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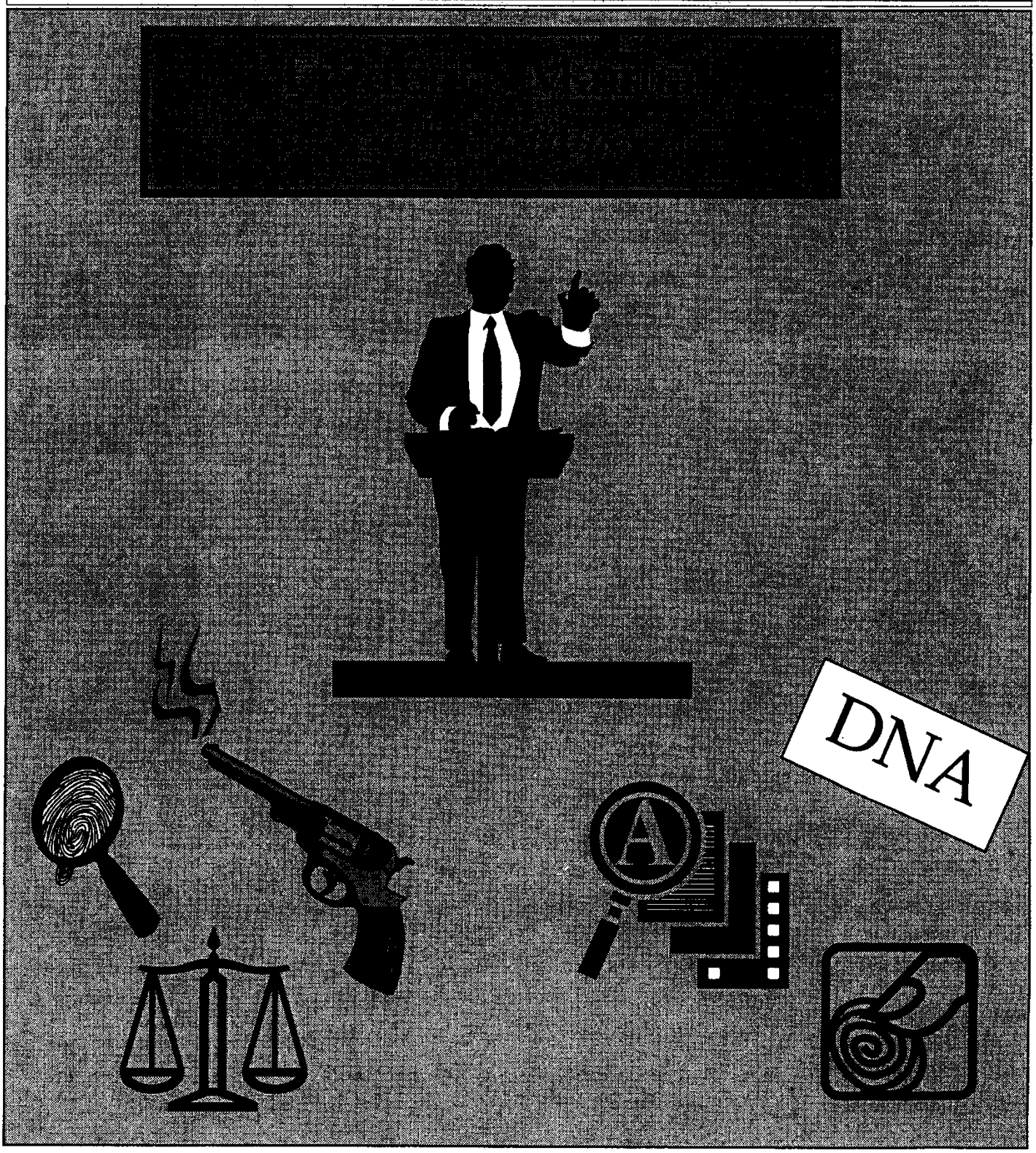

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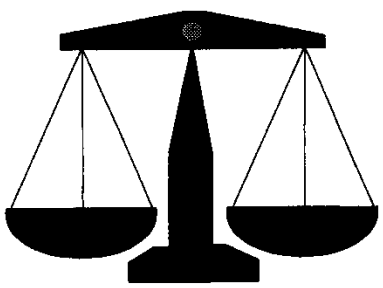

The Advocate

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. It educates criminal justice professionals and the public on defender work, mission and values.

The Advocate is a bi-monthly (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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From The Editor. . .

The Kentucky Rules of Evidence have revolutionized the practice of law and at the same time things are very much the same for litigators representing clients. Robert Lawson tells us in *Interpretation of the Kentucky Rules of Evidence – What Happened to the Common Law?* 87 Kentucky Law Journal 517 (Spring 1999), that the Kentucky Rules of Evidence significantly changed the way we deal with evidence issues in that they allow us to find the rules easily, they distill many cases over time into a rule, and bring certainty. Yet, he observes that we still have significant issues unresolved, including what role prior common law now plays in applying the rules, what about areas not addressed by the rules, and who creates new rules? These are issues, he observes, that the Kentucky Supreme Court is beginning to address through cases like *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883 (1997) and *Moseley v. Commonwealth*, Ky., 960 S.W.2d 460 (1997).

But what we know as litigators is that no matter what the resolution of these important issues, we remain charged with persuading the factfinders in a way to insure our client's side of the story is well told. We know that whatever the rules or common law are, facts marshaled into a well thought out theory are persuasive. Successful litigators know how to use statutes, rules, caselaw and persuasion to present fact finders with the facts relevant to their theory of their case. This results in clients being effectively represented. This type of litigation provides judges with all the information for good judicial decision making. This type of litigation provides jurors with all the relevant information to render reliable results.

To achieve the full presentation of all the facts relevant to the theory of the defense, effective litigators persuasively use the rules of evidence, caselaw, common law and constitutional guarantees to insure relevant facts are admitted and irrelevant facts are excluded from consideration, and that the record is fully preserved for complete appellate review on the merits.

This fourth edition of this manual is an attempt to collect the relevant authority and thinking to persuasively use the rules of evidence, the caselaw, the common law, and the constitutional guarantees necessary to advance the defense theory to the fact finders so clients have their story accurately told to those deciding their client's fate.

Special thanks to our authors who have selflessly given us the benefit of their work, research, and insight.

Ed Monahan
Deputy Public Advocate
Editor, *The Advocate*

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Introduction to 4th Edition

Since the last revision in 1997, the number of opinions explaining Kentucky evidence law has grown almost exponentially. And, in addition to Lawson's *Evidence Handbook*, lawyers now also have Professor Underwood's and Professor Glen Issenberg's annually published *Kentucky Evidence Courtroom Manual* to explain what these cases mean. There are other sources to look at as well. Professor Leslie Abramson's *Criminal Practice and Procedure* (3rd Ed. 1997) has a section on evidence and Cliff Travis's *Admissibility of Evidence* has been updated. One has to wonder whether criminal practitioners need another evidence manual.

We obviously think so and are pleased to present the fourth revision of the Department of Public Advocacy's *The Advocate* Evidence Manual. In this 4th revision, the transformation of the Manual from a crib sheet to help lawyers and judges cope with new evidence rules to a short litigation book with quick answers to evidence problems in criminal cases continues. The number of editors has expanded as well. Christopher Polk, a Louisville criminal defense attorney, has contributed Chapter 8 on hearsay. Susan Balliet, DPA manager of the Capital Post Conviction branch in Frankfort, has edited the Chapters on Articles 4, 5 and 7. Susan has relied extensively on prior work of Steve Mirkin on 404(b). David Niehaus has edited the remainder of the chapters with Ed Monahan serving as author of the "Right to Present a Defense" chapter and as general superintendent of the project.

Readers will note that fewer cases from the federal system and other states appear in this edition. We have made a judgment that there are enough Kentucky cases to explain the important points of law and that judges are less likely to be persuaded by cases from other jurisdictions construing their version of their rules of evidence. Both Lawson and Underwood do a good job of dealing with other jurisdictions. We saw no reason to try to duplicate their work.

And we point out that the Manual is not designed as a comprehensive explanation of the law and theory of evidence. Lawson and other general evidence textbooks like *McCormick's* do that. The goal of this Manual is a resource that allows an attorney faced with an evidence problem at the courthouse or office to come up with an answer within a few minutes.

This Manual has not changed significantly. The text of each rule is stated, followed by a brief statement of its purpose and a number of paragraphs that deal with topics arising under the rule. There is an alphabetical Table of Cases and a somewhat expanded subject index at the end of the rules and comments.

Any comments or corrections are welcomed. Please send them to the attention of Ed Monahan at 100 Fair Oaks Lane, Ste 302, Frankfort, KY 40601. Tel: 502-564-8006; Fax: 502-564-7890.

Abbreviations Used

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

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Article 1: General Provisions

NOTES

Rule 101 Scope.

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

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

COMMENTARY

PREMISE/PURPOSE:
Two mundane purposes are obvious: (a) to limit the rules 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.*

Recently the Kentucky Supreme Court and the Court of Appeals have rendered opinions which, read together, amount to holdings that the Kentucky Rules of Evidence do not apply at suppression hearings. *White v. Commonwealth*, Ky., 5 S.W.3d 140, 146 (1999); *Farmer v. Commonwealth*, Ky.App., 6 S.W.3d 140, 142 (1999). The statement in *White* is dicta but says that had the party moved to exclude testimony on the ground of a constitutional violation, the matter would have been settled at a suppression hearing at which the rules of evidence would not have applied.

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 Kentucky 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.*, Ky., 691 S.W.2d 893, 899 (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 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 appel-

late 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*, Ky., 896 S.W.2d 4 (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."

(g) Recently, Lawson has written about the precedent value of evidence cases decided before July, 1992. *Interpretation of the Kentucky Rules of Evidence – What happened to he Common Law?* 87 Kentucky Law Journal 517-582 (1999). While Section 233 of the Constitution says that common law prevails until altered or repealed by the General Assembly, *NREP Cabinet v. Neace*, Ky., 14 S.W.3d 15, 19 (2000), the General Assembly did enact the Rules of Evidence in 1992. *KRE 101* says that the rules govern proceedings in the courts. Therefore, any subject covered by a rule is governed by the rule, not by cases discussing prior common law. In general, pre-1992 cases are persuasive authority, not binding.

(h) In *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883 (1997), the court dealt with a subject not covered by the rules. The court deemed the matter within its common law authority to overrule cases. The court overruled prior opinions on the "ultimate issue" question in expert testimony cases in light of *KRE 401* and *KRE 702*.

(i) Keep in mind that the issue of admissibility of evidence is procedural. *Commonwealth v. Alexander*, Ky., 5 S.W.3d 104, 106 (1999). Therefore, court opinions construing evidence questions may be applied retroactively as long as the rule announced does not lessen the Commonwealth's burden of proof.

(j) *Alexander* also confirms the policy of the Supreme Court that the General Assembly cannot by statute declare evidence admissible.

Rule 103 Rulings on evidence.

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

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

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

(b) 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.

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

COMMENTARY

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*, Ky.App. , 894 S.W.2d 643, 645 (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. *Lewis v. Grange Mutual*, Ky.App., 11 S.W.3d 591, 593 (2000); *Johnson v. Commonwealth*, Ky., 12 S.W.3d. 258, 261 (1999).

(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*, Ky., 918 S.W.2d 219 (1996); *Commonwealth v. Ferrell*, Ky., 17 S.W.3d, 520, 523 (2000).

(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*, Ky., 913 S.W.2d 310 (1994); *Justice v. Commonwealth*, Ky., 987 S.W.3d 306, 316 (1998). 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. *Davis v. Commonwealth*, Ky., 967 S.W.2d 574, 578 (1998).

(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*, Ky., 906 S.W.2d 694, 703 (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*, Ky., 907 S.W.2d 771 (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 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*, Ky., 892 S.W.2d 571 (1995) [See Comment 103(d)]

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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*, Ky., 918 S.W.2d 219 (1996); *Estep v. Commonwealth*, Ky., 957 S.W.2d 191, 194 (1997); *Murphy v. Montgomery Elevator Co.*, Ky.App., 957 S.W.2d, 297, 298 (1997); *Skimmerhorn v. Commonwealth*, Ky.App., 998 S.W.2d 771, 775 (1998). For a denial of a constitutional right like confrontation, the beneficiary of the error must prove it harmless beyond reasonable doubt. *Renfro v. Commonwealth*, Ky., 893 S.W.2d 795, 797 (1995).

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

103(b)

PREMISE/PURPOSE:

This rule 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. [*Sholler v. Commonwealth*, Ky., 969 S.W.2d 706, 710 (1998)] *Tamme v. Commonwealth*, Ky., 973 S.W.2d 13, 31 (1998); *Commonwealth v. Ferrell*, Ky., 17 S.W.2d 520 (2000).

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 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

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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 of 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*, Ky., 916 S.W.2d 181, 183 (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*, Ky., 892 S.W.2d 571, 574 (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*, Ky., 916 S.W.2d 148, 157 (1995), the Supreme Court observed that where there was no objection to the introduction of evidence or where the objection was insufficient, "to require exclusion without an objection, we would have to conclude as a matter of law that there were no facts or circumstances which would have justified admission of the evidence."

(b) *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181, 183 (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.

(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. *Turner v. Commonwealth*, Ky., 5 S.W.3d 119, 123 (1999); *White v. Commonwealth*, Ky., 5 S.W.3d 140, 142 (1999). 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.

(c) The determination of consent to search in a suppression hearing is a preliminary question of fact to be decided by the judge. *Talbott v. Commonwealth*, Ky., 968 S.W.2d 76, 82 (1998).

(d) The determination of reliability in a *Daubert* hearing is a preliminary question of fact not binding on the jury. *Johnson v. Commonwealth*, Ky., 12 S.W.2d 258, 262 (1999).

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 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 argu-

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ments 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).

(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:

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. *Commonwealth v. Hall*, Ky.App., 4 S.W.3d 30, 33 (1999).

(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

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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*, Ky., 702 S.W.2d 440 (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.

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.

(1) An admonition is presumed to cure most problems that arise at trial. *Mills v. Commonwealth*, Ky., 996 S.W.2d 473, 485 (1999). The party claiming otherwise must rebut this presumption.

(2) The guiding principle is whether sensible, fair-minded jurors can be expected to follow the admonition. *Justice v. Commonwealth*, Ky., 987 S.W.2d 306, 314 (1998).

(3) The appellate courts defer to the trial judge's decisions on the need to give an admonition and its contents, if given. *Baze v. Commonwealth*, Ky., 965 S.W.3d 817, 821 (1997); *Tamme v. Commonwealth,* Ky., 973 S.W.2d 13, 27 (1998).

(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*, Ky., 875 S.W.2d 882, 890 (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

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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

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. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 858 (1997).

(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 lawsay 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 situations 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 of 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.

(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.

(c) The policy of the Supreme Court is to apply the more advantageous law to the criminal defendant. *Tamme v. Commonwealth*, Ky., 973 S.W.2d 13, 22 (1998). •

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Article II: Judicial Notice

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Rule 201 Judicial Notice of Adjudicative Facts.

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

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

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

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

COMMENTARY

PURPOSE/PREMISE:

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

(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*, Ky.App., 867 S.W.2d 207 (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.

(1) Recently, the appellate courts have taken notice of teenage drinking, *Commonwealth v. Howard*, Ky., 969 S.W.2d 700, 705 (1998), the purpose of seatbelts in automobiles, *Laughlin v. Lamkin*, Ky.App., 979 S.W.2d 121, 125 (1998), the facts stated in a Bill of Particulars, *Jackson v. Commonwealth*, Ky., 3 S.W.3d 718, 719 (1999), and the reliability of certain forms of expert/scientific evidence. *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 261-262 (1999).

(2) In *Samples v. Commonwealth*, Ky., 983 S.W.2d 151, 153 (1998), the court refused to take notice of a document not included in the record on appeal. The court held that the document could not be authenticated otherwise.

(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 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 eight 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 is made before trial but this is not a requirement. •

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Rule 201

The ideal condition would be, I admit, that men should be right by instinct; but since we are likely to go astray, the reasonable thing is to learn from those who can teach.

-- Sophocles,
Antigone (l. 729)(Ode II)

NOTES

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. *Grimes v. McAnulty*, Ky., 957 S.W.2d 223, 231 (1997). These rules deal only with civil actions and therefore do not affect criminal practice. •

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Article IV: Relevancy and Related Subjects

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Rule 401 Definition of "relevant evidence."

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

Rule 402 General rule of relevancy.

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

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

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

COMMENTARY

PURPOSE/PREMISE:
These three rules are usually considered together and are, along with *KRE 601* and *602*, the fundamental principles by which the admissibility of evidence is determined. If evidence is not relevant, it is not admissible. If it is not admissible, it is unnecessary to consider any other objection to the evidence. [*KRE 402*]. If evidence is relevant, the judge still has authority pursuant to *KRE 403* and *611(a)* to exclude it if the jury is likely to be misled or confused to the point that it might decide the case on improper grounds. Relevancy is the first question to ask in every problem of evidence analysis.

Together, *KRE 401*, *402*, *403*, and *501 (requiring every person to appear as a witness and produce evidence unless excused by law)* evince a clear preference for production and admission of evidence that can help produce a fair and accurate determination of factual issues. This is the guiding principle in deciding whether to admit or exclude evidence.

More about Rule 401

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*, Ky., 920 S.W.2d 61, 67 (1996). If the evidence is a "link in the chain" of proof, it is relevant. *Turner v. Commonwealth*, Ky., 914 S.W.2d 343, 346 (1996). Relevancy is established by any showing of probativeness, however slight. *Springer v. Commonwealth*, Ky., 998 S.W.2d 439, 449 (1999). Relevant evidence may tend to prove an element of the offense, or to disprove a defense. *Springer v. Commonwealth*, Ky., 998 S.W.2d 439, 449 (1999).

More about Rule 402

If evidence is relevant, it is admissible, subject to other policies established by federal and state courts, statutes, or court rules. Relevant 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)* (allowing exclusion of evidence not produced in discovery).

If evidence is irrelevant, it is inadmissible *without exception* because evidence that has no tendency to establish or disprove a point of a case has no reason to be presented. *KRE 106* is no exception, because the remainder of a writing or recording may tend to explain or rebut the part put on by the adverse party.

More about Rule 403

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

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

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

Availability of other evidence
The availability of other means to prove the same point weighs against admission. *U.S. v. Merriweather*, 78 F.3d 1070, 1077 (6th Cir. 1996). Similarly, a judge may exclude on the ground that the proposed evidence is cumulative, that is, the same point has been established through introduction of other evidence. *F.B. Ins. Co. v. Jones*, Ky. App., 864 S.W.2d 929, 930 (1993).

Effect of limiting instruction
However, in all *KRE 403* cases, the judge must consider that a limiting instruction *[KRE 105]* may temper anticipated prejudice. *U.S. v. Lech*, 895 F.Supp. 582 (S.D. N.Y. 1995). If the instruction is unlikely to confine the evidence to its proper use, the judge may exclude the evidence entirely.

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

Specific Applications of Rule 401

Collateral matters of credibility usually not relevant
Evidence on collateral matters, such as attempts to impeach on credibility as to collateral matters, is not usually relevant. But here it was reversible error to refuse to admit evidence when witness said at deposition she was not aware her husband had received a settlement check for his injuries. *Simmons v. Small*, Ky.App., 986 S.W.2d 452, 455 (1998)

Co-defendant's fingernails
Rogers v. Commonwealth, Ky., 992 S.W.2d 183, 187 (1999)
The length of a co-defendant's fingernails one year after the offense was not relevant to their length at the time of the crime.

African-American accent relevant to identify speaker
Clifford v. Commonwealth, Ky., 7 S.W.3d 371 (1999). The fact a voice sounded like an "African American accent" was relevant to prove the defendant was the speaker.

Hair comparisons
Johnson v. Commonwealth, Ky., 12 S.W.3d 258 (1999). Similarity of hair found in victim's hand with defendant's hair was relevant, despite lack of underlying statistical data to support probability. Lack of proficiency testing re: hair characteristics went to weight only. See discussion of *Johnson* in Article 7, Opinions and Expert Testimony.

Tape Recordings, Inaudible
Although no case has yet so held an inaudible tape recording should be objected to as irrelevant under *KRE 401*, as it cannot tend to make any fact more or less probable. Sting tapes have been held to be non-hearsay on the theory that they are not offered to prove the truth of what's said. Thus, they are not subjected to 804(b)(3) analysis *Norton v. Commonwealth*, Ky. App., 890 S.W.2d 632 (1994).

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Specific Applications of Rule 402

Emotional distress of witness
Mullins v. Commonwealth, Ky., 956 S.W.2d 210, 213 (1997). Emotional distress of witness is relevant on issue of lack of consent.

Medical bills
Amount of medical bills can be relevant to prove serious physical injury. *Justice v. Commonwealth*, Ky., 987 S.W.2d 306, 314 (1998)

Motivation to testify
Motorists Mutual v. Glass, Ky., 996 S.W.2d 437 (1997) Any evidence that tends to show a motivation to testify is admissible.

Similar litigation
KFBMI v. Troxell, Ky., 959 S.W.2d 82, 85 (1997). Similar litigation against same agent is relevant on issue of notice.

Out-of-court experiment
Experiment must be sufficiently similar to be relevant.

No witness vouching, No Asking if Other Witness is Lying
Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 888 (1997). A witness may not vouch for the credibility of another witness. However, in *Stringer* there was no contemporaneous objection. It is improper to ask a witness to comment on the credibility of another witness. A witness's opinion about the truth of the testimony of another witness is no permitted. *Moss v. Commonwealth*, Ky., 949 S.W.2d 579, 583 (1997).

Scope of cross-examination
Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 721 (1997) contains criteria for analyzing scope of cross-examination.

Specific Applications of Rule 403

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

Clark v. Hauck Mfg. Co., Ky., 910 S.W.2d 247, 253 (1995) But relevant photos are not always admissible. Here photos of a burn victim offered as evidence of pain and suffering were excluded. There was ample evidence on this point introduced through the testimony of a physician and through hospital records.

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].*

Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 721 (1997) balancing of value/prejudicial potential of photos. Danger of confusion or misleading.

Offers to stipulate, and prior convictions
Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 492-93 (1995). A defendant cannot stipulate away the parts of the Commonwealth's case he does not want the jury to hear.

Barnett v. Commonwealth, Ky., 979 S.W.2d 98 (1998) photos of injuries admissible despite offer to stipulate to seriousness. But see *Old Chief.*

Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 650-656 (1997). In *Old Chief* the Court held it is an abuse of discretion to refuse to allow a defendant to stipulate to a prior conviction (a status element of the charge against him) and then admit evidence of the prior conviction. The offer to stipulate does not make the evidence irrelevant under KRE 402, but ren-

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ders it more prejudicial than probative under KRE 403. *Cf. U.S. v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998) a post-*Old Chief* case that holds FRE 404(b) does not preclude evidence of bad acts to prove element of crime despite unequivocal offer to stipulate, limiting *Old Chief* to its facts.

McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 938 (1994). At jury sentencing, *KRE 403* may preclude introduction of a prior conviction (that has not otherwise been overturned) only if the defendant can show the conviction was without benefit of counsel.

Eyewitness identification
The test for eyewitness identification in *Neil v. Biggers*, 409 U.S. 188 (1972) requires consideration of the witness's opportunity to view the criminal at the time of the crime, degree of attention, accuracy of the witness' prior description, level of certainty, and length of time between the crime and the confrontation. *Rule 403* can be used like the *Biggers* test to exclude eyewitness identification testimony. Such testimony is not hearsay under *KRE 801A(a)(3)*, but even so, *KRE 403* requires the judge to balance the necessity of the testimony against the likelihood of juror misuse or confusion whenever evidence is of limited probative value. See below.

Photo line-up
First, the court examines the pre-identification encounters to determine whether they were unduly suggestive. If so, the identification may still be admissible if under the totality of the circumstances the identification was reliable even though the procedure was suggestive. *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972); *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377, 383 (1999)

Remarriage of spouse
Watts v. KS&H, Ky., 957 S.W.2d 212, 213 (1997) Remarriage of spouse is inadmissible due to danger of prejudice.

Anatomic dolls
Stringer v. Commonwealth, Ky., 956 S.W.2d 883, 886 (1997) Use of anatomic dolls in sex abuse case not unduly prejudicial.

Evidence of prior injuries
Jarvis v. Commonwealth, Ky., 960 S.W.2d 466, 471 (1998) If no linkage of prior injuries to defendant, evidence of same should have been excluded.

Scene photos
Dillard v. Commonwealth, Ky., 995 S.W.2d 366 (1999) Crime scene photographs are probative and admissible.

Videotape of crime scene, deceased
Mills v. Commonwealth, Ky., 996 S.W.2d 473, 489 (1999) Video of crime scene, deceased judged just as photos would be, and here found admissible.

Confidential Informant Testimony
The defense can argue confidential informant testimony is subject to balancing under *KRE 403*. Also see 804(b)(3), which requires a high degree of trustworthiness as a precondition to allowing hearsay.

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

KRE 403 stronger than state or federal constitution
Commonwealth v. Cooper, Ky., 899 S.W.2d 75, 79 (1995). *KRE 403* may require exclusion of incriminating out of court statements made by the defendant under circumstances in which the federal or state constitutions might not require exclusion.

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Rule 403

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Alternative perpetrators

United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998), cert den. 526 U.S. 1007 (1999) okay to exclude alternative perpetrators, unless exclusion would result in a fundamentally unfair trial, i.e., evidence was so material it would create reasonable doubt.

No unsupported theories via cross-exam

Commonwealth v. Maddox, Ky., 955 S.W.2d 718, 722 (1997) A party cannot present unsupported theories under the guise of cross-examination.

No inference based on another inference

In addition to *KRE 401, 402 and 403,* Kentucky's case law contains an old relevance doctrine forbidding the use of one inference to support another inference, a rule that applies in motions for directed verdict. A recent Kentucky Court of Appeals opinion calls this doctrine a "well-founded rule of law that such relationship may not be proved by an inference which is itself based upon an inference." *Smith v. General Motors Corp.*, Ky.App., 979 S.W.2d 127, 131 (1998). The seminal case is *Pengleton v. Commonwealth*, 294 Ky. 484, 172 S.W.2d 52 (1943) (where defendant walked into a store between her boyfriend, who was carrying two stolen chickens, and her daughter, who was also carrying two stolen chickens, the jury could not infer from inferred possession that she had stolen the chickens). See also *Klingenfus v. Dunaway*, Ky., 402 S.W.2d 844 (1966), and *Brown v. Rice*, Ky., 453 S.W.2d 11(1970).

The rule against basing an inference on another inference is well-established in the law of due process, as illustrated in numerous decisions of the United States Supreme Court. *United States v. Lopez,* 115 S.Ct. 1624, 1625, 514 U.S. 549 (1995) (refusing to "pile inference upon inference"); *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) (constitutionally impermissible to presume that one who possessed marijuana automatically knew of its unlawful importation); *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L. Ed. 1519 (1943) (unconstitutional to presume that a firearm had been received in interstate or foreign commerce, because the presumption shifted the burden of proof to the defendant); *Illinois Central Railroad Company v. ICC*, 206 U.S. 441, 51 L. Ed. 1128, 27 S. Ct. 700 (1907) (the fact on which an inference is based must first be established before the law can draw its inference).

Rule 404 Character evidence and evidence of other crimes.

A. Character evidence generally.

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

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

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

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

B. Other crimes, wrongs, or acts.

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

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

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

C. Notice requirement.

In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to

give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

COMMENTARY

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

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

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

Rule 404(a)

The plain language of the rule identifies it as a blanket prohibition against using character evidence to prove an act.

Rule 404 applies only to the accused and the "victim"

Rule 404 applies only when the character of the accused or the purported victim is relevant. If the character of some other witness or person is relevant, this rule does not apply. *U.S. v. Hart*, 70 F.3d 854 (6th Circ. 1995). The character of a witness other than the accused or the victim may be attacked by the methods in *KRE 607, 608* and *609*.

The proponent of a witness cannot introduce evidence of good character until the character of the witness has been attacked. *Pickard Chrysler, Inc. v. Sizemore*, Ky.App., 918 S.W.2d 736, 740-41 (1995); *LaMastus v. Commonwealth*, Ky.App., 878 S.W.2d 32 (1994).
The accused may always introduce evidence of his own character.

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

Prosecutor may not attack defendant's character, except to rebut
If, and only if, the defendant has put his character in issue, the prosecutor is allowed to rebut by introduction of other evidence bearing on the defendant's character. *U.S. v. Monteleone*, 77 F.3d 1086, 1089 (8th Cir. 1996). *LaMastus v. Commonwealth*, Ky. App., 878 S.W.2d 32 (1994) is wrong to the extent it holds a defendant who appears as a witness is subject to character attack whether he puts his character at issue or not. Though *KRE 608* and *609* allow attacks on credibility in general, it is extremely unlikely the drafters intended *KRE 405(a)* to apply only to non-testifying defendants.

See *Brown v. Commonwealth*, Ky., 983 S.W.2d 513, 515 (1999) (permitting ex-wife's fiancée to testify while holding his Bible was reversible error, because his character had not yet been attacked).

The accused may present relevant traits of the victim
The accused may also present evidence of a relevant trait of the "victim" of the crime except in prosecutions for sexual offenses in which *KRE 412* governs. The prosecution is entitled to re-

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but the defendant's attack. The general character of the "victim" is not admissible under *KRE 404 (a)(2). Stringer v. Commonwealth,* Ky., 956 S.W.2d 883, 892 (1997).

Okay to rebut self-defense with peacefulness of victim

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

KRE 405 lists the methods by which the character of the accused or the victim may be established.

404(b)

PURPOSE/PREMISE:

In *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694, 703 (1994) the Kentucky Supreme Court held other acts evidence is usually important on questions of corpus delicti, identity, or mens rea. However, proof the defendant has done other similar bad acts is even more likely to mislead or over-persuade the jury than character evidence. Therefore, Kentucky *KRE 404(b)* is a rule of general exclusion with only certain specific exceptions. Uncharged misconduct evidence is presumably inadmissible unless the proponent meets each part of a three-part test.

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

1. Is the other crime evidence relevant for some acceptable purpose other than to show criminal disposition of the accused? There must be a legitimate issue which the other acts evidence addresses, such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Vires v. Commonwealth*, Ky., 989 S.W.2d 946, 948 (1999).

   See also *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997) (cannot admit evidence on mere assertion it meets the rule). The evidence must address a "fact of consequence" to the disposition of the case. *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); *Bell v. Commonwealth*, Ky., 875 S.W.2d 882, 889 (1994); *Daniel v. Commonwealth*, Ky., 905 S.W.2d 76, 78 (1995).

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

   All that is required is that the jury can reasonably conclude the act occurred and the defendant was the actor. *Huddleston v. United States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 1501 (1988); *Parker v. Commonwealth*, Ky., 952 S.W.2d 209 (1997) (uncharged crime need not be proved by direct evidence –essentially embracing rule in *Huddleston*) Note: in *Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668 (1990) the standard is low enough to allow evidence of acts for which the defendant was acquitted. *Cf.* Kentucky's pre-*Dowling* case, *Commonwealth v. Hillebrand*, Ky., 536 S.W.2d 451 (1976), which held an acquittal barred such use.

   After *Huddleston* states are free to adopt a stricter standard. Texas, for instance, requires proof beyond a reasonable doubt. *State v. Harrell*, 884 S.W.2d 154 (Tex.App. 1994).

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

3. Finally, does the potential for unfair prejudice substantially outweigh probative value? *Bell*, p.890; *KRE 403*. In *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694, 703 (1994), the court held such evidence should be admitted only where the probative value and *the need* for the evidence outweigh its unduly prejudicial effect.

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

   Imwinkelreid at Section 8.24 cites a study of jurors' attitudes showing especial outrage at interracial crimes, brutal assaults, and official misconduct.

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Remoteness in time
Gray v. Commonwealth, Ky., 843 S.W.2d 895 (1992) [evidence of prior sexual misconduct with other witness not sufficiently similar and too remote in time (from 3 to 12 years earlier) to have any probative value compared to unfair prejudice]. And *Robey v. Commonwealth*, Ky., 943 S.W.2d 616 (1997) (guilty plea to rape 16 years earlier even though similar was too remote in time & unfairly prejudicial).

Too much detail
Funk v. Commonwealth, Ky., 842 S.W.2d 476 (1993) (testimony of victim's mother and examining physician was prejudicial overkill); *Chumbler v. Commonwealth*, Ky., 905 S.W.2d 488, 493-494 (1995) sex between co-defendants was relevant, but with third parties, etc. improperly admitted); *Brown v. Commonwealth*, Ky., 983 S.W.2d 516 (1999) (excessive presentation of details unduly prejudicial).

Relevance for some acceptable purpose
Evidence to show propensity, and not applicable to one of the recognized exceptions, is improper. *Hendrickson v. Commonwealth*, Ky., 486 S.W.2d 55 (1972) (bootlegging beer & threatening to kill 3rd person earlier the same day does not show identity, intent, guilty knowledge or motive).

Dyer v. Commonwealth, Ky. 816 S.W.2d 647 (1991), overruled on other grounds, 973 S.W.2d 54 (1998) (possession of pornographic materials not relevant to sodomy case).

Jarvis v. Commonwealth, Ky. 960 S.W.2d 466 (1998) (evidence that defendant was going out to buy drugs prior to alleged murder of wife, & evidence of prior abuse not linking defendant should have been excluded).
Tabor v. Commonwealth, Ky.App., 948 S.W.2d 569 (1997) (prior felony revealed during voir dire –panel should have been discharged).

Sexual immorality no tendency to prove homicide
Evidence of the defendant's extramarital relationship and sexual activity had no tendency to prove disposition to homicide, so 404(b) was not an issue. However, prior sexual conduct was relevant and admissible to show motive and to rebut claim of spousal abuse. *Springer v. Commonwealth*, Ky., 998 S.W.2d 439 (1999).

Effect of stipulation
If a defendant stipulates one or more elements of the prosecutor's case, *i.e.*, admits identity or admits a culpable mental state, the need for other acts evidence is greatly reduced, perhaps to the point that there is no material issue as to the conceded point. 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. See also *Old Chief*, discussed under KRE 403, supra. See also *Commonwealth v. Ramsey*, Ky., 920 S.W.2d 526 (1996); *Dedic v. Commonwealth*, Ky., 920 S.W.2d 878 (1996)(DUI subsequent offense); and *Clay v. Commonwealth*, Ky., 818 S.W.2d 264 (1991) (drug trafficking subsequent offense).

A stipulation is not excluded by the hearsay rule, because it is a party admission under *KRE 801A(b)(2), (3)* or *(4)*. The judge may treat the admission as an adequate substitute for prejudicial other acts evidence because an admission is more probative than an inference from previous conduct.

Inextricably intertwined acts are not excluded by 404(b) when other acts evidence is so interwoven with the charged crime that mention of the other acts is unavoidable. *Funk v. Commonwealth*, Ky., 842 S.W.2d 476 (1993). 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.

Brown v. Commonwealth, Ky., 983 S.W.2d 513 (1999) Evidence of flagrant non-support was not inextricably intertwined with evidence of murder.

Specific Applications

Absence of mistake or accident
Parker v. Commonwealth, Ky., 952 S.W.2d 209 (1997) (injuries suffered by child victim prior to charged offense, at times when left in defendant's custody admissible when defendant testified he did not know how injuries occurred).
But cf., evidence the victim stalked a prior boyfriend of the victim's ex-wife was not sufficiently relevant when defendant sought to rebut commonwealth's claim the appellant --and not the victim-- caused the rear-end accident that led to the shooting. *Vires v. Commonwealth*, Ky., 989 S.W.2d 946, 949 (1999)

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

Flight
Chumbler v. Commonwealth, Ky., 905 S.W.2d 488 (1995) recognized that flight can indicate consciousness of guilt.

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

Intent
There must be a specific issue regarding intent for this exception to apply. *Bell v. Commonwealth*, Ky., 404 S.W.2d 462, 464 (1966) (in cold-blooded crimes, motive, intent, and guilty knowledge may be inferred from the act). And beware of *Sanders v. Commonwealth*, Ky., 801 S.W.2d 665, 674-675 (1990) (intent always an issue in intentional crimes, ergo other crimes evidence always relevant re: intent). But note: *Sanders* was an insanity case, where mental state was specifically at issue.

Motive
Other acts may illustrate motive. *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181, 183 (1996) upheld introduction of evidence of a prior robbery to show motive to kill a clerk in the charged robbery. *Brown v. Commonwealth*, Ky., 983 S.W.2d 513 (1999) probative value of admitting defendant's indictment for non-support outweighed any prejudice because relevant to motive to kill ex-wife. See threats, above.

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

Identity, Modus Operandi
Evidence that reveals identity of the perpetrator by showing peculiar and striking similarities between prior and current acts and by showing the acts are the "trademark" of the defendant. *U.S. v. Crowder*, 87 F.3d 1405, 1410 (D.C.Cir. 1996). Cf. *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997) which holds that for identity, proponent must show "reasonable similarity" between acts. See *Commonwealth v. English*, Ky., 993 S.W.2d 941, 944 (1999) which holds that remoteness in time does not matter for prior acts that show modus operandi.

Bowling v. Commonwealth, Ky., 942 S.W.2d 293, 300 (1997) (ballistics showed same gun used in each case).

Tucker v. Commonwealth, Ky., 916 S.W.2d 181 (1996) ballistics showed same gun in charged and uncharged case, uncharged case placed gun in defendant's possession).

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Knowledge
Lindsay v. Commonwealth, Ky., 500 S.W.2d 76 (1973) (evidence of defendant's possession of stolen cigarettes admissible to rebut lack of knowledge he possessed stolen stamps).

Opportunity
A means to prove identity, by proving defendant had opportunity to commit the charged crime, *e.g.*, that he committed another offense at the same location shortly before or after the charged crime. No Kentucky case illustrates this exception. *United States v. Doherty*, 675 F.Supp. 714 (D.Mass. 1987) (evidence of sale of other civil service exams admissible to show defendant had opportunity to sell civil service exams).

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. *Cf.*, *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997) where court uses "common plan or scheme" language and states 404(b) requires a "signature," *i.e.*, real distinctiveness (possibly confusing plan with identity).

In *Commonwealth v. English*, Ky., 993 S.W.2d 941, 944 (1999) the Kentucky Supreme Court explains the common scheme or plan exception, and points out that proximity in time is more essential to show common plan than to show modus operandi.
Plan, as used in *KRE 404(b)(1)*, refers to two situations: (1) where several crimes are constituents of a larger plan, the existence of which is proved by evidence other than the acts offered; and (2) where a person devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. *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.

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

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

Evidence must not only show absence of mistake or accident, but must satisfy hearsay rules as well. *Moseley v. Commonwealth*, Ky., 960 S.W.2d 460, 470 (1997).

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

404(c)

Reasonable notice required
The defendant must have time to investigate whether the other acts occurred and whether the defendant committed them. The underlying policy is to afford time to investigate before rather than during trial. *Daniel v. Commonwealth*, Ky., 905 S.W.2d 76, 77 (1995).

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

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

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

Exclusion
Exclusion is not the only remedy provided for by the rule. But in the absence of a satisfactory excuse for failure to give notice --more than simple failure to prepare in a timely manner-- exclusion should be the remedy.

Opening the door, rebuttal
The rule is limited to other acts evidence intended for the case-in-chief. If the defendant opens the door during cross-examination, or by introducing evidence, the commonwealth may rebut by putting on evidence to deny or explain, but only to the extent necessary to counter the defendant's evidence. *Keene v. Commonwealth*, Ky., 210 S.W.2d 926, 928 (1948). The Commonwealth may not hold back other acts evidence and then try to offer it as rebuttal.

Bowling v. Commonwealth, Ky., 942 S.W.2d 293 (1997) defendant denied owning certain type of handgun, evidence of other robberies by defendant using same gun became admissible.

Brown v. Commonwealth, Ky., 983 S.W.2d 516 (1999) defendant claimed self-defense in shooting ex-wife, and evidence of non-support prosecution became admissible to show motive in rebuttal.

Preservation Note
Do not rely on a motion in limine to preserve 404(b) objections. *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181 (1996) (objection to some evidentiary details of uncharged crime unpreserved).

Rule 405 Methods of proving character.

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to general reputation in the community or by testimony in the form of opinion.

(b) Inquiry on cross-examination. On cross-examination of a character witness, it is proper to inquire if the witness has heard of or knows about relevant specific instances of conduct. However, no specific instance of conduct may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of the inquiry.

(c) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

COMMENTARY

PURPOSE/PREMISE:
Prejudice inevitably flows from the selective presentation of negative incidents from a person's past. The purpose of Rule 405 is to define and limit the methods of proving character in order to limit that prejudice. Character is not considered a "collateral" issue, because it is "of consequence to the determination of the action." Still, character evidence does not bear on the determination of the action in the same way as eyewitness identification or fingerprints. Rule 405 is a policy determination that in the limited circumstances in which character may be presented, it must be presented in ways that limit prejudice.

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

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

405(a) limits testimony as to character or character traits to general reputation in the community or the opinion of the witness. Both are opinion testimony, the former a sort of generalized hearsay or opinion regarding other people's opinions, and the latter the witness's own personal opinion.

KRE 705 (exempting experts from disclosing underlying facts) does not apply here. The only foundation requirement is found in *KRE 602*, which does not necessarily require introduction of facts before rendition of the opinion. However, as a practical matter, the jury will be unimpressed by an opinion of honesty, peacefulness, etc., given without any indication of how the witness came to this conclusion.

"Community" means those persons likely to know something about the person whose character is at issue. The word does not necessarily describe a geographical location.

An expert qualified under *KRE 702* may give an opinion as to the character of a person. *KRE 608* expressly authorizes attacking the credibility of a witness by evidence "in the form of 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 how the witness's psychological makeup might affect the ability to be truthful.

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

Specific incident cross examination is to "test the knowledge and credibility of the witness" to show the witness doesn't know enough about the person for the jury to credit his opinion. *U.S. vs. Monteleone*, 77 F.3d 1086, 1089 (8th Circuit, 1996).

The cross examiner must have a good-faith belief 1) the incident occurred and 2) the witness would probably have known about it. Questions about events essentially private in nature cannot test the accuracy, reliability, or credibility of a witness. Such incidents are irrelevant. *Monteleone*, p. 1090.

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

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

Rule 406 (Number not yet utilized.)

PURPOSE/PREMISE:
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. However, the Kentucky Supreme Court has stated the failure to adopt a habit rule means the question of habit should be addressed under KRE 401, 402, and 403. *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 892 (1997).
[See 404(b)].

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.

Rule 407

COMMENTARY

PURPOSE/PREMISE:
This rule reflects a policy judgement that it is more advantageous to society to encourage repair or improvement measures by excluding mention of them at trial than to allow a party to argue the repair or improvement is an admission the item or premises were dangerous. The rule can apply in cases in which a failure to perceive a risk [reckless/wanton culpable mental state] is an element. An example: repairs made to a car after involvement in an accident resulting in a death.

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

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

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

Rule 408 Compromise and offers to compromise.

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

COMMENTARY

PURPOSE/PREMISE:
The rule seeks to encourage compromise and settlement by preventing later use of an offer to compromise (or discussions leading up to the offer) as an admission of guilt or liability. 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.

COMMENTARY

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

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

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
(1) A plea of guilty which was later withdrawn;
(2) A plea of nolo contendere in a jurisdiction accepting such pleas, and a plea under Alford v. North Carolina, 394 U.S. 956 (1969);

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

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

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

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

COMMENTARY

PURPOSE/PREMISE:

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

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

With a county attorney

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

With a police detective

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

Specific applications

Admissions against interest

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

Statements made during withdrawn or *Alford* pleas

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

During a PSI investigation

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

***KRS 532.055* or *KRS 532.080* hearings**

The rule does not preclude the use of *Alford* or nolo contendere pleas as evidence of prior convictions in *KRS 532.055* or *KRS 532.080* hearings.

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

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

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

Rule 411 Liability insurance.

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

COMMENTARY

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

Can apply in criminal case
Justice v. Commonwealth, Ky., 987 S.W.2d 306, 314 (1998) The rule applies in criminal cases, but here evidence of no insurance was not sufficiently prejudicial.

Exceptions
Ownership, agency, or control of property: 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* counsel exclusion.

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

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

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

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

B. Particular acts and other evidence. Notwithstanding any other provision of law, in a

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

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

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

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

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

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

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

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

COMMENTARY

PURPOSE/PREMISE:

Just as the sex life of the defendant is generally irrelevant under 404(b), this rule reflects the policy that the sex life of the prosecuting witness is also generally irrelevant. The rule is necessary because of the attitude of society toward sex and a history of misogyny in the common law and in Kentucky's statutory law. Like any other witness, the prosecuting witness in a sex offense case is subject to a testing of credibility through evidence "in the form of opinion or general reputation in the community." *KRE 404(a)(3)* and *KRE 608*. What was overlooked in the past, however, is that the opinion or reputation was supposed to be only for honesty or mendacity. *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 deemed relevant "to the reasonableness of her story" and in which proof of prior acts proved chastity. *Roberson's New Kentucky Criminal Law and Procedures*, 2 Ed., p.779-784 (1927).

Details of the rule

The rule prescribes rigid procedural steps which must be taken to introduce evidence on the limited subjects which the rule permits.

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Witness reputation, others' opinion
KRE 412(a) precludes evidence of the prosecuting witness's reputation for sexual behavior, as well as other people's opinion of the said sexual behavior. These are also inadmissible under *KRE 404(a)(3)* and *608*. The character of an assault victim is usually inadmissible. *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 892 (1997).

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

Sex with the accused, consent
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 intent or lack of mistake or would be admissible as inextricably intertwined acts.

Other evidence directly pertaining
KRE 412(b)(3) is a catch-all that allows introduction of other sexual behavior pertaining directly to the act charged. Other acts must be "directly" relevant. In *Violett vs. Commonwealth*, Ky., 907 S.W.2d, 773, 776 (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.

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

Rape shield does not always apply
Arguably, The Rape Shield rule should not be applied in any case involving a child victim under twelve where consent is not the issue.

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

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

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

State v. Jalo, 27 Or.App. 845, 557 P.2d 1359 Oregon's rule infringed on the right of confrontation because it prohibited evidence of a complainant's ulterior motive for making a false charge. See also *Lewis v. State*, 591 So.2d 922 (1991) (victim fabricated story to hide sex with boyfriend); and *Commonwealth v. Black*, 487 A.2d 396 (1985) (evidence not offered to show

general moral turpitude but to reveal specific bias and motive).

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

15 Days Notice, offer of proof

KRE 412(c)(1) requires a defendant wishing to introduce evidence of prior sexual conduct to 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. With the motion, the defendant must submit a written offer of proof that the evidence sought to be admitted is of behavior covered by *KRE 412(b)*.

Hearing may be required

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

At the hearing, either party may call witnesses. The defendant may call the prosecuting witness and offer other "relevant" evidence.

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 .

Exclusion is mandatory

KRE 412(c)(3). 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.

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

The Supreme Court agrees with *Lawson* that the balancing test prescribed by *KRE 412(c)(3)* has "an obvious tilt toward exclusion over admission" *Commonwealth v. Dunn*, Ky., 899 S. W.2d 492, 494 (1995).

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

Use record of hearing for impeachment, substantive evidence

The record of the hearing in chambers may be used to impeach the prosecuting witness at trial. *[KRE 801 A(a)(1); 106]* If the prosecuting witness suffers loss of memory at trial but testified on that subject at the hearing, the video tape or transcript may be introduced as substantive evidence under *KRE 801 A(a)(1), 804(a)(3), and 804(b)(1).* •

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Article V: Privileges

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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, and Chapter 194 for CHR records or Chapter 61 for records not falling under the open records law.

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

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

COMMENTARY

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

Privilege rules apply only in court
Keep in mind this rule applies only when the rules apply, that is, in proceedings in the Court of Justice. *KRE 101*; *KRE 1101(a)(c)*. Production of evidence 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.

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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.

Grand jury proceedings, depositions
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 a deposition.

Construe privileges strictly, burden on claimant
Peer review privilege under KRS 311.377 does not prohibit discovery of peer review records and material in medical malpractice suits. Privileges must be construed strictly, and the burden is on the claimant. *Sisters of Charity Health Systems, Inc. v. Raikes*, Ky. 984 S.W.2d 464, 465 (1998)

Work product privilege
Morrow v. B, T, & H, Ky., 957 S.W.2d 722 (1997) discussion of the work product privilege in Kentucky.

No surveillance privilege
Weaver v. Commonwealth, Ky., 955 S.W.2d 722, 727 (1997) No surveillance privilege exists in favor of the commonwealth.

Rule 502 (Number not yet utilized.)

PURPOSE/PREMISE:
The so-called **"honest eavesdropper rule"** was dropped from the proposal in 1992. It would have allowed a person who overheard privileged communications to testify, and could have allowed an adverse party to compel that person to testify concerning the communication as long as the communication was obtained "legally."
The failure to adopt the honest eavesdropper rule in 1992 does not mean evidence heard is necessarily excluded: analyze under KRE 401, 402, and 403. *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 892 (1997). Cf. *KRE 509* and *KRE 510.*

No surveillance privilege exists in favor of the commonwealth. *Weaver v. Commonwealth*, Ky., 955 S.W.2d 722, 727 (1997).

Rule 503 Lawyer-client privilege.

A. Definitions, As used in this rule

1. **"Client" means a person, including a public officer, corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.**
2. **"Representative of the client" means:**
   (A) A person having authority to obtain professional legal services, or to act on advice thereby rendered on behalf of the client; or
   (B) Any employee or representative of the client who makes or receives a confidential communication:
      (i) In the course and scope of his or her employment;
      (ii) Concerning the subject matter of his or her employment; and
      (iii) To effectuate legal representation for the client.
3. **"Lawyer" means a person authorized, or reasonably believed by the client to be authorized to engage in the practice of law in any state or nation.**

4. **"Representative of the lawyer" means a person employed by the lawyer to assist the lawyer in rendering professional legal services.**
5. **A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.**

B. General rule of privilege

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

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

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

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

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

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

C. Who may claim the privilege

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

D. Exceptions

There is no privilege under this rule:

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

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

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

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

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

COMMENTARY

PURPOSE/PREMISE:

This protects most communications between clients and attorneys. Subsection A.5 defines a confidential communication as one made in the furtherance of rendition of legal services not intended to be disclosed to third persons. Communication is given a broad definition as either words or actions intended to communicate some meaning to the attorney or the attorney's assistants.

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.

Practice of law, defined

SCR 3.020 defines the practice of law as "any service rendered involving legal knowledge or

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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.

Rule covers only disclosure a court can force

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

Client may refuse, and prevent others

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

Lawyer must assert privilege

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.

Erroneous forced disclosure

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

Exceptions to the privilege

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

Where the lawyer and client are adverse parties, there is no point having a privilege because information that would be privileged would also be essential to the disposition of the case.

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

Successor counsel

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

Work product

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

Rule 504 Husband-wife privilege.

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

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

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

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

COMMENTARY

PURPOSE/PREMISE:
Subsection (a) allows the spouse of a party to refuse to testify against party-spouse concerning "events occurring after the date of their marriage." The party-spouse may also prevent the spouse from testifying concerning the same events.

Rule only covers matters not intended to be divulged
Subsection (b) also protects confidential communications "made privately by an individual to his or her spouse," but only those not meant to be divulged. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 853 (1997). 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. *But cf.* "honest eavesdropper rule" in non-adopted Rule 502. The marital privilege is given to the maker of the statement or the person's guardian, conservator or personal representative.

Rule does not apply if spouses are conspirators or adversaries
Subsection (c) removes the privilege if the Commonwealth introduces a *prima facie* case that the spouses are conspirators or accomplices in a crime that is the subject matter of the case. Also, if one of the spouses is charged with wrongful conduct against the other spouse, a minor child of either, an individual residing in the household of either, or a third person injured during the course of wrongful acts against the spouse, child, or other individual, then the privilege does not exist. 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 it would be unfair to afford either of them a privilege.

Child abuse reporting may or may not be covered
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

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child." *Mullins v. Commonwealth*, Ky., 956 S.W.2d 210, 212 (1997) points out the privilege is based on marital harmony, and is subject to exceptions, including KRS 620.050 where a child is involved.

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

Rule 505 Religious privilege.

1. Definitions. As used in this rule:

(a) A "clergyman" is a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting him.

(b) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

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

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

COMMENTARY

PURPOSE/PREMISE:

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

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

Rule 506 Counselor-client privilege.

A. Definitions. As used in this rule

(1) A "counselor" includes:

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

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

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

(d) A certified marriage and family therapist as defined in KRS 335.300 who is engaged

to conduct marriage and family therapy pursuant to KRS 335.300 to 335.399;

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

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

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

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

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

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

B. General rule of privilege

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

C. Who may claim the privilege

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

D. Exceptions

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

(1) If the client is asserting his physical, mental, or emotional condition as an element of a claim or defense; or, after the client's death, in any proceeding in which any party relies upon the condition as an element of a claim or defense.

(2) If the judge finds:

(a) That the substance of the communication is relevant to an essential issue in the case;

(b) That there are no available alternate means to obtain the substantial equivalent of the communication; and

(c) That the need for the information outweighs the interest protected by the privilege. The court may receive evidence in camera to make findings under this rule.

COMMENTARY

PURPOSE/PREMISE:

This rule originally dealt with school counselors, sexual assault counselors, drug abuse counselors, and alcohol abuse counselors. Amendments have added certified professional art therapists, certified marriage and family therapists, members of certain crisis teams, certain (but not all) victim advocates, and fee-based pastoral counselors to the definition of "counselor."

Group, family sessions are covered

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.

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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.

The rule has many exceptions
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.

The rule can be overcome if
In addition, if the judge finds the communication is relevant to an essential issue and there is no alternate means to obtain the "substantial equivalent" of the communication, and the need for information outweighs the interests protected by the privilege, then the privilege may be overcome. The rule provides that the court may receive evidence ***in camera*** to make findings under this rule.

Rule 507 Psychotherapist-patient privilege.

A. Definitions, As used in this rule

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

(2) A "psychotherapist" is:

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

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

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

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

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

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

B. General rule of privilege

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

C. Exceptions

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

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

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

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

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PURPOSE/PREMISE:
Any confidential communication as defined in subsection (a)(3) made to a psychotherapist as defined in subsection (a) is privileged, and the patient or his authorized representative may refuse to disclose and keep any other person from disclosing the confidential communication that was made for the purpose of diagnosis or treatment of mental condition.

Registered nurses, nurse practitioners, others present
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)).

Authorized representative, attorney
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.

Exceptions where mental condition is an issue
The exceptions under the rule involve involuntary hospitalization proceedings and statements made in interviews authorized by *RCr 7.24(3)(B)(ii)*. By creating an issue of mental condition, the patient creates the need for evidence concerning it. Also, if the patient is dead at the time of the proceeding, if any party relies on the condition as an element or claim of a defense, the plain language of the rule excepts any communications that would have fallen under this rule from the rule of privilege.

Rule 508 Identity of informer.

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

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

C. Exceptions
(1) Voluntary disclosure; informer as a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed by the holder of the privilege or by the informer's own action, or if the informer appears as a witness for the state. Disclosure within a law enforcement agency or legislative committee for a proper purpose does not waive the privilege.
(2) Testimony on relevant issue. If it appears that an informer may be able to give relevant testimony and the public entity invokes the privilege, the court shall give the public entity an opportunity to make an in camera showing in support of the claim of privilege. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavits. If the court finds that there is a reasonable probability that the informer can give relevant testimony, and the public entity elects not to disclose this identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one (1) or more of the following:
(a) Requiring the prosecuting attorney to comply;
(b) Granting the defendant additional time or a continuance;
(c) Relieving the defendant from making disclosures otherwise required of him;
(d) Prohibiting the prosecuting attorney from introducing specified evidence; and
(e) Dismissing charges.
D. In civil cases, the court may make any order the interests of justice require if the in-

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former 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.

COMMENTARY

PURPOSE/PREMISE:
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. Exceptions to the privilege occur when the disclosure is voluntary, when the informant is a witness and when the testimony of the informant is relevant to an issue. *Taylor v. Commonwealth*, Ky., 987 S.W.2d 302, 304 (1998)

Mere tipster need not be revealed
KRE 508 reflects the decision of the United States Supreme Court in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), which indicates that a proper balance regarding nondisclosure must depend on the particular circumstances of each case, taking into consideration the crimes charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors. Relying on *Rovario*, Kentucky holds that a "mere tipster" need not be disclosed. *Taylor v. Commonwealth*, Ky., 987 S.W.2d 302, 304 (1998). The "tipster" in *Taylor* was not present when the charged crime was committed. It was mere speculation that the informant could have provided any testimony about what occurred.

Public entities may invoke the privilege
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.

In camera hearing required
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.

Rule does not cover exculpatory evidence
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.

Reasonable probability of relevant evidence requires disclosure
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.

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

Rule 509 Waiver of privilege by voluntary disclosure.

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

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ment for professional services does not waive any privilege with respect to such communications.

PURPOSE/PREMISE:
If a party voluntarily gives up a significant part of privileged matter, there is not much reason to keep the other side from learning the rest of it. This is an example of the rule of completeness that permeates evidence law. However, KRE 509 is cast in terms of waiver, and compelled disclosures or disclosures made *in camera* as authorized by law do not result in waiver. See KRE 612.

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

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

COMMENTARY

PURPOSE/PREMISE:
This rule provides that a claim of privilege is not lost forever if a judge erroneously compels disclosure of confidential information or the disclosure was made without an opportunity to claim the privilege, e.g., a husband who discloses a confidential communication to the police before his spouse has an 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.

COMMENTARY

PURPOSE/PREMISE:
Both the judge and the attorneys who know a claim of privilege is likely to be made must ensure the jury does not learn of it.
Subsection (a) makes clear that no one may make a comment about a lawfully invoked privilege, 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, upon request, to an instruction that no inference may be drawn from a claim of privilege. This adds to current federal constitutional law, which requires such instructions only when the defendant refuses to testify.•

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Article VI: Witnesses

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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 which they are performing these functions. There is no minimum age for witnesses in Kentucky. *Humphrey v. Commonwealth*, Ky., 962 S.W.2d 870, 874 (1998). The determination of qualifications is left to the discretion of the trial judge at a hearing that should be held outside the presence of the jury. *Jarvis v. Commonwealth*, Ky., 960 S. W.2d 466, 468 (1998).

(a) A defendant in a criminal case is a competent witness because 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. 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 Heri tage 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 Cir. 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.

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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*, Ky., 916 S.W.2d 148, 157 (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.

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

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(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*, Ky., 901 S.W.2d 871, 873 (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 court 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*, *801A*, 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.

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.

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

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

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

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

Rule 606 Competency of juror as witness.

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

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

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Rule 606

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 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. This is never a collateral issue. *Motorists Mutual Ins. Co. v. Glass*, Ky., 996 S.W.2d 437, 447 (1997); *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 720-721 (1997); *Weaver v. Commonwealth*, Ky., 955 S.W.2d 722, 725 (1997).

(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 801A* and *804* allow substantive use of out of court statements, limited impeachment is rarely given as a reason to introduce out of court statements.

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

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

(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. *Commonwwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997).

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

(k) But the proponent cannot rehabilitate a witness in advance. The credibility of the witness is to come from demeanor and objective indications that the witness knows what he is talking about. "Bolstering" evidence is irrelevant until the adverse party makes an attack on the witness because it does not contribute to make the existence of a fact of consequence more or less likely. *Samples v. Commonwealth*, Ky., 983 S.W.2d 151, 154 (1998). "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 801A*.

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

(m) In *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997), the court noted that the judge may limit impeachment as long as the jury gets a "reasonably complete" picture of the witness' interest, bias and motivation. The court also commented that a party should be given greater latitude in impeachment of a non-party witness.

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,

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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. Certainly CR 43.07 still forbids such acts. [*Tamme v. Commonwealth*, Ky., 973 S.W.2d 13, 29 (1998)].

(b) In *Tucker v. Commonwealth*, Ky., 916 S.W.2d 181, 184 (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*, Ky.App., 918 S.W.2d 736, 741 (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 *KRE 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*.

(i) *KRS 532.055(2)(a)(6)* purports to allow prior juvenile adjudications as impeachment evidence during a criminal trial if the offense for which the juvenile was adjudicated "would be a felony if committed by an adult." This is a legislative amendment of *KRE 609(a)* which limits impeachment to those crimes "punishable by death or imprisonment for one year or more under the law which the witness was convicted." A juvenile public offender is never subjected to these punishments. *KRS 635.060*. Thus, the statute should not be employed.

Rule 609 Impeachment by evidence of conviction of crime.

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

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

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

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

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.

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(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*, Ky., 875 S.W.2d 518, 528 (1994).

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

(d) The Kentucky rule does not permit identification of the crime unless (1) the witness under cross-examination has denied the conviction or (2) the witness wishes to identify the nature of the conviction for tactical reasons. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 859 (1997). However, a party can open the door by his action. *Tamme v. Commonwealth*, Ky., 973 S.W. 2d 13, 28 (1998).

(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 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*, Ky., 80 S.W. 1096 (1904). This evidence rule is the positive 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 pre liminary question of whether the child can distinguish between truth and lies and under-

stands 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 bol ster or undermine the child's credibility with the jury.

Rule 611 Mode and order of interrogation and presentation.

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:
- **(1) Make the interrogation and presentation effective for the ascertainment of the truth;**
- **(2) Avoid needless consumption of time; and**
- **(3) Protect witnesses from harassment or undue embarrassment.**

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

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination, but only upon the subject matter of the direct examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

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

COMMENTARY

PURPOSE/PREMISE:
The Rule has three (3) loosely related sections although subsection a is by far the most important for evidence analysis. This subsection imposes a duty on the trial judge to exercise reasonable control over the introduction of evidence. It is not intended to supersede the order of proceedings set out in *RCr 9.42* or to supersede 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 of oral statements to explain portions of written statements when used in conjunction with *KRE 106, 612, 803* or *804*.
- **(1)** Courts generally say that such matters are left to the sound discretion of the judge. Trial decisions will be overturned only upon showing that the discretion was abused. *Baze v. Commonwealth*, Ky., 965 S.W.2d 817, 821 (1997); *Humphrey v. Commonwealth*, Ky., 962 S.W.2d 870, 874 (1998); *Danner v. Commonwealth*, Ky., 963 S. W.2d 632, 634 (1998).
- **(2)** In *Commonwealth v. Maddox*, Ky., 955 S.W.2d 718, 721 (1997), the court suggested that judges use the considerations set out in *KRE 403* to guide their decisions under this rule.

(b) Section Eleven of the Constitution and the Sixth Amendment of the U.S. Constitution preserve a criminal defendant's right to confront witnesses. *Moseley v. Commonwealth*, Ky., 960 S.W. d 460, 462 (1997); *Rogers v. Commonwealth*, Ky., 992 S.W.2d 183, 185 (1999). However, *KRE 611(a)* gives judges authority to limit cross examination for any of the three purposes specified by the Rule. *Humble v. Commonwealth*, Ky.App., 887 S.W.2d 567, 572 (1994); *Nunn v. Commonwealth*, Ky., 896 S.W.2d 911 913 (1995).); *Rogers v. Commonwealth*, Ky., 992 S.W.2d 183, 185 (1999). However, denial of effective cross-examination is error that is reversible without showing of any additional prejudice. *Eldred*

v. Commonwealth, Ky., 906 S.W.2d 694, 702 (1994).

(c) Finding the line where limitation ceases to be reasonable and becomes an imposition on the right to confront is dependent on the circumstances of each case. *Nunn* and *Humble* intimate that where the jury is given enough information to make the desired inference the right of confrontation is upheld. *Weaver v. Commonwealth*, Ky., 955 S.W.2d 722, 726 (1997) says so explicitly.

(d) The concepts of "invited error" and "opening the door" are often associated with *KRE 611 (a)*. Courts allow inadmissible as well as admissible evidence in rebuttal where a party has introduced inadmissible evidence (*i.e.*, irrelevant or excluded for other reasons). This is to "neutralize or cure any prejudice incurred from the introduction of evidence." *Commonwealth v. Alexander*, Ky., 5 S.W. 3d 104, 105 (1999); *Commonwealth v. Gaines*, Ky., 13 S.W. d 923, 924 (2000); *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 problems 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 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*, Ky., 916 S.W.2d 176, 180 (1995); *Perdue v. Commonwealth*, Ky., 916 S. W.2d 148, 155 (1995); *Norton v. Commonwealth*, Ky.App., 890 S.W.2d 632 (1994).

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

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Subsection b

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

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

(o) In 1996, the General Assembly amended *KRS 431.350* yet again to try to make it possible to have an upset child in a sexual offense prosecution examined and cross examined "in a room other than the courtroom," and outside the presence of the defendant who can only look on via TV. The statute was upheld in *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 886 (1997).

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.

(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. *Humphrey v. Commonwealth*, Ky., 962 S.W.2d 870, 874 (1998).

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

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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 testi mony is not personal knowledge, refreshed memory or recorded recollection. The judge has authority to allow this hybrid form of testimony under KRE 611(a) & (b) if he finds that it will contribute toward ascertainment of the truth and avoid wasted time. But the judge must consider the likelihood that the jury might be misled. The judge should require the proponent to show the following before allowing this hybrid form of testimony:

1. That the officer's testimony is actually needed. Much of an officer's testimony concerns irrelevant details of a police investigation.
2. That the officer cannot testify coherently from memory alone.
3. That a reading of recorded recollection is not a sufficient substitute for the officer's testimony. *KRE 803(5).*
4. That the officer's testimony will be based mostly on present personal knowledge and that the writing or prompt will be used only to fill in occasional details.
5. That the jury will be able to distinguish the portions of testimony that come from per sonal 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 "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 31 years Kentucky has allowed introduction of prior inconsistent statements as substantive evidence as well, *Jett v. Commonwealth*, Ky., 436 S.W.2d 788 (1969), upon compliance with *CR 43.08* foundation requirements. 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 wit ness 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 mak ing the other statement.

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

1. Witness testifies that defendant is the person who robbed him.
2. Examiner asks the following questions:
   - **A.** *"Do you recall talking about this case with Officer X on March 15, 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* allow introduction of other evidence to show that the other statement was made, that it was different from trial testimony, that a witness who has made two different statements is untruthful, and that the testimony of such a witness should be disregarded. The adverse party may request a limiting admonition.

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

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

(h) *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 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.

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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*, Ky., 570 S.W.2d 627, 634 (1978), dissent. The judge has the duty to make sure that the jury is not misled. *KRE 403*. 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, 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.
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).

(c) 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 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 pro-

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tect 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. *Tamme v. Commonwealth*, Ky., 973 S.W.3d 13, 29 (1998).

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

(d) Any party can use subsection (c). Often a party will have an expert witness sit at counsel table or in the courtroom as a prelude to the expert's testimony based on observations made during trial or what the 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 a police officer is exempt from separation under Subsection 2, his relevant out of court statements are also exempted from the hearsay exclusionary rule because they are statements of the party's agent or servant concerning a matter within the scope of employment. *KRE 801A(b)(4)*. This means that relevant statements of the officer designated as a representative can be introduced without any showing of inconsistency or the *KRE 613(a)* foundation. •

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Rule 615

The Confrontation Clause, some say, was a reaction to the infamous seventeenth century trial of Sir Walter Raleigh. The redoubtable Raleigh was accused of high treason. An alleged coconspirator, Lord Cobham, was not called as a witness because he was imprisoned in the Tower of London. However, the Crown, over Raleigh's objection, was allowed to introduce in evidence an affidavit signed by Cobham asserting that both he and Sir Walter had been involved in a plot to overthrow Queen Elizabeth I and replace her with Arabella Stewart. Raleigh was convicted. (He wasn't beheaded, though. That happened many years later, as a punishment for subsequent transgressions.)

David F. Binder
Hearsay Handbook (3rd Ed. 1999) at § 7.01.

Article VII: Opinions and Expert Testimony

NOTES

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.

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 from which the jury can draw its own conclusions. However, opinions are routinely offered throughout the course of any trial. Article Seven regulates opinion testimony, and *KRE 701* limits opinions given by persons "not testifying as an expert." This Rule governs both lay witnesses and experts when they are not testifying as experts.

Rationally based on perception and helpful
Opinion or inference testimony by non-experts must be rationally based on the perception of the witness and 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). Kentucky considers the rule "more inclusionary than exclusionary." *Clifford v. Commonwealth*, Ky., 7 S.W.3d 371, 374 (1999).

Collective facts opinion
Some opinions are admissible chiefly because it is difficult to express certain subject matters without including opinion. The phrase "collective facts" is used to describe such situations. In *Bowling v. Commonwealth*, Ky. 926 S.W.2d 667 (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 the defendant gave him an "intense look." The Court held this testimony was based on perception and was helpful.

Lay witnesses in Kentucky have been allowed to opine as to the **speed of a moving vehicle**, the **age** of a person and whether that person was **intoxicated**, the degree of **physical suffering** endured by another, the **mental and emotional state** of another, and that upon arriving at the scene of a fire, the witness **smelled gasoline.** *Clifford v. Commonwealth*, Ky., 7 S.W.3d 371, 374 (1999).

Sanity
Another subject matter where non-expert testimony is allowed is sanity. In *Brown v. Commonwealth*, Ky., 932 S.W.2d 359 (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.

A non-expert witness can observe peculiar behavior and draw conclusions from that behavior. The real issue becomes whether such opinions and inferences are helpful to "determination of a fact in issue." 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*.

No opinion that defendant is guilty
No one may give an opinion as to guilt. *Meredith v. Commonwealth*, Ky., 959 S.W.2d 87, 92 (1997).

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

Lay technical opinion by non-experts
Defense counsel should not allow a trial court to use KRE 701 to allow "lay technical opinion" on a theory that such opinion meets the requirements of the Rule, personal knowledge, rational basis for the inference, and helpfulness to the jury. In *Griffin Industries, Inc. v. Jones*, Ky., 975 S.W.2d 100 (1998) the Kentucky Supreme Court agreed with the Court of Appeals that **the trial court erred when it allowed lay witnesses to testify regarding details of a screw conveyor system**. *Griffin* stands for the rule that If a person has experience or specialized knowledge, but does not qualify as an expert under *Daubert* or *Kumho Tire*, this **does not mean** he or she will automatically be allowed to express lay technical opinion under KRE 701. Obviously this would be a loophole big enough to swallow *Daubert* and *Kumho Tire* both.

Lay witness may testify another is intoxicated
A lay witness may testify on the basis of observation and appearance that another person was intoxicated at a given point in time. *Johnson v. Vaughn*, Ky., 370 S.W.2d 591, 593 (1963); *Howard v. Kentucky Alcoholic Beverage Control Board*, 294 Ky. 429, 172 S.W.2d 46 (1943); R. Lawson, The Kentucky Evidence Law Handbook, § 6.10, p. 281 (3rd ed. Michie 1993). *Motorists Mut. Ins. Co. v. Glass*, Ky., 996 S.W.2d 437, 464 (1997).

Lay witness may give opinion regarding crime scene
Mills v. Commonwealth, Ky., 996 S.W.2d 473, 488 (1999) Non-expert's opinion was rationally based on his own perceptions and helpful to the jury.

Lay witness may opine re marital sexual aids
Sgt. Johnson's descriptions of the sexual devices as "marital aids" and the activities portrayed in the videotape and photographs as "consenting adults having fun" were proper subjects of lay opinion, and were not prejudicial characterizations. *Springer v. Commonwealth*, Ky., 998 S. W.2d 439, 451 (1999).

Rule 702 Scientific Evidence & Experts.

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

COMMENTARY

PURPOSE/PREMISE:
This Rule specifies that as to matters of scientific, technical, or otherwise specialized, a properly trained or experienced person may testify to help the jury understand evidence or determine a fact in issue. First the topic must qualify as scientific, technical, or otherwise specialized. Only then may a witness qualified as an expert on that topic give an opinion and be excused, to a certain extent, from the personal knowledge requirement of *KRE 602*.

The key to understanding KRE 702 lies in *Daubert v. Merrill Dow Pharmaceuticals*
Under KRE 702 (which is identical to FRE 702) in order to qualify as "scientific knowledge," an inference or assertion **must be derived by the scientific method**. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2795, 509 U.S. 579, (1993) Faced with a **proffer** of expert opinion testimony, a trial judge must determine at the outset whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. *Daubert*, at 2796. In other words 1) is it science, and 2) is it relevant? *Id. Daubert* does not "presume to set out a definitive checklist or test." However, *Daubert* states clearly that "a **key question** to be answered in determining whether a theory or

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technique is scientific knowledge that will assist the trier of fact will be **whether it can be (and has been) tested.**" *Id.* (Emphasis added).

The old test, under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) was general acceptance within the field in which the science belonged. The problem with *Frye* was that it would allow astrology evidence based on general acceptance among astrologers. *Daubert* is much more focused on reliability of the underlying data and testing. Under *Daubert*, even evidence of a new, little known science can be admissible, if it has been tested and proved reliable.

What does *Daubert* actually say that a trial court must consider?

1) **TESTING** must be considered because testing is the KEY to *DAUBERT* in that "generating hypotheses and **testing them** to see if they can be falsified...**is what distinguishes science from other fields of human inquiry.**" *Id.* (Emphasis added); *Mitchell*, p. 102. Thus, when *Daubert* says the test for what constitutes science is "flexible" ***Daubert* does not mean a court can ignore whether a technique has been TESTED.** *Id.* 2797.

2) **PEER REVIEW AND PUBLICATION** can be considered but are not essential, like TESTING. This is where the flexibility comes in. Peer review and publication, unlike testing, are not what distinguishes science from fads and fancy, but *Daubert* is flexible and peer review and publication can be a "pertinent consideration." *Daubert* at 2797; *Mitchell*, p. 102.

3) A trial court "should consider" the **KNOWN OR POTENTIAL RATE OF ERROR AND THE EXISTENCE AND MAINTENANCE OF STANDARDS CONTROLLING THE TECHNIQUE'S OPERATION.** But under *Daubert* these are implicitly not as essential as TESTING. *Id.*

4) Finally, *Daubert* makes clear that **GENERAL ACCEPTANCE** in the relevant scientific community is ONLY A FACTOR, at best. *Id.*

Kentucky has adopted *Daubert*

Where a new or unusual method or principal is involved, a pre-trial hearing is *required*, and the principles of *Daubert v. Merrell Dow*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) apply. *Mitchell v. Commonwealth*, Ky. 908 S.W.2d 100, 101-102 (1995).

Kumho Tire Company Ltd. V. Carmichael* expands *Daubert

The good news is that *Kumho Tire Co. Ltd. V. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) s*ays the *Daubert* test applies not only to strictly scientific matters, but also to other technical or specialized knowledge. But the bad news is that *Kumho Tire* blurs the subtle weighting of the four factors above that Justice Blackmun so carefully stated in *Daubert*. Justice Breyer writes in *Kumho Tire* that *Daubert's* test of reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court... broad latitude....*Kumho Tire*, 119 S. Ct. at 1171.

Kumho Tire* muddies the *Daubert factors

The problem with Breyer's Opinion in *Kumho Tire* is that it tends to obscure the careful weighting of the four factors in *Daubert*, set out above, and could be interpreted to allow trial courts to pick and choose among the factors at will, and to substitute a loose, discretionary test for determining what is scientific. Unfortunately, the Kentucky Supreme Court has been quick to adopt a similar loose standard, stating, for instance, in *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 264 (1999) that in assessing scientific reliability "a court may consider one or more or all of the factors mentioned in *Daubert*, or even other relevant factors, in determining the admissibility of expert testimony."

However, while *Daubert* said the test is "flexible," *Daubert* did not say it was loosey-goosey. The extremely loose approach of *Kumho Tire* and *Johnson* is contrary to a strict reading of *Daubert*. Defense counsel should stick by *Daubert* whenever necessary to combat junk science that is aimed at harming a client.

Kentucky has adopted *Kumho Tire*

Kentucky has adopted *Kumho Tire* in *Goodyear Tire and Rubber Co. v. Thompson*, Ky., 11 S. W.3d 575 (2000).

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Kentucky has accepted reliability of some DNA testing
In *Fugate v. Commonwealth*, Ky., 993 S.W.2d 931 (1999) Kentucky finally accepted the scientific reliability of two types of DNA testing, the RFLP method and the PCR method. In *Fugate*, Kentucky took judicial notice of certain already-established science, and thus avoid the strictures of *Daubert.* Since they are now accepted as reliable, there is no longer a need for a full pretrial *Daubert* hearing as to the PCR or RFLP methods of testing DNA evidence.

Kentucky's reliance on Judicial Notice
In *Fugate*, the Kentucky Supreme Court determined that DNA evidence qualifies under *Daubert* because "the overwhelming weight of medical and legal authority accepts results of properly conducted DNA testing." *Id.* at 937. Thus, the Court held it would no longer require a pretrial *Daubert* hearing in every case involving the admission of DNA evidence using certain specified methods of analysis, and to that extent overruled *Mitchell v. Commonwealth*, Ky., 908 S.W.2d 100 (1995). *Id.* However, it should be noted that *Daubert* only allows judicial notice of "theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics...." *Daubert*, 113 S.Ct. 2786, n. 11. Arguably, perhaps, DNA testing fits this category. However, most, if not all, sciences are much less "firmly established" and for such matters judicial notice is not appropriate.

Kentucky errs insofar as it relies on general acceptance by *courts* instead of *scientists and testing*. Most scientific, technical or specialized knowledge involved in criminal cases, including many fields accepted by Kentucky's high court, may **seem** to be well-established theoretically and practically, but are not. See Michael J. Saks, "Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science," 49 *Hastings Law Journal*, 1069 – 1141.

Kentucky erroneously places burden on defendant
In Kentucky, the opponent of the evidence now has the burden to prove the evidence "is no longer deemed scientifically reliable." J*ohnson v. Commonwealth*, Ky., 12 S.W.3d 258 (1999) Defense counsel must now ask for *Daubert* hearings and be prepared to put on evidence to "disprove" the scientific reliability of a techniques. Counsel should object to the erroneous placement of the burden of proof on the defendant. Under *Daubert* the burden is on the proponent of the scientific evidence, not on the party seeking to keep it out.

Kentucky is trying to eliminate *Daubert* hearings, but ask for a *Daubert* hearing anyway!
Whenever there is a doubt, defense counsel should ask for a *Daubert* hearing where the factors in *Daubert* can be explored, *especially the question whether the technique has been tested and proven reliable.* Most if not all of the old familiar forensic identification techniques, including (despite *Johnson*) hair analysis, bite-mark identification, footprint analysis, handwriting analysis, and many if not all social science syndromes may be lacking in adequate underlying scientific testing and data needed to establish accuracy and reliability. Ask yourself, has this technique or theory been tested to see if it always applies, or in what percentage of cases it applies? If there have been no studies establishing satisfactory answers to these questions, you are not dealing with science as defined in *Daubert.*

Kentucky has stated that no hearing is required if the evidence sought to be admitted has long been accepted by Kentucky courts, and has gone so far as to list several scientific techniques which may be deemed in Kentucky to be reliable without the need for any *Daubert* hearing: **breath testing to determine blood alcohol content, HLA blood typing to determine paternity; fiber analysis; ballistics analysis; and fingerprint analysis.** *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999). Defense counsel should object to judicial notice as to any so-called but unproved science including those in the list above, and should insist that the Commonwealth has a burden to establish that these techniques have been tested and proved reliable.

To keep unfavorable, unreliable opinion testimony OUT
Under a strict reading of *Daubert*, to keep out unreliable so-called expert opinion, the defense should argue that regardless of any general acceptance, under *Daubert* TESTING is the KEY and the *sine qua non* to whether a matter is sufficiently reliable to support expert opinion testimony.

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Counsel should argue that the loose discretionary standard of *Kumho Tire* should be limited to its facts, to technical and specialized knowledge as opposed to true science. And as to true scientific knowledge, *Daubert* should be strictly applied, including the four factors above, with a tremendous emphasis on the requirement of TESTING. In this regard, Justices Scalia, O'Connor and Thomas state in their concurrence in *Kumho Tire* that while the *Daubert* factors may not be "holy writ," nevertheless "**in a particular case the failure to apply one or another of them may be unreasonable, and hence an abuse of discretion.**" 119 S.Ct. at 1179. Since *Daubert* identified TESTING is the "key" factor, defense counsel should point to the *Kumho Tire* concurrence and argue that a failure to require that a technique can be and has been proved reliable through TESTING is always an abuse of discretion.

To get favorable opinion testimony IN
Point to the "broad latitude" language in *Kumho Tire* and *Johnson v. Commonwealth*, come up with cases, preferably Kentucky cases, where the technique has been accepted in the past, and ask for judicial notice the technique has been generally accepted. Argue that *Daubert* is just a loose test, the court can pick and choose what factors to rely on, and no hearing is necessary under *Fugate* and *Johnson* because the technique is already accepted as reliable.

Bottom Line: to win in Kentucky you must convince the trial court.
Under *Goodyear Tire and Rubber Co. v. Thompson*, Ky., 11 S.W.3d 575, 577 (2000) trial court discretion is everything. The Court in *Goodyear Tire* upheld a trial court decision to exclude expert testimony by a Ph.D. in mechanical engineering regarding the design of an airplane wheel, because the improvements Hahn suggested had not been tested or subjected to peer review, and there was no known error rate to prove Hahn's design would have been better. Ironically, the trial court in this case did a bang-up job of applying *Daubert*, and it would be comforting to think that Kentucky's high court affirmed on that basis. But alas, as Chief Justice Lambert points out in dissent, the bottom line here was that under the majority opinion **only the view of the trial judge matters, and trial court discretion is now everything.**

Accident reconstruction
In *Allgeier v. Commonwealth*, Ky., 915 S.W.2d 745, 747 (1996), the Court upheld a decision to allow a police officer not qualified as a reconstructionist to give an opinion. And the Court of Appeals has held a witness need not have practical experience in a given industry to qualify as an expert. *Murphy v. Montgomery Elevator Co.*, Ky.App., 957 S.W.2d 297, 298 (1997).

Ballistics
In *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999) Kentucky held (in dicta) that trial courts may take judicial notice that ballistics is a reliable science. This is highly suspect, however, and defense counsel should demand *Daubert* hearings to challenge any possibly unreliable ballistics testing.

Blood spatter evidence
Though the court never qualified the witness as an expert, by the fact the court let him testify as to blood spatter evidence, the court has impliedly deemed that the witness is qualified. *Mills v. Commonwealth*, Ky., 996 S.W.2d 473, 487 (1999).

Breath testing
In *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999) Kentucky held (in dicta) that trial courts may take judicial notice that breath testing is a reliable science. This is highly suspect, however, and defense counsel should demand *Daubert* hearings to challenge any possibly unreliable breath testing.

Fiber analysis
In *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999) Kentucky held (in dicta) that trial courts may take judicial notice that fiber analysis is a reliable science. This is highly suspect, and defense counsel should demand *Daubert* hearings to challenge any possibly unreliable breath testing. See Michael J. Saks, "Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science," 49 *Hastings Law Journal*, 1069 – 1141.

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Fingerprint analysis
In *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999) Kentucky held (in dicta) that trial courts may take judicial notice that fingerprint comparison is a reliable science. This is highly suspect, however, because there has never been testing to prove the reliability of fingerprint comparison techniques, according to a recent presentation at the NAACP Legal Defense Fund July 2000 capital defense training. See also Michael J. Saks, "Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science," 49 *Hastings Law Journal,* 1069 – 1141. Defense counsel should demand *Daubert* hearings to challenge any possibly unreliable fingerprint identifications.

Hair analysis
Kentucky has recently used its judicial notice approach to find that hair comparison analysis is a reliable science. *Johnson v. Commonwealth*, Ky., 12 S.W.3d 258, 262 (1999) However, courts outside Kentucky have firmly rejected **hair analysis** due to a complete lack of evidence this is a reliable technique. See Michael J. Saks, *supra.*

Handwriting analysis
The FBI, after conducting post-*Daubert* testing on the reliability of handwriting analysis, has determined that it is not at all reliable, and as a result FBI policy now precludes the use of handwriting analysis in prosecuting its cases. Michael J. Saks, "Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science," 49 *Hastings Law Journal,* 1069 – 1141.

No need to qualify expert witness as an expert
Mills v. Commonwealth, Ky., 996 S.W.2d 473, 487 (1999) See above.

Okay, what if it *is* a science?
Even if a science has been tested and qualified under *Daubert* or *Kumho Tire*, counsel should still question the handling of the samples, the chain of custody, the accuracy of the procedures, the quality of training of those who conducted the specific tests and whatever other challenge could be made to the credibility of the evidence. Such complaint would go to the weight of the evidence, if not its admissibility. *Fugate v. Commonwealth*, Ky., 993 S.W.2d 931, 938 (1999).

Be aware: Even though Kentucky has accepted RFLP and PCR types of DNA testing as scientifically reliable, if the commonwealth is using some other DNA testing method, *e.g.*, mitochondrial DNA testing, a full-scale *Daubert* hearing will still be necessary. And in every case, even when dealing with a fully accepted science, there is always the possibility of lab error. Is the lab accredited? What is the error rate of the lab? Who performed the testing? Did they follow the appropriate protocols? And it is always permissible to attack the credentials of a proposed expert, even when the science is admittedly valid.

Marijuana, testing 6 of 98 plants okay
Taylor v. Commonwealth, Ky.App., 984 S.W.2d 482, 484 (1998) The fact the Commonwealth's witnesses did not testify it was cannabis, and only said it was marijuana was okay. Only six out of the 98 plants seized were tested at the state forensic lab. Taylor claimed since weight (more than eight ounces and less than five pounds) was an element, each plant used to determine the total weight must be tested. The court held to the contrary, relying on the theory that the element could be proved by circumstantial evidence.

Manufacture of cocaine
Kentucky has approved expert testimony by Lt. Mike Bosse, commander of Lexington's Police Narcotics Unit, on the relative commercial value of powder and crack cocaine, how crack cocaine is manufactured, and the methods for preparation and inhalation of both powder and crack cocaine. *Burdell v. Commonwealth*, Ky., 990 S.W.2d 628, 634 (1999) NOTE: the issue was unpreserved at the trial level.

Valuation of a claim
Motorists Mut. Ins. Co., v. Glass, Ky., 996 S.W.2d 437, 447 (1997). It was error to allow witness to express his opinion that the value of Glass's claim was between $900,000.00 and $1,250,000.00, although he admitted that he had no knowledge concerning jury verdicts in the community where this case was tried, but rather had used a computer program based on jury

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verdicts from all over the United States. This was in direct contravention of *Manchester Insurance & Indemnity Co. v. Grundy*, Ky., 531 S.W.2d 493 (1975), cert. denied, 429 U.S. 821, 97 S.Ct. 70, 50 L.Ed.2d 82 (1976). The test is what in the opinion of the expert a jury in the same community probably would have awarded at the time of the trial on liability.

Who qualifies as an expert? What is scientific or technical?

Three requirements
The language of the Rule suggests three requirements before a witness is allowed to testify as an expert: (1) the witness must be qualified by knowledge, experience, and/or training; (2) the subject matter 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.

Knowledge, experience, or training
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*, Ky., 922 S.W.2d 368, 371 (1995).

Specific applications

Police officer, gouge on door
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*, Ky., 915 S.W.2d 745, 747 (1996).

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

Credentials not always necessary
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 analyses that show white powder has cocaine in it, even though a lab technician probably could run the tests by following an instruction book.

In camera not always necessary
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 the witness can be cross-examined on qualifications before the jury hears what the witness has to say.

No need to tender witness, no need to announce expertise
It is not necessary to "tender" the witness as an expert. The judge must make a ruling on the preliminary question whether the witness is qualified as an expert. However, there is no provision either in *KRE 702* or in *104(a)* or *(b)* for the judge to *announce* that a witness is qualified. The jury has no right or need to know what that ruling is, and the judge should not "vouch" for an expert's qualifications.

Only requirement is helpfulness
The language of the Rule is sufficiently broad to cover even subject matters the jury might be able to understand on its own. The only requirement is that the expert's knowledge must be helpful.

Erroneous "DNA" argument
Meredith v. Commonwealth, Ky., 959 S.W.2d 87, 93 (1997), which was reversed for erroneous use of a DNA statistical calculation.

Jury may not need an expert
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*, Ky.App., 901 S.W.2d 876, 881 (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.*, Ky., 910 S.W.2d 247, 253 (1995). A jury does not need an expert on the issue of guilt, but may need one to help on medical condition. *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 890 (1997).

Assisting is not enough
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*.

Indicators of pedophilia are not science
In *Tungate v. Commonwealth*, Ky., 901 S.W.2d 41, 42-44 (1995), the court upheld exclusion of a psychiatrist's "profile" or list of "indicators" of pedophilia by saying that "it will require much more by way of scientific accreditation and proof of probity" to justify admission.

Cause of accident or fault of drivers
In *Renfro v. Commonwealth*, Ky., 893 S.W.2d 795 (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.

Sanity
An expert can give an opinion on sanity. *Cecil v. Commonwealth*, Ky., 888 S.W.2d 669, 674 (1994). But, see above, so can a lay witness.

Opinion re: lying
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).

Okay to criticize underlying method or theory
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).

Eyewitness identification
In a number of jurisdictions, 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). *Cf. Christie v. Commonwealth*, 2000 WL 968069 (not final) in which the Kentucky Supreme Court upheld a trial court's refusal to allow expert testimony on the pitfalls of eyewitness testimony.

Rule 703 Bases of opinion testimony by experts.

(a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data relied upon by an expert pursuant to subdivision (a) may at the discretion of the court be disclosed to the jury even though such facts or data are not admissible in evidence. Upon request the court shall admonish the jury to use such facts or data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

(c) Nothing in this rule is intended to limit the right of an opposing party to cross-examine an expert witness or to test the basis of an expert's opinion or inference.

COMMENTARY

PURPOSE/PREMISE:
The Commentary says "trial judges should take an active role in policing the content of the

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expert witness' direct testimony." An 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*.

An expert may rely on inadmissible evidence

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

Subsection (a) requires the judge to 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)*.

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

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

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

Admonition upon request

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."

Hypothetical questions are allowed

In medical malpractice action, assumed facts, within hypothetical questions, did not have to be based on oral testimony of persons present in the operating room. *Seaton v. Rosenberg*, Ky., 573 S.W.2d 333 (1978); *Mahaffey v. McMahon*, Ky., 630 S.W.2d 68 (1982).

Must be more probative than prejudicial

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).

No limit on cross-examination

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

Rule 703(c)

Get an admonition for harmful hearsay

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, *KRE 703(b)* could be a ground for relating these statements to the jury. If the judge decides the statements are necessary on direct examination or if cross examination brings them out, it is essential to obtain an admonition limiting the statements to only non-substantive use, as an explanation of the reason that the witness reached a particular conclusion. *Port v. Commonwealth*, Ky., 906 S.W.2d 327, 332 (1995), provides an example of a defense psychiatrist cross-examined by the prosecution.

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

PURPOSE/PREMISE:

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

An expert may testify as to an ultimate issue, if it will be helpful to the jury. Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies *Daubert*, (3) the subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702. *Stringer*, 891-892.

Rule 705 Disclosure of facts or data underlying expert opinion.

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

COMMENTARY

PURPOSE/PREMISE:

This rule permits the proponent of an expert witness some flexibility in the presentation of the expert's opinion or inference. Under this rule, the expert may give the opinion or make the inference before discussing the thought process that led to it or the factual basis for it. This is acceptable because *RCr 7.24(1)(b)* and *RCr 3(A)(i)* provide for pre-trial discovery of reports of scientific tests and experiments and of physical or mental examinations. Thus the adverse party knows of the opinion in advance and can object to the inference or opinion even before the witness testifies.

The rule is designed to give some leeway to the proponent of the expert, but leaves the final decision as to how the expert testifies to the judge. The judge can always "require otherwise."

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.

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

Ask to voir dire your opponent's expert

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

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opinion without previous disclosure of its basis.

Rule 706 Court appointed experts.

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

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

COMMENTARY

PURPOSE/PREMISE:
This 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. ■

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Article VIII: Hearsay

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

(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*, Ky. App., 890 S.W.2d 632, 635 (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,* Ky., 916 S.W.2d 148, 156 (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. Moseley v. Commonwealth, Ky.,* 960 S.W.2d 460, 461-462 (1997).

(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. Additionally, it is relatively clear that this exception/restriction applies to all witnesses, not just police officers. See, *Stringer v. Commonwealth,* Ky., 956 S.W.2d 883, 887 (1997); *Slaven v. Commonwealth,* Ky., 962 S.W.2d 845, 859 (1997).

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

(j) *Gordon v. Commonwealth,* Ky., 916 S.W.2d 178, 179 (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.* For example, an officer cannot relate the details of the radio dispatch that caused him to pull the defendant's car over, unless the defendant "opens the door" by claiming an improper motive in the stop. *White v. Commonwealth,* Ky., 5 S.W.3d 140, 142 (1999).

(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,* Ky., 916 S.W.2d 148, 157 (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.

(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;

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(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 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, Ky.*, 892 S.W.2d 594, 596 (1995). However, this applies only when the witness being impeached has "personal knowledge" of the issue inquired about. See *Askew v. Commonwealth*, Ky., 768 S.W.2d 51 (1989); *Meredith v. Commonwealth*, Ky., 959 S.W.2d 87, 91 (1997). However, where the supposed maker of the statement denies making the statement, which contains admissions by a third party, it is permissible to then call a witness to relate that the witness did make the

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statement. *Thurman v. Commonwealth*, Ky., 975 S.W.2d 888, 893 (1998). It is also improper to introduce the prior inconsistent statement through the police officer prior to the witness being called and examined about the supposed statement: it is improper to "predict" that the witness will say something inconsistent. *White v. Commonwealth*, Ky., 5 S.W.3d 140, 141 (1999).

(c) This premise led the drafters to reject the Federal Rule language that allows prior statements, but only those given "under oath" at legal proceedings or depositions. *Thurman v. Commonwealth*, Ky., 975 S.W.2d 888, 893-894 (1998).

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

(e) 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*, Ky., 920 S.W.2d 514, 516-517 (1995) and *Fields v. Commonwealth*, Ky.App., 904 S.W.2d 510, 512-513 (1995), the courts discussed 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 to "buttress testimony called into issue as a result of faulty memory, inability to observe or any of the host of reasons for challenging testimony." However, introduction of a portion of a prior written statement during cross-examination may allow the opponent to require the balance of the writing to be introduced pursuant to KRE 106, even if portions are otherwise consistent and otherwise inadmissible under KRE 801A(a)(2). *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 858 (1997).

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

(j) Kentucky has followed the U.S. Supreme Court analysis set out in *Tome v. U.S.*, 130 L. Ed.2d 574 (1995) which limits consistent statements to those made before the motive for fabrication existed. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 858 (1997).

(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 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 photopak. *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 that is governed by *KRE 804(b)(3)*.

(p) A party's own statement may be introduced against her whether the party appears to testify or not. *Hubble v. Johnson*, Ky., 841 S.W.2d 169, 172, Dissent (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*, Ky., 870 S.W.2d 219, 221 (1994).

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

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*, Ky., 916 S.W.2d 148, 158 (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*, Ky., 917 S.W.2d 574, 575 (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:

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.

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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*, Ky., 906 S.W.2d 694, 702 (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 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

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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 per-

son guilty of a crime punishable by death or imprisonment under the law defining the crime, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused.

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

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

COMMENTARY

PURPOSE/PREMISE

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

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*, Ky., 888 S.W.2d 669, 675 (1994). The time requirement for this exception is critical. It would appear that only a "slight lapse" of time is permitted, and the proponent of the evidence must prove the absence of more than the "slight lapse." The proponent of the evidence must establish this by more than "generally" questioning witnesses as to the circumstances: the testimony must be rather detailed. *Jarvis v. Commonwealth*, Ky., 960 S.W.2d 466, 469-470 (1998); *Sammy Fields v. Commonwealth*, Ky., 12 S.W.3d 275, 279-280 (2000).

KRE 803(2)

This is similar to the present sense exception except that it does not have the strict time limitation that the other exception has. In this situation, the statement must relate to a "startling" event or condition and must be made while the declarant is still "under the stress of excitement" caused by that event or condition. The requirements are what the rule says. The event must be of a startling 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*, Ky., 892 S.W.2d 299, 301-302 (1995); *Clark v. Hauck Mfg. Co.*, Ky., 910 S.W.2d 247, 252 (1995). It would appear that the Court will not be satisfied by an inference that the event must have been "startling" to the declarant: there must "evidence or testimony" to establish the criteria. *Jarvis v. Commonwealth*, Ky., 960 S.W.2d 466, 470 (1998).

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*, Ky., 858 S.W.2d 698, 708-709 (1993); *Partin v. Commonwealth*, Ky., 918 S.W.2d 219, 222 (1996). It is clear that the statement must relate to things being presently observed or felt at the time of the making of the statement, not merely relating to a recollection of the event. *Moseley v. Commonwealth*, Ky., 960 S.W.2d 460, 462 (1997); Slaven *v. Commonwealth*, Ky., 962 S.W.2d 845, 854 (1997); *Shepard v. United States*, 290 U.S. 96, 105 (1933).

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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*, Ky.App., 905 S.W.2d 510 (1995) and *Smith v. Commonwealth*, Ky., 920 S.W.2d 514 (1995), should have 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).* However, it would appear that details of the statements of children to treating physicians of therapists may continue to be admissible, including statements as to the identity of the perpetrator if he or she is a household member or in a position of special trust. *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883, 889 (1997); *Edwards v. Commonwealth*, Ky., 833 S.W.2d 842, 844 (1992).

(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*, Ky., 925 S.W.2d 449 (1996); Cf., *Stringer v. Commonwealth,* Ky., 956 S.W.2d 883, 888, 893-894 (1997) (psychologist who treated child for twenty-two sessions considered "treating counselor.")

KRE 803(5)

This is a standard hearsay exception which may be used once the proponent of the past recollection has shown that the witness has "insufficient recollection" to testify fully and accurately to matters which the witness once knew. If the "memorandum or record" was made or adopted

by the witness when the subject matter was fresh in the witness' memory and the memorandum or record reflects that knowledge correctly, it may be used by the witness as a basis either for refreshment or as the testimony of the witness. Note that this exception only allows use of a memorandum or record. These documents may be read into evidence, but only the adverse party may introduce them as exhibits. See: *Hall v. Transit Authority*, Ky.App., 883 S.W.2d 884, 887 (1994).

KRE 803(6)

The last of the major 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. For example, in *Kirk v. Commonwealth*, Ky., 6 S.W.3d 823, 828 (1999), a deceased medical examiner's autopsy report, including his opinions, was admissible. Authentication is governed by KRE 901(a) or 902(11). The second is the easier method. See: *Alexander v. Commonwealth*, Ky., 862 S.W.2d 856, 861-862 (1993); *Johnson v. Commonwealth*, Ky., 883 S.W.2d 482, 484 (1994); *Jones v. Commonwealth*, Ky.App., 907 S.W.2d 783 (1995); *Allgeier v. Commonwealth*, Ky., 915 S.W.2d 745, 747 (1996). However, opinions and findings contained in the records are not admissible if the maker of the record would not be allowed to testify about the result if he/she were present to testify. In the case of physical evidence that authentication evidence is lacking, the fact that the results are stored in the business records does not make those results admissible. *Rabovsky v. Commonwealth*, Ky., 973 S.W.2d 6, 9 (1998); *Sammy Fields v. Commonwealth*, Ky., 12 S.W.3d 275, 280, 284 (2000). Both the maker of the record and the person providing the information must have been acting under a business duty for the observation/statement to be admissible. If either the maker or the recorder is not under such a duty, that portion of the business record is not admissible. *Alexander*, at p. 461; *Prater v. CHR*, Ky., 954 S.W.2d 954, 959 (1997); *Rabovsky*, at p. 10. The rule also requires, even if the recorder is under some duty to record the information, that it must be the organization's normal business to do so – it may not be some isolated decision to record that type of data. *Rabovsky* at pp. 10 –11; *Sammy Fields* at p. 284.

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 that 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*, Ky., 875 S.W.2d 882 (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

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Rule 803(10)

matter of course as an exception to the hearsay rule. See: *Skeans v. Commonwealth*, Ky., 915 S.W.2d 455 (1995); *Prater v. CHR*, Ky., 954 S.W.2d 954, 958 (1997); *Skimmerhorn v. Commonwealth*, Ky.App., 998 S.W.2d 771, 776(1998).

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

KRE 803 (22)

This rule is used to excuse calling the court clerk when evidence of a final judgment is relevant. The judgment must, of course, be authenticated under *KRE 902* or some other rule or statute. *Pettiway v. Commonwealth*, Ky., 860 S.W.2d 766 (1993); *Skimmerhorn v. Commonwealth*, Ky.App., 998 S.W.2d 771, 777 (1998).

Rule 804 Hearsay exceptions: declarant unavailable.

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the declarant's statement;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement under belief of impending death. In a criminal prosecution or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a

claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statements of personal or family history.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) A statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

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 about 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 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). The fact that the Commonwealth has attempted to subpoena a witness without success is insufficient for the defendant's attempt to show that the witness is unavailable: the defendant must make his or her own independent efforts to have the witness served. *Justice v. Commonwealth*, Ky., 987 S.

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W.2d 306, 313 (1999).

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.
6. **Redaction:** The fact that prior testimony is admissible under an exception to the hearsay rule does not automatically mean it should be admitted during trial. Other rules, such as *KRE 103* principles, may preclude or limit its use. For example, redaction of previous testimony, and substitution of a neutral phrase for a prejudicial reference to another, notorious crime, was approved by the Supreme Court in *Hodge v. Commonwealth*, Ky., 17 S.W.3d 824 (2000). See, also, *Mills v. Commonwealth*, Ky., 996 S. W.2d 473 (1999); *Dillard v. Commonwealth*, Ky., 995 S.W.2d 366 (1999). When dealing with such prior testimony, the fact that a particular question or answer was not objected to at the time of the testimony obviously does not preclude a contemporaneous objection at the time such testimony is sought to be used.

   See *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998) (mere substitution in a non-testifying defendant's confession of blank spaces or the word "delete" in place of the name of a non-confessing co-defendant did not satisfy *Bruton* because the jury obviously knew whose name had been deleted).

   Police statements like "your story doesn't make sense," or "start tell the truth" indicating the cop does not believe the defendant **must be redacted.** *Commonwealth v. Kitchen*, 730 A.2d 513 (Pa.Supr.Ct. 1999). Admitting statements of this kind is very similar in impact to admitting a live witness's prosecutor's personal opinion about a defendant's guilt. Courts hold that admitting such opinion testimony is constitutional error because it may influence the jury and thereby deny the defendant a fair and impartial trial. Se also *State v. Demery*, Wash.Ct. App., No. 237792-II, 4/14/00.

(f) **Statement under belief of impending death: KRE 804 (b)(2).** In *Wells v. Commonwealth*, Ky., 892 S.W.2d 299, 302 (1995), the court held that statements made by the deceased to a 911 operator and to EMTs within minutes of the stabbing and later statements

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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*, Ky., 568 S.W.2d 927 (1978), case precedents antedating the adoption of this rule may be used. However, *KRE 804 (b)(3)* differs from the federal rule by explicitly requiring a high degree of trustworthiness for statements used for both inculpatory and exculpatory use. 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. The affected pecuniary or proprietary interests must not be too indirect or remote. *Slaven v. Commonwealth*, Ky., 962 S.W.2d 845, 854 (1998). To be against penal interests, the statement must relate to an actual criminal offense. *Slaven*, at p. 855.
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).
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*, Ky., 858 S.W.2d 172 (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. The generalized findings suggested by *Taylor v. Commonwealth*, Ky., 821 S. W.2d 72 (1990) would clearly seem insufficient. Indeed, even the Kentucky Supreme

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Court has recently acknowledged that the "*Taylor rule* " is probably unconstitutional. *Gill v. Commonwealth*, Ky., 7 S.W.3d 365, 367 (2000), citing *Lilly v. Virginia*, 527 U.S. 116, 119 S.Ct. 1187, 144 L.Ed.2d 117 (1999).

(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. *Thurman v. Commonwealth*, Ky., 975 S.W.2d 888, 893 (1998). An often used example for this Rule involves an excited utterance, *KRE 803(2)*, or statement for medical treatment, *KRE 803 (4)*, contained in a medical record. *KRE 803(6)*. As in all hearsay cases, qualification for exemption from the Hearsay Exclusionary Rule does not guarantee admissibility. *KRE 402; 403.*

Rule 806 Attacking and supporting credibility of declarant.

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

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

COMMENTARY

PURPOSE/PREMISE

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

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

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

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

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

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

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Rule 806

Right to Present a Defense

The sad truth is that in many countries around the world, criminal defendants are routinely convicted without an opportunity to present a defense. Even when the defendant is present at the trial, she may not be accorded any right to introduce exculpatory evidence on her own behalf. The "trial" is largely a charade. One of the distinguishing features of tyrannical government is the accused's lack of a right to present an effective defense.

Edward J. Imwinkelnied and Norman M. Garland
Exculpatory Evidence (2nd Ed. 1996)

Article IX: Authentication and Identification

NOTES

COMMENTARY

Article IX is a chapter that lists the many ways in which a proponent of documents, photographs, or other non-testimonial objects may introduce them. The chapter tells the proponent to introduce evidence to show that the object is what the proponent claims it is. Questions of relevance must be determined under Article IV, and if the object is a writing containing statements, it must satisfy one of the hearsay exceptions under Article VIII. This Article demonstrates the drafter's intent to avoid wasting time by calling needless witnesses simply to introduce a piece of paper or a photograph.

Rule 901 Requirement of authentication or identification.

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Non-expert testimony on handwriting. Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for the purposes of litigation

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular place or business if:

(A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the phone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form:

(A) Is in such condition as to create no suspicion concerning its authenticity;

(B) Was in a place where it, if authentic, would likely be; and

(C) Has been in existence twenty (20) years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by act of the General Assembly or by rule prescribed by the Supreme Court of Kentucky.

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

COMMENTARY

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*, Ky.App., 896 S.W.2d 914, 916 (1995); *Bell v. Commonwealth*, Ky., 875 S.W.2d 882, 886 (1994); *Rogers v. Commonwealth*, Ky., 992 S.W.2d 183, 187 (1999).

(a) 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. *Rabovsky v. Commonwealth*, Ky., 973 S.W.2d 6, 8 (1998); *Molette v. Personnel Board*, Ky.App., 997 S.W.2d 492, 495 (1999).

(b) There is no special chain of custody rule anymore, if there ever was one. In *Rabovsky*, the court noted that a chain is not necessary to qualify guns or other easily identified items for admission. A chain is required for blood, human tissue samples, drugs or similar items, but it does not have to be a "perfect" chain.

(1) The proponent must show that it is reasonably probable that the evidence has not been altered and that the substance tested was the substance seized or taken.

(2) Chain of custody defects ordinarily affect the weight of the evidence, not its admissibility.

(c) To authenticate a photo, a party must introduce evidence, through testimony primarily, that it accurately depicts the subject of the photograph. *Eldred v. Commonwealth*, Ky., 906 S.W.2d 694, 704 (1994).

(d) A replica may be introduced upon a showing that it is similar to the original object. *Allen v. Commonwealth*, Ky.App., 901 S.W.2d 881, 884 (1995) reproduces a foundation colloquy for replicas.

(e) Certainly a judge should be careful when admitting fungible material about which there is some question. KRE 403 applies in this determination and the judge may exclude evidence like cocaine or some other controlled substance if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading of the jury. The Commentary notes that the judge should take special care where it is likely that the jury may not be willing or able to decide the preliminary issue of identity before assigning probative value to the evidence. [Commentary, p. 101].

(f) Subsection (b) provides a list of illustrations that are purposely called illustrations. 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.

(g) 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.

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(h) 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.

(I) 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.

(j) Finally, a catchall authorizes proof by any other method authorized by law. An example is *KRS 422.300* which is a procedure for authenticating medical records without calling the records librarian. *Bell v. Commonwealth*, Ky., 875 S.W.2d 882, 887 (1994).

Rule 902 Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) of this rule, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign public documents. A document purporting to be executed, or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature of official position:

(A) Of the executing or attesting person; or

(B) Of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Official records. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by an official having the legal custody of the record. If the office in which the record is kept is outside the Commonwealth of Kentucky, the attested copy shall be accompanied by a certificate that the official attesting to the accuracy of the copy has the authority to do so. The certificate accompanying domestic records (those from offices within the territorial jurisdiction of the United States) may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, 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

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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 items have already been identified by some means or the other outside of court. The most important parts for purposes of criminal practice deal with public documents which may be introduced under *KRE 902(1)* or *(2)* upon seal and attestation of the keeper of the document. *Young v. Commonwealth*, Ky., 968 S.W.2d

670, 674 (1998); *Sroka-Calvert v. Watkins*, Ky.App., 971 S.W.2d 823, 828 (1998). 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*, Ky.App., 889 S.W.2d 49, 51 (1994); *Davis v. Commonwealth*, Ky., 899 S.W.2d 487, 489 (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. *Rabovsky v. Commonwealth*, Ky., 973 S.W.2d 6, 9 (1998); *Dillingham v. Commonwealth*, Ky., 995 S.W.2d 377, 383 (1999). In short, the custodian of business records need not be produced at trial. However, there is a notice requirement which requires the proponent to let the adverse party know that the record is coming in and to produce the record at such time before introduction that the adverse party has a "fair opportunity" to challenge it. For straight business records, the certification must be a "written declaration under oath subject to the penalty of perjury."

Although *KRE 902(11)* can be used to admit hospital records, better practice might be to follow the procedure under *KRS 422.300* to *422.330* which will guarantee the subject of the medical records at least some measure of privacy before trial.

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

Rule 903 Subscribing witness' testimony unnecessary.

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

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

COMMENTARY

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

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Article X: Contents of Writings, Recordings, and Photographs

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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.

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COMMENTARY

The best explanation of this rule is found in the Commentary. "The best evidence rule is applicable only when the offering party is trying to prove the contents of a writing, recording, or photograph. If such an item is being used at trial for some other purpose, the provisions of this Article have no application." Commentary, p. 109. The Commentary also notes that where photographs are simply used to illustrate a witness's testimony, they are not being used to prove their contents, and therefore the best evidence rule does not apply. Commentary, p. 109-110. However, where photographs are used to show, for example, the scene of an offense, or to show the location of an object within a room, it is being used to show the truth of some proposition and therefore the rule must apply.

Rule 1003 Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless:
(1) A genuine question is raised as to the authenticity of the original; or
(2) In the circumstances it would be unfair to admit the duplicate in lieu of the original.

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. *Skimmerhorn v. Commonwealth*, Ky.App., 998 S.W.2d 771, 776 (1998).

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. 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.

Rule 1007 Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the non-production of the original.

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

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COMMENTARY

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

Rule 1008 Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of KRE 104. However, when an issue is raised:

(a) Whether the asserted writing ever existed;

(b) Whether another writing, recording, or photograph produced at the trial is the original;

(c) Whether other evidence of contents correctly reflects the contents,

the issue is for the trier of fact to determine as in the case of other issues of fact.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 72; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

This rule sets out a special description of duties for the judge and the jury. Ordinarily, the question of admissibility is for the judge under *KRE 104(a)*. This involves questions arising under *KRE 1004, 1001(4)* and *1003*. Ordinary questions of conditional relevancy must be left to the jury under *KRE 104(b)*. The judge's duty is simply to make a determination that the proponent has introduced enough evidence that the jury reasonably could conclude that one of the exception rules is met. •

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Rule 1008

Consequences of Constitutional Right to Present a Defense

Important direct and indirect consequences flow from the constitutionalization of the accused's right to present defense evidence.

The direct consequence is that defense counsel now have a constitutional argument for overriding exclusionary rules in the form of statutes, common law decisions, or court rules. In our legal hierarchy, a constitutional provision is of higher dignity than a statue or common law rule. In the event of a conflict between a constitutional provision and either a stature or common law rule, the constitutional provision prevails. Hence, when an exclusionary rule in any of those three forms blocks the admission of important defense evidence, the defense can argue that the constitutional right to present defense evidence preempts the rule.

Edward J. Imwinkelnied and Norman M. Garland
Exculpatory Evidence (2nd Ed. 1996)

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 in 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 de-

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nied or revoked based only on the say so of an officer who has received a phone call from a prosecuting witness who says that the defendant has done something bad. While this may have been the practice in some courts in Kentucky before the enactment of the rules, it certainly should not be. Section 25 of the Constitution prohibits involuntary servitude "except as a punishment for crime, whereof the party shall have been duly convicted." The liberty interest of the defendant who is clothed with the presumption of innocence at this point demands that the determination of the amount of bail be made with the same accuracy required for determination of guilt or innocence. Bail hearings should be hearings requiring the presence of witnesses with personal knowledge subject to cross-examination.

Rule 1102 Amendments.

(a) Supreme Court. The Supreme Court of Kentucky shall have the power to prescribe amendments or additions to the Kentucky Rules of Evidence. Amendments or additions shall not take effect until they have been reported to the Kentucky General Assembly by the Chief Justice of the Supreme Court at or after the beginning of a regular session of the General Assembly but not later than the first day of March, and until the adjournment of that regular session of the General Assembly; but if the General Assembly within that time shall by resolution disapprove any amendment or addition so reported it shall not take effect. The effective date of any amendment or addition so reported may be deferred by the General Assembly to a later date or until approved by the General Assembly. However, the General Assembly may not disapprove any amendment or addition or defer the effective date of any amendment or addition that constitutes rules of practice and procedure under Section 116 of the Kentucky Constitution.

(b) General Assembly. The General Assembly may amend any proposal reported by the Supreme Court pursuant to subdivision (a) of this rule and may adopt amendments or additions to the Kentucky Rules of Evidence not reported to the General Assembly by the Supreme Court. However, the General Assembly may not amend any proposals reported by the Supreme Court and may not adopt amendments or additions to the Kentucky Rules of Evidence that constitute rules of practice and procedure under Section 116 of the Constitution of Kentucky.

(c) Review of proposals for change. Neither the Supreme Court nor the General Assembly should undertake to amend or add to the Kentucky Rules of Evidence without first obtaining a review of proposed amendments or additions from the Evidence Rules Review Commission described in KRE 1103.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 74; amended 1992 Ky. Acts ch. 324, sec. 26; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

(a) This provides that both the Supreme Court and the General Assembly may propose rule changes. It recognizes that rules of evidence, with the exception of privileges, are primarily issues of practice and procedure and therefore are assigned to the Supreme Court of Kentucky under Section 116 of the Constitution. However, this rule also points out that any proposed changes should be presented to the Evidence Rules Commission authorized by *KRE 1103*.

(b) Not all changes in evidence law come about by rule modification. In *Stringer v. Commonwealth*, Ky., 956 S.W.2d 883 (1997), the Supreme Court did away with the "ultimate issue" prohibition in expert testimony cases, a principle which was not covered by any specific rule. The court reasoned that evidence principles not preempted by enactment of rules remain within the court's authority to change by case precedent as long as the court does so with due regard to rules of evidence in existence. *Mullins v. Commonwealth*, Ky., 956 S.W.2d 210 (1997) and *Weaver v. Commonwealth*, Ky., 955 S.W.2d 722 (1997) are other examples.

Rule 1103 Evidence rules review commission.

(a) The Chief Justice of the Supreme Court or a designated justice shall serve as chairman of a permanent Evidence Rules Review Commission which shall consist of the Chief Justice or a designated justice, one (1) additional member of the judiciary appointed by the Chief Justice, the chairman of the Senate Judiciary Committee, the chairman of the House Judiciary Committee, and five (5) members of the Kentucky bar appointed to four (4) year terms by the Chief Justice.

(b) The Evidence Rules Review Commission shall meet at the call of the Chief Justice or a designated justice for the purpose of reviewing proposals for amendment or addition to the Kentucky Rules of Evidence, as requested by the Supreme Court or General Assembly pursuant to KRE 1102. The Commission shall act promptly to assist the Supreme Court or General Assembly and shall perform its review function in furtherance of the ideals and objectives described in KRE 102.

HIST: Enacted 1990 Ky. Acts ch. 88, sec. 75; amended 1992 Ky. Acts ch. 324, sec. 27; renumbered (7/1/92) pursuant to 1992 Ky. Acts ch. 324, sec. 34.

COMMENTARY

The Evidence Rules Commission is the initial screening body that will review any proposals to change the Kentucky Rules of Evidence. It serves an important function but has never met. 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)* and in Underwood's *Manual.*

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

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NOTES

The Right to Present the Defense Evidence

There is nothing that astonishes man so much as common sense and plain dealing.

— Ralph Waldo Emerson

The right to present a defense is as American as apple pie. Defendants are constitutionally entitled to:

- be heard,
- effectively present evidence central to their defense,
- call-witnesses to testify on their behalf,
- rebut evidence presented by the prosecution.

Many of the Kentucky Rules of Evidence are the result of these rights. Much of Kentucky caselaw implements these rights. Fundamentally, Sections 2 and 11 of the Kentucky Constitution and the 6th and 14th Amendments of the United States Constitution guarantee these rights.

Some think that they cannot present or exclude evidence if the KREs do not allow. But that is not the case. The client's constitutional right to present a defense is more fundamental than the KREs and allows the introduction of evidence even if not allowed by the KREs or requires the exclusion of evidence even if not required by the KREs. The reliability of the jurors' verdict on guilt or innocence and on the degree of guilt and on the extent of punishment requires that a defendant be permitted to fully be heard, to fully present his defense, to rebut prosecution evidence, to call witnesses.

The right to present a defense is constitutionally guaranteed. The sacred right to present a defense is ingrained in our system of justice. After a long history of development, the common law in England "recognized that the accused has a right to present a defense at trial." Imwinkelried, *Exculpatory Evidence* (1996) at 1.

The United States Supreme Court has found the right to effectively present a defense to be constitutionally required. Evidentiary rules cannot prevent a defendant from presenting his defense. *Chambers v. Mississippi*, 410 U.S. 284 (1972). In *Chambers,* Leon Chambers was charged with shooting a policeman in a crowded bar and alley while the policeman was there to arrest another man. Chambers' defense was that he was innocent. He had two grounds to show his innocence: he did not shoot the policeman, Gable McDonald shot the officer. McDonald confessed that he killed the officer but repudiated the confession. Chambers called McDonald to testify at trial but was prevented from cross-examining him as an adverse witness because of Mississippi's common law rule prohibiting impeachment of your own witness. Chambers sought to introduce testimony from 3 witnesses to the effect that McDonald admitted he killed the officer to them or made incriminating statements to them. The trial judge refused to allow those witnesses' testimony, as the testimonies were hearsay. "As a consequence of the combination of Mississippi's 'party witness' or 'voucher' rule and its hearsay rule, [Chambers] was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated complicity." *Id.* at 294.

The Court held that the exclusion of the defense evidence because it was hearsay and because it violated the voucher rule was an unconstitutional denial of the right to show another person did the crime, which was the defendant's defense. The Court noted that the hearsay statements were made under circumstances that "provided considerable assurance of their reliability." *Id.* at 300. This included spontaneity of the statements, corroboration of the statements, the number of independent confessions, the statements were against the interest of McDonald. The Court said," The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* at 294.

Chambers teaches that state evidence rules or common law caselaw that prevent admission of evidence must fall if a defendant is prevented by them of presenting his defense. Just as significant, Chambers teaches that prevailing requires thorough litigating. Reading the opinion of the United States Supreme Court reveals that the defense attorney litigated this issue prior to trail via motion practice, in court and from multiple perspectives. It is a lesson in the ingredients of persuasion.

Kentucky has recognized that an indigent defendant is entitled, when a proper showing is made, to funds for a mental health expert to "conduct an appropriate examination and assist in the evaluation, preparation and presentation of the defense." *Binion v. Commonwealth*, Ky., 891 S.W.2d 383, 386 (1995). The court recognized "that in an adversarial system of criminal justice, due to process requires a level playing field at trial...there is a need for more than just an examination by a neutral psychiatrist. It also means that there must be an appointment of a psychiatrist to provide assistance to the accused to help evaluate the strength of his defense, to offer his own expert diagnosis at trial, and to identify weaknesses in the prosecution's case by testifying and/or preparing counsel to cross-examine opposing experts."

Defendants have a constitutional right to rebut prosecution evidence. The United States Supreme Court has repeatedly held that 14th Amendment due process provides defendants the right to *rebut* the prosecution's evidence.

In *Ake v. Oklahoma,* 470 U.S. 68, 83 (1985) the Court held that a defendant charged with capital murder was entitled to funds to hire a psychiatrist to effectively present evidence of his defense of insanity. But the Court also looked at the penalty phase and held that Ake was also entitled to have the assistance of a psychiatrist on the issue of the aggravating factor of future dangerousness, which was a significant factor in the penalty phase. In effect, the Court held that the defendant was entitled under the due process clause to the ability to mitigate or rebut the state's evidence in aggravation. "Ake also was denied the means of presenting evidence to rebut the State's evidence of his future dangerousness." Id. at 83. The principle which underlies this ruling is significant. "This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness...." *Id.* at 76.

In *Gardner v. Florida*, 430 U.S. 349 (1977) the defendant was convicted of murder. In imposing the death penalty, the trial judge said he relied on parts of the presentence investigation report, which were confidential and not disclosed to defense counsel. The Court noted that the sentencing process must satisfy due process requirements capital case, and held that Daniel Gardner was "denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362. We learn from *Gardner* that fundamental due process requires a defendant the opportunity to deny or explain evidence used against him.

The rule of law of *Gardner* has been applied by the Supreme Court in other situations. In *Skipper v. South Carolina*, 476 U.S. 1 (1986) the defendant was convicted of murder and rape and sentenced to death. In the penalty phase Ronald Skipper presented testimony through himself and his former wife that he had behaved well during his over 7 months in jail awaiting trial and tried unsuccessfully to present the testimony of two jailers and a regular visitor that he had adjusted well in jail during the time between arrest and trial. The trial judge ruled that such evidence was irrelevant. During closing argument the prosecutor said that Mr. Skipper, if sentenced to prison, would likely rape other prisoners and be a disciplinary problem in prison. The Court held that evidence of good behavior was admissible as mitigation under *Lockett* and *Eddings* but also determined that the defendant was entitled to rebut, deny, explain prosecution evidence of future dangerousness. "Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' *Gardner v. Florida*, 430 U.S. 349, 362 (1977)." *Id.* at 5 n.1.

In Kentucky, the right to rebut is often termed the right to respond when the opponent has opened the door. The right to respond includes the right to respond to evidence that should not have been originally admitted. In *Commonwealth v. Alexander*, Ky., 5 S.W.3d 104 (1999) a Sheriff's Deputy was convicted of reckless homicide when his cruiser which was travelling at over 95 miles per hour collided with the victim's car, as the Deputy was responding to an emergency call. At trial Sergeant Simms testified for the prosecution about his investigation of the scene. On cross-examination, defense counsel asked Simms questions to show the investigation report indicated that the victim, not the Deputy was at fault in the collision. On redirect, the prosecutor asked Simms if he still believed the victim was at fault. The defense unsuccessfully objected and Simms testified that upon further investigation, he believed the Deputy was at fault because of his excessive speed within a city. The issue on appeal was whether Simms could offer his opinion on an ultimate issue for the jury.

The Kentucky Supreme Court recognized the manifest fairness of allowing a party to respond to what the other party has chosen to open up. "We agree with the Commonwealth that the defense did, in fact, 'open the door' by asking Sergeant Simms his opinion about who was at fault for the collision. In *Dunaway v. Commonwealth*, Ky. 239 Ky. 166, 39 S. W.2d 242, 243 (1931), our predecessor Court held: 'It is an established and recognized rule of practice that a party to litigation, who first introduces into the trial of the case either irrelevant or incompetent evidence cannot complain of the subsequent admission by the court of like evidence from the adverse party, relating to the same matter.'" *Id.* at 105-106.

The Court also determined that there was no requirement that the prosecution had to object when the door was opened in order for a trial judge to be able to allow responsive evidence. "The Commonwealth's limited redirect examination regarding the cause of the collision became relevant and admissible pursuant to KRE 401 and 402 once defense counsel opened the door to this line of inquiry." *Id.* at 106.

The lesson of *Alexander* is that commonsense ideas of fair play in the hands of a skilled litigator insure that the factfinders will hear both sides of the story and not a skewed set of facts.

Defendants are constitutionally entitled to present exculpatory evidence. In *Crane v. Kentucky*, 476 U.S. 683 (1986) the16-year-old defendant's pretrial motion to suppress the confession was denied At trial, Major Crane tried to show his confession was not worthy of belief in light of the affects of the psychological and physical conditions (windowless room, protracted length of questioning, involvement of 6 officers, refusal to allow him to call his mother) in the taking of his confession by the police. The trial judge said such evidence was inadmissible since it only related to the voluntariness of the confession, which he had previously ruled on. The defendant was convicted of murder and sentenced to 40 years.

On appeal, the Kentucky Supreme Court held that "once a hearing is conducted pursuant to RCr 9.78 and a finding is made by the judge based on substantial evidence that the confession was voluntary, that finding is conclusive and the trail court may exclude evidence relating to voluntariness from the consideration by the jury when the evidence has little or no relationship to any other issue. This shall not preclude the defendant from introduction of any competent evidence relating to authenticity, reliability or credibility of the confession." *Crane v. Commonwealth*, Ky., 690 S.W.2d 753, 755 (1985).

The United States Supreme Court held that it was error to prevent jurors from hearing exculpatory testimony about the environment in which the defendant's confession was taken by the police since the manner in which it was taken was relevant to the reliability and credibility of the confession. The Court stated that whether found in the 14th amendment due process clause or the 6th amendment's confrontation and compulsory process clauses "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Id.* at 690. In explaining what that meant, the Court said: "That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" *Id.* at 690-91.

We learn from *Crane* that a Kentucky Rule of Criminal Procedure and the interpretation of it by the Kentucky Supreme Court cannot stand in the way of a defendant's ability to present his full side of the story to the factfinders.

Right to confront witnesses and show testimony false. In *Olden v. Kentucky*, 488 U.S. 227 (1988) the trial judge refused to allow a black defendant in his kidnapping, rape, and sodomy trial to cross-examine the white complaining witness regarding her cohabitation with a black boyfriend. The Court held this prohibition violated the 6th amendment right to confrontation of a witness to show the falsity of the witness' testimony. The excluded evidence was relevant to the defense that the black defendant and the white complainant were engaged in a consensual sexual relationship and that the complainant lied in saying the black defendant raped her out of fear of jeopardizing her relationship with her boyfriend. The Court explained its ruling by emphasizing that "'the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Id.* at 231.

It is clear that "'a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors... could appropriately draw inferences relating to the reliability of the witness.'" *Id.*

"The credibility of a witness' relevant testimony is always at issue, and the trial court may not exclude evidence that impeaches credibility even though such testimony would be inadmissible to prove a substantive issue in the case." *Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534, 545 (1988).

Constitutional Right of Defense to test inculpatory and exculpatory evidence. In *James v. Commonwealth*, Ky., 482 S.W.2d 92, 94 (1972) the Court held that a defendant charged with illegal sale of narcotics was entitled to have a sample of the substance for inspection with his own chemist under Kentucky discovery rules and to avoid a "cat and mouse game whereby the Commonwealth is permitted to withhold important information requested by the accused..."

The defendant in *Green v. Commonwealth*, Ky.App., 684 S.W.2d 13, 16 (1984) was charged with possession of a Schedule II controlled substance. The state crime lab unnecessarily consumed the entire substance in testing it. The Court of Appeals observed that defense testing is implicitly authorized under Kentucky's discovery rules. It held under the 14th Amendment due process and Section 11 of Kentucky's Constitution that "the unnecessary (though unintentional) destruction of the total drug sample, after the defendant stands charged, renders the test results inadmissible, unless the defendant is provided a reasonable opportunity to participate in the testing, or is provided with the notes and other information incidental to the testing, sufficient to enable him to obtain his own expert evaluation. Therefore, the trial court, having refused production of the lab's notes, the test results (as testified to by forensic chemist, John Harris) regarding the portion of the 'small, pink, round tablet', should have been suppressed."

In *McGregor v. Hines*, Ky., 995 S.W.2d 384, 388 (1999) the Court determined that the defendant who comes into possession of evidence had a due process right to have his own expert test the evidence and does not have to first turn over the evidence to the prosecution's expert. In this case, the testing by the state expert would have consumed the evidence. The defense expert's more sophisticated testing process would not have consumed the evidence. In a strongly worded statement, the Court determined that the defense should have the evidence to test even if both its and the state's testing methods would have consumed the evidence. "It is crucial to a defendant's fundamental right to due process that he be allowed to develop and present any exculpatory evidence in his own defense, and we reject any alternative that would imperil that right."

A defendant is constitutionally entitled to present evidence in mitigation and statutorily entitled to present evidence of leniency. Even if a court finds evidence not admissible in the guilt/innocence phase of a case, evidence which lessens culpability is clearly admissible in the sentencing phase before jurors.

Under the change in KRS 532.055(2)(b), which became effective July 15, 1998, "The defendant may introduce evidence in mitigation or in support of leniency...."

There is constitutional support for this statutory provision. In *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) the Court held it unconstitutional to exclude the relevant evidence in mitigation of punishment of the defendant's good behavior in jail from the time of arrest until trial.

Evidentiary bars must fall to the right to present a defense. In *Green v. Georgia*, 442 U.S. 95, 97 (1979) Roosevelt Green, Jr.'s defense was that he was not present when the victim was killed and was not a participant in her death. Green was prevented from introducing in the penalty phase of his capital trial a statement made by a witness who had testified for the state at the codefendant's trail to the effect that the codefendant admitted to he killed the victim. Since it was hearsay. Georgia allowed admission of declarations against pecuniary but not penal interest. According to the United States Supreme Court, the state had no legitimate reason to keep from the jurors evidence which helps them assess the defense presented by the defendant. Fourteenth Amendment due process requires that a state evidentiary bar to admission must fall when evidence is "highly relevant to a critical issue.... and substantial reasons existed to assume its reliability." *Id.* at 97. Those reasons included; the witness' statement was spontaneously made, it was against interest, the state used the evidence against the codefendant.

In reversing, the Court citing *Chambers* said, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 97. See also *Gilmore v. Henderson*, 825 F.2d 663, 665-667 (2d Cir. 1987) (constitutional error to exclude the testimony of witnesses that provided exculpatory testimony and testimony that would have contradicted another's testimony).

Procedural failures cannot bar right to present defense. In *United States v. Foster*, 128 F.3d 949 (6th Cir. 1997) the defense attorney failed to timely subpoena a grand jury witness who would have testified to exculpatory evidence. The trial judge refused to allow the introduction of the grand jury transcript due to the defense's failure to preserve its request for the testimony meant the witness was not unavailable under Federal Rule of Evidence 804(b)(1). Despite the failure of the defense to fully preserve the error, the Sixth Circuit reversed the conviction. The judge's failure to allow the defense to introduce exculpatory grand jury evidence "could have had a significant impact on the jury's verdict." *Id.* at 956.

Fair trials require full presentation of the defense. Our Constitutions insure that a defendant is allowed to present his defense which exculpates him from guilt or exonerates him from a greater degree of guilt or punishment or rebuts harmful prosecution evidence. Defendants deserve to have jurors understand their defense before they render their verdict so their decision is reliable. The public wants verdicts that are correct so they have confidence in them. Full presentation of the defense insures fair process and reliable results. Plain dealing in the presentation of evidence under common sense themes will prove compelling. •

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