JOURNAL

The Advocate

Journal of Criminal Justice Education & Research

Volume 19, No. 1, January 1997

Evidence & Preservation Manual (3rd edition)

FROM THE EDITOR:

8 Rules of Success. Dr. William Menninger was close to having it right when he identified, "Six essential qualities that are the key to success: sincerity, personal integrity, humility, courtesy, wisdom, charity."

He was two short. There are really eight essential qualities to being a successful attorney. Number seven is effectively using the rules of evidence and number eight is effectively preserving error.

Successful litigators know how to insure that their theory of the case is advanced through the use of the rules of evidence and the practices of preservation. Winning litigators use both to make sure evidence consistent with their theory of the case is admitted and evidence inconsistent with their theory is excluded.

Third Edition. The December 1992 *Advocate* was DPA's first ever *Evidence & Preservation Manual*. This *Advocate* DPA issues its 3rd edition of the Manual with **David Niehaus'** commentary to the code updated and with a changed focus and format. All Kentucky cases citing to the code are included in the commentary after each rule.

The preservation chapter by **Bruce Hackett, Julie Namkin,** and **Marie Allison** has been updated. We continue in this 3rd edition with the components of an objection and the table of constitutional rights, their provisions and caselaw. We add to this edition a separate table of cases for the evidence commentary and for the preservation chapter.

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 in addition to their other work.

Future Editions. We hope to continue 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. As Samuel Johnson tells us, "The next best thing to knowing something, is knowing where to find it."

Edward C. Monahan,
Editor, *The Advocate*

The Advocate

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

The Advocate is a bimonthly (January, March, May, July, September, November) 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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Paid for by State Funds KRS 57.375 & donations

Evidence & Preservation Manual (3rd ed.)

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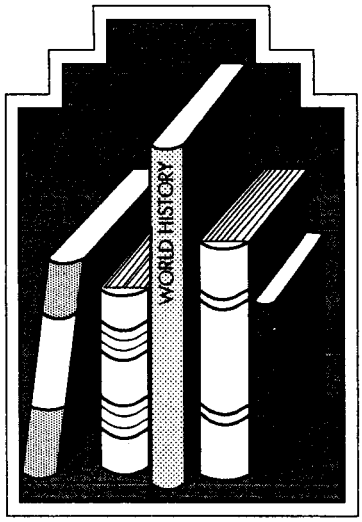

Chapter 1: Kentucky Rules of Evidence & Commentary & Table of Cases

Introduction to Kentucky Rules of Evidence and Commentary - 3rd Edition

A Change in Focus: As the time for this revision approached, the number of Kentucky appellate decisions on the Rules of Evidence raised the question of changing the focus and format of this manual. The initial purpose of this project in 1992 was to familiarize criminal defense attorneys with the language of the rules and the interpretation of that language, primarily by examination of the Commentary and the Revised Commentary to the Kentucky Rules and by taking the consensus of the leading federal rules treatises. Since then, Lawson's 3rd edition of the *Evidence Handbook*, keyed to the rules, has been published making a comprehensive analysis of evidence law available to attorneys. And since 1992, Kentucky appellate courts have rendered a sufficient number of opinions so that, particularly as to Articles 1, 3, 4, 6, 7 and 8, it is possible to base the Commentaries of this work on case precedent. These developments have made it possible to start the transition of this manual from its present format to that of a quick, practical reference guide to evidence that can be taken to court and used to answer evidence questions that arise in preparation for and during a criminal trial or hearing.

To the extent possible, this revision of the Commentary focuses on issues that most often arise in criminal practice and relies, when possible, on Kentucky decisions. Where these are not available or in cases where Kentucky precedent is dubious, the work relies on the Commentaries to the rule drafts, federal cases or precedents of other states with the same or similar rule language. As more opinions are rendered, they will be worked into the manual.

Organization: This manual follows the plans of most works of its type. Each rule is introduced by a brief explanation of its underlying purpose or premise. This is followed by a number of short paragraphs devoted to topics arising under the rule or cases construing the rule.

Suggestions and Corrections Solicited: It is impossible to write about every situation that may arise during the prosecution of a criminal case and topics that some attorneys think important may not appear in this revision. If there is a topic or situation that should be included in a manual of this type, please notify David Niehaus, Office of the Public Defender, 200 Civic Plaza, 719 W. Jefferson Street, Louisville, Kentucky 40202; Tel: (502) 574-3800; Voice Mail: (502) 329-1838; Fax: (502) 574-4052. Readers are particularly asked to note any mistakes or ambiguities and bring them to David's attention.

Listing 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*. All cases citing a KRE through 932 S.W.2d 311 (Dec. 10, 1996) are included.

1996 Amendments. Note that the four 1996 amendments by the General Assembly to KREs 506 and 507 have not to date been adopted by the Kentucky Supreme Court pursuant to KRE 11.02.

CITATION	TEXT
KRE	Kentucky Rules of Evidence
KRS	Kentucky Rules Statutes
CR	Kentucky Rules of Civil Procedure
RCr	Kentucky Rules of Criminal Procedure
SCR	Rules of the Kentucky Supreme Court
RPC	Kentucky Rules of Professional Conduct [SCR 3.130]
CJC	Kentucky Code of Judicial Conduct [SCR 4.300]
Ad Pro	Administrative Procedures of the Kentucky Supreme Court
Commentary	1989 Final Draft, Kentucky Rules of Evidence
Revised Commentary	1992 Revised Commentary

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Article I. General Provisions

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Rule 101 ♦ Scope.

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

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

COMMENTARY

PREMISE/PURPOSE: Two mundane purposes are obvious: (a) to limit the rules to proceedings in the Court of Justice; and, (b) to provide a uniform method of citation. The language is similar to language found in *CR 1* and *RCr 1.02*.

(a) As explained in *KRE 1102*, the Kentucky Supreme Court is the primary source for new rules and amendments. This is consistent with the position taken in ***Drumm v. Commonwealth*, 783 S.W.2d 380 (Ky. 1990)**, in which the Court asserted primary responsibility for rules of evidence [*Kentucky Constitution Sections 110, 116*] although it left open the possibility that it might extend "comity" to enactments of the General Assembly.

(b) The only exception to the general statement made in **Comment (a)** may be found in District Court proceedings. *Section 113(6)* of the Constitution authorizes the General Assembly to enact statutes governing the exercise of District Court original jurisdiction and therefore in such instances the statutory enactment outside the rules of evidence most likely will prevail, *e.g.*, *KRS 610.280(2)(a)*.

(c) *KRE 1101* lists the types of proceedings to which the rules need not, but may, apply. See **Comment 102(a).**

Rule 102 ♦ Purpose and construction.

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

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

COMMENTARY

PREMISE/PURPOSE: This rule is a general aspirational statement of the drafters as well as a more conventional directive to interpret the rules liberally to achieve the stated goals. Implicit in this rule is a recognition that the rules only govern the most common evidentiary questions that arise during a proceeding in the Court of Justice and that new circumstances (*e.g.*, novel scientific information) may not be covered explicitly by the text. This statement, together with others found in *KRE 106, 403, and 611(a)* provides some guidance when unanticipated questions arise.

(a) *Section Two* of the Constitution prohibits arbitrary conduct by any agent or agency of government, including decisions on evidence questions by trial judges. Although it is never mentioned in the rules, *Section Two* is the fundamental principle for interpretation of rule language. ***Kroger Company v. Kentucky Milk Marketing Comm.*, 691 S.W.2d 893, 899 (Ky. 1985)**.

(b) The language of rule *102*, together with that of *403 and 611*, gives the judge substantial authority to admit or exclude evidence on non-legal or non-theoretical grounds. The proponent of evidence may well have to show more than

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relevance or qualification under a hearsay exception. The judge is charged by these "rules of economy" to decide whether the probative value of evidence is worth the cost in terms of time, expense, or jury confusion. However, these considerations cannot deprive a party of the right to present evidence that is substantial.

(c) Kentucky is a plain language state which means that this rule should not be used to sidle past the obvious meaning of rule language. *KRE 102* should apply only in cases where the rules do not provide a clear answer.

(d) "Growth and development of the law of evidence" is not an invitation to trial level judges to make up law. Because the rules are designed for the Court of Justice, the growth and development of evidence law is to come primarily from the Supreme Court through appellate opinions on the meaning and applicability of rule language and through the rules creation and amendment machinery established by *KRE 1102* and *1103*.

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

(f) ***Roberts v. Commonwealth*, 896 S.W.2d 4 (Ky. 1995)** noted that in the absence of any Kentucky opinions construing *KRE 410*, the Court was "free to look to federal authorities for interpretation of the federal counterparts."

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.

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.

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COMMENTARY

PREMISE/PURPOSE: To advise trial level courts hearing new trial or *RCr 11.42* motions and all courts on appeal of the conditions under which error may be found. The language deals with the effect of an erroneous "ruling" which implies that the judge had an occasion to rule on a question of admission or exclusion. *Subsection (e)* deals with palpable error. Neither rule is designed to reach errors that do not affect a "substantial right" of the complaining party. ***Green River Electric Co. v. Nantz*, 894 S.W.2d 643, 645 (Ky.App. 1995).**

103(a)

(a) At minimum to preserve an objection an attorney must say, "I object." If the judge requests an explanation, the attorney must provide it. Ostensibly, nothing else is required to preserve the issue for appellate review. However, in practice a motion to strike, a request for admonition or a motion for mistrial will be required to obtain reversal on appeal.

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

(c) If evidence is excluded, the attorney must demand an avowal in testimony format with the witness making specific statements. This can be narrative in form, although questions and answers are the more usual practice. Otherwise, the reviewing court will not know what was excluded and why it was important for the jury to hear it. ***Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996).**

(d) Failure to object at all is almost always fatal to success on appeal or review. The Supreme Court is saying, in opinion after opinion, that it is not going to bother with appellate issues in which the question was not raised at the trial level, *e.g.*, ***Roberson v. Commonwealth*, 913 S.W.2d 310 (Ky. 1994)**. The federal courts paraphrase the gospel saying about a camel passing through the eye of a needle when referring to the chances of success on a *preserved* evidence issue. The reader may draw her own conclusions about the chances of success for an unpreserved issue.

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

(f) The literal language of *KRE 103(a)* does not require a contemporaneous objection. This certainly may be implied, and, because *KRE 103(a)* requires a timely objection and does not supersede *RCr 9.22,* the contemporaneous objection rule obviously still applies.

(g) Occasionally the appellate court will address an issue on appeal because it is likely to recur on a retrial, *e.g.*, ***Eldred v. Commonwealth*, 906 S.W.2d 694, 703 (Ky. 1995)**. The court does this to preclude error at a retrial that is going to take place for other reasons.

(h) A nasty trap is described in ***Frank v. Commonwealth*, 907 S.W.2d 771 (Ky. 1995)** in which the court ruled that a defendant's objection to the admission of evidence is waived by cross-examination on the objected-to subject matter. This is an old principle that seems to apply only when the court does not want to reverse. It reflects the "all or nothing" approach of the ancient common law which required

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theoretical consistency to the point that it defied common sense or logic. Theoretically, a party objecting to evidence should preserve the issue and wait for vindication on appeal. But this is a waste of time, money and court resources which *KRE 102* counsels against. This is also contrary to the approach court took in ***O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995)** [See **Comment 103(d)**] which took a pragmatic view of the *in limine* rule and rejected a claim that introduction of evidence voided a pretrial in limine ruling. Certainly, at some point cross-examination on a subject will amount to waiver. But a party should not be put in the position of having to ignore damaging evidence at the cost of waiving the right to later relief from the appellate courts.

(i) On appeal, the standard of review is abuse of discretion. ***Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996)**. For a denial of a constitutional right like confrontation, the beneficiary of the error must prove it harmless beyond reasonable doubt. ***Renfro v. Commonwealth*, 893 S.W.2d 795, 797 (Ky. 1995)**.

103(b)

PREMISE/PURPOSE: This rule expresses the authority of the judge to make the record reflect what actually happened. The rule has nothing to do with the attorney unless the judge's comments are objectionable. This rule does not authorize an "offer of proof" by the attorney as a substitute for the testimony of the avowal witness, although, of course, if a judge will not permit avowal and will permit only an offer of proof this necessarily will suffice.

103(c)

PREMISE/PURPOSE: Along with *KRE 104(c)* this rule exists to insulate jurors from hearing evidence of contested admissibility until the judge has decided whether and under what limiting instructions the jury can hear it. It is based on the sensible belief that it is easier to keep a jury from hearing improper information than it is to come up with an admonition or an instruction to "unring the bell" or to try the case again after mistrial. Again, the policy of economy and fairness stated in *KRE 102, 403, and 611* underlies this rule.

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

(b) Attorneys have an ethical duty to assist the judge under *SCR 3.130. RPC 3.1* generally prohibits raising frivolous issues while *RPC 3.2* requires reasonable efforts to expedite the litigation. *RPC 3.4(e)* prevents a lawyer from alluding to any matter not reasonably relevant or believed to be supported by admissible evidence. More specifically, *RPC 3.4(c)* prohibits disobedience to court rules except through open and clear refusal while *RPC 3.5(a)* prohibits any attempt to influence a juror through means prohibited by law.

(c) This rule presumes the participation of attorneys who know their ethical duties and do not engage in cheap tricks. The judge has a legal duty under *KRE 611(a)* and an ethical duty under *SCR 4.300(3)(A)(3) and (4)* to hear arguments on the admissibility of evidence. Because admissibility is a legal question, the jurors do not need to know about it.

103(d)

PREMISE/PURPOSE: Another economical feature of the rules is the provision for pretrial determination of admissibility questions. Kentucky's rule differs

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

(a) The procedural requirements must be followed. If the motion does not result in an "order of record" the issue is not preserved and the objecting party must object when the problematic evidence is introduced at trial. Excluded evidence requires an avowal that complies with *KRE 103(a)(2)*. An "order of record" is a written order signed by the judge and entered by the clerk. [*CR 58(1); RCR 13.04*].

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

(c) An unsuccessful pretrial motion for severance under *RCR 9.16* must be renewed when the prejudice of joint trial becomes evident. Because this motion is often closely associated with questions with admissibility of evidence as to one or more co-defendants, it is probably well to renew the evidence objection at the same time.

(d) In ***Tucker v. Commonwealth*, 916 S.W.2d 181, 183 (Ky. 1996)**, the Supreme Court stated its policy that "an objection made prior to trial will not be treated in the Appellate Court as raising any question for review which is not strictly within the scope of the objection made, both as to the matter objected to and as to the grounds of the objection. It must appear that the question was fairly brought to the attention of the trial court."

(e) However, in ***O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 574 (Ky. 1995)** the court held that if evidence is excluded by a pretrial *in limine* order, a party may still go forward with evidence to avoid being put in a bad light before the jury. The court held that the issue would be preserved under those circumstances.

103(e)

PREMISE/PURPOSE: The function of all appellate courts is to review the record generated in the lower court. [*Kentucky Constitution, Section 115*]. The Supreme Court has an additional administrative authority [*Section 110(2)*] which authorizes it to take corrective action to assure the orderly and effective administration of justice. *KRE 102* posits discovery of truth and just disposition of the case as the goals of the evidence rules. Reviewing courts need a way to deal with error of record that clearly affected the case in a way that cannot be tolerated. *KRE 103(e)* is the evidence rule that provides the means to do so.

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

(b) ***Tucker v. Commonwealth*, 916 S.W.2d 181, 183 (Ky. 1996)** held that if the record shows that counsel was aware of an issue and failed to request appropriate relief on a timely basis, the matter would not be considered on appeal as plain error.

(c) A different rule obtains in death penalty cases. The Supreme Court uses a three part analysis which asks whether error was committed, whether there was a reasonable justification for failure to object, including trial tactical reasons, and, regardless of justification for failure to object, whether the error was so prejudicial that in its absence the defendant might not have been found guilty or sentenced to death. ***Perdue*, 916 S.W.2d 148, 154 (1995)**.

Rule 104 ♦ Preliminary questions.

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

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

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

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

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

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

COMMENTARY

PREMISE/PURPOSE: This subsection identifies the judge as the person who will make the determination as to admission or exclusion of evidence in any proceeding. Because the decision to admit is not dispositive of the weight or credibility that the jurors might give to the evidence, the judge is not bound by the rules of evidence except as to privileged information. Although the judge is not required to follow the rules of evidence, *Section 2* of the Kentucky Constitution requires at minimum that the evidence be reliable enough that a rational person could make a decision based upon it.

104(a)

(a) The judge's exemption from the rules of evidence is also restated in *KRE 1101(d)(1)*.

(b) A judge decides admissibility or qualifications of a witness under a preponderance standard. [*Commentary, p.7*]. Relying on ***Bourjailly v. U.S.*, 483 U.S. 171 (1987)**, the drafters stated that the language was susceptible to a construction requiring preponderance. Lawson's Handbook maintains that preponderance is the right standard, *i.e.*, that the item more likely than not is what it is claimed to be, that the witness more likely than not is qualified to express an opinion.

104(b)

PREMISE/PURPOSE: The procedural aspect of this rule works together with *KRE 611(a)* to allow the judge flexibility in the presentation of evidence where witness schedules prevent a logical sequence that would show the relevance of particular testimony or evidence. Essentially, the judge allows the evidence on the proponent's promise that all will become clear later. A more substantive application arises in instances where jurors must find the existence of one fact before another fact is

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relevant. An often-cited example of this application is the situation in which the jury must believe that property was stolen before the second inference, commission of a prior bad act, theft, occurred. ***Huddleston v. U.S.*, 485 U.S. 681, 690 (1988)**. The judge decides whether jurors reasonably could believe the first fact either upon proof introduced by the proponent or the promise that such proof is forthcoming.

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

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

104(c)

PREMISE/PURPOSE: While *KRE 103(c)* covers all aspects of a jury trial, *KRE 104(c)* deals specifically with arguments and hearings about the admission or exclusion of evidence. The same ethical considerations govern both situations. The decision to excuse the jury while arguments are going on is left to the judge except in cases involving suppression of confessions or the products of searches and seizures or in which the defendant testifies and asks for exclusion.

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

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

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

104(d)

PREMISE/PURPOSE: This rule permits a defendant to testify on the limited issue of admissibility of evidence without being subjected to cross-examination on other subjects which is authorized by *KRE 611(b)*. It does not govern later use of that testimony, but by limiting the subject matter of the testimony to the facts bearing on admissibility of evidence, the rule leaves to the defendant how much exposure to later use of his statements he wishes to face. Later use of the statement for substantive purposes is prevented by considerations of relevancy rather than by any protection found in this rule.

(a) Federal Constitutional precedent forbids the use of the defendant's suppression hearing testimony as part of the Commonwealth's case in chief but it may be used as impeachment/rebuttal testimony if the defendant testifies inconsistently at trial. ***Harris v. New York*, 401 U.S. 222, 224 (1971)**; ***Simmons v. U.S.*, 390 U.S. 377, 393 (1968)**.

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

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

(d) In any case, the rule of completeness (*See KRE 106* and *611(a)*), might allow introduction of these preliminary statements if the defendant selectively testifies in a way that might mislead the jury.

104(e)

PREMISE/PURPOSE: In Kentucky this is sometime called the *Crane* rule because it was stated in ***Crane v. Kentucky*, 476 U.S. 683 (1986).** This rule precludes use of pretrial or preliminary judicial rulings on the admissibility of evidence to limit attacks on the weight or credibility of evidence or on the witnesses presenting evidence. The last phrase referring to bias, interest or prejudice was added to the federal language to insure that a party has the opportunity fully to confront the case presented against him. The rule works in favor of any party while the *Crane* precedent applies only for the benefit of the defendant.

(a) In a sense, this rule is not necessary when the defendant's out of court confession is introduced against him at trial. While the federal rule says that the confession is not hearsay, *KRE 801A(b)(1)* says only that it is not excluded by the hearsay rule. The confession is still hearsay [*KRE 801(c)*] and therefore subject to all the methods of attack authorized by *KRE 806*.

(b) The last phrase might better have been introduced as part of Article 6, but, regardless of its position, it guarantees the right to show bias, interest or prejudice as to any witness within the general framework of KRE 401-403.

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

(d) Of course, any impeachment can open the door to rebuttal evidence. [*KRE 106; 801A(a)(2)*]. The type and scope of impeachment requires careful consideration.

Rule 105 ♦ Limited admissibility.

(a) When evidence which is admissible as to one (1) party or for one (1) purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and admonish the jury accordingly. In the absence of such a request, the admission of the evidence by the trial judge without limitation shall not be a ground for complaint on appeal, except under the palpable error rule.

(b) When evidence described in subdivision (a) above is excluded, such exclusion shall not be a ground for complaint on appeal, except under the palpable error rule, unless the proponent expressly offers the evidence for its proper purpose or limits the offer of proof to the party against whom the evidence is properly admissible.

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

NOTES

COMMENTARY

PREMISE/PURPOSE: One of the fundamental premises of the rules is that evidence of dubious value may safely be presented to the jury if the judge gives the jury a clear instruction as to the proper and limited use of the evidence. This rule sets the mechanism for requesting limiting instructions and explains the consequences of failing to ask for instructions.

(a) The first sentence is a directive to the judge to determine the limits of evidence in cases where it is admissible as to some but not all parties or admissible only for some limited purpose.

(b) Everyone thinks immediately about "the" admonition, the limiting instruction that may be given after a party has impeached a witness by proof of a prior felony conviction pursuant to *KRE 609*. But this is very limited conception of the applicability and importance of this rule.

(c) In many jurisdictions, the courts have held that an appropriate limiting instruction must be given when other acts evidence under *Rule 404(b)* has been introduced. ***U.S. v. Merriweather*, 78 F.3d 1070, 1077 (6th Cir. 1996)**. ***Bell v. Commonwealth*, 875 S.W.2d 882, 890 (Ky. 1994)** strongly suggests that a limiting instruction will be required in most cases. *Bell* does not mandate such instructions in every case however.

(d) In non-testifying co-defendant joint trials, there is a question as to whether an admonition will prevent prejudice. The common response to the question is stated in ***Richardson v. Marsh*, 481 U.S. 200 (1987)** where the court wrote that it did not know if admonitions worked but that it pretty much was required to hope so.

(e) A limiting instruction to the jury has two effects: (1) the jury might actually use the evidence for its proper purpose; and (2) the prosecutor will not be allowed to misuse the evidence in closing argument.

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

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

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

Rule 106 ♦ Remainder of or related writings or recorded statements.

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

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

COMMENTARY **NOTES**

PREMISE/PURPOSE: Read literally, this is a procedural rule which explicitly allows variance of the order of presentation of evidence where writings or recorded statements are presented during a party's case. The judge could, under *KRE 611 (a)*, permit interruption of the party's presentation of evidence or the adverse party could deal with the statement or document on cross examination. [*KRE 611(b)*]. This rule recognizes that the proper time for dealing with the document or recorded statement is when the witness is on the stand, not later on cross examination or recall. This rule gives the adverse party, rather than the judge, the right to choose when the other parts of a statement or document will be dealt with.

(a) For tactical reasons, a lawyer may well choose to interrupt the Commonwealth's presentation of evidence through a document or tape/video recording to point out non-inculpatory parts, although this choice is a tactical rather than a legal decision.

(b) The key to determining whether "completeness" requires interruption is whether "in fairness" other parts of the statement or any other writing or recorded statement should be introduced at this point. The idea is keep the jury from being misled.

(c) ***Any other writing or recorded statement*** can be used under this rule. This means that if the defendant has two other confessions that have exculpatory parts they can be introduced in the middle of the prosecutor's case so that the jury does not get the wrong impression.

(d) This can be done even if other witnesses must be called to introduce these writings or statements.

(e) The rule is limited to writings or recorded statements. It does not of its own terms permit introduction of unrecorded statements.However, some courts, relying on *Rule 611(a)* language or the common law say that a judge can let in oral statements at this point as well. ***U.S. v. Haddad*, 10 F.3d 1252 (7th Cir. 1993); *U.S. v. Lewis*, 954 F.2d 1386 (7th Cir. 1992); *U.S. v. Pierce*, 781 F.2d 329 (2nd Cir. 1986).**

(f) The admission of oral statements arises from the belief that fairness requires prompt rebuttal if a party "opens the door" (See *KRE 403*), raising the possibility of misleading the jury.

(g) Under any circumstances, other written, recorded or oral statements are admitted only to explain or put in context the statements relied upon by the proponent.

(h) There is still some debate as to whether a party may use otherwise inadmissible evidence to explain the other written, recorded or oral statements or writings.

(i) Some courts limit such evidence to situation where it is necessary to put the omitted part in context, to avoid misleading the jury, or to assure a fair understanding of the evidence. ***U.S. v. Soures*, 736 F.2d 87 (3rd Cir. 1984).**

(j) If a party has put inadmissible evidence before the jury, the opposing party is entitled to rebut, even by using inadmissible evidence. ***U.S. v. Beverly*, 5 F.3d 633 (2nd Cir. 1993).**

(k) Because introduction of evidence under KRE 106 can be so complicated and can lead to introduction to otherwise inadmissible evidence, in many cases the smart move is to exclude a writing or recorded statement in the first place. *KRE 403*; ***U.S. v. Lefevour*, 798 F.2d 977 (7th Cir. 1986).**

(l) If evidence is to be admitted under this rule, an admonition as to its use almost certainly will be needed. [*KRE 105*].

Rule 107 ♦ Miscellaneous provisions.

NOTES

(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.

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.

NOTES

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing the jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

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

COMMENTARY

PURPOSE/PREMISE: Some facts are so obviously true that it is a waste of time to introduce evidence or witnesses to establish them and a perversion of the trial process to allow cross examination to try to disprove them. This rule deals with facts relevant to issues in a particular case. Although it is still common for judges to "take notice" of laws and regulations, they do not do so under this rule.

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

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

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

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

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

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

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

(h) Subsection g provides that if the judge takes notice of a fact she must instruct the jury to accept it as conclusively established. Thus, if the judge notices the fact that Frankfort is in Franklin County, the judge must also instruct the jury that it cannot refuse to find this fact. The rule does not say whether this advice is to be in the form of an oral admonition from the bench or a written instruction given along with other instructions at the end of trial.

There is a real question about the constitutionality of this subsection in light of the preservation of the ancient mode of jury trial by Section 7 of the

NOTES

Kentucky Constitution. In criminal cases literally every element of the case, (*i.e.*, identity of the actor, venue and elements of the offense), must be proved true beyond a reasonable doubt and only the jury can make these findings. *[RCr 8.22]* However, in four years there has been no reported problem with this subsection and the problem may be more theoretical than real.

(i) Because the fact noticed is conclusive, the adverse party is not allowed to introduce contradictory evidence. A party facing this situation is entitled to be heard upon timely request. Judicial notice is addressed to the judge as a preliminary issue of admissibility of evidence and therefore the judge is entitled to rely on any reliable information to make the determination. Fairness to the adverse party suggests that a request for judicial notice be made before trial but this is not a requirement.

Article III. Presumptions in Civil Actions and Proceedings

Rule 301 ♦ Presumptions in general in civil actions and proceedings.

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

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

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

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

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

COMMENTARY TO 301 & 302

PURPOSE/PREMISE: The due process clause of the 14th amendment prohibits shifting any portion of the burden of proof from the prosecution to the defense. *KRS 500.070(1) & (3)* assign the burden of proof (of persuasion) to the Commonwealth on every element of the case except for certain mistake defenses and insanity. These rules deal only with civil actions and therefore do not affect criminal practice.

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.

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. NOTES

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.
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.
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

PURPOSE/PREMISE: These three rules are rarely considered without reference to each other and are, together with *KRE 601* and *602*, the fundamental principles by which the admissibility of evidence is determined. If evidence is not relevant, it is not admissible and, if it is inadmissible, it is unnecessary to consider the hearsay character of the evidence or the personal knowledge or bias of the witness offered to relate it to the jury. [*KRE 402*]. If the evidence does bear on an issue of consequence to the determination of the proceeding, [*KRE 401*], the judge has authority pursuant to *KRE 403* and *611(a)* to exclude it because the jury is likely to be misled or confused to the point that it might decide the case on improper grounds. Relevancy is the threshold question in every problem of evidence analysis.

401

(a) Evidence is relevant if it has any tendency to make a "fact of consequence" to the determination of the case more or less probable than it would be without the evidence. ***Kroger Co. v. Willgruber*, 920 S.W.2d 61, 67 (Ky. 1996)**. The evidence need not establish the fact of consequence conclusively to be relevant. If the evidence is a "link in the chain" of proof, it is relevant. ***Turner v. Commonwealth*, 914 S.W.2d 343, 346 (Ky. 1996)**. This is not to say that evidence is admissible just because it is relevant. Relevancy is a necessary but not a sufficient finding. This definition only describes the requirement of a logical connection between the offered proof and the fact of consequence to be proved.

(b) Determinations of relevancy are reviewed on appeal under the abuse of discretion standard. ***Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996)**.

402

(c) If the offered evidence is relevant, it is admissible, subject to other policies of inadmissibility established by federal and state courts, statutes and court rules. Admissible evidence can be excluded for a number of public policy reasons ranging from the constitutional exclusionary rule to administrative rules like *RCr 7.24 (9)*.

(d) If evidence is irrelevant, it is inadmissible. There are no exceptions to this principle because evidence that has no tendency to establish a point of a case has no reason to be presented to a jury. Judges and attorneys sometime think that *KRE 106*

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might be an exception to this rule, but a moment's reflection leads to the realization that in such cases evidence of dubious relevance is admitted to reply to questionable evidence previously introduced by an adverse party. In such cases the relevance is the tendency to explain or rebut the inference raised by the adverse party's evidence. There is never any excuse to allow irrelevant evidence before the jury.

(e) This rule is supplemented by *KRE 501* which requires every person to appear as a witness and produce evidence unless excused by law.

(f) Together, *KRE 401*, *402*, *403*, and *501* evince a clear preference for production and admission of evidence that can help produce an accurate determination of the factual issues of a trial and a fair disposition of the controversy giving rise to the proceeding. This is a guiding principle in deciding whether to admit or exclude evidence.

403

(g) Method of analysis: In ***Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996)**, the Supreme Court adopted Lawson's methodology for determining whether KRE 403 allows exclusion of relevant evidence:

1. Assessment of the probative worth of the evidence
2. Assessment of the probable impact of the expected undesirable consequences that would result from admission
3. Determination of whether the harmful effects of admission substantially outweigh its probative worth

(h) In many jurisdictions, there is another element of analysis, a determination of the availability of other means to prove the same point. ***U.S v. Merriweather*, 78 F.3d 1070, 1077 (6th Cir. 1996)**.

(i) In all *KRE 403* cases, the judge must also take into account the likelihood that a limiting instruction *[KRE 105]* will temper the anticipated prejudice resulting from admission of the evidence. ***U.S. v. Lech*, 895 F.Supp. 582 (S.D. N.Y. 1995)**. If the instruction is unlikely to channel the evidence to its proper use, the judge may exclude the evidence entirely.

(j) The prejudice spoken of in the rule is "unnecessary" prejudice that is in addition to the legitimate probative force of the evidence as to a particular issue. [*Partin*, p. 223].

(k) The time it will take to develop the evidence and the likelihood that it would lead the jury off to "collateral" issues are legitimate reasons for exclusion. ***Menefee v. State*, 928 S.W.2d 374 (Tx.App. 1996)**.

(l) The judge may exclude on the ground that the proposed evidence is cumulative, that is, the same point has been established through introduction of other evidence. ***F.B. Ins. Co. v. Jones*, 864 S.W.2d 929, 930 (Ky.App. 1993)**.

(m) The judge's decision under KRE 403 is reviewed under the abuse of discretion standard on appeal. ***Simpson v. Commonwealth*, 889 S.W.2d 781, 783 (Ky. 1994)**.

(n) Relevant photographs that depict the scene of the offense, illustrate the testimony of a witness or have some other legitimate evidentiary purpose are relevant and therefore admissible unless their gruesome nature will so incense or revolt the jury that it may decide the case on the basis of its anger or revulsion. ***Eldred v. Commonwealth*, 906 S.W.2d 694, 704-05 (Ky. 1994)**.

(o) But this does not mean that relevant photos are invariably admissible. In ***Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 253 (Ky. 1995)**, the court upheld the trial judge's decision to exclude photos of a burn victim offered as evidence of pain and suffering noting that there was ample evidence on this point introduced through the testimony of a physician and through hospital records.

NOTES

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

(r) A hot issue in other jurisdictions is the defendant's offer to stipulate one or more of the elements that the prosecutor must prove to get the case to the jury. The theory is that a conclusive stipulation makes evidence that the prosecutor wants to introduce irrelevant *[KRE 402]* or unnecessary *[KRE 403]* and thus excludable. Stipulations are most often offered to exclude other acts evidence otherwise admissible under *KRE 404 (b)*.

The court, in ***Chumbler v. Commonwealth*, 905 S.W.2d 488, 492-93 (Ky. 1995)**, said that the defendant cannot stipulate away the parts of the Commonwealth's case that she does not want the jury to hear. This may be interpreted as holding that the defendant's unilateral offer to stipulate does not require the judge to exclude evidence. It does not mean that the judge cannot do so in the appropriate case. The decision to admit or exclude is entrusted to the discretion of the trial judge. [See Comment 404(b)-(l)].

(s) At jury sentencing, *KRE 403* may preclude introduction of prior convictions. ***McGuire v. Commonwealth*, 885 S.W.2d 931, 938 (Ky. 1994)**.

(t) *Rule 403* can be a substitute for the ***Neil v. Biggers*, 409 U.S. 188 (1972)** test for exclusion of eyewitness identification testimony. Identification is an element of every criminal prosecution, ***Sanders v. Commonwealth*, 801 S.W.2d 665, 674 (Ky. 1990)**, and *KRE 801A(a)(3)* even exempts out of court statements by the eyewitness from the hearsay exclusionary rule. *KRE 403* focuses on the necessity of the testimony and requires the judge to balance the necessity of the testimony against the likelihood of juror misuse or confusion if the evidence is of limited probative value. (Also may be excluded under *KRE 611 (a)* which requires the judge to make the presentation of evidence effective for the ascertainment of the truth.)

(u) *KRE 403* and *KRE 611 (a)* undercut reasons that judges occasionally give to allow introduction of dubious evidence. Occasionally judges say that evidence can be introduced "for whatever it's worth." The judge has a duty to know the worth of any evidence that might be admitted as well as the potential for its misuse by the jury. The jury is never supposed to hear any evidence that has not been carefully analyzed. *[KRE 103 (c)].*

(v) The Supreme Court has recognized that *KRE 403* may require exclusion of incriminating out of court statements made by the defendant under circumstances in which the federal of state constitutions might not apply to require exclusion. ***Commonwealth v. Cooper*, 899 S.W.2d 75, 79 (Ky. 1995)**.

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.

NOTES

(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.

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

PURPOSE/PREMISE: *Rule 404* prohibits introduction of evidence tending to illustrate the character of a person for the purpose of inferring that the person acted in keeping with that character. This rule is counterintuitive because most lawyers, judges and jurors believe that people usually act according to character. But this is exactly the reason for the rule of exclusion; jurors might give character evidence too much weight, perhaps disregarding or discounting of other, more probative evidence. Particularly in criminal cases where the liberty of the defendant is at stake, the public policy judgment is that it is generally better to exclude this type of evidence even though character evidence has some probative value.

Character is a less probative form of habit evidence which most jurisdictions, but not Kentucky, recognize. Habit is invariable conduct in certain situations. If behavior is invariable, the probability of action in conformity with it is high and the risk of juror misuse is low enough to be acceptable. Character is less satisfactory for this purpose because it describes a tendency rather than an invariable response. Character indicates to the jury that action in conformity is more likely but it is impossible to say how much more likely it is. Thus, the strict limitations on its use.

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

404(a)

(a) The plain language of the rule identifies it as a blanket prohibition of character to prove act.

(b) The exceptions to the general rule of exclusion apply when the characters of the accused, of the purported "victim" of the crime, or of a witness are relevant. If the character of some other person is relevant, this rule does not apply. ***U.S. v. Hart*, 70 F.3d 854 (1995).**

(c) The accused may always introduce evidence of her own character or trait of character, when relevant, to convince the jury that he is not the type of person who would perform the acts charged, or at least not with the culpable mental state alleged.

***Johnson v. Commonwealth*, 885 S.W.2d 951, 953 (Ky. 1994).**

(d) If, and only if, the defendant has put his character in issue, the prosecutor is allowed to rebut by introduction of other evidence bearing on the defendant's character. ***U.S. v. Monteleone*, 77 F.3d 1086, 1089 (8th Cir. 1996). *LaMastus v. Commonwealth*, 878 S.W.2d 32 (Ky.App. 1994)** is wrong to the extent that it holds that a defendant who appears as a witness is subject to character attack whether he puts his character at issue or not.

(e) The accused may also present evidence of a relevant trait of the "victim" of the crime except in prosecutions for sexual offenses in which *KRE 412* governs. The prosecution is entitled to rebut the defendant's attack. The general character of the "victim" is not admissible under *KRE 404 (a)(2)*.

(f) In homicide cases, if the defendant claims self defense or that the "victim" was the "first aggressor," the prosecution may introduce evidence of the trait of peacefulness to rebut the claim made by the defendant. Evidence of only this trait is authorized by this rule. ***Mack v. State*, 928 S.W.2d 219, 225 (Tx.App. 1996).**

(g) *KRE 405* lists the methods by which the character of the accused or the "victim" may be established.

(h) The character of a witness other than the accused or the "victim" is to be attacked by the methods prescribed in *KRE 607*, *608* and *609*. The proponent of the witness cannot introduce evidence of good character until the character of the witness has been attacked. ***Pickard Chrysler, Inc. v. Sizemore*, 918 S.W.2d 736, 740-41 (Ky.App. 1995); *LaMastus v. Commonwealth*, 878 S.W.2d 32 (Ky.App. 1994).**

(i) A defendant who testifies on his own behalf does not open himself up to general attack on his character. *KRE 608* and *609* allow attacks on credibility in general and deal with the trait of honesty. It is extremely unlikely that the drafters intended *KRE 405(a)* to apply only to non-testifying defendants.

404(b)

PURPOSE/PREMISE: This rule is a refinement of the general prohibition against using character as a predictor of behavior. Proof that the defendant has done other similar acts is more likely to mis- or over-persuade the jury than opinions or reputation for character traits. Other acts give the jury a track record to rely on. Therefore, in Kentucky *KRE 404(b)* is applied as a rule of general exclusion with only certain specific exceptions. Evidence of other acts is inadmissible unless the proponent of such evidence makes a showing that it is offered for a legitimate purpose and that the jury is not likely to misconstrue or misuse the evidence.

General Analysis

(j) Method of analyzing *404(b)* cases:

1. There must be a legitimate issue about the point to which the other acts evidence is addressed. The evidence must address a "fact of consequence" to the disposition of the case. ***U.S. v. Merriweather*, 78 F.3d 1070, 1077 (6th Cir. 1996); *U.S. v. Crowder*, 87 F.3d 1405, 1410 (D.C. Cir. 1995).**

2. The proponent of the evidence must identify a legitimate non-propensity purpose for its introduction. ***Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994); *Daniel v. Commonwealth*, 905 S.W.2d 76, 78 (Ky. 1995).**

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3. The judge must decide whether there is sufficient proof that the defendant committed the other act. [*Bell*, p. 890].

4. If these thresholds are met, the judge must decide whether the potential for prejudice substantially outweighs the probative value. *Bell*, p.890; *KRE 403*.

   a. The Supreme Court has noted the "universal agreement" that other crimes evidence is inherently highly prejudicial. *Bell*, p. 890; ***Dedic v. Commonwealth*, 920 S.W.2d 878, 879 (Ky. 1996)**.
   b. Thus, in ***Eldred v. Commonwealth*, 906 S.W.2d 694, 703 (Ky. 1994)**, the court held that such evidence should be admitted only where the probative value and *the need* for the evidence outweigh its unduly prejudicial effect.
   c. Where value is slight and prejudice is great, the other acts should be excluded entirely. ***Chumbler v. Commonwealth*, 905 S.W.2d 488, 494, (Ky. 1995)**.
   d. Obviously, the effectiveness of a limiting instruction figures in the balancing process. *Bell*, p. 890.

(k) In ***Eldred v. Commonwealth*, 906 S.W.2d 694, 703 (Ky. 1994)** held that other acts evidence is usually important on questions of corpus delicti, identity or mens rea.

(l) If a defendant stipulates one or more elements of the prosecutor's case, *i.e.*, admits identity or admits a culpable mental state, the need for other acts evidence is greatly reduced, perhaps to the point that there is no material issue as to the conceded point. In the federal courts, a formal stipulation often results in exclusion of other evidence. ***U.S. v. Crowder*, 87 F.3d 1405, 1410 (D.C. Cir. 1996)**, which cites the positions taken by other circuits. A stipulation is not excluded by the hearsay rule because it qualifies for exemption as a party admission under *KRE 801A(b)(2), (3)* or *(4)*. The judge may treat the admission as an adequate substitute for the inherently prejudicial other acts evidence because an admission of a party is more probative evidence than the inference made from previous conduct.

Specific Uses

(m) Inextricably intertwined acts are not subject to exclusion because such evidence by definition deals with acts that are so interwoven with the charged crime that mention of the other acts is unavoidable. ***Funk v. Commonwealth*, 842 S.W.2d 476 (Ky. 1992)**. However, the interwoven acts must be intertwined with evidence that is "essential" to the case so that exclusion of the other acts would have a "serious adverse effect on the offering party." *[KRE 404(b)(2)]*. Again the proponent of the other acts evidence must show the relationship of the acts and how its case will suffer serious adverse effects from exclusion.

(n) Habit: There is no rule governing habit. Prior Kentucky law excluded habit evidence and this, together with the failure to adopt proposed rule 406 authorizing habit evidence, indicates that habit is never admissible. Habit questions are considered under *KRE 404(b)*. ***Johnson v. Commonwealth*, 885 S.W.2d 951 (Ky. 1994)**.

(o) Flight: ***Chumbler v. Commonwealth*, 905 S.W.2d 488 (Ky. 1995)** recognized that flight, a subsequent act, can be an indicator of consciousness of guilt.

(p) Threats: In ***Perdue v. Commonwealth*, 916 S.W.2d 148, 154 (Ky. 1995)** the court noted that threats by the defendant indicated a consciousness of guilt when made against a witness. Threats before the charged act may bear on motive.

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(q) **Motive:** Other acts may illustrate the motive for committing the crime charged. ***Tucker v. Commonwealth*, 916 S.W.2d 181, 183 (Ky. 1996)** upheld introduction of evidence of a prior robbery to show motive to kill a clerk in the charged robbery.

(r) **Marital infidelity/unconventional sex acts:** Evidence of this type is characterized as a character smear with little probative value. ***Smith v. Commonwealth*, 904 S.W.2d 220, 222 (Ky. 1995)**; ***Chumbler v. Commonwealth*, 905 S.W.2d 488, 492 (Ky. 1995)**.

(s) **Modus Operandi:** This is used to reveal identity of the person who committed the charged act by showing peculiar and striking similarities between the acts and by showing that the acts are the "trademark" of the defendant. ***U.S. v. Crowder*, 87 F.3d 1405, 1410 (D.C.Cir. 1996)**.

(t) **Plan:** This is the most misunderstood purpose for other acts evidence. It should not be confused with "common plan or scheme" which appears in RCr 6.18 which governs the types of offenses that may be joined in an indictment. RCr 6.18 applies only to the grand jury. Plan, as used in *KRE 404(b)(1)*, refers to two situations: (1) where several crimes are constituents of a larger plan, the existence of which is proved by evidence other than the acts offered; and (2) where a person devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. ***State v. Lough*, 889 P.2d 487, 491 (Wash. 1995)**. In either instance, the other acts cannot be used to show the existence of the plan. The plan is the justification for admission of the other acts.

(u) **Pattern of conduct:** ***Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky. 1994)** discussed a pattern of conduct as a ground of admission if the proponent shows that the acts are so similar as to indicate a reasonable probability that the crimes were committed by the same person. How this differs from M.O. is unclear.

(v) The list of purposes is not exhaustive. Any legitimate non-propensity purpose can justify admission of other acts evidence.

404(c)

PURPOSE/PREMISE: The notice provision allows the opponent of other acts evidence time to prepare to meet it. Although the burden of showing proper purpose is on the prosecution, the defendant must be given an opportunity to learn if there is adequate proof that the other acts occurred and that the defendant committed them. The rule presents a policy judgment that it is expedient to afford time to investigate before rather than during trial. ***Daniel v. Commonwealth*, 905 S.W.2d 76, 77 (Ky. 1995)**.

(w) The rule is limited to other acts evidence that the prosecution intends to introduce in chief. Of course, if the defendant opens the door during cross examination or by introduction of evidence, the Commonwealth is entitled to rebut, but only to the extent necessary to counter the defendant's evidence. The long accepted definition of rebuttal evidence describes it as "evidence in denial of some affirmative case or fact which the adverse party has attempted to prove...." or evidence which explains the other party's evidence. ***Keene v. Commonwealth*, 210 S.W.2d 926, 928 (Ky. 1948)**. The Commonwealth should not be allowed to avoid giving notice by holding back other acts evidence and trying to offer it as rebuttal.

(x) A letter from the prosecutor to defense counsel is considered sufficient notice but a police report included in a discovery response is not. ***Gray v. Commonwealth*, 843 S.W.2d 895 (Ky. 1992)**; ***Lear v. Commonwealth*, 884 S.W.2d 637 (Ky. 1994)**; ***Daniel v. Commonwealth*, 905 S.W.2d 76, 77 (Ky. 1995)**.

(y) Exclusion is not the only remedy provided for by the rule although in the absence of a satisfactory excuse for failure to give notice, one that is more than simple failure to prepare the case for trial in a timely manner, this should be the remedy.

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

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.

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

PURPOSE/PREMISE: To define and limit the methods of proving character, when character is an issue. Attempts to prove character by examples of an individual's behavior are subject to many problems, not the least of which is balancing the prejudice certain to flow from selective presentation of incidents from a person's past against the probative value of character. While character is not considered a "collateral" issue, because it is "of consequence to the determination of the action," it does not bear on the determination of the action in the same way that eyewitness identification evidence or fingerprints bear on the elements of the case. This rule is a policy determination that in those limited circumstances in which character may be presented, it must be presented in ways that limit the prejudicial potential.

(a) *KRE 701* limits non-expert opinion testimony to opinions rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or determination of a fact in issue. *KRE 405* is a specialized version of this general principle.

(b) *405(a)* limits testimony as to character or character traits to general reputation in the community or the opinion of the witness. Both obviously are forms of opinion testimony, the former an inference based on the witness's impressions of what other people think and the latter the witness's own personal opinion.

(c) *KRE 705* does not apply to lay opinion testimony. There obviously must be some basis for the witness's opinion, but the only foundation requirement is found in *KRE 602*, which does not necessarily require introduction of facts before rendition of the opinion. The jury will be unimpressed by an opinion of honesty, peacefulness, etc., given without any indication of how the witness came to this conclusion.

(d) In reputation evidence, the "community" consists of persons likely to know something about the person whose character is at issue. The word does not necessarily describe a geographical location.

(e) Nothing in this rule prevents an expert from giving an opinion as to the character of a person, assuming the requirements of *KRE 702* are met. *KRE 608* expressly authorizes attacking the credibility of a witness by evidence "in the form of

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opinion." While there are no experts qualified to tell the jury that a person is telling the truth [See *KRE 702*] there are experts, psychiatrists, etc., who can testify as to their expert opinion of the psychological or psychiatric makeup of the witness and how this might bear on the witness's ability to be truthful.

(f) Cross examination as to specific incidents is limited to "relevant" specific instances of conduct. The rule imposes a duty on the questioner to have a "factual basis" for the subject matter of the inquiry. This requirement parallels the attorney's ethical duty under *RPC 3.4(e)*.

(g) Understanding of the purpose of specific incident cross examination is critical. It is to "test the knowledge and credibility of the witness" for the purpose of showing that the witness does not know enough about the character of the person he is testifying about for the jury to accredit his opinion. ***U.S. vs. Monteleone*, 77 F.3d 1086, 1089 (8th Circuit, 1996)**.

(h) It is not enough that the specific incidents occurred, although this is a prerequisite under *KRE 104(a)*. The cross examiner must also have a good-faith belief that the incidents are the type that were likely to have come to the witness's attention. If the witness is asked about events "essentially private in nature and not likely to be known in the community at large, then the questions cannot possibly be intended to test the accuracy, reliability, or credibility" of the witnesses's testimony. Rather, such incidents are irrelevant. ***Monteleone*, p. 1090.**

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

(j) If the witness has not heard of the specific incident posed by the cross examiner, there is no legitimate basis for further impeachment by proving that the event occurred or that the witness is lying about not hearing or knowing about it. At this point, the inquiry becomes "collateral" as an attempt to impeach an answer to an impeachment question of a witness who gave opinion/reputation evidence of character which circumstantially may or may not bear on the jury's determination of an issue of the case.

(k) It is hard to think of any Penal Code or other offense in which character or a character trait is an element of the offense. *KRE 405(c)* is unlikely to be a legitimate part of the prosecution's case in chief.

Rule 406 ♦ (Number not yet utilized.)

COMMENTARY

This number was assigned in the original draft of the rules to a rule authorizing introduction of habit evidence. The rule was not adopted in 1992. Habit evidence, therefore, is not admissible in Kentucky **[See Comment 404(b)-(e)].**

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.
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 NOTES

PURPOSE/PREMISE: This is a policy judgement that it is more advantageous to society to encourage repair or improvement measures by excluding mention of them at trial than it is to give a party an argument that the opponent's subsequent repair or improvement is an admission that the item or premises were dangerous at the time of the events giving rise to the litigation. The rule may not often apply in criminal actions, but it is intended to reach cases in which a failure to perceive a risk **[reckless/wanton culpable mental state]** is an element. An example: repairs made to a car after involvement in an accident resulting in a death.

(a) In ***Ison vs. St. Elizabeth Medical Center*, ___ S.W.2d ___ (Ky. 1996)**, the Supreme Court held that ordinarily a change in policy at a hospital will be excluded by the rule because the change would be a subsequent remedial measure and could not be used to "prove negligence in connection with the event."

(b) A party may use subsequent repair, improvement, or change to show "ownership or control." The inference is that the owner or person in control would undertake to repair the car. Another possible use is impeachment. Of course, these matters must be "at issue" and also must be "of consequence to the determination of the action."

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

Rule 408 ♦ Compromise and offers to compromise.

Evidence of:

(1) Furnishing or offering or promising to furnish; or

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

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

COMMENTARY

PURPOSE/PREMISE: The rule seeks to encourage compromise and settlement without recourse to the Court of Justice by preventing the later use of the fact of an offer to compromise or the discussions of the parties leading up to the offer as an admission of guilt or liability. In practice, the rule operates much like KRE 410 for plea bargaining. However, such evidence is available to show the bias or prejudice of a witness [the inference being the witness is testifying because not offered enough to compromise the claim] or an attempt to obstruct criminal investigation or prosecution [an attempt to buy off the witness].

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.

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

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COMMENTARY

PURPOSE/PREMISE: This is the third humanitarian/pragmatic Article 4 rule which insulates an offer or attempt to ameliorate harm from being used against the party later by creating an inference of guilty knowledge of the party who makes the offer. The rule protects offers to pay or payment of medical or similar expenses which may or may not include payment for pain and suffering.

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

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

(1) A plea of guilty which was later withdrawn;

(2) A plea of nolo contendere in a jurisdiction accepting such pleas, and a plea under Alford v. North Carolina, 394 U.S. 956 (1969);

(3) Any statement made in the course of formal plea proceedings, under either state procedures or Rule 11 of the Federal Rules of Criminal Procedure, regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible:

(A) In any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it; or

(B) In a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

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

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

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

(b) This rule does not preclude the use of *Alford* or nolo contendere pleas as evidence of prior convictions in *KRS 532.055* or *KRS 532.080* hearings. The author disagrees with these holdings because the pleas are certainly used as admissions against interest *[KRE 801 A(b)(1)]* as well as evidence of the judgement of the court which entered them *[KRE 803(22)]*. However, *Pettiway vs. Commonwealth*, p.767 and ***Whalen vs. Commonwealth*, 891 S.W.2d 86, 89 (Ky.App. 1995)** authorize use in sentencing cases.

(c) The rule excludes the defendant's statements taken during the taking of the withdrawn plea or the entered *Alford* or nolo plea.

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(d) Neither *RCr 8.08* nor *RCr 8.09* explicitly authorizes a Kentucky judge to accept an *Alford* plea, although they are accepted daily in circuit and district courts throughout Kentucky. *Pettiway* at least tacitly recognizes that such pleas may be accepted. ***North Carolina vs. Alford*, 400 U.S. 25 (1970)** does not require a state to accept pleas in which the defendant refuses to admit guilt. It simply holds that such pleas are not unconstitutional. *Alford* pleas are not mentioned in the federal rule.

(e) Plea discussions are defined as discussions in advance of the time of pleading "with a view toward agreement" under which the defendant enters a plea in exchange for charge or sentencing concessions. ***Roberts vs. Commonwealth*, 896 S.W.2d 4, 5 (Ky. 1995)**.

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

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

(h) The court adopted a two-part federal test to determine when plea discussions take place. It focuses first on the accused's actual and subjective expectations that he was negotiating a bargain at the time of the discussion and second on whether the defendant's expectations were reasonable in light of all the objective circumstances. ***Roberts*, p.6.**

(i) The protection of the rule applies to discussions held before or after formal charges are filed ***Roberts*, p.6.**

(j) This rule exists for the protection only of the criminal defendant. The text of the rule provides no exemption for statements made by agents of the commonwealth either in plea discussions or at the pleas themselves. Statements by the police or prosecutors, if relevant, could be introduced as party admissions pursuant to *KRE 801 A(b)(2), (3) or (4)*. However, *KRE 410 (4)(a)*, a special application of the rule of completeness, would allow the prosecution to introduce other parts of the plea or plea discussions that "ought in fairness be considered contemporaneously with it." Use of prosecution statements is an available but risky tactic.

(k) If the defendant is tried for perjury, false statements made under oath, on record, and in the presence of counsel, plea statements may be admitted. This would apply to station house interrogations as well as court proceedings.

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

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.

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

COMMENTARY

PURPOSE/PREMISE: This is another of the pragmatic/humanitarian exclusion which supports the public policy of mandatory insurance for automobiles and encourages insurance for other purposes. It does so by denying a party the inference

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that the adverse party's insurance or failure to insure against a possible risk is evidence of negligent or wrongful conduct.

(a) Like most policy declarations, there are exceptions to the rule of exclusion.

(b) In the absence of other evidence, proof of insurance would be evidence of ownership, agency, or control of property. However, this type of evidence is excluded on the basis of a policy determination that the potential for prejudicing, confusing, or misleading the jury is generally so high that its probative value is outweighed. If there is other evidence to prove these points, the policies underlying this rule and *KRE 403* counsels exclusion.

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

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

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

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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.

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

PURPOSE/PREMISE: This is the last of the pragmatic/humanitarian policy rules of Article 4 designed to impress upon litigants the principle that the sex life of the prosecuting witness in a Chapter 510 proceeding generally is not relevant to any point likely to arise during trial. The rule differs from the others in the rigid procedural steps which must be taken to introduce evidence on the limited subjects which the rule permits. Just as the sex life of the defendant in prosecutions is generally irrelevant, **[Comment 404(b)-(i)]**, that of the prosecuting witness is equally likely to be irrelevant. The special rule is necessary because of a combination of the weird and ambivalent attitude of society toward sex and the misogyny that was prevalent in the common law and in Kentucky's statutory law.

(a) The prosecuting witness in a sex offense case is a witness whose credibility may, under *KRE 404(a)(3)* and *KRE 608* be attacked by evidence "in the form of opinion or general reputation in the community." What has been overlooked in the past, however, is that the opinion or reputation is only for honesty or mendacity.

(b) *KRE 404(b)(1)* precludes introduction of specific acts to prove action in conformity with character. This defeats the inference that prior consensual acts are proof of consent to the charged act.

(c) *KRE 404(a)(2)* precludes a defendant from offering in a sex offense prosecution a pertinent trait of character to prove action in conformity with that trait.

(d) However, if sexual conduct is inextricably intertwined with other evidence essential to the case such that serious damage to the proponent's case would result from exclusion, the evidence of other acts would be admissible. *KRE 404(b)(2).*

(e) In light of the above, *KRE 412(a) and (b)* make few changes to the principles of admission or exclusion of evidence.

(1) The prosecuting witness's reputation for sexual behavior and other people's opinion of her sexual behavior is not admissible under *KRE 412(a).* However, it would not be admissible under *KRE 404(a)(3)* or *608* either.

(2) *KRE 412(b)* prohibits evidence of past sexual behavior with others except for a specific purpose, identification of the donor of the semen or the cause of injuries. *KRE 404(b)(1)* would preclude introduction of other sexual conduct with others to establish propensity.

(3) *KRE 412(b)(2)* permits proof of sexual behavior with the accused as evidence of consent. Under *KRE 404(b)(1) or (b)(2)*, the same evidence would be admissible to prove lack of intent or mistake or would be admissible as inextricably intertwined acts.

(4) *KRE 412(b)(3)* is a catch-all that allows introduction of other sexual behavior pertaining directly to the act charged.

(f) *KRE 412* is a compilation of principles spread throughout Article 4 made necessary by previous practice in which the chastity of the prosecuting witness was

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deemed relevant "to the reasonableness of her story" and in which proof of prior acts proved chastity ***Robersons New Kentucky Criminal Law and Procedures*, 2 Ed., p.779-784 (1927).**

(g) The defendant who wishes to introduce evidence of other acts under this rule must file a written motion 15 days before the scheduled first day of trial, although the judge may allow later filing for new evidence not discovered by due diligence or the raising of a new issue *412(c)(1)*.

(h) With the motion, the defendant must submit a written offer of proof which will show the judge that the defendant wishes to introduce prior behavior which is covered by *KRE 412(b)* [*412(c)(1)*].

(i) If the offer of proof is sufficient, the judge must conduct a hearing from which the public is excluded [*412(c)(2)*].

(j) At the hearing, either party may call witnesses. The defendant may call the prosecuting witness and offer other "relevant" evidence [*412(c)(2)*].

(k) The issue of admissibility must be settled before trial. *KRE 104(b)* does not apply here. If the admissibility of past sexual behavior evidence depends on a condition of fact, the judge must make the determination before the evidence is admitted or excluded [*412(c)(2)*].

(l) If the judge finds that the evidence qualifies under the rule, is relevant, and that the probative value outweighs the danger of unfair prejudice, the judge *shall* rule it admissible [*412(c)(3)*].

(m) The judge must enter an order which identifies the evidence to be admitted and the subject matter of direct and cross examination.

(n) The record of the hearing in chambers constitutes a means by which the prosecuting witness may be impeached if the prosecuting witness testifies at trial in a manner inconsistent with hearing testimony. *[KRE 801 A(a)(1); 106]*

(o) If the prosecuting witness testifies as to lack of memory at trial and has testified on that subject matter at the hearing, the video tape or transcript may be introduced as substantive evidence under *KRE 801 A(a)(1), 804(a)(3), and 804(b)(1)*.

(p) The judge's ruling on admission or exclusion is reviewed for abuse of discretion ***Commonwealth vs. Dunn*, 899 S.W.2d, 492, 493 (Ky. 1995).**

(q) The Supreme Court agrees with *Lawson* that the balancing test prescribed by *KRE 412(c)(3)* has "an obvious tilt toward exclusion over admission" ***Dunn*, p.494.**

(r) Remoteness of prior acts is a vital consideration in exclusion. In Dunn, acts occurring seven years before the charged act were excluded. p. 494.

(s) It appears that other acts must be "directly" relevant to the charged act. In ***Violett vs. Commonwealth*, 907 S.W.2d, 773, 776 (Ky. 1996)** the court upheld exclusion of letters from the prosecuting witness to her boyfriend which contained references to sexual activity. The defendant maintained that the letters supported his theory of defense, that the boyfriend and the prosecuting witness made up charges to get him out of the way and that *KRE 412(b)(3)* allowed admission.

(t) Evidence must be relevant within the meaning of *KRE 402* before consideration of exclusion under *Rule 412* is necessary ***Miller vs. Commonwealth*, 925 S.W.2d 449, 452 (Ky. 1996).**

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. NOTES

In the original KRE draft, proposed KRE 502 adopted Wigmore's principle 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 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.

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

COMMENTARY

Any person properly summoned to the witness stand under *RCr 7.02* or *KRS 421.190* cannot lawfully refuse to be a witness, refuse to disclose any "matter" or refuse to produce any object or writing unless that person claims a privilege under the Federal or 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 524* 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;

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(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.
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. However, *SCR 3.020* defines the practice of law as "any service rendered involving legal knowledge or legal advice" which involves "representation, counseling, or advocacy in or out of court and which concerns the rights, duties, obligations, liabilities or business relations of the one requiring the services." If the communication is about one of these topics, it should fall under the attorney-client privilege.

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

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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 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 NOTES

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

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.

KRS 620.030 imposes a duty on practically every adult to report child abuse to police, or to the commonwealth's and county attorneys. *KRS 620.050(2)* expressly states that the husband/wife and any professional/client/patient privileges except the attorney/client and clergy/penitent privileges do not excuse a person from the duty to report. These privileges will not apply "in any criminal proceeding in district or circuit court regarding a dependent, neglected or abused child."

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

Rule 505 ♦ Religious privilege.

(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

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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.

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*, 892 S.W.2d 542 (Ky. 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.
(without 1996 General Assembly amendments)

(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; and

(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.

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(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.

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).

Rule 506 ♦ Counselor-client privilege.
(with 1996 General Assembly amendments but see KRE 11.02)

(a) Definitions. As used in this rule:

(1) A "counselor" includes:

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

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

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

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

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

(F) An individual who provides crisis response services as a member of the community crisis response team or local community crisis response team pursuant to KRS 42.660 to 42.680; and,

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

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

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(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.

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) now under the 1996 amendment (a)(1)(C) and (a)(1)(D); amended by the 1996 Ky. Acts. chs. 189, 316, and 364. eff. 7/15/96; however, the 1996 amendments have not to date been enacted by the Kentucky Supreme Court pursuant to KRE 11.02.

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

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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.

The 1996 amendments by the General Assembly have not to date been enacted by the Kentucky Supreme Court pursuant to KRE 11.02.

Rule 507 Psychotherapist-patient privilege.
(without 1996 General Assembly amendment)

(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; or

(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.

(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 his 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

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(3) If the patient is asserting his 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.

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).

Rule 507 ♦ Psychotherapist-patient privilege.
(with 1996 General Assembly amendment but see KRE 11.02)

(a) Definitions. As used in this rule:

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

(2) A "psychotherapist" is:

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

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

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

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

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

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

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

(c) Exceptions. There is no privilege under this rule for any relevant communications under this rule:

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

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

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

in which any party relies upon the condition as an element of a claim or defense.

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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); amended by the 1996 Ky. Acts chs. 369, sec. 18, eff. 7/15/96; however, the 1996 amendments have not to date been enacted by the Kentucky Supreme Court pursuant to KRE 11.02.

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 definition of "psychotherapist" to include registered nurses and nurse practitioners. The privilege applies despite the presence of other persons who may be participating in the diagnosis or treatment. (Subsection (b)).

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)*. 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.

The 1996 amendments by the General Assembly have not to date been enacted by the Kentucky Supreme Court pursuant to KRE 11.02.

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

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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.

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.

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Disclosure of communications for the purpose of receiving third-party payment for professional services does not waive any privilege with respect to such communications.

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. See Comment 612-(k).

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.

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.

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.

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

COMMENTARY

PURPOSE/PREMISE: Five rules, *KRE 401, 402, 403, 601*, and *602* form the fundamental basis for admission or exclusion of evidence. The common and statutory law of Kentucky were rife with provisions declaring certain persons, (criminal defendants, wives, takers under a will) incompetent. Now every person is competent unless some other provision of law declares them otherwise. Competency is a legal policy question dealing with types of witnesses.

Subsection (b) tells the judge the minimum abilities that an otherwise competent witness must possess in order to "testify as a witness." Subsection (b) deals with the capacity of the individual. It is important to note that rules *605* and *606* declare the trial judge and the jury incompetent, but only as to the trial at to which they are performing these functions.

(a) A defendant in a criminal case is a competent witness because this rule and *KRS 421.225* make him so. *KRS 421.225* now is more of an exemption from the *KRE 501(1)* requirement to testify than it is a witness competency statute. Under the statute, the defendant testifies only at his own request.

(b) A lawyer is a competent witness for any purpose although a lawyer who may be called as a "necessary" witness is bound by *RPC 3.7(a)* to disqualify herself as counsel and by *RPC 1.6* and *KRE 503* to maintain confidentiality of any information falling under these rules.

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

(d) Any person who wishes to testify must demonstrate that he (1) was able to perceive accurately the matters about which he proposes to testify, (2) presently has the ability to recall these facts, (3) can, in some meaningful way, communicate these facts to the jury, and (4) understands the obligation to tell the truth.

(e) A witness who is drunk, insane, or mentally incompetent, at the time of an incident or at the time of testifying may or may not be disqualified as a witness.

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The judge must determine whether the witness so "lacked" capacity to perceive or to remember that no jury could rely on what the person had to say.

(f) "Lack" is defined as "entirely without or having very little of" something. ***American Heritage Dictionary*, 3 Ed., p. 1005 (1992).** A person who is entirely without or just barely possesses one or more of the required capacities is disqualified on practical grounds. Nothing the witness says is reliable enough to be used or it is unlikely that the jury will comprehend what the witness has to say.

(g) If the person demonstrates marginal capacity, the judge must decide questions of the likely relevance of his testimony and the potential for misleading or confusing the jury under *KRE 401-403*.

(h) In Federal courts, ***Morgan v. Foretich*, 846 F.2d 941 (4th Circuit 1988)** is sometimes cited for the proposition that a witness's incompetency does not necessarily preclude introduction of that person's hearsay statements. The federal rule does not have a counterpart to *KRE 601(b)*, however. The federal rule consists of KRE 601(a) language and a provision about choice of law. This is a critical difference.

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

Rule 602 ♦ Lack of personal knowledge.

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

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

COMMENTARY

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

(a) Testimony that is not based on personal knowledge is always inadmissable. ***Perdue v. Commonwealth*, 916 S.W.2d 148, 157 (Ky. 1995).** But if the defendant does not object, it may be used for any purpose.

(b) Although it is good practice to establish the basis for the witness's personal knowledge before the witness testifies to important facts, the rules do not require it. The judge has no duty to intervene simply because foundation is not shown. But if the basis of the witness's knowledge is unclear, *KRE 611(a)* allows the judge to intervene to ask the lawyer to establish the basis or under *KRE 614(b)* to ask the foundation questions himself. Relying on the judge to practice the case for one side or the other is unwise. The adverse party must demand foundation or the question will be deemed waived.

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

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

(e) A lay witness is required by *KRE 701* to base his opinion on facts or circumstances perceived by the witness.

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

(g) ***Rowland v. Commonwealth*, 901 S.W.2d 871, 873 (Ky. 1995)**, held that hypnotically refreshed testimony of a witness could be admitted under certain conditions. The obvious danger with such testimony is the potential for suggestion to overtake the memory of the witness. However, in this case the Commonwealth held that because the witness' "pre-hypnotic recollections" had been recorded (in written or taped form) the decision to allow the witness to testify was permissible.

Rule 603 ♦ Oath or affirmation.

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

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

COMMENTARY

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

(a) The efficacy of this rule for its stated purpose is open to doubt. The theory is that the promise will "awaken" the witness's conscience and notify the witness of the duty to tell the truth. The notice is a veiled threat necessary to satisfy the perjury statute, *KRS 523.020(1)*. The "conscience awakening" part of the rule is undercut by the existence of rules like *KRE 613*, *801 A*, and *804* which anticipate willful refusal to testify truthfully by providing remedies for such untruthful testimony.

(b) In some courts the judge ends the oath with the phrase "so help you God." While this is not offensive to a great majority of witnesses, it is unwise practice. If a witness does not wish to invoke the Almighty, the witness has a constitutional and a legal right not to. To avoid embarrassment and potential prejudice to the party calling the witness, judges either should inquire out of the hearing of the jury how that witness wishes to comply with the rule or simply to ask each witness to swear or affirm without any further embellishment.

Rule 604 ♦ Interpreters. NOTES

An interpreter is subject to the provisions of these rules relating to qualifications of an expert and the administration of an oath or affirmation to make a true translation.
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 37; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

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

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

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

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

Rule 605 ♦ Competency of judge as witness.

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 38; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

PREMISE/PURPOSE: There are some rules that allow or require a judge to be something other than an umpire waiting to be called upon to resolve an evidentiary dispute. *KRE 611(a)* makes the judge ultimately responsible for the quality of the evidence heard by the jury and *KRE 614(a)* and *(b)* give the judge the means to make the presentation of evidence effective for the ascertainment of the truth. *KRE 605* exists to prevent an over-eager judge from intruding too far into the adversarial process. This rule precludes the judge from testifying as a witness at a trial over which she is presiding. The second sentence of the rule makes an objection unnecessary if this occurs.

(a) This situation does not arise often. It is possible to imagine some scenarios in which a judge might be the best, and perhaps the only witness. A judge might overhear the defendant threaten the life of a witness or overhear the prosecuting witness tell the prosecutor that he really can't say that the defendant is the person who robbed him. This obviously would be potent evidence and, if adduced through the presiding judge, would be nearly unimpeachable. But this is just the reason for the rule: the adversary party's cross-examination would be so difficult and so unlikely to counteract the judge's testimony, that the drafters have decided that the presiding judge's testimony must be unavailable at the trial.

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

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

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

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

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

Rule 606 ♦ Competency of juror as witness.

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

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

COMMENTARY

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

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

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

Rule 607 ♦ Who may impeach.

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

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

COMMENTARY

PURPOSE/PREMISE: This rule was included in the federal rules to supersede the common law rule that the proponent of the witness implicitly vouched for the credibility of the witness by calling him. If the witness turned on the proponent, the common law forbade impeachment. Under the Civil Code **[Section 596]** the proponent usually could not impeach, but could contradict with other evidence. After 1953, *CR 43.07* allowed impeachment by any means except evidence of particular

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wrongful acts. *KRE 607* builds on *CR 43.07* and authorizes impeachment of any witness by any party by any method authorized by law.

(a) Credibility may be attacked in any number of ways, as reference to *CR 43.07*, *KRE 104(e)*, *KRE 608*, *KRE 609*, and case precedent shows. Impeachment is the process of showing the jury why it should disbelieve or discount what the witness is testifying to.

(b) Bias-interest-prejudice - These terms describe evidence that allows the jury to conclude that the witness has a reason for not telling the truth or not telling the whole truth. Typically this is accomplished by introducing evidence that the witness has a grudge or a reason to hold a grudge against a party, that the witness has something to gain or a bad result to avoid by testifying in a certain way, or that for personal reasons the witness is not being square with the jury.

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

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

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

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

(g) The standard rule is that a witness cannot be impeached on a "collateral issue." ***Eldred v. Commonwealth*, 906 S.W.2d 694, 706 (Ky. 1994).** It is hard to find a satisfactory analysis for determining when the attempted impeachment is "collateral." The question comes up usually in attempts to impeach by inconsistent statements and contradiction and must be approached through general relevancy/ balancing analysis under *KRE 401-403*. Impeachment evidence is likely to be considered collateral when its bearing on an "issue of consequence" is slight and the potential for misleading the jury is high.

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

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

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

(k) But the proponent cannot rehabilitate a witness in advance. The credibility of the witness is to come from demeanor and objective indications that the

witness knows what he is talking about. "Bolstering" evidence is irrelevant until the adverse party makes an attack on the witness because it does not contribute to make the existence of a fact of consequence more or less likely. "Bolstering evidence" deals with the witness rather than with his testimony. ***Williams v. State*, 927 S.W.2d 752, 763 (Tx.App. 1996).** The fact that a witness said the same thing out of court and in court is equally irrelevant. See *Rule 801 A.*

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.

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

PREMISE/PURPOSE: *KRE 401(a)(3)* provides that evidence of a person's character or a trait of character may not be introduced to prove action in conformity with character except when introduced as authorized under *KRE 607*, *608*, and *609*. *KRE 608* tells the attacking party how to attack character. It may be done by opinion or reputation testimony. No other means are provided.

(a) The original draft of this rule also contained the language of *FRE 608(b)* which allows, under certain circumstances, cross-examination on specific instances of conduct. This language was deleted prior to adoption in 1992 which leads to the conclusion that cross-examination on specific acts by the witness is not permitted.

(b) In ***Tucker v. Commonwealth*, 916 S.W.2d 181, 184 (Ky. 1996)**, there is an example of what is no longer permitted. In that case, a defendant cross-examined witnesses about the presence of marijuana to discredit their testimony, essentially, "to impeach the prior victim's credibility with evidence of marijuana." The court was not asked to rule on the admissibility of this evidence under *KRE 608*, but it is clear that specific situations like this no longer can be the subject matter of cross-examination.

(c) In ***Pickard Chrysler, Inc. v. Sizemore*, 918 S.W.2d 736, 741 (Ky.App. 1995)**, the court held that evidence of the good character of a witness cannot be introduced until after that character has been attacked.

(d) Comments 405(a), (b), and (c) as to opinion testimony apply here.

(e) A witness may say that in his opinion, another witness is a liar, but may not say that the other witness is lying in that particular case. See *KRS 702*.

(f) Reputation is limited to a statement about another witness's general reputation in the community, that is, whether it is good or bad.

(g) The two methods prescribed for attacking credibility are the only methods allowed for rehabilitation as well.

(h) The judge may put limits on the number of witnesses called to testify under this rule because of the limited usefulness of cumulative opinions as to credibility. *KRE 403*.

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.

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The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.

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

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

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

COMMENTARY

PURPOSE/PREMISE: Although courts considering other acts evidence under *KRE 404(b)* recognize that it is inherently highly prejudicial, this vestigial rule of witness disqualification continues to hang on despite the inability of anyone to explain why introduction of evidence of a conviction is not even more highly prejudicial. The premise of the rule, such as it is, is that a person who suffers a felony conviction of any type is less deserving of belief because of that conviction.

(a) If a party desires to impeach by use of evidence of a prior conviction, Subsection a provides that it "shall be admitted." Ordinary *401-403* balancing and analysis does not apply to this subject.

(b) Remoteness is the only consideration for exclusion. If a conviction is more than ten years old, it is not admissible unless the judge determines that probative value of proof of the conviction outweighs its prejudicial effect [Subsection b]. The burden of showing this is on the party desiring to use the conviction. ***McGinnis v. Commonwealth*, 875 S.W.2d 518, 528 (Ky. 1994).**

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

(d) The Kentucky rule does not permit identification of the crime unless (1) the witness under cross-examination has denied the conviction or (2) the witness wishes to identify the nature of the conviction for tactical reasons.

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

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

(g) The rule does not allow a party to ask the witness if he has been convicted of a "felony." The language of the rule allows "evidence that the witness has been convicted of a crime." The question should follow the rule language.

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

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

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and how much effect it has. This is the only purpose for which you can use this evidence.

Rule 610 ♦ Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 43; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

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

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

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

Rule 611 ♦ Mode and order of interrogation and presentation.

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

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

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination, but only upon the subject matter of the direct examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 44; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

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

Subsection a

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

(b) Section Eleven of the Constitution and the Sixth Amendment of the U.S. Constitution preserve a criminal defendant's right to confront witnesses. However, *KRE 611(a)* gives judges authority to limit cross examination for any of the three purposes specified by the Rule. ***Humble v. Commonwealth*, 887 S.W.2d 567, 572 (Ky.App. 1994); *Nunn v. Commonwealth*, 896 S.W.2d 911 913 (Ky. 1995).** However, denial of effective cross examination is error that is reversible without showing of any additional prejudice. ***Eldred v. Commonwealth*, 906 S.W.2d 694, 702 (Ky. 1994).**

(c) Finding the line where limitation ceases to be reasonable and becomes an imposition on the right to confront is dependent on the circumstances of each case. *Nunn* and *Humble* intimate that where the jury is given enough information to make the desired inference the right of confrontation is upheld.

(d) The concepts of "invited error" and "opening the door" are often associated with *KRE 611(a)*. The Federal Courts allow inadmissible as well as admissible evidence in rebuttal where a party has introduced inadmissible evidence (*i.e.*, irrelevant or excluded for other reasons). This is to "neutralize or cure any prejudice incurred from the introduction of evidence." ***Ryan v. Bd. Police Cmmrs.*, 96 F.3d 1076, 1082 (8th Cir. 1996).**

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

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

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

(h) Subsection (a)(2) permits the judge to control the presentation of evidence to avoid needless consumption of time. This presumes that the judge will heed her

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ethical duty under *CJC 3(A)(4)* to accord every person "and his lawyer" full right to be heard according to law. *KRE 611(a)(2)* does not authorize the judge to practice the case for the parties or to exclude evidence because production of the evidence might delay proceedings.

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

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

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

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

Subsection b

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

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

(o) In 1996, the General Assembly amended *KRS 431.350* yet again to try to make it possible to have an upset child in a sexual offense prosecution examined and cross examined "in a room other than the courtroom," and outside the presence of the defendant who can only look on via TV. Aside from the constitutional problems resulting from this interference with face-to-face confrontation, the statute purports to authorize the judge to limit cross examination which *Drumm* [Comment 101-(a)] forbids. This statute cannot be enforced because it is an illegal attempt to bypass the Rule's adoption process set out in *KRE 1103*.

Subsection c

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

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

(r) The Rule permits leading questions "to develop the testimony," which is another way of saying that if a little leading will get an excited, confused or verbose witness settled down and testifying, the practice should not be discouraged. This portion of the Rule permits leading of child witnesses or persons with communication problems.

(s) A hostile witness may be led on direct examination when his answers or lack of answers show that the witness will not testify fairly and fully in response to open-ended questions. The identity of the person who subpoenaed the witness has nothing to do with hostility. Hostility must be shown before the request to use leading questions is made.

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

Rule 612 ♦ Writing used to refresh memory.

Except as otherwise provided in the Kentucky Rules of Criminal Procedure, if a witness uses a writing during the course of testimony for the purpose of refreshing memory, an adverse party is entitled to have the writing produced at the trial or hearing or at the taking of a deposition, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.

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

COMMENTARY

PURPOSE/PREMISE: This is a special version of the rule of completeness that is used when a witness "uses a writing during the course of testimony for the purpose of refreshing memory." If the writing was not provided in pretrial discovery, the adverse party, in fairness, should have a chance to see the complete document. Otherwise, jurors might be misled. The rule does not describe what "refreshment" is.

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

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

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to make the presentation effective for discerning the truth. *KRE 611*

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

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

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

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

(g) "Use" of the memory prompt is the key concept for determining whether the adverse party is entitled to examine the writing. Prosecutors sometime mail transcripts of statements or other notes to witnesses weeks before trial. Sometimes witnesses review these prompts just before going into the courtroom to testify. In either case, because the prompt was "used" to refresh memory, the adverse party is entitled to look at the writing. The adverse party may ask about use of prompts as a pretrial motion or may elicit this information on cross examination.

KRE 612 differs from the federal rule which contains a specific subsection which allows the judge to order access to statements. The Kentucky language mandates access if the prompt is "used."

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

(i) The rule applies to a witness testifying at a trial, hearing or deposition.

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

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

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

1. That the officer's testimony is actually needed. Much of an officer's testimony concerns irrelevant details of a police investigation.

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

Rule 613 ♦ Prior statements of witnesses.

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

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

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

COMMENTARY

PURPOSE/PREMISE: The language is that of *CR 43.08* with a different rule number attached. Its purpose is to fix the foundation requirements for impeachment by introduction of out of court statements. *CR 43.07*, applicable to criminal cases through *RCr 13.04*, allows an attack on the credibility of a witness by showing that the witness and "made statements different from his present testimony." The fact of different statements together with the judge's admonition limiting the jury's use only to reflection on the credibility of present testimony constitutes "strict" or "straight" impeachment. This use has survived enactment of the evidence rules.

However, for 28 years Kentucky has allowed introduction of prior inconsistent statements as substantive evidence as well, ***Jett v. Commonwealth*, 436 S.W.2d 788 (Ky. 1969)**, upon compliance with *CR 43.08* foundation requirements. Not surprisingly, substantive use of out of court statements has eclipsed straight impeachment. *KRE 801A(a)(1)* is the rule enactment of the *Jett* rule and a rejection of the more limited federal rule approach to substantive use.

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

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

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

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(c) The foundation is not elaborate as the following example shows:
1. Witness testifies that defendant is the person who robbed him.
2. Examiner asks the following questions:
   A. *"Do you recall talking about this case with Officer X on March 15, 1996 at LPD Headquarters?" "Yes."*
   B. *"Were Detectives Y and Z there also?" "Yes."*
   C. *If the other statement is in writing, it is presented to the witness to review.*
   D. *If not in writing, the examiner asks "Did you tell them that you could not identify the robber because he wore a mask?"*
   E. *If in writing, the examiner reads exactly what is on the page: "Did you tell them "I, uh, I could not say because, um, um, he had like a mask that he was wearing'."*

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

(e) If the witness denies or cannot recall making the statement or cannot recall the substance of the other statement, this rule and *CR 43.07* allows introduction of other evidence to show that the other statement was made, that it was different from trial testimony, that a witness who has made two different statements is untruthful, and that the testimony of such a witness should be disregarded. The adverse party may request a limiting admonition.

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

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

(h) *CR 43.07* and *KRE 613* use the word "different." *KRE 801(a)(1)* uses the word "inconsistent" to describe the types of statements that trigger impeachment. Both words imply that the in court testimony differs from the out of court statement by adding or deleting some details. It is not necessary for the statements to be outright contradictory of each other.

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

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

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

Rule 614 ♦ Calling and interrogation of witnesses by court.

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

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

(c) Interrogation by juror. A juror may be permitted to address questions to a witness by submitting them in writing to the judge who will

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decide at his discretion whether or not to submit the questions to the witness for answer.

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

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

COMMENTARY

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

(a) The obvious danger of judge questioning of witnesses is that the judge will become, in fact or in the jury's view, an advocate for one side. ***U.S. v. Albers*, 93 F.3d 1469, 1485 (10th Cir. 1996)**. *KRE 611 (a)(1)* charges the judge to help the jury to find the truth of the case. But Kentucky has always followed a particularly strict rule of adversary presentation of evidence to avoid undue influence of the trial judge on the fact finding process. ***Whorton v. Commonwealth*, 570 S.W.2d 627, 634 (Ky. 1978)**, dissent. The judge has the duty to make sure that the jury is not misled. *KRE 403*. The judge is not the guarantor that every important fact is made known to the jury.

(b) Jurors, as the sole fact finders in a criminal trial *RCr 8.22*, must know all relevant and admissible facts about the case. But the jury is not usually sophisticated enough to discern the difference between what it wants to know and what it is allowed to know. Subsection c allows jurors to submit written questions to the judge who will decide whether the questions may be asked. The requirement of written questions is largely ignored although the substance of the questions usually is preserved on the videotape or stenographic transcript.

(c) As with judge questions, the danger with juror questions is that jurors may be transformed from neutral fact finders to inquisitors or advocates. They may become either after the case is submitted for deliberation, but not before. ***U.S. v. Ajmal*, 67 F.3d 12 (2d Cir. 1995)**.

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

Rule 615 ♦ Exclusion of witnesses.

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

(1) A party who is a natural person;

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

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

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

COMMENTARY

PURPOSE/PREMISE: The common law never expected people to behave any better than they had to. To prevent intentional or unwitting modification of testimony, the judge always has had authority to exclude witnesses from the courtroom during the testimony of other witnesses. This rule differs from *RCr 9.48* because under *KRE 615* the judge must exclude witnesses upon the request of a party. The judge may exclude witnesses on her own motion. The rule does not specify a sanction for violation

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of the rule. Penalties can range from contempt for the one violating the separation order to prohibition of that witness's testimony. The severity of the sanctions is left to the discretion of the judge.

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

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

(c) In ***Humble v. Commonwealth*, 887 S.W.2d 567, 571 (Ky.App. 1994)**, the court held that the Commonwealth's Attorney could designate a Jefferson County Police Officer as a representative pursuant to *KRE 615(2)*. *Humble* had maintained that the designation had to be on the basis of necessity under Subsection 3. The result in *Humble* requires a too-expansive reading of the terms "officer or employee of a party." The party is the Commonwealth of Kentucky which, by law, appears in circuit court only through the Commonwealth's Attorney, *KRS 15.725(1)*, just as a corporation appears through its counsel or officers. A state police officer or someone employed by the central government of the state can qualify under the language of the rule. However, city and county police officers are employees of the city or county. Sheriffs and their deputies are county officers. *Humble* is wrong because it ignores the plain language of the rule.

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

(e) The rule does not limit the number of persons who can be exempted from the separation order. If the government requires three officers to make sure its presentation is correct, federal courts allow it. ***U.S. v. Jackson*, 60 F.3d 128 (2d Cir. 1995)**. By the same reasoning, if the defendant needs two or more experts in the courtroom, the judge may permit this.

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

Article VII. Opinions and Expert Testimony

Rule 701 ♦ Opinion testimony by lay witnesses.

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

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

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

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

NOTES

COMMENTARY

PURPOSE/PREMISE: Opinions tend to usurp the jury's function of deciding the facts of a case by offering the witness's view of what the evidence means in place of factual statements front which the jury can draw its own conclusions. That said, however, it is only fair to recognize that opinions are offered throughout the course of any trial. Article Seven regulates opinion testimony. *KRE 701* limits opinions given by persons "not testifying as an expert." However, this Rule governs both lay witnesses and "experts" as long as these witnesses are not testifying as persons particularly skilled in some field of expertise.

(a) The decision to allow opinion testimony by non-experts is based on a determination that the opinion or inference is rationally based on the perception of the witness and that the inference or opinion is helpful to understanding the witness's testimony or to determination of a fact in issue. The rule was designed primarily to allow non-experts to express opinions "that are in reality only a shorthand statement of fact." ***Asplundh Mfg. v. Benton Harbor Engrg.*, 57 F.3d 1190, (3rd Cir. 1995)**. Courts generally say that lay opinion is permissible about identification, speed, state of health, value, and emotional state.

(b) Some opinions are admissible chiefly because it is difficult to express certain subject matters without doing so. The phrase "collective facts" is used to describe such situations. In ***Bowling v. Commonwealth*, ___ S.W.2d ___ (Ky. 1996)**, the Court held that *KRE 701* permitted testimony about demeanor or conduct. In *Bowling*, one witness testified that the defendant had "just a kind of strange look in his eyes." Another witness was permitted to say that the defendant gave him an "intense look." The Court held that this testimony was based on perception and was helpful.

(c) Another subject matter for non-expert testimony is sanity. In ***Brown v. Commonwealth*, ___ S.W.2d ___ (Ky. 1996)** the Court rejected a claim that opinions as to sanity could be formed only by experts qualified under *KRE 702*. The Court did not undertake to justify "lay" opinions under *KRE 701*, but instead relied on the long pedigree of the Common Law Rule permitting lay opinion as to sanity. Supreme Court precedent allows such testimony but this is not the same as saying that *KRE 701* allows it. Obviously, a non-expert witness can observe peculiar behavior and draw rational conclusions from that behavior. But the real issue for admissibility is whether such opinions and inferences would be helpful to "determination of a fact in issue." The answer is that in some cases they would, and in some cases they would not. In some cases, such as with a malingering party, only an expert would be able to see through the act. *Brown* should not be read as authorizing non-expert opinion on sanity in every case. The judge must make a careful appraisal of how likely such testimony is to aid the jury to determine the issue and how likely it is to mislead. *KRE 403*.

(d) No witness is qualified to give an opinion that another witness is lying. This issue is reserved to the jury alone. ***Chumbler v. Commonwealth*, 905 S.W.2d 488, 495 (Ky. 1995)**; ***U.S. v. Sullivan*, 85 F.3d 743, 750 (1st Cir. 1996)**.

(e) There is some authority for using *KRE 701* as the basis of a hybrid opinion called "lay technical opinion" if the opinion meets the requirements of the Rule, personal knowledge, rational basis for the inference, and helpfulness to the jury. Thus when a person has experience or specialized knowledge or for one reason or the other does not qualify as an expert, courts may allow the opinion. In ***Allgeier v. Commonwealth*, 915 S.W.2d 745, 747 (Ky. 1995)**, the Court seemed to follow this line of analysis to uphold a decision to allow police officer not qualified as a reconstructionist to give an opinion.

Rule 702 ♦ Testimony by experts. NOTES

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

COMMENTARY

PURPOSE/PREMISE: This Rule authorizes testimony by trained or experienced persons on matters of scientific technical or other specialized knowledge to help the jury understand the evidence or determine one of the facts in issue. If the witness qualifies under this rule, the witness may give an opinion and is excused, to a certain extent, from the personal knowledge requirement of *KRE 602*. However, the witness is not allowed to tell the jury his opinion on an "ultimate issue" of the case. Kentucky has no analog to *FRE 704* and Kentucky Common Law has always prohibited such testimony on the ground that it "invades the province of the jury," *i.e.*, it is too likely to result in a jury decision based on the opinion rather than on the jury's own analysis of all of the evidence. ***Renfro v. Commonwealth*, 893 S.W.2d 795 (Ky. 1995)**.

(a) The language of the Rule suggests three (3) requirements that the proponent must meet before a witness is allowed to testify under the rule: (1) the witness must be qualified by knowledge, experience, and/or training; (2) the subject matter of the testimony must be scientific, technical or otherwise specialized; and (3) the witness must be able to present the information in a way that will "assist" the jury either to understand the evidence in the case or to determine a fact at issue.

(b) The proponent must satisfy the judge that the witness is qualified by knowledge, experience or training to talk about the subject matter of the proposed testimony. The judge must be satisfied that the witness knows enough about the subject to help the jury. Like other preliminary decisions, this determination is reviewed under the Abuse of Discretion Standard. ***Hogan v. Long*, 922 S.W.2d 368, 371 (Ky. 1995)**.

(c) Thus, a police officer, through experience and study, may be qualified to express an opinion that a mark or gouge on a door was not the result of an attempt to force it open. ***Allgeier v. Commonwealth*, 915 S.W.2d 745, 747 (Ky. 1996)**.

(d) But a gun shop owner is not qualified to express an opinion about a bullet wound. ***Chumbler v. Commonwealth*, 905 S.W.2d 488, 497 (Ky. 1995)**.

(e) It helps to have a "credentialed" witness but it is not necessary in all cases. The State Police Lab Toolmark and Firearm Inspector learns that specialty on the job. But it takes a chemist to speak intelligently about the three (3) analyses that show that white powder has cocaine in it, even though a lab technician probably could run the test by following an instruction book.

(f) The judge may hear evidence of the witness's qualification out of the hearing of the jury or out of its presence. The only guide on this point is the requirement to keep the jury from hearing inadmissible evidence. *KRE 103(c)*; *104(c)*. If a dispute as to qualifications is likely, the adverse party should ask for a hearing so that the witness can be cross examined on qualifications before the jury hears what the witness has to say.

(g) It is not necessary to "tender" the witness as an expert. There is no provision either in *KRE 702* or in *104(a)* or *(b)* for the judge to announce that a witness is qualified. Qualification is a preliminary question that is exclusively the business of the judge. It is a legal ruling. The jury has no right or need to know what that ruling is. The jury is there to hear what the witness says, not the judge's estimate of his qualifications.

(h) The language of the Rule is sufficiently broad to cover many subject matters. Although by definition most scientific technical or specialized knowledge is beyond the comprehension of most jurors, it need not be so to qualify. The knowledge must only be helpful to the jury in order to qualify. DNA typing technology is generally not well known among jurors. An expert can explain it. But the mathematics involved in predicting the chances of random match is within the knowledge of most jurors, it simply involves multiplication of denominators. Almost any juror can comprehend this without having it explained, but both subjects can be testified to by a qualified expert because they involve scientific technical and specialized knowledge and the expert's testimony can help the jury understand what is going on.

(i) Most scientific, technical or specialized knowledge that a lawyer in a criminal case deals with is well-founded theoretically and practically. Criminal lawyers deal with ballistics, drug tests, ABO blood identification, alcohol level and things of that type. These should be carefully monitored for proficiency of the operative performing the test. But it is only where some new or unusual method or principal is involved, like DNA typing, that the principles of ***Daubert v. Merrell Dow*, 125 L.Ed.2d 469 (1993)**, adopted in ***Mitchell v. Commonwealth*, 908 S.W.2d 100, 101-102 (Ky. 1995)** come into play.

(j) In ***Braun v. Lorillard, Inc.*, 84 F.3d 230 (7th Cir. 1996)**, the purpose of *Daubert* was stated. *Daubert* allows opinions of reputable scientists to be given, even if their methods have not gained general acceptance in their area of expertise as long as the trial judge makes sure that when they testify these scientists "adhere to the same standards of intellectual rigor that are demanded in their professional work." The purpose of *Daubert* is to exclude quack opinion testimony.

(k) Because neither the judge nor the jury is equipped to evaluate scientific innovations, the judge must insist that a scientist who "departs from the generally accepted methodology of his field and embarks on a sea of uncertainty" base his opinion and testimony on demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry." *Braun*, p. 235. There must be some scientific basis for the testimony.

(l) To determine whether opinion testimony based on innovation is reliable to admit, the judge must make several inquiries:

(1) The first and most important question is whether the theory or technique can be tested." *Mitchell*, p. 102. If it cannot be tested, there is no way to know if the results of the theory or technique are accurate or reliable. Reproducible results are the goal of all scientific experimentation because they provide the objective basis for judging the validity of the theory or process.

(2) Peer review and publication in journals (particularly refereed journals) are helpful indicators of the objective worth of the theory or technique because journal articles typically can point out flaws. *Mitchell*, p. 102.

(3) For a technical or scientific process, *Daubert* encourages production of information about the known or rate of error, an objective indicator of how reliable the theory or process is. *Mitchell*, p. 102.

(4) "General acceptance" should be considered as well. As noted in *Mitchell*, a known technique that has been able to attract only minimal support within the community...may properly be viewed with skepticism." *Mitchell*, p. 102.

(m) *Mitchell* mandates a preliminary hearing on the admissibility of "expert scientific testimony." The plain language requires hearing for any expert although, in light of the policy stated in *Braun*, this should not be so. A *Daubert/Mitchell* hearing should be required only where the process, theory or test is not well established.

(n) The ruling on admissibility is reviewed under the abuse of discretion Standard. *Mitchell*, p. 102.

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(o) At least for the near term, any DNA evidence is subject to *Daubert/Mitchell* hearings. *Mitchell*, p. 101.

(p) Unless the expert's testimony will assist the trier of fact, it is inadmissible. Sometimes, as in "garden variety" negligence cases, no expert testimony is needed. ***Kenton Public Parks v. Modlin*, 901 S.W.2d 876, 881 (Ky.App. 1995)**. Even if the evidence can assist the jury, it may be excluded if the jury can understand without expert intervention and the expert has the potential to confuse the jury. ***Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 253 (Ky. 1995)**.

(q) It is not enough that expert testimony "assist" the finder of fact in some general way. It must assist the trier of fact either to understand the evidence or to determine a fact in issue. These are the limitations stated in *KRE 702*.

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

(s) In ***Renfro v. Commonwealth*, 893 S.W.2d 795 (Ky. 1995)**, the court held that an expert invades the province of the jury by giving an opinion as to the cause of a motor vehicle accident or the fault of the drivers.

(t) An expert can give an opinion on sanity. ***Cecil v. Commonwealth*, 888 S.W.2d 669, 674 (Ky. 1994)**.

(u) Even though a witness cannot opine that another witness is lying, a party can call a witness to testify as to psychological reasons that explain why a defendant might admit crimes that he did not commit. ***U.S. v. Hall*, 93 F.3d 1337 (7th Cir. 1996)**.

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

(w) In a number of jurisdiction actions, courts recognize the usefulness of expert testimony on eye witness identification, particularly in the areas of human memory and perception. ***U.S. v. Jordan*, 924 F.Supp. 443 (W.D.N.Y. 1996)**.

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.

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

COMMENTARY

PURPOSE/PREMISE: The Commentary [p.69] says that "trial judges should take an active role in policing the content of the expert witness' direct testimony." An

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expert can be excused to a degree from the requirements of personal knowledge, *KRE 602*, and may rely on information that ordinarily could not be mentioned in front of the jury. *KRE 703(a)*. The expert may state an opinion or draw an inference. *KRE 702*. Because of the unusual nature of expert evidence, the drafters have added two subsections to the Federal Rule language set out in Subsection a to govern presentation of otherwise inadmissible evidence.

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

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

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

(d) In Subsections (a) and (b) of the rule, the judge must resolve a preliminary question before allowing the expert to rely on or testify about these other facts.

(1) In Subsection (a), the judge must decide whether the inadmissible information actually is "of a type reasonably relied upon in the particular field informing opinions or inferences..." This is a *KRE 104(a)* determination which requires the proponent to show by a preponderance of evidence that the standard is met. Because this is a preliminary question, however, other rules, except for privileges do not apply and the judge may base the decision on a variety of factors. *KRE 1101(d)(1)*.

(2) For Subsection (b), the judge must first decide that the facts or data are admissible under subsection (a). If so, the judge must then decide whether the information is (a) trustworthy, (b) necessary to illuminate the testimony, and (c) unprivileged. If so and if the judge believes that an admonition will cause the jury to use the evidence properly, the witness may be allowed to speak about the inadmissible facts or data.

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

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

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

(h) ***Port v. Commonwealth*, 906 S.W.2d 327, 332 (Ky. 1995)**, provides an example of a defense psychiatrist cross examined by the prosecution.

(i) One of the obvious concerns of the drafters is that Subsection (b) might be misused to allow expert witnesses to bootleg hearsay into the case. This problem commonly arises in sexual abuse/assault cases in which a physician testifies that the

prosecuting witness described the assault, the identity of the assailant, the emotional and physical pain associated with the incident, and other details. Usually, such out of court statements are excluded on relevance or hearsay grounds. *KRE 401; 801A(a)(2).* But if the doctor relied on the statements in forming a diagnosis, Subsection b could be a ground for relating these statements to the jury. If the judge decides that the statements are necessary on direct examination or if cross examination leads to mention of them, it is essential to obtain an admonition limiting the statements to only non-substantive use, as an explanation of the reason that the witness reached a particular conclusion.

Rule 704 ♦ (Number not yet utilized.)

COMMENTARY

(a) The Kentucky Rules of Evidence are unusual in that the omissions from the final draft are probably as significant as if they had been enacted. This is another rule that was proposed in 1989 but was not adopted. The original proposal paralleled the language of *FRE 704*. The purpose of the proposed rule was to abrogate Kentucky's common law precedents precluding opinion testimony on an "ultimate issue" of a case. But because the rule was not adopted, these common law precedents on "ultimate issue" opinions still govern.

(b) The most intellectually satisfying reason for excluding ultimate issue testimony is that the testimony of experts often carries an "aura of special reliability and trustworthiness" that might persuade the jury to abdicate its fact finding duties or disregard other more probative evidence because of the source of the opinion. ***Hester v. Commonwealth*, 734 S.W.2d 457, 458 (Ky. 1987).** However, the courts are not of a single mind on this. In many instances, the courts treat expert opinion testimony like any other evidence which the jury may either accept or reject. ***Sanborn v. Commonwealth*, 892 S.W.2d 542, 554 (Ky. 1994).**

(c) Kentucky criminal law has always given special emphasis to the jury's function as the sole fact finder in a criminal trial. *RCr 8.22*. The ancient mode of jury trial demanded by Section Seven of the Constitution requires this strict segregation of duties which is the reason that judges are not allowed to comment on the evidence, give instructions that do more than set out the factual questions that the jury must answer, or in any other way indicate acceptance or rejection of evidence. The jury is required to decide whether the elements of the offense, that is, the identity of the actor, the acts or omissions, and the culpable mental state, have been shown. No one else is authorized to draw these inferences from the evidence.

(d) A party objecting to proposed opinion testimony by a lay or expert witness should rely on *KRE 702* to say that the opinion or inference is not "helpful" to the jury but instead unlawfully intrudes on a decision reserved solely to the jury. In this instance, the party must rely on any case precedents that might bear on the particular issue.

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.

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 **NOTES**

PREMISE/PURPOSE: This rule permits the proponent of an expert witness some flexibility in the presentation of the opinion or inference of the witness. Under this rule, the expert may give the opinion or make the inference before discussing the thought process that led to it or the factual basis for it. This is acceptable because *RCr 7.24(1)(b)* and *RCr 3(A)(i)* provide for pre-trial discovery of reports of scientific tests and experiments and of physical or mental examinations. The adverse party, therefore, usually has some means to make a timely objection to the inference or opinion before the witness testifies.

(a) The rule is designed to give some leeway to the proponent of the expert but the final decision as to how experts testify is left to the judge by the last phrase of the first sentence. The judge can always "require[] otherwise."

(b) The second sentence of the rule insures the right of the adverse party to establish the facts or data on cross examination if they are not brought out by the proponent of the witness.

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

(d) As a general practice, the adverse party should demand a voir dire of any expert witness. *KRE 104(a)* and *(c)*. This is particularly important when an expert is called to render an opinion without previous disclosure of its basis. In the original draft of this rule, a second subsection authorized the adverse party to demand a voir dire outside the presence of the jury "to provide some protection against expert opinion which might be insufficiently supported by underlying facts or data." Although this provision was deleted in the final draft, the same protection is available under KRE 104 and should be sought.

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.

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

PREMISE/PURPOSE: This is *RCr 9.46* minus the last sentence of that rule. It is rarely used because the parties may hire their own experts and even indigents may apply for funds to hire an expert pursuant to *KRS 31.190*. A criminal defendant's right of compulsory process under the Sixth Amendment and Section Eleven of the

Constitution guarantees that the defendant may call witnesses who have something relevant and important to say so the need for this rule in criminal cases is unclear. A court appointed expert who testifies in a way that damages one or all parties to a litigation would create a problem analogous to that foreseen by *KRE 605* and *606*. A standard form of cross examination involves impeachment of an expert by questions about identification with the party, retention on behalf of a class or type of plaintiff or defendant, and the amount and contingency of payment for services. This kind of cross examination would backfire when addressed to a "court appointed" expert who would be perceived as the judge's witness with no axe to grind in the case. It is best that this procedure never be used.

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.

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

COMMENTARY

PURPOSE/PREMISE: Because hearsay testimony is a complex area, Article 8 is organized according to a plan in which hearsay is identified and defined, prohibited in most instances and permitted in certain well-delineated circumstances. *KRE 801* defines hearsay.

(a) Hearsay deals first of all with a "statement." It does not deal with several assertions lumped together and considered as a group because a person made them at one time out of court. One of the most important decisions in recent years is ***Williamson v. U.S.*, 129 L.Ed.2d 482, 483 (1994)**, which, interpreting the federal rules for the federal court system, held that a hearsay "statement" means a "single declaration or remark" rather than a "report or narrative." When considering a hearsay issue like a confession or a witness interview, the judge must consider each individual statement, line by line and phrase by phrase. Each individual hearsay statement must qualify as a hearsay exception.

(b) A "statement" is an assertion, oral written or nonverbal. Nonverbal conduct ordinarily does nor assert anything but it can in some instances. A timely nod or gesture can be an answer to a question as much as an oral response. However, a

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witness's observation of conduct and his conclusion of what it means is not hearsay. ***Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996)**.

(c) An assertion is "a positive statement or declaration." "Positive" in this context implies a statement explicitly or openly expressed. *American Heritage Dictionary*, 3d ed., p. 111; 1413 (1992).

(d) The Commentary states that the party claiming that nonverbal conduct is an assertion has the burden of showing that it is. This is a *KRE 104(a)* decision for the judge. (p. 76).

(e) Hearsay is customarily equated with "out of court" statements. *e.g.*, ***Norton v. Commonwealth*, 890 S.W.2d 632, 635 (Ky.App. 1994)**. This is correct in most but not all cases. The language of Subsection c describes hearsay as a statement made at a time that the declarant is not "testifying at the trial or hearing." Under this definition, unsworn statements made in the courtroom but not from the stand as a witness are subject to hearsay analysis. Depositions, although sworn cross-examined statements, are hearsay.

(f) Statements made other than in the course of testifying at the trial or hearing must also be offered in evidence "to prove the truth of the matter asserted" to be hearsay under Subsection (c). Both conditions must be met before the statement is subject to the hearsay exclusionary rule, *KRE 802*. ***Perdue v. Commonwealth*, 916 S.W.2d 148, 156 (Ky. 1995)**.

(g) If the proponent claims a non-hearsay use for the statement, he must satisfy the judge that the non-hearsay purpose is legitimate and that the jury will not be misled or confused as to the proper use of the statement. *KRE 403*.

(h) "Investigative hearsay" is a constant problem. Part of the trouble may arise from the phrase which is a misnomer. If statements on which the officer relied are properly admissible under this concept, they are not hearsay because they are not offered to prove the truth of the statements. They are introduced only to explain the officer's actions.

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

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

(k) The danger of misleading the jury is usually a reason to exclude evidence, not to admit it. *KRE 403*. Claims that the jury will want to know how the officer got involved in the case *Gordon*, p.179, ignore the burden of proof. On direct examination the actions of the officer are irrelevant and therefore inadmissible. *KRE 402*.

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

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

Rule 801A ♦ Prior statements of witnesses and admissions. NOTES

(a) Prior statements of witnesses. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the declarant testifies at the trial or hearing and is examined concerning the statement, with a foundation laid as required by KRE 613 and the statement is:

(1) Inconsistent with the declarant's testimony;

(2) Consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; or

(3) One of identification of a person made after perceiving the person.

(b) Admissions of parties. A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:

(1) The party's own statement, in either an individual or a representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(5) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(c) Admission by privity:

(1) Wrongful death. A statement by the deceased is not excluded by the hearsay rule when offered as evidence against the plaintiff in an action for wrongful death of the deceased.

(2) Predecessors in interest. Even though the declarant is available as a witness, when a right, title, or interest in any property or claim asserted by a party to a civil action requires a determination that a right, title, or interest existed in the declarant, evidence of a statement made by the declarant during the time the party now claims the declarant was the holder of the right, title, or interest is not excluded by the hearsay rule when offered against the party if the evidence would be admissible if offered against the declarant in an action involving that right, title, or interest.

(3) Predecessors in litigation. Even though the declarant is available as a witness, when the liability, obligation, or duty of a party to a civil action is based in whole or in part upon the liability, obligation, or duty of the declarant, or when the claim or right asserted by a party to a civil action is barred or diminished by a breach of duty by the declarant, evidence of a statement made by the declarant is not excluded by the hearsay rule when offered against the party if the evidence would be admissible against the declarant in an action involving that liability, obligation, duty, or breach of duty.

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

COMMENTARY

PURPOSE/PREMISE: The three Subsections of this Rule deal with principles that are well established, statements of witnesses, admissions of parties and admissions by privity. Admissions by privity do not often figure in criminal cases and therefore they are not discussed here. The Federal Rule flatly declares that these types

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of statements are not hearsay. Kentucky merely excepts them from the Hearsay Exclusionary Rule. The history of the *Jett* Rule is given in *KRE 613*. Kentucky also differs markedly from the Federal Rule on the types of statements that can be qualified under *KRE 801A(a)(1)*. This Rule removes the barrier that prevented statements formerly admissible only as impeachment from being admitted as substantive evidence.

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

(b) The *Jett* principle is carried on by Subsection (a)(1) and is based on the belief that as long as the declarant and the person claiming that the out of court statement was made are present and subject to cross examination, "there is simply no justification for not permitting the jury to hear, as substantive evidence, all they have to say on the subject and to determine wherein lies the truth." ***Porter v. Commonwealth*, 892 S.W.2d 594, 596 (Ky. 1995)**.

(c) This premise led the drafters to reject the Federal Rule language which allows prior statements, but only those given "under oath" at legal proceedings or depositions.

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

(e) Until recently, misuse of consistent statements was a big problem. The language of the Rule seems clear. Consistent statements may be used upon proper foundation but only for purposes of rebutting an express or implied charge against the declarant/witness of (1) recent fabrication or (2) improper influence or motive. Prosecutors in particular overlooked the limitation to rebuttal use and the limited issues for which the Rule provided exemption from the Hearsay Exclusionary Rule.

(f) In ***Smith v. Commonwealth*, 920 S.W.2d 514, 516-517 (Ky. 1996)** and ***Fields v. Commonwealth*, 904 S.W.2d 510, 512-513 (Ky.App. 1995)**, the courts discussed the Subsection (a)(2) and properly limited its use. In Fields, the court noted that the Rule "preserves the concept that the problems admitting [prior consistent] testimony outweigh its cumulative probative effect except in certain instances."

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

(h) The *Fields* Court pointed out that prior consistent statements cannot be used "buttress testimony called into issue as a result of faulty memory, inability to observe or any of the host of reasons for challenging testimony."

(i) The *Smith* Court identified the danger of bolstering and noted the Supreme Court's record of condemning testimony of social workers and police officers as to consistent statements. The court held that in addition to improper bolstering such testimony "lacked probative value" and was unnecessary.

(j) Kentucky has followed the U.S. Supreme Court analysis set out in ***Tome v. U.S.*, 130 L.Ed.2d 574 (1995)** which limits consistent statements to those made before the motive for fabrication existed.

(k) Subsection (a)(3) is as much a concession to crowded court dockets as it is a statement of rational principle. It primarily addresses the problem of a witness who once identified or failed to identify and who later, in trial testimony, either cannot

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identify the person or now identifies the person. This Rule deals primarily with a witness who has forgotten what the defendant looks like.

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

(m) The statement of identification can be oral or written or it can be the act of picking the defendant's photograph out of a photo-pak. *KRE 801(a)*.

(n) The Commentary makes it clear that this is an exemption from the Hearsay Exclusionary Rule only for the person who made the identification. [Commentary, p. 78].

PARTY ADMISSIONS

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

(p) A party's own statement may be introduced against her whether the party appears to testify or not. ***Hubble v. Johnson*, 841 S.W.2d 169, 172, Dissent (Ky. 1992)**. In criminal cases the defendant's "statement" to police is often introduced by the Commonwealth during its case in chief. It is important to remember the Constitutional limitations on the use of the defendant's statements to the authorities. Involuntary statements may never be used. Statements taken without *Miranda* warnings cannot be used in chief but may be used to contradict the testimony of the defendant. ***Canler v. Commonwealth*, 870 S.W.2d 219, 221 (Ky. 1994)**.

(q) Refusal to answer can be a non-verbal statement. Failure to respond to an accusation traditionally has been considered a manifestation of the accused person's belief that the accusation is true. In Kentucky, however, there is no legal duty to speak with police either before or after arrest or *Miranda* rights are given. *KRS 519.040*, *523.100* and *523.110* only prohibit false statements by a person who chooses to speak to police or other authorities. Thus, silence in the face of an accusation by police never should be construed as a non-verbal statement that might qualify under this rule.

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

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

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

(t) Subsection (b)(4) may well apply to statements made by the attorney for the Commonwealth, police officers or defense counsel. See: Comment 615(f). Attorneys appearing on behalf of a party are agents. ***Clark v. Burden*, 917 S.W.2d 574, 575 (Ky. 1996)**. For defense counsel, there is a practical reason for RPC 1.6 which forbids disclosure of "information relating to the representation of a client." Any disclosure by the attorney may be introduced against the client under this Subsection of *KRE 801A*.

(u) Subsection (b)(5) deals with statements made by other participants in a conspiracy that are introduced against the defendant who was part of the conspiracy. If such statements qualify, they may be used as substantive evidence against the defendant. The analysis for such statements is as follows:

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1. Obviously, the judge must first determine that a conspiracy existed and that the defendant was involved. *KRE 104(a)*; ***Bourjailly v. U.S.*, 483 U.S. 171 (1987)**.
2. The judge may consider the proffered statement as evidence that the conspiracy existed because the Rules of Evidence do not apply to *KRE 104(a)* determinations. *KRE 1101(d)(1)*; *Bourjailly*.
3. But most jurisdictions require additional independent proof of an existing conspiracy before the finding can be made. *e.g.*, ***U.S. v. Clark*, 18 F.3d 1337 (6th Cir. 1994)**.
4. The judge must also find that the proffered statement was made while the conspiracy was going on and that it was "in furtherance" or served some purpose for the success of the conspiracy.
5. If the proponent meets the requirements and *KRE 403* does not justify exclusion, co-conspirator statements may be introduced.

Rule 802 ♦ Hearsay rule.

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

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

COMMENTARY

PURPOSE/PREMISE: Trial is premised on sworn testimony, *KRE 603*, by a witness with personal knowledge of the subject matter of the testimony, *KRE 602*, subject to cross examination. *KRE 611 (b); 6th Amendment; Section 11*. The witness who relates what the declarant told her merely passes along what she heard. The witness can be sworn and cross examined about the circumstances in which the statement was made but the witness does not have personal knowledge of the truthfulness of the statement and therefore cross examination does not reach the really important part of the testimony. Hearsay is excluded as much for lack of personal knowledge as for denial of effective cross examination.

(a) This rule makes the admissibility of hearsay the exclusive responsibility of the Supreme Court which is the only agency of government authorized to make rules for the Court of Justice. *Constitution, Sec. 116. RCr 3.14(2)* permits hearsay in adult felony probable cause hearings. The exceptions in Article 8, *KRE 801A, 803 and 804* also permit hearsay.

(b) The General Assembly cannot authorize the use of hearsay without the concurrence of the Supreme Court pursuant to *KRE 1102 (b)*. For this reason, *KRS 421.350 (3)*, as amended in 1996, is void because it purports to authorize use of prerecorded testimony in child sexual abuse trials.

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

(d) The right of confrontation protected by the 6th Amendment and by Section 11 is an important consideration in any hearsay case. The federal Supreme Court has long held that the 6th Amendment does not necessarily prohibit admission of hearsay against a criminal defendant. ***Idaho v. Wright*, 497 U.S. 805 (1990)**; ***Earnest v. Dorsey*, 87 F.3d 1123, 1130 (10th Cir. 1996)**. If the statement bears sufficient "indicia of reliability" by being either a "firmly rooted exception" to the hearsay rule or otherwise circumstantially reliable, it may be admissible. ***Ohio v. Roberts*, 448 U.S. 56, 66 (1980)**; ***Dorsey*, p. 1131**. Although a criminal defendant has a legal and constitutional right of effective cross examination, *KRE 611 (b)*; ***Eldred v. Commonwealth*, 906 S.W.2d 694, 702 (Ky. 1994)**, courts have been willing to

dispense with this requirement when satisfied that cross examination will do little to insure the reliability of the statements.

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

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

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

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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.

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

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

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]. See: ***Cecil v. Commonwealth*, 888 S.W.2d 669, 675 (Ky. 1994)**.

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," although it is not the only consideration. See: *Cecil*, p. 675; ***Wells v. Commonwealth*, 892 S.W.2d 299, 301-302 (Ky. 1995)**; ***Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 252 (Ky. 1995)**.

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. See: ***DeGrella v. Elsten*, 858 S.W.2d 698, 708-709 (Ky. 1993)**; ***Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996)**.

KRE 803(4)

(a) This rule has too often been misapplied, particularly in child sexual abuse cases in which the prosecutor would introduce statements of the child made to a physician as evidence of the truth of the statements, even though the statements were really only improper bolstering by repetition of the child's in-court testimony. Unless such statements are intended to rebut a charge of recent fabrication or improper motive to testify, they do not even qualify as hearsay exemptions, much less admissible evidence of guilt. *KRE 801A (a)(2)*.

Unless the statements are proper rebuttal under *KRE 801A (a)(2)*, their only lawful use is as an explanation of the basis of the doctor's diagnosis or opinion under *KRE 703 (b)*. Statements admitted under this rule cannot be used as evidence of the truthfulness of the statements and the judge must admonish the jury of this limitation upon request of the opponent.

The rendition in 1995 of ***Fields v. Commonwealth*, 905 S.W.2d 510 (Ky.App. 1995)** and ***Smith v. Commonwealth*, 920 S.W.2d 514 (Ky. 1995)**, should put this matter to rest. These cases adopted the U. S. Supreme Court's analysis of the *801A (a)(2)* language and affirmed long-standing common law precedent to make it clear that statements of the child to the physician can be exempted from the hearsay

exclusionary rule only to the extent that a charge of fabrication or improper motive has been made. Put simply, the child's (or patient's) statements are irrelevant bolstering until they address the issues listed in *KRE 801A (a)(2)*.

(b) It is not difficult to use this rule properly. The statements must be made to a physician or some medical worker for the purpose of assisting the physician to make an accurate diagnosis or to render appropriate treatment. The motive of the declarant is paramount because the presumed desire to be treated effectively is the circumstantial guarantee of trustworthiness for this exemption. The motive or beliefs of the physician are irrelevant.

(c) Unless the declarant legitimately believes that a statement identifying the perpetrator will assist the doctor to diagnose or treat the declarant, statements of identification cannot be exempted by this subsection. In light of *KRS 216B.400*, which requires a physician conducting a rape examination to obtain informed consent for the examination, (which includes gathering of evidence for possible prosecution), statements of identification are more likely to be motivated by a desire to make sure that the perpetrator is identified for purposes of criminal prosecution rather than for purposes of medical treatment.

(d) In some cases, prosecutors claim that statements of the declarant contained in medical records can qualify for exemption because *803 (4)* and *803 (6)* meet the independent admissibility requirement of *KRE 805*. This is wrong. The doctor has a legal duty to note and report abuse under *KRS 620.030 (1) & (2)*. But the declarant has no business or legal duty to report the abuse. Thus, the report of activity prong of the analysis fails.

(e) However, if the declarant appears and testifies, if the *KRE 613* foundation is laid, and if there is a legitimate purpose for the introduction of additional evidence of identification, the prior statement of identification is exempted by *KRE 801A (a) (3)*.

(f) Courts are uneasy about statements made by the declarant to an "examining" physician rather than the "treating" physician, particularly when the statements are made after an appreciable lapse of time. Courts are a good deal more likely to find that *KRE 403* balancing favors exclusion in such circumstances. ***Miller v. Commonwealth*, 925 S.W.2d 449 (Ky. 1996)**.

KRE 803(5): This is a standard hearsay exception which may be used once the proponent of the past recollection has shown that the witness has "insufficient recollection" to testify fully and accurately to matters which the witness once knew. If the "memorandum or record" was made or adopted by the witness when the subject matter was fresh in the witness' memory and the memorandum or record reflects that knowledge correctly, it may be used by the witness as a basis either for refreshment or as the testimony of the witness. Note that this exception only allows use of a memorandum or record. These documents may be read into evidence, but only the adverse party may introduce them as exhibits. See: ***Hall v. Transit Authority*, 883 S.W.2d 884, 887 (Ky.App. 1994)**.

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. See: ***Alexander v. Commonwealth*, 862 S.W.2d 856, 861-862 (Ky. 1993)**; ***Johnson v. Commonwealth*, 883 S.W.2d 482, 484**

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Ky. 1994); ***Jones v. Commonwealth*, 907 S.W.2d 783 (Ky.App. 1995)**; ***Allgeier v. Commonwealth*, 915 S.W.2d 745, 747 (Ky. 1996)**.

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. See: ***Skeans v. Commonwealth*, 915 S.W.2d 455 (1995)**.

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.

KRE 803(18)

In ***Harman v. Commonwealth*, 898 S.W.2d 486, 490 (Ky. 1995)**, the court upheld introduction of statements from a medical treatise upon a foundation that established it as "a reliable authority on the subject."

KRE 803 (22)

This rule is used to excuse calling the court clerk when evidence of a final judgment is relevant. The judgment must, of course, be authenticated under *KRE 902* or some other rule or statute. ***Pettiway v. Commonwealth*, 860 S.W.2d 766 (Ky. 1993)**.

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;

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(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.

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

PURPOSE/PREMISE: These four exemptions from the hearsay exclusionary rule are also policy judgments that recognize that sworn, *viva voce* testimony of a witness is not always going to be available, regardless of the provisions for production of evidence and compulsion of testimony in *KRE 501*, *Section 11* of the Constitution and the *Sixth Amendment* of the federal constitution. The rule reveals a premise that in some instances it is more important to have evidence than to exclude hearsay.

(a) The final paragraph of subsection (a) is an indication that the drafters of the rule were aware that the rule could encourage "unavailability" of a witness brought

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bout by the actions of a party rather than by the witness himself. All attorneys are bound to respect the policy expressed in *RCr 7.02* and *KRE 501* which requires everyone to appear in response to a subpoena and, unless excused by law, to testify or produce evidence. *RPC 3.4(a)* and *8.3(e)* impose an ethical duty to refrain from interfering with the appearance of a witness. *KRS 524.050 (1) (a)* makes improper interference a crime.

(b) But witnesses will refuse to refuse to testify whether they have a lawful reason to do so or not.

1. *KRE 804 (a) (1)* recognizes lawful privileges as grounds of unavailability.

2. *KRE 804 (a) (2)* recognizes that some witnesses will, because of corrupt motives or honest belief, refuse to testify. This subsection prevents an intransigent witness from defeating the policy of requiring evidence from every person.

A. The witness cannot refuse in advance. The refusal must follow an explicit order to testify.

3. If the witness appears but "testifies" that she lacks "memory of the subject matter of the declarant's statement" the witness is unavailable under *KRE 804 (a)(3).*

A. In most instances the judge will have little choice but to believe the witness who claims lack of memory but, because the decision is one for the judge under *KRE 104(a)* the judge may disbelieve and refuse to find the witness unavailable.

4. The death of the declarant, or serious physical or mental illness at the time testimony is desired present obvious problems of unavailability. This is a preliminary question to which the rules do not apply. *KRE 1101 (d)(1).* Although the judge may accept the attorney's representation as to death or illness, prudence dictates a more convincing showing through a death certificate or a letter from a physician.

5. A party wishing to rely on subsection (5) should be able to show that a subpoena was timely issued and that good faith efforts to serve it failed. U.S. Supreme Court precedent says that this much is necessary to protect the defendant's right of confrontation. ***Ohio v. Roberts*, 448 U.S. 56 (1980).**

A. Subpoenas require personal, not mail, service. If a party has mailed a subpoena, the witness cannot be considered properly summoned and cannot be unavailable.

B. *KRS 421.230-270* and *KRS 421.600, et. seq.*, provide means of summoning out of state witnesses and prisoners. To summon a federal prisoner, the party should file a petition for a Writ of Habeas Corpus ad Testificandum in the federal district court. The existence of these remedies indicates that they are "reasonable" means to secure the presence of witnesses and therefore a party must at least attempt to use them to secure the presence of a witness. If the court denies relief, the party has done all she can to procure attendance.

(d) The language of the rule says that unavailability "includes" the listed situations which suggests that other situations may justify a finding that a witness is unavailable.

(e) Former testimony: *KRE 804 (b)(1)*

1. This exemption from the hearsay exclusionary rule involves, first, "testimony given as a witness" If the declarant was not under oath and testifying, the statements cannot be exempted.

2. The statement must have been made by the declarant in a hearing or deposition given in the same or a different proceeding.

3. If given in a deposition, the deposition must have been authorized under the grounds set out in *RCr 7.10 (1) or (2).*

4. *RCr 7.20 (1)* lists the situations in which the deposition may be used, but because of its explicit reference to use " so far as otherwise admissible under the rules of evidence," it appears that the criminal rule has been superseded by *KRE 804.*

5. The exemption is not available unless the opponent had "opportunity and similar motive" to "develop" the testimony by direct, cross, or redirect examination.

If the opportunity and motive for developing existed at the time the statement was made, and the opponent declined to do so, the statement qualifies for exemption. If the opponent had opportunity but no reason to "develop" the testimony at the time it was given, (*e.g.*, at a bond reduction hearing), the statement does not qualify. The key is opportunity to question the declarant at the time of the prior testimony with the same rigor she would be examined at the present hearing or trial. It does not matter if it was actually done. The only question is whether the opponent had a chance to do so.

(f) Statement under belief of impending death: KRE 804 (b)(2). In ***Wells v. Commonwealth*, 892 S.W.2d 299, 302 (Ky. 1995)**, the court held that statements made by the deceased to a 911 operator and to EMTs within minutes of the stabbing and later statements to a detective after being told his condition was critical and that he could die at any minute qualified for exemption under this rule. The statements to the detective clearly met the requirements of the rule but it is not clear that the statements to the 911 operator and EMTs were made under a belief that the deceased declarant would die soon. These statements were probably admissible under *KRE 803(1)*. Being stabbed and later dying does not qualify statements of the deceased under this subsection. The proponent must show that the declarant actually knew of the seriousness of his condition and that he believed that he might die. The belief in impending death is the circumstantial guarantee of trustworthiness in this instance.

(g) Statement against interest: KRE 804 (b)(3). This is the most problematic of the exemptions because in criminal cases the use of such declarations often involves constitutional rights of the defendant. The use of statements to exculpate the defendant implicates the defendant's right to present exculpatory evidence. ***People v. Barrera*, 547 N.W.2d 280 (Mich. 1996)**. The use of such statements to inculpate the defendant can violate the constitutional right of confrontation. Because Kentucky adopted the language of *FRE 804 (b)(3)* in 1978, ***Crawley v. Commonwealth*, 568 S.W.2d 927 (Ky. 1978)**, case precedents antedating the adoption of this rule may be used. However, *KRE 804 (b)(3)* differs from the federal rule by explicitly requiring a high degree of trustworthiness for statements used for both inculpatory and exculpatory use. The federal rule requires it only for exculpatory use.

(h) When used to exculpate, the court must determine

1. Whether a reasonable person in the declarant's position would have made it unless true. A person facing no reasonable exposure to liability as a result of the statement is less likely to be speaking the truth.

2. Whether the statement actually contains an admission of the declarant's liability. It is not enough for the statement to exculpate the defendant. ***Barrera*,** p. 288; ***Williamson v. U.S.*, 129 L.Ed.2d 476 (1994)**.

3. Through two inquiries whether the statement is trustworthy: (a) did the declarant actually make the statement and (b) if so, is there some reason to believe that the assertions in the statement are true. Usually courts consider the following factors, none of which is dispositive of the question.

A. Was the statement made voluntarily?
B. Was it made more or less contemporaneously with the events described?
C. Was it made to persons to whom the declarant was likely to speak the truth?
D. Was it made without prompting or inquiry? ***Barrera*,** p. 288.

4. These factors support exclusion, although again none is dispositive.

A. Statement made to law enforcement officers.
B. Made in response to prompting or inquiry.
C. Tends to minimize declarant's role or shifts blame from declarant.
D. Made to curry favor of authorities.
E. Made with a reason to lie or distort (*i.e.*, revenge).

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5. Statements made while in custody of police are inherently suspect. ***Williamson***, p. 483, citing ***Lee v. Illinois*, 476 U.S. 530 (1986)**]. However, the presumption of unreliability may be overcome upon showing that the statement was made without an improper motive.

(j) The rule requires that circumstances clearly indicate the trustworthiness of the statement when used for any purpose. ***Harrison v. Commonwealth*, 858 S.W.2d 172 (Ky. 1993)**, gives an idea of what the court believes sufficient indications for a statement used to inculpate. The statement was made prior to arrest, after *Miranda* warnings and was reduced to writing by authorities, although it was not signed by the declarant. The court found little evidence that the declarant was attempting to curry favor but found that the details of the statement were corroborated by other testimony and the physical evidence. The court held that a reasonable person in declarant's position would not have made the statement unless it was true.

(k) One unresolved question that arises in inculpatory use cases is the potential for infringement on the right to confrontation. In ***Bruton v. U.S.*, 391 U.S. 123 (1968)**, the court held that the use of a non-testifying co-defendant's out of court statements as evidence against the defendant violated the defendant's *Sixth Amendment* right of confrontation. *Harrison* acknowledges the danger and acknowledges that such statements are presumptively unreliable. However, as the *Harrison* majority notes, the presumption may be rebutted. The unanswered question is whether *KRE 804 (b)(3)* necessarily means that qualifying statements do not violate the right of confrontation. The dissent in *Harrison*, based on ***Idaho v. Wright*, 497 U.S. 805 (1990)** states that inculpatory *804 (b)(3)* statements should not be admitted unless the declarant's truthfulness is so clear from the surrounding circumstances that cross examination would be of "marginal utility" in exposing lies, or improper motive. Keep in mind that *KRE 806* authorizes attacks on the credibility of hearsay statements.

(l) Personal or family history: KRE 804 (b)(4). These statements are exempted from the hearsay exclusionary rule because they literally might be the only source of information if the declarant does not testify.

Rule 805 ♦ Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

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

COMMENTARY

PURPOSE/PREMISE: Under the Rules, hearsay statements contained in other hearsay statements may be admitted. This Rule continues the Common Law precedent that multiple hearsay statements may be admitted if they individually qualify under an exception. This rule is another indication that hearsay exceptions apply to a single remark and that each remark must stand or fall on its own. It is not intended to supersede the Order of Proceedings set out in An often used example for this Rule involves an excited utterance, *KRE 803(2)*, or statement for medical treatment, *KRE 803(4)*, contained in a medical record. *KRE 803(6)*. As in all hearsay cases, qualification for exemption from the Hearsay Exclusionary Rule does not guarantee admissibility. *KRE 402; 403*.

Rule 806 ♦ Attacking and supporting credibility of declarant. NOTES

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

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

COMMENTARY

PURPOSE/PREMISE: When a hearsay statement has qualified under *KRE 803* and *801A(b)*, the declarant often is not present. Under *KRE 804* the declarant is never present to testify and be cross examined as to credibility. This rule makes it clear that the adverse party may use the same methods to attack the credibility of the declarant as if he were present and available for cross examination.

(a) The second sentence of the Rule excuses the adverse party from the duty of establishing the *KRE 613* foundation when the witness is not present.

(b) It is important to recall that *KRE 801A(a)* requires the witness to be present and questioned pursuant to *KRE 613* before prior inconsistent, consistent, or identification statements can qualify. *KRE 806* is unnecessary in these instances because the witness is available for questioning and for impeachment as to credibility.

(c) The party against whom a hearsay statement is admitted may call the declarant as a witness. *KRE 806* allows that party to "examine the declarant...as if under cross examination" but only as to the statement. Barring a showing of hostility, the party must avoid leading questions on other subjects. *KRE 611(c)*.

(d) There may be a notice problem in this Rule. The party against whom the statement is introduced may not know that the declarant will not be called until trial is underway. A prudent attorney will ask the prosecutor about his intentions or will simply "stand by" subpoena the witness.

(e) If a party attacks the credibility of a declarant under this rule, the adverse party may use the same techniques of rehabilitation or support as if the declarant were present and testifying.

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.

NOTES

(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.

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; ***Hackworth v. Hackworth*, 896 S.W.2d 914, 916 (Ky.App. 1995)**; ***Bell v. Commonwealth*, 875 S.W.2d 882, 886 (Ky. 1994)**.

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. To authenticate a photo, a party must introduce evidence, through testimony primarily, that it accurately depicts the subject of the photograph. ***Eldred v. Commonwealth*, 906 S.W.2d 694, 704 (Ky. 1994)**. A replica may be introduced upon a showing that it is similar to the original object. ***Allen v. Commonwealth*, 901 S.W.2d 881, 884 (Ky.App. 1995)** reproduces a foundation colloquy for replicas. 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. An example is *KRS 422.300* which is a procedure for authenticating medical records without calling the records librarian. ***Bell v. Commonwealth*, 875 S.W.2d 882, 887 (Ky. 1994)**.

Rule 902 ♦ Self-authentication.

NOTES

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.

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

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tems 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*). ***Munn v. Commonwealth*, 889 S.W.2d 49, 51 (Ky.App. 1994)**; ***Davis v. Commonwealth*, 899 S.W.2d 487, 489 (Ky. 1995)**.

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.

In ***Skeans v. Commonwealth*, 912 S.W.2d 455, 456 (Ky.App. 1995)**, the court held that certified copies of a driver's record could be used to prove the date of a prior offense in DUI cases.

Rule 903 ♦ Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 64; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule does away with the common law requirement that the subscribing witness must appear and testify. The Commentary notes that in will cases, the witnesses to the will must appear and testify unless the will is self-authenticating under Chapter 394 of the statutes.

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.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 65; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

Professor Lawson has made the point a number of times that the best evidence rule was important at a time when copies were made by hand or by other methods that could result in errors affecting the intent and meaning of the written document. He says that now, where there are so many different ways of producing accurate copies, the rule is one of "preference" rather than one of necessity. [Commentary, p. 108-109]. *KRE 1001* is the definition section for Article X and it describes the types of objects to which the "best evidence rule" is applicable. First the rule applies to writings or recordings which means that if it is written down on a paper, put on a magnetic tape, put on a floppy disk, or is on a tape recording or compact disc, it is a writing or recording for purposes of the rule. Photographs, including normal photographs, x-rays, videotapes and motion pictures, also are included. The definitions of the terms "original" and "duplicate" are important because they describe what may be introduced as more or less the original without worrying about the best evidence rule. The original of a writing or recording is the first writing or recording itself, or any counterpart (*i.e.*, carbon copy or any hard copy made from the contents of a word processor system). An original of a photograph includes the negative or any print made from that negative. A duplicate is a "counterpart" produced by the same impression as the original or by means of photography including enlargement or miniaturization, or by mechanical or electronic re-recording or other equivalent technique. A duplicate is something that "accurately reproduces the original".

Rule 1002 ♦ Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules, in other rules adopted by the Kentucky Supreme Court, or by statute.

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

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.

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Rule 1003 ♦ Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless:
(1) A genuine question is raised as to the authenticity of the original; or
(2) In the circumstances it would be unfair to admit the duplicate in lieu of the original.
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 67; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

Because there is little possibility of error where most duplicates are concerned, there is really not much reason to keep them out except when there is a genuine question raised concerning the authenticity of the original or when under the circumstances it would be unfair to admit the duplicate. The reason for the first exception is obvious, but the text writers do not provide much in the way of examples of any "unfairness." Apparently the chief reason for this rule is that sometimes the duplicate may not contain the entire writing and therefore under *KRE 106* the original containing all parts might be required.

Rule 1004 ♦ Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;
(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or
(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing.
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 68; amended 1992 Ky. Acts ch. 324, sec. 25; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule lists the instances in which the original is not required and in which other evidence concerning the writing, recording or photograph may be presented. Obviously, if the original is lost or destroyed other evidence of the contents must be provided. However, the proponent should be ready to show that they were lost or destroyed for reasons other than his own bad faith. The subpoena power of Kentucky ends at its borders. If there is no way to obtain the original by judicial process then necessity requires introduction of other evidence. Finally, if the adverse party has the original and will not give it up, it is only fair to allow the proponent to introduce other evidence about the contents of the writing, recording or photograph. If the writing, recording or photograph bears only on some collateral issue, the judge should be given some latitude in deciding whether the original is really necessary to make this point.

Rule 1005 ♦ Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed with a governmental agency,

either federal, state, county, or municipal, in a place where official records or documents are ordinarily filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with KRE 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 69; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This is a practical rule which recognizes that official records and documents ordinarily will not be available because they cannot be removed from their official depository. 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.
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. 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. *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.

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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.
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 71; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

Obviously, a party who admits the authenticity of the contents of a writing, recording or photograph is not in a position to claim that there is a "genuine question" concerning the authenticity of the original. *KRE 1003*. Therefore, *KRE 1007* authorizes introduction of any evidence of the contents of a writing, recording or photograph if the party against whom it is offered admits genuineness.

Rule 1008 ♦ Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of KRE 104. However, when an issue is raised:
(a) Whether the asserted writing ever existed;
(b) Whether another writing, recording, or photograph produced at the trial is the original;
(c) Whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.
HIST: Enacted 1990 Ky. Acts ch. 88, sec. 72; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule sets out a special description of duties for the judge and the jury. Ordinarily, the question of admissibility is for the judge under *KRE 104(a)*. This involves questions arising under *KRE 1004, 1001(4)* and *1003*. *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.

Article XI. Miscellaneous Rules

Rule 1101 ♦ Applicability of rules.

(a) Courts. These rules apply to all the courts of this Commonwealth in the actions, cases, and proceedings and to the extent hereinafter set forth.
(b) Proceedings generally. These rules apply generally to civil actions and proceedings and to criminal cases and proceedings, except as provided in subdivision (d) of this rule.
(c) Rules on privileges. The rules with respect to privileges apply at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under KRE 104.

(2) Grand jury. Proceedings before grand juries.

(3) Small claims. Proceedings before the small claims division of the District Courts.

(4) Summary contempt proceedings. Contempt proceedings in which the judge is authorized to act summarily.

(5) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary hearings in criminal cases; sentencing by a judge; granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 73; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule must be read together with *KRE 101*. This rule emphasizes that these rules apply to the Court of Justice. They do not apply to parole revocation hearings, administrative hearings, or any other type of 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. 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 reasons.

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

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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.

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.
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.

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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.
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).*

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.

KENTUCKY RULES OF EVIDENCE ♦ TABLE OF CASES

This We Shall Have!
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Chapter 3: A Process for Successful Preservation of Your Client's Record

The Preventive Practice of Law vs. Chicken Noodle soup and hot toddies - LHM

I. Begin With the End In Mind:

A. Think about all you do from the viewpoint of how it will look to appellate judge(s).

B. If things affecting your case are happening in or outside of the courtroom, place them in the record by speaking into the record and later filing a written motion.

C. With suppression hearing, describe the area where the search took place, how many miles is it from the center of town, a wooded area, a deserted location, a neighborhood whose racial or ethnic population is significant. (These essential facts are the building blocks of your case, **everyone in the courtroom knows the facts, everyone in the appellate arena does not!**)

II. Forward Your Theory of the Case with Your Objections:

A. First use your trial practice persuasion institute education to develop a solid theory of the case and then determine how to advance that theory with your objections.

B. Identify your best facts. What will the prosecutor do to undermine your presentation of those facts? Stop her/him ahead of time. Figure out why the law does not allow him/her to undercut that important evidence and prepare strategy with motions to object.

C. Identify the prosecutor's best facts. What weapons do you have in the law to render impotent those facts? Use your right to object to weaken prosecutor's case.

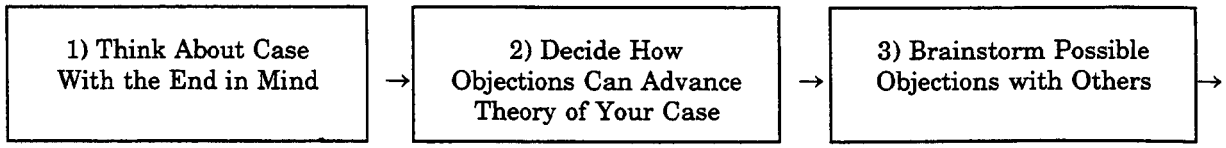
III. Brainstorm All Possible Objections:

A. Discuss with others the errors likely to be a part of your particular case as well as those objectionable statements or tactics used regularly by your prosecutor, judge, chief investigating officer or other prosecution witness.

B. Create, file and argue motions in limine to prohibit prejudicial comments/tactics. Use the arguing of such motions to put on evidence for the trial and appellate court about the objectionable practice (*i.e.* subpoena the prosecutor, if s/he challenges the accuracy of your motion).

IV. Be Informed by Reviewing:

A. Relevant KRS
B. Controlling Caselaw
C. Kentucky Rules of Evidence
D. Relevant scientific, psychological or other forensic information to know what the evidence is and what it means
E. Kentucky RCrs



F. Kentucky Rules of Professional Conduct
G. KBA Ethics Opinions
H. ABA Standards for Criminal Justice, Defense Function and Prosecution Function
I. ABA Mental Health Standards

V. Prepare All Objections Before Trial:

A. Do not wait until trial to preserve anything unless you have a sound strategy for waiving or delaying. You cannot be spontaneous about preserving record.

B. File motions in limine to cover every anticipated error or objection, or decide strategically to wait for trial or object orally.

C. Have a checklist of evidence you want admitted that prosecutor will try to have excluded and evidence you want out that prosecutor will try to admit. What are your grounds for admitting or excluding evidence? Put checklist for each part of trial in your trial notebook.

voir dire: anticipate right to ask specific questions, list supportive cases to understand prosecutor's objections.

opening: list grounds to object to prosecutor's opening - what does this prose-cutor usually say that is objectionable?

prosecution witness: list objections and grounds, to anticipate areas prosecutor may cover.

defense witnesses: anticipate prosecutor's objections, list supportive KREs and case law.

directed verdict: list all elements you need to address so that none are forgotten in heat of moment.

instructions: list supportive case-law in trial notebook if not within defense tendered instructions.

closing argument: list possible grounds for objection to prosecutor's closing, list authority to support defense closing.

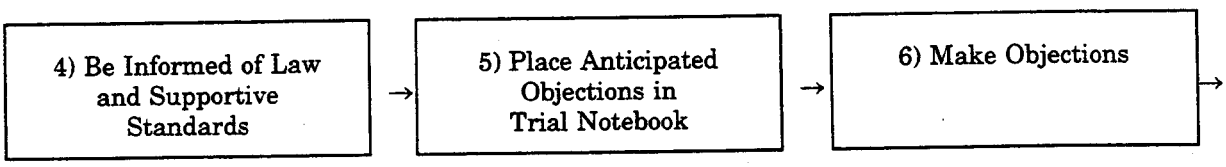
D. Note all the objections you need to make for that section. Prepare a page for objections for each section before trial and add to it as unexpected, objectionable events occur during trial

E. Prepare voir dire questions to educate jurors to understand and accept your need to object without prejudice to your client.

F. When objectionable material is admitted despite motions, continue to make objections during trial and use motion for new trial and jnov as last opportunity to object.

G. When preparing your motions in limine fill them with all of the facts necessary to place the appellate jurists there in the courtroom, county, or at the scene with you.

H. Even if you decide to wait until trial to object because of a tactical reason, have your objection in written form at the proper place in your trial notebook to insure that all bases are covered.



I. Before trial, prepare written jury instructions to tender.

VI. How to Present Your Objections Most Persuasively:

A. Rulings by the judge are required for preservation of objections!

B. Be as specific as possible about why this is error, while covering every angle in your objections.

C. State the specific relief you want, beginning with the best relief first *i.e.* mistrial, admonition, suppression of evidence, right to put on evidence to counter the erroneously introduced evidence.

D. If judge overrules your request move down the line, not forgetting to put evidence on by avowal.

E. If judge says she will rule later on your objection, make sure you write that down and remind yourself to obtain ruling.

VII. Posture Yourself Psychologically and Physically to Object:

A. If you seldom object during opening statement or closing argument, find a "readiness stance" (*e.g.*, sit on edge of seat with hands ready on arm chair to push yourself up). Maintain this position during prosecutor's entire closing and make your objections!

VIII. Analyze Your Challenges to the Admissibility of Evidence:

A. If filing motion to suppress evidence on search and seizure grounds, make sure you have gone sufficiently back in time in your challenge to the illegal police action (*i.e.* if there was a stop, an interrogation, a search and then a seizure of evidence-make sure that you object to the stop as well as all of the steps thereafter).

B. Go over the search or seizure with an appellate lawyer or expert in search and seizure law.

C. Outline the actions of the investigating officer in obtaining statements from client or witnesses. Is there anything that officer did to render inadmissible the evidence?

IX. Prevent the Backdoor Admissibility of Inadmissible Evidence:

A. When the prosecutor seems to be trying to introduce damaging and questionable evidence, refer to your checklist of objections to prevent the prosecutor from introducing evidence that the court has ruled inadmissible.

X. Make Sure Your Voir Dire Objections are on the Record:

A. Place on the record every prosecutor strike of racial or ethnic minorities. Object to prosecutor's justifications for jury strikes.

B. State on the record the race of jurors, how many are men, women, young, old, other relevant classification.

C. Even with video records, the names and numbers of jurors are not in the record when they answer questions unless you ask for them to state their names and numbers.

7) Obtain Rulings	→	8) Do Any Needed Avowals

XI. When Racial or Cultural Prejudice Affects Right to Fair Trial Place it in the Record:

A. When relevant and helpful to your client's case, place into the record the race and cultural background of the arresting and investigating officers, eyewitnesses, social workers and psychologists.

B. Make the prejudice as real for the appellate court as it is for you and your client.

XII. Avowal/Offer of Proof:

A. When evidence is excluded against your objection, make an offer of proof which sets forth all of the information for the appellate court to understand the materiality of the error.

B. If you are not allowed to put the evidence in the record through witnesses, put it in orally or in writing but whatever you do try to place everything in the record.

C. If you inadvertently left some part of the avowal out of the record, file a motion for new trial and set forth what was excluded, attach evidence by affidavit if possible.

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The 3 Aspects of Effective Relief: Must, Can, Should

Millard Farmer and Joe Nursey in *The Building Blocks of Capital Cases: Motions and Objections*, The Champion, Vol. 8, No. 2 (March 1984) at 16, 20 detail the three components of requests for relief being made in a motion or an objection:

> The relief requested should be written in at least three parts. The motion should request: a remedy which it would be error to deny, a remedy which can be granted, and a remedy which aims for a more "perfect" level of justice but which will not be granted under the current state of the law. It is important that the prayer for relief state that the alternative requests for relief are lesser acceptable alternatives for relief. Requesting relief in this comprehensive manner takes advantage of the established law as well as the developing law. Since the prosecution often does not or even cannot appeal the relief granted by motions, the body of existing case law is never an accurate measure of the relief that may be given in response to motions and basing motions on existing case law alone is simply inadequate representation. Almost every motion should request, and anticipate use of, an evidentiary hearing. Creativity in the type of relief requested, as well as the quality of the evidence supporting the relief requested, may often be decisive in bringing about favorable results.

Chapter 4: Effectively Obtaining Funds for Expert Help

Some truths about funds for experts are self-evident: 1) indigent criminal defendants are entitled to money to hire defense experts when reasonably necessary to the defense, and 2) public defenders too often do a poor job of persuasively asking for the necessary funds, and therefore many indigents do not obtain the help of experts they are constitutionally entitled to receive.

10 Factors of the Threshold Showing

There is a common sense, effective way to make threshold showings which persuade judges to authorize the necessary funds. That persuasive evidentiary showing, most usually made *ex parte*, has the following ten components: 1) Type of the resource; 2) Nature and stage of assistance; 3) Who will provide the help, qualifications of that person, costs of their help; 4) Reasonableness of both the rates and total cost; 5) Factual basis for the resources *in this case*, including the theory of the case and relevant themes; 6) Counsel's observations, knowledge, insights about this case and this defendant; 7) Legal bases for expert *in this case*; 8) Legal reasons for *defense* resources; 9) Inadequacy or unavailability of state resources; 10) Evidentiary documentation.

Standards of Practice

These have been the components of the national practice of successfully obtaining funds for experts for some time. *See, e.g.*, Edward C. Monahan, *Obtaining Funds for Experts in Indigent Cases*, *The Champion*, Vol. 13, No. 7 (August 1989) at 10; Nancy Hollander & Lauren M. Baldwin, *Expert Testimony in Criminal Trials*, *The Champion*, Vol. 15, No. 10 (Dec. 1991) at 12; Paul C. Giannelli, *The Constitutional Right to Defense Experts*, *Public Defender Report*, Vol. 16, No. 3 (1993); Nancy Hollander & Barbara E. Bergman, *Every Trial Criminal Defense Resource Book* (1995) §46:8.

NLADA's *Performance Guidelines for Criminal Defense Representation* (1995) Guideline 4.1(7) addresses the need for expert assistance: "Counsel should secure the assistance of experts where it is necessary or appropriate to: (A) the preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebut the prosecution's case."

The ABA *Providing Defense Services* Standard 5-1.4 requires that defenders have the necessary resources for quality representation: "The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation. These should include not only those services and facilities needed for an effective defense at trial but also those that are required for effective defense preparation in every phase of the process...."

The ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989). Guideline 8.1 addresses the necessity for supporting services: "The legal representation plan for each jurisdiction should provide counsel appointed pursuant to these Guidelines with investigative expert, and other services necessary to prepare and present an adequate defense. These should include not only those services and facilities needed for an effective defense at trial, but also those that are required for effective defense representation at every stage of the proceedings, including the sentencing phase."

The evolution of being successful in this funds practice since the 1980s includes making this threshold showing more specifically, more explicitly, more *thematically*. The necessity for an expert to effectively communicate the client's *story* is the focus of the showing to the judge.

Resource Manual Available

The Kentucky Department of Public Advocacy has developed a *Funds for Experts and Resources Manual* to provide litigators a practical aid to making persuasive requests for funds for resources. The Manual has collected cases which hold it is necessary to provide funds for experts in the following areas: 1) drug and alcohol; 2) statisticians; 3) firearms and gunshot wounds; 4) pathologists; 5) DNA.

Additionally, one chapter of the Manual details how to persuasively present the 10 threshold showing factors thematically with practical examples. Other chapters present the law and strategies for: demonstrating the need for having a defense expert since a neutral expert is inadequate; making the request *ex parte*; obtaining funds for a consulting expert; showing the ineffectiveness in failing to ask for funds for resources; detailing what national benchmarks require; and, obtaining funds when an indigent is represented by retained counsel.

Sample motions, orders, affidavits and supporting documents are included to demonstrate pragmatic ways to meet the threshold showing requirements.

The Manual is available from the Kentucky Department of Public Advocacy at the address below for $29.00, including postage and handling. Alternatively, it can be obtained on WP 5.1 diskette for $59.00. It is updated annually with the additions of 5 new chapters. Make your check payable to the *Kentucky State Treasurer*.

Edward C. Monahan
Deputy Public Advocate

Chapter 5: 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." *Pelfrey v. Commonwealth*, 842 S.W.2d 524, 526 (Ky. 1993).

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).

k. Jurors who had prior relationship with prosecuting attorneys, and who professed that they would seek out such relationship in future. ***Riddle v. Commonwealth***, 864 S.W.2d 308 (Ky.App. 1993).

D. **Juror Who Has Trouble Accepting Legal Principles.** Juror demonstrated a serious problem accepting the concepts of a defendant's right to remain silent, the burden of proof and the presumption of innocence. ***Humble v. Commonwealth***, 887 S.W.2d 867 (Ky.App. 1994).

E. 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).

f. African-American defendant was charged with sexual offenses against his step-daughter from a bi-racial marriage, it was reversible error for the trial court to fail to strike for cause a juror who was biased against bi-racial jurors and would judge the wife's crediblity a degree different from the credibility of other witnesses. ***Alexander v. Commonwealth***, 862 S.W.2d 856 (Ky. 1992).

g. The probability of bias was so great that it was an abuse of discretion for the trial court to fail to strike a juror who was employed by the Cabinet for Human Resources, the same organization which a key prosecution was employed, in the same unit that the key witness and detective involved in the case were assigned. ***Alexander v. Commonwealth***, 862 S.W.2d 856 (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 prospective 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. Commonwealth*, 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, 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. 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. 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. 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 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***, 504 U.S. 719, 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 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 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 forcause 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, do 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 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 seeking 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 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).

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, ask for one. *Morton v. Commonwealth*, 817 S.W.2d 218 (Ky. 1991); *Derossett v. Common-wealth*, 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 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 lesser included offense instruction 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. CLOSING ARGUMENT

RCr 9.22 - Defense counsel is required to object to the prosecutor's improper comments during his closing argument at the time the comments are made. Defense counsel must make known to the trial court the type of relief she desires, *i.e.*, admonition, mistrial. Defense counsel need not state the grounds for her objection unless requested to do so by the court. Counsel needs to be aware of all possible grounds for the objection and types of relief because failure to mention a specific ground at trial, if requested to do so, will foreclose ability to argue said ground on appeal. *Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993); *Kennedy v. Commonwealth*, 544 S.W.2d 219, 221 (Ky. 1977). Also, failure to request the specific relief desired will foreclose the ability to argue you are entitled to said relief on appeal. *Derossett v. Commonwealth*, 867 S.W.2d 195 (Ky. 1993); *West v. Commonwealth*, 780 S.W.2d 600, 602 (Ky. 1989).

Where the trial court denies defense counsel a reasonable opportunity to make a record, the appellate court will not hold defense counsel strictly accountable to the rules regarding making contemporaneous objections. *Alexander v. Commonwealth*, 864 S.W.2d 909, 914-15 (Ky. 1993).

Two procedures to deal with the prosecutor's closing argument are to (1) move *in limine*, prior to trial, to preclude improper comments in closing argument; and (2) make timely objection at trial during the closing argument. Each procedure requires knowledge and understanding of the types of arguments which have been found to be improper by the Kentucky courts.

Trial counsel must be alert for prejudicial and improper arguments by the prosecutor at both the guilt and truth-in-sentencing phases of the trial. Counsel must make a contemporaneous objection (RCr 9.22) to the improper argument and move for a mistrial. Counsel should always invoke Section 2 of the Kentucky Constitution and the Due Process Clause of the 14th Amendment to the U.S. Constitution to support her objection and mistrial motion. Counsel should resist the judge's offer to give the jury a "curative" instruction or an admonition rather than grant a mistrial. Counsel should point out that such an instruction or admonition is insufficient to cure the prejudice. You can never unring the bell. *Bruton v. U.S.*, 88 S.Ct. 1620, 1628 (1968); *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky. 1994).

Besides becoming familiar with the law regarding closing argument, counsel should become familiar with the practices of the prosecutor trying the case. Many prosecutors make the same (or variations on a theme) improper argument over and over again. By being familiar with the types of arguments and issues of your particular prosecutor, you can move the court *in limine* to preclude the use of the types of improper and prejudicial arguments likely to be used by the prosecutor. Even if your motion in limine is denied, you will be better prepared to object at trial.

Examples of unfair arguments using the West Key Number system:

708 - Scope and effect of summing up

709 - For prosecution

Prosecutor is given wide latitude in closing argument, *Bowling v. Commonwealth*, 873 S.W.2d 175 (Ky. 1993), but prosecutor may not cajole or coerce jury to reach a verdict. *Lycans v. Commonwealth*, 562 S.W.2d 303 (Ky. 1978).

717 - Arguing or reading law to jury

Prosecutor misstated law on insanity when he told jury test was whether defendant knew right from wrong. *Mattingly v. Commonwealth*, 878 S.W.2d 797 (Ky. App. 1994).

Prosecutor improperly defined reasonable doubt. *Sanborn v. Commonwealth*, 754 S.W.2d 534, 544 (Ky. 1988); *Commonwealth v. Goforth*, 692 S.W.2d 803 (Ky. 1985).

A prosecutor shall not knowingly make a false statement of law to a tribunal. SCR 3.130-3.3(a)(1).

718 - Arguing matters not within issues

A lawyer shall not knowingly or intentionally allude to any matter that the lawyer does not reasonably believe is relevant. SCR 3.130-3.4(e).

719 - Arguing matters not sustained by the evidence

A lawyer shall not knowingly or intentionally allude to any matter that will not be supported by admissible evidence. SCR 3.130-3.3(e).

1) in general

Prosecutor may not mention facts prejudicial to defendant that have not been introduced into evidence. *Sommers v. Commonwealth*, 843 S.W.2d 879 (Ky. 1992); *Bowling v. Commonwealth*, 279 S.W.2d 23 (Ky. 1955).

3) personal knowledge, opinion or belief of counsel

A lawyer shall not state a personal opinion as to the justness of a cause, the credibility of a witness or the guilt or innocence of an accused. SCR 3.130-3.4(e).

Prosecutor's expression of his opinion is proper when based on the evidence. *Derossett v. Commonwealth*, 867 S.W.2d 195 (Ky. 1993).

It was error for prosecutor to make statement about believability of defendant's explanation of how he received certain injuries and to present demonstration of defendant's explanation which was outside the evidence presented. *Wager v. Commonwealth*, 751 S.W.2d 28 (Ky. 1988).

It was improper for prosecutor to tell jury that he knew of his own personal knowledge that persons referred to by defendant's alibi witness were "rotten to the core." *Terry v. Commonwealth*, 471 S.W.2d 730 (Ky. 1971).

4) evidence excluded

It was error for prosecutor to argue there was a vast store of incriminating evidence which the jury was not allowed to hear because of the rules of evidence. *Mack v. Commonwealth*, 860 S.W.2d 275 (Ky. 1993).

Where trial court ruled part of a tape recording was not admissible, it was error for the prosecutor to tell the jury he "wished" it could have heard those parts that had been excluded. *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982).

720 - Comments on evidence or witnesses

1) in general

Hall v. Commonwealth, 862 S.W.2d 321 (Ky. 1993).

Prosecutor violated defendant's right to remain silent when he told the jury that if the defendant, who was a passenger in the car, had really been innocent he would have accused other individual in car of committing crime. *Churchwell v. Commonwealth*, 843 S.W.2d 336 (Ky.App. 1992).

Prosecutor violated defendant's right to remain silent when he told jury that defendant would have denied ownership of pouch containing drugs if he were innocent. *Green v. Commonwealth*, 815 S.W.2d 398 (Ky.App. 1991).

2) misstatements of evidence

It was improper for prosecutor to misstate testimony of psychologist both on cross-examination and in closing argument. *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984).

5) credibility and character of witnesses

A lawyer shall not state a personal opinion as to the credibility of a witness, including the defendant. SCR 3.130-3.4(e).

It was error for prosecutor to make statement about believability of defendant's explanation of how he received certain injuries and to present demonstration of defendant's explanation which was outside the evidence presented. *Wager v. Commonwealth*, 751 S.W.2d 28 (Ky. 1988).

The personal opinion of the prosecutor as to the character of a witness is not relevant and is not proper comment. *Moore v. Commonwealth*, 634 S.W.2d 426 (Ky. 1982).

It was improper for prosecutor to comment that he had known and worked with police officer for a long time, that officer was honest and con-

scientious, and officer's word was worthy of belief. *Armstrong v. Commonwealth*, 517 S.W.2d 233 (Ky. 1974).

6) inferences from and effect of evidence in general

It is improper for prosecutor to infer the potentiality of another crime. *Elswick v. Commonwealth*, 574 S.W.2d 916 (Ky.App. 1978).

720.5 - Expression of opinion as to guilt of accused

It is always improper for the prosecutor to suggest the defendant is guilty simply because he was indicted or is being prosecuted. *U.S. v. Bess*, 593 F.2d 749 (6th Cir. 1979).

A lawyer shall not state a personal opinion as to the guilt or innocence of an accused. SCR 3.130-3.4(e).

721 - Comments on failure of accused to testify

1) in general

Commonwealth should not comment on defendant's failure to testify. *Powell v. Commonwealth*, 843 S.W.2d 908 (Ky.App. 1992).

In a joint trial, counsel for co-defendant may not comment on defendant's failure to testify. *Luttrell v. Commonwealth*, 554 S.W.2d 75 (Ky. 1977).

5) reference to testimony as uncontradicted and failure to produce witnesses or testimony - is not held to be an improper comment on the accused's failure to testify or a violation of his right to remain silent under Section 11 of the Kentucky Constitution and the Fifth Amendment of the U.S. Constitution, but you should object anyway because such a comment denies the accused due process of law and a fair trial under the Fourteenth Amendment to the U.S. Constitution.

721.5 - Comments on failure to produce witnesses or evidence

It is error for the prosecutor to comment on the defendant's spouse's failure to testify. *Gossett v. Commonwealth*, 402 S.W.2d 857 (Ky. 1966).

722 - Comments on character or conduct of accused or prosecutor

It was error for the prosecutor to make demeaning comments about defendant and defense counsel. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

Where defendant is on trial for possession of a controlled substance, it is improper for the prosecutor to make the defendant appear to be [insinuate] involved in trafficking in a controlled substance. *Jacobs v. Commonwealth*, 551 S.W.2d 223 (Ky. 1977).

722.5 - Comments on commission of other offenses by accused

Where the defendant was on trial for second degree manslaughter arising out of an automobile accident, it was error for the prosecutor to urge the jury to consider the defendant's prior conviction for DUI while deliberating on the manslaughter charge. *Osborne v. Commonwealth*, 867 S.W.2d 484 (Ky.App. 1993).

It is improper for prosecutor to infer the potentiality of another crime. *Elswick v. Commonwealth*, 574 S.W.2d 916 (Ky.App. 1978).

723 - Appeals to sympathy or prejudice

1) in general

Prosecutor's reference to decedent as "my client" was "less than commendable," although it was not reversible error. *Derossett v. Commonwealth*, 867 S.W.2d 195 (Ky. 1993).

A prosecutor may not minimize a jury's responsibility for its verdict or mislead the jury as to its responsibility. *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1992).

Prosecutor may not encourage verdict based on passion or prejudice or for reasons not reasonably inferred from the evidence. *Bush v. Commonwealth*, 839 S.W.2d 550 (Ky. 1992). *See* also *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1992); *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky. 1989); *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky. 1989); *Ruppee v. Commonwealth*, 754 S.W.2d 852 (Ky. 1988); *Estes v. Commonwealth*, 744 S.W.2d 421 (Ky. 1988).

2) Golden Rule argument

It is error for prosecutor to urge jurors to put themselves or members of their families in the shoes of the victim. *Lycans v. Commonwealth*, 562 S.W.2d 303 (Ky. 1978).

3) Deterrence argument - appeals for enforcement of laws

It is error for prosecutor to urge jury to convict in order to protect community values, preserve civil order, or deter future lawbreaking. *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991).

It is error for the prosecutor to appeal to the community's conscience in the context of the war on drugs and to suggest that drug problems in the community would continue if the jury did not convict the defendant. *U.S. v. Solivan*, 937 F.2d 1146 (6th Cir. 1991).

4) threats and appeals to fears of jury

It was prosecutorial misconduct for prosecutor to repeatedly refer the jury to the danger to the community if it turned the defendant loose. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

5) appeals to racial prejudices

Dotye v. Commonwealth, 289 S.W.2d 206 (Ky. 1956).

724 - Abusive language

Prosecutor's reference to defendant as "black dog of a night," "monster," "coyote that roamed the road at night hunting woman to use his knife on," and "wolf" was improper. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988).

725 - Instructions to jury as to its duties

Prosecutor may not argue to jurors that a not guilty verdict (or a guilty verdict on a lesser included offense) is a violation of their oath. *Goff v. Commonwealth*, 44 S.W.2d 306, 241 Ky. 428 (1932).

XI. 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).

XII. 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. 20, 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).

XIII. CUMULATIVE ERROR

In *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky. 1992) and prior cases, the 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.

XIV. 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.

XVI. 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 removed 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.

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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).

Making & Meeting Objections ♦ Table of Cases

LAWYERS & COURAGE

Courage is the most important attribute of a lawyer. It is more important than competence or vision. It can never be an elective in any law school. It can never be delimited, dated or outworn, and it should pervade the heart, the halls of justice and the chambers of the mind.

- Robert F. Kennedy
University of San Francisco Law School 9/29/62

Chapter 6: Constitutional Guarantees: State & Federal

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)

Chapter 7: 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!

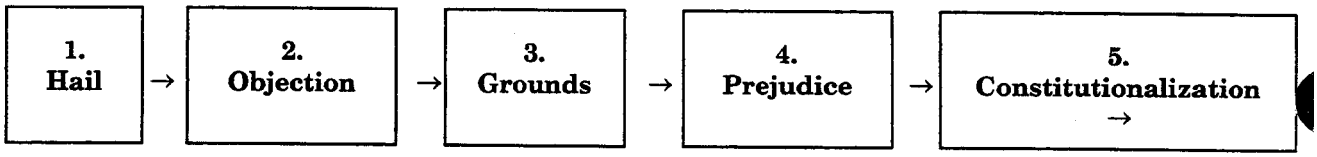
2. **OBJECTION.** A phrase or sentence which immediately notifies the court and your adversary that you object and identifies exactly what question, answer, tactic, conduct or occurrence you believe is objectionable. For example: Object to the question. Objection, the witness's answer is replete with 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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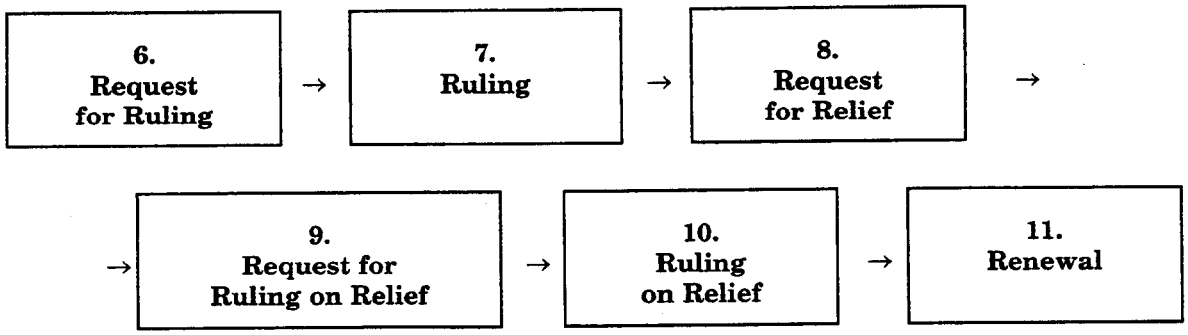

Chapter 8: Preservation Motion and Order

COMMONWEALTH OF KENTUCKY
CHRISTIAN CIRCUIT COURT
(LYON) INDICTMENT NO. 84-CR-005

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **DEFENDANT'S MOTION IN LIMINE TO BAR IMPROPER PROSECUTORIAL ARGUMENT**

FRED GROOMS DEFENDANT

* * * * * *

Fred Grooms, by counsel, requests this Court to enter an Order prohibiting the prosecutor from engaging in improper argument before the jurors, and from violating Mr. Grooms' rights as described below at any stage of the proceedings pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Sections 1, 2, 7, 11, 17, and 26 of the Kentucky Constitution, and the right to a full and fair hearing. In support of which, Mr. Grooms states as follows:

A. The Commonwealth is seeking the death penalty.

B. A citizen on trial for his life is entitled to fundamental fairness, a reliable determination of guilt and sentence, and to an individualized determination of the appropriate sentence guided by clear, objective, and evenly applied standards. See, *e.g.*, *Gardner v. Florida*, 430 U.S. 349 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). Improper argument by the prosecutor can violate these vital constitutional rights in numerous ways. See, *e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Tamme v. Commonwealth*, 759 S.W.2d 51, 53 (Ky. 1988); *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988); *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1992). Because the prosecutor has responsibilities to the public and to the public's perception of the system of justice, duties which are circumscribed by constitutional commands, the canons of ethics, statutory provisions, and the common law, this Court has an obligation to ensure that the prosecutor observes the boundaries on permissible argument and remarks to the jurors during trial.

C. To preserve the fairness of his trial and sentencing hearing, Mr. Grooms sets forth illegitimate arguments a prosecutor may not use. This list is representative only, by no means exhaustive, and Mr. Grooms does not waive other constitutional objections to the prosecutor's argument by not including them in this list of examples. An *in limine* ruling is necessary on these matters because a "curative" instruction at trial will generally exacerbate, rather than cure, the prejudice caused by improper argument. See, *e.g.*, *United States v. Miranda*, 593 F.2d 590, 596 n.7 (5th Cir. 1979). Mr. Grooms presents these examples for the purpose of informing the Court and the prosecution that he objects to them unequivocally.

(1) Misstating the law concerning the jury's responsibility for the sentence imposed.

D. It is essential that jurors recognize "the truly awesome responsibility of decreeing death for a fellow human [so that they] will act with due regard for the consequences of their decision." *McGautha v. California*, 402 U.S. 183, 208 (1971). The Commonwealth may not inform the jury that the responsibility for the sentence lies elsewhere than with the jurors themselves (*e.g.*, by using such terms as "recommend" to describe the sentencing verdict). Prosecutors can wrongly convey this impression in a variety of ways. See, *e.g.*, *Clark v. Commonwealth*, 833 S.W.2d 793, 796 (Ky. 1992):

> Comments by the prosecutor in this case leave broad doubt whether the death penalty was imposed because 1) the prosecutor determined to seek it, or 2) the Legislature decreed it, or 3) the jury thought it only a recommendation, or 4) the jury determined it to be the appropriate punishment.

See also *Tamme v. Commonwealth*, 759 S.W.2d 51, 53 (Ky. 1988) ("the word 'recommend' may not be used with reference to a jury's sentencing responsibility in voir dire, instructions, or closing arguments"); *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In the same vein, the prosecutor may not refer to the existence of appellate review as reducing the importance of the jury's determination of sentence. *Id.* See also *Fleming v. State*, 240 S.E.2d 37 (Ga. 1977) (improper to argue to capital sentencing jury that appellate court will correct any errors).

Error of this nature also includes misleading the jury as to the role of mercy in sentencing. In *Presnell v. Zant*, 959 F.2d 1524 (11th Cir. 1992), the prosecutor's quotation of a case decision expressing the view that society has extended too much mercy to the accused and not enough to society rendered sentencing phase fundamentally unfair. See also *Ruffin v. State*, 243 S.E.2d 41 (Ga. 1979). It is improper for the prosecutor to disparage mitigating circumstances and mischaracterize the concept of "mitigation" as an "excuse." Nor may the prosecutor misstate substantive defenses. See, *e.g.*, *Dix v. Kemp*, 832 F.2d 546 (11th Cir. 1987) (en banc).

(2) Reducing the State's burden of establishing guilt and the existence of any aggravating factors beyond a reasonable doubt.

E. The prosecutor may not suggest to the jury that a "reasonable doubt" must be "substantial," or use similar language designed to reduce the state's burden of proof. *See, e.g.*, *Cage v. Louisiana*, 502 U.S. 874, 116 L.Ed.2d 170 (1990) (equation of "reasonable doubt" with "substantial doubt" violates due process of law); *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988) (prosecutor improperly defined reasonable doubt); *Commonwealth v. Callahan*, 675 S.W.2d 391 (Ky. 1984) (counsel should not attempt to define reasonable doubt).

(3) Suggesting that the jurors need not consider mitigating evidence in the process of determining the appropriate sentence, or that there is any duty to sentence the defendant to death under any circumstances, or expressing the prosecutor's opinion that death is the appropriate sentence.

F. The prosecutor may not suggest to the jury that they may or should determine sentence without taking into consideration the evidence in support of a sentence less than death, or that they are not required by law to consider that evidence in passing sentence. *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Nor may the prosecutor suggest that if an aggravating circumstance but no mitigating circumstance is found, the jurors have a duty to sentence to death. *Dean v. Commonwealth*, 777 S.W.2d 900, 904 (Ky. 1989). The death penalty is never required under Kentucky law and the jurors always retain the option to impose a sentence less than death, regardless of aggravating factors and even if no mitigating factors are established. See, *e.g.*, *Moore v. Zant*, 809 F.2d 702, 730 (11th Cir. 1987) (en banc), *cert. denied*, 481 U.S. 1054 (1987) (interpreting the Georgia capital statute upon which Kentucky's statute was patterned). Finally, the prosecutor may not give his personal opinion that the defendant deserves the death penalty.[1] *United States v. Young*, 470 U.S. 1, 8 (1985); *Berger v. United States*, 295 U.S. 78, 85-88 (1935); *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky. 1989) (Stephens, J., concurring); *Clark v. Commonwealth*, 833 S.W.2d 793 (Ky. 1992) (prosecutor's argument regarding his office's thought processes as to why to seek the death penalty improper).

(4) Suggesting that the personal qualities or personal worth of the victim justifies a death sentence.

G. The Commonwealth should not suggest that the worth of the victim justifies a death sentence. While the Supreme Court has held that the admission of some quantity of "victim impact" evidence does not invariably violate the federal constitution, the use of such argument calculated to inflame the jury and divert its attention from its constitutionally required focus on the defendant as a "uniquely individual human being," *Woodson*, 428 U.S. at 304, should be prohibited. *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988); *Morris v. Commonwealth*, 766 S.W.2d 58 (Ky. 1989); *Dean v. Commonwealth*; 777 S.W.2d 900 (Ky. 1989).

(5) Suggesting that the jury should "imagine itself in the victim's shoes," or "imagine itself in the survivor's shoes."

H. It is error for the prosecutor to suggest that the jurors "put themselves in the victim's shoes" and attempt to imagine the horror of his/her final moments. See *Bertoletti v. State*, 691 S.W.2d 699 (Tex. Crim. App. 1985); *Dean v. Commonwealth*, 777 S.W.2d 900, 904 (Ky. 1989); *Lycans v. Commonwealth*, 562 S.W.2d 303 (Ky. 1978). It is also error to place the jury "in the survivor's shoes." *Brandley v. State*, 691 S.W.2d 699 (Tex. Crim. App. 1985).

(6) Suggesting that the jury must vote for death to keep the defendant "off the streets, " or that the jury must vote for death to prevent the defendant from killing again.

I. The prosecutor may not argue that the death penalty is necessary to in order to keep the defendant "off the streets." This is a barely veiled reference to pardon and parole, and as such is improper. By inviting the jury to speculate about future events concerning which it has heard no evidence (thereby requiring the jurors to consider matters not in evidence, which defense counsel has had no opportunity to confront, explain, or rebut), this argument violates constitutional guarantees against arbitrariness and unfairness in the imposition of the death penalty. See *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984).

This argument also serves to impermissibly inflame the passions and prejudices of the jury. See *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991) (improper for prosecutor to appeal to community conscience and fear of future crime); *Newlon v. Armontrout*, 885 F.2d 1328, 1335 (8th Cir. 1989); *Sanborn v. Commonwealth*, *supra*.

(7) Urging the jury to consider "deterrence" as a reason for imposing death.

J. The prosecutor may not argue that Mr. Grooms should be killed to "send a message" to others or to serve as a deterrent. These concerns are extraneous to the constitutionally required focus on the personal moral culpability of the defendant as the basis for the appropriate sentence. See, *e.g.*, *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (sentencing "must be tailored to [the defendant's] personal responsibility and moral guilt"); *Tison v. Arizona*, 481 U.S. 137, 149 ("a criminal sentence must be directly related to the personal culpability of the criminal offender"); *State v. Irick*, 762 S.W.2d 121, 131 (Tenn. 1988) ("[u]nquestionably, any argument based on general deterrence to others has no application to either aggravating or mitigating circumstances...[and a]rgument of this nature is inappropriate at a sentencing hearing"); *State v. Zuniga*, 357 S.E.2d 898, 920 (N.C. 1987) (state cannot argue "the effect...of the death penalty on the commission of crimes by others"); *Zant v. Stephens*, 462 U.S. 862 (1983):

> A prosecutor may not urge jurors to [sentence] a defendant in order to...deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence...The amelioration of society's woes is far too heavy a burden for the individual criminal defendant to bear.

K. If this Court concludes that the Commonwealth is entitled to argue that capital punishment is a deterrent to crime, Mr. Grooms hereby moves this Court for funds for expert assistance, and the right to present evidence that capital punishment is not a deterrent. Mr. Grooms has a right to contest or rebut any evidence presented by the prosecution, *Skipper v. South Carolina*, 476 U.S. 1, 7 n.1 (1986), and a right not to have the jury make its decision based on the bald assertions of the prosecutor when reliable evidence is available for development and presentation which would convince the jury otherwise.

(8)Arguing facts which are not in evidence or which may not be introduced into evidence or misstating facts or testimony.

L. The prosecutor is not permitted to make statements which cannot be proven. *Sheppard v. Commonwealth*, 322 S.W.2d 115, 117 (Ky. 1959). A mistrial may be appropriate if the prosecutor tells the jury in opening he will introduce evidence but does not later admit said evidence. *Williams v. Commonwealth*, 602 S.W.2d 148, 149-150 (Ky. 1980). It is "reprehensible for a lawyer in closing argument to misstate the testimony or facts in evidence." *Barnes v. State*, 260 S.E.2d 40, 44 (Ga. 1979); *Williams v. State*, 330 S.E.2d 353, 355 (Ga. 1985) ("prosecutor may not ...inject into his

final argument 'matters which [have] not been proven in evidence'"); American Bar Association's *Standards Relating to the Prosecution Function*, §3-5.9.

(9) Inflaming the passions and prejudices of the jury.

M. Inflammatory appeals to the passions and prejudices of the jury are impermissible. See *Viereck v. United States*, 318 U.S. 236, 247-48 (1943); *United States v. Solivan*, 937 F.2d 1146 (6th Cir. 1991); *Sanborn v. Commonwealth*, *supra*; *Dean v. Commonwealth*, *supra*; *United States v. Gasparo*, 744 F.2d 438 (5th Cir. 1984); *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979); *Parks v. State*, 330 S.E.2d 686 (Ga. 1985); *Bridgeforth v. State*, 498 So.2d 796, 801 (1986) ("Justice is not served by attorneys who use closing argument to express inflammatory personal ideas or engage in personal vilification. The purpose of...argument is to enlighten the jury, not to enrage it."); American Bar Association's *Standards Relating to the Prosecution Function*, §3-5.8(c).

N. This misconduct can take many forms. See, *e.g.*, *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989) (improper to attempt to link defendant with well known mass murderers); *Mathis v. Zant*, 744 F.Supp. 272 (N.D. Ga. 1990) (inappropriate and inflammatory to urge jurors to see their own parents in crime scene photographs of the victims); *Commonwealth v. Chambers*, 599 A.2d 630 (Pa. 1991) (sentence reversed due to prosecutor's argument that Bible says "murderers shall be put to death"); *Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991) (prosecutor's appeals to religious symbols and beliefs during penalty phase arguments constituted improper appeals to jurors' passions and improper attempts to inflame the jury against the defendant); *United States v. Giry*, 818 F.2d 120 (1st Cir. 1987), *cert. denied*, 484 U.S. 855 (1987) (reference to Bible is improper appeal to jurors' private religious beliefs); *Evans v. Thigpen*, 809 F.2d 239 (5th Cir. 1987), *reh'g and reh'g en banc denied*, 814 F.2d 658 (5th Cir. 1987), *cert. denied*, 483 U.S. 1033 (1987) (biblical evidence irrelevant at sentencing phase).

O. The prosecutor may not inflame the passions of a jury and urge the jury to impose a death sentence by characterizing the defendant as an outsider who came in and took the life of a local citizen. It is also improper for the prosecutor to tell the jury that it is "the last line of defense" against outsiders. *Tucker v. Kemp*, 762 F.2d 1496, 1508 (11th Cir. 1985) (en banc), *subsequent history*, 776 F.2d 1487 (1985), *cert. denied*, 478 U.S. 1022 (1986). See, also, *Mathis v. Zant*, 744 F.Supp. 272 (N.D. Ga. 1990) (improper to urge jurors to "protect your community, your society, your homes, and your family from the violence" of the defendant).

(10) Denigrating the constitutional rights of the accused.

P. A prosecutor may not comment upon the defendant's exercise of his right to remain silent. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965). Similarly, a prosecutor may not argue that the accused did not "come clean" with the police. See, *e.g.*, *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976). A prosecutor also cannot argue that the accused did not express remorse, as it comments upon the failure to testify. *Lesko v. Lehman*, 925 F.2d 1527 (3rd. Cir. 1991). Although the defendant in that case testified at the penalty phase, his testimony had been limited to mitigating circumstances in his background. It was therefore improper comment on the defendant's silence regarding the facts of the crime to argue that he had not expressed sorrow and remorse. *Id.* See, also, *Butler v. State*, 608 So.2d 314 (Miss. 1992) (prosecutor's comments such as "she hasn't told you the whole truth *yet*" amounted to comment on failure to testify).

Q. Related arguments include those which disparage some, or all, of the accused's constitutional rights. See, *e.g.*, *Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969); *United States ex rel. Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976). In *Cunningham v. Zant*, 928 F.2d 1006, 1019 (11th Cir. 1991), the Eleventh Circuit described as "outrageous" the prosecutor's argument which implied that the defendant had abused the legal system by asserting his right to trial by jury.

It is improper to compare Mr. Grooms' situation with that of the victim, Pat Ross, since the implication is that he does not deserve rights the victim did not receive.

> [A] government founded by a moral and civilized society should not act as unmercifully as the defendant is accused of act-

> ing...What separates the unlawful killing by man and the lawful killing by the state are the legal barriers that exist to preserve the individual's constitutional rights and protect against the unlawful execution of a death sentence. If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the [defendant].
> *Mercer v. Armontrout*, 864 F.2d 1429, 1431 (8th Cir. 1988).

See also *Brooks v. Kemp*, 762 F.2d 1383, 1410 (11th Cir. 1985) (en banc), *vacated on other grounds*, 478 U.S. 1016 (1986), *on remand*, 809 F.2d 700 (1987) ("[I]t is wrong to imply that the system coddles criminals by providing them with more procedural protections than their victims. A capital sentencing jury's important deliberation should not be colored by such considerations."); *Willison v. Warden, Green Bay Correctional Institution*, 657 F.Supp. 259, 266 (E.D. Wis. 1987) ("prosecutor's comparison of the rights of the accused in our criminal justice system with the 'rights' of the ...[victim] tended to be inflammatory"); *Rhodes v. State*, 547 So.2d 1201 (Fla. 1989) (improper to urge jury to put itself in the victim's place).

WHEREFORE, Mr. Grooms moves this Court to enter an order *in limine* forbidding the prosecutor from making any of the arguments described above, or any other argument in violation of Mr. Grooms' rights under the federal and state constitutions as set out above, at any stage in the proceedings, and for any other relief which justice may require. Such an order is necessary because such infringements upon Mr. Grooms' rights will be extremely difficult, if not impossible, to correct by means of admonition or instruction. If this Court has any question as to the need for such an order, defense counsel request an evidentiary hearing.

FOOTNOTES

[1]It is necessary for the Court to specifically order the special prosecutor not to express this opinion, as he has already done so publicly in the March 16, 1992 *The Paducah Sun* newspaper article.

Respectfully submitted,

KELLY A. GLEASON
Assistant Public Advocate

■ ■ ■ ■ ■ ■ ■ ■ ■ ■

COMMONWEALTH OF KENTUCKY
CHRISTIAN CIRCUIT COURT
(LYON) INDICTMENT NO. 84-CR-005

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. **ORDER BARRING IMPROPER PROSECUTORIAL ARGUMENT**

FRED GROOMS DEFENDANT

* * * * * *

Upon consideration of defendant Fred Grooms' MOTION IN LIMINE TO BAR IMPROPER PROSECUTORIAL ARGUMENT, it is hereby

ORDERED that Defendant's *in limine* motion be granted; and it is further

ORDERED that the state shall not engage in improper argument at Fred Grooms' trial and sentencing phase and, in particular, shall not misstate the law or facts; shall not inflame the passions or prejudices of the jurors; shall not mislead the jury as to its responsibilities; shall not argue facts not in evidence; shall not comment -- expressly or by implication -- on the defendant's failure to testify if Mr. Grooms chooses not to testify; shall not express personal opinions; shall not comment on the question of parole or deterrence; shall not make general appeals to prejudice; and shall not otherwise prejudice the rights of the defendant.

So ordered this ____ day of _____, 199__.

_____

■ ■ ■ ■ ■ ■ ■ ■ ■ ■

Not failure, but low aim, is crime.
- James Russell Lowell, "For an Autograph," stanza 5, *The Writings of James Russell Lowell*, vol. 9, p. 175 (1890).

Chapter 9: Need Quick Answers or Advice?

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A

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Appeals, video - Riddell*, Boyce, Namkin
Appellate procedure - Marshall, Riddell*, Boyce
Arrest, general - Lewis*
Arrest, at home - Lewis*
Arrest, probable cause - West, Lewis*
Arson - Williams
Attorney Fees in indigent cases - Monahan,

B

Batson - Aprile, Namkin
Battered Women Syndrome - Mirkin, Campbell*, McArdle
Belated appeals - Riddell*, Boyce, Myers*, Hubbard*, Hartell*
Brady - Tustaniwsky, Namkin

C

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Case Review Process, Appeal - Aprile
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Competency to waive insanity defense - Boyce, Namkin, Gleason
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Confessions, Anti-Sweating Act - Allison, Convery*
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Confessions, juveniles - DiLoreto
Confessions, *Miranda* - Riddell*, Namkin
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Criminal rules - Niehaus*
Criminal syndicate - West

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Death Penalty--National Death Penalty Information Bank - Pearson*
Death Penalty investigation and mitigation - McArdle
Death Penalty--Motions - Gleason, McArdle, Tustaniwsky
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Death Penalty--Racial discrimination - Williams, Gleason, McArdle
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Death Penalty--Victim impact - Williams, Gleason
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DUI - Williams, Riley*, Eucker

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Evidence, flight/escape - West, Niehaus*
Evidence, hearsay - West, Niehaus*, Namkin, Campbell*
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Evidence, prior sexual conduct - Allison, Niehaus*, Campbell*
Evidence, sufficiency - West, Marshall, Niehaus*, Campbell*
Evidence, tampering with - Aprile, Niehaus*
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Ex Post Facto - West, Myers*
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Expert Witness Directory - Mirkin
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Extraordinary Writs - Riddell*, Aprile, West
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Forensic pathology - Mirkin, Eucker
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H

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■ ■ ■ ■ ■ ■ ■ ■ ■ ■ ■

A Decalogue of Canons for observation in practical life.

1. Never put off till tomorrow what you can do today.
2. Never trouble another for what you can do yourself.
3. Never spend your money before you have it.
4. Never buy what you do not want, because it is cheap; it will be dear to you.
5. Pride costs us more than hunger, thirst and cold.
6. We never repent of having eaten too little.
7. Nothing is troublesome that we do willingly.
8. How much pain have cost us the evils which have never happened.
9. Take things always by their smooth handle.
10. when angry, count ten, before you speak; if very angry, a hundred.

Thomas Jefferson, letter to Thomas Jefferson Smith, February 21, 1825 - *Writings of Thomas Jefferson*, ed. Paul L. Ford, vol. 10, p. 341 (1899).

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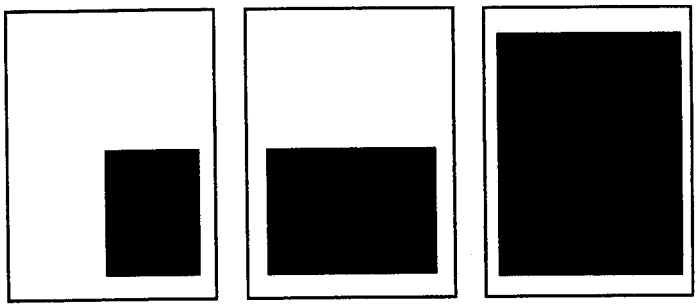

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DEFINING A PUBLIC ADVOCATE

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.

advocate,

ad.vo.cate/n. ...[fr. past part of advocate to summon, call to one's aid, fr. ad+vocare to call - more at voice]

1: one that pleads the cause of another: Defender... Counselor

2: one that argues for, defends, maintains, or recommends a cause or proposal.

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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