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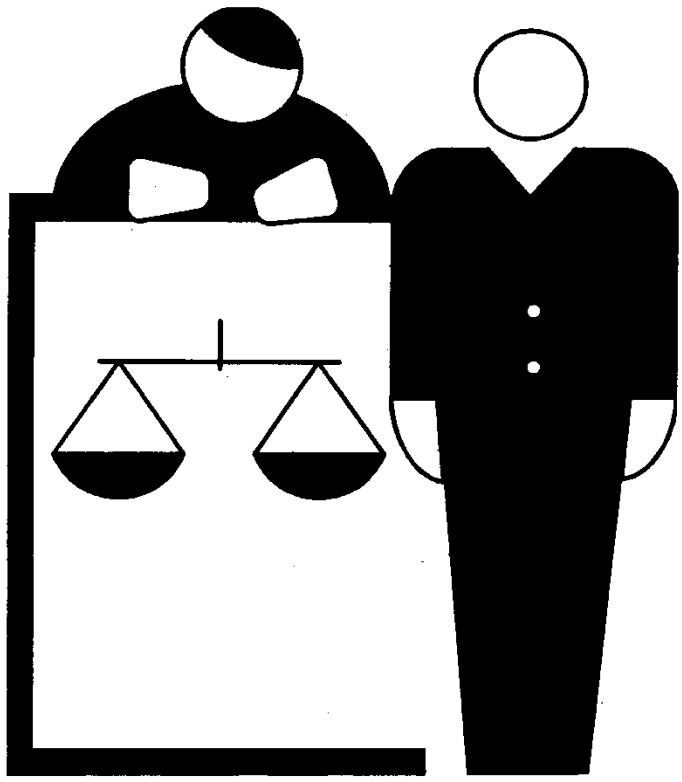
Evidence & Preservation Manual (2d edition)



In all criminal prosecutions, the accused has the right to be heard by himself and counsel.... Section 11, Kentucky Constitution (1891)

The Advocate

The mission of *The Advocate* is to provide education and research for persons serving indigent clients to improve client representation, fair process and reliable results for those whose life or liberty is at risk. *The Advocate* educates criminal justice professionals and the public on its work, its mission, and its values.

The Advocate is a bi-monthly (February, April, June, August, October, December) publication of the Department of Public Advocacy, an independent agency within the Public Protection and Regulation Cabinet. Opinions expressed in articles are those of the authors and do not necessarily represent the views of DPA. *The Advocate* welcomes correspondence on subjects covered by it. If you have an article our readers will find of interest, type a short outline or general description and send it to the Editor.

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FROM THE EDITOR:

Evidence & Preservation are Critical. Successful litigators know how to insure helpful evidence gets in and how hurtful evidence stays out. Winning litigation at the trial level and on appeal is a product of knowledgeable and skillful preservation.

2d Edition. The December 1992 *Advocate* was DPA's first ever *Evidence & Preservation Manual*. This *Advocate* DPA issues its 2d Edition of the Manual with the Evidence Code updated with the 1994 amendments, and **David Niehaus'** commentary to the code updated. All cases citing to the code are included. A translation table has been added, along with a table of evidence code cases. The preservation article has been updated by **Bruce Hackett, Julie Namkin**, and **Marie Allison**. We have added articles on preservation in capital cases, preserving requests for funds and issues around medical records. We continue in this 2d Edition the components of an objection, the table of constitutional rights, their provisions and case-law. We add to this edition a table of cases for the entire work.

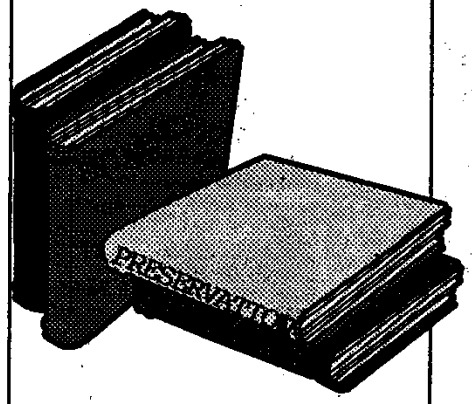
Thanks to the Contributors. The authors have been very generous with their knowledge, time and insights. We owe them much. They do it out of the goodness of their hearts.

Future Editions. We are committed to continuing to issue future editions of this work every two years if it meets your needs. Let us know if it does. We want your suggestions for changes and additions.

Our Goals: Effectiveness & Efficiency. We hope this Manual substantially increases the quality of the representation clients receive and that it allows you to provide that service more efficiently.

Edward C. Monahan, **Editor**

IN THIS ISSUE



INTRODUCTION TO KENTUCKY RULES OF EVIDENCE AND COMMENTARY - 2nd Edition

31 KRE Cases. By my count, 31 Kentucky appellate cases mention or discuss, to a greater or lesser extent, the Kentucky Rules of Evidence (KRE) from the period beginning July 1992 through the South Western Reporter advance sheet for November 22, 1994 (884 S.W.2d 590). Not all cases that mention the rules actually construe them. The Kentucky courts have observed KRE 107(b) rather scrupulously and many cases simply note the new rule as inapplicable to cases tried before July, 1992.

404(b) & 803. There are few surprises in the Kentucky appellate opinions. As you might expect, KRE 404(b) and KRE 803 were the most often discussed rules. As shown in the revised commentary that follows, the Kentucky Supreme Court continues to treat KRE 404(b) as a rule of exclusion, which, although it runs counter to the opinion of several text writers, is certainly not a bad approach to this rule given the great potential for harm that *other acts* evidence possesses. It also appears that the Kentucky Supreme Court in particular will continue to restrict hearsay testimony in abuse cases.

KRE Amendments. There are some changes in the rules themselves. KRE 506, 507 and 803(18) have been amended by joint action of the General Assembly and the Supreme Court.

The definition of "counselor" in KRE 506(a)(1) now includes certified professional art therapists and certified marriage and family therapists.

In KRE 507(a) the definition of "psychotherapist" was expanded to include registered nurses and nurse practitioners who practice psychiatric or mental health nursing.

The other change, in KRE 803(18), adds a requirement that treatises, periodicals and pamphlets be published before they may be used to cross-examine expert witnesses.

Frye* & Priors.** The much-anticipated ruling on whether or not the *Frye* test will be retained or rejected by Kentucky after adoption of KRE 702 has not come down as of this writing. However, an unexpected ruling in ***McGuire v. Commonwealth, ___ S.W.2d___ (Ky. 1994); 41:11 K.L.S. p. 16 (10/27/94) has, for all intents and purposes, done away with the usual evidentiary and constitutional challenges to prior convictions used to establish PFO status. This renders analysis of prior conviction evidence under KRE 410 and KRE 803(22) and KRE 803(10) rather unnecessary.

Other Sexual Misconduct. Although it will not have any immediate effect on KRE 404, I think it is important to note the unfortunate adoption of a new provision of FRE 404 which will allow the introduction of other instances of sexual assault or child molestation of the defendant under circumstances that do not amount to signature or modus operandi. Apparently nothing can be done to prevent the adoption of these federal rules. However, every defense lawyer should be on the lookout for any attempt to use them by analogy in Kentucky cases and certainly be ready to object if similar rules are proposed for Kentucky. Other instances of sexual activity may be admissible on KRE 404(b) grounds, and, perhaps as a matter of expert psychiatric or psychological testimony concerning the individual defendant. But certainly they should not be considered admissible simply because of the type of acts. This is a matter that bears close watching.

Resources. In revising these evidence outlines, I did not use any new secondary sources. I do however recommend most highly Lawson's 3rd Edition of the *Evidence Law Handbook* particularly with its 1994 pocket part which has just been issued. This is the book to have for a more thorough analysis of evidence rules in Kentucky. Citations to works consulted for the Commentary are as follows:

CITATION	TEXT
KRE	Text of the Kentucky Rules of Evidence, LRC Pamphlet (June 1992)
McCormick	*McCormick on Evidence*, 4th Ed. (2 vols.), (West 1992)
Nutshell	Graham, *Federal Rules of Evidence in a Nutshell*, 3rd Ed. (West 1992)
Practical Guide	Bocchino and Sonenshein, *A Practical Guide to Federal Evidence*, 2nd Ed. (NITA 1991)
Graham	Graham, *Evidence: Text Rules Illustration and Problems*, 2nd Ed. (NITA 1989)
Commentary	Evidence Rules Study Committee, *Kentucky Rules of Evidence* (1992)
Revised Commentary	UK/CLE Monograph Series, *Kentucky Rules of Evidence* (1992)
ABA Problems	ABA Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence*, 2nd Ed (West 1991)
Imwinkelreid	Imwinkelreid, *Uncharged Misconduct Evidence*, (Callaghan 1984)

Table of KRE Cases. The format of the commentary has not changed except for the addition at the end of a list of cases organized under the rules to which they refer. This is to allow quick cite when you know what your issue is and need a quick case reference. It also is, I hope, the beginning of an index of evidence cases that can be updated on a regular basis in *The Advocate*.

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KENTUCKY RULES OF EVIDENCE & COMMENTARY INDEX

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

COMMENTARY

The language of this rule is similar to that found in RCr 1.02 and CR 1 and explains the general applicability of the rules. The first thing to note is that the rules are supposed to apply to the Court of Justice at all levels.

In the Court of Justice, the rules apply primarily to the trial in chief of civil or criminal cases. The reference to KRE 1101 is a cross reference to the list of proceedings to which the rules do not apply. As you can see from that rule, most preliminary questions and determinations do not require application of the rules except for privileges. In these other proceedings the most common departure will be by use of hearsay testimony, absence of authentication and informality of presentation.

Actually, this is not so different from previous practice as reference to RCr 5.10 and 3.14 show. The potential conflict between KRE 101, KRE 1101 and KRS 610.280(2)(a) which guarantees the child the right to confront and cross examine witnesses at the detention hearing has not been observed. Because juvenile proceedings are special statutory proceedings, the statute must prevail. [Constitution 113(6); KRS 24A.130].

The second sentence of the rule states the uniform method of citation agreed on by the General Assembly and the Supreme Court. There is no reason not to use this simple method.

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

COMMENTARY

The text of this rule is practically the same as that of RCr 1.04 and that of CR 1 before it was amended in 1976. The source is FRE 102 which was drafted for two purposes. The first is to avoid the rule that statutes in derogation of the common law must be construed strictly. This is unnecessary in Kentucky because KRS 446.080(1) and (2) say otherwise. The second reason is the recognition of the drafters that it is impossible to cover every evidence question that might come up and still have a set of rules of manageable size. [Nutshell, 2-3]. As you will see, there are a number of common evidence matters that are not specifically mentioned in this code. KRE 611 and 401-403 leave these up to the good sense and fairness of the judge who needs a general statement of what he or she should try to do during the course of trial. Generally, these purpose statements are ignored by lawyers and judges, but in this instance it should be internalized.

The U.S. Supreme Court does not allow this policy statement to override the plain language of the rules as shown by its recent decision in ***United States v. Salerno***, ___ U.S. ___, 112 S.Ct. 2503, 120 L.Ed.2d 255 (1992) although some federal appellate courts had used it to resolve ambiguities in rule language. [ABA Problems, p. 4-5].

But in those situations for which there really is no precedent or language, judges are reminded by KRE 102 that the rules are not a straightjacket and that the law of evidence will necessarily continue to grow. In criminal defense cases, ***Chambers v. Mississippi***, 410 U.S. 284 (1973) requires courts to allow the defense to introduce reliable evidence whether or not current law allows it. Trial judges are not at liberty to make law up, as the refusal of the Supreme Court to adopt any residual exception to the hearsay rule shows. But in those situations in which the other considerations demand it, trial level judges should not hesitate to admit or exclude evidence under the considerations stated in KRE 102.

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) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) 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.

EFF DATE: July 1, 1992

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.

COMMENTARY

(a) This part is ostensibly a direction to appellate courts not to reverse unless certain conditions are met. Of more interest to the trial bar is the method for objecting to evidence prescribed in the rule. This provision does not change the law. The first thing that a lawyer has to say to preserve an objection is "*I object.*" If the judge rules without asking grounds, the objection is preserved and the grounds can be supplied on appeal. However, if the judge asks for grounds, the lawyer must state them at that time and the client will be bound by them on appeal.

There are several exceptions to the contemporaneous objection rule. A party is not required to object if the judge or a juror testifies as a witness in the trial [KRE 605,606]. The party may delay objection to the first available time when the judge calls witnesses on her own motion [KRE 614(d)], or when a juror asks a question and the lawyer cannot object, [KRE 614(d)], or the judge takes judicial notice before an objection is made. [KRE 201(e)].

If the lawyer does not state grounds when asked by the judge, the appellate court may still review the issue if the specific ground is apparent from the record.

(2) If the judge excludes evidence, the proponent must make an offer of proof in question and answer format. This is the same requirement as under the former avowal rules, CR 43.10 and RCr 9.52. The witness must make a specific answer to the objected to question.

(b) This part reflects the hurried revision of the rules in 1992. The last sentence of KRE 103(a)(2) requires the question and answer format. This subsection by giving the judge discretion to require question and answer avowal is at best redundant and is likely to cause confusion. The last sentence of this subsection should be excised as soon as possible unless the intent is to allow the judge to decide how the avowal will be made [***F.B.Ins.Co. vs. Jones***, 864 S.W.2d 926 (Ky.App. 1993)].

A critical point to keep in mind is the restriction of KRE 105(b) which can become a trap. KRE 105 is the limited admissibility rule and it requires a party desiring to preserve an objection to exclusion of evidence to articulate the proper purpose or identify the person(s) against whom the evidence is properly admitted at the time the objection and avowal occur. This can be quite important in co-defendant or consolidated indictment cases.

(c) Advises the judge to use good judgment to make sure that the jury does not hear inadmissible evidence. It is not an iron clad proscription but it is a strong warning to the judge to keep control of the courtroom and the attorneys. If the judge intends to hear argument about objections the attorneys should be called to the bench. RPC 3.4(3) prohibits asking questions about irrelevant matters or about any matter not supported by admissible evidence. The ethical rule should make this warning superfluous.

(d) This rule has no FRE analogue. It does make explicit a judge's authority to make the rulings on the admissibility of evidence before trial in the interest of saving time. The rule is useful because it makes the task of following subsection (c) much easier. As an incentive to use the rule, the drafters have added a provision that relieves a party of the duty to object at the time of admission of objected-to evidence as long as the judge has made the required 'order of record' disposing of the issue.

This rule should be used as a matter of course when you can see a problem coming up. Of course in some situations, like severance [RCr 9.16], the motion has to be made before trial and must be renewed when the predicted trouble has actually come about. In limine hearings may be used to object to use of prior convictions [KRE 404(b) (c), 609], to test the foundation in hearsay [KRE 804], to question the competency of an expert witness [KRE 702] and to determine authentication [Article IX] and best evidence [Article X] questions. The rape-shield law requires a pre-trial hearing and disposition and therefore does not come under this rule. [KRE 412].

(e) Palpable error is the last, most desperate hope of the client and its presence in an appeal is a sign that the trial attorney was careless or did not tell the client why the objection was foregone or the defense evidence was ruled inadmissible. Appellate courts are quick to find tactical reasons for failure to object, but that is not the standard of representation required by the Rules of Professional Conduct. There are good reasons not to object, but ignorance is not one of them.

To prevail on this ground, the client must show that there was no reasonable explanation for the failure to object, ask for an admonition, ask for a mistrial, or ask for a continuance, and that the effect of the erroneous admission for exclusion of evidence was so great that the reviewing court can have no confidence in the accuracy of the jury's determination of the issues.

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.

EFF DATE: July 1, 1992

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.

COMMENTARY

(a) This is a specific direction on how to handle questions of the admissibility of evidence, the qualification of a person to be a witness, or the existence of a privilege. It is important to note the last sentence of this rule which says that the judge is not bound by the Rules of Evidence when making the determination except regarding privilege. This is also covered by KRE 1101(d)(1). The Commentary notes that in determining the admissibility of evidence, the court may consider anything, hearsay or not and makes a specific reference to ***Bourjailly v. United States***, 483 U.S. 171 (1987) in making this point. According to the drafters, the judge decides the admissibility of evidence or the qualification of a witness under the preponderance standard. [Commentary, p. 7].

(b) This is a procedural rule governing those situations in which the order of proof cannot accommodate necessary foundations to show relevance of evidence. This rule is limited to questions of relevancy. It says that a court may allow evidence to be introduced subject to fulfillment of a condition and says that the court shall admit it upon the introduction of evidence sufficient to support a finding that the condition was fulfilled. The language used is significant. The judge determines only if the jury could, on the evidence introduced, find that the fact is true. [Commentary, p. 8]. If the proponent fails to introduce the necessary connecting evidence, it is the duty of the adverse party to bring the failure to the attention of the court and make a motion to strike or to declare mistrial. [1 McCormick, p. 234].

(c) Any hearing on the admissibility of a confession or of evidence obtained through searches "conducted under color of law" must be conducted out of the hearing of the jury. This is consistent with current practice. However, the rule also states that hearings on other preliminary matters shall be conducted outside the hearing of the jury only when the interest of justice requires or when the accused in a criminal case is a witness and asks that the jury be excluded. One way to avoid this problem is to take advantage of the motion in limine provision found in KRE 103. However, when it is necessary to put the defendant on in a criminal case to establish the admissibility or inadmissibility of evidence, it is up to defense counsel to make the request so that the judge will excuse the jury. On all other questions, the judge decides whether to send the jury out. This will depend largely on the judge's initial estimate of the likelihood of an admissibility. If the judge anticipates that the evidence will be admissible, then there is not much purpose in taking the time to send the jury out of the courtroom. However, this is always done at the risk of creating reversible error or the need for mistrial. Counsel certainly may advise the judge on the necessity of excusing the jury before any hearing on admissibility takes place.

(d) This provides that the accused in a criminal case does not become subject to cross-examination on other issues in the case by testifying on a preliminary matter. This rule is necessary because cross-examination in Kentucky under KRE 611(b) allows any party to develop new information on cross-examination. The defendant could never testify safely concerning suppression of prior statements. Even though the defendant's testimony in a preliminary hearing is not admissible in chief, it may be used to impeach if the defendant testifies inconsistently at trial. [Nutshell, p. 21].

(e) This provision serves an important double function. It preserves the rule set out in ***Crane v. Kentucky***, 476 U.S. 683 (1986) in which the U.S. Supreme Court held that a preliminary determination of fact on admissibility cannot limit the defendant's right in a criminal case to cast doubt on the credibility or weight of the evidence. [Commentary, p. 9]. The last phrase was added to the original draft to make an explicit reference to the basic right of any party to introduce evidence tending to show the bias, interest or prejudice of a witness testifying at trial. This is an unusual place to add such a provision and it might better have been placed in KRE

607 which authorizes impeachment of any witness. However, regardless of its location, it guarantees the right to impeach by showing bias, interest or prejudice. Examination on these points may be limited by the trial court to protect witnesses from harassment or undue embarrassment [KRS 611(a)(3)] and to exclude evidence if its probative value is substantially outweighed by the danger of undue prejudice, confusion, misleading the jury or undue delay. [KRE 403].

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.

EFF DATE: July 1, 1992

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

COMMENTARY

(a) This rule provides explicit authority for the judge to restrict evidence to its proper use and to admonish the jury concerning that proper use. The judge does not have to do so on his own motion, and in the second sentence of subsection (a), the drafters have provided that in the absence of such a request, appellate courts will not consider the introduction of such evidence except under the palpable error rule. However, if a party does request restriction and admonition, the court "shall restrict the evidence to its proper scope" and admonish the jury.

The Commentary states that this rule must be used in conjunction with KRE 403 which allows exclusion of evidence if probative value is substantially outweighed by danger of undue prejudice. Under Rule 105(a) and Rule 403, the judge must determine if an admonition would be effective. In criminal cases this is a problem. In ***Richardson v. Marsh***, 481 U.S. 200 (1987) the U.S. Supreme Court said that it was pretty much required to believe that admonitions work although empirical evidence seemed to demonstrate that they do not. Judges should not read this rule as authorizing the introduction of evidence in the belief that an admonition will take care of any problems with the jury. An admonition may satisfy an appellate court but it may not have any effect on the jury, and therefore the judge may contribute to an inaccurate or unfair fact finding by a mechanical application of this rule.

(b) This part has already been mentioned in relation to the offer of proof required under KRE 103(a). It is important to remember that if the evidence is admissible only for a limited purpose or against a particular party, failure to state this in the course of the argument concerning admissibility will result in non-preservation of the issue and review only under the palpable error standard.

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.

EFF DATE: July 1, 1992

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

COMMENTARY

This is a procedural rule which allows a party to vary the order of proof at trial when a writing or a recorded statement is introduced into evidence by the other party. This rule is one of fairness because of the effect that incomplete written or recorded statements may have on the jury.

Under Kentucky's open cross-examination [KRE 611(b)] the adverse party could take care of the remainder during cross-examination of the same witness. However, to avoid the possibility that the jury might be misled or confused, the drafters have included KRE 106 to allow, at the option of the adverse party, introduction of all important parts of the statement or related writings at the same time. The jurisdictions are still split on the question of whether KRE 106 language authorizes introduction of incompetent evidence (retaliation) under this rule. Some say that the rule deals only with varying trial procedure while others say that the main purpose of the rule is to prevent distortion of a writing and that incompetent evidence may become admissible to serve this purpose. [ABA Problems, p. 21-22]. This question may be avoided entirely however if a timely objection gives the court an opportunity to exclude the writing entirely in the first place.

Graham notes that KRE 403 applies in this situation and that the judge may exclude evidence in the first place if it tends to mislead. [p. 565]. Under the joint application of Rules 106 and 403, a judge must determine whether the introduction of parts or all of a recorded statement or writing creates too much confusion or other problems in the first place, before deciding that the completion rule will resolve any problems created. Evidence must be admissible in the first place before curative measures should be considered.

One final point to note is that oral statements are not included and the opponent must wait for cross-examination or introduction during the case-in-chief or rebuttal to deal with these.

Rule 107 Miscellaneous provisions.

(a) Parole 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.

EFF DATE: July 1, 1992

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

COMMENTARY

(a) Parole 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 parole 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. [Commentary, p. 12].

(b) After July 1, 1992, subsection (b) would be of interest 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. [*e.g.*, most KRE 804(b) exceptions]. 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.

Article II. Judicial Notice

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.

EFF DATE: July 1, 1992

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

COMMENTARY

(a) The rule is strictly limited to judicial notice of "adjudicative facts." The Commentary says that adjudicative facts are those facts which must be formally proved because they are part of the controversy being tried. [Commentary, p. 13]. Graham says that adjudicative facts are the facts of a particular case that normally will go to the jury, "who did what, where, when and how and with what motive or intent." [Graham, p. 573]. Questions of law are disposed of under RCr 9.58 which reserves all questions of law to the trial judge and which makes those determinations of law binding upon the jury. The many statutes formerly found in KRS Chapter 422 dealing with proof of law of other jurisdictions have been repealed as part of the enactment of the Evidence Rules. These are questions of law that do not concern the jury and therefore they are not considered under KRE 201.

(b) The court may not take judicial notice of a fact unless it is not subject to "reasonable dispute" which means that it is either generally known within the county from which the jurors are drawn or, if it is a bench trial, the county in which the venue is fixed, or is capable of "accurate and ready determination" by looking at sources the accuracy of which cannot reasonably be questioned. The judge may not take notice of a fact because it is known personally to her. Rather, the Commentary states that to be generally known a fact must "exist" in the unaided memory of the general population. [Commentary, p. 15]. Under subsection (2) of this rule, a court may notice geographic facts [KRE 803(20)], published compilations of statistics [KRE 803(17)], history

[KRE 803(20)], government and public records [KRE 803(8)], religious facts [KRE 803(11)], political facts, business, scientific principles and authoritative treatises [KRE 803(18)], court records [KRE 902(4)], and judgments of prior conviction. [KRE 803(22)]. [Graham, p. 578]. Most facts that can be judicially noticed can be put into the record through witnesses under Articles VIII and IX. Judges need to take care concerning judicial notice because the judge may appear to agree with the proponent of the evidence and appear to favor that proponent's case. [Practical Guide, p. 13]. KRE 611(a) gives the judge discretion to determine how evidence will be presented effectively and fairly, and where judicial notice is not mandatory, the judge must use care in application of this rule.

(c) The court may take judicial notice whether requested to or not. Typically, a judge will take judicial notice of a fact *sua sponte* when a witness is floundering or a party is setting up an interminable foundation for a fact that is reasonably beyond dispute. However, to maintain the neutral role required by law and the Constitution, the judge must take care not to intervene too rapidly.

(d) The judge "shall" take judicial notice when a party asks her to and the party supplies the judge with the necessary information. The question that arises is whether or not this is still a discretionary call subject to the judge's general superintendence power under KRE 611(a). Obviously, if the fact is not subject to reasonable dispute, there can be little sincere objection to requiring the judge to take judicial notice. But as in cases where the judge may take judicial notice, the judge must be sure that the fact is suitable for notice and that there is no reasonable dispute as to its correctness.

(e) Because of the conclusive nature of the judge's notice, a party is entitled to be heard upon "timely request." Both the Commentary and Graham note that this determination is preliminary in nature, so under KRE 104(a) there is no limitation on the type of information that a judge can receive in making the determination. For tactical reasons, a party may wish to make the judicial notice a matter of a pretrial *in limine* motion. However, the last sentence of the rule allows a party to make a delayed objection and to make a request for hearing after notice has been taken if the ruling was made without a fair opportunity to object.

(f) Judicial notice may be taken at any stage of the proceeding. In practical terms this means that a judge may take notice of a fact after the submission of a case to a jury [RCr 9.74], and perhaps even after the return of the verdict. The Commentary is clear that the court may take notice on appeal, a point noted in ***Newburg v. Jent***, 867 S.W.2d 201 (Ky.App. 1993). However, the Commentary also says that if the party did not raise the matter in the lower court, the appellate court should not be bound to take notice in accordance with the rule. [Commentary, p. 17]. This cannot be squared with the plain language of subsection (f). The rule is cast in mandatory terms, and says that at any stage of the proceeding, notice shall be taken upon request and presentation of sufficient information to justify the request.

(g) This is something of a problem in the federal system and in other jurisdictions adopting the rules. RCr 9.58 requires the jury to accept the decision of a court on points of law. However, Section 7 of the Constitution guarantees the ancient mode of jury trial which requires submission of issues of fact to the jury. RCr 8.22 says that an issue of fact shall be tried by a jury if a jury trial is required by law. Obviously, in criminal cases there is a real problem in allowing a judge to instruct a jury that it must accept as conclusive any fact that the court has taken notice of. The Commentary makes a good point that the jury should not be allowed to ignore facts that really are beyond dispute. It gives the example of a federal instruction in which a judge was forced to instruct a jury that he had made a finding that San Francisco is located north of Los Angeles, but that the jury was not bound by that finding. [Commentary, p. 17]. However, a mandatory instruction to the jury that it must take as true certain facts found by the court appears to be squarely against the constitutional requirements of a jury trial and RCr 8.22. This should act as a brake on judges taking judicial notice on their own motion. Prosecutors might do well to consider introducing evidence on facts of which notice could be taken simply to avoid this question.

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.

EFF DATE: July 1, 1992

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.

EFF DATE: July 1, 1992

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

The Due Process Clause of the 14th Amendment prohibits shifting the burden of proof by presumption in criminal cases. Under KRS 500.070(1)(3), the Commonwealth is assigned the burden of proof (persuasion) throughout

the case and is required to disprove beyond reasonable doubt any defense that the defendant puts forward except for insanity [KRS 504.020(3)] and mistake of age in sex cases [KRS 510.030]. Therefore, these rules do not figure in criminal actions.

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.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 11; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

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.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 12; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

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.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 13; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY TO 401, 402 & 403

These rules rarely can be considered without reference to each other. They govern the admissibility of evidence on the basis of relevancy. In essence, they are a codification of the common law power of the judge to determine whether evidence has a legitimate logical relation to what a party wants to prove and whether that evidence may be admitted without danger of causing the jury to reach a decision on an improper basis.

401: Evidence is relevant if it has "any" tendency to make the existence of a "fact of consequence" more or less probable than it would be without the evidence. The commentators agree that this is a very broad definition and is intended only to describe the logical relationship that testimony or evidence must have to the point to be made before it can be considered. Rule 401 is a preliminary determination of admissibility in which the judge decides whether or not the evidence has anything to do with the issues at trial. Under the rules, direct evidence of a fact, facts from which a conclusion can be inferred, and background facts such as demonstrative evidence, demeanor and impeachment evidence all may be considered relevant. [Graham, p. 11].

402: This rule states the simple guide that the judge must follow. If evidence is relevant under the definition of KRE 401, it is admissible unless it is otherwise prohibited. If the evidence is not relevant under the definition of KRE 401, it is not admissible, period.

403: Rule 403 is the last factor in the determination of admissibility and it provides the authority of the judge to exclude evidence that crosses the KRE 401 and KRE 402 thresholds if its probative value is "substantially outweighed" by the danger of undue prejudice, confusion of the issues, or misleading the jury, or if admission would cause undue delay or needless presentation of cumulative evidence. The objecting party has the burden of showing that probative value is outweighed substantially by the prejudice that would result. There are a number of considerations for the judge under this rule. The analysis should consider (1) the importance of the fact of consequence to which the evidence would apply, (2) the complexity of the chain of inferences necessary to establish the fact of consequence from the proposed evidence, (3) the existence of alternative means of proof to achieve the same end, (4) determination of whether the fact of consequence is disputed, and (5) whether an admonition could prevent or limit undue prejudice or jury confusion. [Graham, p. 15]. The factors considered by the judge in making this determination are known at least intuitively by most practitioners. The Kentucky rule allows the judge to exclude evidence that would create undue prejudice. This refers to bias, sympathy, hatred, contempt, anger or horror that might cause the jury to decide on that basis rather than on the relevant evidence presented. [Graham, p. 16]. Judges sometimes have trouble remembering that evidence which would not bother practicing lawyers or judges may confuse the jury as to the issue to be decided or may mislead the jury into an area of controversy not germane to the questions presented. It is not enough to assume that the jury will read the instructions given to it at the end of the case and follow them rigidly. Nor is it enough to assume that simply telling the jury to consider evidence for one purpose will cause the jury to do so. The judge must make a realistic prediction of whether the jury is likely to be "overpersuaded" or whether the jury actually can handle the emotional content of gruesome photographs or other evidence without having that emotional baggage affect the fairness

of the disposition.

The other considerations given in the rule are more related to the judge's task of moving the trial along. When evidence is presented that may lead to a lengthy side controversy during the trial, the judge is justified in excluding that evidence as long as she can determine that the party does not have a real need for it. The same thing applies to the judge's determination on whether evidence is cumulative. Under the federal rules, and under the Kentucky rules, the prosecution is not bound by a defendant's offer to stipulate to an element of the crime because the Commonwealth, like any other litigant, is permitted to present its own case to best advantage. However, an offer to stipulate should be taken into account when a judge is making a KRE 403 determination. [Graham, p. 20].

Since 1992, some cases have dealt with balancing explicitly although there are many more that do so without identifying the rule. Useful examples are ***Bell v. Commonwealth***, 875 S.W.2d 882 (Ky. 1994) and ***F.B. Ins. Co. v. Jones***, 864 S.W.2d 930 (Ky.App. 1993). Appellate decisions will rarely duplicate the circumstances at a given trial so precedents usually will be used as statements of general principle rather than as four square authority. In any event, a KRE 403 ruling is largely within the discretion of the trial judge which creates a wide range of acceptable analysis. [***Hall v. Transit Authority***, 883 S.W.2d 884 (Ky.App. 1994)].

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 14; amended 1992 Ky. Acts ch. 324, sec. 4; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

KRE 404 is a general rule concerning character evidence with particular attention to other crimes. It is basically two rules joined together under one number.

(a) This rule prohibits introduction of evidence concerning a person's general character or a particular character trait for the purpose of proving that the person acted in conformity with character on a particular occasion. This general rule is subject to three exceptions.

In a criminal case, the defendant may introduce evidence concerning a particular character trait or his general good moral character but the prosecution may not deal with the subject except on rebuttal. This should end the prosecutorial tactic of preemptive character attack which has been allowed in some cases.

The defendant in a criminal case may also offer evidence of a pertinent trait of character of the victim of the crime except in cases involving criminal sexual conduct. This is governed by KRE 412. The prosecution is again limited to rebuttal of this evidence.

The prosecution in homicide cases may introduce evidence of the peaceful character of the deceased in order to rebut evidence that the deceased was the first aggressor.

Under these rules, the defendant may introduce evidence tending to show that the prosecuting witness is a liar or is basically dishonest as an element of the defense case in chief. As the Commentary notes, the prosecution is denied the right to introduce character evidence or trait evidence in chief except in cases of homicide, where the deceased is unavailable to testify and therefore the Commonwealth would suffer an unfair disadvantage. [Commentary, p. 24].

The final element of this subsection concerns the character of witnesses, and says that evidence of the character of witnesses may be attacked as provided in KRE 607, 608 and 609. It should contain a reference to KRE 104(e) which authorizes evidence of bias, interest or prejudice.

(b) Every commentator acknowledges the great difficulty involved in trying to fashion a rule governing the introduction of evidence that is relevant to prove some point in the case but which shows that the defendant has done something wrong in the past or in relation to the case. Imwinklereid in *Uncharged Misconduct Evidence* (1984), quotes from a wide variety of sources to reach the conclusion that "uncharged misconduct evidence will usually sink the defense without a trace." [p. 4]. Empirical studies on the subject all conclude that if the jury learns about a defendant's uncharged misconduct, particularly if that misconduct is a previous criminal conviction, "the jury will probably use a different...calculus of probabilities in deciding whether to convict." To a large extent, any belief that a combination of admonitions and explanations of law will counter these obvious tendencies of the jury is wishful thinking. However, it is hard to get rid of such a firmly entrenched principle of evidence law, and therefore KRE 404(b) attempts to minimize the damage.

The rule prohibits introduction of evidence that the defendant or witness did something wrong for the purpose of showing "action in conformity therewith." By phrasing the rule in this way, the drafters obviously intend that evidence introduced for some other purpose must be admissible even if it shows past wrongs or crimes. Subsection (1) gives a list of the common purposes for which evidence could be admitted. It is important to note that the drafters intentionally left out the "common plan or scheme" purpose because it has been consistently misunderstood and misused. [Commentary, p. 25]. However, exclusion of a purpose from the list does not mean that evidence is necessarily inadmissible. The only real requirement under KRE 404(b) is for the proponent to be able to show that the evidence is not admitted for the purpose of showing that the person acted in conformity with the character or character trait. Once this is shown, the final determination is made under KRE 403 and 105(a).

However, the Supreme Court in ***Bell v. Commonwealth***, 875 S.W.2d 882 (Ky. 1994) held that Rule 404(b) is exclusionary in nature. This is important because it means that the party seeking admission of other crimes/acts evidence must show why it is not excluded by the general rule. The proponent must find an exception. This appears to differ from the federal approach.

The other given example is a statement of what used to be called the "interwoven" rule which provides that if the proof of other bad acts is so "inextricably intertwined with other evidence" essential to the case that separation of the two could not be accomplished without serious harm to a party's case, the evidence may be introduced. The important words to note in this portion are that the evidence must be "inextricably intertwined" with the point at issue, and the evidence must be "essential to the case" so that a party would be prejudiced by its exclusion. The obvious example of this provision is stealing a gun before a bank robbery where only the robbery is on trial. Although this evidence might satisfy the test of relevance under KRE 404(b), it must also pass the hurdle of KRE 403 if the opposing party claims that it is sufficiently prejudicial or confusing.

(c) The prosecution in a criminal case must give "reasonable pretrial notice" to the defendant of its intention to introduce other crimes evidence. This does not necessarily mean that such notice must be given during discovery, although this could be an appropriate place to get the information circulated. If the Commonwealth fails to give such notice, the court may exclude the evidence or, if the prosecutor shows good cause, may excuse the failure to give the notice and then decide whether a continuance or other remedy can avoid "unfair prejudice" caused by such failure. This is a major useful innovation in law. Although in many criminal cases it is easy enough to see other crimes evidence coming, the pretrial notice requirement will allow the parties to dispose of the question at a pretrial *in limine* hearing under KRE 103(d) and will materially aid in preparation for trial or disposition of cases by guilty plea. The Commentary makes a point of noting that the prosecution does not have to give pretrial notice of other crimes evidence that it does not intend to use in chief. [Commentary, p. 27]. Nor does this rule affect the use of prior felony convictions under KRE 609 for the limited purpose of impeaching credibility.

An essential question is the level of certainty that the defendant did these other acts the judge must have before allowing proof of them into evidence. In ***Huddleston v. United States***, 485 U.S. 681 (1988), the Court held that the determination was made under Rule 104(b) and therefore the judge was required to make a determination that the jury could reasonably find the conditional fact, that the defendant performed the other act, to be true. [p. 690]. KRE 404(b) is the same language and therefore the determination should be the same.

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 15; amended 1992 Ky. Acts ch. 324, sec. 5; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

(a) Anytime that character is admissible as evidence, a party may prove it by evidence of general reputation in the community, or by opinion testimony. The addition of opinion testimony as a method of proof is welcomed by most lawyers in light of the near impossibility of getting character witnesses to understand that their

own opinion is not the same as the reputation in the community. In most cases, general reputation will decline as the method of proof and opinion of the individual witness, based on personal knowledge, will become the preferred method of proof.

(b) The party cross-examining a character witness may ask that witness if she has heard or knows about specific instances of conduct that would bear on reputation or opinion concerning character or character trait. To prevent fishing and unfair suggestion to the jury [prohibited also by KRE 103(c)] the cross-examiner may not ask about specific instances unless the cross-examiner has "a factual basis" for the inquiry.

(c) If the defense is character or a trait such as honesty, both the proponent and the opponent may delve into instances of that person's conduct. However, the drafters clearly do not intend this provision to be used when character is being introduced to prove the doing or the failure to do of a particular act. [Commentary, p. 28]. The drafters apparently accept the judgment of the federal rules that evidence of specific instances of a person's conduct have the greatest capacity to create prejudice or confuse the jury. Therefore, it is unlikely that this section will be used in criminal cases to any great extent.

Rule 406 (Number not yet utilized.)

COMMENTARY

Although the rules simply state that this number is not yet utilized, it originally was to be the rule concerning habit evidence in Kentucky. Habit has been rejected as a form of evidence and therefore this rule was deleted from the final draft of rules.

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.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 17; amended 1992 Ky. Acts ch. 324, sec. 6; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

Although this ordinarily applies in personal injury cases, there are a number of instances, primarily vehicular homicide or assault cases, in which subsequent repair measures to an automobile or other vehicle could be important to prove or disprove negligence in connection with the event at issue. There is some question as to whether the type of negligence spoken of in this rule corresponds to the type of negligence described by the terms wantonly and recklessly in KRS 501.020(3) and (4). However, these terms speak in terms of creation of substantial and unjustifiable risk and therefore certainly are a type of negligent conduct. It is important to note that this rule does not prohibit introduction of evidence that the instrument, automobile or other thing was unsafe to begin with, but it does prohibit introduction of evidence that the defendant fixed the problem afterward as sort of a quasi-admission of guilt.

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.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 18; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule operates in much the same way as KRE 407 by preventing the use of an offer to compromise a dispute as evidence of guilty knowledge or a feeling of moral blameworthiness. Often times, in theft or fraud cases, the parties can reach some sort of agreement that will obviate any further legal action. In several counties, it appears that this is the sole function of the warrant division of district courts. The usefulness of such settlements in disposing of criminal cases is enough justification for the rule. However the last sentence of the rule allows a party to use evidence of compromise or offer to compromise of a claim to show the bias or prejudice of a witness, to rebut a claim of delay, or to prove an effort to obstruct a criminal investigation or prosecution.

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.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 19; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This is the third of the Article IV rules that prevent creation of an inference of guilty knowledge resulting from an act of a party, in this instance an offer to pay medical or other expenses. The rule states very plainly that payment or an offer to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury. In any criminal offense in which personal injury is an element, the fact that the defendant may have offered to pay for the injury cannot be used to create an inference in the jury that the defendant would not have done so except for his own belief in his guilt.

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

COMMENTARY

Courts have come to recognize that plea bargaining is a necessity in criminal cases and that plea bargains are sometimes accepted by persons who might not be guilty but who believe that they will spend less time in jail by pleading guilty than by risking a trial. KRE 410 prohibits introduction of four aspects of the guilty plea process. Under the rule, a plea of guilty which was withdrawn cannot be mentioned. Pleas of *nolo contendere* and *Alford* pleas also cannot be admitted. Any statement made in the course of a formal plea proceeding, (*i.e.* the *Boykin* colloquy), preceding the entry of a *nolo contendere* or *Alford* plea, and any statement made in the course of plea discussions with the attorney for the prosecuting authority cannot be admitted. It is important to note that the attorney for the prosecuting authority is the only person to whom statements may be made with impunity. In a criminal proceeding for perjury or false statement any statements made under oath may be introduced, and in any proceeding in which another statement has been made and the statement ought in fairness be considered contemporaneously, the other statement may be introduced.

No one knows for sure if Kentucky recognizes pleas under ***North Carolina v. Alford***, 394 U.S. 956 (1969), although ***Pettiway v. Commonwealth***, 860 S.W.2d 766 (Ky. 1993) speaks as if they are. Under federal law, an *Alford* plea is as much of a guilty plea as a "straight" plea of guilt. The provision for *Alford* pleas was added onto the rules after the final draft, and therefore are not mentioned in the original Commentary. However, the revised Commentary says its inadmissibility is based on the same premise as that of the *nolo contendere* plea. [Revised Commentary, p. 31]. *Nolo contendere* pleas are declared inadmissible because they are entered only for the purpose of resolving pending charges and therefore are "not very probative." In an *Alford* plea the defendant admits that the Commonwealth's evidence could prove him guilty to a jury and therefore, it appears that the plea is similar conceptually to the *nolo* plea.

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

COMMENTARY

Liability insurance is more important in tort cases where the party sued does not want the jury to know that there is a deep pocket waiting to satisfy any damages that are returned. Although this rule is aimed chiefly at that problem, it is important to note the second sentence of the rule which does not require exclusion of evidence concerning evidence against insurance when it is offered to prove ownership, control or the bias or prejudice of a witness. Because Kentucky law requires the owner of a vehicle to maintain liability insurance [KRS Chapter 304.39], this would be a method of proving the ownership of a vehicle if other methods failed. For the same reason, in a drug case, evidence of liability insurance identifying the defendant as the owner of the car could be important in establishing liability for possession of controlled substances. In vehicular homicide or assault cases the Commonwealth could not use the liability insurance of the defendant as evidence that the defendant acted negligently or otherwise wrongfully. This is a rule that almost would seem to be unnecessary, but, given the history of liability insurance in evidence law, it is kept on primarily to make sure that the jury is not improperly influenced in tort cases.

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

(a) Reputation or opinion. Notwithstanding any other provision of law, in a criminal prosecution under KRS Chapter 510 or for attempt or conspiracy to commit an offense defined in KRS Chapter 510, or KRS 530.020, reputation or opinion evidence related to the sexual behavior of an alleged victim is not admissible.

(b) Particular acts and other evidence. Notwithstanding any other provision of law, in a criminal prosecution under KRS Chapter 510, or KRS 530.020, or for attempt or conspiracy to commit an offense defined in KRS Chapter 510, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence is admitted in accordance with subdivision (c) and is:

(1) Evidence of past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury;

(2) Evidence of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which an offense is alleged; or

(3) Any other evidence directly pertaining to the offense charged.

(c) (1) Motion to offer evidence. If the person accused of committing an offense described above intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen (15) days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.

(2) Hearing on motion. The motion described in the preceding paragraph shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of KRE 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) Findings and order. If the court determines on the basis of the hearing described in the preceding paragraph that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) Definition. For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which the offense being tried is alleged to have occurred.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 22; amended 1992 Ky. Acts ch. 324, sec. 29; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

(a) The Rules of Evidence continue the rape shield concept formerly found at KRS 510.145. This subsection provides that in any criminal prosecution under Chapter 510, or 530.020, or any criminal prosecution for attempt or conspiracy to commit such offenses, reputation or opinion evidence "related to the sexual behavior of an alleged victim is not admissible." The provision does not say it is not admissible to show conformity or any other limitation. It simply states that reputation or opinion evidence concerning the prosecuting witness' sexual behavior is not admissible.

(b) However, other evidence concerning the prosecuting witness's past sexual behavior may be admissible if the proponent follows the procedural requirements of subsection (c), and the evidence concerns one of three particular issues.

The first type of evidence could be evidence of past sexual behavior with persons other than the accused if offered for the purpose of showing that the defendant either was or was not the source of semen found or injury suffered by the prosecuting witness. Although ordinarily only the defendant would be interested in this subject, the rule is so written that the Commonwealth may, if it wishes for tactical reasons to do so, introduce evidence of other sexual activity that might explain certain injuries in order to deprive the defendant of an issue. However, in most cases it will be the defense wishing to show that it was another person who committed the offenses charged.

Where the defense is consent, subsection (2) permits introduction of evidence of "past sexual behavior with the accused." This means any type of sexual activity other than the sexual activity which gave rise to the criminal charge. [See subsection (d)].

The final purpose is to permit introduction of any evidence directly pertaining to the offense charged. This will not include opinion or character evidence about the prosecuting witness, but will give sufficient flexibility to allow the introduction of any evidence that may be necessary to give a complete picture of the offense charged. This could include showing motive to lie by introduction of previous false charges or reason to claim compulsion to protect another relationship. [***Olden v. Kentucky***, 488 U.S. 227, 109 S.Ct. 480 (1988). The defendant may introduce evidence necessary to give an adequate picture of the offense as well.

The Commentary notes that the federal rule contains a provision that requires admission of the prosecuting witness's past sexual behavior when it is "constitutionally required to be admitted." [Commentary, p. 37]. Kentucky did not include this rule because the drafters made a determination that constitutional principles do not have to be stated in a statute or rule of court to have effect. Both judges and attorneys should keep in mind that the 6th Amendment of the United States Constitution entitles a criminal defendant to put on a complete defense and to have relevant evidence heard by the jury. Sections 7 and 11 of the Constitution of Kentucky also guarantee the right to be heard. Although it is important to keep the exception from swallowing the rule, it is equally important to keep in mind that the defendant's knowledge of the victim's reputation may have a bearing on the defendant's liability in the criminal case. Therefore, subsection (3) requires a lively attention to the right of the defendant to put on a defense while protecting the prosecuting witness from undue harassment or degradation.

(c) Subsection (c) requires the defendant to make a motion to allow the introduction of evidence of specific instances of the prosecuting witness's past sexual behavior. This written motion must be made at least 15 days before the scheduled trial date although the court may allow a later application upon showing that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that it has newly arisen in the case, as through the surprise testimony of a witness or the prosecuting witness.

The defendant's application consists of a motion and a written offer of proof detailing what the defendant desires to present to the jury. The judge must make an initial determination as to whether the evidence would be admissible under subsection (b), and then must have a hearing in chambers to determine admissibility. Because this is a preliminary hearing, the Rules of Evidence do not apply and the parties may rely on any relevant facts to support their positions. The one restriction in the rule is that the judge may not conditionally admit the testimony. All facts must be shown before the ruling on admissibility can be made. The ruling need not be made at one particular hearing, but the admissibility of evidence under this rule must be made in chambers before anyone can mention it. This is a KRE 104(a) determination.

If the judge finds that the proposed evidence is relevant and that the probative value of the evidence outweighs the danger of unfair prejudice the evidence shall be admissible in trial to the extent allowed by a specific court order. The balancing test of KRE 403 in which the opponent must show that probative value is substantially outweighed by danger of unfair prejudice does not apply. In this case, it is a balancing test in which the party shows that the probative value simply outweighs the danger of prejudice. The judge's order must detail what may be testified to and what may be cross-examined on. Although the rule does not so state, the better practice would be to have a written order by the court given to both attorneys before trial so there can be no question as to the subject matter of examination and cross-examination.

Article V. Privileges

COMMENTARY

This is the most involved article of the rules because of the number of specific restrictions 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 only in proceedings in the Court of Justice, and therefore privileges that are left 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, Chapter 194 for CHR records or Chapter 61 for records not falling under the open records law.

In the original KRE draft, proposed KRE 502 adopted Wigmore's attitude which is that because a privilege relieves a witness of the general duty to testify, it must be strictly construed against the claimant. [Commentary, p. 39]. KRE 502 was not adopted because of the almost universal unfavorable reception it received from attorneys. Therefore, the extremely hard line against privileges that might have been expected had KRE 502 been adopted should not apply here. However, the Court may still construe privileges narrowly as exceptions to the KRE 501 duty to testify. Ruling on claims of privilege should construe them as any other statute or court rule. Certainly KRE 102 has as one of its purposes that "the truth may be ascertained and proceedings justly determined." 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. Privileges are a recognition that the government should not intrude in some areas of communication. The General Assembly and the Supreme Court, by adopting rules of privilege, already have balanced the pros and cons of

keeping certain evidence away from juries. Neither attorneys nor trial level 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 of how the existence and policy of a privilege affects the situation presented.

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:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 23; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This should be called the general rule requiring testimony. Any person properly summoned to the witness stand under RCr 7.02 or KRS 421.190 cannot lawfully refuse to be a witness, lawfully refuse to disclose any "matter" or refuse to produce any object or writing unless that person claims a privilege under the Federal or State Constitution or Kentucky statute or court rule. 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 424 provides criminal penalties for tampering, intimidating, or bribing a witness. Keep in mind that 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 or testimony before trial is still governed by the discovery rules in Chapter 7 of the Criminal Rules and Rules 26-37 of the Civil Rules. However, the privileges set out in Article V of the Evidence Rules apply at any point of any proceeding.

There is a fair question about the applicability of KRE 501 at proceedings in which the Rules of Evidence do not apply. KRE 1101(c) provides that privileges are available at these proceedings while KRE 1101(d) provides that the rules other than privileges do not apply. KRE 501 can hardly be considered a privilege. Therefore, it should not apply except at trial in chief or in those proceedings in which the rules apply. Neither RCr 7.02 nor KRS 421.190 does anything more than provide a means of getting a person before the court. Therefore, a person who does not wish to testify at a proceeding where the Rules of Evidence do not apply probably cannot be made to do so. This analysis does not apply to grand jury testimony because of RCr 5.12 which allows the grand jury to seek compelled testimony. Also, because depositions under RCr 7.12 are not excluded from the application of the Rules of Evidence, a witness probably may be compelled to testify at deposition. This quirk in the law may or may not turn out to be a problem. However, to foreclose the possibility of trouble down the line, the court may wish to make KRE 501 a rule of civil or criminal procedure.

Rule 502 (Number not yet utilized.)

COMMENTARY

This was the so-called "honest eavesdropper rule" which was dropped from the proposal in 1992. It would have allowed a person who overheard privileged communications to testify, and could have allowed an adverse party to compel that person to testify concerning the communication as long as the communication was obtained "legally". Disclosure of privileged communications is now dealt with by KRE 509 and KRE 510.

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 25; amended 1992 Ky. Acts ch. 324, sec. 8; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

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.

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.

The rule does not define what legal services are. A good indication of what they might be is found in SCR 3.020 which 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, then it should fall under the attorney-client privilege.

This rule is not the only restriction on a lawyer concerning client confidentiality. RPC 1.6 prohibits an attorney from disseminating "information" about a client or case unless compelled to by law. This privilege 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 RPC 1.6. The Commentary to RPC 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 that the lawyer may claim the privilege, but only on behalf of the client, not on behalf of himself.

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 there. The bottom line of this privilege is that the lawyer has an ethical and legal duty to assert the privilege where a colorable claim can be made until the client authorizes disclosure or an order of court demands it. 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 somehow be restored on appeal or reconsideration.

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.

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.

Rule 504 Husband-wife privilege.

(a) 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.

(b) 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.

(c) Exceptions. There is no privilege under this rule:

(1) 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;

(2) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:

(A) The other;

(B) A minor child of either;

(C) An individual residing in the household of either; or

(D) 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

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

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 26; amended 1992 Ky. Acts ch. 324, sec. 9; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This has two elements. Subsection (a) allows the spouse of a party to refuse to testify against party-spouse concerning "events occurring after the date of their marriage." The party-spouse involved may also prevent the spouse from testifying concerning the same events.

Subsection (b) also protects confidential communications, that is, communications "made privately by an individual to his or her spouse" not intended to be disclosed to anyone else. An individual may refuse to testify and may prevent another person from testifying to any such communication that was made by that individual to the spouse during the course of the marriage. This privilege is given to the maker of the statement or the person's guardian, conservator or personal representative.

Subsection (c) takes the privilege away 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. Also, if one of the spouses is charged with wrongful conduct against the person or property of 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. In addition, the judge 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 there is no point in having a privilege to shut the other spouse up.

Rule 505 Religious privilege.

(a) Definitions. As used in this rule:

(1) 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.

(2) 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.

(b) 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.

(c) 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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 27; amended 1992 Ky. Acts ch. 324, sec. 10; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

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 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 bonafide minister or a person reasonably appearing to be a clergyman) "in his professional character as spiritual adviser." [***Sanborn v. Commonwealth***, 41 KLS 11, p. 37 (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 drug abuse counselor, who is a person employed by a drug abuse and education center licensed by the Kentucky Cabinet for Human Resources pursuant to KRS Chapter 210;

(D) An alcohol abuse counselor, who is a person employed by a licensed hospital, or treatment facility licensed by the Kentucky Cabinet for Human Resources pursuant to KRS Chapter 222;

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

(F) 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.

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

(3) A communication is "confidential" if 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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 28; amended 1992 Ky. Acts ch. 324, sec. 11; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34. Amended 1994 ch. 352, §13, ch. 337, §11, eff. 7-15-94 by adding (a)(1)(E), and (a)(1)(F).

COMMENTARY

This rule originally dealt with school counselors, sexual assault counselors, drug abuse counselors, and alcohol abuse counselors. The 1994 Amendment adds certified professional art therapists and certified marriage and family therapists to the definition of "counselor." 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. 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.

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, or if the client is dead, the privilege does not apply. In addition, if the judge finds in a particular case that the communication is relevant to an essential issue in the case and there is no alternate means to obtain the "substantial equivalent" of the communication, and that 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.

NOTES

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 clinical social worker, licensed by the State Board of Examiners of Social Work and holding a certificate of qualification for the independent practice of clinical 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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 29; amended 1992 Ky. Acts ch. 324, sec. 12; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34. Amended 1994 ch. 367, §13, eff. 7-15-94 by adding (a)(2)(D) and by changing "his" to "patient's" in (b) and (c)(3).

COMMENTARY

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 defintion 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)).

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.

The exceptions under the rule involve involuntary hospitalization proceedings and statements made in interviews authorized by RCr 7.24(3)(B)(ii). Obviously, the patient by creating the issue of mental condition creates the need for evidence concerning it. 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.

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 30; amended 1992 Ky. Acts ch. 324, sec. 13; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

Any agency of government 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. 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. The privilege is invoked by the "public entity" to which the information was furnished. Under a strict reading of this rule, it appears that the Commonwealth or County Attorney could not invoke the privilege for information given to police officers, federal enforcement agencies, or probation or parole officers. It would be up to some representative of those public entities to make the claim.

Of course the informant may make him or herself known, or the Commonwealth may voluntarily choose to identify.

However, the more likely scenario is that 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. 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. 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. If the Commonwealth does not do so in criminal cases, 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 that any judge thinks of when the Commonwealth is being difficult about revealing the identity of an informant. It is also important to note that the options listed in subsection (c)(2) are not the only options available to a judge.

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 31; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule states the common sense conclusion that 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. In a sense, this is an example of the rule of completeness that permeates evidence law. However, this is cast in terms of waiver, so that compelled disclosures or disclosures made *in camera* as authorized by law will not result in waiver.

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 32; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

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 the Nutshell under this heading the author gives the example of the wife who has disclosed a confidential communication to someone else (the police) before the spouse has the opportunity to invoke the privilege. Under these circumstances, the spouse could still come to court and claim the privilege. If a judge errs in a ruling on disclosure, it may be remedied by reconsideration and mistrial or on retrial after appeal.

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 33; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This is an important rule that requires both the judge and the attorneys who know that a claim of privilege is likely to be made to ensure that it is done without the jury knowing about it. Also, subsection (a) makes clear that if a person lawfully invokes a privilege, no one may make a comment about it and no inference concerning any issue may be drawn from it. This is a caution to judges making rulings on motions for directed verdict. Subsection (c) entitles any party who is afraid that the jury might draw an adverse inference from invocation of the privilege by anyone to an instruction that no inference may be drawn from it. This adds to current federal constitutional law which requires such instructions only when the defendant refuses to testify.

Article VI. Witnesses

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.

EFF DATE: July 1, 1992

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

COMMENTARY

(a) Except for persons precluded by Article V from testifying, anyone in Kentucky is competent to be a witness. Subsection (a) deals only with legal disqualifications, and it would require a thorough search of the statutes to find any disqualifications. As shown below, the judge of the case and the jury are disqualified from appearing as witnesses. In certain instances, the Rules of Professional Conduct will prevent an attorney from appearing as a witness if he chooses to act as an advocate in the case. However, other than these, the policy, in keeping with KRE 501, is to allow anyone to testify who may conceivably help achieve a fair disposition of the case. This also includes persons who formerly might have been excluded by the deadman statute [KRS 421.210 repealed].

(b) Witnesses must show a minimum ability to have seen or heard something, have the ability to recall what was perceived, and have the capacity to tell the truth concerning what was seen or heard. The text writers and commentators all agree that this rule applies only to persons who are "incapable," and not to persons who testimony might be considered incredible. [Commentary, p. 54]. The question of witness competency must be viewed in the light most favorable to the witness. If the witness meets these minimum qualifications, the judge

must allow the jury to make the determination of credibility. [Graham, p. 26]. However, the judge may apply KRE 403 to the witness's testimony if the witness's capacity is so marginal that the testimony might confuse or mislead the jury or unduly prejudice one side. [Nutshell, p. 147; 1 McCormick, p. 247-248]. In addition, the judge has to decide whether or not the opposing party will have a fair opportunity to confront the witness, as required by Section 11 of the Kentucky Constitution and the 6th Amendment of the United States Constitution in criminal cases. This is a KRE 104(a) determination.

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.

EFF DATE: July 1, 1992

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

COMMENTARY

Personal knowledge is a fundamental requirement for witnesses because the witness's version of what another person said is not reliable or useful. Ordinarily, determination of personal knowledge is a question of conditional relevance under KRE 104(b), and therefore the proponent must introduce sufficient evidence to allow a finding that a reasonable juror would believe the person was talking from personal knowledge. Again, the evidence is viewed in the light most favorable to the proponent on a preponderance standard. [Nutshell, p. 151]. The rule notes that the foundation testimony need not be from the witness herself. Obviously, unobjected to testimony, whether based on personal knowledge or not, is not a ground for reversal [KRE 103(1)] and may be considered by the jury for any purpose. [KRE 105(a)].

The Commentary points out that the personal knowledge requirement is an integral part of the hearsay rule. The personal knowledge rule prevents a witness from testifying to facts learned from other people, and requires a hearsay witness to have personal knowledge of the out-of-court statement. [Commentary, p. 55].

The final sentence of the rule notes that an expert may rely on facts and data supplied by others if that is normally done in that particular field of expertise. [KRE 703]. However, under KRE 701, a lay witness must have personal knowledge of the predicate facts because that witness' opinion must be rationally based on her perceptions.

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.

EFF DATE: July 1, 1992

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

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.

EFF DATE: July 1, 1992

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

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.

EFF DATE: July 1, 1992

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

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.

EFF DATE: July 1, 1992

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

COMMENTARY FOR 603, 604, 605 & 606

These rules are considered together because while necessary, they are unexceptional in content. KRE 603 requires every witness to take an oath or make an affirmation of some form that impresses upon the witness the duty to testify truthfully. KRE 604 makes an explicit provision for interpreters in all cases in which an interpreter is necessary. The interpreter must qualify by knowledge, skill, experience, training or education, and the interpreter must be necessary. [KRE 702]. The interpreter must take an oath or make an affirmation to translate truthfully. KRS 30A.400 and 430 provide a limited privilege for interpreters.

KRE 605 states that the judge presiding at the trial may not testify in that trial as a witness and that no objection is necessary to preserve the point. It bears noting that under Cannon 3(C)(1)(a) of the Rules of the Supreme Court [SCR 4.300], a judge is supposed to disqualify herself if she has personal knowledge of disputed evidentiary facts in a proceeding. It is unlikely that this rule will be used much. It might also be observed here that under RPC 3.7(a), an attorney may not act as an advocate in a proceeding in which she is likely to be a necessary witness except when the testimony would be on an uncontroverted point or the disqualification of the attorney would create clear hardship for the client. Obviously, this is a point that opposing counsel must litigate.

Under KRE 606, no juror may testify as a witness before the jury of which she is a member in a trial. Again no objection need be made on this point, and it is extremely unlikely that this rule will create any litigation. RCr 10.04 also prohibits examination of jurors concerning the verdict except to determine if the verdict was obtained by lot.

Rule 607 Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling the witness.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 40; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This principle has been followed by Kentucky courts under CR 43.07 for many years. The language of the rule does not impose any limitations on the methods that may be used. KRE 104(e) specifically allows a party to present evidence relevant to the weight or credibility of a witness, including evidence of the witness' bias, interest or prejudice. KRE 801A(a)(1) allows use of prior inconsistent statements.

One problem that the federal courts have had under their different rule of substantive use of prior statements is the question of whether a party should be allowed to call a witness if the only purpose for calling is to impeach that witness with a previous statement admissible as substantive evidence under KRE 801A(a). The federal rule in several circuits is that the party may not call a witness who has told the party before trial that he will not testify favorably. This is based on the idea that the rule was aimed at the "turncoat" or surprise witness. The Commentary notes this problem [p. 57], but says that it will be best to approach this question on a case-by-case basis. This should be a matter of interest in many trials because quite often co-defendants and neighbors are called for the sole purpose of laying the foundation for introduction in an out-of-court statement.

One possible solution, suggested by Weinstein, is to apply KRE 403 to this question to determine whether the relevant evidence (the other statement) will create undue prejudice under the circumstances of the case. [1 McCormick, p. 129]. As a preliminary observation, it seems that if a party knows that a witness will testify unfavorably, it is improper to call that witness simply to get an out-of-court statement, that is presumed inherently less reliable, before the jury as substantive evidence. [See also Rule 104.]

Rule 608 Evidence of character.

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 the limitation that the evidence may refer only to general reputation in the community.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 41; amended 1992 Ky. Acts ch. 324, sec. 14; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule is quite different from the original draft and from the federal rule. The character of a witness may be attacked or supported either by opinion or reputation evidence. However, the last phrase of the rule was added on to the original draft and it is unclear whether the limitation to general reputation in the community refers only to reputation, which would be understandable, or whether the opinion also is limited to general reputation in the community. It is difficult to tell from reading this rule and only a trip to the appellate courts will resolve this question.

The 1989 draft of KRE contained a provision similar to the federal rule which allows introduction of specific instances as a means of impeaching character. This was rejected in the final enactment, and therefore, there is no real question as to inadmissibility of specific instances of conduct as a means of attacking character.

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.
EFF DATE: July 1, 1992
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.

COMMENTARY

(a) This rule differs from the federal rule because it employs the word "shall" without the qualification of the balancing test prescribed by KRE 403 now written into the federal rule. As written, this rule requires the trial judge to admit into evidence the existence of a previous conviction without any balancing whatever. As long as the proponent shows that the witness had suffered a conviction carrying a penalty of death or imprisonment of one (1) year or more, the fact of conviction must be introduced either through the witness or by court record under KRE 803(22). In keeping with Kentucky practice, the identity of the prior conviction is not identified on cross- examination unless the witness has denied its existence. The witness may however choose to let the jury know what the conviction was. In ***Green v. Bock Laundry Machine Co.***, 490 U.S. 504, 524 (1989) the Court said that it could only follow the plain language of the rule as then written, and therefore held that the judge had no discretion because of the mandatory direction. Professor Lawson has correctly maintained in his presentations on the Evidence Rules that KRE 403 applies to every determination of admissibility except where prohibited. *Green* was an unnecessarily rigid decision. And no one should assume without a crystal clear indication of legislative or judicial intent that the Supreme Court or the General Assembly consciously chose to make impeachment by prior conviction, alone among the provisions of the Rules, the only section to which KRE 403 cannot apply. Lawson is right. Convictions over 10 years old are presumptively too prejudicial. The use of more recent convictions may still be too prejudicial. KRE 403 should be applied.

(b) The rule puts a clear ten (10) year limitation on convictions except where the court determines that the probative value outweighs the prejudicial effect. It is interesting to note that none of the text writers can cite to an example in which use of a ten (10) year old conviction could logically be used. It is easy to conceive of using an old conviction to prove signature or *modus operandi*. [KRS 404(b)]. However, except in cases in which the witness volunteers the statement that he has never been convicted of anything, it is difficult to see any real use for this portion of the rule.

(c) If the conviction has been pardoned, annulled or set aside by a procedure amounting to a finding of innocence, then it may not be used. It is up to the attorneys to request the admonition authorized by KRE 105(a) when the prior conviction is introduced.

One final uncertain point is whether the pendency of an appeal on the conviction would prevent its use. In the final draft, the drafters proposed to follow the federal rule which would allow use of the prior conviction despite the pendency of appeal. This part was stricken from the final enactment. Whether the current Kentucky rule of inadmissibility under the case of ***Duvall v. Commonwealth***, 548 S.W.2d 832 (Ky. 1977) will continue is not a settled question, although it would appear that this policy should continue in light of the right of a party to appeal under Section 115. [Commentary, p. 60].

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

COMMENTARY

This rule is written in a manner similar to KRE 404(b). Proof of a witness's religious beliefs is not admissible for the purpose of showing that the witness's credibility is either enhanced or impaired by virtue of those beliefs. This appears to be the only limitation. Therefore, as long as religious beliefs are relevant to some issue of consequence in the case, they should be admissible under the analysis provided by KRE 401-403.

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.
EFF DATE: July 1, 1992

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

COMMENTARY

(a) This makes explicit the trial court's authority to exercise reasonable control over the presentation of evidence and the process of trial. It does not authorize the trial court to ignore RCr 9.42 or the Rules of Evidence except in cases of real need. The Commentary points out that the rule authorizes the court to decide whether testimony will be taken in narrative or question and answer form, whether the court will allow questions on re-direct or re-cross that should have been asked earlier, and things like that. [Commentary, p. 63]. Because KRS 421.210 was repealed in its entirety in 1992, there is no longer any question about order of witnesses in either civil or criminal cases. The Practical Guide notes that the judge's authority to deal with objections to the form of questions (asked and answered, compound, etc.), to require a voir dire of a witness on qualifications, and to require a preliminary determination of authenticity also emanate from this rule. When this rule is read with KRE 102, 403, and 106, the power of the court to govern proceedings and to deal with matters not specifically treated by the rules is evident. As has been noted earlier, not every subject of evidence law has been dealt with by the rules. In such circumstances, the trial judge under KRE 611, 401-403, and 102 determines whether the evidence has something to do with the case and whether it may be admitted without unduly prejudicing the parties.

(b) The Commentary notes that this rule is the reverse of the federal procedure. [p. 63]. The rule restates Kentucky's "wide open" cross-examination rule which permits the cross-examiner to deal with any subject germane to the litigation about which the witness might know. The rule does permit the judge, "in the interest of justice" to limit (and presumably prohibit) cross-examination on matters that were not testified to on direct examination. It should also be observed that the judge has the authority under KRE 403 to limit the introduction of relevant evidence if it would confuse the jury or take too much time in presentation.

(c) Leading questions are not defined in the Kentucky Rules of Evidence, but have been defined at CR 43.05 as questions that suggest an answer to the question. Ordinary foundation questions such as establishing the presence of the witness at the scene of an event do not fall under the idea of leading questions. Undisputed preliminary or unimportant issues may be dealt with on leading questions. Questions presented to a hostile, unwilling, frightened or biased witness may be leading questions. This must be established to the satisfaction of the judge however. A child witness or an adult with communication problems may be led as well as a witness whose recollection is exhausted or a witness who is being impeached by the party calling him. [Nutshell, p. 203].

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.

EFF DATE: July 1, 1992

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

COMMENTARY

This rule deals only with writings that are used to refresh the witness's memory. Refreshment is not governed by the Kentucky Rules and therefore the judge may permit it under KRE 611(a) in order to try to jog the witness's memory. The purpose of giving the writing to the adverse party is to allow that party to have a decent basis for cross-examination. [Nutshell, p. 214]. McCormick says that this rule may also apply to writings that were reviewed by the witness before trial. [1 McCormick, p. 33]. It also may amount to a waiver of privilege with respect to anything on the paper. [1 McCormick, p. 35; 346]. This is the reason for the second part of the rule which allows the party using the writing an opportunity to keep unnecessary or privileged contents from the jury. If the Commonwealth will not allow the writing to be produced, the court may strike the testimony or grant a mistrial, as required.

The rule makes it clear that the provisions of RCr 7.26 will prevail over this rule. [Commentary, p. 64].

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.

EFF DATE: July 1, 1992
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.

COMMENTARY

(a) This is CR 43.08 reproduced word for word. It is important both for strict impeachment, in which the contrary statement is not admitted as substantive evidence, and as the foundation for the substantive use of statements authorized by KRE 801A(a). The foundation requirements are well known. The person hoping to impeach must tell the witness when and where the statement was made and name the persons present. If the statement is written, the person must give the statement to the witness to review. The witness must be given an opportunity to explain the statement. If this foundation is met, then the witness may be impeached by the mere fact that a different statement was made, or, if the requirements of KRE 801A(a) are met, the statement may be admitted as substantive evidence.

The second sentence of subsection (a) has always been rather mysterious. It has rarely if ever been used in Kentucky. It exists to allow a party to contradict or impeach an earlier or later statement made by a witness who is not present at the trial or hearing because he has been excused. The rule requires a demonstration of good faith on the party desiring to impeach the earlier statement.

(b) No KRE 613 foundation is required for admissions of the adverse party under KRE 801A(b). Statements of the party have always been admissible against that party.

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.

EFF DATE: July 1, 1992
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

This rule formalizes practice that apparently has been common in Kentucky for a number of years. The Commentary says that "well established principles" recognize the judge's power to call and interrogate witnesses although "it is expected that courts will use this power sparingly and always with sensitivity to the potential for unfairness to the litigants." [Commentary, p. 66]. Juror questions have always been more a matter of local custom than of law. KRE 614(c) specifically authorizes juror questions and requires them to be submitted in writing to the judge who will decide whether or not a question shall be asked of the witness. The requirement of written questions is universally ignored. The final subsection allows parties to object "out of the hearing of the jury at the earliest available opportunity." The obvious reason for this is that attorneys would look quite bad for objecting to the judge's calling of or interrogating witnesses. Obviously, attorneys would be reluctant to offend jurors by objecting to their questions in open court, and the rule therefore allows the objection to be delayed until such time as it can be made out of the hearing of the jury.

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.

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

COMMENTARY

The main change in the rule of separation is that the trial judge "shall" order the witnesses excluded upon the request of a party. The court may order separation on its own motion. However, subsection (2) of the rule permits the Commonwealth to keep a representative at counsel table as it has in the past.

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' testimony or the determination of a fact in issue.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 49; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

Testimony that is clearly opinion is admitted all the time during criminal trials, although the law prohibits witnesses from expressing conclusions that should be made only by the jury. In this rule, the judge is required to determine whether the witness actually had an opportunity to observe, hear or otherwise experience things that rationally led the witness to make a conclusion and to determine whether expression of the conclusion rather than the mere recitation of these facts would be "helpful" to a clear understanding of the testimony or the facts. Some examples of opinion or conclusion testimony admissible under this rule are the appearance of persons, state of intoxication, identity, competency, speed of a vehicle, value of personal property, age or sanity of another person, and general questions of size, weight or distance. [Nutshell, p. 230]. Evidence admissible under this rule is subject to the balancing tests set out in KRE 403.

Rule 702 Testimony by 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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 50; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

If a witness has some sort of specialized knowledge that will "assist" the trier of fact to understand the evidence or determine a fact in issue, the witness may give an opinion as long as the proponent shows that the witness is qualified to do so by knowledge, skill, experience, training or education. The Commentary states that this rule is identical to law that has existed in Kentucky for many years. [Commentary, p. 68].

The determining factor is whether the testimony will be "helpful" to the jury, not whether the jury could or could not figure it out for itself.

The determination of a witness's qualifications is made by the judge under KRE 104(a). There is no special foundation for establishing the qualification of the witness. The proponent must only introduce enough evidence to ward off an objection by opposing counsel. At this point it is helpful to observe that there has never been in Kentucky a requirement that the proponent tender the witness to the court for anointing as an expert. No special rules apply here. It is obviously in the proponent's best interest to lay a strong foundation of professional qualification of the witness so that the witness will be perceived as a true expert by the jury. But as long as the opposing party does not object, there is no reason to present the judge with the issue of whether the witness should be allowed to give an opinion. Testimony is testimony, regardless of the subject matter. If no one is complaining, then the judge need not be bothered. When the proponent asks the judge to say that the witness is an expert, unless the judge explains what this means, the jury will no doubt perceive this ruling as some sort of special approbation of the witness by the judge, a clear indication that this witness should be paid attention to more than others. There is no reason to run this sort of risk, and therefore, practice under KRE 702 should not differ from practice under any other rule. If the opponent does not object, the witness obviously may give opinion testimony and no one can complain about it later. [KRE 103(a)]. It is important to keep in mind that the judge has a duty to keep inadmissible evidence from being suggested to the jury by any means. [KRE 103(c)]. The process of tendering the witness in open court creates the impression for the jury that the witness's testimony is especially believable, obviously an improper inference. Therefore, the practice of tendering a witness should be discontinued wherever it is practiced.

The U.S. Supreme Court's decision in ***Daubert v. Merrell-Dow***, 509 U.S. ___, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) has not been adopted by any published decision of the Kentucky appellate courts. The Kentucky Supreme Court has, to this point, taken a rather conservative stance on novel scientific theories and has relied on ***Frye v. U.S.***, 293 F. 1013 (D.C. Cir., 1923) in a number of recent cases. Most recently, in ***Staggs v. Commonwealth***, 877 S.W.2d 604 (Ky. 1993), Chief Justice Stephens and Justice Reynolds wrote in concurrence that they are strongly in favor of retaining the *Frye* test. However, in ***Rowland v. Commonwealth***, ___ S.W.2d ___ (Ky.App. 1994); 1994 WL 151039, the Court of Appeals discussed the admissibility of hypnotically refreshed testimony under both standards but said that *Frye* had to apply because the trial took place before the adoption of the Rules of Evidence. At this point it is hard to say which standard Kentucky will follow.

The difference between the two rules is not great. *Daubert* requires the judge to make a Rule 104(a) finding that the method or process which underlies the proposed testimony produces reliable results because it is scientifically valid and can be applied to a matter at issue in the trial. General acceptance in a scientific discipline is relevant but not essential to admissibility under this approach. This is the chief difference between *Frye* and *Daubert*.

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 51; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This trio of rules, according to the Commentary, makes it clear that "trial judges should take an active role in policing the content of an expert witness's direct testimony." [Commentary, p. 69]. Subsection (a) is the federal rule and subsections (b) and (c) are elaborations on the rule which point out how this information is supposed to be dealt with. Ordinarily, a party may have the expert sit through the trial to pick up the facts of the case, [KRE 615(3)], or may draw up a hypothetical question containing these facts for presentation to the witness. Subsection (a) makes clear that the expert is not bound by the Rules of Evidence concerning the type of information that he or she may rely on. The expert may rely on any information of the type that is "reasonably relied upon by experts in the particular field." Of course the judge must apply KRE 403 when determining whether the expert may testify concerning this information.

According to the Commentary, subsection (b) allows the expert, at the discretion of the trial judge, to disclose information that would not ordinarily be admissible. The judge must make a determination of trustworthiness and must determine whether this information is necessary to a full presentation of the expert's testimony. The Commentary says that the information must be unprivileged. Obviously, this rule is designed to be applied sparingly and only when it is really necessary to bolster the expert witness against unfair cross-examination or to explain a particularly arcane subject. This rule was created by the drafters of the Kentucky Evidence Code. [Commentary, p. 69]. KRE 403 applies to this determination.

Subsection (c) makes clear that the preceding rule does not limit the adverse party in the type of cross-examination that might be undertaken to undermine the expert witness's credibility. This is a decision that is rightly put in the hands of the adverse party since the information not brought out on direct examination typically would be prejudicial to the proponent. KRE 703 is not intended to deprive the trial court of the right to govern the introduction of evidence under KRE 611 or KRE 403.

Rule 704 (Number not yet utilized.)

COMMENTARY

This is another important deletion from the original draft of the rules. KRE 704 originally was intended to do away with the ultimate fact rule in Kentucky. Most people know what the ultimate fact is in theory, but the decisions of Kentucky appellate courts show that in practice it is difficult to predict when a particular type of information might interfere with the jury's determination of ultimate fact. Actually, the only real reason to invoke the ultimate fact rule is when the testimony of the expert is on a subject so specialized or difficult to deal with that jurors would be likely to give up their role as fact finders in favor of the conclusion of the "expert" on the subject. The absence of the rule should be interpreted as a determination by the Court and the legislature that opinions on the ultimate issue usually should be disallowed. However, this is a matter for the good judgment of the trial judge. It is unlikely that the Supreme Court of Kentucky will allow opinions on insanity or other subjects on which it currently excludes ultimate opinion testimony.

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 53; amended 1992 Ky. Acts ch. 324, sec. 18; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This is a procedural rule. It permits a party to introduce the opinion or inference desired and an explanation for the opinion or inference without going through a lengthy development of the foundational facts. In practice, this rule will give the proponent a tactical choice. Obviously, in most instances the jury will want to have a fairly coherent presentation of the facts and premises of the conclusion. However, the opinion or inference cannot be objected to simply because the proponent did not go through every possible basis or predicate for the conclusion testified to.

In the original proposal, there was a second subsection of this rule that would have allowed the adverse party to voir dire the witness outside the hearing of the jury on the underlying facts or data. The obvious purpose of this proposal was to permit the opposing party to avoid a forced motion for mistrial if the opinion were given first and the supporting facts or predicates were found inadequate to support it. This rule was deleted in the final enactment, although KRE 403 and KRE 103(c) and (d) allow a party to make the same motion. The only difference is that the grant or denial of the motion is left to the discretion the trial judge rather than the desire of the adverse party.

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 54; amended 1992 Ky. Acts ch. 324, sec. 19; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule is a candidate for abrogation by desuetude. It is rarely if ever used in criminal cases because attorneys representing indigents have authority under KRS Chapter 31A to obtain funds to hire their own experts, KRS 31.200, and under the adversary system posited by the Rules of Criminal Procedure it is unlikely that the drafters expected this rule to see much use. However, this rule authorizes the judge to decide that a "disinterested" expert (if one exists) should be appointed in a particular case and provides the means for doing so. One important thing to note is that the final sentence of the rule as proposed, (and as it is still written in RCr 9.46), has been deleted. That sentence provided that the rule would not limit the parties in calling expert witnesses of their own selection. For unknown reasons, this statement has been deleted. This either means that the Supreme Court and the General Assembly have decided that the statement was unimportant in light of other statutory authorizations or that they intend that when the judge calls the expert, no others be called. It is extremely unlikely that this second alternative was the intent of the enacting bodies in light of the constitutional right of compulsory process in criminal cases.

Article VIII. Hearsay

COMMENTARY

One of the things that nearly all the commentators find necessary to mention is that hearsay rules are not rules of admissibility, ". . . On the contrary, the rules merely provide that certain statements are not excluded [from evidence] by the hearsay rule." [ABA Problems, p. 199]. Hearsay presents a two step analysis. The proponent must show that the proposed hearsay evidence falls under one of the hearsay exceptions. If this hurdle is overcome, the party must show relevance [KRE 401-402] and overcome any objections of the opponent [typically Article IV or VI objections] before the evidence can be introduced before the jury. 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.

EFF DATE: July 1, 1992

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

COMMENTARY

The definitions in this rule say that hearsay is (1) a statement, which means either words or actions intended to substitute for words, (2) made by a person outside the trial process, (3) which is introduced to prove that what was said is true. This rule is identical to FRE 801. The Commentary makes the important point that

the person objecting to the introduction of non-verbal conduct has a burden to show that the conduct was intended as a statement. This is a determination for the judge under KRE 104(a). [Commentary, p. 76].

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.

EFF DATE: July 1, 1992

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

This rule has two important roles in criminal law. Subsection (b) restates the rule concerning statements of a party. This may be reduced to the proposition that anything that a party says which is relevant to the issues at trial may be introduced against the party. There are no fancy foundation requirements, the proponent just has to show that the statement was made. If a party said it and it is relevant it should be admitted. Of course, KRE 403 applies.

Of particular importance to criminal defense lawyers are subsections (1), (2) and (5). The first subsection deals with the party's own statement. Subsection (2) deals with statements made by others to which the party has indicated agreement in one way or the other. Subsection (5) deals with the statement of a co-conspirator of a party made during the course of and in furtherance of the conspiracy. The party's own statements made in a conspiracy would come in under subsection (1). Subsection (5) deals with the statement of the co-conspirator which must be made during the course of the conspiracy and for the purpose of advancing it in some way. Once the arrest takes place or prosecution begin, it is clear that these statements of the co-conspirator may not be admitted.

The other really important part of this rule is the one that allows introductions of statements of witnesses made out of court that are either consistent or inconsistent with trial testimony. KRE 801A(a) says that statements made by the "declarant" are not excluded by the hearsay rule as long as the declarant testifies at the trial or hearing, and first testifies to facts that establish the KRE 613 foundation for inconsistent statements. When these conditions are met, and the statement is inconsistent with the declarant's trial testimony, the evidence is not excluded by the hearsay rule.

It is important to note that this is all KRE 801A(a) does. It does not make statements relevant and it does not mean that the statement cannot be kept out under KRE 403 or some other rule. It simply means that these statements are not hearsay, and that if they are otherwise admissible the jury may consider them as substantive evidence.

The other use of prior statements is to rebut charges of fabrication, bias, influence or motive to lie. This is a standard use of prior consistent statements and will only become important if one party opens the door by bringing the subject up. Again KRE 403 applies.

The last part of this subsection deals with the situation in which the witness has made a photopack or other pretrial identification but at trial cannot make the same identification. The drafters apparently concluded that the earlier identification is sufficiently reliable to be admitted. The Commentary is very clear that this is an exception to the hearsay rule only for the person who made the original identification. The officer or any other individual who observed the identification is not allowed to testify about it under this exception. [Commentary, p. 78].

The remainder of the provisions of KRE 801A are unlikely to be important in most criminal cases and therefore are not dealt with here.

Rule 802 Hearsay rule.

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

EFF DATE: July 1, 1992

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

This states the rather obvious principle that hearsay is not admissible in Kentucky as substantive evidence except as provided by the Rules of Evidence or the Rules of the Supreme Court of Kentucky. Hearsay is permitted in the proceedings listed in KRE 1101, in preliminary determinations under KRE 104 and under Article VIII.

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

(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.

EFF DATE: July 1, 1992

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

KRE 803 is a list of hearsay exceptions. In practice, the first six are likely to be the most often used. Other exceptions are of the type that need to be noted but that are not often used. It is important to know of the

existence of these rules, but they are fairly easy to apply and therefore are not dealt with here. KRE 806 is particularly important as the means of attacking hearsay admitted under this rule because it allows impeachment and contradiction of the absent declarant. KRE 403 applies in each instance.

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. The Commentary states that the underlying rationale for this exception is the lack of opportunity to fabricate. [Commentary, p. 83].

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 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," [Nutshell, p. 317], although it is not the only consideration. [ABA Problems, p. 219].

KRE 803(3): This allows the declarant's statement of his "then existing state of mind" emotion, sensation or physical condition to be given. The rule gives examples of legitimate purposes of such statements, to prove intent, plan, motive, design, mental feeling, pain or bodily health.

KRE 803(4): Statements made for purposes of medical treatment or diagnosis and describing medical history or past or present symptoms may be admitted as long as they are "reasonably pertinent to treatment or diagnosis." Under ***Drumm v. Commonwealth***, 783 S.W.2d 380 (Ky. 1990) the Supreme Court has already adopted this exception. Statements identifying the defendant as the perpetrator of the offense are rarely admissible under this exception. However, statements as to what happened to the declarant are. In the Revised Commentary, Lawson points out that the language of subsection (4) "does not limit the coverage of the exception to statements made by a patient." Rather, "admissibility turns on whether or not the statements were made for purposes of diagnosis or treatment." Therefore, statements made by a parent, guardian or other person concerning the medical or physical condition of another can be introduced under this exception. [Revised Commentary, p. 75].

There are important limitations to this rule in sexual assault or abuse cases. A statement to a non-treating physician is inherently less reliable than one made for purposes of medical treatment. [***Bell v. Commonwealth***, 875 S.W.2d 882 (Ky. 1994)]. This is important in light of KRS 216B.400 which makes emergency room physicians paid investigative agents of the Commonwealth when they perform sexual assault examinations. These physicians must obtain the patient's informed consent for the rape examination so the patient knows that not only is he or she speaking to a physician who will treat for any injuries but also to an investigator for the state. If this knowledge does not destroy the underlying assumption of reliability of such statements, it certainly undermines it to the point that in most cases these statements must be excluded under KRE 403.

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.

KRE 803(6): The last of the major hearsay 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. Almost any regular activity can qualify as a business under the rule. Authentication is governed by KRE 901(a) or 902(11). The second is the easier method.

KRE 803(7): To introduce evidence under the rule, the party must satisfy the requirement set out above, and must authenticate the records either through the testimony of the keeper of the records, or under KRE 902. The rule makes a provision for hospital records which will still be obtained and presented to the court under KRS 422.300 *et. seq.*.

An important proviso to the rule prohibits bootlegging opinions into evidence under the guise of business records. Only those opinions that could be introduced on their own through the witness making the record may be introduced by the records. [***Bell v. Commonwealth***, 875 S.W.2d 882 (Ky. 1994)].

One final point is that subsection (7) allows a party to prove the absence of such a record to show the non-occurrence of an event or condition.

KRE 803(8), (9) & (10): Public records are treated quite like business records but 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.

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.

Handbooks on federal evidence are unanimous that the absence of a public record may be introduced to show the non-occurrence of event.

Of the remaining exceptions to this rule, the only other important one is KRE 803(22). This allows evidence of a final judgment to be introduced to prove "any fact essential to sustain the judgment." A duly authenticated copy of a final judgment is sufficient to prove the fact of conviction for any purpose and may be introduced as allowed by KRE 609.

One last point needs to be made about the absence of the residual exception authorized under **FRE 803(24)**. The drafters did not propose a residual clause under this rule, but did propose one under KRE 804(b)(5). No residual exception has been adopted. This is important for purposes of interpreting not only hearsay exceptions but also the rules in general. Although the trial judge is supposed to exercise sound judgment in deciding evidence questions not specifically provided for by rule, the Supreme Court and the General Assembly have denied the trial judge the authority to create new rules of evidence upon demand in Article VIII.

Rule 804 Hearsay exceptions: declarant unavailable.

(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.

EFF DATE: July 1, 1992

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.

COMMENTARY

KRE 804(b) creates four ways in which evidence may be admitted even though the declarant is not available to testify as a witness. These are exceptions that do not depend on the existence of contradictory

evidence. The underlying reason for the rules is that the combination of necessity and the supposed reliability of the statements to be admitted makes them sufficiently trustworthy to be admissible.

KRE 804(a): A witness is unavailable if the judge exempts the witness from testifying on the ground of privilege, if the witness contumaciously refuses to testify, if the witness cannot remember what she said before trial, if the witness is too sick, or is dead, or is unable mentally to appear and testify or if absent and all normal process has been insufficient to obtain his presence. However, there is an important proviso which is that the declarant will not be considered unavailable if the proponent of the statement has done something to prevent the witness from attending or testifying.

KRE 804(b): The rules say that four types of evidence concerning out-of-court statements may be admitted. The first is testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken according to the law. In criminal cases, depositions are governed by RCr 7.20, and their use is strictly limited. Testimony at a former trial can be treated as a deposition under RCr 7.22. However, it appears that RCr 7.22 may be superseded by KRE 804(b)(1) which allows the testimony to be introduced as a substantive form of evidence. However, in all cases the opposing party must have had at the earlier time an opportunity and a reason to directly examine, cross-examine or re-directly examine the witness as if on trial. [***United States v. Salerno***, 505 U.S. ___, 120 L.Ed.2d 255 (1992)].

Subsection (2) incorporates a fairly well established hearsay exception concerning statements made by a person who believed that he was going to die "imminently." The statement must concern only the cause or the circumstances of the immediately impending death. Although one would assume that the declarant would be unavailable because of death, it is important to remember that the statement may be admissible under any of the unavailability provisions of subsection (a) of the rule. If the person lapses into a coma, the person is equally unavailable and therefore the statement would be admissible under this exception. The circumstances under which the statement is given make it trustworthy. The unavailability of the witness is what creates the occasion for it to be admitted through someone other than the declarant.

KRE 804(3): This is one of the first federal rules to be adopted by Kentucky. Kentucky courts have applied this rule rigidly showing that it is certainly not a favored means of introducing evidence. Of most interest here is the application of the exception to statements made by another person which exculpate or inculpate the criminal defendant on trial. To be admissible, such statements must be so much against the interest or so likely to subject the declarant to criminal liability that a reasonable person would not have made the statement unless he believed it to be true. This is the basic requirement for admissibility. There is an additional requirement stated in the last sentence of the subsection. If the statement exposes the declarant to criminal liability, it may not be admitted unless "corroborating circumstances clearly indicate the trustworthiness of the statement." It is on this point that most such statements are ruled inadmissible in Kentucky. There is an over-blown fear of false jailhouse confessions that makes use of this rule difficult. This is contrary to the basic premise of the Rules of Evidence which is that the judge's duty is to make a minimal determination that the evidence has something to do with the case and that it is not unfairly prejudicial before ruling the evidence admissible. Once this minimal foundation is shown, it is up to the jury to deal with the information. It is somewhat illogical for the courts to believe that jurors can follow admonitions concerning the use of the co-defendant's testimony and to be able to make determinations about credibility of a child's statement admitted under the hearsay rule but not to be able to see through a ponied-up jailhouse confession. However, the rules say that the circumstances must "clearly indicate the trustworthiness of the statement" and the proponent of the statement must meet this foundation burden.

Another point to note is that this requirement does not apply only to exculpatory statements about the defendant; inculpatory statements also fall under the rule. If the statement has any tendency to expose the declarant to criminal liability, no one may introduce it into evidence without showing that it is trustworthy.

KRE 804(4): The last of the unavailable witness exceptions takes care of a number of matters that formerly were handled under the deadman statute, KRS 421.210. In many families, knowledge of family history is handed down by word of mouth rather than by written records. This exception acknowledges the situation and acknowledges the need for information that will arise in domestic relations or wills cases.

All KRE 804 hearsay exceptions do nothing more than say that certain types of evidence are not excluded by the hearsay rule. This rule does not make these statements relevant nor does it make them automatically admissible. These statements must be tested under the relevancy and prejudice analysis established under KRE 401-403. Questions of hearsay admissibility should be handled in a motion in limine under KRE 103(d), or at least determined in a proceeding outside the hearing of the jury. [KRE 104(c)].

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.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 60; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This is a technical rule that provides that hearsay which is itself admissible is not excluded by the hearsay rule simply because it is contained in another hearsay statement. One example given in the Nutshell is that of an excited utterance admissible under Rule 803(2) being contained in a business record which is admissible under KRE 803(6).

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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 61; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This procedural rule recognizes that the adverse party has the right to attack the credibility of a statement and the bias, motive or other prejudice of the declarant and that this ordinarily will not be possible when evidence is admitted under Article VIII. Therefore, this rule allows the adverse party to attack the credibility of the declarant in the same way that it would be attacked if the declarant had appeared and testified at trial. The proponent of the hearsay statement may defend the credibility of the declarant in the same manner. Because the declarant is not present, it would be pointless to require the foundation under KRE 613, and therefore the rule permits impeachment without this step.

The last part of the rule recognizes that under KRE 803 the unavailability of the witness is not a requirement. For those situations in which a proponent introduces a statement under a KRE 803 rule, this rule provides that the adverse party may subpoena the declarant and have that declarant testify at trial. Under these circumstances, the original proponent of the statement is entitled to cross-examine the declarant because the declarant has become the adverse party's witness.

Article IX. Authentication and Identification

COMMENTARY

Article IX is a chapter that list the many ways in which a proponent of documents, photographs, or other non-testimonial objects may introduce them. The chapter tells the proponent to introduce 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 demonstrates the drafter's intent to avoid wasting time by calling needless witnesses simply to introduce a piece of paper or a photograph.

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) Nonexpert testimony on handwriting. Nonexpert 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.

EFF DATE: July 1, 1992

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 62; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

The Commentary says that authentication and identification under this rule is a matter of conditional relevancy to be determined under KRE 104(b). In these circumstances, the judge is only making 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. The standard is preponderance. [Commentary, p. 100].

Subsection (a) of the rule states the basic principle of admissibility. A party may satisfy the requirement of authentication or identification upon production of evidence "sufficient to support a finding that the matter in question is what its proponent claims." This rule applies to any tangible objects that may be introduced. This should set to rest once and for all the difficulties concerning chain of custody of murder weapons, dope, 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. There is no special chain of custody rule anymore, if there ever was one. 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].

Subsection (b) provides a list of illustrations that are purposely called illustrations. Any witness with knowledge that the matter is what it is claimed to be may testify and this may satisfy the foundation burden. 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.

Typically, a person will identify an item because it has a distinctive characteristic of one sort or the other. 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. 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. 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. Finally, a catch-all authorizes proof by any other method authorized by law.

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, authenticated 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.

EFF DATE: July 1, 1992

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.

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 some means or the other 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. Subsection (4) of the rule supersedes CR 44 and RCr 9.44 by illustrating 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).

The last important self-authentication provision is KRE 902(11) which allows 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. In short, the custodian of business records need not be produced at trial. 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.

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.
EFF DATE: July 1, 1992
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.

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, photostating, 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.
EFF DATE: July 1, 1992
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 hard or 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.
EFF DATE: July 1, 1992
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 66; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

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, it is being used to show the truth of some proposition 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.

EFF DATE: July 1, 1992
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. [Graham, p. 326-327].

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.

EFF DATE: July 1, 1992
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. 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.

EFF DATE: July 1, 1992
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. [Commentary, p. 112]. 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.

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.

EFF DATE: July 1, 1992

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 they 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. [Nutshell, p. 451-452]. 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. [Nutshell, p. 452]. Graham maintains that the introduction of a summary without the opportunity to cross-examine the preparer should be prohibited under Rule 403 and under KRE 802 prohibiting hearsay. [Graham, p. 333]. 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.

Summaries introduced under this rule are evidence and may be taken by the jury into its deliberation room. [ABA Problems, p. 302].

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 nonproduction of the original.

EFF DATE: July 1, 1992

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.

EFF DATE: July 1, 1992

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. [Graham, p. 335]. Ordinary questions of conditional relevancy must be left to the jury under KRE 104(b). Graham says therefore that if an issue is raised whether the writing ever existed, whether another writing, recording or photograph produced at trial is the original, or whether the proffered evidence correctly reflects the contents, the issue is left for the jury as a question of fact. [Graham, p. 335]. 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.

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.

EFF DATE: July 1, 1992

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 makes it clear that these rules apply to the Court of Justice. They do not apply to parole revocation hearings, administrative hearings, or any other type of proceeding unless those agencies adopt these rules as their own by regulation.

KRE 1101(c) makes it clear that privileges apply at all stages of "all actions, cases and proceedings."

The important part of the rule for criminal defense lawyers is subsection (d) which lists the instances in which the rules do not apply. As shown earlier under KRE 104, the rules do not apply when the judge is making a preliminary determination of the admissibility of evidence. Grand juries are not bound by Rules of Evidence. Certainly the grand jury may wish to be advised on evidence questions, but there is no requirement that they follow the Rules. In both the small claims division of district court and on summary contempt proceedings the rules need not apply for obvious reason.

Subsection (5) provides a list of the criminal proceedings at which the rules except for privileges do not apply. Extradition or rendition on governor's warrants are not covered, nor are preliminary hearings under RCr 3.14. 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). The rules must apply to granting or revoking probation because they are elements of sentencing. The rules of evidence concerning arrests and search warrants is governed by United States Supreme Court cases as a matter of federal constitutional law. Therefore, Kentucky rules could not supersede these requirements. The last portion of the rule deals with bail hearings. The Commentary notes that this rule simply adopts Federal Rule 1101. [Commentary, p. 114-115]. But the liberty of an individual is of sufficient importance that it 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 only on the say so of an officer who has received a phone call from a prosecuting witness who says that the defendant has done something bad. While this may have been the practice in some courts in Kentucky before the enactment of the rules, it certainly should not be. Section 25 of the Constitution prohibits involuntary servitude "except as a punishment for crime, whereof the party shall have been duly convicted." The liberty interest of the defendant who is clothed with the presumption of innocence at this point demands that the determination of the amount of bail be made with the same accuracy required for determination of guilt or innocence. Bail hearings should be hearings requiring the presence of witnesses with personal knowledge subject to cross-examination.

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.

EFF DATE: July 1, 1992

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

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. However, this rule also points out that any proposed changes should be presented to the Evidence Rules Commission authorized by KRE 1103.

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.

EFF DATE: July 1, 1992

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. 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.

EFF DATE: July 1, 1992

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 modified. Professor Lawson has written a revised Commentary which is available through the UK CLE program under the title *Kentucky Rules of Evidence (1992).* This is an essential book for all practitioners. In addition to the new Commentary there are extensive outlines concerning the rules and a text of the final enactment. The book is available from the UK CLE Office for $40.00. You can make your check payable to the University of Kentucky or they accept VISA or MASTERCARD and mail your request to: Office of Continuing Legal Education, College of Law, University of Kentucky, Lexington, Kentucky 40506-0048; (606) 258-2921. It was used at the UK CLE evidence seminar given at eight locations around the Commonwealth in 1992.

The Commentary is in no sense binding, and the addition of this language was unnecessary. The Commentary of the drafters however is perhaps the best evidence of what the text of the rules is supposed to mean. Taken together with federal cases interpreting identical language, there will be no need to resort to old practices and outmoded concepts of what the law is.

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A USER'S GUIDE TO THE KENTUCKY RULES OF EVIDENCE

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I. ORIGIN AND ADOPTION

(A) What it is:

(1) It is called the Kentucky Rules of Evidence and is cited (KRE __). [KRE 101].

(2) It went into effect on July 1, 1992.

(3) It consists of over 200 separate provisions grouped under 11 Article headings and 69 rule numbers.

(4) Articles I and XI contain most of the procedural, interpretive and limitation of application rules.

(5) Articles II through X contain rules primarily concerned with admissibility of evidence, competency of witnesses, evidentiary privileges and control of the trial process by the judge.

(6) The source of the Rules is a proposal submitted by a drafting committee in November, 1989.

(a) the chief model is the Federal Rules of Evidence with occasional Uniform Rules and Kentucky Rules thrown in.

(b) The drafters submitted a Commentary which is extremely helpful but both KRE 1104 and the Supreme Court order of adoption (5/12/92) indicate that it is not binding on the courts.

(c) As a practical matter, both the original Commentary and the Revised Commentary will be critical to correct application of the Rules, despite the disclaimers.

(d) It was written by the people who drafted the Rules. Together with federal cases interpreting the same language, it should have great weight in any controversy about meaning or application.

II. APPLICATION

(A) When it applies:

(1) KRE 101 limits applicability of the rules to "proceedings" in the courts of Kentucky.

(2) KRE 101 must be read together with KRE 1101 to determine when the rules apply.

(a) KRE 1101(a) again limits the rules to courts.

(b) KRE 1101(b) applies the rules to criminal proceedings except for the proceedings set out in subsection (d) of the rule - grand jury, preliminary hearings under RCr 3.14, sentencing by the judge, probation hearings, warrant proceedings, bail proceedings, extradition, or summary contempt.

(c) However, the privileges set out in Article V and any other privilege apply at all times and in all proceedings.

(d) Special proceedings like suppression of evidence under RCr 9.78 must conform to constitutional requirements and therefore, all Rules should apply.

(B) Cases it applies to [KRE 107(b)]:

(1) All cases coming on for trial or hearing on or after July 1, 1992.

(2) If the offense occurred before July 1, 1992, the

defendant may choose to use previous common law or statutory evidence law if the evidence sought to be introduced under the rules would not have been admissible under the old law.

(3) Appeals of trials conducted under the old law will be decided under the old law.

(4) Retrials will be governed by the defendant's choice principle. (No. 2 above).

III. THE ROLE OF THE JUDGE

(A) The judge is more than a referee.

(1) The judge may call witnesses on her own motion. [KRE 614(a); 706(a)].

(2) The judge may question any witness called. [KRE 614(b)].

(3) The judge decides whether juror questions, which must be submitted in writing, may be asked. [KRE 614(c)].

(4) The judge regulates examination of witnesses, presentation of evidence, and the order of proof. [KRE 611(a)].

(B) KRE 611 is a key provision of the Rules. It allows the judge to limit or expand a party's examination of witnesses to:

(1) Protect witnesses from harassment on undue embarrassment.

(2) Speed the trial along.

(3) Make the interrogation "effective" so that the truth can be found.

(4) KRE 611(a)(1) is the authority for the judge to do mundane things like controlling the form of questions, allowing a party to lead, and things such as that.

(a) KRE 611(b) allows the judge to limit the scope of cross-examination to matters covered on direct.

(b) But matters relating to credibility are open to cross except in rare cases. [KRE 611(b); 607; 104(e); *Olden v. Kentucky*, 109 S.Ct. 480 (1988)].

(5) KRE 611(a) together with KRE 401-402 also gives the judge authority to allow in retaliating evidence when the other side has opened the door.

(a) Previously excluded evidence, including confessions, may suddenly become relevant

(1) or non-prejudicial. If a party raises an issue, it can't complain that it's too prejudiced for the opponent to discuss it.

(b) An example is where testimony about a police investigation would be irrelevant to the issue of guilt or innocence but for the defense attacking that investigation as part of defense of mistaken identity. [Mistakenly called investigative hearsay].

(c) The judge would have to decide whether testimony about the investigation was necessary to assist the jury to determine the truth.

(C) The judge always makes the initial determination of admissibility of evidence or the competency of witnesses.

(1) There are two types of decisions the judge makes - KRE 104(a) or 104(b).

(2) 104(a) states that preliminary questions about competency, admissibility or the existence of privilege are decided by the judge unless the ruling turns a "condition of fact."

(a) The judge may hear any type of evidence he feels is alright or necessary.

(b) The only rules that apply to this preliminary determination are privilege rules.

(c) If the judge is satisfied (*i.e.* preponderance) that the jury may hear the evidence, it comes in.

(3) 104(b) applies to relevancy questions.

(a) Often, the order of proof cannot accommodate evidence necessary to show the relevancy of an item.

(b) A judge may delay admission until the necessary "linkage" is made or she may admit it subject to presentation of sufficient evidence to support a finding of relevancy.

(c) NOTE: Under 104(b) the judge is determining whether the jury could find the facts necessary to make the proffered evidence relevant - not that the jury will or must do so.

(d) An example often given is that witness A says that the deceased was struck by a white Ford and until another witness testifies that the defendant was seen driving a white Ford shortly after the accident, A's testimony is marginally relevant at best.

(1) If the judge is fairly sure that another witness will "connect up" A's testimony, he may admit it subject to the anticipated testimony actually coming in.
(2) Or the judge may direct the proponent to avoid this subject until the second witness testifies.

(e) Obviously, if the proponent fails to meet the condition the opponent must move for mistrial or move to strike.

(4) There are two exceptions to the 104(b) rule.

(a) The rape shield rule forbids the judge to admit any testimony that has not already been connected up at a hearing conducted outside the hearing of the jury. [KRE 412(c)(2)].

(b) In best evidence rules cases, KRE 1008 provides that the question of fulfillment of the condition of fact is up to the judge except there is an issue of (1) whether the writing even existed; (2) whether it or a note is the original and (3) whether other evidence of contents correctly reflects the contents, in

which case the issue is for the jury to decide like any other fact issue.

(D) Admonitions or Instructions.

(1) The judge must admonish or instruct the jury

(a) KRE 105(a) - upon request of a party to limit the admissibility of evidence to one party or one purpose, the judge must given an admonition limiting the evidence to its purpose. [LIMITED ADMISSIBILITY RULE].

(1) typical applications: confession of non-testifying co-defendant, 804(b) (3); 810A(a) hearsay, 404(b) other crimes evidence, 609 impeachment by prior conviction, 613 strict impeachment.

(b) KRE 201(g) - when judge takes judicial notice of a fact, she shall instruct the jury to accept the fact as conclusively established.

(c) KRE 511(c) - upon request, any party who feels that his or anyone else's claim of privilege might lead the jury to draw an unfavorable inference against him is entitled to an instruction not to do so.

(1) This is an expansion of the federal due process right to an instruction that the jury shall draw no inference from the defendant's refusal to testify. [*Carter v. Kentucky*, 450 U.S. 288 (1981)].

(2) It probably should be included in the mandatory RCr 9.56(1) instruction which also instructs the jury not to consider the indictment as evidence against the defendant.

(3) KRE 103(c) forbids suggestion of inadmissible evidence to the jury by any means. If the prosecutor makes a big production of reading the indictment to the jury, implying that because a grand jury returned it there must some basis for the charge, under KRE 105 (a), 102, and 611(a)(1), the judge, upon request, should admonish the jury that the prosecutor is misleading it.

(2) Failure to request.

(a) The jury may use the evidence any way it sees fit.

(b) The prosecutor may argue to evidence any way she wants.

(c) The judge can base or deny instructions on it.

(d) On appeal, if the evidence is admitted over objection, but the opponent did not ask for an admonition, relief will be granted only on a showing of pal-pable error. [KRE 105(a); 103(e)].

(e) If the evidence was admissible for a limited purpose but was erroneously excluded and the proponent did not tell the trial judge the correct limited purpose, the appellate court will grant relief only on showing of palpable error. [KRE 105(b); 103(e)].

IV. THE LAWYER'S RESPONSIBILITY

(A) Production of witnesses and evidence is still governed by Ch. 7 of the Criminal Rules.

(1) Unless the holder of a valid privilege, no person may refuse to testify or produce tangible objects or writings or refuse to disclose any matter at a proceeding in the Court of Justice. [KRE 501].

(a) A party may not prevent another from being a witness or disclosing or producing evidence.

(B) (1) A lawyer may cross-examine on any matter relevant to any issue in the case including credibility. [KRE 611(b)].

(a) This includes bias, interest or prejudice [KRE 104(e)] or any other manner of impeachment like character [KRE 608], prior felony convictions [KRE 609] or previous inconsistent statements [KRE 613; 801A(a)(1)].

(b) The judge may limit the cross to matters developed on direct exam, except for impeachment. [KRE 611(b)].

(2) A lawyer may use leading questions.

(a) When crossing the witness on the subject matter of the direct examination.

(b) When "developing" the witness' testimony, *i.e.*, foundation; establishing personal knowledge; presence, etc.

(c) When examining a hostile witness that he has called. [KRE 611(b)].

(d) Under any other circumstances that the judge finds them necessary. [KRE 611(a)(1)].

(C) On direct examination a lawyer may not lead except when permitted [KRE 611(a)] or when necessary to "develop" the testimony.

(D) Duty to Object.

(1) The law has not changed too much.

(a) A lawyer does not have to state grounds for an objection unless the judge asks. [KRE 103(a)(1)].

(b) KRE 103(a)(1) does require a motion to strike if that is the necessary relief.

(2) Avowal is still required to preserve a claim that evidence was excluded erroneously. [KRE 103(a)(2)]. The manner is somewhat unsettled:

(a) KRE 103(a)(2) says that the witness, upon request may make a specific offer to the question.

(b) KRE 103(b) says that the judge may direct the making of an offer in question and answer form.

(c) Lawson says that strict question and answer format is not required in every instance.

(d) Until this is sorted out, the only safe practice is to do a question and answer avowal unless the judge insists on a narrative.

(3) If evidence is admissible for limited purposes or against only certain parties is excluded, the lawyer MUST EXPRESSLY offer it for its proper purpose or the objection is considered waived. [KRE 105(b)].

(4) When to object:

(a) KRE 103(a)(1) requires a timely objection or motion to strike.

(1) This language is different from RCr 9.22 which requires objection "at the time the ruling or order of court is made or sought."
(2) It is doubtful that this will be a major change in the requirement of a contemporaneous objection.

(b) Delayed objections are allowed in certain circumstances.

(1) KRE 201(e) - if judicial notice is taken before opportunity to be heard.
(2) KRE 510(2) if person discloses privileged information before holder has time to assert it.
(3) KRE 614 - if judge calls or questions witness or asks questions tendered by juror - at earliest available opportunity.

(c) Objections not necessary.

(1) KRE 605 - if judge testifies as witness at trial.
(2) KRE 606 - if juror testifies as witness at trial.

(E) In Limine Motions

(1) A lawyer may ask for a pretrial ruling on the admissibility of evidence under KRE 103(d).

(a) The judge may defer ruling until the time of presentation, but,
(b) If the question is resolved by an "order of record", the record on the issue is preserved - meaning that no further objection is necessary.

(2) The "order of record" should be a written order complying with CR 58. A ruling on videotape may be sufficient, but it would be very dangerous to rely on it.

(3) If new circumstances at trial require reconsideration, KRE 103(d) explicitly authorizes reconsideration.

(4) This rule does not supersede requirements of rules like RCr 9.16 which requires renewal of objection when the injury to the defendant manifests itself.

(F) Duty to Shield Jury From Inadmissible Evidence

(1) KRE 103(c) prohibits lawyers from suggesting the existence of inadmissible evidence to the jury through statements, offers of proof, or questions. Unless the judge says otherwise, approach the bench or ask for the jury to be excused when admissibility questions come up.

(2) (a) RCr 9.78 hearings must be held out of the hearing of the jury, not necessarily out of its presence.
(b) Any other hearing on preliminary matters must be held out of the jury's hearing (1) if required by the interests of justice or (2) when the accused testifies on the matter and asks for exclusion of the jury.
(c) The lawyer must point out either circumstance to the judge.

(3) When the defendant in a criminal case testifies on a preliminary matter, the normal rule of cross-examination [KRE 611(b)] does not apply. [KRE 104(d)].

(a) But because the Rules of Evidence do not apply in preliminary hearings on admissibility (except 4th and 5th Amendment cases), the judge may allow retaliatory questioning on other matters.
(b) If the defendant testifies one way at the hearing and inconsistently at trial, the judge may allow introduction of the prior inconsistent statement. [KRE 611(a); 401-403; *Harris v. New York*, 401 U.S. 222 (1971)].

(G) Duty to Give Notice

(1) Judicial notice [KRE 201(e)] - the opposing party is entitled to be heard before judicial notice is taken. If the party is not given prior notice of intent to seek notice, it may make a request for hearing afterward.

(2) Substantive use of other crimes [KRE 404(c)] - subsection (c) requires the prosecutor to give "reasonable pretrial notice of intent to use other acts evidence." NOT required for impeachment use under KRE 609.

(3) Rape Shield rule [KRE 412(c)(1)] - requires the accused to file a written motion and offer of proof "not later than 15 days" before the trial is scheduled to begin.

(4) Self-Authenticated Business Records [KRE 902(11)(B)] - the proponent must let the opponent know of intent to use these records and make them available for inspection "sufficiently in advance of its offer in evidence" to give the opponent "a fair opportunity to challenge it."

(5) Summaries [KRE 1006] - if writings, recordings or photographs are to be summarized, the party desiring to make the summary must give "timely" notice to the opponent and file the notice with the court. The opponent must be given a reasonable time to inspect the originals.

V. ANALYSIS OF EVIDENCE ISSUES UNDER THE RULES

(A) The general rules are these:

(1) Except for the judge and jury, anyone with personal knowledge of facts relevant to an issue in the case is a competent witness unless proved otherwise. [KRE 601; 602; 605; 606; 401; 402].

(a) Witnesses presenting hearsay must have personal knowledge of the hearsay.
(b) Experts do not always have to possess personal knowledge. [KRE 703].

(2) Evidence is relevant if it has "any tendency" to make a "fact of consequence to the determination of the action more or less probable." [KRE 401].

(a) Any tendency means just that - the evidence doesn't have to determine the outcome of the case, it just has to have some effect.
(b) The phrase "fact of consequence" means that the evidence must concern some issue that is important to the case.

(3) Irrelevant evidence is never admissible. Relevant evidence is admissible unless excluded by the judge or made inadmissible by rule (*i.e.* privilege) or statute. [KRE 402].

(4) Even if evidence is relevant it may be excluded if the judge decides that 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 accumulation of evidence.

(a) The key here is the weighing policy; the danger must substantially outweigh the probative value.
(b) This test applies to all determinations of admissibility except:

(1) The Rape Shield rule which mandates a determination of whether probative value outweighs the danger of unfair prejudice. [KRE 412(c)(2)].
(2) Possibly KRE 609(a) which says that the judge shall admit evidence of the fact of a qualifying felony conviction. Lawson says different but it is not a settled question.

(5) Hearsay is not admissible except as permitted by Article VIII or other rules of the Supreme Court (*i.e.* RCr 3.14). [KRE 802].

(a) Hearsay exceptions are not rules of admissibility. Each simply provides that evidence of a certain type is not excluded by the hearsay rule. The general questions of relevance, competence and balance are always present.

(6) There is no special foundation or chain of custody rule. The only thing that the proponent of evidence must do is introduce evidence sufficient to support a finding that the matter in question is what it is claimed to be. [KRE 901].

(7) Opinion testimony may be given by any witness whose qualifications are established.

(a) A non-expert who shows personal knowledge may give an opinion based on that knowledge if the opinion is helpful to understanding the witness's testimony or to the determination of an issue. [KRE 701].
(b) A witness qualified by training, education, experience or otherwise may give an opinion if it will assist the jury to understand the evidence or determine a fact in issue. [KRE 702].

(B) Some Specific Rules - Impeachment of Witnesses

(1) There are 5 methods authorized.

(2) KRE 104(e) authorizes production of evidence showing bias, interest or prejudice.

(3) KRE 608 allows presentation of opinion and reputation evidence of character, limited to reputation in the community.

(4) KRE 609 allows impeachment by proof of a prior felony conviction that occurred less than 10 years previously.

(a) Any felony from anywhere may be used (1 year or more).
(b) The crime may not be identified unless the witness denies it or the witness chooses to identify.
(c) May be proved by testimony or by court record [KRE 803 (22)], if the witness denies it.
(d) There is no explicit reference to KRE 403 balancing in this rule although there was in the original proposal. It is unclear whether this means that qualifying priors are always admissible without balancing. [*Green v. Bock Laundry Mach. Co.*, 109 S.Ct. 1981 (1989)].
(e) It is not absolutely clear that pendency of an appeal prevents use of that conviction but the deletion of a provision of the rule that would have made such convictions available indicates that the law has not changed.
(f) In rare instances where the judge can find that probative value of a conviction more than 10 years old substantially outweighs prejudicial effect, an old conviction can be used.

(5) KRE 613 allows introduction of prior inconsistent statements for strict impeachment.

(a) The adverse party must ask for a limiting instruction. [KRE 105(a)].
(b) The foundation is the same as required by CR 43.08 - with circumstances of time, place, persons present being established and an opportunity to review any written statement and explain the inconsistency.
(c) If the foundation is established, KRE 801A(a)(1) allows substantive use of inconsistent statements.

(6) KRE 806 allows a party to attack the credibility of the declarant of a hearsay statement in any way that a live witness could be attacked.

(C) Specific Rules - Other Acts Evidence

(1) KRE 404(a) prohibits use of a person's character or traits "for the purpose of showing conformity therewith on a particular occasion."

(a) The defendant may use a character defense or may attack the character of the prosecuting witness - except in sex offense cases. [KRE 412].

(b) The prosecutor may use character only in rebuttal.

(2) KRE 404(b) prohibits evidence of other crimes, wrongs or acts,

(a) To prove the character of a person.
(b) In order to show action in conformity therewith.

If evidence does not violate these two principles, it is admissible subject to KRE 403 balancing.

(3) The illustrations of KRE 404(b)(1) and (2) are illustrations, not limitations or commands to admit evidence.

(4) KRE 404(c) requires the prosecutor, if she intends to prove other acts as part of her case in chief to give "reasonable pretrial notice" of the intent to the defendant.

(a) This rule does not apply to evidence that reasonably would be considered rebuttal.
(b) If the prosecutor does not give notice, the judge may exclude the evidence, give the defendant a continuance if the failure is excusable, or enter any other remedial order.

(5) In the original proposal, KRE 406 was to allow habit evidence which had previously not been admissible to prove action in conformity with habit. The proposal was not enacted. Therefore, habit is not valid evidence in Kentucky.

(D) Specific Rules - Guilty Pleas

(1) KRE 410 prohibits introduction against the defendant of evidence of:

(a) A withdrawn guilty plea.
(b) A *nolo* or *Alford* plea.
(c) Any statement made in the course of a formal plea entry proceeding under (a) and (b).
(d) Any statement made to the "attorney" for the prosecuting authority during discussions that do not result in a plea or which result in a plea later withdrawn.

(1) Unless it would be unfair to exclude it in light of the introduction of other statements or in a criminal prosecution for perjury or false swearing.

(E) Specific Rules - Rape Shield

(1) KRE 412(a) absolutely excludes reputation or opinion evidence of the prosecuting witness's character for sexual behavior in a Chapter 510 prosecution or an incest prosecution. This covers prosecutions for completed acts, attempts or conspiracy.

(2) KRE 412(b) allows introduction of other evidence of sexual behavior upon proper motion.

(a) To show the source of semen or injury.
(b) To show consent.
(c) Any other evidence directly pertaining to the crime charged.

(3) But a rigid procedure must be followed.

(a) Not less than 15 days before the scheduled trial date.

(1) This conflicts with KRS 500.070(2).

(b) The defendant must file a written motion to offer subsection (b) evidence together with a written offer of the proof sought to be introduced.
(c) The judge initially reviews the papers to see if the evidence qualifies under subsection (b).
(d) If it does, judge must have in chambers hearing at which wit-nesses may appear, including prosecuting witness.
(e) All conditions of fact must be resolved at the hearing.
(f) The judge must determine whether probative value outweighs danger of unfair prejudice.
(g) If so, judge admits evidence by entering order specifying what may be done.

(F) Specific Rules - Judicial Notice

(1) KRE 201 applies only to facts. RCr 9.58 deals with all questions of law.

(2) A fact may be noticed when it is:

(a) Generally know in the county or
(b) Capable of being verified from sources whose accuracy cannot be reasonably questioned. [KRE 201(b)].

(3) A judge may take notice on her own motion. [KRE 201(c)].

(4) A judge must take notice when a party supplies "necessary" information and asks for notice. [KRE 201(d)].

(5) If the judge takes notice, he must give an instruction telling the jury that the fact must be accepted as conclusive. [KRE 201(e)].

(6) Notice can be taken at any time. [KRE 201(f)].

(G) Specific Rules - Retaliation and Opening the Door.

(1) The general rules are KRE 611(a) (1), 102, and 403. If a party raises an issue by testimony or otherwise, the judge must, upon application, decide whether previously excluded, incompetent or otherwise inadmissible evidence is now material to fair presentation of the issues.

(a) Irrelevant evidence is never admissible. [KRE 402].
(b) As relevance becomes more problematic, KRE 402 and 403 weigh more heavily against admission.
(c) On the other side, if a party has previously secured a favorable exclusion ruling but then tries to take unfair advantage of it, the fairness considerations of 102 and 611 weigh in favor of allowing retaliation.
(d) These rules are particularly important where the evidence or issue has been excluded on KRE 403 or constitutional prophylactic grounds in the first place. [*e.g. Miranda*

violations].

(2) Other specific rules are:

(a) KRE 106 which allows introduction of the remainder of a writing at the time part of it is used by the opponent - this varies the order of proof but does not necessarily allow introduction of inadmissible parts - that would be determined under the general rule.

(b) KRE 404(a) - the character of the accused is not an issue in the case unless she makes it one. The prosecution is limited to rebuttal.

(c) KRE 410(4) - if the defendant testifies inconsistently with statements protected by the rule, the prosecutor may use the prior statements.

(d) KRE 506(d)(1) - when the client of a counselor makes his physical, mental or emotional condition an element of the case or, after death, if anyone makes them an element of a claim or defense.

(e) KRE 507(c)(3) - the same rule applies with psychotherapists.

(f) KRE 508(c)(1) - disclosure of the identity or introduction of a confidential informant as a witness.

(g) KRE 509 - voluntary disclosure of a significant part of privileged information allows the other side to discover and use the remainder.

(h) KRE 612 - if a writing is used to refresh the witness' memory, the opponent is allowed to inspect the writing, cross on it, and introduce relevant portions into evidence.

(i) KRE 613 - an inconsistent statement at the proceeding authorizes the opponent, after laying the foundation, to impeach with or [KRE 801A (a)(1)] introduce as substantive evidence the previous statement.

(j) KRE 801A(a)(2) - allows the proponent of a witness to rebut charges of recent fabrication, influence or improper motive whether express or implied.

(k) KRE 804(a)(2)(3) - if the witness refuses to testify or claims loss of memory, the examiner may introduce 804(b) hearsay, primarily statement against interest.

(l) KRE 806 - if hearsay is admitted, the opponent can attack the declarant as if she were present and testifying. [Chiefly KRE 803].

(m) KRE 1004(3) - if original of writing, recording or photo is in possession of party, party is notified of need for same, and party refuses, to produce, duplicate or other evidence may be used.

VI. PRIVILEGES - SHARED CHARACTERISTICS

(A) Types: lawyer-client (503); husband- wife (504); religious (505); counselor (506); psychotherapist (507). Government informant (508), and spousal witness' 504(a) are covered later.

(B) (1) The privilege is one that allows the witness to refuse to disclose "confidential communications," and, in most cases, allows the witness to prevent another person privy to the communication from testifying. [KRE 502(b)(c); 504(b); 505(b)(c); 506(b)(c); 507(a)(3)].

(a) A communication is "confidential" if it is made to another authorized person(s) and is not intended to be disclosed to a third person. [KRE 503(a)(5); 504(b); 505(a)(2); 506(a)(3); 507(a)(3)].

(b) The communication must be made for a specified purpose (1) seeking legal assistance [KRE 503(a)(5)]; (2) made between husband and wife during marriage [KRE 504(b)]; (3) seeking spiritual advice or counseling [KRE 505(a)(2); (b)]; (4) obtaining counseling from school, sexual assault, alcohol abuse or drug abuse counselors [KRE 506 (a)(1); (3)]; (5) consultation with a medical doctor, psychologist, or LCSW for diagnosis or treatment of a mental condition [KRE 507(a)(2); (b)].

(1) For the privilege to apply, the claimant must have consulted a bonafide lawyer, clergyman, psychologist or medical doctor or a person that the claimant reasonably believed to be one. [KRE 503(a)(3); 505(a) (1); 506(a)(2)(A), (B)].

(2) But if the claimant has consulted a counselor or a licensed clinical social worker, the reasonable belief provision does not apply. [KRE 506(a)(1); 507(a)(2)(C)].

(c) The presence of other persons at the time the statements are made or who learn about it because they are reasonably necessary for transmission to the lawyer, counselor, etc. does not defeat the privilege. [KRE 506(a) (5); 505(a)(2); 506(a) (3); 507(a) (3)].

(1) This exception does not apply to marital confidential communications. [KRE 504(b)].

(2) The privilege may be asserted by the claimant or someone acting on the claimant's behalf.

(a) Attorney may only claim on behalf of client. [KRE 503(c)] and is required to do so by the Rules of Professional Conduct. [RPC 1.6(a)].

(b) Clergyman may claim on behalf of communicant. [KRE 505(c)].

(c) Counselor or counselor's employer may claim on behalf of client. [KRE 506(c)].

(d) Psychotherapist as the "authorized representative" may claim. [KRE 507(b)].

(e) In cases of the attorney, marital, religious and counselor privileges, the guardian, conservator or personal representative of the claimant may assert it on behalf of the claimant. [KRE 503(c); 504 (b); 505(c); 506(c)].

(f) The "authorized representative" of the claimant, meaning someone specifically empowered to exercise the privilege, or anyone whose communication is privileged under KRS 507(a)(3) may assert on behalf of the claimant. [KRE 507(b)].

(C) Exceptions.

(1) Lawyer privilege inapplicable. [KRE 506(d)].

(a) If client knows or reasonably should know services are sought to enable anyone to commit a fraud or crime.
(b) In disputes about breach of duty to or by lawyer.
(c) When lawyer was only an attesting witness.
(d) When lawyer represents joint clients if statement relates to common interest.

(2) Husband-wife inapplicable. [KRE 504(c)].

(a) When prosecutor introduces enough evidence to show that spouses conspired or acted jointly to commit crime charged.
(b) When one spouse charged with injuring or damaging property of the other, a minor child of either, an individual residing in the household of either or a third person when in course of such wrongful conduct.
(c) If the interest of a minor child of either may be adversely affected.
(d) If spouses are adverse parties in any proceeding.

(3) There are no exceptions to the religious privilege.

(4) Counselor inapplicable. [KRE 506(d)].

(a) If client asserts physical, mental or emotional condition as part of a claim or defense.
(b) If client is dead, in any proceeding where any party makes the claim.
(c) If the judge finds that communication is relevant to an essential issue of the case, there is no other way to obtain the substantial equivalent of it, and the need for the information outweighs the interest protected by the privilege.

(5) Psychotherapist inapplicable. [KRE 507(c)].

(a) In involuntary commitment cases if psychotherapist has determined it necessary.
(b) In situations where patient has been told communications not confidential. [RCr 7.24].
(c) If patient is asserting mental condition as part of claim or defense.
(d) If patient is dead, in any proceeding in which any party relies on condition as part of claim or defense.

(D) Specific Rules

(1) There is a husband and wife privilege simply not to testify. Each spouse can refuse to testify against the other and each may prevent the other from testifying except in the situations set out in subsection (d) of the Rule. [KRE 504(a)]. This is limited to "events" occurring after they were married.

(2) Government Informant Privilege. [KRE 508].

(a) Allows government agencies to refuse to disclose the identity of a person who provided information to law enforcement officers or investigative legislative committees or legislative staff conducting an investigation. [KRE 508(c)(1)].

(b) Is asserted by the "appropriate representative" of the entity to whom information was given. [KRE 508(b)].
(c) The government may voluntarily disclose the identity or may waive it by inconsistent actions or if the informant appears as a witness for the government. [KRE 508(c)(1)].
(d) The opposing party may challenge the privilege by showing that the informant can give relevant testimony. [KRE 508(c)(2)].

(1) The court must give the government an *in camera* opportunity to support the claim of privilege, usually based on affidavits.
(2) If it appears that the informant can provide relevant testimony the court may order the government to release the identity or face sanctions up to dismissal.
(3) If a person holding the privilege voluntarily discloses a significant part of the privileged matter, or consents to disclosure, the privilege is waived. [KRE 509].
(4) If the judge erroneously compels disclosure or if another person discloses information before the holder has a chance to assert the privilege, the privilege can be reinstated. [KRE 510].
(5) (a) The judge and the parties are supposed to try hard to avoid having witnesses assert privileges in front of the jury. [KRE 511(b)].

(b) No one may attempt to develop an inference from the claim of privilege and no one may comment on it. [KRE 511(a)].

(c) If a party fears that the jury might draw an adverse inference from a claim of privilege, the party is entitled to a noninference instruction. [KRE 511(c)].

VII. OPINION AND EXPERTS

(A) Anyone can given an opinion under the right circumstances.

(1) KRE 701 allows anyone who has "perceived" facts to give an opinion if the opinion is

(a) rationally based on the perception and
(b) helpful either (1) to a clear understanding of the witness's testimony or (2) to determination of a fact in issue.

(2) KRE 702 allows a person who is qualified by knowledge, skill, experience, training or education to give an opinion on the subject matter of her expertise.

(3) IMPORTANT: Kentucky did not adopt proposed KRE 704 which would have abrogated the ultimate issue rule.

(a) Many opinions admissible under FRE 704(a) which allow opinions on anything except the mental state or condition of

the defendant in a criminal case where that forms an element of the offense are not NECESSARILY ADMISSIBLE under the Kentucky Rules.

(B) Only "EXPERTS" may testify concerning scientific, technical or other specialized knowledge.

(1) The expert is qualified as an "expert" by knowledge, skill, experience, training or education.

(a) Is "qualified" used as a verb - "to qualify the witness?"

(1) There is no need to tender the witness to the judge for an official finding.

(a) This is a KRE 104(a) determination.
(b) It is like KRE 601-602 - the proponent must introduce evidence showing qualifications but there is no need for any ruling unless the opponent objects. [KRE 103(a)].
(c) Everyone is under a duty to keep inadmissible evidence from being suggested to the jury. [103(c)].
(d) If the judge officially declares witness to be expert without telling the jury what that means, he creates possible inference that witness should be given special consideration.

(2) The subject matter of the testimony is scientific, technical or other specialized knowledge.

(a) *Frye v. United States*, 293 F. 1013 (D.C. Cir., 1923)] versus language of 702.

(1) Theory 1 - *Frye* not duplicated in rule language or in any commentary - therefore not part of evidence law.
(2) Theory 2 - Something as important as *Frye* need not be mentioned.
(3) It appears that Kentucky has followed *Frye* - it is still sound law.

(b) *Frye* Standard - accepted in relevant discipline.

(3) Expert testimony is admissible:

(a) if it will assist trier of fact to understand the evidence or
(b) if it will assist trier of fact to determine a fact in issue.

(4) It may be given by opinion or otherwise

(a) hypotheticals
(b) explanatory.

(5) It is always subject to KRE 403.

(C) Other Opinion-Type Rules.

(1) KRE 901(b)(2) - non-expert handwriting - familiarity not obtained for purposes of litigation.

(2) KRE 901(b)(3) - comparison by expert witness of authenticated specimens.

(3) KRE 901(b)(4) - appearance, characteristics.

(4) KRE 901(b)(5) - opinion based on hearing and voice at any time under circumstances that connect it with speaker.

(5) KRE 405(a) - opinion of character - substantive use.

(6) KRE 608 - opinion of character of witness.

(D) Specific Rules

(1) The expert may testify about her opinion without providing all facts or underlying data first. [KRE 705].

(a) It is a tactical choice.
(b) Opponent may cross on any data or facts.

(2) The expert may rely on facts made known to him before trial or at trial. [KRE 703(a)].

(a) Could avoid KRE 615(3) separation order by showing that witness' presence is essential to presentation of the case.
(b) The information need not be admissible if it is the type "reasonably" relied on by others in the field.

(3) If determined to be (a) trustworthy, (b) necessary to illuminate testimony and (c) unprivileged, the party may disclose the underlying facts or data even if inadmissible. The judge must admonish the jury to limit evidence to evaluating the validity and probative value of the witness' opinion or inference. [KRE 703(b)].

(4) KRE 703(c) provides that the existence of subsections (a) and (b) does not limit the opponent's right to cross-examine the witness or test the basis of the testimony.

(5) Proposed KRE 704 would have allowed witnesses to give their opinion whether or not the opinion also dealt with the "ultimate" fact that the jury was to decide. The refusal to adopt the proposal should be viewed as an indication that courts should be hesitant about letting juries hear "ultimate facts".

(6) KRE 706 allows the judge to get her own experts if she wants to. The language of this rule is that of RCr 9.46 almost word for word. I do not know of any instance in which RCr 9.46 has been used before.

VIII. HEARSAY

(A) Shared Characteristics

(1) They are not rules governing admissibility

(a) each exception reads the same - A statement is not excluded by the hearsay rule... [810A; 803; 804; 805].
(b) the analysis proceeds in three (3) steps

(1) Is the statement hearsay?
(2) Is it covered by a hearsay exception?
(3) Is it relevant under KRE 401-403?

(c) A "no" answer to questions number 2 or 3 means that the evidence is inadmissible.
(d) A "no" answer to number 1 means that admissibility is determined under general principles or the principle of retaliation or opening the door.

(B) What is hearsay?

(1) KRE 801(C) defines it as

(a) a statement,
(b) other than one made by the declarant (the person to whom the statement is attributed) [KRE 801(b)]),
(c) while testifying at a trial or hearing,
(d) offered in evidence to prove the truth of the matter asserted.

(2) A "statement" is either an oral or written assertion or non-verbal conduct (nodding, shrugging shoulders) if it is intended to be an assertion.

(3) A statement not made under oath [KRE 603] at a trial or proceeding is made inadmissible for a number of reasons.

(a) CR 43.04(1) requires oral testimony by witnesses at all non-equity trials.
(b) Section 7 of the Kentucky Constitution requires the government to preserve the ancient mode of jury trial which includes presentation of evidence through witnesses under oath.

(1) Although the older cases (Ca. 1900) inexplicably maintain that this is not part of the constitutional guarantee.

(c) Section 11 of the Kentucky Constitution requires the state to afford compulsory process in favor of the defendant in a criminal prosecution and mandates that the defendant be allowed to meet the witnesses "face to face."

(1) This guarantee obviously has not voided the traditional, common law hearsay exceptions (*e.g.* co-conspirator, excited utterance).
(2) The question is how far the courts or the legislature may go in adopting new hearsay exceptions.

(d)(1) KRE 102 requires interpretation of the rules to promote the growth and development of the law of evidence so that truth may be determined and proceedings justly determined.

(2) But the court refused to adopt any residual exceptions to the hearsay rule [proposed KRE 804 (b)(5)]. The drafters did not even propose a residual exception like FRE 803(24).

(e) KRE 803 and 804 represent most of the innovations in hearsay law and must be tested against Sections 7 and 11 to determine if they subvert the trial process envisioned by the constitutional guarantees.
(f) The federal constitutional confrontation mandates that the defendant be allowed to "confront" witnesses. [6th and 14th Amendments].

(1) Chiefly involve co-defendant statements and child testimony in recent years. [*Marsh v. Richardson*, 481 U.S. 200; *Idaho v. Wright*, 110 S.Ct. 3139 (1990)].

(C) The chief consideration on federal questions for sure and on state questions perhaps is the expected efficacy of cross-examination.

(1) If cross-examination will not do much to insure that the out of court statement actually was made and is being reported accurately then the hearsay is more likely to be admitted.

(2) The ultimate consideration is a balancing of the necessity for the information (*i.e.* not available from any other source) against the risks of fabrication and inaccurate reporting.

(D) Because the exceptions found in Article VIII are both statutes and court rules, they will be considered doubly strong public policy choices.

(a) These exceptions have, with few exceptions, been adopted by 40 other states and have been used without successful challenge in the federal system since 1975.
(b) In almost every instance, the place to challenge the rules is in application to your case rather than on the ground that the rule is itself a constitutional violation.

(E) Specific Rules - General Rule of Exclusion.

(1) KRE 802 says that hearsay is not admissible except as permitted by KRE or other rules of the Supreme Court of Kentucky.

(a) There is no exception for bench trials.
(b) If it's hearsay and if there is no exception, it's not admissible in any proceeding to which the rules apply.

(1) This means no "investigative hearsay" or "*res gestae*."

(c) However, if the proceeding is one of those listed in KRE 1101(d), this rule does not apply and constitutional considerations of fair process [14th Amendment; Section 2] become the key argument.

(2) An important question is the extent to which the judge may allow retaliatory introduction of hearsay statements.

(a) KRE 611(a) gives the judge control over the "mode" of presenting evidence to make the presentation effective for the ascertainment of the truth.
(b) The courts are divided over the question of whether the rule of completeness allows the use of incompetent evidence in a writing under the analog of KRE 106.
(c) The proper solution might be to exclude the triggering statement under KRE 403 if the objection is made in time.

(d) Otherwise, the admissibility of retaliatory hearsay depends on the authority that KRE 611 and 106 actually give to a trial judge - who knows?

(F) Specific Rules - Prior Statements.

(1) [KRE 801A(a)] - any prior statement that a witness in a proceeding has made is not excluded by the hearsay rule if the following conditions are met:

(a) The declarant testifies at the trial or hearing;
(b) The declarant is examined concerning the previous statement as required by KRE 613; and
(c) The statement is:

(1) inconsistent with the declarant's testimony, or
(2) consistent with the testimony to rebut an express or implied charge of recent fabrication, improper influence or improper motive, or
(3) a statement identifying a person that the declarant had already perceived.

(2) [KRE 801A(b)] - a prior statement of a party is not excluded by the hearsay rule if

(a) it is offered against the party AND
(b) (1) is the party's own statement
(2) is a statement in which the party or has indicated agreement or belief in its truth.
(3) is a statement of a co-conspirator of the party made during the course of and to further the purpose of the conspiracy.
(a) the existence of the conspiracy is a KRE 104(b) decision.

(c) It does not matter whether the declarant is available as a witness [KRE 804(a)] or not.

(G) Specific Rules - 803 Exceptions.

(1) It does not matter whether the declarant is available or not.

(2) The rule is a combination of traditional exceptions and exceptions based on the belief that introduction through a live witness would be more trouble than it is worth.

(3) Most often used.

(a) Excited utterance [803(2)] if the declarant made a statement relating to a startling event or condition while still under the stress of excitment caused by the event.
(b) [803(4)] medical statement, usually found in hospital records, must satisfy the requirement of being statements concerning the illness or injury, not who caused it.

(c) Regularly conducted activity [803 (6)] - any record made contemporaneously with the event described so long as it was the regular practice of the entity to make records.

(1) If the source of information or the circumstances or method indicate trustworthiness problems, the exception does not apply.

(2) The maker does not have to have personal knowledge as long as he gets info from a person who does.
(3) Foundation: testimony of the keeper or certificate of the medical records librarian or other custodian.
(4) Any opinion contained in records must be one that could be given by the person under KRE 701 or 702. [KRE 803(6)(B)].
(5) Any opinion or statement that involves hearsay must satisfy either KRE 703(a) or KRE 805, the double hearsay rule.

(d) Public Records [803(8)] - unless the circumstances indicate lack of trustworthiness, public records or data concerning the agency's regularly conducted and regularly recorded activities or observations it was required to make and reports on factual findings are not excluded.

(1) There are three exceptions:

(a) Investigative reports by police and law enforcement personnel.
(b) Investigations by an agency if it is a party.
(c) Factual findings offered by government in criminal cases.

(e) Absence of entry in business or public record. [KRE 803(7); 803(10)].

(1) If entry would be expected [recording of auto title; *Boykin* transcript], absence may be noted to show non-existence of matter or non-occurrence of the event.

(f) Judgment of previous conviction [KRE 803(22)] - if entered after trial or guilty plea (not *nolo*), judgment imposing sentence of imprisonment not excluded if introduced to support any fact essential to sustain the judgment.

(1) May not be introduced against non-defendants except for impeachment. [KRE 609].

(H) Specific Rules - 804 Exceptions.

(1) Who is unavailable - a declarant who

(a) is relieved of the duty to testify [KRE 501] by order of court.
(b) refuses to testify despite court order.
(c) testifies to lack of memory about the subject matter (not the mere fact of) the statement.
(d) is dead or physically or mentally ill enough that he cannot come to court or testify. [KRE 601].
(e) is absent and cannot be subpoenaed or otherwise summoned. [*e.g.* KRS 421.650].

(2) A person is not unavailable if the proponent of the hearsay statement has set up the situation by procurement (bribes) or wrongdoing (threats, injury, homicide, kidnapping). [KRE 804(a)].

(e) Types of statements admissible:

(a) [KRE 804(b)(1)] - former testimony at a

proceeding or in a deposition if the opponent had an opportunity and a reason to obtain testimony by direct, cross or redirect as if on trial of the issue of the instant case.

(b) [804(b)(2)] - statement made by a declarant about the cause or circumstances of what the declarant believed to be impending death.

(c) [804(b)(3)] - statement against the declarant's civil or criminal interest that a reasonable person would not make unless it were true. If the statement exposes the declarant to criminal liability, the proponent must introduce corroborative proof clearly showing the trustworthiness of the statement.

(d) [804(b)(4)] -

(1) statements concerning family - type events of declarant.

(a) personal knowledge not required.

(2) statements about events of family or close personal associates if declarant most likely has accurate information.

(I) Specific Rules - Double Hearsay and Impeachment.

(1) KRE 805 allows hearsay within hearsay if both are permitted by hearsay exceptions. (*e.g.* excited utterances in medical records).

(2) KRE 806 allows the opponent of hearsay statements to call the declarant if possible (subject to 403 balancing and 611(a)), to attack an absent declarant without laying a 613 foundation, and in general to impeach by any method authorized against a present witness.

IX. AUTHENTICATION AND ORIGINALS

(A) There are only two requirements for the introduction of writings, photos, tape recordings or other objects. The proponent must

(1) Introduce enough evidence to support a finding that the matter or object is what it is claimed to be [901(a)]; AND

(2) If it is necessary to prove the contents of a writing, recording or photograph, introduce the original [1002; 1001(3)] or duplicate [1003; 1001(4)]. The original is not required unless

(a) there is a genuine question about the authenticity of the original. [1003(1)].

(b) under the particular circumstances it would be unfair to admit the duplicate in place of the original. [1003(2)].

(c) the original is lost or destroyed for reasons other than the proponent's bad faith.

(d) the original cannot be obtained by any (not just reasonable) judicial procedure. OR

(e) the possessor of the original, after being given notice, by pleadings or otherwise, that contents would be the subject of proof at a hearing, does not produce the original.

(B) The remaining rules are exceptions and illustrations. Some common ones are

(1) Public records which may be authenticated by *viva voce* testimony of the keeper [KRE 901(b) (1)] or by self authentication under KRE 902.

(a) public documents, deeds, commissions, etc. may be introduced under seal and signature of attestation. [902(1)].

(b) official records, court records, etc., by official publication (*e.g.* S.W.2d; KRS) or attestation. [902(4)].

(c) official publications, (*e.g.* LRC Reports, agency bulletins, etc.), by showing issuance by a public authority. [902(5)].

(d) commercial paper (bad checks, etc.) to the extent permitted by UCC. [902(9)].

(e) business records by a certification of the custodian that the record was made at or near the time of the matter, on personal knowledge of the recorder or another, in the course of a regularly conducted activity, as a regular practice. [902(11)].

(1) the proponent must notify the adverse party and make the record available "sufficiently in advance" of introduction to allow the opponent "a fair opportunity to challenge it".
(2) Public records are not subject to the "original" rule provided the custodian either authenticates a copy under KRE 902 or testifies that the copy is correct after comparing it to the original. [KRE 1005].
(3) Obviously if a party agrees by testimony, deposition or written admission that a copy is accurate, there is no need to worry about the original. [KRE 1007].

(4) Handwriting may be authenticated by

(a) non-expert opinion [701] on the question of genuineness if the witness became familiar with it "not ... for purposes of litigation". [901(b)(2)].

(b) by expert opinion [702] of a witness who has examined authenticated specimens. [901(b)(3)].

(c) by the jury. [901(b)(3); 1008].

(5) Any object may be authenticated by testimony that it has a distinctive appearance, contents or characteristics. [901(b)(4)].

(6) Voices may be identified by the opinion of someone who has heard the voice under circumstances "connecting" it with a speaker. [901(b)(5)].

(7) Telephone conversations may be authenticated by showing that

(a) the call was made to the assigned number

(b) circumstances show that the person who answered was the one called (self-identification or otherwise)

(c) if a business, proof that the call was to a place of business and related to business

reasonably transacted over the phone. [901(6)].

(8) KRE 901(3) permits the jury to compare items without any limitation.

(9) KRE 901(3) also permits an expert to compare samples with authenticated samples without any limitation.

(10) In rare cases where documents, writings, recordings or photographs are too much to be examined in court "conveniently", a party may prepare a summary, a chart, or a calculation of the information after notifying the opponent by writing in a timely manner and affording the opponent an opportunity to examine the originals. [KRE 1006].

X. CONCLUSION

(A) The major faults of common law or hybrid evidence rules were the difficulty in teaching each new class of lawyers the law, the difficulty in convincing older lawyers that local custom did not supersede statutes or cases setting out standards, and the wide disparity of applications around the state and even between divisions of the same circuit.

(1) The chief practical problem until the 1980s was the absence of meaningful judicial decisions applying evidence law.

(B) There is a lot to be said in favor of the Rules of Evidence.

(1) The rules are all in one place.

(2) The Rules have been construed in the federal system for 17 years and the great majority of states for the same or lesser periods so there is a consensus on what most of the language means and a source of ready information about application.

(3) The law can be made uniform if everyone realizes that the language has a particular meaning and is not intended to be a restatement of Kentucky common and statutory law.

(C) Therefore, do not rely on Kentucky cases interpreting superseded evidence concepts.

(1) The exceptions are KRE 613, KRE 706, KRE 804(a), KRE 803(4) and KRE 804 (b)(3) which, in the case of 613 and 706 are transplants from the Criminal Rules and, in the case of 803(4), 804(a) and 804(b) (3) are rules adopted in case law by the Supreme Court before the Rules of Evidence were adopted.

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Making and Meeting Objections:
Insuring That the Client's Story is Communicated

"I am not a potted plant, Sir."
- *Brendan v. Sullivan, Jr.*

TABLE OF CONTENTS

I. IN GENERAL

1. **Timeliness** - Contemporaneous objection rule requires that an objection be made at the time of the ruling. RCr 9.22; KRE 103(a)(1).

2. **What Is The Objection?** - The objecting party must make known to the court either the action which he/she desires the court to take, or his/her objection to the action of the court. RCr 9.22.

If the trial court denies counsel an opportunity to approach the bench and explain the objection, do it "[a]t the first reasonable opportunity to preserve the record *Anderson v. Commonwealth*, 864 S.W.2d 909, 912 (Ky. 1993).

3. **Grounds for the Objection** - A party is required to state the grounds for an objection only when requested to do so by the court. *Ross v. Commonwealth*, 577 S.W.2d 6 (Ky.App. 1977); RCr 9.22; KRE 103(a)(1).

4. **Relief Requested** - If objection is made after error occurred, party making objection must ask for such remedial relief as is desired. *Ferguson v. Commonwealth*, 512 S.W.2d 501 (Ky. 1974); *Commonwealth v. Huber*, 711 S.W.2d 490 (Ky. 1986); *White v. Commonwealth*, 695 S.W.2d 438 (Ky.App. 1985).

If trial counsel sees an issue and fails to make a timely request for relief, a plain error argument will not be considered on appeal. *Crane v. Commonwealth*, 833 S.W.2d 813, 819 (Ky. 1992).

5. **Ruling Required** - If an objection is made, the party making it must insist on a ruling or the objection is waived. *Bell v. Commonwealth*, 473 S.W.2d 820, 821 (Ky. 1971); *Harris v. Commonwealth*, 342 S.W.2d 535, 539 (Ky. 1960).

II. PRETRIAL MOTIONS

1. Review RCr 8.14, 8.16, 8.18, 8.20, 8.22 and 8.24 for pretrial motion practice.

2. Caution: According to RCr 8.20, motions "raising defenses or objections" must be made prior to a plea being entered. The general practice at arraignment, though, is for defense counsel to request leave of court to reserve the right to make all necessary motions even though a plea is being entered.

3. Regarding motions to dismiss based on lack of jurisdiction or failure of the indictment to charge an offense [RCr 8.18], counsel must make a tactical decision when to raise the issue. For example, if a count of the indictment fails to state a public offense, there may be no good reason to bring it to the court's attention prior to the attachment of jeopardy. See *Stark v. Commonwealth*, 828 S.W.2d 603 (Ky. 1991), where the issue was raised for the first time on appeal and the Supreme Court ordered that the convictions based on defective counts of the indictment be reversed and the sentences vacated rather than remanded for a new trial.

A. Pretrial Discovery

If you announce ready for trial, you waive any non-compliance with discovery rules or orders. *Sargent v. Commonwealth*, 813 S.W.2d 801 (Ky. 1991).

B. Venue

1. **Improper Venue** - Improper venue can be waived by the defendant, so make sure that a timely motion or objection is made. KRS 452.650; *Chancellor v. Commonwealth*, 438 S.W.2d 783 (Ky. 1969).

2. **Change of Venue** - A motion for change of venue must comply with KRS 452.210, KRS 452.220. Make sure that the petition is verified and accompanied by at least two affidavits. Also make sure that the request for a change of venue is made in a timely manner with timely notice to the Commonwealth. See: *Whitler v. Commonwealth*, 810 S.W.2d 505 (Ky. 1991) and *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky. 1991). According to *Thompson v. Commonwealth*, 862 S.W.2d 871 (Ky. 1993), a motion filed two days before trial is not timely.

C. Motions in Limine

1. **Motion** - A request for a pretrial ruling on the admissibility of evidence may be made under KRE 103(d).

2. **Ruling** - The court may defer a ruling, but if the issue is resolved by an "order of record", no further objection is necessary. KRE 103(d). The making of the motion will preserve the issue for appellate review. *Powell v. Commonwealth*, 843 S.W.2d 908 (Ky.App. 1992).

3. **Reconsideration** - Reconsideration of a pretrial in limine ruling is authorized if new circumstances at trial require it. KRE 103(d).

III. Voir Dire

A. Nature of Rights to Fair Jury and Due Process in Jury Selection

As trial counsel, you have the duty to protect each defendant's right to be tried by a fair and impartial jury, as well as the right to receive due process in the jury selection proceedings. This article is written to help you secure these rights, ideally, at the trial level; and alternatively at the appellate level. Due to length requirements, this article will not specifically address the Commonwealth's improper use of its peremptory challenges under ***Batson v. Kentucky***, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The right to a fair and impartial jury is guaranteed by the 6th Amendment to the United States Constitution and Section 11 of the Kentucky Constitution. This right encompasses not only the substantive right under the 6th Amendment, but it also encompasses the substantive due process right to fairness under the 14th Amendment to the United States Constitution. The harm which occurs from a violation of this right is that the accused is tried by a jury which includes at least one juror who is biased, partial, unfair, and/or not neutral.

The right to procedural due process in the course of jury selection is guaranteed by the 14th Amendment to the United States Constitution and Section 2 of the Kentucky Constitution. The harm which occurs from a violation of this right is that there is an interference, or denial, of your client's right to utilize the *procedures* established to ensure that a fair and impartial jury is empaneled. The harm which results from a violation of this right usually comes in the form of a denial of your client's right to freely exercise his peremptory challenges.

B. Two Types of Challenges: Cause and Peremptory

In Kentucky the method for assuring that your client is tried by a fair and impartial jury includes the provision of *two types of challenges* that can be made of potential jurors:

1. **Challenges for Cause:** RCr 9.36 (1) provides:

"...[W]here there is **reasonable ground to believe that a juror cannot render a fair and impartial verdict on the evidence, he shall be excused as not qualified to serve.**

The number of challenges for cause is limitless.

2. **Peremptory Challenges:** RCr 9.36 (2) provides:

"After the parties have been given the opportunity of challenging jurors for cause, each side or party having the right to exercise peremptory challenges shall be handed a list of qualified jurors drawn from the box equal to the number of jurors to be seated plus the number of allowable peremptory challenges for all parties. Peremptory challenges shall be exercised simultaneously by striking names from the list and returning it to the trial judge.

RCr 9.40 sets forth the number of challenges allotted to each side in a criminal case. For a felony, the defendant or defendants jointly get 8. For a misdemeanor, the defendant or defendants jointly get 3. If 1 or 2 additional jurors are called, the number of peremptory challenges allowed each defendant shall be increased by 1.

If more than 1 defendant is being tried, each defendant shall be entitled to at least 1 additional peremptory challenge to be exercised independently of any other defendant.

RCr 9.36 and RCr 9.40 guarantee the criminal defendant "a substantive right provided by state law - the right of peremptory strikes against qualified jurors. This procedural right is not an 'impartial jury' question, but a 'due process' question." *Thomas v. Commonwealth*, 864 S.W.2d 252, 260 (Ky. 1993).

In *Thomas v. Commonwealth*, 864 S.W.2d 252 (Ky. 1993), the Kentucky Supreme Court clarified the difference between the right to a fair and impartial jury, as guaranteed by the Sixth Amendment to the U. S. Constitution and Section 11 of the Kentucky Constitution, and the right to procedural due process, as guaranteed by the Fourteenth Amendment to the U. S Constitution and Section 2 of the Kentucky Constitution. The Court made it clear that when a defendant has used all his peremptory challenges, he "has been denied the number of peremptory challenges procedurally allotted to him [procedural due process] when forced to use peremptory challenges on jurors who should have been excused for cause." *Id.* at 259. For there to be a violation of procedural due process, the defendant need not establish that a juror who should have been disqualified actually sat on the jury that decided his case. *Id.* at 260.

C. Timing of Challenges

The timing of the exercise of these two types of challenges is also set forth in the criminal rules.

Pursuant to RCr 9.36(1), "Challenges for cause shall be made first by the Commonwealth and then by the defense," and (3) "All challenges must be made before the jury is sworn. No prospective juror may be challenged after being accepted unless the court for good cause permits it."

D. Black Letter Principles Relating to Challenges for Cause

1. The trial court must determine the existence of bias based on the particular facts of each case. ***Taylor v. Commonwealth***, 335 S.W.2d 556 (Ky. 1960).

2. "A potential juror may be disqualified from service because of **connection to the case, parties, or attorneys** and **that is a bias that will be implied as a matter of law.** ***Randolph v. Commonwealth***, 716 S.W.2d 253 (Ky. 1986)

3. "Irrespective of the answers given on voir dire, the court should presume the likelihood of prejudice on the part of the prospective juror because the potential juror has such **a close relationship, be it familial, financial or situational, with any of the parties, counsel, victims or witnesses.**" ***Montgomery v. Commonwealth***, 819 S.W.2d 713 (Ky. 1992).

4. "Once that close relationship is established, without regard to protestations of lack of bias, the court should sustain a challenge for cause and excuse the juror." ***Ward v. Commonwealth***, 695 S.W.2d 404 (Ky. 1985).

E. How Court Should Resolve Doubt As To For-Cause Challenges

"Even where jurors disclaim any bias and state they can give the defendant a fair trial, conditions may be such that their connection would probably subconsciously affect their connection would probably subconsciously affect their decision in the case. **It is always vital to the defendant in a criminal prosecution that doubt of unfairness be resolved in his favor.** ***Randolph v. Commonwealth***, 716 S.W.2d 253 (Ky. 1986).

F. Examples of Above Principles as Applied to Facts Where For-Cause Challenges Should Have Been Granted

1. Juror who **Fails to Meet Statutory Qualifications** for jury service as set forth in KRS 29A.080.

2. Juror Who Has **Formed Opinion Regarding Guilt.**

Neace v. Commonwealth, 313 Ky. 225, 230 S.W.2d 915 (1950).

Montgomery v. Commonwealth, 819 S.W.2d 713 (Ky. 1992).

Thompson v. Commonwealth, 862 S.W.2d 871, 875 (Ky. 1993).

3. Juror Who Has A **Close Relationship With a Party, Attorney or Witness.** ***Ward v. Commonwealth***, 695 S.W.2d 404, 407 (Ky. 1985).

A. Juror Who Has **A Close Relationship With a Party:**

a. Venireperson who discussed the case with a relative of the victim. ***Thompson v. Commonwealth***, 862 S.W.2d 871, 875 (Ky. 1993).

b. **Married to a person who was a second or third cousin of the victim.** ***Marsch v. Commonwealth***, 743 S.W.2d 830 (Ky. 1987).

c. **First cousin to victim.** ***Pennington v. Commonwealth***, 316 S.W.2d 221 (Ky. 1958).

d. **Mother was first cousin to victim's mother.** ***Leadingham v. Commonwealth***, 180 Ky. 38, 201 S.W. 500 (1918).

e. **Wife was second cousin of defendant.** ***Smith v. Commonwealth***, 734 S.W.2d 437 (Ky. 1987).

B. Juror Who Has A **Close Relationship With a Witness:**

a. Juror's being related to and living in the same rural area of the county with the complaining witness' boyfriend and being married to boyfriend's cousin may have justified a challenge for cause. *Anderson v. Commonwealth*, 864 S.W.2d 909, 911 (Ky. 1993).

b. Where juror, an investigative social worker, was employed by CHR, the same organization with which a key Commonwealth witness was employed, and was assigned to the same unit as two key Commonwealth witnesses were assigned, it was an abuse of discretion to fail to

excuse the juror for cause. *Alexander v. Commonwealth*, 862 S.W.2d 856, 864 (Ky. 1993).

c. Venireman knew both Commonwealth Attorney and chief investigating officer in the crime. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993).

d. Juror who was friend of chief investigating officer. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993).

e. **First cousin to key prosecution witness.** ***Sanborn v. Commonwealth***, 754 S.W.2d 534 (Ky. 1988).

f. **Wife of arresting police officer.** ***Calvert v. Commonwealth***, 708 S.W.2d 121 (Ky.App. 1986).

C. Juror Who Has A **Close Relationship With Attorney:**

a. Venireman knew both Commonwealth Attorney and chief investigating officer in the crime. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993).

b. Venirewoman who had business dealings with the prosecution. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993).

c. Juror's wife and prosecutor were first-cousins by marriage (however, relationship by blood and affinity are treated the same for purposes of juror disqualification). *Thomas v. Commonwealth*, 864 S.W.2d 252, 256-7 (Ky. 1993).

d. Prospective and actual jurors who had previously been represented by the prosecutor and who stated they would seek out such representation in the future (although attorney/ client relationship does not automatically disqualify a venireperson). *Riddle v. Commonwealth*, 864 S.W.2d 308 (Ky.App. 1993).

e. **Uncle of Commonwealth Attorney.** ***Ward v. Commonwealth***, 695 S.W.2d 404, 407 (Ky. 1985).

f. **Secretary to Commonwealth Attorney.** Position gave rise to a loyalty to employer that would imply bias. ***Randolph v. Commonwealth***, 716 S.W.2d 3 (Ky. 1986).

g. **Manager of ambulance service,** which had a contract with the Ambulance Board **for which the prosecutor was the attorney,** and who had been asked as manager of the Ambulance Board to participate in the search for the defendants (who were charged with escape) and who had been held hostage in a previous escape. ***Montgomery v. Commonwealth***, 819 S.W.2d 713 (Ky. 1992).

h. **County attorney at the time of the defendant's preliminary hearing.** ***Godsey v. Commonwealth***, 661 S.W.2d 2 (Ky.App. 1983).

i. Juror was **being represented by the prosecutor on a legal matter at the time of trial.** ***Montgomery v. Commonwealth***, 819 S.W.2d 713 (Ky. 1992).

j. **Cousin's son-in-law was the prosecutor.** ***Montgomery v. Commonwealth***, 819 S.W.2d 713 (Ky. 1992).

D. Miscellaneous

a. Where the defendant, on trial for sexual crimes against his seven year old daughter, is black, his wife is white, and their child is biracial, juror who expressed a distaste for "mixed marriages," and stated he would judge the wife's credibility a degree differently than he would judge the credibility of other witnesses should have been excused for cause. *Alexander v. Commonwealth*, 862 S.W.2d 856, 864 (Ky. 1993).

b. Venirepersons and jurors related to pison employees, who knew many prison employees, whose two best friends and two brothers worked at prison and had discussed case with two brothers. *Thompson v. Commonwealth*, 862 S.W.2d 871, 875 (Ky. 1993).

c. **Former police officer and present deputy sheriff.** ***Montgomery v. Commonwealth***, 819 S.W.2d 713 (Ky. 1992).

d. **Employee of the prison from which defendants escaped and who acknowledged he would give more credibility to a law enforcement officer's testimony and would feel "bad" about acquitting defendants if proof was not sufficient to show guilt.** ***Montgomery v. Commonwealth***, 819 S.W.2d 713 (Ky. 1992).

e. Outside patrolman and guard for prison who acknowledged he had spoken with persons in the prison regarding the escape. ***Montgomery v. Commonwealth***, 819 S.W.2d 713 (Ky. 1992).

G. Unsuccessful Challenges Which Should Continue To Be Asserted

The following are examples of challenges for cause that have been denied by the trial court and the denial upheld by the Kentucky Supreme Court. Although Kentucky law is not favorable on these grounds it is recommended that you continue to make challenges on these grounds.

1. In a case where the defendant was facing the death penalty but received a life sentence, the defendant moved to excuse for cause two prosepective jurors who initially indicated they could not consider the minimum sentence of twenty years (one of these individuals additionally stated he felt that if a person killed another, the life of the killer should also be taken), and a third prospective juror who indicated she would have a hard time considering a lesser sentence for murder when alcohol was involved and that such feelings would impair her ability to follow jury instructions. Through the use of "follow-up" questions, each prospective juror was "rehabilitated," thus allowing the Kentucky Supreme Court to find no error in the trial court's rulings. (The defendant used a peremptory to remove each of the three prospective jurors.) *Mabe v. Commonwealth*, 884 S.W.2d 668 (1994).

2. Venireperson who lived four houses from victim's family and although not acquainted with victim, knew two of victim's sisters "pretty well" was not such a close situational relationship with the victim as to compel a presumption of bias. *DeRosset v. Commonwealth*, 867 S.W.2d 195, 197 (Ky. 1993).

3. Venireperson who drove to scene of crime the night it happened out of curiosity, but stated that such information was not enough to talk about and disclaimed any bias need not be excused for cause. *DeRosset v. Commonwealth*, 867 S.W.2d 195, 197 (Ky. 1993).

4. Where defendant was on trial for the shooting death of his ex-girlfriend's current boyfriend, it was not reversible error to fail to excuse for cause potential jurors who worked at same place of employment as victim and ex-girlfriend, who was a prosecution witness. *Copley v. Com-*

monwealth, 854 S.W.2d 748, 750 (Ky. 1993).

5. Defendant filed a motion for a mistrial because juror failed to disclose on voir dire that he knew defendant. At hearing on mistrial motion defendant did not present any testimony from the juror in question, nor did he present any evidence showing that the questioned juror was aware of having any prior knowledge of the defendant or his family. The defendant's father testified at the hearing that he had known the juror for 40 years but had not seen him for 20-25 years, that their two families had known each other well, and that he would expect the juror to recognize the defendant's family name. Denying the mistrial motion, the Court of Appeals held that defendant's evidence was nothing more than mere speculation and that questions concerning how and when the juror knew the defendant must be answered to determine if there is juror bias. *Key v. Commonwealth*, 840 S.W.2d 827 (Ky.App. 1992).

6. In a malpractice action against a doctor, it was not an abuse of discretion for the trial court to fail to excuse for cause three jurors who were former patients of the doctor on trial. *Altman v. Allen*, 850 S.W.2d 44 (Ky. 1993).

7. Although Court of Appeals stated it was abuse of discretion for trial court to fail to excuse for cause on ground of "implied bias" venireperson who was county attorney at time of alleged offense up to and including time of trial, Court held harmful error was not shown because defendant did not demonstrate that use of peremptory to strike county attorney resulted in failure to strike another unacceptable juror. *Farris v. Commonwealth*, 836 S.W.2d 451 454-5 (Ky.App. 1992).

8. **Juror Was Victim of Similar Offense** - Where defendant was on trial for robbery, fact that two prospective jurors had been robbery victims was not sufficient to render prospective jurors unqualified. ***Stark v. Commonwealth***, 828 S.W. 603, 608 (Ky. 1991).

9. **Juror Was Friend of Victim of Similar Offense** - Where defendants were on trial for having engaged in sexual acts with young children, trial court's failure to excuse for cause a juror whose best friend's granddaughter had been abused and killed 14 years previously and about which juror had strong feelings was held not an abuse of discretion. However, the Kentucky Supreme Court indicated it would not have been an abuse of discretion if this juror had been excused for cause as unqualified. ***Stoker v. Commonwealth***, 828 S.W.2d 619, 625 (Ky. 1992).

H. How To Preserve For-Cause Challenges And Protect Your Client's Right To A Trial By A Fair And Impartial Jury As Well As Her Right To Substantive Due Process

1. Conduct a thorough job of questioning the prospective juror to establish the actual or implied partiality. General questions of fairness and impartiality are not sufficient. Specific questions related to the facts of the case and your theory of defense must be asked. Attempt to elicit facts known by the juror or opinions held by the juror which reasonably could be expected to influence her decision. ***Miracle v. Commonwealth***, 646 S.W.2d 720, 723 (Ky. 1983) (Leibson, J., concurring). "It often takes detailed questioning to uncover deep-seated biases of which the juror may not be aware. The cursory examination typically conducted by the trial court is often inadequate for this purpose." ***Trial Practice Series, Jury Selection, The Law, Art, and Science of Selecting a Jury***, Second Edition, James J. Gobert, Walter E. Jordon (1992 Cumulative Supplement, p. 23).

2. Timely move to strike the juror for cause, listing every reason which would require removal of the juror. In some appellate opinions the courts have described the jurors by listing several areas of bias which, when combined, required removal for cause. *See* ***Montgomery v. Commonwealth***, 819 S.W.2d 713 (Ky. 1992).

3. Where defendant did not learn until after trial that juror was related to and living in the same rural area of the county with the complaining witness' boyfriend and was married to the boyfriend's cousin, proper procedure was to bring this information to the trial court's attention in a motion for a new trial. ***Anderson v. Commonwealth***, 864 S.W.2d 909, 911 (Ky. 1993).

4. You have the option of using your peremptory challenges on any prospective jurors whom you believe should have been excused for cause. Theoretically, you should *not have* to use your peremptory challenges on such persons since the purpose of a peremptory challenge is to eliminate those individuals whose disqualifications do not rise to the level of a for-cause challenge, but whom you have some reason or gut feeling about that makes you believe they will not be able to be fair and impartial. However, to assure your client's right to be tried by a fair and impartial jury, you may have to use your peremptory challenges on these individuals.

If you use your peremptory challenges on the persons whom you challenged for cause, and you still believe there is a juror for whom you have a reason to use a peremptory challenge, and whom you believe will not be fair and impartial, you should do the following. State to the trial court that you used your peremptory strike to eliminate the specific juror(s) whom you challenged for cause. State that as a result a different juror whom you would have used your peremptory on is still on the jury. You should state you believe this juror is not fair and impartial and that your client's right to be tried by a fair and impartial jury has been denied, even though the juror's bias does not rise to a level of a for-cause challenge.

For example, your client is on trial for sex abuse of a minor. You determine through voir dire that prospective Juror A is related to the victim, and prospective Juror B is the grandmother of a victim of child abuse. You move to strike both Juror A and Juror B for cause. Under ***Marsch v. Commonwealth***, 743 S.W.2d 830 (Ky. 1987), the trial court should strike Juror A. The law is not settled on whether Juror B must be stricken for cause. ***Stoker v. Commonwealth***, 828 S.W.2d 619 (Ky. 1992). However, the trial court denies both your for-cause challenges. You use all your peremptory strikes on other for-cause challenges, including Juror A, and have none left to strike Juror B. You should then assert your position that Juror B cannot be fair and impartial and your client's right to a fair and impartial jury has been denied because you had no peremptories left to strike Juror B since you had to use a peremptory on Juror A who should have been stricken for cause.

You should also ask the trial court for an additional peremptory to use on Juror B.

5. There are some states that have adopted a rule requiring the defendant to first use his peremptory challenges on those unsuccessful for-cause challenges to ensure the actual jury has no tainted jurors. However, there is no such rule in Kentucky. Accordingly, ***Ross v. Oklahoma***, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) does not apply to Kentucky since this opinion was based on an Oklahoma rule requiring use of peremptory challenges to cure for-cause challenge errors. You may prefer to use your peremptory challenges as they are intended and then place into the record

that you have chosen to use all your peremptories on those persons whose characteristics or circumstances do not rise to a for-cause challenge. You should then ask for extra peremptory challenges to remove those persons who should have been stricken for cause.

6. If you choose to use your peremptory challenges to cure a for-cause error, you should put into the record that you are doing so, and state you would have used each peremptory on a specifically named juror had you not felt constrained to use it on an unsuccessful for-cause challenge.

7. You must demonstrate, by stating in the record, that you used all your peremptory challenges and there are still unfair, biased juror(s) on the panel that actually served on the case. In addition, **be sure you make the jury strike sheet part of the record for appeal.**

In ***Sanders v. Commonwealth***, 801 S.W.2d 665, 669 (Ky. 1991), it was observed that "[i]t is elementary logic and sound law that a defendant's right to be tried by an impartial jury is infringed if and only if an unqualified juror participates in the decision of the case." *See* also ***Williams v. Commonwealth***, 829 S.W.2d 942 (Ky.App. 1992) where it was noted that to prevail on appeal and a defendant must demonstrate he used all his peremptories *and* an incompetent juror was allowed to sit who should have been stricken for cause.

I. How To Preserve A Denial Of Your Client's Right To Procedural Due Process

To establish that your client's right to freely exercise his peremptory challenges has been violated you must do the following:

1. Challenge for cause all persons you believe the law requires to be stricken.

2. Establish on the record that all of your client's peremptory challenges have been exhausted. **Be sure to make the jury strike sheet part of the record for appeal.**

3. If the trial court overruled any **one** of your for-cause challenges and you used a peremptory challenge to remove that person, your client's right to challenge peremptorily has been infringed and your client is entitled to a reversal of his conviction. ***Marsch v. Commonwealth***, 743 S.W.2d 830, 831 (Ky. 1988).

4. To make your record for appeal, you should also indicate which persons you would have removed with a peremptory challenge, if you had not been forced to use them on for-cause jurors. While you do not need to articulate *why* you would have exercised a peremptory on the persons, it is more impressive to the appellate court if you have reasons, even if they do not rise to the level of for-cause reasons. Ask to introduce this information by an avowal if you want to avoid revealing your thought processes to the Commonwealth. In ***Foster v. Commonwealth***, 827 S.W.2d 670, 676 (Ky. 1992), the Kentucky Supreme Court stated that for there to be error, the defendant must use all of her peremptories *and* show that "her use of a peremptory to strike each venireman 'resulted in a subsequent inability to challenge additional unacceptable venireman.'"

In ***Thomas v. Commonwealth***, 864 S.W.2d 252, 259-260 (Ky. 1993), the Kentucky Supreme Court made it clear that when a defendant has used all his peremptory challenges, he "has been denied the number of peremptory challenges procedurally alloted to him when forced to use peremptory challenges on jurors who should have been excused for cause." For there to be a violation of procedural due process, the defendant need not establish that a juror who should have been disqualified actually sat on the jury that decided his case.

In ***Swain v. Alabama***, 380 U.S. 202, 85 S.Ct. 824, 825, 13 L.Ed.2d 759 (1965) it was found that "[s]uch a denial or impairment of a right to peremptory challenges is reversible error without a further showing of prejudice."

J. Can Jurors Be Rehabilitated?

There is no "magic question" such as, "Can you set aside what you have heard, your connection, your religious beliefs, etc., and make a decision based only on the evidence and instructions given by the Court?" ***Montgomery v. Commonwealth***, 819 S.W.2d 713, 717-718 (Ky. 1992). In ***Montgomery***, the Kentucky Supreme Court "declared the concept of 'rehabilitation' is a *misnomer* in the context of choosing qualified jurors and direct[d] trial judges to remove it from their thinking and strike it from their lexicon." *Id.* at 718.

Where potential jurors' attitude and past experiences created a reasonable inference of bias or prejudice, their affirmative responses to the "magic question" did not eradicate the bias and prejudice. ***Alexander v. Commonwealth***, 862 S.W.2d 856, 865 (Ky. 1993).

Reaffirming *Montgomery v. Commonwealth*, 819 S.W.2d 713, 718 (Ky. 1992), ***Thomas v. Commonwealth***, 864 S.W.2d 252, 258 (Ky. 1993), holds that once a potentional juror expresses disqualifying opinions, the potential juror may not be rehabilitated by leading questions regarding whether s/he can put aside those opinions and be fair and impartial.

The Kentucky Supreme Court has also held that prospective jurors' answers "to leading questions, that they would disregard all previous information, opinions and relationships **should not be taken at face value.**" ***Marsch v. Commonwealth***, 743 S.W.2d 830, 834 (Ky. 1988). (Emphasis added). "Mere agreement to a leading question that the jurors will be able to disregard what they have previously read or heard, without further inquiry, is not enough...to discharge the court's obligation to determine whether the jury [can] be impartial." ***Miracle v. Commonwealth***, 646 S.W.2d 720, 722 (Ky. 1983).

Be sure to object to the trial court's or the Commonwealth's use of leading questions in an attempt to rehabilitate an unqualified juror.

"Even where jurors disclaim any bias and state that they can give the defendant a fair trial, conditions may be such that their connection [to the case or the parties] would probably subconsciously affect their decision in the case." ***Randolph***, *supra*, at 255.

"It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty [or alcoholism or homosexuality or law enforcement personnel or other subject relevant to your case] would prevent him or her from doing so." ***Morgan v. Illinois***, ___ U.S. ___, 112 S.Ct. 2222, 2233, 119 L.Ed.2d 492 (1992).

K. How To Preserve Your Challenge To A Tainted Jury Pool

Often times you are faced with a jury pool containing persons from which a co-defendant's jury was selected or who were victims of the charged offense.

Two recent cases have addressed the procedure for obtaining a different jury pool.

In ***Jett v. Commonwealth***, 862 S.W.2d 908, 910-11 (Ky.App. 1993), the defendant moved to set aside the jury panel when one prospective juror stated, in the presence of the entire panel, that a drug trafficker had killed his daughter. Instead, the trial court struck the prospective juror. The Court of Appeals held it was not error not to strike the entire panel because the defendant has proven no prejudice. Prejudicial remark by juror does not necessarily require striking the entire panel.

In ***Hellard v. Commonwealth***, 829 S.W.2d 427 (Ky.App. 1992), the defendant was charged with theft by deception and forgery based on a forged rental agreement with a video store. The owner of the video store was a member of the jury pool from which the jurors were selected to hear the defendant's case. The defendant moved for a continuance of her trial until a new jury pool was called. The continuance motion was denied, but the trial court stated its ruling was subject to change if the defendant could show bias or prejudice during voir dire. The Kentucky Court of Appeals did "not feel that Hellard was required to show bias or prejudice under these circumstances." *Id.* at 429.

On appeal, the Commonwealth argued the defendant had waived the issue by failing to renew her continuance motion at the end of voir dire. However, reversing the defendant's convictions, the Kentucky Court of Appeals, relying on RCr 10.26, held the trial court erred in denying the original continuance motion because the "possibility of a jury according the testimony of a witness greater weight than it otherwise would have received is just too great when the witness is a member of the same jury pool."

Pelfrey v. Commonwealth, 842 S.W.2d 524 (Ky. 1993), involves a situation similar to ***Hellard***, *supra*, but reaches the opposite result because the issue was not properly preserved for review. In ***Pelfrey*** the defendant moved for a continuance until a new jury pool could be empaneled because the jury that had convicted the defendant's companion one month earlier had been selected from this same jury pool. The trial court denied the continuance motion.

On appeal, the Kentucky Supreme Court held the trial court had not abused its discretion in denying the continuance motion because "there were adequate safeguards in place to assure an unbiased jury." These safeguards were for-cause and peremptory challenges. In addition, the defendant had conducted a thorough voir dire examination and had not challenged any prospective jurors for cause, and the trial court had admonished the jurors to consider against the defendant only what they heard from the witness stand.

The Kentucky Supreme Court further held that because the defendant had not challenged any of the prospective jurors for cause "we can only assume that he was satisfied with the jury." Also, "a continuance motion for a new panel is not the equivalent of individually challenging jurors for cause. Once trial counsel's general [continuance] motion was denied, his method for reviewing the bias issue was to specifically challenge jurors. Without doing so, counsel clearly waived his jury challenge."

Although Hellard was able to obtain relief on appeal despite failure to properly preserve the issue for review, you should not rely on the "manifest injustice" principle of RCr 10.26 to protect your client's rights to a fair and impartial jury. The lesson to be gleaned from ***Pelfrey***, *supra*, is that to properly preserve this issue for review you must do two things: 1) Move for a continuance, pursuant to RCr 9.04, until a new jury can be empaneled; 2) Challenge for cause, as biased and prejudiced, each and every juror on the tainted panel. You may also want to move to dismiss the entire jury panel pursuant to RCr 9.34.

L. Voir Dire on the Issue of Punishment

Even in a case where the prosecution is not seeeking the death penalty, the defendant is entitled to voir dire the jury panel as to its ability to consider the full range of possible punishments. *Shields v. Commonwealth*, 812 S.W.2d 152 (Ky. 1991).

Where the trial court denied the defendant the right to meaningful voir dire on the issue of punishment **and the defendant received the maximum punishment**, the Kentucky Supreme Court found the error was not harmless beyond a reasonable doubt. *Alexander v. Commonwealth*, 864 S.W.2d 909, 911 (Ky. 1993).

However, where the defendant moved to voir dire the jury on the penalty range for first degree burglary and second degree assault but *not* for second degree persistent felony offender, the Kentucky Supreme Court held the issue was not properly preserved for review. In addition, since the defendant received the *minimum* sentence for his PFO II conviction, the Court held the trial court's failure to allow voir dire on the penalty range was not error.

IV. OPENING STATEMENT

The prosecutor may state the nature of the charge and the evidence upon which he or she will rely to support it. RCr 9.42.

Don't allow the prosecutor to argue his or her case. RCr 9.42(2); *Turner v. Commonwealth*, 240 S.W.2d 80 (Ky. 1951).

It is reversible error for a prosecutor to define reasonable doubt in opening statement. *Marsch v. Commonwealth*, 743 S.W.2d 830, 833 (Ky. 1987), quoting *Commonwealth v. Callahan*, 675 S.W.2d 391 (Ky. 1984).

It is reversible error for a prosecutor to discuss evidence that the court had ruled inadmissible. *Linder v. Commonwealth*, 714 S.W.2d 154 (Ky. 1986); KRE 103(c).

If the prosecutor tells about damaging information in opening statement, then fails to introduce evidence to support it, the proper remedy is a motion for mistrial. *Williams v. Commonwealth*, 602 S.W.2d 148 (Ky. 1980).

Be sure to request a mistrial, if that is what you want.

V. COMMONWEALTH'S CASE

1. **Make Timely Objections** - KRE 103 (a). [See Above, Section A.1]. Compare *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994) [timely] to *Bowling v. Commonwealth*, 873 S.W.2d 175 (Ky. 1993) [not timely].

2. **Motion to Strike** - If you want the court to strike evidence, you must specifically ask for this relief. KRE 103(a)(1).

3. **Delayed Objections** - A delayed objection may be made if (a) judicial notice is taken before an opportunity to be heard. KRE 201(3); (b) a person disclosed privileged information before the holder of the privilege has time to assert it. KRE 510(2); (c) the judge calls a witness or questions a witness or asks questions tendered by a juror. KRE 614.

4. **Objections Not Necessary** - In two situations, an error is preserved even in the absence of an objection: (a) the judge testifies at trial, or (b) a juror testifies at trial. KRE 605 and 606.

5. **Mistrial** - If your objection is sustained and you ask for an admonition, which is given, you are deemed to be satisfied with the relief and cannot argue on appeal that a mistrial should have been granted. If you want a mistrial, you must ask for one. *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991); *Derossett v. Commonwealth*, 867 S.W.2d 195 (Ky. 1993). The appellate court will presume that an admonition "controls the jury and removes the prejudice". *Clay v. Commonwealth*, 867 S.W.2d 200 (Ky. App. 1993). Therefore, if you believe that the admonition was not adequate let the court know and explain why.

6. **Objections to Your Cross-Examination of Prosecution Witnesses** - When the prosecutor objects to your cross-examination questions, remind the court that Kentucky's "wide open" rule of cross-examination has been embodied in the KRE. *Derossett v. Commonwealth*, 867 S.W.2d 195 (Ky. 1993); KRE 611).

VI. DEFENSE CASE

1. **Separation of Witnesses**

a. If one of your witnesses violates the rule, the court cannot automatically preclude the witness' testimony, but must hold a hearing before ruling. *Henson v. Commonwealth*, 812 S.W.2d 718 (Ky. 1991).

b. **Police Officers** - The courts have yet to decide whether the Commonwealth may simply "designate" a police officer as its representative without justifying a need for the officer to remain in the courtroom [KRE 615(2)] or whether the prosecutor must first demonstrate that the officer is "essential" to the presentation" of the Commonwealth's case. [KRE 615(3)].

2. **Impeachment With Prior Felony Conviction** - Object on the basis that the conviction is too remote in time. A twenty-two year old conviction is too old for impeachment purposes. *Brown v. Commonwealth*, 812 S.W.2d 502 (Ky. 1991). See KRE 609(b) [10 year limit].

3. **Character Evidence** - Object to anything that sounds like character evidence, whether it came from prosecution witnesses, cross-examination of defense witnesses or cross-examination of your client. Character evidence is not admissible unless and until the defendant places his or her character in issue. *Holbrook v. Commonwealth*, 813 S.W.2d 811 (Ky. 1991); KRE 404; see also *LaMastus v. Commonwealth*, 878 S.W.2d 32 (Ky.App. 1994).

4. **Evidence of Other Crimes, Wrongs or Acts** - Consider a four-prong attack on this type of evidence: (a) prosecutor failed to give proper notice; (b) evidence is not relevant to prove something other than criminal disposition; (c) evidence is not sufficiently probative to warrant introduction; (d) probative value outweighs potential for prejudice. KRE 404(b) and (e); *Clark v. Commonwealth*, 833 S.W.2d 793, 795 (Ky. 1991); *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994).

See, for example, *Funk v. Commonwealth*, 842 S.W.2d 476, 480-481 (Ky. 1992), where the Supreme Court found evidence of a prior offense relevant and admissible, but further found reversible error because "[h]ere the evidence of prior misconduct was presented in such a way as to cause undue prejudice." The court called the presentation by the prosecutor an "extensive use of over kill"

5. **Separate Trial** - If you asked for a trial separate from a co-defendant, keep pointing out to the court how the proceedings are unfair, even at the penalty phase of trial. See: *Cosby v. Commonwealth*, 776 S.W.2d 367 (Ky. 1989) and *Foster v. Commonwealth*, 827 S.W.2d 670 (Ky. 1991).

VII. AVOWALS

RCr 9.52 states:

1. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, upon request of the examining attorney the witness may make a specific offer of his answer to the question. The court shall require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

NOTE: In *Jones v. Commonwealth*, 623 S.W.2d 226 (Ky. 1981), it was held to be prejudicially erroneous for a trial court to deny defense counsel an opportunity to offer the testimony of a witness by avowal. See also *Perkins v. Commonwealth*, 834 S.W.2d 182 (Ky.App. 1992).

2. Error in trial court sustaining objections to cross-examination of witness could not be a basis for reversal where the appellant failed to request an avowal. *Jones v. Commonwealth*, 833 S.W.2d 839 (Ky. 1992).

3. KRE 103(b) says that the court "may" direct that an offer of proof be in question and answer form. While this suggests that a narrative may be sufficient, the safest practice would be to make a question and answer avowal unless the court orders otherwise. Also, see *FB Ins. Co. v. Jones*, 864 S.W.2d 926, 929 (Ky.App. 1993), where the court said that statements by counsel in that case were not sufficient to constitute a proper avowal and counsel also failed to explain why the proposed testimony was not cumulative, after the trial court had ruled the witness testimony would be cumulative.

VIII. MOTION - DIRECTED VERDICT

1. *Kimbrough v. Commonwealth*, 550 S.W.2d 525 (Ky. 1977); *Queen v. Commonwealth*, 551 S.W.2d 239 (Ky. 1977).

You must make a motion for a directed verdict at the close of the prosecution's case and at the close of the defense's case in order to properly preserve an issue as to the sufficiency of the evidence for appellate review. If either or both parties offer rebuttal evidence, an additional motion for a directed verdict should be made as a safeguard at the close of such proof.

You must object to the given instructions in order to preserve an issue as to sufficiency of evidence for appellate review.

General motions for directed verdicts on all counts of the indictment are insufficient to apprise the trial court of the precise nature of the objection. *Seay v. Commonwealth*, 609 S.W.2d 128, 130 (Ky. 1980).

NOTE: If defendant's evidence fills in gap in prosecution's case, then defendant is not entitled to directed verdict. *Heflin v. Commonwealth*, 689 S.W.2d 621 (Ky.App. 1985); *Cutrer v. Commonwealth*, 697 S.W.2d 156 (Ky.App. 1985).

2. In *Dyer v. Commonwealth*, 816 S.W.2d 647 (Ky. 1991), the court said that it was not necessary to make a DV motion at the close of all evidence if one was made at the close of the Commonwealth's case and no new defense evidence cured the defect in the Commonwealth's evidence. It is best to **IGNORE THIS CASE**.

3. **Directed Verdict Test** - In *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991), the court explained that *Sawhill v. Commonwealth*, 660 S.W.2d 3 (Ky. 1983) is a trial court test for DV and *Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky. 1977) is an appellate test. See also *Clay*

v. Commonwealth, 867 S.W.2d 200 (Ky. App. 1993). [Also, keep in mind the federal constitutional test: *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)]. But see *Commonwealth v. Jones*, 880 S.W.2d 544 (Ky. 1994), declaring that a verdict must be upheld if there is "substantial evidence to support it."

IX. INSTRUCTIONS

1. **RCr 9.54(2)** [Amended September 1, 1993] states:

> (2) No party may assign as error the giving or the failure to give an instruction unless the party's position has been fairly and adequately presented to the trial judge by an offered instruction or by motion, or unless the party makes objection before the court instructs the jury, stating specifically the matter to which the party objects and the ground or grounds of the objection.

NOTE: This portion of the rule is now almost identical to CR 51(3), giving a party three separate ways to preserve an instruction issue.

2. **Right to Lesser Included Offense Instructions** - *Ward v. Commonwealth*, 695 S.W.2d 404, 406 (Ky. 1985); *Trimble v. Commonwealth*, 447 S.W.2d 348 (Ky. 1969); *Martin v. Commonwealth*, 571 S.W.2d 613 (Ky. 1978); *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977).

NOTE: Also argue LIO INS. required as part of right to present a defense under 6th and 14th Amendments to United States Constitution and Section 11 of Kentucky Constitution.

3. **Entitled to Instructions on D's Theory of Case** - *Sanborn v. Commonwealth*, 754 S.W.2d 534, 549-550 (Ky. 1988); *Kohler v. Commonwealth*, 492 S.W.2d 198 (Ky. 1973); *Rudolph v. Commonwealth*, 504 S.W.2d 340 (Ky. 1974). See also *Hayes v. Commonwealth*, 870 S.W.2d 786, 788 (Ky. 1993), where the court explained that when the defendant admits the facts constituting the offense, but relies on an affirmative defense, "such defendant is entitled to a concrete or definite and specific instruction on the defendant's theory of the case."

4. **Entitled to Instructions on Alternative or Inconsistent Theories of Defense** - *Pace v. Commonwealth*, 561 S.W.2d 664, 667 (Ky. 1978); *Mishler v. Commonwealth*, 556 S.W.2d 676 (Ky. 1977).

5. **Instructions Protecting Right to Unanimous Verdict** - *Wells v. Commonwealth*, 561 S.W.2d 85 (Ky. 1978); *Boulder v. Commonwealth*, 610 S.W.2d 615 (Ky. 1980); *Hayes v. Commonwealth*, 625 S.W.2d 583 (Ky. 1981).

NOTE: Defendant entitled to majority verdict under 6th Amendment - *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

6. **Preserving Error** - Tendering an instruction and arguing to the court in support of the instruction is not sufficient to preserve the objection. A party must specifically object to the instructions given by the court before the court gives those instructions. *Commonwealth v. Collins*, 821 S.W.2d 488 (Ky. 1991). But see recent amendment to RCr 9.54(2)

X. VERDICT OF JURY

If a defect in a verdict is merely formal, the defense must bring the error to the court's attention before the jury is discharged, but if the defect is one of substance, the error may be raised after the jury is discharged such as in a motion for new trial. *Caretenders, Inc. v. Commonwealth*, 821 S.W.2d 83 (Ky. 1991).

XI. SENTENCING

1. **Preservation of Sentencing Error** - Error which occurs at sentencing can be addressed by a motion to alter, amend or vacate a judgment under CR 59.05 which is applicable to criminal cases. *Crane v. Commonwealth*, 833 S.W.2d 813, 819 (Ky. 1992). In *Crane*, the Supreme Court suggested that a motion to recuse the trial judge based on comments made prior to sentencing should have been raised in a CR 59.05 motion.

2. **Jurisdictional Error** - The *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985) rule that "sentencing is jurisdictional...[and] cannot be waived by failure to object" does not apply to procedural errors which must be objected to in the trial court. *Montgomery v. Commonwealth*, 819 S.W.2d 713 (Ky. 1991). [Whether a jury must fix a sentence on the underlying offense before fixing an enhanced sentence for PFO is procedural]. See also *Hughes v. Commonwealth*, 875 S.W.2d 99 (Ky. 1994). Appeal of sentencing error can be taken after plea of guilty.

3. **Concurrent/Consecutive Sentences** - An instruction allowing the jury to recommend concurrent or consecutive sentences [KRS 532.055] must give the jury the option of recommending that some sentences be served concurrently and some consecutively, not all or nothing.

Stoker v. Commonwealth, 828 S.W.2d 619 (Ky. 1992).

4. **Truth-In-Sentencing** - Proof of Prior Convictions - Prior convictions, including prior misdemeanor convictions, can be attacked in the same manner as prior convictions used for PFO purposes. *Parke v. Raley*, 506 U.S. ___, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) and *Dunn v. Commonwealth*, 703 S.W.2d 874 (Ky. 1986) apply to misdemeanor convictions. See *McGinnis v. Commonwealth*, 875 S.W.2d 518 (Ky. 1994).

XII. CUMULATIVE ERROR

In *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky. 1992) and prior cases, the Supreme Court has recognized that cumulative error may be a ground for reversal even if each individual error is not sufficient to require reversal. In *Funk*, the court found that the cumulative effect of prejudice from three trial errors was sufficient to require reversal. You may want to make a cumulative error argument at the close of the Commonwealth's case, close of all evidence, in a motion for new trial, or at any other logical point.

XIII. Constitutional Grounds for Objections

If you cite particular constitutional provisions, be careful that you don't leave one out. Don't forget the state constitution. See the table that follows.

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RESOURCES:

Kentucky Practice Library, Trial Handbook for Kentucky Lawyers, Second Edition, Thomas L. Osborne, Lawyers Cooperative Publishing Company (1992).

Trial Practice Series, The Law, Art, and Science of Selecting a Jury, Second Edition, James J. Gobert, Walter E. Jordan, McGraw Hill (1990).

VOIR DIRE CAUSE CHECKLIST

Here is a checklist with the necessary steps to preserve error due to the trial court's denial of a defense challenge for cause to a prospective juror:

1. The voir dire of the prospective jurors must be recorded and transcribed or videotaped and designated as part of the record on appeal.
2. The defense attorney must assert a clear and specific challenge for cause to the prospective juror and must clearly articulate the grounds for the challenge. State the name of the person you are challenging especially if your trial record will be on videotape.
3. After a challenge for cause is denied by the trial court, you must decide whether to use a peremptory on the prospective juror.
4. You must use all your peremptory challenges.
5. You should ask the trial court for additional peremptory challenges.
6. Be sure the juror strike sheets are made part of the record on appeal.
7. State clearly for the record that you had to use a peremptory on a specific juror who should have been stricken for cause. Make this statement for each prospective juror you challenged for cause and then re-moved with a peremptory. Clearly state that you used all your peremptories. Then clearly state the names of the prospective jurors you would have used a peremptory on if you had not had to use your peremptories to remove persons who should have been removed for cause.
8. State clearly for the record the names of those jurors who are actually selected to sit on the jury that are objectionable to you. This statement should be made at the time the trial court identifies the final twelve jurors (plus any alternates) but prior to their being sworn.

Rights Protected	Federal Constitutional Amendment	Kentucky Constitution Section	Kentucky Cases on State Constitutional Right
Search & Seizure	4th	10	*Holbrook v. Knopf*, 847 S.W.2d 52 (Ky. 1993)
Self-Incrimination	5th	11	*Jones v. Commonwealth*, 303 Ky. 666, 198 S.W.2d 969 (1947); *Mace v. Morris*, 851 S.W.2d 457 (Ky. 1993)
Grand Jury Indictment	5th	12	*King v. City of Pineville*, 299 S.W. 1082 (Ky. 1927)
Double Jeopardy	5th	13	*Ingram v. Commonwealth*, 801 S.W.2d 321 (Ky. 1990)
Due Process (Invoked in federal cases by the 5th & in the state cases by the 14th)	5th, 14th	2, 3, 10, 11	*Commonwealth v. Raines*, 847 S.W.2d 724 (Ky. 1993); *Kentucky Milk Marketing v. Kroger, Co.*, 691 S.W.2d 893 (Ky. 1985)
Equal Protection	5th, 14th	1, 2, 3	*Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446 (Ky. 1994); *Commonwealth, Revenue Cabinet v. Smith*, 875 S.W.2d 873 (Ky. 1994)
Speedy Trial	6th	11	*Hayes v. Ropke*, 416 S.W.2d 349 (Ky. 1967)
Public Trial	6th	11	*Lexington Herald-Leader Co. v. Meigs*, 660 S.W.2d 658 (Ky. 1983)
Jury	6th	7, 11	*Donta v. Commonwealth*, 858 S.W.2d 719 (Ky.App. 1993); *Whitler v. Commonwealth*, 810 S.W.2d 505 (Ky. 1991)
Informed of Nature of Accusation	6th	11	*Carter v. Commonwealth*, 404 S.W.2d 461 (Ky. 1966)
Confrontation & Cross-Examination	6th	11	*Bell v. Commonwealth*, 875 S.W.2d 882, 888 (Ky. 1994)
Compulsory Process	6th	11	*Ross v. Commonwealth*, 577 S.W.2d 6 (Ky.App. 1977)
Effective Counsel (& Right to Counsel)	6th	11	*Ivey v. Commonwealth*, 655 S.W.2d 506 (Ky.App. 1969)
Bail	8th	2, 16, 17	*Marcum v. Broughton*, 442 S.W.2d 307 (Ky. 1969)
Cruel & Unusual Punishment	8th	2, 17	*Sizemore v. Commonwealth*, 485 S.W.2d 498, 500 (Ky. 1972); *Cornelison v. Commonwealth*, 2 S.W. 235, 242 (1886)
Present a Defense	6th, 14th	11	*Barnett v. Commonwealth*, 838 S.W.2d 361 (Ky. 1992)
Prohibition Against *Ex Post Facto* Laws	Art. I, Sec. 10	19	*Morse v. Alley*, 638 S.W.2d 284 (Ky.App. 1982)
Freedom of Speech	1st	8	*Musselman v. Commonwealth*, 705 S.W.2d 476 (Ky. 1986)
Privacy	5th, 14th	1, 2, 3	*Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992)
Right of Appeal	None	115	*Revenue Cabinet v. Barbour*, 836 S.W.2d 418 (Ky.App. 1992); *Stahl v. Commonwealth*, 613 S.W.2d 617 (Ky. 1981)
Unanimous Verdict	None	7	*Hayes v. Commonwealth*, 625 S.W.2d 583 (Ky. 1981)

Components of an Objection

Perhaps the most frequently used weapon of a trial lawyer is the mundane and ostensibly simplistic procedural device of the oral objection. As a procedure the verbal objection freezes the trial or hearing in a state of suspended animation, propels the objector to center stage to be heard, provides a vehicle by which the objector can persuade the trial judge that the objection should be sustained and appropriate curative relief granted, and insures that a reviewing court will understand exactly what the overruling of the objection and/or the requested relief did to prejudice the accused's right to a fair trial. To appreciate the functions of the trial objection, one must dissect the objection and analyze its anatomy.

Reduced to a basic structure, the eleven components of an objection are:

1. **HAIL.** The word, phrase or sentence used to interrupt the proceedings and to secure an opportunity to speak on the record. Examples of effective hails include: May I approach the bench? May I be heard? May the defense be heard? Objection! The defense objects!

2. **OBJECTION.** A phrase or sentence which immediately notifies the court and your adversary that you object and identifies exactly what question, answer, tactic, conduct or occurrence you believe is objectionable. For example: Object to the question. Objection, the witness's answer is replete with inadmissible hearsay. The defense objects to the prosecutor's characterization of the defendant as "pond scum."

3. **GROUNDS.** A statement of the legal basis, whether statutory, decisional, procedural or constitutional, for your objection. Kentucky only requires a statement of "the specific grounds" of an objection "upon request of court...if the specific ground was not apparent from the context." KRE 103(a)(1). Nevertheless, explaining the grounds for the objection is often necessary to persuade the trial court and to insure that the record on appeal clearly states the defense position.

4. **PREJUDICE.** A description of how the objectionable matter will adversely impact on your client's "substantial rights" [KRE 103(a)] with specific references to the unique circumstances of your individual case. Example: If the prosecution is allowed to introduce evidence of my client's membership in a gang, the jury will infer from that information that: (1) he has committed prior "uncharged misconduct" with the gang; (2) his character is bad and is compatible with the commission of the charged violent crimes; (3) he is unbelievable as a witness due to his gang loyalties; (4) he is a member of an ongoing criminal conspiracy run by the gang; and (5) he condones and in fact encourages violent and lawless conduct. This ruling will allow the prosecution to suggest without any proof that the defendant has a prior record, has a flawed character, has been impeached as a witness, is involved in yet undiscovered ongoing crimes, and by his lifestyle explicitly rejects any semblance of law and order in the community.

5. **CONSTITUTIONALIZATION.** Identification of the federal and state constitutional provisions which will be violated by the objectionable evidence, tactic, conduct or occurrence. Example: The prosecutor's question is intended to elicit inadmissible hearsay and the introduction of that evidence will violate the accused's rights of confrontation and cross-examination as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Section 11 of the Kentucky Constitution.

6. **REQUEST FOR RULING.** Having voiced an objection, counsel must request that the trial court either sustain or overrule the objection. Examples: Your Honor, the defense requires a ruling on its objection. The defense objection is still pending and requires a ruling by you before the trial [hearing] can proceed.

7. **RULING.** "[I]f an objection is made, the party, making the objection, must insist that the trial court rule on the objection, or else it is waived." *Bell v. Commonwealth*, Ky., 473 S.W.2d 820, 821 (1971); *Harris v. Commonwealth*, Ky., 342 S.W.2d 535, 539 (1961).

8. **REQUEST FOR RELIEF.** When a defense counsel merely objects to an error, such as improper evidence being presented to the jury, without requesting any relief, the trial court's sustaining of the objection affords the defense as much relief as is requested. *See Wheeler v. Commonwealth*, Ky., 472 S.W.2d 254, 256 (1971). Normally the requested relief should begin with the greatest relief available, such as dismissal of the charges or mistrial. If the trial court denies that level of relief, then defense counsel should request a lesser degree of relief, such as an admonition to the jury. Defense counsel should note on the record that the defense request for the lesser relief does not waive the original request for the more substantial relief.

9. **REQUEST FOR RULING ON RELIEF.** Having sought a specific form of relief, counsel must request that the trial court either grant or deny, on the record, that form of relief.

10. **RULING ON RELIEF.** Here again a failure of counsel to insist that the trial judge either grant or deny the requested relief will undoubtedly waive the issue of whether the defense was entitled to the specific relief requested.

11. **RENEWAL.** Even though an objection was previously overruled by the trial judge, defense counsel should renew the objection at every subsequent point in the proceedings where the challenged evidence is reiterated or discussed. Example: The defense renews its prior objection to the admission of this evidence and moves this Court to reconsider its prior ruling holding this evidence admissible.

Once the component parts of the oral objection are known and appreciated, a trial lawyer is able to fashion those separate parts into a procedural device with offensive and defensive capabilities which can pierce the adversary's suspect proof or shield the defense case from the adversary's improper or illegal tactics. The often overlooked vehicle of the oral objection is a complex tool which should be artfully employed initially to persuade the trial court to rule in the objector's favor or, failing that, to preserve the trial court's error.

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Need Quick Answers or Advice?

The staff of the Department of Public Advocacy will provide quick answers and immediate advice about any legal issues which may arise in your criminal defense practice. Due to time restraints this will not be a research service. It is intended to allow you quick access to the wealth of knowledge that DPA staff has acquired over the years. If your specific issue is not delineated below, please find the nearest relevant issue, then contact the person listed. An answer to almost any question is just a phone call away at (502) 564-8006. If you have an expertise that you would like to add to this list and be available to answer questions, please let us know.

A

Alternative Sentencing - Norat, Hubbard*, Bridges*, Durham*, Wilder*, West
Appeals, video - Riddell*, Case, Namkin
Appellate procedure - Marshall, Riddell*, Case
Arrest, general - Lewis*
Arrest, at home - Lewis*
Arrest, probable cause - West, Lewis*
Arson - Williams
Attorney Fees in indigent cases - Monahan, Connelly

B

Batson - Aprile
Battered Women Syndrome - Mirkin, Campbell*
Belated appeals - Connelly, Riddell*, Case, Myers*, Hubbard*, Hartell*
Brady - Tustaniwsky

C

Caselaw, recent KY/U.S.- West, Aprile, Namkin, Connelly
Case Review Process, Trial - Lewis*, Aprile
Case Review Process, Appeal - Aprile
Civil rules - Niehaus*
Collateral attacks (11.42/60.02) - Connelly, Thomas, Myers*, Hubbard*, West
Comment on silence (*Doyle*) - Marshall, Case
Competency to stand trial - McDaniel, Boyce, Gleason, Williams, Allison
Competency to waive insanity defense - Boyce
Conditional pleas - Allison
Confessions, Anti-Sweating Act - Allison
Confessions, involuntary - Riddell*, Namkin
Confessions, juveniles - DiLoreto
Confessions, *Miranda* - Riddell*, Namkin
Conflicts - Aprile
Conspiracy - Marshall
Contempt of court - Aprile, Connelly, Simpson
Continuance - Williams, Mirkin, Gleason, Spicer*
Controlled substances - Riddell*, Campbell*, Marshall
Counsel, conflict of interest - West, Aprile, Connelly
Counsel, right to - West, Connelly, Namkin
Criminal facilitation - Allison
Criminal rules - Niehaus*
Criminal syndicate - West

D

DNA - Marshall
Death Penalty--Appeal - Boyce, DiLoreto
Death Penalty--Federal Post-Conviction - Wheeler, Monahan
Death Penalty, Library - Word
Death Penalty--National Death Penalty Information Bank - Pearson
Death Penalty investigation and mitigation - Brown
Death Penalty--Motions - Gleason
Death Penalty--Plea Negotiations - Gleason, Williams
Death Penalty--Racial discrimination - Williams, Gleason
Death Penalty--Trial - Boyce, McDaniel, Lewis*, Gleason, Williams, Mirkin, Aprile, DiLoreto, Tustaniwsky
Death Penalty--Voir dire - Williams, Gleason, Lewis*
Death Penalty--Victim impact - Williams, Gleason
Defense, right to present - Marshall, Gleason, Williams
Detainers/I.A.D. - Connelly, West, Hubbard*, Case, Aldridge*, Norat, Eddy*, Gafford*, Simpson
Disability - P & A
Discovery - Gleason, Williams, Tustaniwsky
District court - DiLoreto, Riley*, Campbell*, Eucker
Double jeopardy - Marshall, Sexton
DUI - Williams, Riley*, Eucker

E

Entrapment - Connelly
Ethics - Aprile, Monahan
Evidence, admissibility - McDaniel, Niehaus*
Evidence, character - West, Niehaus*, Simpson
Evidence, co-defendant's guilt - Marshall, Niehaus*
Evidence, flight/escape - West, Niehaus*
Evidence, hearsay - West, Niehaus*, Simpson, Campbell*, Namkin
Evidence, opinion - Niehaus*, Marshall, McDaniel, Campbell*
Evidence, other crimes/prior misconduct - Allison, Mirkin, Niehaus*, Simpson, Campbell*
Evidence, prior sexual conduct - Allison, Niehaus*, Campbell*
Evidence, sufficiency - West, Marshall, Niehaus*, Campbell*
Evidence, tampering with - Aprile, Niehaus*
Exculpatory info/*Brady* - Tustaniwsky
Ex Post Facto - West, Myers*
Expert Witnesses, funds for - Monahan, Boyce, Tustaniwsky, Mirkin, Williams, Gleason
Expert Witness Directory - Ransdell
Extradition - Connelly, Gafford*
Extraordinary Writs - Riddell*, Connelly, Aprile, West
Extreme Emotional Disturbance - McDaniel, Monahan, Tustaniwsky, Gleason, Williams, DiLoreto, Case
Eyewitness identification - McDaniel

F

Federal Habeas Corpus - Wheeler
Federal Habeas Corpus, cause/prejudice - Wheeler, West
Federal Habeas Corpus, exhaustion - Riddell*, Wheeler
Federal Habeas Corpus, hearings - Riddell*
Firearms issues - Eucker
Forensic evidence - Boyce,
Forensic pathology - Mirkin, Eucker
Forfeiture - Campbell*

G

Genograms - Word
Grand Jury - Gleason, Williams, Mirkin
Guilty pleas, constitutional validity - Connelly, Hubbard*, Simpson
Guilty pleas, withdrawal - Connelly, Simpson

H

Habeas corpus, state - Connelly, Thomas, Gafford*, Myers*, Hubbard*, West

I

Impeachment, bias/hostility/interest - Namkin
Ineffective Assistance - Wheeler, Eddy*, Myers*, Hubbard*, Hartell*, Williams, Tustaniwsky
***In forma pauperis*, denial review** - Riddell*, Hubbard*
Informants, confidential - Halstead*, Cox*, Gleason, Williams
Informants, prison - Mirkin
Instructions, capital - Boyce, Williams, Gleason, Tustaniwsky
Instructions manual - Throckmorton
Investigations, advice - Harp
Investigations manual - Stewart
Involuntary commitments - Allison, Halstead*

J

Jail Credits - Thomas, Connelly, Aldridge*, Hubbard*, Hartell*, Grigsby*, West
***Jett* testimony** - Namkin
Juror, challenges for cause - Tustaniwsky, Allison, Namkin
Juror misconduct - Riddell*, Namkin
Juror testimony re verdict - Monahan
Jury panel challenges - Boyce, Tustaniwsky
Juvenile transfer - DiLoreto, Craig

K

Kentucky Revised Statutes - Niehaus*
Kidnapping exemption - Marshall, DiLoreto

L

Lesser included offenses, instructions - Marshall, Campbell*
Library Training Materials - Throckmorton
Lineup/showup/photo display - Marshall, West

M

Malpractice Insurance - Aprile
Media, speaking to - Monahan, Aprile
Mental illness - P & A
Mental retardation - Allison, P & A, Williams, Gleason
Miranda - Riddell*
Motion File - Throckmorton
Motion practice - DiLoreto, Case

N

Notice of Appeal - Riddell*, Case

O

Offenses, single vs. multiple - Allison
Oral argument, appellate - Boyce, Monahan, Marshall, Allison

P

Pardons and commutations - Norat
Parole - Norat, Connelly, Eddy*, Myers*, Hubbard*, Grigsby*
PFO proceedings - McDaniel, Myers*
Possession, what constitutes - Allison, Norat, Marshall
Post-Conviction Manuals - Pearson
Post Traumatic Stress Disorders - DiLoreto
Preemptories, improper use of - Riddell*
Preservation for appeal - Namkin, Allison, DiLoreto
Presumptions - Marshall
Prior offenses/enhancement - Thomas
Prisons - Norat, Connelly, Case, Hubbard*, Grigsby*, West
Private Prosecutor - Spicer*
Privilege, husband/wife - Riddell*
Privilege, psychiatrist/patient - Allison
Prosecutorial misconduct, arguments to jury - Tustaniwsky, Aprile, Gleason, Williams, Namkin
Prosecutorial vindictiveness - Marshall, Aprile, Connelly

R

Rape Shield Law - McDaniel, Connelly
Records, lost - Namkin
Records, obtaining - Thomas
Recusal, judge - Monahan, Aprile, Gleason, Williams
Recusal, prosecutor - Aprile
Reinstated appeals - Case
Retroactivity - Wheeler, Aprile

S

Sanctions, Appellate - Riddell*, Marshall, Aprile, Namkin
Sanctions, Trial - Monahan, Aprile
Search and Seizure - Lewis*, Riddell*, West
Self-Protection - Riddell*, DiLoreto, Simpson
Sentence calculations - Grigsby*
Sentencing alternatives - Norat, Aldridge*, Hubbard*
Sentencing, delay in - Riddell*
Separate trials, co-defendants - Allison, DiLoreto, Namkin
Separate trials, counts - Riddell*, West, DiLoreto
Sexual Abuse-legal defense & strategies - Aprile, Williams, Lewis*, Spicer*, Eucker
Sexual Abuse Syndrome - Marshall, Williams
Sex offender treatment - Case, Myers*, Allison
Sexual offenses, mistake as to age - Riddell*
Shock probation - Connelly, West, Hubbard*, Hartell*, Case, Eucker
Speedy trial - West, McDaniel, Connelly, Spicer*
State Constitution - DiLoreto, Mirkin, Heft*, Niehaus*
State crime lab, use of - Monahan
Statutory construction - Niehaus*

T

Timelines - Word
Truth in sentencing - Mirkin, Gibbs*
Truth tactics - Connelly

U

U.S. Supreme Court Cases--Capital - Pearson

V

Vehicular homicide - Marshall
Venue (change of) - Monahan, Boyce, Tustaniwsky, Gleason, Williams, McDaniel
Venue Surveys - Curtis
Victim Impact Issues - Tustaniwsky
Video Production - Burkhead*
Video Re-enactments - Burkhead*, Simpson
Viet Nam Vets - Gleason

W

Waiver, counsel - Riddell*, Campbell*, Namkin
Waiver, effect of mental retardation - Allison
Waiver, jury trial - Riddell*, Namkin
Westlaw and C.I.T.E. - Pearson
Wiretap - West
Witness, bias - Wheeler
Witness, competency - Marshall
Witnesses, obtaining (out-of-state) - Monahan, Wheeler, Spicer*
Writs, mandamus/prohibition -Boyce, Riddell*, Aprile, Connelly

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(Except, see asterisks below)
Allison, Marie
Connelly, Allison
Aprile, Vince
Brown, Cris
Boyce, Donna
Case, Margaret
Craig, Wendy
Curtis, Bill
DiLoreto, Rebecca
Eucker, Dave
Gleason, Kelly
Marshall, Larry
McDaniel, Rodney
Mirkin, Steve
Monahan, Ed
Namkin, Julie
Norat, Dave
Pearson, Julia
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Ransdell, Tom
Simpson, Bobby
Stewart, Dave
Thomas, Marguerite
Throckmorton, Brian
Tustaniwsky, Oleh
West, Linda
Wheeler, Randy
Williams, Mike
Word, Jennifer

*See List Below

Aldridge, Lynn (502) 388-9755
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Gibbs, Roger (606) 878-8042
Grigsby, Laurie (606) 236-9012
Halstead, John (606) 236-9012
Hartell, Becky (502) 222-9441
Heft, Frank (502) 574-3800
Hubbard, Bob (502) 222-9441
Lewis, Ernie (606) 623-8413
Myers, Joe (502) 222-9441
Niehaus, David (502) 574-3800
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Riley, Rob (502) 222-7712
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Spicer, Bill (606) 663-2844
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Obtaining, Paying For, and Admitting Medical Records

Your client's medical records are needed during your investigation of the case, or to admit at trial. How do you get the money to obtain these records?

Indigent Defendant Resource Fund: KRS Chapter 31

Under KRS 31.185 and KRS 31.200 you can request your judge to order funds from the *Indigent Defendant Resource Fund*, and the judge is required to do that if it is a "cost...that is necessarily incurred in representing a needy person under" KRS Chapter 31.

There are other potential ways to obtain the materials.

Health Care Reform Act Process: No Charge to Patient

Free on Written Request of Patient. As a result of the 1994 Kentucky Health Care Reform Act (HB 250) a *patient* can obtain a *free* copy of his own medical records if requested in *writing*.

KRS 422.317, titled: "Copy of patient's medical record to be supplied on patient's written request," states, "Upon a patient's written request, a hospital licensed under KRS Chapter 216B or a health care provider shall provide, without charge to the patient, a copy of the patient's medical record. A copying fee, not to exceed one dollar ($1) per page, may be charged by the health care provider for furnishing a second copy of the patient's medical record upon request either by the patient or the patient's attorney or the patient's authorized representative." This statute became effective July 15, 1994.

Health Care Provider. A health care provider is defined by KRS 216.2901(3) as "any facility and service required to be licensed pursuant to KRS Chapter 216B, pharmacist as defined pursuant to KRS Chapter 315, and any of the following independent practicing practitioners: (a) Physicians, osteopaths, and podiatrists licensed pursuant to KRS Chapter 311; (b) Chiropractors licensed pursuant to KRS Chapter 312; (c) Dentists licensed

pursuant to KRS Chapter 313; (d) Optometrists licensed pursuant to KRS Chapter 320; (e) Physician assistants regulated pursuant to KRS Chapter 311; (f) Nurse practitioners licensed pursuant to KRS Chapter 314; and (g) Other health care practitioners as determined by the board by administrative regulation promulgated pursuant to KRS Chapter 13A."

Health Facility. A health facility is defined by KRS 216B.015(10) as "any institution, place, building, agency, or portion thereof, public or private, whether organized for profit or not, used, operated, or designed to provide medical diagnosis, treatment, nursing, rehabilitative, or preventive care and includes alcohol abuse, drug abuse, and mental health services. This shall include, but shall not be limited to, health facilities and health services commonly referred to as hospitals, psychiatric hospitals, physical rehabilitation hospitals, chemical dependency programs, tuberculosis hospitals, skilled nursing facilities, nursing facilities, nursing homes, personal care homes, intermediate care facilities, family care homes, primary care centers, rural health clinics, outpatient clinics, ambulatory care facilities, ambulatory surgical centers, emergency care centers and services, ambulance services, nonemergency health transportation services, hospices, community mental health and mental retardation centers, home health agencies, kidney disease treatment centers and freestanding hemodialysis units, health maintenance organizations, and others providing similarly organized services regardless of nomenclature."

Health Services. Health services is defined by KRS 216B.015(11) as "clinically related services provided within the Commonwealth to two(2) or more persons, including, but not limited to, diagnostic, treatment, or rehabilitative services, and includes alcohol, drug abuse, and mental health services." *See Medical Personnel v. Management Registry*, 869 S.W.2d 42 (Ky.App. 1994) for an example of the interpretation of this statute.

Authenticity & Admissibility

Certified. If the facility is a hospital, the letter your client writes to obtain his records or the letter you write for his signature, could request that the records be certified under KRS 422.300, 422.305, entitled "subpoena of records - certification of copies - personal delivery." *See* KRE 901(10); 902(11); 803(6); 803(7).

There may be a practical incentive for the hospital with the medical records to add the certification to avoid having their personnel to spend time duplicating the records again or being personally subpoenaed under KRS 422.310, which however gives the hospital the upper hand in that it can avoid personal attendance by supplying the certified copies. If the records are to be certified for court use, the hospital is also able to demand payment of "actual and reasonable expenses of duplication," unless "otherwise ordered by the court...." Significantly, the procedures of KRS 422.300-310 only apply to hospitals. *Bell v. Commonwealth*, 875 S.W.2d 882, 886-87 (Ky. 1994).

Authenticity. It should also be noted that this statute only aids the *authenticity* hurdle, not the *admissibility* hurdle. *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503, 508 (Ky. 1989).

If this is not successful and the medical records are needed as evidence in the case, the prosecutor may agree to their authenticity without the certification, *see e.g., Phipps v. Winxler*, 715 S.W.2d 893, 894 (Ky.App. 1986), or the records may be able to be authenticated through your testifying expert. KRS 901(b)(1); Lawson, *The Kentucky Evidence Law Handbook*, (3d Ed. 1993) §705(I).

Authentication requires "preliminary proof of two things: (1) the pertinence of the proposed evidence to the litigation, and (2) that a document is what its proponent claims it to be." *Bell v. Commonwealth*, 875 S.W.2d 882, 886 (Ky. 1994).

Admissibility. Authenticity is only half the battle. *See, Phipps, supra* at 895. ("A simple agreement to relive a medical records librarian from attending court to 'polly parrot' what is contained in the medical records cannot be automatically translated as an agreement to admit evidence which would otherwise be inadmissible under the circumstances.")

The records must also be admissible, a significant process in itself. *See, e.g., Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990); *Hellstrom v. Commonwealth*, 825 S.W.2d 612 (Ky. 1992); *Young, supra*, at 508-509.

Constitutional Ramifications. When the prosecutor attempts to introduce medical records which have authenticity or admissibility problems, there are constitutional dimensions of confrontation involved. *See, e.g., Bell, supra* at 888; Section 11 of the Kentucky Constitution and the 6th Amendment to the United States Constitution.

See also D. Scott Furkia, *You're Not Smart if You're Still Paying for Copies of Medical Records*, the Kentucky Association of Trial Attorneys, *The Advocate*, (Sept/Oct 1994) at 8.

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Some Think Free Medical Records May Attract Suits

This is an article from the Lexington Herald-Leader, November 25, 1994 by Jim Warren.

A little-known consumer protection provision in Kentucky's health-care reform law might be helping lawyers who are contemplating filing medical malpractice lawsuits, some critics contend.

The director of the Kentucky Association of Trial Attorneys says that's true, but that it actually might result in fewer lawsuits.

The issue revolves around a provision that allows all patients in Kentucky to request and receive one free copy of their medical records from a health-care provider.

Lawmakers put the clause in the reform law last winter after several hearings at which consumers complained of problems in getting access to their health records.

Officials at the Kentucky Hospital Association say requests for medical records have gone up somewhat since the record law went into effect July 15, but that most requests are coming, not from patients, but from lawyers.

Nancy Galvani, a researcher for the hospital association, said lawyers apparently are requesting the free copies on behalf of patients, then using the records to see whether there are grounds for possible lawsuits against providers.

Expensive Copies

Copies of records can be expensive. Officials say that in the past patients paid 50 cents to $1 a page for records, and the cost could add up rapidly for someone who had been through an extensive treatment that generated many pages of records.

"Patients usually don't ask for copies of their medical records, so the volume never was very high," Galvani said. "What we see now is almost all records are going out free, and most requests are coming from attorneys."

Galvani said the hospital association, which represents Kentucky's acute-care hospitals, had asked the state Legislative Research Commission for a clarification of who is to get free copies of medical records under the law.

Only one Lexington hospital reports any significant increase in requests for medical records in recent weeks.

Dave Riggins, a spokesman for St. Joseph Hospital, said records, requests there have increased by about 25 percent, and most seems to be coming from lawyers.

Meanwhile, Ken Doyle, operates a Louisville company that processes requests for medical records, argues that lawyers are taking advantage of the law.

"Absolutely," said Doyle, whose Best Corp. makes copies of medical records and mails them on request. "The number of requests we're getting from individuals...is absolutely zilch compared to the lawyers using this law to obtain medical records to sue somebody. It's unbelievable." Doyle says most requests come from lawyers who advertise on radio and TV.

The law makes things easier for lawyers considering fling suits, Doyle contends, because they can now obtain free medical records and then look through them for possible violations that might provide grounds for court action.

"I think it's a good idea that patients should have access to the records, but this part of the law probably needs to be fine-tuned," Doyle said. "What amazes me is that one of the objectives of the law was to cut down litigation. But this particular portion does nothing but perpetuate more litigation."

Fewer Lawsuits?

That's not true, says Williams Garmer of Lexington, director of Kentucky Association of Trial Attorneys. Lawyers are using the free medical records provision, Garmer says. But he argues that the result actually could be fewer, not more, lawsuits.

"I think what it does is facilitate people getting their cases investigated," he said. "If someone comes in to your office and says such and such has happened to me, a good lawyer is going to need to look at that person's medical records and see just what happened. The records may show there is not case.

"You have to get copies of the records, and that's an expense for the client. But someone in dire straits may not be anxious to shell out $100 or $200 for records when they know it may not get them anywhere."

Now, with the availability of free records, virtually anyone can get his case investigated by a lawyer, Garmer says.

But with records in hand, lawyers will be more likely to throw out inappropriate cases, rather than going to court based on inadequate information, he said. "Lawyers won't be going off half-cocked," he said.

Garmer said that in his own law office, lawyers accept as cases only about one out of every 30 inquires they receive. When they check medical records, they take about one case out of 10, he said.

"I've often wanted to tell doctors you don't know how much we save you by turning down cases," Garmer said.

State Rep. Ernesto Scorsone, D-Lexington, says he sees no real problem with the medical records situation. Scorsone helped write the reform law.

The records provision was placed in the law to help patients, he said, and patients ultimately will benefit whether the records copies go to them or their attorneys.

Another architect of the law, state Rep. Marshall Long, D-Shelbyville, generally agreed. "I think the hospital association probably is crying wolf a little bit," he said.

The Evidence of a Lifetime: Ignorance is No Excuse

It has become increasingly difficult over the past few years to obtain relief for capital clients in post-conviction proceedings. Courts are insisting on the earliest presentation of facts and legal issues, defaulting claims if there has been a failure at any point in the proceedings. There is also a greater emphasis on the mere **provision** of counsel than on whether counsel has been **effective** under the Sixth Amendment.

But there is one area, the failure to thoroughly investigate a defendant's background for the penalty phase, in which courts continue to grant post-conviction relief, even on ineffective assistance claims, because the issue brings into play a fundamental requirement of effectiveness and the constitutional right of every capital defendant to be considered as an individual during his capital proceedings. *See Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and their progeny. Counsel for a person accused of a capital crime must understand this responsibility, not only to protect himself against claims of ineffective assistance, but also to ensure that his client receives the representation which the Constitution still strongly demands, even in these days of diminished constitutional protections afforded to criminal defendants.

What you don't know *can* hurt your client.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the Supreme Court developed a two-pronged test for determining whether a defendant has been rendered constitutionally ineffective assistance of counsel.

First, counsel's performance must be deficient and below the objective standard of reasonableness.

Second, the deficient performance must be prejudicial, thus depriving the defendant of both a fair trial and a reliable result.

In other words, but for counsel's unprofessional errors, there is a reasonable probability that the verdict would have been different. *Sims v. Livesay*, 970 F.2d. 1575, 1581 (6th Cir. 1992).

It is clear that this reasonable probability can result from even one error by counsel. "[A]n additional safeguard against miscarriages of justice...is the right to effective assistance of counsel, which... may in a particular case be violated by even an isolated error of counsel if that error is sufficiently **egregious and prejudicial**." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986), citing *United States v. Cronic*, 466 U.S. 648, 657, n.20, 104 S.Ct. 2039, 2046, n. 20, 80 L.Ed.2d 657 (1984).

But this one error does not necessarily have to be committed at trial or even on the record. And it can result as much from what counsel does not know as from decisions made on the basis of information possessed.

This is nowhere more true than when counsel fails to investigate the circumstances of the defendant's life as part of his preparation for the penalty phase. Regardless of the job counsel has done during the guilt phase or in the remainder of the penalty phase, courts consistently have been critical of the competence of counsel who does little or no exploration into a defendant's background and, therefore, misses evidence which could have persuaded the jury that his client did not deserve to die.

Know your client inside and out.

The American Bar Assocation (ABA) Standards for Criminal Justice note:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case **and the penalty in the event of conviction**. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty. Standard 4-4.1, at 4-53 (2d. ed. Supp. 1986) (emphasis added).

See below Sims v. Livesay, *supra*, at 1580, n.1. In a capital case this means defense counsel has:

> a duty to investigate the client's life history, and emotional and psychological make-up, as well as the substantive case and defenses. There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings. The affirmative case for sparing the defendant's life will be composed in part of information uncovered in the course of this investigation. The importance of this investigation, and the thoroughness and care with which it is conducted, cannot be overemphasized. Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 323-24 (1983).

This "requires literally hundreds of hours of the attorney's time and requires the attorney's utmost attention and ability." *State v. Wigley*, 624 So.2d 425, 430 (La. 1993) (Dennis, J., concurring).

The ABA has stated that a capital case "requires extensive and generally unparalleled investigation into personal and family history." See American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, at 43, 49, 50 (October 1989).

Cases abound which hold that counsel's failure to investigate mitigating evidence is ineffective under the Sixth Amendment. *See, e.g., Harris v. Blodgett*, 853 F.Supp. 1239 (W.D. Wash. 1994) (troubled childhood, well documented mental and emotional disorders); *Loyd v. Whitley*, 977 F.2d 149 (5th Cir. 1992)

(brain damage, child abuse, substance abuse); *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992) (no family witnesses); *Buenoano v. Singletary*, 963 F.2d 1433 (11th Cir. 1992) (poverty, foster homes, childhood abuse, mental health problems, brain damage, head trauma); *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987) (poverty, poor living conditions in childhood, lack of childhood supervision, poor school attendance, seizures, brain damage, non-violent history, etc.); *Kenley v. Armontrout*, 937 F.2d 1298 (8th Cir. 1991) (brain damage, alcoholism); *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991) (difficult childhood, medical difficulties at birth, treatment for mental health problems, problems in the Army, brain damage, depressive tendencies).

Some is Not Enough.

A minimal effort at presenting some mitigation, even mitigation which the jury should rightly hear, is not effective if there has been little or no effort to investigate other significant evidence. Full exploration of the defendant's life history goes to very heart of the constitutional requirement for individualized sentencing. The Supreme Court has indicated that this principle requires the presentation of **any** evidence about the defendant that might support a sentence less than death, not simply evidence which goes to his moral culpability. *See Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). This includes evidence beyond just that which will prove statutory mitigation. *See Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct.1821, 95 L.Ed.2d 347 (1987).

In *King v. Strickland*, 714 F.2d 1481 (11th Cir. 1983), the Eleventh Circuit found ineffective assistance where counsel "presented some mitigating evidence," but "neglected to present other available evidence." *Id.* at 1490. *See Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991) (only character witnesses presented); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991) (only character witnesses presented, no evidence of head trauma, mental retardation, socioeconomic background and good work reputation); *Mauldin v. Wainwright*, 723 F.2d 799 (11th Cir. 1984) ("superficial" investigation and "cursory" presentation not enough in light of available records of hospitalization for alcoholism and failure of attorney to explore the defendant's past with family members).

Strategy Decisions Must be Fully Informed.

Although the Supreme Court has stated that strategic decisions of counsel will usually not be disturbed, strategy must be based on an intelligent choice after the consideration of relevant facts. There must be a "reasonable investigation into the alternatives" or the failure to present mitigating evidence "cannot be deemed a strategic decision." *King, supra.* "[F]ailing to interview witnesses or discover mitigating evidence relates to trial preparation and not to trial strategy." *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990).

Furthermore, any strategy resulting from the lack of investigation is not protected by any presumptions in favor of counsel. *Eldridge v. Atkins*, 665 F.2d 228, 235-37 (8th Cir. 1981). Indeed, a lack of investigation into and ignorance of crucial aspects of mitigation preclude any finding that a strategy adopted was reasonable. *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991). The relevant inquiry is whether it was reasonable for counsel to determine not to conduct any investigation under the particular facts of the case. *Kenley v. Armontrout*, 937 F.2d at 1307.

Seek and You Shall Find.

Moreover, it is **counsel's** duty to conduct this investigation and not rely on other sources to provide this evidence. "At the heart of effective representation is the *independent* duty to investigate and prepare." *Weidner v. Wainwright*, 708 F.2d 614, 616 (11th Cir. 1983) (emphasis added), citing *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982).

Counsel has a clear duty to explain to family members the nature of mitigation and to explore with them how they can help. He cannot simply depend on his client's family to provide this information on its own. They likely will not understand what mitigation is and must be educated about what the jury can hear that might spare the defendant's life. Counsel, therefore, has a duty to ask them, with knowledge of what he is looking for, about his client's past. *Mauldin v. Wainwright, supra.*

In *Tyler v. Kemp*, 755 F.2d 741 (11th Cir 1985), trial counsel **did** talk to family members before trial and was told that they did not want to testify. But, counsel never explained to the family what they might be able to testify about in mitigation. Counsel's performance was held to be constitutionally ineffective, because the family could have testified about an abusive relationship and that the defendant was a good mother and worker.

Similarly, the burden cannot be placed upon the client to tell counsel about his past or what witnesses to call without some education and inquiry by counsel. A defendant cannot waive investigation or the presentation of evidence unless he has been advised properly. This advice is not and cannot be sufficient until some investigation by the trial counsel has been conducted, so that the defendant will have adequate knowledge about exactly what will be waived and the consequences resulting from that waiver.

In *Thomas v. Kemp*, 796 F.2d 1322 (11th Cir. 1986), trial counsel talked to the defendant's mother, but to no other family members or friends. The trial attorney said he did not do more because his client told him that he did not want to testify and wanted no witnesses called in his behalf. The court held that the waiver could not have been intelligent because the attorney had rendered ineffective assistance by failing to investigate and inform the defendant that he would be waiving testimony about a difficult family environment, mental and physical abuse, his mother's drinking problem, his hard work in school, that he was a loving son and had a mental disorder. *See also Blanco v. Singletary, supra.*

In *Douglas v Wainwright*, 714 F.2d 1532 (11th Cir. 1983), it was asserted that the petitioner was at fault for not suggesting penalty phase witnesses. But the court held that counsel's lack of investigation could only have led to ineffective and inadequate advice on this matter. *Id.*, at 1555.

"Bad" Evidence May be Good Evidence.

The *Douglas* court also found that one reason counsel had not presented any witnesses at the penalty phase, including family witnesses, was because he had concluded simply that his client "hasn't been a good boy." *Id.* However, the **absence** of family witnesses can lead a jury to this conclusion anyway. *Walters v. Zant*, 979 F.2d 1473 (11th Cir. 1992).

It is extremely important to note, too, that even a troubled background, showing that the defendant did not have a good family life or had been in trouble with authorities before, can be and usually will be mitigating evidence. This type of evidence is particularly difficult to obtain because the defendant and his family are

often reluctant to discuss such matters, even with people they know, let alone an attorney from a completely different environment.

The client and his family may not understand the beneficial effects of this type of mitigating evidence. They will have a general tendency to conclude that they should reveal only the good things in the defendant's past in order to ameliorate the homicide. It is up to the attorney to make them understand that the bad events, even the most horrible, need to be disclosed.

In *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983), the Eighth Circuit recognized that evidence, which on its face appears negative and detrimental, may be appropriate and even necessary mitigation. The court made clear, at least, that negativity can not be an excuse for not investigating these matters. *Id.* at 1467. Unless an investigation into these matters is undertaken there can be no reasoned judgment as to harm. *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989). The failure to do so is a "total abdication of duty." *Pickens v. Lockhart, supra* at 1467. Additionally, it cannot be legitimate strategy to avoid investigating a troubled past if that evidence has been or is likely to be introduced at the trial from another source or as aggravation. *See Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985) (in which the court rejected the state's argument that trial counsel's failure to prepare and present mitigation was not ineffective because he feared opening the door to prior misconduct, because the jury was already aware of it); *Hill v. Lockhart*, 824 F.Supp 1327 (E.D.Ark. 1993) (failure to introduce medical records illustrating mental illness and drug and alcohol abuse because they contained information about prior offenses and bad acts was ineffective since the jury had already heard numerous bad things about the defendant anyway).

An Expert is No Substitute.

It is not enough for counsel to arrange for his client to be evaluated by a mental health expert or other expert, so the expert can be called at the penalty phase to discuss the client's background. An expert's testimony about the defendant's background is not a sufficient replacement for testimony from those who were and are a part of his life experiences, particularly his family. *Hendricks v. Vasquez*, 974 F.2d 1099 (9th Cir. 1992).

Furthermore, an expert likely will not be able to spend the time necessary to **completely** explore the defendant's background with him, his family and acquaintances. Ultimately, the expert may be able to discover and give only a cursory rendition of the client's background which will not have the power or emotional persuasion of very personal information from those who have been a part of the defendant's life.

Moreover, an incomplete background inevitably will result in an inadequate evaluation. Counsel must facilitate the disclosure of all the information needed by the expert, ensure that the expert has all pertinent records and conducts the interviews necessary to complete the task effectively. It is *fundamental* that a psychiatrist cannot perform an adequate evaluation "without understanding how the personality of the patient...has been shaped, and this shaping occurs through past experience with important people in that patient's earlier life." Kaplan and Sadock, *Comprehensive Textbook of Psychiatry*, 451 (5th Ed. 1989). It is, therefore, incumbent upon counsel to prepare his psychiatric witness for the evaluation and eventual testimony in this regard. See *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988). A brief discussion with the psychiatrist, not knowing precisely what will be or has been done or what will be said at trial, is not effective assistance. *Walters v. Zant, supra*; *Loyd v. Smith, supra*.

Beware!

There is a clear need for the mental health expert and the jury to know all of the *relevant* facts about the troubled past of the defendant, particularly when the defendant has a prior record of unlawful conduct and that conduct will be introduced. With only a superficial understanding of the defendant's life there is a real danger that a defendant with a background of prior offenses and misconduct will be deemed by the expert and, ultimately be seen by the jury as a sociopathic personality. This has sometimes been considered by defense counsel to be mitigation simply because it attributes a mental disorder to the defendant. But this can actually lead to the jury's conclusion that the defendant should be executed. Indeed, the existence of a sociopathic personality disorder has been held as an adequate reason to *support* the imposition of the death penalty. *See People v. Young*, 619 N.E.2d 851 (Ill.App. Dist. 1993).

It is only when the sociopathy is sufficiently linked with the defendant's history, establishing a nexus between the disorder and the defendant's troubled life experiences, that it becomes a mitigator. *See Richard v. State*, 842 S.W.2d 279, 283 (Tex.Cr.App. 1992). Without such evidence, there is an absolute and unrefutable likelihood that a jury will see this, not as mitigation, but as a reason to sentence a defendant to death. *See Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Every Defendant is Unique.

Representation of a person facing the death penalty is consuming - a task which demands that counsel know as much about his client's past as possible, in addition to knowledge of some of the most intricate issues in the field of criminal law. If the case reaches the penalty phase, counsel must be able to present the jury with all of the information that can explain how his client wound up committing the offense. To fail to humanize the defendant in this way violates the vital constitutional requirement that a jury not impose the death sentence without first considering the defendant as the unique individual **that he is**. *Lockett v. Ohio, supra*; *Eddings v. Oklahoma, supra*.

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Should Justice Include Compassion?

One law professor who agreed with the decision against capital punishment noted that the Simpson jury could never have "dehumanized" the defendant, as jurors must before they can recommend execution. That consideration shows starkly how the death penalty cheapens the justic system. If a jury can only recommend that someone die through a process of dehumanization, the compassion that any legal process much include is clearly missing.

The prosecutor was right in forgoing the death penalty for O.J. Simpson. All other defendants should receive the same consideration.

- St. Louis *Post-Dispatch*, 1994

Funds for Resources: Persuading & Preserving

This is the third of a series of articles addressing funds for independent defense expert assistance in light of the new substantial funding available statewide as a result of KRS 31.185 and 31.200 amendments.

Having the constitutional and statutory right to funds for resources for the defense of an indigent is critical. It does not mean a simple request for those funds will be adequate to have a judge or an appellate court give them to you. A particularized showing to the factfinder will be persuasive.

Particularized Showing Persuades and Preserves

Competent criminal defense attorneys make developed factual and legal showings to the trial judge when requesting funds for resources for two reasons: 1) most often *persuading* the judge requires a particularized showing of the reasonableness of the need; and 2) if the funds are denied, the issue must be fully *preserved* for the appellate court to address the issue on the merits and for the appellate advocate to be able to *persuade* the appellate judicial factfinders.

When the request for funds for resources is general and undocumented, the Constitution does not require giving the indigent the money. In ***Caldwell v. Mississippi***, 472 U.S. 320, 105, 1633, 2637 n.1, 86 L.Ed.2d 231 (1985) Justice Marshall writing for the Court found "no deprivation of due process" in the denial of funds for an investigator, fingerprint examiner and ballistics expert based on the defense's "undeveloped assertions that the requested assistance would be beneficial." *Id.*

When the particularized showing is made, our state and federal Constitutions require funds for help for the indigent. In ***Ake v. Oklahoma***, 470 U.S. 68, 105 S.Ct. 1087, 1096, 84 L.Ed.2d 53 (1985) the Court termed this a "threshold showing," and found it was made in that case by the following facts: "Ake's mental state at the time of the offense was a substantial factor in his defense;" the trial court was put on notice of the need by a request by the defense; the defendant's sole defense was insanity; the defendant's behavior was bizarre; there was a need to assess competency; a state psychiatrist felt the defendant incompetent; when found competent 6 weeks later it was only on the condition that he be medicated; state psychiatrists felt he was mentally ill; the burden of showing a defendant insane is on the defense. *Id.* at 1097-98. "Taken together, these factors make clear that the question of Ake's sanity was likely to be a significant factor in his defense." *Id.*

In ***Simmons v. Commonwealth***, 843 S.W.2d 879 (Ky. 1992), the Court found the particularized showing was made based on a substantial evidentiary showing. The evidence included an affidavit from the Kentucky State Police concerning the unworkable conflict the police would be put in if working for the defense, and an affidavit from the Kentucky Correctional Psychiatric Center (KCPC) concerning its inability to provide the help the defense needed.

10 Factors for the Full Factual & Legal Showing

An effective demonstration of the reasonable necessity for funds for defense expert resources will likely involve an evidentiary showing of the following ten dimensions:

1. type of the resource;
2. nature & stage of assistance;
3. who will provide the help, qualifications of that person, costs of their help;
4. reasonableness of the rates and total cost;
5. factual basis for the resources *in this case*;
6. counsel's observations, knowledge, insights about this case and this defendant;
7. legal bases for expert;
8. legal reasons for *defense* resources;
9. inadequacy of state resources, or unavailability of state resources;
10. evidentiary documentation.

Persuasively Presenting The 10 Dimensions

This is not brain surgery. What should be done is obvious or apparent after some thought. So what follows is predominantly common sense. However, as Stephen Covey tells us, what is common sense is often not common practice. The development and presentation of the showing will take time, work and energy. Its rewards will be having the resources to represent the client competently.

1. **Type of Resources.** Precisely describe to the factfinder the type of help needed, *e.g.*, a specialist in hair analysis, an investigator, a pharmacologist, mental health expert, transcript, interpreter, additional counsel, serologist, travel expenses, out-of-state witnesses.

2. **Nature & Stage of Assistance.** Describe the stage at which the resources will be needed: a) pretrial, b) trial, c) penalty phase before the jurors, d) sentencing before the judge.

Specifically describe what assistance will be required: a) investigating, b) testing, c) interviewing, d) evaluating, e) consulting, f) rebutting, g) presenting mitigation in capital cases, h) testifying.

Four examples to illustrate what is needed: a) a psychologist is needed to evaluate and testify both pretrial and at trial to the voluntariness of the defendant's waiver; b) a social worker to find the client's records, interview persons, develop a social history and testify at the sentencing phase; c) a consulting mental health expert to provide expertise on the mental health dimensions of the case: developing cross-examination of the state's mental health expert, identifying the mental health theory of the case, advising on what kind of mental health disciplines are called for by the facts of the case; d) a psychiatrist to testify at trial to the defendant's state of mind.

3. **Name, Qualifications, Fees.** Relate who the expert you want to hear is, her qualifications, the hourly rate for the work

and the expected range of the total expected costs for the services.

For example, Dr. Jones is a practicing clinical forensic psychologist with the following vitae indicating her education, experience and licensing. She charges $100 per hour for out-of-court work and travel and $500 per day to testify. Her estimate of a total fee for testing, interviewing, travelling, and reporting is $1,500 - $2,000 plus necessary expenses with an additional fee of $500 per day for testifying.

4. **Reasonableness of Rates and Total Cost.** Demonstrate to the judge that the hourly rate and total expected costs are within the range of rates and total costs for competent work by similar qualified experts in the region. An affidavit from one or more other experts could demonstrate the reasonableness of the costs. The attorney could represent to the court that these fees are within the range of other fees quoted to the attorney by other professionals.

5. **Factual Basis *in this Case*.** Communicate the specific *facts in this case* which justify the particular resources requested. This is the most critical part of the threshold showing: It must be case specific, and developed to be persuasive.

6. **Counsel's Observations, Knowledge and Insights.** To the extent legally and ethically appropriate, relate *ex parte* the observations or statements of your client, witnesses, state experts that you or your defense team know. For example, my client has acted bizarrely. He makes statements which are hard to make sense of. He has hallucinated during interviews.

7. **Legal Bases for Expert.** Tell the judge the legal justification for the funds and for the resources.

Three examples. The mental state of my client which the state has made an essential element of the crime is in question because the following indicates his conduct was not fully intentional.... Another example, the influence of the drugs my client ingested on his body and his behavior needs analysis by a pharmacologist and mental health expert.

A third example. The medical analysis of the victim's body in a homicide or sex abuse case is subject to question because the defendant did not commit this act and the analysis done by the state's doctor involves substantial aspects of judgment and interpretation of testing upon which qualified experts disagree.

See, e.g., Ake, supra, Simmons, supra and *Hunter v. Commonwealth*, 869 S.W.2d 719 (Ky. 1994) (meaningful access to justice).

Legal duty of others. Some judges may expect the family or friends of the indigent defendant to foot the bill for experts if they have the money. Just as the wealth of those not legally responsible for an indigent defendant does not affect the defendant's right to prosecute an appeal *in forma pauperis*, *Stinnett v. Commonwealth*, 452 S.W.2d 613, 614 (Ky. 1970) or to institute a dissolution of marriage suit *in forma pauperis*, *Tolson v. Lane*, 569 S.W.2d 159, 161 (Ky. 1978), so too the monied family and friends of a defendant cannot constitutionally be a bar to the defendant receiving funds from the government to hire his own experts.

Legal Standard. Most courts, statutes, and rules have followed the lead of the federal statute's standard of *reasonably necessary*. That is Kentucky's statutory, KRS 31.200, and caselaw standard. *Young v. Commonwealth*, 585 S.W.2d 378 (Ky. 1979). *Ake's* standard for when a defendant is entitled to the help of a psychiatrist is: *when the mental state of the defendant is seriously in question.*

In explaining the *reasonably necessary* standard, the Massachusetts Supreme Court in *Commonwealth v. Lockley*, 408 N.E.2d 834 (Mass. 1980) stated: "This standard is essentially one of the reasonableness, and looks to whether a defendant who was able to pay and was paying the expenses himself, would consider the 'document, service or object' sufficiently important that he would choose to obtain it in preparation for his trial. The test is not whether a particular item or service would be acquired by a defendant who had unlimited resources, nor is it whether the item might conceivably contribute some assistance to the defense or prosecution by the indigent person. On the other hand, it need not be shown that the addition of the particular item to the defense or prosecution would necessarily change the final outcome of the case. The test is whether the item is reasonably necessary to prevent the party from being subjected to a disadvantage in preparing or presenting his case adequately, in comparison with one who could afford to pay for the preparation which the case reasonably requires.

In making this determination under that statute, the judge may look at such factors as the cost of the item requested, the uses to which it may be put at trial, and the potential value of the item to the litigant." *Id.* at 838.

Constitutionalize. Make sure you ask for this relief under every conceivable constitutional guarantee. A listing follows:

A. United States Constitution, 14th Amendment Due Process
   1. Due Process fairness.
   2. Due Process right to present a defense.
   3. Due Process right to disclosure of favorable evidence.
   4. Due process right to fair administration of state created right.

B. Kentucky Constitution, Section 2 Due Process.

C. United States Constitution, 14th Amendment Equal Protection

D. United States Constitution, 14th and 6th Amendment Right to Effective Assistance of Counsel

E. Kentucky Constitution, Section 11 Right to Effective Assistance of Counsel

F. United States Constitution, 14th and 6th Amendment Right to Confrontation

G. Kentucky Constitution, Section 11 Right to Confrontation.

H. United States Constitution, 14th and 6th Amendment Right to Compulsory Process

I. Kentucky Constitution, Section 11 Right to Compulsory Process

J. United States Constitution, 14th and 8th Amendment Reliable Sentencing, Produce Mitigating Evidence; Rebut aggravating evidence.

If all the necessary money is not obtained, you will want to insure that you have made the proper showing to have reversible error on appeal or in federal habeas.

8. **Legal and Practical Reasons for *Defense* Resources.** Explain why independent defense expert help is critical. Investigation must be done by someone who acts at the direction of the defense attorney and whose work is totally confidential. The investigation is focused on marshalling the defense and rebutting the state's evidence. Expert testing and analysis must likewise be confidential and at the direction of the attorney. The defense is entitled to an expert who will help in cross-examining the state's expert, who will marshall the defense, and

who will rebut the state's expert. These are two sides to this testing process. We need an expert to tell the rest of the story.

Caselaw recognizes the essential need for a *defense* expert. In a practical matter, *Ake* requires that the expert be a defense expert by requiring an indigent be offered an expert who will *marshall* the defense, *rebut* the state's expert and *assist* in cross-examining the state's expert.

See, e.g., DeFreece v. State, 848 S.W.2d 150 (Tex.Cr.Ct. 1993), *Lindsey v. State*, 330 S.E.2d 563 (Ga. 1985); *Halloway v. State*, 361 S.E.2d 794 (Ga. 1987); *Palmer v. Indiana*, 486 N.E.2d 477 (Ind. 1985); *State v. Gambrell*, 347 S.E.2d 390 (N.C. 1986); *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990); *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985); *Cawley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991). *But see Granviel v. Lynaugh*, 581 F.2d 185 (5th Cir. 1981).

9. **Inadequacy or Unavailability of State Resources.** Communicate to the court that state experts, themselves, acknowledge they are unable to perform as defense experts, and communicate what those state experts say.

KCPC. The state mental health hospital experts are not able to help cross-examine the state's expert. They do not work at the direction of the defense attorney. They do not work to marshall the defense. Their work is for the court. It is not confidential. Under Kentucky statutes, their work is limited to "neutral" evaluations on incompetency and insanity. A February 24, 1994 letter from CHR Commissioner Angela M. Ford to public defender Steve Mirkin demonstrates these limitations:

> This is given in response to your letter to me of February 14, 1994, wherein you have requested that the Cabinet for Human Resources supply you with an expert witness on to assist you in the preparation of a death penalty case on behalf of Mr. _____, who has been charged with two (2) counts of murder in _____ County. The assistance which you have requested, as presented in your letter, is as follows:
>
> "...I expect such assistance will include: evaluation of records, witness statements and other materials obtained through the defense's efforts; confidential evaluation of the accused; consultation with counsel as to availability and viability of potential defenses, and potential penalty-phase strategies, as well as direction for further investigation to develop such defenses or strategies; assistance in the preparation and presentation of direct testimony of exerts and/or lay witnesses necessary to lay the foundation for expert opinions; assistance in the planning and preparation of cross-examination of expert and lay witnesses to be called by the Commonwealth on mental health matters; and expert testimony on the accused's behalf, with preparation for such testimony, as well as for cross and redirect examination."
>
> This is to advise that the Cabinet is unable to provide you with the specific assistance which you have requested because of both budgetary considerations and the need for the Cabinet to observe its objectivity in performing the court-ordered forensic evaluations under the Kentucky Penal Code as specifically set forth by KRS 504.060-504.110. Staff at the Kentucky Correctional Psychiatric Center (KCPC) do perform court-ordered evaluations for individuals charged with felonies to ascertain competency to stand trial and the capacity of the defendant to appreciate the criminality of the defendant's conduct. Depending upon the clinicians' conclusions, the evaluation may or may not favor the defendant. KCPC staff do observe the confidentiality of records, information, and their evaluations relating to defendants and consistent with any requirements which may exist in the court order for the evaluation.
>
> I will confirm your understanding that KCPC clinical staff, including Dr. _____ who has evaluated Mr. _____, are available to review available and relevant background information and material concerning the persons whom they evaluate, and which could constitute useful input for their evaluations. They are also available to consult with legal counsel to clarify the findings of their evaluations (if not prohibited by the court order), however, they are not available to provide ongoing consultation with counsel for purposes of preparing for trial or developing legal defenses....

KSP. The Kentucky State Police (KSP) and their lab personnel are not able to help cross-examine the state's expert. They do not do work at the direction of a defense attorney. They do not help marshall the defense. Their work is done on behalf of investigating police officers or prosecutors, not defense attorneys. The KSP lab is directed by a Kentucky State Police captain. The lab personnel are employees of the Kentucky State Police. KSP Lab personnel refuse to meet with defense attorneys until the prosecutor is contacted. There is a dramatic conflict for them when one of their employees has already tested the evidence and arrived at an opinion since they have an understandable vested interest in the integrity and reliability of their employee's work. Understandably, the KSP lab is an integral part of the prosecution team.

Access to a neutral state expert even by subpoena is not constitutionally sufficient. "Before *Ake*, the ability to subpoena and question a neutral expert on whose examination both the state and the defense were relying may have satisfied due process. ***See United States ex rel. Smith v. Baldi***, 344 U.S. 561, 568, 73 S.Ct. 391, 394-95, 97 L.Ed. 549 (1953) ....However, *Ake* expressly disavows the result in *Smith* and explains that the requirements of due process have fundamentally changed that decision.... The ability to subpoena a state examiner and to question that person on the stand does not amount to the expert assistance required by *Ake*." ***Starr v. Lockhart***, 23 F.3d 1280, 1289-91 (8th Cir. 1994).

10. **Evidentiary Documentation.** There are a variety of effective methods of producing persuasive evidence to document your representations to the court: scientific articles, letters or affidavits from your own expert (who may give you a free, short affidavit), from the operators of the state facilities(who do not want to work for the defense), other practicing attorneys (who experience these realities), calling these same persons to testify at an evidentiary hearing; calling the state experts who have tested the evidence in this case and asking them questions to prove their inability to perform as required for the defense, or the limits of the science.

Questions to the state's experts can occur at your *ex parte* hearing, a pretrial hearing or prior to the expert's testifying at trial. This may allow you to prove some things otherwise difficult or impossible to show. It can also give your issue more persuasive clout since you are proving or corroborating through the prosecution's witnesses. The prosecution

expert is likely to testify favorably in this area since it is in the expert's self-interest to support the profession's purpose and necessity, and the expert's own worth. Questions like the following are possible areas of inquiry:

IT IS AN EXPERTISE

a. The area you are testifying on is an area of expertise?

b. It is not an area that is within a layperson's knowledge?

c. You have studied a long time and have a lot of experience?

d. What is all the education and training you've had?

e. Who has trained you?

f. What is all the experience you have had?

g. Your expertise has a lot of dimensions not within layperson's knowledge?

h. You have conducted tests in this case which are not within a lay person's knowledge?

i. Your opinion is an expert's and is based on training, experience and testing, not within the competence of laypersons?

j. I am not qualified as an attorney to render an expert opinion in this area, am I?

TIME/REASONABLE FEE/AVAILABILITY OF DEFENSE EXPERTS

a. How long have you spent analyzing evidence in this case?

b. It took a long time?

c. What is the going rate for an expert in private practice to do this kind of testing and analysis and testifying?

d. Are there any experts in this state, region or country that can do this kind of testing in criminal cases who do not work for law enforcement agencies?

e. Are there other people as experienced and as capable to do the analysis testing and to render an opinion?

f. Are there experts more experienced than you?

STATE EXPERT NOT NEUTRAL

a. You work for the Kentucky State Police (KSP) Lab?

b. Your ultimate boss is the Commissioner of State Police?

c. The person in charge of the state Lab system in Kentucky is a captain in the state police?

d. You refused to talk to me without first notifying the prosecutor?

e. You refused to talk to me without the prosecutor being present or waiving his presence?

f. You do not work at my direction?

g. You test based on police requests?

h. You returned test results back to the police in this case?

i. You are not a defense expert?

j. You would not help me cross-examine one of your co-workers or any prosecution witness?

k. How many times have you testified at the request of the prosecution?

l. How many times at the request of the defense?

POSSIBILITIES OF DIFFERENT RESULTS/OPINION; MORE TESTING POSSIBLE

a. Your expertise involves standard tests?

b. What are they?

c. Which did you do?

d. What other tests could be done but were not?

e. Other experts can do the tests you did not do?

f. In doing your tests, you do not always get exactly identical results each time you do the test on the same sample?

g. The opinion you rendered involves doing tests, observing what is there and what isn't there, analyzing the results to reach your conclusion?

h. The art of rendering an opinion, reaching a conclusion involves your professional judgment based on your training, experience, analysis and test results?

i. That is one reason why two experts can disagree?

j. Because their judgments, based on the same data, can be different?

k. It is possible that a different examiner could come to a different conclusion than you?

l. It is possible that you could have made a mistake in your testing?

m. Have you ever made an error in your testing?

n. All tests have an error rate.

o. What are the error rates of the tests you have run?

CONCLUSION

Resources for an effective defense are at hand. Doing the obvious will return rich dividends to insure the expert resources necessary for fair process and reliable results for indigent accused and in which the courts and the public can have confidence. Not doing the obvious will be at the peril of your client.

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Improper Police Bolstering

Recent decisions in the Kentucky courts point up the still-unsettled issue of the admissibility of evidence concerning the police investigation of a crime. In ***LeMastus v. Commonwealth***, 878 S.W.2d 32 (Ky.App. 1994), testimony about what the prosecuting witness said and what the officer did in response to these statements was condemned as investigative hearsay that amounted to improper opinion testimony about the prosecuting witness' credibility. The issue of investigative hearsay seems so straightforward that it should be easy to apply in every case to exclude this type of testimony.

But all you have to do is read ***Carter v. Commonwealth***, 782 S.W.2d 597 (Ky. 1989) to realize that it is not so easily applied. In that case the court held that the Commonwealth may introduce testimony about the prosecuting witness' statements under the "verbal acts" rule as background to explain why its agents did the things they did, that is, why they arrested the defendant.

It is possible to make a formal distinction between improper investigative hearsay use of out-of-court statements and the "proper" use of statements as verbal acts. The Supreme Court does so in ***Releford v. Commonwealth***, 860 S.W.2d 770 (Ky. 1993) which condemns the misuse by "some prosecutors" of the permissible verbal acts rule "for the real purpose of asserting the truth of the statement." (Emphasis in original).

My purpose in this article is to show that in practice the distinction between verbal acts and investigative hearsay is so imprecise and difficult to make that it is unreasonable to expect the jury to understand the difference and to make only proper use of verbal acts testimony in its deliberations.

The underlying theory of this article is that the emphasis on hearsay and non-hearsay use of out-of-court statements causes most lawyers and judges to overlook the two important determinations that must be made whenever the admissibility of any evidence is in question: (1) *Is the evidence relevant to a material issue in the case?* [KRE 401]; and (2) *If so, is it* (a) *likely to assist the jury to resolve that issue properly* or (b) *substantially more likely to mislead or confuse the jury?* [KRE 403]. Proper use of this relevancy analysis should in most cases keep out almost any reference to the police investigation of the crimes charged and, perforce, render anything that a prosecuting witness or any other witness said to the police inadmissible.

It is important to exclude the police investigation and the out-of-court statements made during the course of the investigation because most jurors reasonably rely on the police investigation as circumstantial evidence of the defendant's guilt and of the prosecuting witness' credibility. Lawyers know or at least should know the old maxim that repetition of an out-of-court statement in court doesn't make the statement true.

The legal rule excluding such statements is that jury must rely on the viva voce testimony of the witness under oath and in open court. [CR 43.04(1)]. Lawyers with any experience have internalized the basis of this rule but jurors, almost all of whom have grown up or grown old watching Dragnet, The FBI, Columbo, or Kojak, think of detectives as persons who logically piece the "clues" together to arrive at a deduction that the defendant is the perpetrator of the crime. Unless the jury is carefully and forcefully instructed to do otherwise, it will use the police investigation as an informal standard against which to test the evidence.

For example, if the police officer arrested the defendant after the prosecuting witness gave a description of the assailant, a jury quite reasonably, and perhaps subconsciously, would think that the description must have been pretty good or the officer wouldn't have arrested the defendant.

The obvious danger is the great likelihood that the jury will conclude that the police are implicitly vouching for the credibility of the prosecuting witness. This of course is not a fair or even a lawful conclusion. It is important to avoid injecting this whole sub-issue into the case in the first place.

If an out-of-court statement is true investigative hearsay, the argument is simple. KRE 802 excludes all hearsay unless the proponent can show an exception. Hearsay is an out-of-court statement introduced "to prove the truth of the matter asserted." [KRE 801]. A police officer's recitation of every detail of the crime told to him by the prosecuting witness is hearsay and is excluded by KRE 802 unless it is inconsistent with the prosecuting witness' trial testimony or consistent with that testimony and introduced to rebut an attack based on recent fabrication or corrupt motive to testify. [KRE 801A(a)].

Out-of-court statements are not admissible as a matter of course nor are they admissible simply because the declarant is going to testify at some point of the trial. If this were so there would be no reason to have KRE 801A(a). If the prosecutor seems to want the out-of-court statement admitted simply to bolster the case, the ruling is obvious - it is excluded by KRE 802 because KRE 801A(a) does not exempt it. Identification of the statement as such should be sufficient to have it excluded. If it is not, you must remind the judge that the exceptions to the hearsay rule only provide that the statement "is not excluded by the hearsay rule," that is, they are not excluded by KRE 802. The statement still must be relevant to some important issue in the case and not likely to mislead or confuse the jury. KRE 402 and 403 require this showing in every instance.

It is hard to think of many relevant purposes sufficient to risk exposing the jury to this highly prejudicial form of evidence. The questions in a typical criminal case, robbery for example, are (a) did the defendant (b) threaten the immediate use of physical force (c) in the course of accomplishing a theft? That a witness has previously said things to police that implicate the defendant really has no effect on the determination of guilt or innocence. The witness can say so in front of the jury, under oath and subject to cross-examination without the danger of the jury using the officer's reaction to the statement as a gauge of the truthfulness of the witness or thinking that the officer's reaction is circumstantial evidence of the officer's opinion that the defendant is guilty.

Investigative hearsay is inadmissible primarily because it is irrelevant and too

likely to mislead or confuse the jury. Irrelevant evidence is never admissible. [KRE 402]. Marginally relevant evidence is admissible only if it does not mislead the finder of fact. [KRE 403]. The out-of-court statements of a witness become relevant only under the circumstances described by KRE 801A(a). Such statements can only become relevant after the defendant has attacked the Commonwealth's case. They never should be admissible as part of the Commonwealth's case in chief.

Of course verbal acts can be a valid evidential use of out-of-court statements but only if an admonition or instruction can make the jury use them properly, *i.e.*, not as an indication of the truth of the assertion contained in them or as circumstantial evidence of the strength of the Commonwealth's case.

Weinstein acknowledges that out-of-court statements may be admitted under the verbal acts doctrine to show the effect on the hearer of the statements. However, Weinstein carefully points out that such evidence is admissible only when the effect of the statement is relevant to a material issue in the case. [4 *Weinstein's* Evidence, p. 801-93, 94].

But such statements hardly ever are relevant. Unless the defendant is making some variation of the "phone book defense," (*i.e.*, the police picked his name out of it), who cares what the police did or did not do? The job of the police officer is to arrest based on probable cause. If a person's statement creates probable cause to suspect that the defendant is guilty of a crime, the police officer must arrest. But this should make no difference to the jury, anymore than the return of an indictment should be considered an indication of guilt. The trouble is, the jury is quite likely to misuse the evidence as cause and effect. The jury is quite likely to conclude that the police officer believed the prosecuting witness and therefore arrested the defendant.

It is also important to distinguish verbal acts and investigative hearsay evidence from what is commonly called "background." If the police find fingerprints and blood at a crime scene, the officers involved can certainly explain what they did to secure that evidence. However, the jury does not need to know that they found the evidence because the prosecuting witness said that the fingerprints and blood came from the defendant. The prosecuting witness can testify to these facts under oath and the Commonwealth's expert witnesses can link the evidence to the defendant through scientific analysis. Similarly, the police do not have to recite the prosecuting witness' statements on which they relied to obtain a search warrant for the defendant's house. If the seized evidence is being admitted at trial it is because the defendant has not challenged the reasonableness of the seizure or because the judge has already ruled against the defendant on this point. It is only where the defendant makes a point of unreasonableness of the search or seizure that the statements on which the police relied become relevant.

There is just no reason to allow the prosecutor to introduce police testimony as to what the prosecuting witness has said. Jurors intuitively believe that constant repetition must mean that the statements are true. The validity of this conclusion is so problematic that courts simply cannot allow it to be created. The balance of probative value against potential prejudice or misleading of the jury is almost always going to come down in favor of exclusion.

A useful case for analyzing investigative hearsay/verbal acts cases is ***U.S. v. Reyes***, 18 F.3d 65 (2nd Cir., 1994). In that case the court acknowledged that in some instances information possessed by investigating agents may be received at trial "not for the truth of the matter but as background to explain the investigation or to show an agent's state of mind so the jury will understand the reasons for the agent's subsequent actions." [p. 70]. However, the court also stated that the evidence balancing required by FRE 401-403 must be made and that "contrary to the government's contention, the mere identification of a relevant non-hearsay use of such evidence is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice." The court observed that the greater the likelihood of prejudice resulting from misuse of the statement the greater the justification must be to introduce the "background" evidence as non-hearsay. [p. 70]. Seven considerations to determine the admissibility of such evidence were identified. Chief among the considerations is whether the defendant has opened the door to such evidence and whether a limiting instruction can effectively protect against misuse or prejudice. [p. 70-71].

In almost every instance, unless the defendant has opened the door to this evidence by attacking either the prosecuting witness as corrupt or the government's investigation as inept or malicious, evidence concerning the police investigation must be excluded. The questions before the jury in a criminal case are simple. Did the defendant commit certain acts? This is proved by in-court cross-examined testimony of the witnesses, not by circumstantial indicators informally provided by the police investigation and the acts of the government agents.

For this reason, the problem of investigative hearsay and verbal acts should rarely arise in criminal trials. It is the duty of the Commonwealth, as proponent of the evidence, to make a substantial showing of probative value and to demonstrate the absence of substantial prejudicial effect. In most cases this will not be possible. Use of relevance analysis rather than hearsay analysis will allow defense lawyers to do away with presentation of the police investigation as evidence of guilt.

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Happy Holidays!!

Table of Cases

SAMPLE MOTIONS AND INSTRUCTIONS

DPA MOTION FILE AND INSTRUCTIONS MANUAL: The Department of Public Advocacy has collected many motions and instructions filed in actual criminal cases in Kentucky, and has compiled indexes of those motions and instructions. Instructions are categorized by offense and statute number. Many motions include memorandums of law.

CAPITAL CASES: The motion file contains many motions which are applicable to capital cases, and that includes many motions filed in capital cases on non-capital issues.

In addition to containing tendered capital instructions, the DPA Instructions Manual contains instructions actually given in many Kentucky capital cases for both the guilt/innocence and penalty phases.

COPIES AVAILABLE: Copies of the instructions and motion file indexes are free to any public defender in Kentucky and any of the actual instructions or motions are free to public defenders in Kentucky, whether full-time, part-time, contract or conflict. Each DPA field office has an entire set of the instructions and motions.

Criminal defense advocates can obtain copies of the indexes, instructions, or motions for the cost of copying and postage.

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DEFINING A PUBLIC ADVOCATE

public

pub•lic/*adj.* [...fr *populus* people + icus -ic...]

1 a : of, relating to, or affecting the people as an organized community: CIVIC, NATIONAL...

3 b : of, relating to, or in the service of the community or nation...
c : devoted to the general or national welfare : PATRIOTIC, HUMANITARIAN

advocate

ad•vo•cate/n. [...fr. past part. of *advocare* to summon, call to one's aid, fr. ad- + *vocare* to call - more at VOICE]

1 : one that pleads the cause of another: DEFENDER...; *specif:* one that pleads the cause of another before a tribunal or judicial court: COUNSELOR...

2 : one that argues for, defends, maintains, or recommends a cause or proposals....

public advocate

N: a lawyer...whose duty is to defend accused persons facing a loss of liberty or life and unable to pay for legal assistance.

See *Webster's Third New International Dictionary* (1976)

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