme Court precedent says that this much is necessary to protect the defendant's right of confrontation. *Ohio v. Roberts, 448* U.S. 56 (1980). The fact that the Commonwealth has attempted to subpoena a witness without success is insufficient for the defendant's attempt to show that the witness is unavailable: the defendant must make his or her own independent efforts to have the witness served. *Justice v. Commonwealth*, Ky.,987 S.W.2d 306, 313 (1999).

A) RCr 7.02 requires personal service. A mailed subpoena, even if the witness agrees to it, is invalid. Thus, the witness cannot be considered properly summoned and cannot be considered unavailable.

B) KRS 421.230-270 and KRS 421.600, et. seq., provide means of summoning out of state witnesses and prisoners. To summon a federal prisoner, the party should file a petition for a Writ of Habeas Corpus ad Testificandum in the federal district court. The existence of these remedies indicates that they are "reasonable" means to secure the presence of witnesses and therefore a party must at least attempt to use them to secure the presence of a witness. If the court denies relief after application, the party has done all she can to procure attendance.

(d) The language of the rule says that unavailability "includes" the listed situations, which suggests that other situations may justify a finding that a witness is unavailable.

(e) **Former testimony**: KRE 804 (b)(1)

1. This exemption from the hearsay exclusionary rule involves, first, "testimony given as a witness" If the declarant was not under oath and testifying, the statements cannot be exempted.

2. The statement must have been made by the declarant in a hearing or deposition given in the same or a different proceeding.

NOTES

3. If given in a deposition, the deposition must have been authorized under the grounds set out in RCr 7.10 (1) or (2).
4. RCr 7.20 (1) lists the situations in which the deposition may be used, but because of its explicit reference to use "so far as otherwise admissible under the rules of evidence," it appears that the criminal rule has been superseded by KRE 804.
5. The exemption is not available unless the opponent had "opportunity and similar motive" to "develop" the testimony by direct, cross, or redirect examination. If the opportunity and motive for developing existed at the time the statement was made, and the opponent declined to do so, the statement qualifies for exemption. If the opponent had opportunity, but no reason, to "develop" the testimony at the time it was given, (*e.g.*, at a bond reduction hearing), the statement does not qualify. The key is opportunity to question the declarant at the time of the prior testimony as rigorously as she would be examined at the present hearing or trial. It does not matter if it was actually done. The only question is whether the opponent had a chance to do so.
6. There should be no *Crawford* problems under this exception because it explicitly requires prior cross examination.

(f) Statement under belief of impending death: KRE 804 (b)(2). In *Wells v. Commonwealth*, Ky.,892 S.W.2d 299, 302 (1995), the court held that statements made by the deceased to a 911 operator and to EMTs within minutes of the stabbing and later statements to a detective after being told his condition was critical and that he could die at any minute, qualified for exemption under this rule. The proponent must show that the declarant actually knew of the seriousness of his condition and that he believed that he might die. The belief in impending death is the circumstantial guarantee of trustworthiness in this instance. However, there may be a *Crawford* problem here because a dying declaration identifying the killer, made to police officers, a 911 operator, or government emergency medical workers, is clearly made with the expectation that it will be used to convict the killer in a later court proceeding. It therefore is "testimonial" and subject to the rule of unavailability plus prior opportunity to cross examine the declarant.

(g) Statement against interest: KRE 804 (b)(3). This is the most problematic of the exemptions because, in criminal cases, the use of such declarations often involves constitutional rights of the defendant. The use of statements to exculpate the defendant implicates the defendant's right to present exculpatory evidence. The use of such statements to inculpate the defendant can violate the constitutional right of confrontation. Because Kentucky adopted the language of KRE 804 (b)(3) in 1978, *Crawley v. Commonwealth*, Ky.,568 S.W.2d 927 (1978), case precedents antedating the adoption of this rule may be used. However, KRE 804 (b)(3) differs from the federal rule by explicitly requiring a high degree of trustworthiness for statements used for both inculpatory and exculpatory use.

(h) It appears that *Crawford v. Washington* will apply to exclude statements against penal interest made to police officers. *Crawford* was an 804(b)(3) case. Statements made to other persons may or may not be subject to *Crawford*, depending on the circumstances under which they are given. "Testimonial" means the equivalent of *ex parte* in-court testimony. Anything said to the police is almost certain to be retold in court, particularly if made in response to questions. A remark made to a friend is not.

(i) In *Terry v. Commonwealth*, Ky.,153 S. W. 3d 794 (2005), the court noted that statements that qualify under this rule cannot be used against codefendants.

(j) Personal or family history: KRE 804 (b)(4). These statements are exempted from the hearsay exclusionary rule because they literally might be the only source of information if the declarant does not testify.

(k) Forfeiture by wrongdoing: KRE 804(b)(5): This was recently added to the rules. As noted in *Crawford v. Washington*, statements are admitted under this rule to penalize a party that procured the absence of the witness by improper means. It is a forfeiture rule, not a hearsay exception. The proponent of a statement under this rule must show that the adverse party (1) either engaged in, or acquiesced in someone else's, wrongdoing, (2) that the wrongdoing was intended to procure the witness's absence, and (3) that it actually was the cause of the witness's absence. This seemingly rigorous set of requirements is rendered less onerous by the fact that that the decision is a preliminary one governed by *K*RE 104(a) to which the rules of evidence (save privileges) do not apply. KRE 1101(d)(1).

NOTES

Rule 805 Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 60; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE

Under the Rules, hearsay statements contained in other hearsay statements may be admitted. This Rule continues the Common Law precedent that multiple hearsay statements may be admitted if they individually qualify under an exception. *Terry v. Commonwealth*, Ky., 153 S. W. 3d 794, 798 (2005). This rule is another indication that hearsay exceptions apply to a single remark and that each remark must stand or fall on its own. *Thurman v. Commonwealth*, Ky., 975 S.W.2d 888, 893 (1998). An often used example for this Rule involves an excited utterance, KRE 803(2), or statement for medical treatment, KRE 803(4), contained in a medical record. KRE 803(6). As in all hearsay cases, qualification for exemption from the Hearsay Exclusionary Rule does not guarantee admissibility. KRE 402; 403.

Rule 806 Attacking and supporting credibility of declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 61; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PURPOSE/PREMISE

When a hearsay statement has qualified under KRE 803 and 801A(b), the declarant often is not present. Under KRE 804 the declarant is never present to testify and be cross-examined as to credibility. This rule makes it clear that the adverse party may use the same methods to attack the credibility of the declarant as if he were present and available for cross examination.

(a) The second sentence of the Rule excuses the adverse party from the duty of establishing the KRE 613 foundation when the witness is not present.

(b) It is important to recall that KRE 801A(a) requires the witness to be present and questioned pursuant to KRE 613 before prior inconsistent, consistent, or identification statements can qualify. KRE 806 is unnecessary in these instances because the witness is available for questioning and for impeachment as to credibility.

(c) The party against whom a hearsay statement is admitted may call the declarant as a witness. KRE 806 allows that party to "examine the declarant...as if under cross-examination" but only as to the statement. Barring a showing of hostility, the party must avoid leading questions on other subjects. KRE 611(c).

(d) There may be a notice problem in this Rule. The party against whom the statement is introduced may not know that the declarant will not be called until trial is underway. A prudent attorney will ask the prosecutor about his intentions or will simply "stand by" subpoena the witness.

(e) If a party attacks the credibility of a declarant under this rule, the adverse party may use the same techniques of rehabilitation or support as if the declarant were present and testifying.■

NOTES

ARTICLE IX.
AUTHENTICATION AND IDENTIFICATION

COMMENTARY

Article IX requires the proponent of tangible evidence to show that the object is what the proponent claims it is. Questions of relevance must be determined under Article IV, and if the object is a writing containing statements, it must satisfy one of the hearsay exceptions under Article VIII. This Article provides means to avoid calling unnecessary witnesses simply to identify objects about whose authenticity there is little doubt.

Rule 901 Requirement of authentication or identification.

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Non-expert testimony on handwriting. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for the purposes of litigation

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular place or business if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the phone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form:

(A) Is in such condition as to create no suspicion concerning its authenticity;

(B) Was in a place where it, if authentic, would likely be; and

(C) Has been in existence twenty (20) years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by act of the General Assembly or by rule prescribed by the Supreme Court of Kentucky.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 62; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

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The Commentary says that authentication and identification under this rule is a matter of conditional relevancy to be determined under KRE 104(b). *Johnson v. Commonwealth,* Ky., 134 S. W. 3d 563 (2004). In these circumstances, the judge makes a determination that the proponent of the evidence has introduced enough evidence to allow a reasonable jury to conclude that the object is what it is claimed to be.

(a) Subsection (a) of the rule states the basic principle of authentication. The proponent of the evidence must make a prima facie showing that the object in question is what its proponent claims. *Johnson v. Commonwealth,* Ky., 134 S. W. 3d 563 (2004). This rule applies to any tangible objects that may be introduced, murder weapons, drugs, blood stained clothes and any other objects. The only thing necessary to support admission into evidence is production by the Commonwealth of evidence that would allow the jury, if it wants to, to decide that the pistol introduced is the one that was taken from the scene or that the dope presented in court is the dope that was taken from the defendant's pocket. *Rabovsky v. Commonwealth,* Ky., 973 S.W.2d 6, 8 (1998).

(b) There is no strict chain of custody rule anymore, if there ever was one. In *Rabovsky,* the court noted that a chain is not necessary to qualify guns or other easily identified items for admission. A chain is required for blood, human tissue samples, drugs or similar items, but it does not have to be a "perfect" chain. *Muncy v. Commonwealth,* Ky., 132 S. W. 3d 845 (2004); *Parson v. Commonwealth,* Ky., 144 S. W. 3d 775 (2004).

(1) The proponent must show that it is reasonably probable that the evidence has not been altered and that the substance tested was the substance seized or taken.

(2) Chain of custody defects ordinarily affect the weight of the evidence, not its admissibility.

(c) To authenticate a photo, a party must introduce evidence, through testimony primarily, that it accurately depicts the subject of the photograph. *Eldred v. Commonwealth,* Ky., 906 S.W.2d 694, 704 (1994).

(d) A replica may be introduced upon a showing that it is similar to the original object. *Allen v. Commonwealth,* Ky.App., 901 S.W.2d 881, 884 (1995) contains a foundation colloquy for replicas.

(e) Certainly a judge should be careful when admitting fungible material about which there is some question. KRE 403 applies in this determination and the judge may exclude evidence like cocaine or some other controlled substance if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading of the jury. The Commentary notes that the judge should take special care where it is likely that the jury may not be willing or able to decide the preliminary issue of identity before assigning probative value to the evidence. [Commentary, p. 101].

(f) Subsection (b) provides a list of illustrations that are purposely called illustrations. The methods listed here are not the only means by which items may be authenticated. *Soto v. Commonwealth,* Ky., 139 S. W. 3d 827 (2004). Any witness with knowledge that the matter is what it is claimed to be may testify and this may satisfy the foundation burden.

(g) Concerning handwriting, any person familiar with the handwriting of another, as long as that person knew the handwriting before the litigation began, may testify concerning "the genuineness" of handwriting. An expert witness may also do so. *Soto v. Commonwealth,* Ky., 139 S. W. 3d 827 (2004). The contents of a letter may be proved by identification of information in the letter uniquely within the knowledge of the writer. *Johnson v. Commonwealth,* Ky., 134 S. W. 3d 563 (2004).

(h) As to voice identification, any person who testifies that she knows a voice may identify it. On telephone conversations, a party may prove the identity of the person on the other end by showing that the call was made to the assigned number and that the circumstances, which may include the other person identifying himself, show that the person answering was the one called. In case of a business, if the call was made to the correct number and the conversation related to business usually conducted over the phone, the foundation burden is met. *Soto v. Commonwealth,* Ky., 139 S. W. 3d 827 (2004).

NOTES

(i) Any public records that are recorded or filed as allowed by law in a public office or a public record of any sort kept in a public office may be identified simply from that fact. Ancient documents, as long as there is no reason to suspect anything untoward, may be admitted if they are 20 years or more old at the time offered.

(j) The process illustration deals with situations like photographs taken by automatic cameras in banks. The party must introduce sufficient evidence to show the design of the system, that it was working, and that it is reasonable to expect that the photographs taken were the result of this system working properly.

(k) In DUI cases, the foundation for introduction of breathalyzer results can be established solely by testimony as long as the service record of the machine and the test paper are also admissible. The service technician need not appear. *Commonwealth v. Roberts*, Ky., 122 S. W. 3d 524 (2003).

(k) Finally, a catchall authorizes proof by any other method authorized by law. An example is *KRS 422.300* which is a procedure for authenticating medical records without calling the records librarian. *Bell v. Commonwealth*, Ky., 875 S.W.2d 882, 887 (1994).

Rule 902 Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) of this rule, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed, or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature of official position:

(A) Of the executing or attesting person; or

(B) OF ANY FOREIGN OFFICIAL WHOSE CERTIFICATE OF GENUINENESS OF SIGNATURE AND OFFICIAL POSITION RELATES TO THE EXECUTION OR ATTESTATION. A FINAL CERTIFICATION MAY BE MADE BY A SECRETARY OF EMBASSY OR LEGATION, CONSUL GENERAL, CONSUL, VICE CONSUL, OR CONSULAR AGENT OF THE UNITED STATES, OR A DIPLOMATIC OR CONSULAR OFFICIAL OF THE FOREIGN COUNTRY ASSIGNED OR ACCREDITED TO THE UNITED STATES. IF REASONABLE OPPORTUNITY HAS BEEN GIVEN TO ALL PARTIES TO INVESTIGATE THE AUTHENTICITY AND ACCURACY OF OFFICIAL DOCUMENTS, THE COURT MAY, FOR GOOD CAUSE SHOWN, ORDER THAT THEY BE TREATED AS PRESUMPTIVELY AUTHENTIC WITHOUT FINAL CERTIFICATION OR PERMIT THEM TO BE EVIDENCED BY AN ATTESTED SUMMARY WITH OR WITHOUT FINAL CERTIFICATION.

(4) Official records. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by an official having the legal custody of the record. If the office in which the record is kept is outside the Commonwealth of Kentucky, the attested copy shall be accompanied by a certificate that the official attesting to the accuracy of the copy has the authority to do so. The certificate accompanying domestic records (those from offices within the territorial jurisdiction of the United States) may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authen-

NOTES

ticated by the seal of office. The certificate accompanying foreign records (those from offices outside the territorial jurisdiction of the United States) may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of office. A written statement prepared by an official having the custody of a record that after diligent search no record or entry of a specified tenor is found to exist in the records of the office, complying with the requirements set out above, is admissible as evidence that the records of the office contain no such record of entry.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Books, newspapers, and periodicals. Printed materials purporting to be books, newspapers, or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law before a notary public or other officer authorized by law to take acknowledgements.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by the general commercial law.

(10) Documents which self-authenticate by the provisions of statutes or other rules of evidence. Any signature, document, or other matter which is declared to be presumptively genuine by Act of Congress or the General Assembly of Kentucky or by rule of the Supreme Court of Kentucky.

(11) Business records.

(A) Unless the sources of information or other circumstances indicate lack of trustworthiness, the original or a duplicate of a record of regularly conducted activity within the scope of KRE 803(6) or KRE 803(7), which the custodian thereof certifies:

(i) Was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(ii) Is kept in the course of the regularly conducted activity; and

(iii) Was made by the regularly conducted activity as a regular practice.

(B) A record so certified is not self-authenticating under this paragraph unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

(C) As used in this paragraph, "certifies" means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury, and, with respect to a foreign record, a written declaration which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and official position:

(i) Of the individual executing the certificate; or

(ii) Of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual.

A final certification must be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by an officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of office.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 63; amended 1992 Ky. Acts ch. 324, sec. 24; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

NOTES

COMMENTARY

This rule allows a party to introduce certain documents without bringing a witness to the hearing to identify them. This type of self-authentication is premised on a belief that there is no good reason to require production of another witness where items have already been identified by satisfactory means outside of court. The most important parts for purposes of criminal practice deal with public documents which may be introduced under KRE 902(1) or (2) upon seal and attestation of the keeper of the document. *Young v. Commonwealth*, Ky., 968 S.W.2d 670 (1998). Subsection (4) of the rule superseded CR 44 and RCr 9.44 which were abrogated effective January 1, 2005. Subsection (4) illustrates the means by which a party may introduce official records or show that no such record is found. The keeper of the official records may issue a certificate attesting to the accuracy of the copy of the record (which is allowed as a matter of course under KRE 1005). *Munn v. Commonwealth*, Ky.App., 889 S.W.2d 49, 51 (1994); *Davis v. Commonwealth*, Ky., 899 S.W.2d 487, 489 (1995). When this is done, the record is deemed "self-authenticating." *Soto v. Commonwealth*, Ky., 139 S. W. 3d 827 (2004).

The last important self-authentication provision is KRE 902(11) which is designed to facilitate the production of business records of the type admissible under KRE 803(6) or 803(7) upon certification by the custodian that the record was made at or near the time of occurrence of the matters involved, either by or from information transmitted by a person with knowledge of the event, is a record kept in the course of a regularly conducted activity, and was made as a regular practice. *Commonwealth v. Roberts*, Ky., 122 S. W. 3d 524 (2003); *Rabovsky v. Commonwealth*, Ky., 973 S.W.2d 6, 9 (1998); *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377, 383 (1999). In short, the custodian of business records need not be produced at trial if the record is certified. *Merriweather v. Commonwealth*, Ky., 99 S. W. 3d 448 (2003). However, there is a notice requirement which requires the proponent to let the adverse party know that the record is coming in and to produce the record at such time before introduction that the adverse party has a "fair opportunity" to challenge it. For straight business records, the certification must be a "written declaration under oath subject to the penalty of perjury."

Although KRE 902(11) can be used to admit hospital records, better practice might be to follow the procedure under KRS 422.300 to 422.330 which will guarantee the subject of the medical records at least some measure of privacy before trial.

In *Skeans v. Commonwealth*, Ky.App., 912 S.W.2d 455, 456 (1995), the court held that certified copies of a driver's record could be used to prove the date of a prior offense in DUI cases.

Rule 903 Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 64; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule does away with the common law requirement that the subscribing witness must appear and testify. The Commentary notes that in will cases, the witnesses to the will must appear and testify unless the will is self-authenticating under Chapter 394 of the statutes. ■

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ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001 Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, Photostatting, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 65; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

Professor Lawson has made the point a number of times that the best evidence rule was important at a time when copies were made by hand or by other methods that could result in errors affecting the intent and meaning of the written document. He says that now, where there are so many different ways of producing accurate copies, the rule is one of "preference" rather than one of necessity. [Commentary, p. 108-109]. KRE 1001 is the definition section for Article X and it describes the types of objects to which the "best evidence rule" is applicable. First the rule applies to writings or recordings which means that if it is written down on a paper, put on a magnetic tape, put on a floppy disk, or is on a tape recording or compact disc, it is a writing or recording for purposes of the rule. Photographs, including normal photographs, x-rays, videotapes and motion pictures, also are included. The definitions of the terms "original" and "duplicate" are important because they describe what may be introduced as more or less the original without worrying about the best evidence rule. The original of a writing or recording is the first writing or recording itself, or any counterpart (*i.e.*, carbon copy or any hard copy made from the contents of a word processor system). An original of a photograph includes the negative or any print made from that negative. A duplicate is a "counterpart" produced by the same impression as the original or by means of photography including enlargement or miniaturization, or by mechanical or electronic re-recording or other equivalent technique. A duplicate is something that "accurately reproduces the original."

Rule 1002 Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 66; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

NOTES

COMMENTARY

The best explanation of this rule is found in the Commentary. "The best evidence rule is applicable only when the offering party is trying to prove the contents of a writing, recording, or photograph. If such an item is being used at trial for some other purpose, the provisions of this Article have no application." Commentary, p. 109. The Commentary also notes that, where photographs are simply used to illustrate a witness's testimony, they are not being used to prove their contents, and therefore the best evidence rule does not apply. Commentary, p. 109-110. However, where photographs are used to show, for example, the scene of an offense, or to show the location of an object within a room, they are being used to show the truth of some proposition(s) and therefore the rule must apply.

Rule 1003 Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless:
(1) A genuine question is raised as to the authenticity of the original; or
(2) In the circumstances it would be unfair to admit the duplicate in lieu of the original.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 67; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

Because there is little possibility of error where most duplicates are concerned, there is really not much reason to keep them out except when there is a genuine question raised concerning the authenticity of the original or when under the circumstances it would be unfair to admit the duplicate. The reason for the first exception is obvious, but the text writers do not provide much in the way of examples of any "unfairness." Apparently the chief reason for this rule is that sometimes the duplicate may not contain the entire writing and therefore under KRE 106 the original containing all parts might be required.

Rule 1004 Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 68; amended 1992 Ky. Acts ch. 324, sec. 25; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule lists the instances in which the original is not required and in which other evidence concerning the writing, recording or photograph may be presented. Obviously, if the original is lost or destroyed other evidence of the contents must be provided. However, the proponent should be ready to show that they were lost or destroyed for reasons other than his own bad faith. The subpoena power of Kentucky ends at its borders. RCr 5.06; RCr 7.02(5). Sometimes documents can be obtained under the *Uniform Act to Secure the Attendance of Witnesses*. KRS 421.230 -.270. Subsection (2) excuses the absence of the original only if the original cannot be obtained by "any" procedure. It seems that a party would have to at least try the statutory procedure to

NOTES

meet this requirement. If there is no way to obtain the original by judicial process then necessity requires introduction of other evidence. Finally, if the adverse party has the original and will not give it up, it is only fair to allow the proponent to introduce other evidence about the contents of the writing, recording or photograph. If the writing, recording or photograph bears only on some collateral issue, the judge should be given some latitude in deciding whether the original is really necessary to make this point.

Rule 1005 Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed with a governmental agency, either federal, state, county, or municipal, in a place where official records or documents are ordinarily filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with KRE 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 69; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This is a practical rule which recognizes that official records and documents ordinarily will not be available because they cannot be removed from their official depository. This rule does away with the requirement of an original and authorizes the use of copies certified under KRE 902 or copies attested as correct by witnesses who have made comparison of the documents. Although the Commentary says that there should be no preference of the alternatives, it seems obvious that there is a good deal less chance for error in a photocopy made under KRE 902 and this should be normal practice for most attorneys. *Skimmerhorn v. Commonwealth*, Ky.App., 998 S.W.2d 771, 776 (1998). The comparison spoken of in this rule must be made by and testified to by an "appropriate" official of the agency possessing the records. *Munn v. Commonwealth*, Ky. App., 889 S. W. 2d 49 (1994).

Rule 1006 Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. A party intending to use such a summary must give timely written notice of his intention to use the summary, proof of which shall be filed with the court. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 70; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule exists to avoid burying the court and the jury with more information than either can handle. This rule allows a party to present a chart, a written summary, or a set of calculations to present the information to the jury in a comprehensible form. convenience, not necessity, is the standard. Of course a proper foundation must be laid establishing the correctness of the exhibit itself. The party intending to use a summary must give "timely" written notice to the opposing party and shall file this notice with the court as proof of having done so. All information relied upon must be made available for examination or copying or both by other parties. In certain circumstances, the judge may order that the supporting information be produced in court so that the basis of the summary can be verified. This means that the originals of the summarized material must be made available to the adverse party. An exhibit prepared under this rule cannot be

admitted if any of the originals on which it is based are inadmissible unless they are admissible under KRE 703 as information used by experts. It is not necessary to produce everyone who worked on the chart or summary, but someone with sufficient knowledge should be produced at trial or hearing.

NOTES

Rule 1007 Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the non-production of the original.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 71; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

Obviously, a party who admits the authenticity of the contents of a writing, recording or photograph is not in a position to claim that there is a "genuine question" concerning the authenticity of the original. KRE 1003. Therefore, KRE 1007 authorizes introduction of any evidence of the contents of a writing, recording or photograph if the party against whom it is offered admits genuineness.

Rule 1008 Functions of court and jury.

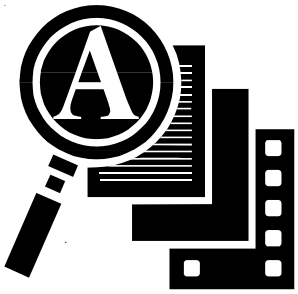
When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of KRE 104. However, when an issue is raised:

(a) Whether the asserted writing ever existed;
(b) Whether another writing, recording, or photograph produced at the trial is the original;
(c) Whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 72; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule sets out a special description of duties for the judge and the jury. Ordinarily, the question of admissibility is for the judge under KRE 104(a). This involves questions arising under KRE 1004, 1001(4) and 1003. Ordinary questions of conditional relevancy must be left to the jury under KRE 104(b). The judge's duty is simply to make a determination that the proponent has introduced enough evidence that the jury reasonably could conclude that one of the exception rules is met. ■



ARTICLE XI. MISCELLANEOUS RULES

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Rule 1101 Applicability of rules.

(a) Courts. These rules apply to all the courts of this Commonwealth in the actions, cases, and proceedings and to the extent hereinafter set forth.
(b) Proceedings generally. These rules apply generally to civil actions and proceedings and to criminal cases and proceedings, except as provided in subdivision (d) of this rule.
(c) Rules on privileges. The rules with respect to privileges apply at all stages of all actions, cases, and proceedings.
(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:
(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under KRE 104.
(2) Grand jury. Proceedings before grand juries.
(3) Small claims. Proceedings before the small claims division of the District Courts.
(4) Summary contempt proceedings. Contempt proceedings in which the judge is authorized to act summarily.
(5) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary hearings in criminal cases; sentencing by a judge; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 73; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule must be read together with KRE 101. This rule emphasizes that these rules apply to the Court of Justice. They do not apply to parole revocation hearings, administrative hearings, or any other type of executive branch proceeding unless those agencies enact regulations to adopt them. KRE 1101(c) makes it clear that privileges apply at all stages of "all actions, cases and proceedings" conducted in the Court of Justice. The important part of the rule for criminal defense lawyers is subsection (d) which lists the instances in which the rules do not apply.

(a) Under KRE 104, the rules do not apply when the judge is making a preliminary determination of the admissibility of evidence. This includes suppression hearings under RCr 9.78. *Kotila v. Commonwealth*, Ky., 114 S. W. 3d 226 (2003).

(b) Grand juries are not bound by the rules because of the nature of the proceeding. The requirement that the grand jury consider only "lawful" evidence was done away with when the Rules of Criminal Procedure were adopted in 1963. The grand jury may ask the judge or the prosecutor for advice on evidence questions, RCr 9.58; RCr 5.14(1), but there is no requirement that the grand jury follow the Rules of Evidence.

(c) In summary contempt proceedings, for acts or omissions in the presence of the judge, the rules do not apply. The judge is both witness and factfinder. Other criminal contempt proceedings, for acts or omissions outside the presence of the judge, are not mentioned here, and therefore are subject to the rules. Privileges apply in both kinds of contempt proceedings.

(d) Subsection (5) provides a list of the criminal proceedings at which the rules except for privileges do not apply.

(1) Extradition or rendition on governor's warrants are not covered,

(2) The only stated purpose of preliminary hearings under RCr 3.14(1) is to determine whether there is probable cause to bind a person over for further proceedings. The Criminal Rule has long authorized use of hearsay testimony and the Evidence Rules make a provision for this. *White v. Commonwealth*, Ky. App., 132 S. W. 3d 877 (2003). In *Barth v. Commonwealth*, Ky., 80 S. W. 3d 390 (2001), the Court held that because KRS 640.010 mandates application of the

Rules of Criminal Procedure to transfer hearings, otherwise inadmissible hearsay might be used to support the decision to transfer. The alternate ground, that KRS 1101(d) exempts such hearings from the Rules, is plainly wrong. A transfer hearing under the Unified Juvenile Code is not a "criminal case." It is a special statutory proceeding.

(3) While it is true that judge sentencing does not involve all due process requirements guaranteed for trial, it is important to keep in mind that a judge may not impose a sentence on material misinformation. *U.S. v. Tucker*, 404 U.S. 443 (1972). Unreliable evidence must be excluded regardless of the provisions of *KRE 1101(d)(5)*. However, *Douglas v. Commonwealth*, Ky., 83 S. W. 3d 462 (2002), holds that a judge need not conduct a *Daubert* hearing before imposing a sex offender assessment rating.

(4) Although there are no cases specifically saying so, reliable evidence is required in proceedings to grant, deny or revoke probation because they are elements of judge sentencing.

(5) *Carrier v. Commonwealth*, Ky., 142 S. W. 3d 670 (2004), holds that the rules do not apply in proceedings to obtain a search warrant.

(6) The liberty of an arrested person should not be taken away without application of all safeguards necessary to an accurate determination of the facts. As the rule is written now, bail can be denied or revoked based solely on the statements of an officer reading from a case file. Section 1(1) of the Constitution proclaims individual liberty as the first (and therefore most important) right. Section 16 creates a presumption in favor of release on bail in almost all criminal cases. The liberty interest of the defendant, who is clothed with the presumption of innocence at this point, demands that the bail determination be made with a high degree of reliability. Judges should require the presence of witnesses with personal knowledge subject to cross-examination at all bail hearings. A bail ruling based on hearsay almost always will violate Sections 1(1) and 2 of the Constitution.

Rule 1102 Amendments.

(a) Supreme Court. The Supreme Court of Kentucky shall have the power to prescribe amendments or additions to the Kentucky Rules of Evidence. Amendments or additions shall not take effect until they have been reported to the Kentucky General Assembly by the Chief Justice of the Supreme Court at or after the beginning of a regular session of the General Assembly but not later than the first day of March, and until the adjournment of that regular session of the General Assembly; but if the General Assembly within that time shall by resolution disapprove any amendment or addition so reported it shall not take effect. The effective date of any amendment or addition so reported may be deferred by the General Assembly to a later date or until approved by the General Assembly. However, the General Assembly may not disapprove any amendment or addition or defer the effective date of any amendment or addition that constitutes rules of practice and procedure under Section 116 of the Kentucky Constitution.

(b) General Assembly. The General Assembly may amend any proposal reported by the Supreme Court pursuant to subdivision (a) of this rule and may adopt amendments or additions to the Kentucky Rules of Evidence not reported to the General Assembly by the Supreme Court. However, the General Assembly may not amend any proposals reported by the Supreme Court and may not adopt amendments or additions to the Kentucky Rules of Evidence that constitute rules of practice and procedure under Section 116 of the Constitution of Kentucky.

(c) Review of proposals for change. Neither the Supreme Court nor the General Assembly should undertake to amend or add to the Kentucky Rules of Evidence without first obtaining a review of proposed amendments or additions from the Evidence Rules Review Commission described in KRE 1103.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 74; amended 1992 Ky. Acts ch. 324, sec. 26; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

(a) This provides that both the Supreme Court and the General Assembly may propose rule changes. It recognizes that rules of evidence, with the exception of privileges, are primarily issues of practice and procedure and therefore are assigned to the Supreme Court of Kentucky under Section 116 of the Constitution. *Manns v. Commonwealth*, Ky., 80 S. W. 3d 439 (2002).

NOTES

However, in *Weaver v. Commonwealth*, Ky., 955 S. W. 2d 922 (1999), the court held that neither the court nor the General Assembly has power to amend or create rules unilaterally. Obviously, inferior courts have no authority to amend or create rules. This rule points out that any proposed changes should be presented to the Evidence Rules Commission authorized by KRE 1103.

(b) Not all changes in evidence law come about by rule modification. In *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883 (1997), the Supreme Court did away with the "ultimate issue" prohibition in expert testimony cases, a principle which was not covered by any specific rule. The court reasoned that evidence principles not preempted by enactment of rules remain within the court's authority to change by case precedent as long as the court does so with due regard to rules of evidence in existence. The most recent controversy in this area deals with "habit evidence." *Thomas v. Greenview Hospital, Inc.*, Ky. App., 127 S. W. 3d 663 (2004).

(c) In *Stidham v. Clark*, Ky., 74 S. W. 3d 719 (2002), the Court observed that the sole means of creating privileges in Kentucky is by the rules amendment process.

Rule 1103 Evidence Rules Review Commission.

(a) The Chief Justice of the Supreme Court or a designated justice shall serve as chairman of a permanent Evidence Rules Review Commission which shall consist of the Chief Justice or a designated justice, one (1) additional member of the judiciary appointed by the Chief Justice, the chairman of the Senate Judiciary Committee, the chairman of the House Judiciary Committee, and five (5) members of the Kentucky bar appointed to four (4) year terms by the Chief Justice.

(b) The Evidence Rules Review Commission shall meet at the call of the Chief Justice or a designated justice for the purpose of reviewing proposals for amendment or addition to the Kentucky Rules of Evidence, as requested by the Supreme Court or General Assembly pursuant to KRE 1102. The Commission shall act promptly to assist the Supreme Court or General Assembly and shall perform its review function in furtherance of the ideals and objectives described in KRE 102.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 75; amended 1992 Ky. Acts ch. 324, sec. 27; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

The Evidence Rules Commission is the initial screening body that will review any proposals to change the Kentucky Rules of Evidence. It serves an important function and has brought about worthwhile revision to KRE 608 and KRE 804(b). Any attorney interested in maintaining fairness of trial procedures should see about staffing this commission with respected and knowledgeable attorneys. There are five slots for members of the Bar.

Rule 1104 Use of official commentary.

The commentary accompanying the Kentucky Rules of Evidence may be used as an aid in construing the provisions of the Rules, but shall not be binding upon the Court of Justice.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 76; amended 1992 Ky. Acts ch. 324, sec. 28; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This was added at the insistence of the Supreme Court. The original Commentary accompanying the final draft in 1989 of necessity has been superseded on many points. Professor Lawson has written a revised Commentary which is available in the UK CLE publication *Kentucky Rules of Evidence, Second Edition (2002)* and in Underwood's *Kentucky Evidence Courtroom Manual*.

The general rule in Kentucky is that a Commentary is not binding unless the adopting entity expressly says that it is. Although it does not have the force of law, the Commentary is perhaps the best evidence of what Lawson and the other drafters intended the rules to mean. *Commonwealth v. Maricle*, Ky., 10 S. W. 3d 117 (1999). It is occasionally cited in opinions. *St. Clair v. Commonwealth*, Ky., 140 S. W. 3d 510 (2004). Where rules have been amended or added to, *e.g.*, KRE 608, KRE 804(b)(5), any earlier Commentary must be disregarded. ■

NOTES

TABLE OF CASES

A

Adcock v. Commonwealth, Ky., 702 S.W.2d 440 (1986) 13
Adkins v. Commonwealth, Ky., 96 S. W. 3d 779 (2003) 21, 22, 26
Alford v. North Carolina, 394 U.S. 956 (1969) 31
Allen v. Commonwealth, Ky.App., 901 S.W.2d (1995) 93
Allgeier v. Commonwealth, Ky., 915 S.W.2d 745 (1996) 68
Anderson v. Commonwealth, Ky., 63 S.W. 3d 135 (2001) 33
Askew v. Commonwealth, Ky., 768 S.W.2d 51 (1989) 78

B

Barnett v. Commonwealth, Ky., 828 S.W.2d 361 (1992) 34
Barroso v. Commonwealth, Ky., 122 S. W. 3d 554 (2003) 43, 45, 47, 56
Barth v. Commonwealth, Ky., 80 S. W. 3d 390 (2001) 101
Baze v. Commonwealth, Ky., 965 S.W.3d 817 (1997) 13
Beaty v. Commonwealth, Ky., 125 S. W. 3d 196 (2003) 21, 58
Beech Aircraft Corp. v, Rainey, 488 U. S. 153 (1988) 15
Bell v. Commonwealth, Ky., 875 S.W. 3d 882 (1994) 14, 24, 27, 94
Belt v. Commonwealth, Ky., 2 S.W.3d 790 (1999) 78
Berry v. Commonwealth, Ky. App., 84 S. W. 3d 82 (2001) 34, 35
Bishop v. Caudill, Ky., 118 S. W. 3d 159 (2003) 45
Blair v. Commonwealth, Ky., 140 S. W. 3d 510 (2004) 66
Blair v. Commonwealth, Ky., 144 S. W. 3d 801 (2004) 15, 19, 21, 24, 25, 26, 55, 56, 79, 85
Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997) 28
Bratcher v. Commonwealth, Ky., 151 S. W. 3d 332 (2004) 53, 58, 71, 85
Brooks v. LFCUCG, Ky., 132 S. W. 3d 790 (2004) 29, 86
Brown v. Commonwealth, Ky., 932 S. W. 2d 359 (1996) 65
Brown v. Commonwealth, Ky., 983 S.W.2d 516 (1999) 25
Brown-Forman Corporation v. Upchurch, Ky., 127 S. W. 3d 615 (2004) 67, 68
Burchett v. Commonwealth, Ky., 98 S. W. 3d 492 (2003) 29
Burton v. Foster Wheeler Corp., Ky., 72 S. W. 3d 925 (2002) 16
Butcher v. Commonwealth, Ky., 96 S. W. 3d 3 (2002) 67
Bye v. Mattingly, Ky. App., 975 S.W.2d 459 (1996) 52

C

Caldwell v. Commonwealth, Ky., 133 S. W. 3d 445 (2004) 8
Canler v. Commonwealth, Ky., 870 S.W.2d 219 (1994) 79
Carrier v. Commonwealth, Ky., 142 S. W. 3d 670 (2004) 41, 102
Caudill v. Commonwealth, Ky., 120 S. W. 3d 635 (2004) 13, 23, 26, 54, 56, 58, 66, 76, 79, 84
Chambers v. Mississippi, 410 U.S. 284 (1973) 7
Chumbler v. Commonwealth, Ky., 905 S.W.2d 488 (1995) 22, 24, 26
City of Owensboro v. Adams, Ky., 136 S. W. 3d 446 (2004) 67, 71
Clark v. Burden, Ky., 917 S.W.2d 574, 575 (1996) 79
Clifford v. Commonwealth, Ky., 7 S. W. 3d 371 (1999) 65
Commonwealth v. Alexander, Ky., 5 S.W.3d 104 (1999) 7, 58, 68, 73
Commonwealth v. Christie, Ky., 98 S.W.3d 485 (2002) 70
Commonwealth v. Davis, Ky., 25 S.W.3d 106 (2000) 69
Commonwealth v. Duvall, Ky., 548 S.W.2d 832 (1977) 24
Commonwealth v. English, Ky., 993 S.W.2d 941(1999) 9, 26, 27
Commonwealth v. Ferrell, Ky., 17 S. W. 3d 520 (2000) 8
Commonwealth v. Gaines, Ky., 13 S.W. d 923, 924 (2000) 58
Commonwealth v. Hall, Ky.App., 4 S.W.3d 30 (1999) 13
Commonwealth v. Howard, Ky., 969 S.W.2d 700 (1998) 17
Commonwealth v. M. G., Ky App., 75 S. W. 3d 714 (2002) 17, 59
Commonwealth v. Maddox, Ky., 955 S.W.2d 718 (1997) 24, 26, 53, 54, 58
Commonwealth v. Maricle, Ky., 10 S. W. 3d 117 (1999) 103
Commonwealth v. Roberts, Ky., 122 S. W. 3d 524 (2003) 87, 94, 96
Cook v. Commonwealth, Ky., 129 S. W. 3d 351 (2004) 9, 10, 20
Crawford v. Washington, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 80, 81, 84, 86, 87, 90
Crawley v. Commonwealth, Ky.,568 S.W.2d 927 (1978) 90
Crowe v. Commonwealth, Ky., 38 S. W. 3d 379 (2001) 66

D

Daniel v. Commonwealth, Ky., 905 S.W.2d 76 (1995) 24, 27, 76
Davis v. Commonwealth, Ky., 899 S.W.2d 487 (1995) 96
DeGrella v. Elsten, Ky., 858 S.W.2d 698 (1993) 85
DeRossett v, Commonwealth, Ky., 867 S.W.2d 195 (1993) 59
Dillingham v. Commonwealth, Ky., 995 S.W.2d 377 (1999) 64, 96
Dixon v. Commonwealth, Ky., 149 S. W. 3d 426 (2004) 66, 67, 68
Douglas v. Commonwealth, Ky., 83 S. W. 3d 462 (2002) 102
Dowling v. United States, 493 U.S. 342, (1990) 24

E

Eldred v. Commonwealth, Ky., 906 S.W. 2d 694 (1995) 8, 21, 24, 45, 53, 58, 93

F

F.B. Ins. Co. v. Jones, Ky. App., 864 S.W.2d 929 (1993) 20
Fields v. Commonwealth, Ky., 12 S.W.3d 275 (2000) 78, 84, 86
Fields v. Commonwealth, Ky.App., 904 S.W.2d 510 (1995) 78, 85
Florence v. Commonwealth, Ky., 120 S. W. 3d 699 (2004) 37, 70
Foley v. Commonwealth, Ky., 55 S.W.3d 809 (2000) 69
Fulcher v. Commonwealth, Ky., 149 S. W. 3d 363 (2004) 65, 68, 76
Funk v. Commonwealth, Ky., 842 S.W.2d 476 (1993) 25
Furnish v. Commonwealth, Ky., 95 S. W. 3d 34 (2002) 25

G

Garland v. Commonwealth, Ky., 127 S. W. 3d 529 (2004) 10, 66, 71, 76
Garrett v. Commonwealth, Ky., 48 S. W. 3d 6 (2001) 34
Gerlaugh v. Commonwealth, Ky., 156 S. W. 3d 747 (2005) 80
Gibbs v. Commonwealth, 723 S.W.2d 871 (1986) 70

God's Center Foundation v. LFUCG,
Ky. App., 125 S. W. 3d 295 (2002) 8, 30
Gordon v. Commonwealth,
Ky., 916 S.W.2d 176 (1995) 59, 76
Gorman v. Hunt, Ky., 19 S.w.3d 662 (2000) 68
Gray v. Commonwealth, Ky., 843 S.W.2d 895 (1992) 27
Griffin Industries, Inc. v. Jones,
Ky., 975 S.W. 2d 100 (1998) 65
Grimes v. McAnulty, Ky., 957 S.W.2d 223 (1997) 18
H
Hall v. Commonwealth, Ky., 956 S.W.2d 224, 226 (1997) 35
Hall v. Transit Authority,
Ky.App., 883 S.W.2d 884 (1994) 86
Hampton v. Commonwealth,
Ky., 133 S. W. 3d 438 (2004) 11, 14, 23, 24, 66
Harman v. Commonwealth,
Ky., 898 S.W.2d 486, 490 (1995) 87
Harris v. Commonwealth, Ky. 134 S. W. 3d 603 (2004) 19
Harris v. New York, 401 U.S. 222 (1971) 12
Hart v. Commonwealth, Ky., 116 S. W. 3d 481 (2003) 8, 74
Huddleston v. U.S., 485 U.S. 681 (1988) 11, 24
Humphrey v. Commonwealth, Ky., 962 S.W.2d 870 (1998) 60
I
Idaho v. Wright, 497 U.S. 805 (1990) 80
J
Jackson v. Commonwealth, Ky., 3 S.W.3d 718 (1999) 17
James v. Wilson, Ky., 95 S. W. 3d 875 (2002) 62
Jarvis v. Commonwealth,
Ky., 960 S.W.2d 466 (1998) 26, 27, 48, 84, 85
Jett v. Commonwealth, Ky., 436 S.W.2d 788 (1969) 62
Johnson v. Commonwealth,
Ky., 103 S. W. 3d 687 (2003) 8
Johnson v. Commonwealth,
Ky., 105 S.W. 3d 430 (2003) 13, 21, 22
Johnson v. Commonwealth,
Ky., 12 S.W.2d 258 (1999) 11, 17, 67, 69, 70
Johnson v. Commonwealth,
Ky., 134 S.W. 3d 563 (2004) 11, 93
Johnson v. Commonwealth,
Ky., 885 S.W.2d 951 (1994) 23, 26
Justice v. Commonwealth,
Ky., 987 S.W.2d 306 (1999) 32, 64, 89
K
Kirk v. Commonwealth, Ky., 6 S.W.3d 823, 828 (1999) 86
Kotila v. Commonwealth,
Ky., 114 S. W. 3d 226 (2003) 11, 101
Kroger Company v. Kentucky Milk Marketing Comm.,
Ky., 691 S.W.2d 893 (1985) 6
L
L & N R. Co. v. Mayes, Ky., 80 S.W. 1096 (1904) 57
LaMastus v. Commonwealth,
Ky. App., 878 S.W.2d 32 (1994) 23
Laughlin v. Lamkin, Ky.App., 979 S.W.2d 121 (1998) 17
Lear v. Commonwealth, Ky., 884 S.W.2d 637 (1994) 27
Lester v. Commonwealth, Ky., 132 S. W. 3d 857 (2004) 41
Lewis v. Commonwealth, Ky., 42 S.W.3d 605 (2001) 69
Lexington Public Library v. Clark,
Ky., 90 S.W. 3d 53 (2002) 39
LFUCG v. Smolic, Ky., 142 S. W. 3d 128 (2004) 31
Lickliter v. Commonwealth,
Ky., 142 S. W. 3d 65 (2004) 8, 28, 48
Lovell v. Winchester, Ky., 941 S. W. 2d 466 (1997) 39
M
M. J. v. Commonwealth,
Ky. App., 115 S. W. 3d 830 (2002) 63
Mack v. Commonwealth, Ky., 860 S.W.2d 275 (1993) 34
Manns v. Commonwealth,
Ky., 80 S. W. 3d 439 (2002) 56, 102
Marrs v. Kelly, Ky., 95 S. W. 3d 856 (2003) 48, 51
McGinnis v. Commonwealth,
Ky., 875 S.W.2d 518 (1994) 56
McGuire v. Commonwealth,
Ky., 885 S.W.2d 931 (1994) 22
McNeeley v. McNeeley, Ky. App., 45 S. W. 3d 876 (2001) 17
Meredith v. Commonwealth,
Ky., 959 S. W. 2d 87 (1997) 66, 78
Merriweather v. Commonwealth,
Ky., 99 S. W. 3d 448 (2003) 96
Metropolitan Property and Casualty Insurance v. Overstreet,
Ky., 103 S. W. 3d 31 (2003) 30
Miller v. Commonwealth, Ky., 77 S.W.3d 566 (2002) 69
Miller v. Marymount Medical Center,
Ky., 125 S.W.3d 274 (2004) 6, 53, 56, 68, 76
Mills v. Commonwealth, Ky., 996 S.W.2d 473 (1999) 13, 21
Mills v. Commonwealth, Ky., 95 S.W. 3d 838 (2003) 64
Mondie v. Commonwealth, Ky., ____S. W. 3d ____ (2005) 65
Morgan v. Foretich, 846 F.2d 941 (4th Cir. 1988) 49
Morrow v. B, T, & H, Ky., 957 S.W.2d 722 (1997) 37, 40
Moseley v. Commonwealth, Ky., 960 S.W. d 460 (1997) ... 58, 76
Motorists Mutual Ins. Co. v. Glass,
Ky., 996 S.W.2d 359 (1997) 53, 65
Mullaney v. Wilbur, 421 U. S. 684 (1973) 18
Mullins v. Commonwealth, Ky., 956 S. W. 2d 210 (1997) 41
Muncy v. Commonwealth,
Ky., 132 S. W. 3d 845 (2004) 27, 93
Munn v. Commonwealth,
Ky. App., 889 S. W. 2d 49 (1994) 96, 99
Murphy v. Montgomery ElevatorCo.,
Ky.App., 957 S.W.2d 297 (1997) 68
Myers v. Commonwealth, Ky., 87 S. W. 3d 243 (2002) 45
N
Neal v. Commonwealth, Ky., 95 S. W. 3d 843 (2003) 53
Newburg v. Jent, Ky.App., 867 S.W.2d 207 (1993) 16
Niemeyer v. Commonwealth,
Ky., 533 S. W. 2d 218 (1976) 47
Norris v. Commonwealth, Ky., 89 S. W. 3d 411 (2002) 21, 24
Norton v. Commonwealth,
Ky.App., 890 S.W.2d 632 (1994) 59
O
Ohio v. Roberts, 448 U. S. 56 (1980) 81, 89
Old Chief v. United States, 519 U.S. 172 (1997) 22
Olden v. Kentucky, 488 U.S. 227 (1988) 54
Osborne v. Commonwealth, Ky., 43 S. W. 3d 234 (2001) 75
Overstreet v. Overstreet,
Ky. App., 144 S. W. 3d 834 (2003) 37
P
Pankey v. Commonwealth, Ky., 485 S.W.2d 513 (1972) 70
Parker v. Commonwealth, Ky., 952 S.W.2d 209 (1997) 24, 26
Parrish v. Kentucky Board of Medical Licensure,
Ky.App., 145 S. W. 3d 401 (2004) 68, 72
Parson v. Commonwealth,
Ky., 144 S. W. 3d 775 (2004) 19, 20, 93
Partin v. Commonwealth,
Ky., 918 S.W.2d 219 (1996) 20, 75

Pate v. Commonwealth, Ky., 134 S. W. 3d 593 (2004) 41
Pendleton v. Commonwealth, Ky., 83 S. W. 3d 522 (2002) 48
Perdue v. Commonwealth,
Ky., 916 S.W.2d 148 (1995) 10, 26, 50, 56, 59, 76, 79
Pettiway v. Commonwealth,
Ky., 860 S.W.2d 766 (1993) 31, 32, 76, 87
Polley v. Allen, Ky. App., 132 S. W. 3d 223 (2004) 17
Porter v. Commonwealth,
Ky., 892 S.W.2d 594 (1995) 31, 78
Prater v. CHR, Ky., 954 S.W.2d 954, 958 (1997) 87
Price v. Commonwealth, Ky., 31 S. W. 3d 885 (2000) 48, 49
Price v. Commonwealth, Ky., 59 S.W.3d 878 (2001) 70
Primm v. Isaac, Ky., 127 S. W. 3d 630 (2004) 13, 20
Purcell v. Commonwealth,
Ky., 149 S. W. 3d (2004) 28, 52, 55, 60
Q
Quarels v. Commonwealth, Ky., 142 S. W. 3d 73 (2004) 9
R
R.C. v. Commonwealth, Ky.App., 101 S.W.3d 897 (2002) 69
Rabovsky v. Commonwealth,
Ky., 973 S.W.2d 6, 8 (1998) 86, 93, 96
Renfro v. Commonwealth, Ky., 893 S.W.2d 795 (1995) 69
Riley v. Commonwealth, Ky., 91 S. W. 3d 560 (2002) 48
Roark v. Commonwealth,
Ky., 90 S. W. 3d 24 (2002) 49, 50, 71
Roberson vs. Commonwealth, Ky., 913 S.W.2d 310 (1994) 32
Roberts v. Commonwealth, Ky., 896 S.W.2d 4 (1995) 7, 31
Rockwell International Corp. v. Wilhite,
Ky.App., 143 S. W. 3d 604, 623 (2003) 71
Rodriguez v. Commonwealth,
Ky., 107 S. W. 3d 215 (2003) 21, 26
Rodriguez v. Commonwealth, Ky., 87 S. W. 3d 8 (2002) 39
Rogers v. Commonwealth, Ky., 86 S.W.3d 29 (2002) 70
Rogers v. Commonwealth, Ky., 992 S.W.2d 183 (1999) 58
Roviaro v. United States, 353 U.S. 53 (1957) 46
S
Samples v. Commonwealth, Ky., 983 S.W.2d 151 (1998) .. 17, 54
Sanborn v. Commonwealth, Ky., 892 S.W.2d 542 (1994) 42
Saylor v. Commonwealth,
Ky., 144 S. W. 3d 812 (2004) 23, 24, 28
Scott v. David L. Grimes, P.S.C.
Ky.App., Not Reported in S.W.3d, (2003) 69
Sherroan v. Commonwealth,
Ky., 142 S. W. 3d 7 (2004) 24, 26, 29
Simmons v. Small,
Ky.App., 986 S.W.2d 452, 455 (1998) 53
Simmons v. U.S., 390 U.S. 377 (1968) 12
Skeans v. Commonwealth,
Ky., 915 S.W.2d 455 (1995) 87, 96
Skimmerhorn v. Commonwealth,
Ky.App., 998 S.W.2d 771 (1998) 87, 99
Slaven v. Commonwealth,
Ky., 962 S.W.2d 845 (1997) 14, 41, 54, 56, 76, 78,
Smith v. Commonwealth, Ky., 904 S.W.2d 220 (1995) 26
Smith v. Commonwealth, Ky., 920 S.W.2d 514 (1995) 78, 85
Soto v. Commonwealth, Ky., 139 S. W. 3d 827 (2004) .....
..... 14, 20, 25, 26, 27, 58, 85, 93, 96
Spivey v. Zant, 683 F.2d 881 (5th Cir. 1982) 40
St. Clair v. Commonwealth, Ky., 140 S. W. 3d 510 (2004) .....
..... 13, 15, 21, 24, 29, 39, 47, 59, 103
State v. Budis, 593 A.2d 784 (N.J. 1991) 35
Stidham v. Clark, Ky., 74 S. W. 3d 719 (2002) 36, 103
Stringer v. Commonwealth,
Ky., 956 S.W.2d 883 (1997) 23, 26, 29, 59, 73, 79, 103
T
Talbott v. Commonwealth, Ky., 968 S.W.2d 76 (1998) 11
Tamme v. Commonwealth, Ky., 973 S.W.2d 13 (1998) 13
Taylor v. Commonwealth, Ky., 987 S.W.2d 302 (1998) 46
Terry v. Commonwealth,
Ky.,153 S. W. 3d 794 (2005) 79, 90, 91
Thacker v. Commonwealth,
Ky.App., 115 S. W. 3d 834 (2003) 86
Thomas v. Greenview Hospital,
Ky. App., 127 S.W.3d 663 (2004) 13, 21, 29, 67, 103
Thompkins v. Commonwealth,
Ky., 54 S. W. 3d 147 (2001) 46
Thompson v. Commonwealth,
Ky., 147 S. W. 3d 22 (2004) 69
Thurman v. Commonwealth,
Ky., 975 S.W.2d 888 (1998) 54, 63, 78, 91
Toyota Motor Corporation v. Gregory,
Ky., 136 S.W.3d 35 (2004) 67
Tucker v. Commonwealth,
Ky., 916 S.W.2d 181 (1996) 10, 26, 28
Tungate v. Commonwealth, Ky., 901 S.W.2d 41 (1995) 71
Turner v. Commonwealth, Ky., 153 S.W. 3d 823 (2005) 76
U
U. S. v. Sanchez-Birruetta, 2005 WL 662655 (9th Cir. 2005) .. 70
U.S. v. Merriweather, 78 F.3d 1070 (6th Cir. 1996) 20
U.S. v. Scarborough, 43 F.3d 1021, 1024 (6th Cir. 1994) 59
U.S. v. Tucker, 404 U.S. 443 (1972) 102
U.S. v. Velasquez, 64 F.3d 844 (3rd Cir. 1995) 73
U.S. vs. Monteleone, 77 F.3d 1086 (8th Cir. 1996) 29
United States v. Bagley, 473 U.S. 667 (1985) 46
United States v. Hill, 898 F.2d 72 (7th Cir. 1990) 27
United States v. Nolan, 910 F.2d 1553 (7th Cir.1990) 27
V
Varble v. Commonwealth, Ky., 125 S. W. 3d 246 (2004) 8
Vires v. Commonwealth, Ky., 989 S.W.2d 946 (1999) 24
W
Wal-Mart Stores, Inc. v. Dickinson,
Ky., 29 S.W.3d 796 (2000) 39
Weaver v. Alexander, Ky., 955 S. W. 2d 722 (1997) 7
Weaver v. Commonwealth,
Ky., 955 S. W. 2d 722 (1997) 37, 53, 58, 103
Wells v. Commonwealth, Ky.,892 S.W.2d 299 (1995) 90
Welsh v. Galen of Virginia,
Ky.App., 128 S.W. 3d 41(2001) 86
Whalen v. Commonwealth,
Ky.App., 891 S.W.2d 86 (1995) 32
Wheeler v. Commonwealth,
Ky., 121 S. W. 3d 173 (2003) 20, 21, 69, 75, 79
White v. Commonwealth, Ky., 5 S.W.3d 140 (1999) 76, 78
White v. Commonwealth,
Ky. App. 132 S. W. 3d 877 (2003) 10, 41, 80, 101
Whorton v. Commonwealth, Ky., 570 S.W.2d 627 (1978) 63
Wilhite v. Rockwell Intern Corp.,
Ky., 83 S.W.3d 516 (2002) 70
Williamson v. U.S., 512 U. S. 594 (1994) 75
Woodall v. Commonwealth,
Ky., 63 S.W.3d 103 (2001) 69, 70
Y
Young v. Commonwealth,
Ky., 50 S. W. 3d 148 (2001) 14, 50, 65
Young v. Commonwealth, Ky., 968 S.W.2d 670 (1998) 96

TOPICS/TRANSLATION TABLE

SUBJECT	RULE
Accident Reconstruction	702
Admission of Evidence	104; 611
Admissions	801A
Admonitions	105
Argumentative Question	611
Asked and Answered	403/611
Attorney Client Privilege	503
Assumption of Facts	611
Authentication of Evidence	901; 902
Avowal	103(a)
Bad Acts	404(b); 608
Ballistics	702
Best Evidence Rule	1001; 1002
Bias	607; CR 43.07
Bite mark identification	702
Bolstering	402; 608; 801A(a)(2)
Blood spatter	702
Breath testing	702
Business Records	803(6); 901; 902
Chain of Custody	901
Character Evidence Inadmissible	404(a)
Character Evidence Accused	404(a)(1)
Character Evidence Witness	404(a)(2)
Character Evidence Opinion/Reputation	405
Character Evidence Specific Acts	608; 405(c)
Character Evidence Foundation	602; 608
Claim valuation	702
Clergy Privilege	505
Cocaine manufacture	702
Collective Facts	701
Co-defendant Statement	804(b)(3)
Comment on Privilege	511
Competence of Witness	601; 602
Compromise of Claim	408
Conclusion of Law	701; 702
Conditional Admission	104(b)
Confidential Informant Privilege	508
Confidential Informant Testimony	403
Confusion of Issues	403; 611
Counselor Privilege	506
Court Records	803(8); (9); (10); 902
Cross-examination	611(b)
Cumulative Evidence	403
Daubert hearings	702
DNA	702
Duplicates	1003
Excited Utterance	803(2)
Exclusion of Evidence	403
Exclusion of Witness	615
Exhibits	901
Existing Physical/Emotional Condition	803(3)
Experts	702, et seq.
Experts, Court-appointed	706
Expert Qualifications	702
Expert/Hearsay	703
Expert Not Helpful	702
Expert, Voir Dire of	705
Fibert Analysis	702
Fingerprint Analysis	702
Flight	402; 403
Footprint analysis	702
Former Testimony	804(b)(1)
Guilty Pleas and Negotiations	410
Habit Evidence	401; 402
Hair analysis	702
Handwriting	702; 901(b)(2); (3)
Hearsay	Article 8
Hearsay Definition	801
Hearsay Exceptions Declarant Available	803
Hearsay Exceptions Declarant Unavailable	804
Hearsay Exclusionary Rule	802
Hearsay Within Hearsay	805
HLA Blood typing	702
Hypothetical Questions	705; 703(a)
Identification Hearsay	801A(a)(3)
Inaudible Sting Tapes	401
Insufficient Identification	901
Impeachment – Strict	607; 611
Impeachment – Witness Lying	403
Impeachment Bias	607
Impeachment – Extrinsic Evidence	608; CR 43.07
Impeachment Own Witness	607
Impeachment Prior Statements	613; 801A(a); 804(b)
Impeachment Methods	CR 43.07
Impeachment Collateral Matter	403; 607
Impeachment Prior Convictions	609
Impeachment Specific Acts of Misconduct	608; CR 43.07
Impeachment, Witness Lying	403
Incompetent Witness	601; 403
Insurance	411
Investigative Hearsay	801
Irrelevant Evidence	401; 402
Judge as Witness	605
Judgment of Prior Conviction	803(22)
Judicial Notice	201; 702
Juror as Witness	606
Lay Opinion	701
Lay technical opinion	701
Leading Questions	611
Learned Treatises	803(18)
Limited Admissibility	105; 611(a)
Marijuana, testing	702
Marital Privilege	504
Medical Expenses	409
Medical Diagnosis or Treatment Statements	803(4)
Medical Records	901; 803(6)
Mental Condition of Accused	701; 702
Misleading Jury	403
Motion in Limine	103(d)
Non-responsive Answer	611
Objections	103(a); RCr 9.22
Opening the Door	106; 611
Opinion, Basis of	703
Opinion, Disclosure of Basis	705
Opinion re: Age	701
Opinion re: Cause of Accident	702
Opinion re: Crime Scene	701
Opinion re: Eyewitness Identification	702
Opinion re: Guilt	704

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SUBJECT	RULE
Opinion re: Intoxication	701
Opinion re: Mental , Emotional State	701
Opinion re: Physical suffering	701
Opinion re: Sanity	701
Opinion re: Sexual Devices	701
Opinion re: Speed	701
Opinion re: Smell	701
Opinion Testimony – Lay	701
Opinion Testimony – Expert	702
Other Crimes/Acts	404(b); 608
Other Crimes – Notice	404(c)
Other Crimes Offered on Stipulated Point	403
Past Recollection Recorded	803(5)
Pedophilia Indicators	702
Personal Knowledge	602
Photographs	403; 901
Plea Bargains	410
Prejudicial Effect Outweighs Value	403
Preliminary Rulings on Admissibility	104
Present Sense Impression	803(1)
Presumptions	301
Prior Consistent Statement	801A(a)(2)
Prior Inconsistent Statement	613; 801A(a)(1)
Prior Inconsistent Statement Foundation	613
Privilege Comment on	511

SUBJECT	RULE
Privilege Only Rule or Statute	501
Privilege Right to All Evidence	501
Privilege Restoration	510
Privilege Waiver	509
Psychotherapist Privilege	507
Public Records	803(8);(9); 901; 902; (10)
Rape Shield	412
Redaction	804(b)(3)
Relevance	401; 402
Religious Belief	610
Rule of Completeness	106; 611(a)
Scientific Evidence	702
Separation of Witnesses	615
Sexual Conduct	412
Silence in face of accusation	801A(b)(2)
Social Science Syndromes	702
Speculation Objection to	602; 701; 702
Statement Against Interest	804(b)(3)
Summaries	1006
Suppression Hearing	103; 104; RCr 9.78
Tape Recordings (see also Redaction)	401
Truthfulness of Other's Testimony	701; 702; 402
Ultimate Issue	704
Unavailable Witness	804(a)