The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

Volume 30, Issue No. 5 November 2008

Department of Public Advocacy

EVIDENCE MANUAL

6th Edition

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

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

The Advocate is a bi-monthly (January, March, May, July, September, November) publication of the Department of Public Advocacy, an independent agency within the Justice & Public Safety 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.

The Advocate strives to present current and accurate information. However, no representation or warranty is made concerning the application of the legal or other principles communicated here to any particular fact situation. The proper interpretation or application of information offered in *The Advocate* is within the sound discretion and the considered, individual judgment of each reader, who has a duty to research original and current authorities when dealing with a specific legal matter. *The Advocate*'s editors and authors specifically disclaim liability for the use to which others put the information and principles offered through this publication.

Department of Public Advocacy
Education & Development
100 Fair Oaks Lane, Suite 302
Frankfort, Kentucky 40601
Tel: (502) 564-8006, ext. 236
Fax: (502) 564-7890
E-mail: Lisa.Blevins@ky.gov

Paid for by State Funds. KRS 57.375

Summary of Table of Contents

TABLE OF CONTENTS

PREFACE TO 6TH EDITION

In almost four years since this manual was last updated, the Kentucky Supreme Court has amended KRE 103(a) changed 404(a)(1), 410, and 407 to require specific objections with stated grounds, eased the rules on avowal evidence, added provisos to both lay and expert opinion rules in KRE 701 and 702, and adopted KRE 406, allowing for habit evidence. In addition, the Kentucky Court of Appeals, Kentucky Supreme Court, 6th Circuit, and U. S. Supreme Court have issued hundreds of new opinions. The 6th Edition covers new developments, an expanded *Daubert* section, and tips on "federalizing" evidence issues for federal court review.

The Advocate Evidence Manual has provided quick answers to evidence questions for over 15 years. Louisville Metro defender J. David Niehaus served as primary author of the first five editions. The current edition updates and builds on his work.

Susan Jackson Balliet and Euva May
DPA Appeals Branch ■

A Note on Unpublished Opinions: Unpublished opinions are cited as examples rather than authorities. In some cases, however, unpublished opinions cited represent the only decision available on the specific issue. Should they be needed as authorities, an attorney should know that, effective January 1, 2007, CR 76.28(4) was amended to say: "...unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action." Also, a couple of important opinions were not yet final at the time of publication. Counsel should check on the status of those cases before citing them.

Abbreviations Used

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

ARTICLE 1: GENERAL PROVISIONS

NOTES

KRE 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.

DISCUSSION:
Kentucky's evidence rules apply in all the courts of justice of Kentucky, but not in all proceedings.

- **(a)** Under KRE 1101 the Rules of Evidence **do not apply** in preliminary hearings, grand jury proceedings, small claims, summary contempt, extradition, rendition, sentencing, probation, warrants, summonses, or bail proceedings. See Article 11.
- **(b) Privileges do apply in all proceedings.** See Article 5.
- **(c)** In cases where no particular rule applies, Ky. Const. §§ 116 and 233 mandate application of the common law of evidence. *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky. 1997). Such instances are rare.

KRE 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.

DISCUSSION:
KRE 102 calls for liberal interpretation of the rules, with the aim of saving time and money, while achieving the stated goals of fairness, truth, and justice. *Miller ex rel, etc. v. Marymount Medical Center,* 125 S.W. 3d 274 (Ky. 2004).

- **(a)** KRE 102's mandate to promote "growth and development of the law of evidence" is not an invitation to trial judges to make law. Under §116 of the Kentucky Constitution, the Supreme Court retains exclusive authority over court rules. "Growth and development" emerges from opinions interpreting the rules and the rules-creation-and-amendment process established in KRE 1102 and 1103. *Weaver v. Alexander,* 955 S.W. 2d 722 (Ky.1997).
- **(b)** KRE 102, 403, and 611 give judges substantial authority to admit or exclude evidence. KRE 102 allows broad leeway for a judge to decide whether the probative value of evidence is worth its cost in time, expense, or jury confusion.
- **(c)** The Supreme Court of Kentucky looks first to the "**plain language**" of a statute or rule. *See, Garrett v. Commonwealth,* 48 S.W.3d 6, 12 (Ky.2001). Since adoption in 1992, not one of Kentucky's Rules of Evidence has been successfully challenged as ambiguous.
- **(d) Avoid citing pre-June 1992** Kentucky opinions on evidence. There is almost always a more recent opinion construing rule language.
- **(e) Retroactivity**. Admissibility is a procedural issue. Therefore opinions construing evidence questions are retroactive. *Commonwealth v. Alexander*, 5 S.W.3d 104, 106 (Ky.1999).
- **(f) Section 2 of the Kentucky Constitution prohibits arbitrariness**, and governs the conduct of every government agent and public officer, including judges. *Kroger Company v. Kentucky Milk Marketing Comm.*, 691 S.W.2d 893, 899 (Ky.1985). Any evidence rule that is arbitrary would violate Section 2 of the state constitution.
- **(g)** Kentucky's constitutional **separation of powers** mandated by Ky. Const. §§27, 28, & 116 prevents enactment of statutes that purport to declare evidence admissible. *O'Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky.1995).
- **(h)** Kentucky courts will consider **federal precedents** in construing Kentucky rules, because Kentucky's evidence rules are modeled on the federal rules. *Roberts v. Commonwealth*, 896 S.W.2d 4 (Ky.1995).

(i) Written notice to the Attorney General? KRS 418.075 requires written notice to the AG whenever a **statute** or regulation is challenged as unconstitutional (as written or applied). *Benet v. Commonwealth*, 253 S.W.3d 528 (Ky.2008). KRS 418.075 does not apply to challenges to evidentiary rules, or application of evidentiary rules. **Rules are not statutes.** They are promulgated by the Kentucky Supreme Court. The failure of a litigant to notify the AG of an attack on the constitutionality of a statute in no way affects the Kentucky Supreme Court's jurisdiction or ability to reach a constitutional issue. *Stewart v. William H. Jolly Plumbing Co.*, 743 S.W.2d 861 (Ky.App.1988).

Preserving for federal review

(j) "Where constitutional rights directly affecting the ascertainment of guilt are implicated," evidence rules "may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (hearsay should **not** have been excluded); *cf., Ege v. Yukins*, 485 F.3d 364 (6th Cir.2007) (bite mark evidence violated due process, and **should have been excluded**). "Regardless of whether the proffered testimony comes within ... [Georgia's] hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause ...." *Green v. Georgia*, 442 U.S. 95, 97 (1979).

(k) Constitutional rights trump evidence rules. The 6th and 14th Amendment right to present a defense trumps a state evidence rule. *Rogers v. Commonwealth*, 86 S.W.3d 29, 38-39 (Ky.2002) (permitting reference to a failed polygraph).

(l) The federal 14th Amendment Due Process right to present **reliable** evidence trumps a state evidence rule that would not allow that evidence. *Chambers v. Mississippi*, 410 U.S. 284 (1973). *Chambers* is also authority for keeping **out** unreliable evidence. *Ege v. Yukins*, 485 F.3d 364 (6th Cir.2007). A rule that **lessens the Commonwealth's burden of proof** violates the 14th Amendment, which requires proof of all elements beyond a reasonable doubt. *Cf., Butcher v. Commonwealth*, 96 S.W.3d 3, 8 (Ky.2002). Such a rule also violates Kentucky Constitution §§ 2 and 11.

(m) Federal courts will not generally second-guess Kentucky courts' interpretation of Kentucky evidence rules. *Estelle v. McGuire*, 502 U.S. 62 (1991); *Marshall v. Lonberger*, 459 U.S. 422 (1983). **Evidence issues must be "federalized" at trial** by citation of the 5th, 6th and 14th Amendments and United States Supreme Court precedent, like *Chambers*, and *Green*, to preserve evidence issues for federal review.

KRE 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. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(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.

NOTES

Rule 103

(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.

HISTORY: Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 1, 34, eff. 7-1-92; 1990 c 88, § 3

DISCUSSION:
KRE 103 informs trial counsel how to preserve evidence objections before and during trial so that appellate courts (and trial level courts hearing new trial or RCr 11.42 motions) may grant relief.

103(a)

The 2007 amendment to KRE 103 makes two changes in the original 1992 rules on preserving errors for review. Both are in KRE 103(a). No other subsections are affected.

(a) "Specific" rather than "general" objections are required. Under the old rule, counsel had to give specific grounds for an objection only when requested by the trial court. Now one must state **specific grounds** to preserve error for review, unless the grounds are apparent from the context. As before, reversal on appeal will require a motion to strike, a request for admonition, or a motion for mistrial, plus a court ruling. *See Bell v. Commonwealth*, 473 S.W.2d 820 (Ky.1971) (specific enough "so the court will know"). *See also Gambrel v. Commonwealth*, 2008 WL 4291538, 2 (Ky.2008) (Unreported) (KRE 103 not to be applied retroactively)

(b) "Proffers" of evidence are the rule. This second change requires lawyers to make the substance of excluded testimony "known to the court by offer." Say "I want to make an offer of proof." Tell the judge what your witness would have said, what the evidence would have been. If it is physical evidence, insist that it be physically included in the record, marked as "proffered."

(c) Avowal testimony. Question-and-answer testimony of witnesses is no longer required, but is **still permissible**. The trial judge may direct the making of a proffer (avowal) in question-and-answer form, as stated in KRE 103(b).

(d) Continuing objections may –**or may not**— preserve error for review. **Be careful.** *Brooks v. Commonwealth*, 217 S.W.3d 219, 223-224 (Ky.2007) (court considered objection to introduction of ledgers, based on continuing objection to testimony regarding the ledgers based on lack of foundation). **But** a continuing objection to bad acts evidence **did not preserve** an objection to hearsay contained **within** the bad acts evidence. *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky.2005). Continuing objections are appropriate re: witness competency, marital privilege, hearsay by the same declarant, or to object to the same irrelevant evidence repeated by different witnesses. *Id.*

(e) Get a ruling. The moving party must insist that the trial court rule on the motion, or it will be deemed waived. *Thompson v. Commonwealth,* 147 S.W.3d 22, 40 (Ky.2004)

103(b)

DISCUSSION:
KRE 103(b) allows the judge to comment on the objection or the avowal. There is no role for the attorney unless the judge misstates the evidence or makes some other objectionable comment. **KRE 103(b) preserves the option of a question-and-answer avowal.**

103(c)

DISCUSSION:
KRE 103(c) operates to prevent jurors from hearing evidence of contested admissibility until the judge has decided whether and under what limiting admonition the jury can hear it. See also 104(c).

(a) Use of the mandatory phrase "proceeding shall be conducted" places primary responsibility for insulating jurors from improper information on the court. "Side-bars," proffers, or witness voir dires should be conducted in a way that prevents jurors from overhearing. Whether this

NOTES

requires a bench conference or recess of the jury is up to the court. See also KRE 611, which puts the court in charge of the "mode and order" of evidence.

(b) Lawyers may not present evidence of dubious admissibility without first conferring with the judge. SCR 3.130(3.4) prohibits alluding to any matter not reasonably relevant or believed to be supported by admissible evidence. SCR 3.5(a) prohibits any attempt to influence a juror through means prohibited by law.

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

103(d)

DISCUSSION:

Motions in limine provide for pretrial determination of admissibility. In Kentucky, pretrial rulings are binding throughout trial and preserve issues for appeal without the necessity of a contemporaneous objection. *In limine* motions lower the danger of jurors overhearing improper evidence, and allow more definite commitment to trial strategy before trial.

(a) **Be specific**. An objection made before trial will not preserve a 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. *Garland v. Commonwealth*, 127 S.W. 3d 529 (Ky.2004); *cf.*, *Lanham v. Commonwealth*, 171 S.W.3d 14, 22 (Ky.2005) (motion objecting to "a couple areas" of a taped statement was sufficiently detailed though tape contained "more than just a few," *similar* references).

(b) **Insist on a ruling.** If the motion does not result in an "order of record," the issue is not preserved, and the opposing party must object anew when the problematic evidence is introduced. **Oral motions** in limine are sufficient to preserve error, if sufficiently detailed. *Lanham v. Commonwealth*, 171 S.W.3d at 22. An oral ruling should also be sufficient. Get a written ruling if possible.

(c) KRE 103(d) has **many uses**: to obtain pretrial exclusion of evidence of prior acts or convictions [KRE 404(b) or 609], to test foundation (KRE 804), to question qualifications of experts [KRE 702], to examine authenticity [KRE 901], and to deal with best evidence or summary questions [KRE 1004 and 1006].

(d) **Severance** motions (if unsuccessful) must be renewed under RCr 9.16 when the prejudice of joint trial becomes evident. Because severance is often closely associated with questions of admissibility of evidence as to one or more co-defendants, it is advisable to **renew the evidence objection** at the same time.

(e) **Be careful re: stipulations**. In *Cook v. Commonwealth*, 129 S. W. 3d 351 (Ky.2004) a defendant who lost a limine motion later agreed to stipulate the evidence, but never formally withdrew the objection. **Lucky for the defendant**, the Court held the party had adequately preserved the objection.

103(e)

DISCUSSION:

KRE 103(e) provides that palpable error that clearly affects the substantial rights of a party will be reviewed on appeal **regardless of objection**. The rule is applied "sparingly." *U.S. v. Young*, 470 U.S. 1 (1985).

(a) A palpable error must be one that would have been obvious to the trial court. *Potts v. Commonwealth*, 172 S.W.3d 345, 352 (Ky.2005) (inaudible videotapes).

(b) A finding of palpable error must involve prejudice more egregious than that required for reversible error. *Ernst v. Commonwealth*, 160 S.W.3d 744 (Ky.2005).

(c) A party's "substantial rights" have been affected when there is a "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process…." *Martin v. Commonwealth*, 207 S.W.3d 1 (Ky.2006) (interpreting similar "substantial rights" language in RCr 10.26).

NOTES

(d) A court reviewing for palpable error must do so in light of the entire record, and must "plumb the depths of the proceeding." *Ernst v. Commonwealth*, 160 S.W.3d 744 (Ky.2005), *citing, U.S. v. Young*, 470 U.S. 1, (1985); *see also U.S. v. Cotton*, 535 U.S. 625 (2002).

(e) In **death penalty cases**, a different, three-part analysis applies to unpreserved error. 1) Was an error committed, 2) was there a reasonable justification for failure to object (including tactical reasons) and, 3) regardless of justification, was the error so prejudicial that in its absence the defendant might not have been found guilty or sentenced to death? *Perdue v. Commonwealth*, 916 S.W.2d 148 (Ky.1995).

KRE 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.

DISCUSSION:

KRE 104 makes the judge responsible for deciding whether evidence will be admitted or excluded, and describes the rules that apply in making these preliminary determinations.

104(a)

DISCUSSION:

Subsection (a) of KRE 104 and KRE 1101(d)(1) expressly provide that (except for privileges) the Rules of Evidence **do not apply** to limit what a judge may consider when making preliminary determinations. *Commonwealth v. Priddy*, 184 S.W.3d 501, 507 (Ky.2005) (upholding suppression based on evidence that *had not been formally admitted* but where parties knew judge would rely on it**).** Even so, Section 2 of the Kentucky Constitution prohibits arbitrary evidence rulings and, at minimum, requires that the evidence be reliable enough that a rational person could base a decision on it.

(a) A judge decides admissibility of evidence or qualifications of a witness under a preponderance standard. *Noel v. Commonwealth*, 76 S.W.3d 923, 926 (Ky.2002).

(b) Under KRE 104(a), the trial judge must make **findings of fact** to support a decision to admit evidence, *Monroe v. Commonwealth*, 244 S.W.3d 69, 76 (Ky.2008); *Commonwealth v. Jones*, 217 S.W.3d 190, 199 (Ky.2006).

(c) A prior acquittal on a criminal charge does not necessarily preclude evidence about the conduct that gave rise to the charge. *Hampton v. Commonwealth*, 133 S. W. 3d 438 (Ky. 2004). Since the prior acquittal was based on failure to find those facts beyond reasonable doubt, and under KRE 104 the judge must only find the occurrence of prior acts by a preponderance, the old facts may be admitted on the theory that a jury could reasonably conclude they occurred. Of course, the judge must weigh such evidence under KRE 403.

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

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

NOTES

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

104(b)

DISCUSSION:

KRE 104(b) works together with KRE 611(a) to allow flexibility in the presentation of evidence. Under 104(b), a judge may allow testimony or evidence that appear irrelevant or insufficiently authenticated in reliance on the proponent's promise that all will become clear. *Huddleston v. U.S.*, 485 U.S. 681 (1988) (allowing proof of a bad act, theft, prior to proof the property was stolen). The Kentucky rule is identical to the federal rule. *Johnson v. Commonwealth*, 134 S. W. 3d 563 (Ky.2004).

(a) Failure to "connect up" the evidence later is grounds for an instruction to disregard the testimony or perhaps even a mistrial. However, under KRE 103(a)(1) the burden is on the opponent, who must move to limit or strike, or the jury may consider such evidence for any purpose.

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

104(c)

DISCUSSION:

KRE 104(c) deals with whether to excuse the jury during arguments and hearings. The decision is left to the judge except for proceedings involving confessions, or search and seizures. RCr 9.78 also requires jury exclusion during eyewitness identification proceedings. And KRE 104(c) requires the jury to be excused for collateral proceedings in which the defendant testifies and asks for jury exclusion.

(a) Pretrial motions under RCr 9.78 and KRE 103(d) can eliminate the need to invoke this rule.

(b) KRE 104(c) applies to anything from a full-blown suppression hearing to a routine hearsay objection. In theory, except for the required instances, a judge can hear argument and evidence about admissibility in open court with the jurors observing. In practice, most judges require argument at the bench on any preliminary issue.

(c) KRE 104(c) allows the judge to hear the qualifications of an expert in the presence of the jury or in a hearing from which the jury is excluded. If the witness's expertise is not contested, there is little concern over jury contamination. But a controversial expert —*e.g.*, 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.

(d) Make a motion to exclude. KRE 104(c) states that hearings on preliminary matters "shall" be conducted outside the jury's presence when the "interests of justice require." Depending on the circumstances, a ***sua sponte*** order of exclusion may be required. *Kurtz v. Commonwealth*, 172 S.W.3d 409 (Ky.2005) (finding no such circumstances).

104(d)

DISCUSSION:

KRE 104(d) permits a defendant to testify on the limited issue of admissibility of evidence without being subjected to cross-examination on other subjects. It does not prevent later use of that testimony, which can be used as impeachment *if the defendant testifies at trial*. By limiting the subject matter of the testimony to the facts bearing on admissibility, the defendant who intends to testify at trial can limit how much impeachment he wishes to face. Later use of the statements for substantive purposes is prevented by considerations of relevancy rather than by any protection in the rule.

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

NOTES

(b) **But beware.** In a non-suppression case, *e.g.*, child witness competency, KRE 801A allows 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 obvious.**

(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 these preclude a finding that the defendant had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

104(e)

DISCUSSION:

KRE 104(e) precludes use of preliminary rulings on the admissibility of evidence to limit attacks against the weight or credibility of evidence or witnesses. *Primm v. Isaac*, 127 S. W. 3d 630 (Ky.2004). The reference to bias, interest or prejudice was added to insure that a party has the opportunity fully to confront the case against him. The rule works in favor of any party. *Commonwealth v. Hall*, 4 S.W.3d 30 (Ky.App.1999).

(a) KRE 104(e) 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 may 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. Common law decisions such as *Adcock v. Commonwealth*, 702 S.W.2d 440 (Ky.1986)(approving questioning parole status of witness), have not been superseded.

(b) Of course, any impeachment can open the door to rebuttal. The type and scope of impeachment evidence requires careful consideration.

KRE 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.**

DISCUSSION:

Evidence of dubious value may be presented to the jury if the judge gives a clear instruction on the proper and limited use of the evidence. This rule provides for limiting admonitions and explains the consequences of failing to ask for admonitions.

(a) The first sentence tells the judge to determine the limits of evidence in cases where it is admissible as to some but not all parties or admissible only for some limited purpose. *Thomas v. Greenview Hospital*, 127 S.W. 3d 663 (Ky.App.2004).

(b) Admonitions must be requested. The judge is under no obligation to give admonitions sua sponte. *Caudill v. Commonwealth*, 120 S.W. 3d 635 (Ky.2003).

1) An admonition is presumed to cure most problems that arise. *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky.1999).

2) There are two situations in which this general presumption is rebutted: 1) when an "overwhelming probability" exists that the jury could not follow the instruction and a there is a strong likelihood that the "impermissible inference" would be "devastating" to the objecting party, and 2) where the question was not premised on fact and was "inflammatory or highly prejudicial." *Johnson v. Commonwealth*, 105 S.W. 3d 430 (Ky.2003).

NOTES

3) Appellate courts defer to the trial judge's decisions on (a) the need to give an admonition, (b) its contents, if given, and (c) the time when it is given. *St. Clair v. Commonwealth,* 140 S.W. 3d 510 (Ky.2004); *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky.1998); *Baze v. Commonwealth*, 965 S.W.3d 817 (Ky.1997).

(c) A limiting admonition will be required in most cases. *Bell v. Commonwealth*, 875 S.W.2d 882 (Ky.1994). Limiting admonitions are proper in KRE 404(b) cases, if requested. *Hampton v. Commonwealth,* 133 S. W. 3d 438 (Ky.2004). Failure to give a requested admonition is subject to harmless error analysis. *Soto v. Commonwealth,* 139 S.W. 3d 827, 859 (Ky.2004).

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

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

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

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

KRE 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.

DISCUSSION:

KRE 106 allows out-of-order presentation of evidence when writings or recorded statements are introduced. Under KRE 611(a), the judge has control over the order of presentation of evidence. But KRE 106 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*, 962 S.W.2d 845 (Ky.1997). KRE 106 recognizes that the proper **time** for dealing with a document or recorded statement is when the witness is on the stand, not later on cross-examination or recall. **How much** of the remainder of the document must be admitted is within the discretion of the court. *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 330-331 (Ky.2006).

(a) "Completeness" requires introduction when "in fairness" other parts of the statement or writing should be introduced to keep the jury from being misled. The adverse party is entitled to the remaining portions only "to the extent that an opposing party's introduction of an incomplete out-of-court statement would render the statement misleading or alter its perceived meaning." *Schrimsher v. Commonwealth*, 190 S.W.3d at 330-331. Additional statements are admitted only to explain or put in context the statements presented by the original proponent. *Young v. Commonwealth,* 50 S.W. 3d 148 (Ky.2001).

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

(c) The Supreme Court has cautioned that KRE 106 is a rule of "limited" admissibility. *Soto v. Commonwealth,* 139 S. W. 3d 827 (Ky.2004). The rule permits introduction of only that part of the statement or recording necessary to correct any misimpression created by the adverse party. *Schrimsher v. Commonwealth*, 190 S.W.3d 318, *Young v. Commonwealth,* 50 S.W. 3d 148 (Ky.2001).

NOTES

(d) KRE 106 is limited to writings or recorded statements. Its language does not permit introduction of unrecorded statements.

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

(f) **Otherwise inadmissible** hearsay statements by a non-testifying defendant may come in on cross to correct a misimpression. *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 330-331 (Ky.2006) (police officer had testified to *some* of the defendant's statements during an interrogation). Schrimsher sought —but was not permitted— to introduce his entire interrogation. He was only allowed to introduce subjects "closely related" that "really affected" how the jury interpreted the officer's testimony.

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

KRE 107 Miscellaneous provisions

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

DISCUSSION:

(a) The parole evidence rule prevents the introduction of oral statements to alter a written agreement, but does not apply when there is an allegation of fraud in the inducement. *Radioshack Corp. v. ComSmart, Inc.*, 222 S.W.3d 25 (Ky.App.2007). Parole evidence may come in play where written or oral contracts appear in **fraud or theft cases**.

(b) **The Effective date** provision in KRE 107 (b) applies to retrials. 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 may follow older rules of evidence if evidence admissible under the new rules would not have been admissible under the old law. *St. Clair v. Commonwealth,* 140 S. W. 3d 510 (Ky.2004). Any appeal of a case tried under the previous common law evidence rules will be decided on that basis. Any retrials of cases originally prosecuted or begun before July 1, 1992 must be considered under the previous evidence law.

(c) When a rule is amended, the principle of KRE 107 applies. For instance, the original version of KRE 608 applies to a retrial occurring after the rule was amended, if it involved a crime committed before the amendment. *Terry v. Commonwealth*, 153 S.W.3d 794, 801-802 (Ky.2005); *Blair v. Commonwealth,* 144 S.W. 3d 801 (Ky.2004).

Appellate Concerns:

(a) **On appeal**, the standard of review for almost every kind of evidence issue is abuse of discretion. *Cook v. Commonwealth,* 129 S.W.3d 351 (Ky.2004). A constitutional violation, like the denial of the constitutional right of confrontation, must be proved harmless beyond reasonable doubt. *Quarels v. Commonwealth,* 142 S.W. 3d 73 (Ky. 2004).

(b) "**Abuse of discretion**" is an arbitrary, unreasonable or unfair decision, or one unsupported by "sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999).

(c) Sometimes appellate courts address issues because they are likely to recur on retrial, *e.g., Eldred v. Commonwealth*, 906 S.W.2d 694 (Ky.1994). ■

NOTES

ARTICLE II: JUDICIAL NOTICE

KRE 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.

DISCUSSION:
Some facts are so obviously true that it would waste time to prove or dispute them, so obviously true that **any court**, including an appellate court, may take judicial notice of them **at any point in the proceedings**, including appeal and post conviction.

(a) Laws and regulations are not properly noticed under this rule. *Burton v. Foster Wheeler Corp*., 72 S.W.3d 925 (Ky.2002). The existence of regulations, and their subject matter, are noticed under KRS 13A.090(2). Current statutes are noticed under KRS 7.138(3). Superseded statutes and codes are noticed under KRS 447.030.

(b) "Adjudicative facts" are facts that must be proved formally, *i.e.*, facts that support or attack the elements of the case, facts bearing on who performed the acts and their culpable mental state. Commentary to KRE 201.

(c) Judicial notice is a preliminary issue. Therefore judges are not required to follow the evidence rules in taking judicial notice. KRE 101(a). Fairness suggests that a request for judicial notice should be made before trial, but this is not a requirement.

(d) What has been noticed by Ky. appellate courts: **teenage drinking**, *Commonwealth v. Howard*, 969 S.W.2d 700 (Ky.1998), **the purpose of seatbelts**, *Laughlin v. Lamkin*, 979 S.W.2d 121 (Ky.App.1998), **facts in a bill of particulars**, *Jackson v. Commonwealth*, 3 S.W.3d 718 (Ky.1999), the **layout/ equipment of a judicial center**, *Commonwealth v. M. G.*, 75 S. W. 3d 714 (Ky App.2002), **prior felony records** from the **same court**, *Hutson v. Commonwealth*, 215 S.W.3d 708, (Ky.App.2006); **federal census data** relevant to a *Batson* claim, *Fuqua v. Commonwealth*, 2006 WL 2191241 (Ky.App.2006)(Unreported); that a certain **photo id** identified defendant, *Lambert v. Commonwealth*, 2004 WL 813363, (Ky.App.2004) (Unreported); **probation conditions** contained in a judgment**,** *Dipietro v. Commonwealth*, 2006 WL 335987 (Ky.App.2006)(Unreported);

(e) Internet materials:
YES to: Mapquest.com, *Rippetoe v. Feese*, 217 S.W.3d 887 (Ky.App.2007) (on appeal, no less); and to **PACER** federal docket info, *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260 (Ky.App.2005).
NO to: Statistics from a government website when **no web address** is provided. *Polley v. Allen*, 132 S.W. 3d 223 (Ky. App.2004); material from a **commercial** website, *Dowell v. Safe Auto Ins. Co*., 208 S.W.3d 872 (Ky.2006); material from a possibly **opinionated** website, *e.g.*,

NOTES

Consumer Electronic Association, *Powers v. Halpin*, 2007WL 1196527, (Ky.App.2007) (Unreported).

(f) Scientific info. Kentucky judicially notices reliability of expert/scientific opinion based on prior approval in old, pre-*Daubert* cases — including **alcohol breath testing, HLA blood typing, fiber, ballistics, fingerprint, and micro hair analysis**, *Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky.1999); **Also noticed:** info from **The Merck Index**, Thirteenth Edition, (2001), and **Uncle Fester, Secrets of Methamphetamine Manufacture**, (6th Ed.2002) (underground publication by Loompanics Unlimited), *Matheny v. Commonwealth*, 191 S.W. 3d 599, 609 (Ky. 2006) (Graves concurrence) (*cf*. Cooper dissent criticizing notice of Uncle Fester); **tests identifying methamphetamine,** *Fulkerson v. Commonwealth*, 2005 WL 2323142 (Ky.App.2005)(Unreported). But *cf*., *Cantrell v. Ashland Inc.*, 2006 WL 2632567, (Ky.App.2006) (appellate court refusal to take judicial notice of scientific opinion from authoritative source it could not understand) (discretionary review granted and pending in 2007-SC-818).

(g) A judge's personal knowledge is not a proper basis for judicial notice. *Xakis v. McDonald*, 2007 WL 188033 (Ky.App.2007)(Unreported)(trial court noticing prior "foot-dragging" by the plaintiff was improper, but harmless); Or maybe it is. *cf*., *Commonwealth v. M.R.*, 2005 WL 2400897 (Ky.App.2005) (Unreported) (*approving* family court's reliance on knowledge of a **separate child custody case** involving the same parties).

(h) Judges must take notice upon request of a party who presents sufficient information to support taking judicial notice. KRE 201(d). The rule is **mandatory**.

(i) Judges may take notice *sua sponte*. KRE 611 (a) instructs judges to regulate the evidence to ascertain truth and avoid wasting time. Judicial notice certainly achieves these purposes. However, the judge must avoid the appearance of supporting one side over the other. KRE 605; 614 (a) & (b).

(j) Judicially noticed facts are conclusively established. KRE 201(g). But in criminal cases every element must be proved beyond a reasonable doubt. KRS 500.070. Only the jury can make such a finding. Ky. Const., §§ 7 and 11. On the surface, 201(g) conflicts with the Ky. Constitution, yet has not been challenged.

(k) The jury must be instructed that noticed facts are conclusive. KRE 201(g). Therefore adverse parties are not allowed to introduce contradictory evidence. **But if it's expert opinion** that's been judicially noticed, a challenging party is entitled to be heard, and must be given a chance to introduce contrary evidence. *Johnson v. Commonwealth*, 12 S.W. 3d 258 (Ky.1999).

(l) Timing. Any court can take judicial notice at any time. KRE 201(f). *Johnson v. Commonwealth*, 12 S.W.3d 258, 261-62 (Ky.1999) (on appeal judicially noticing *beaucoup* areas of "science"); *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky.1999) (appellate judicial notice of reliability of DNA testing); *Rippetoe v. Feese* 217 S.W.3d 887 (Ky.App.2007) (noticing Mapquest.com on appeal). The Commentary suggests appellate courts should be reluctant to take judicial notice if no request was made at the trial level. But the rule itself, and Kentucky case law, say otherwise.

(m) Documents not of record may not be noticed. *Samples v. Commonwealth*, 983 S.W.2d 151, 153 (Ky.1998) (document could not be authenticated because not of record); Or perhaps they may, in an emergency: *cf*., *McNeeley v. McNeeley*, 45 S.W. 3d 876 (Ky. App.2001) (on appeal of a denial of a visitation *hearing*, judgment of conviction for murder of a small child was judicially noticeable on appeal). ■

NOTES

ARTICLE III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

KRE 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.

KRE 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.

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

NOTES

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

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

ARTICLE IV.
RELEVANCY AND RELATED SUBJECTS

KRE 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.

KRE 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.

KRE 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.

DISCUSSION:
Relevancy is always the first question to ask. KRE 401, 402, and 403 are usually considered together and —along with KRE 601 and 602 (witness competency)—form the fundamental principles of admissibility. If evidence is not relevant, it is not admissible, and no further objection is necessary.

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

Step One: Relevance Defined
Relevant evidence is evidence that has any tendency to make a fact "of consequence" to the case more, or less, probable. If the evidence is a "link in the chain" of proof, it is relevant. *Parson v. Commonwealth,* 144 S. W. 3d 775 (Ky.2004). Evidence that is even slightly probative satisfies KRE 401. *Blair v. Commonwealth,* 144 S. W. 3d 801 (Ky.2004). Evidence that tends to prove or disprove an element of an offense or defense is relevant. *Harris v. Commonwealth,* 134 S.W. 3d 603 (Ky.2004).

Step Two: Exclusions
Under KRE 402 if evidence is relevant, it is admissible —unless **excluded by statutes, court rules, or federal / state constitutional reasons**. Relevant evidence may be excluded, for instance, under RCr 7.24 (9) (discovery sanction), or under KRE 403 (undue prejudice), or under the 4th Amendment (fruits of illegal search and seizure). The fact that evidence was obtained in violation of a statute, standing alone, is not a ground for exclusion. *Cook v. Commonwealth,* 129 S.W. 3d 351 (Ky. 2004).

If evidence is not relevant, under KRE 402 **it is not admissible**. *See Major v. Commonwealth*. 177 S.W.3d 700 (Ky.2005) (guns unrelated to the crime not relevant, not admissible); *cf*., *Coulthard v. Commonwealth,* 230 S.W.3d 572, 580 (Ky.2007) (extensive gun evidence relevant to show knowledge/skill with firearms, and refute claim shooting was unintended).

NOTES

Rule 403

Step Three: Balancing

KRE 403 balancing is performed under Prof. Lawson's three-step method:

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

--*Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky.1996)

Prejudice defined

Legitimate probative force of evidence does not count as prejudice. To meet KRE 403, you must show harmful effects beyond any legitimate probative value. *Partin v. Commonwealth*, 918 S.W.2d at 223.

Availability of other evidence

Availability of other means to prove the point weighs against admission. *U.S. v. Merriweather*, 78 F.3d 1070 (6th Cir. 1996). A judge may also exclude on the ground that evidence is cumulative. *F.B. Ins. Co. v. Jones*, 864 S.W.2d 929 (Ky. App.1993).

Failure to perform balancing under KRE 403 may be –in and of itself—an abuse of discretion. *Ferry v. Commonwealth*, 234 S.W.3d 358, 361-362 (Ky.App.2007).

Old sex crimes are excludable. Old drug crimes? maybe not. Compare *Clark v. Commonwealth*, 223 S.W.3d 90 (Ky.2007) (prejudice from prior bad sexual acts over 20 years old outweighed probative value), with *Pate v. Commonwealth*, 243 S.W.3d 327 (Ky.2007) (prior possession of items for manufacturing meth was relevant to intent to manufacture meth, and not unduly prejudicial).

Pregnancy of victim

Cook v. Commonwealth, 129 S.W.3d 351, 361-362 (Ky.2004) (informing jury that victim was pregnant was not unduly prejudicial).

Limiting instructions –when they won't work

In all KRE 403 balancing situations, the judge must consider whether the limiting instruction authorized by KRE 105 will temper anticipated prejudice. If the instruction is unlikely to confine the evidence to its proper use, the judge may exclude the evidence entirely.

How relevant must other bad acts be? Except for sex crimes, the standard of relevance for other bad acts can be low. *See Berryman v. Commonwealth*, 237 S.W.3d 175 (Ky.2007) (in vehicular homicide, evidence that driver was distracted by counting of illicit Lortabs was held relevant to wantonness, & not unduly prejudicial).

How far must relevance outweigh prejudice? Marginally relevant bad acts evidence has been found harmless. *Welch v. Commonwealth*, 235 S.W.3d 555 (Ky.2007) (defendant said this was his "last lick," "lick" referred to a robbery, and a rap song, "Hitting Licks, Getting Ripped, and Making Money").

Waste of time, delay, collateral issues

The time it will take to present the evidence and the likelihood that it will lead the jury off to collateral issues are legitimate reasons for exclusion under the plain language of KRE 403.

Federalize by citing 5th and 14th Amendment due process. *Chambers v. Mississippi*, 410 U.S. 284 (1973) (failure to allow reliable evidence violates due process); *Ege v. Yukins*, 485 F.3d 364 (6th Cir.2007) (intro of *unreliable* evidence violates due process, citing *Chambers*).

Specific Applications:

Alternate perpetrator

Kentucky recognizes the alternative perpetrator defense. *Blair v. Commonwealth*, 144 S.W. 3d 801 (Ky.2004); *Beaty v. Commonwealth*, 125 S. W. 3d 196 (Ky.2003). The identity of the perpetrator is an essential element of every case. *St. Clair v. Commonwealth*, 140 S.W. 3d 510 (Ky.2004). Because identity is an issue "of consequence" under KRE 401, and because Kentucky follows the

NOTES

slight probative value approach, any evidence tending to show the defendant was not the perpetrator is relevant and admissible, subject to KRE 403 balancing. *Beaty* and *Blair* impose limitations, requiring a showing of **some likelihood** that another person could have done this.

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

Co-defendant guilty plea
It is improper to introduce evidence of a co-defendant or co-indictee's guilty plea during the prosecutor's case in chief. *St. Clair v. Commonwealth,* 140 S. W. 3d 510 (Ky.2004). Strictly speaking, this is not a 404(b) rule. This is the rule from *Parido v. Commonwealth*, 547 S.W.2d 125 (Ky.1977), which found a "substantial rights" violation predating the Kentucky Evidence Code. *See also Dant v. Commonwealth*, 258 S.W.3d 12, 24 (Ky.2008); and *Tipton v. Commonwealth*, 640 S.W.2d 818 (Ky.1982).

Cross-examination, scope
Cross-examination on collateral matters is subject to 403 balancing. *Davenport v. Commonwealth*, 177 S.W.3d 763, 772 (Ky.2005).

***Daubert*, opinion**
Qualifying under *Daubert* as scientifically reliable does **not** mean evidence is automatically admissible, because it must also pass 401 relevance and 403 balancing. *McIntire v. Commonwealth*, 192 S.W.3d 690 (Ky.2006) (admission of Dr.'s opinion that a non-abusing parent would be aware his child was being abused was harmful error); *cf., Ragland v. Commonwealth*, 191 S.W.3d 569 (Ky.2006) (tests showing bullets could not have been fired from 3 other similar guns relevant, not too prejudicial). *See also Meadows v. Commonwealth*, 178 S.W.3d 527 (Ky.App.2005) (expert opinion on bite marks not unduly prejudicial); *cf., Ege v. Yukins*, 485 F.3d 364 (6thCir.2007) (bite mark evidence is such junk it violates due process).

Doubtful, equivocal
Occasionally judges allow **doubtful evidence** "for whatever it's worth." But judges have a duty to analyze and *know* the worth of any evidence that might be admitted, as well as its potential for misuse by the jury. KRE 103 (c). KRE 403 requires careful balancing, and KRE 611 (a) requires the judge to manage presentation of evidence for ascertainment of the truth. **Equivocal testimony** regarding a party's marijuana use was excluded under KRE 403 in *Bloxam v. Berg*, 230 S.W.3d 592, 595 (Ky.App.2007).

Flight
Flight after a crime is deemed "always to be some proof of guilt." *Rodriguez v. Commonwealth*, 107 S. W. 3d 215 (Ky.2003). The government should be required to show a link between the crime and the flight in question. But *cf., Commonwealth v. Bowles*, 237 S.W.3d 137 (Ky.2007) (flight from police after a separate, unrelated hit-and-run, because defendant *may* have been thinking about earlier crime).

Photos
Photos are admissible unless their gruesome nature goes "far beyond demonstrating proof of a relevant contested fact." *Ratliff v. Commonwealth*, 194 S.W.3d 258, 271 (Ky.2006). The trial court should consider whether **evidentiary alternatives** would sufficiently prove the fact without comparable risk of prejudice. *Ratliff*, 194 S.W. 3d at 271, *citing Old Chief v. U. S.*, 519 U.S. 172, 184-85 (1997). Cases where photos have been held excessively gruesome are few, including *Funk v. Commonwealth*, 842 S.W.2d 476, 479 (Ky.1992) (animal mutilation of a corpse, substantial decomposition, maggot infestation); *Clark v. Commonwealth*, 833 S.W.2d 793, 794-95 (Ky.1991) (close-ups of substantially decomposed corpse with decompositional fluid oozing, projected in courtroom "excessively"); *Holland v. Commonwealth*, 703 S.W.2d 876, 879-80 (Ky. 1985) (corpse with extensive animal mutilation).

The judge may limit the number and content of photos admitted as exhibits, and –separately— those shown to the jury. KRE 611(a); KRE 403.

NOTES

Rule 403

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

Prior bad acts, sex abuse, convictions
Prejudice from prior bad act 404(b) evidence almost always outweighs its probative value. *Metcalf v. Commonwealth*, 158 S.W.3d 740, 745 (Ky.2005). Prior convictions, undisturbed, are admissible at jury sentencing **unless** the defendant can show the conviction was without benefit of counsel. *McGuire v. Commonwealth*, 885 S.W.2d 931, 938 (Ky.1994). Sexual abuse of a daughter and evidence of guns lacking connection to the crime were irrelevant and unduly prejudicial. *Major v. Commonwealth*, 177 S.W.3d 700 (Ky.2005). But *cf*., *Martin v. Commonwealth*, 170 S.W.3d 374 (Ky.2005) (prior sex abuse, if sufficiently similar and relevant, is subject to 403 balancing).

Privilege violation
When a **privilege** has been violated, balancing under KRE 403 is not necessary, and reversal is appropriate on a simple finding of prejudice. *St. Clair v. Commonwealth*, 174 S.W.3d 474 (Ky.2005) (as noted in the dissent).

Stipulations
The government is allowed to present a complete, unfragmented picture of the crime and investigation. *Adkins v. Commonwealth,* 96 S.W. 3d 779 (Ky.2003). A defendant cannot stipulate away parts of the Commonwealth's case. *Pollini v. Commonwealth*, 172 S.W.3d 418, 424 (Ky.2005), *citing, Johnson v. Commonwealth*, 105 S.W.3d 430, 438-39 (Ky.2003). An offer to stipulate does not make evidence less relevant or subject to exclusion under KRE 403. *Johnson* ,105 S.W.3d at 439, distinguishing *Old Chief v. U.S.* 519 U.S. 172 (1997), which found abuse of discretion for refusing to allow a stipulation to a status element and instead admitting evidence of a prior conviction.

***Old Chief* is not a constitutional ruling, and not binding on Kentucky courts.** *But see* the Kentucky Supreme Court's nod to *Old Chief* in *Ratliff v. Commonwealth,* 194 S.W.3d 258, 271 (Ky.2006) (re: gruesome photos, trial court should consider whether evidentiary alternatives would sufficiently prove the fact at issue without a comparable risk of prejudice).

Victim humanization
Victim humanization evidence is relevant in homicide cases (or so says Kentucky) and **not** just in sentencing. But "careful" 403 balancing applies. *Hilbert v. Commonwealth*, 162 S.W.3d 921 (Ky.2005) (approving a "brief display" of victim portraits and "reserved testimony" by two mothers lasting a little over three minutes). Allowing this evidence during the guilt phase arguably violates due process.

Beware: Defense attacks on the character of the victim during the guilt phase may **open the door** to positive victim evidence. Note also that the exceptions in *Soto, Wheeler* are questionable because they conflict with Kentucky's "plain language" rule of interpretation. *Garrett v. Commonwealth,* 48 S.W.3d 6, 12 (Ky.2001).

Curative rebuttal:
A party who introduces incompetent evidence cannot complain if an opponent does the same to rebut it. *Johnson v. Commonwealth*, 105 S. W. 3d 430 (Ky.2003); *Norris v. Commonwealth*, 89 S. W. 3d 411 (Ky.2002) (allowing curative incompetent rebuttal despite lack of objection to initial incompetent evidence); *Thomas v. Greenview Hospital,* 127 S.W. 3d 663 (Ky.App.2004).

Witness lying?
A witness cannot be asked if another witness is lying. *St. Clair v. Commonwealth,* 140 S.W. 3d 510 (Ky.2004). The veracity of another witness may bear on an issue of consequence and qualify as relevant. But this question solicits an opinion no witness is qualified to give, an opinion unhelpful to the jury, inadmissible under KRE 701. See also KRE 607, 608 and 609, regarding attacks on witness credibility.

NOTES

KRE 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, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
(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 is covered 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.

HISTORY: Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 4, 34, eff. 7-1-92; 1990 c 88, § 14

DISCUSSION:
The 2007 amendment changes subsection (a)(1), **only**, in order to allow the prosecution to prove a defendant's character not only in rebuttal of character evidence offered by the defendant, but also after the defense has attacked the character of the victim. For example, if the accused in a murder case offers evidence of the alleged victim's violent disposition, the prosecution may now introduce evidence of the accused's violent disposition, even if the accused has not presented any evidence of his own character. See Fed.R.Evid. 404, Advisory Committee Notes, 2000 Amendment.

Otherwise, generally, Rule 404 prohibits character evidence offered to prove a person acted in keeping with that character. Character is less probative, and less reliable than habit evidence, because it describes a tendency rather than an invariable response. Character indicates that action in conformity is likely, but affords no reasonable basis for determining how likely. There are strict limitations on its use.

NOTES

404(a)

By its plain language, KRE 404 strictly forbids evidence to prove an act in conformance with character. **Rule 404 applies only to the accused and the victim,** and only when their character is relevant. The character of a witness other than the accused or the victim may be attacked by the methods described in KRE 607, 608 and 609. **The accused** may always introduce evidence of her own relevant character or trait of character to convince the jury she is not the type of person who would do the acts charged, or act with the culpable mental state alleged. *Johnson v. Commonwealth*, 885 S.W.2d 951, 953 (Ky.1994).

Prosecutor may attack defendant's character, to rebut, AND if defendant attacks victim character

If the defendant has put his character in issue by testifying (or otherwise), the prosecutor is allowed to rebut with other evidence of the defendant's character. *Anderson v. Commonwealth*, 231 S.W.3d 117 (Ky.2007) (where defendant did not testify, testimony that defendant said he "just got out of prison for the same thing" was inadmissible); *Thomas v. Commonwealth*, 170 S.W.3d 343 (Ky.2005) (expert's hypo violated 404(a) by relying on bad character not in evidence). When rehabilitation evidence is admitted **before** credibility is attacked, error is harmless as long as credibility is later impeached. *Fairrow v. Commonwealth*, 175 S.W.3d 601, 606 (Ky.2005). **Note well** that the 2007 amendment to Rule 404 (a) (1) also allows the prosecutor to attack the defendant's character if the defendant has attacked the victim's character.

Only "truthfulness" evidence allowed

Character evidence regarding a witness —other than evidence of prior conviction— is limited to the trait of truthfulness or untruthfulness. *Fairrow v. Commonwealth*, 175 S.W.3d 601, 606 (Ky.2005) (distinguishing evidence of "reliability," which is not allowed).

Accused may present relevant traits of victim

The general character of the victim is not admissible under KRE 404 (a)(2). *Stringer v. Commonwealth*, 956 S.W.2d 883, 892 (Ky.1997). But the accused may present evidence of a relevant trait of the victim, as limited in prosecutions for sexual offenses by KRE 412 (rape shield). The prosecution is entitled to rebut. *Hampton v. Commonwealth*, 133 S.W. 3d 438 (Ky.2004). Under the 2007 amendment to 404(a)(1) if the defendant attacks the character of the victim, the prosecution is also allowed to attack the character of the defendant.

Okay to rebut self-defense with peacefulness of victim

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

Methods of proving character when permitted

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

NOTES

404(b)

DISCUSSION:

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

Federalize: A state court evidentiary ruling will be reviewed by a federal court only if it is so fundamentally unfair that it violates 5th and 14th Amendment due process or the 6th Amendment right to present a defense. *See Coleman v. Mitchell,* 244 F.3d 533, 542 (6th Cir. 2001). See also Article 1, KRE 102, Federalizing.

Three-part balancing test:

1. Is the other bad act evidence relevant for some acceptable purpose? There must be a legitimate issue that the other act evidence addresses, such as motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. *Vires v. Commonwealth*, 989 S.W.2d 946, 948 (Ky.1999). *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky.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. *Daniel v. Commonwealth*, 905 S.W.2d 76, 78 (Ky.1995); *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky.1994).

2. Is there sufficient proof the defendant committed the other act? *Bell*, 875 S.W.2d at 890. The standard is a preponderance. KRE 104. Can the jury reasonably conclude the act occurred and the defendant was the actor? *Huddleston v. U. S.*, 485 U.S. 681 (1988). Because of the low, preponderance standard, even acts for which the defendant has been acquitted are allowed. *Dowling v. U. S*, 493 U.S. 342, (1990); *Hampton v. Commonwealth,* 133 S. W. 3d 438 (Ky.2004). Uncharged crimes need not be proved by direct evidence. *Parker v. Commonwealth*, 952 S.W.2d 209 (Ky.1997). Evidence of a prior conviction may not be used if a direct appeal is still pending. *St. Clair v. Commonwealth*,140 S. W. 3d 510 (Ky.2004); *Commonwealth v. Duvall*, 548 S.W.2d 832 (Ky.1977).

3. Finally, does the potential for unfair prejudice substantially outweigh probative value? *Bell*, 875 S.W.2d at 890. Bad acts evidence should be admitted only where the probative value and *the need* for the evidence outweigh its unduly prejudicial effect. *Eldred v. Commonwealth*, 906 S.W.2d 694, 703 (Ky.1994). Where value is slight and prejudice great, other acts should be excluded. *Chumbler v. Commonwealth*, 905 S.W.2d 488, 494, (Ky.1995). **Beware of opening the door:** *Dillman v. Commonwealth*, 257 S.W.3d 126, 130 (Ky.App.2008) (though extremely prejudicial, inquiry was direct rebuttal of denial of selling drugs). The effectiveness of a limiting instruction figures in the balancing process. *Bell*, 875 S.W.2d at 890.

Remoteness in time

Remoteness in time can preclude admission of bad acts evidence. *Gray v. Commonwealth*, 843 S.W.2d 895, 896 (Ky.1992) (prior incidents 3, 6, 12 years earlier); *cf., Jarvis*, 960 S.W.2d 466 (Ky.1998) (3-4 weeks okay). The probative value of bad acts evidence can be so diminished by temporal remoteness that it is rendered inadmissible. *Clark v. Commonwealth*, 223 S.W.3d 90, (Ky.2007)(over 20 years). But *cf. Soto v. Commonwealth*, 139 S. W. 3d 827 (Ky.2004) (permitting evidence of "no contact" order from three years previously, temporal remoteness went only to "weight").

Too much detail

Evidence of other acts should be limited to showing that the other act occurred and that the defendant probably did the act. Excessive details are unduly prejudicial. *Brown v. Commonwealth*, 983 S.W.2d 516 (Ky.1999).

NOTES

Relevance for some acceptable purpose: the forbidden inference

Evidence that shows nothing more than criminal propensity is not admissible. *Harris v. Commonwealth,* 134 S.W. 3d 603 (Ky.2004). The "forbidden inference" chain goes like this: the defendant committed the prior act; the prior act shows bad character; a person of bad character is likely to commit crimes; therefore the defendant probably committed this crime.

Effect of stipulation –it's up to the judge

A stipulation is a party admission under KRE 801A(b)(2), (3) or (4). If a defendant stipulates one or more elements, *i.e.*, admits identity or a culpable mental state, the need for other acts evidence is greatly reduced, or eliminated. But the Kentucky Supreme Court maintains that a defendant may not stipulate away part of the prosecutor's case. *Furnish v. Commonwealth,* 95 S.W. 3d 34 (Ky.2002). The policy is justified by the prosecution's burden of proof and the double jeopardy prohibition of retrial. But KRE 102, 403, and 611 also encourage consideration of time and fairness.

Inextricably interwoven acts

Inextricably intertwined acts are not excluded by 404(b) when mentioning such acts is unavoidable. *Funk v. Commonwealth*, 842 S.W.2d 476 (Ky.1993). In one case, to show the defendant recently came into money, it was necessary to show where the money went, and a cocaine buy was deemed sufficiently interwoven. *Furnish v. Commonwealth,* 95 S.W. 3d 34 (Ky.2002). The proponent of other acts evidence must show that the acts are intertwined with evidence "essential" to the case, and that exclusion of the other acts would have a "serious adverse effect on the offering party." KRE 404(b)(2).

"Reverse" 404(b) evidence

Where the defense is that someone else (an alternate perpetrator or "aaltperp") did the crime, the standard for admission of "other acts" evidence against that person is **lower**. Unfair prejudice is less of a concern when other acts evidence implicates someone other than the defendant. *Blair v. Commonwealth*, 144 S. W. 3d 801, 810 (Ky.2004); *Beaty v. Commonwealth*, 125 S.W.3d 196, 208 (Ky.2003)(to qualify an "aaltperp," showing motive alone is insufficient, one must also show opportunity).

Specific Applications:

Fundamental fairness requires that a verdict be predicated on the particular crime charged, and not on prior bad conduct. *Robey v. Commonwealth*, 943 S.W.2d 616, 618 (Ky.1997). But any legitimate non-propensity purpose can justify admission of other acts evidence. The list below is not exhaustive.

Absence of mistake or accident

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

Flight

Flight can indicate consciousness of guilt when there is enough link between the defendant's flight and the offense to allow a reasonable inference that the defendant left because he feared detection or capture. *Rodriguez v. Commonwealth*, 107 S.W. 3d 215 (Ky.2003); *cf., Commonwealth v. Bowles*, 237 S.W.3d 137 (Ky.2007) (flight after subsequent crime evinced guilt of earlier crime).

Habit evidence

Kentucky law traditionally excluded habit evidence, and did not adopt proposed Rule 406 authorizing habit evidence until 2006. KRE 406 applies to all proceedings originally brought on for trial **on or after July 1, 2006**. See **KRE 406,** below.

Identity, Modus Operandi

Evidence that reveals identity of the perpetrator by showing peculiar and striking similarities between prior and current acts, and showing the acts are the "trademark" of the defendant is modus operandi (m.o.) evidence, and subject to a "high standard" for admission. *Blair v. Commonwealth,* 144 S.W. 3d 801 (Ky.2004). Temporal remoteness is of less concern in m.o. cases

NOTES

because the basis for admission is the distinctive character of the acts. *Commonwealth v. English*, 993 S.W.2d 941, 944 (Ky.1999). For identity, the proponent must show "reasonable similarity" between acts. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky.1997).

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

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

Marijuana use
Evidence of defendant's past marijuana use was prejudicial, and non-probative in a case involving allegations that he gave the victim prescription drugs (not marijuana) to keep her awake during sexual abuse. *Bell v. Commonwealth*, 245 S.W.3d 738 (Ky.2008).

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

Motive
Other acts may illustrate motive. *Tucker v. Commonwealth*, 916 S.W.2d 181, 183 (Ky.1996) (evidence of a prior robbery showed motive to kill clerk in charged robbery). Evidence of a drug habit, together with evidence of lack of funds, tends to show motive to commit robberies or burglaries. *Caudill v. Commonwealth*, 120 S. W. 3d 635 (Ky.2003); *Adkins v. Commonwealth*, 96 S. W. 3d 779 (Ky.2003).

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

Pattern of conduct, prior abuse
A pattern of conduct may be admissible 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. *Bell v. Commonwealth*, 875 S.W.2d 882, 889 (Ky.1994) How this differs from m.o. is unclear. The Commonwealth may show evidence of a pattern of abuse in homicide cases if incidents are not too remote. *Jarvis v. Commonwealth*, 960 S.W.2d 466, 470 (Ky.1998) (prior threats within 3-4 weeks of killing not too remote).

Plan
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. The 404(b)(1) plan should not be confused with "common plan or scheme" in RCr 6.18, which governs the types of offenses that may be joined in an indictment. Proximity in time is more essential to show an RCr 6.18 common plan than to show 404(b)(1) m.o. *Commonwealth v. English*, 993 S.W.2d 941, 944 (Ky.1999) (explaining the common scheme or plan exception).

Preparation
U.S. v. Nolan, 910 F.2d 1553 (7th Cir.1990) (stealing getaway car for robbery); *U.S. v. Hill*, 898 F.2d 72 (7th Cir. 1990) (obtaining marijuana seeds as preparation for conspiracy to manufacture marijuana). *See Hopkins v. Commonwealth*, 2006 WL 1360889 (Ky.2006) (unpublished) (discussion and prep for other burglaries).

NOTES

Rule 404(b)

Threats

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

404(c)

Reasonable notice strictly required

404(c) notice must be given regardless of whom prior bad acts evidence will be introduced against. *Parker v. Commonwealth*, 241 S.W.3d 805, 812 (Ky.2007) (notice should have been given re: **general** gang activity evidence not involving the defendant). The defendant must have time to investigate proposed other acts evidence before, not during, trial. *Daniel v. Commonwealth*, 905 S.W.2d 76, 77 (Ky.1995). The rule does not specify what time before trial is reasonable. Reasonableness will vary with the type of evidence.

What qualifies as notice

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

Actual notice

A defense motion in limine demonstrates "actual notice" of 404(b) evidence. *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky.1997).

Exclusion

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

Opening the door, rebuttal

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

Be specific.

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

KRE 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.

DISCUSSION:

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.

NOTES

Rule 405

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

(b) Under KRE 405(a), character cannot be proved by specific instances of conduct. Only two methods of proof are allowed: reputation and opinion. *Fairrow v. Commonwealth,* 175 S.W.3d 601 (Ky.2005) Note: when the issue is first aggressor or self defense, specific instances *are permitted* under KRE 404(a). *Saylor v. Commonwealth,* 144 S. W. 3d 812 (Ky.2004). A prior conviction is a specific instance of bad conduct, which may be used to impeach credibility, but not to prove bad character of the person convicted. *Hayes v. Commonwealth,* 175 S.W.3d 574, 588 (Ky.2005).

(c) Reputation and opinion regarding character are forms of lay opinion that might otherwise be governed by KRE 701. Obviously, a jury will not be impressed by either without an adequate basis of personal knowledge. While neither KRE 405 nor KRE 602 requires a formal foundation, a foundation should be laid carefully and thoroughly.

(d) "Community" means the people likely to know something about the person whose character is at issue. The word does not necessarily describe a geographical location. *See, Vaughn v. Commonwealth,* 230 S.W.3d 559 (Ky.2007) (child's school qualified as "community").

(e) Cross examination under 405(b) is limited to **relevant** specific instances of conduct. The questioner must have a **factual basis** for the subject matter of the inquiry. This requirement parallels the attorney's ethical duty under SCR 3.130(3.4)(e).

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

(g) The cross examiner must have a good-faith belief that the incident occurred and that the witness would probably have known about it. Questions about events essentially private in nature cannot test the accuracy, reliability, or credibility of a witness. Such incidents are irrelevant. *U.S. v. Monteleone,* 77 F.3d at 1090.

(h) 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.

(i) 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.

KRE 406 –Habit; Routine practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

HISTORY: Adopted by Supreme Court Order 2006-06, eff. 7-1-06

COMMENT:
Since KRE 406 is new, and there are no cases interpreting it, portions of the Commentary to KRE 406 are reproduced here.

NOTES

***

Rule 406 authorizes the introduction of evidence of a person's habit (and the routine practice of an organization) without opening the gates to the introduction of evidence of character or generalized disposition. The provision contains no definition of "habit" or "routine practice" but the following definition from the Advisory Committee Notes on Federal Rule 406 is both helpful and typical:

"Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." Fed.R.Evid. 406, Advisory Committee's Note.

It is contemplated that testimony about a driver's specific behavior (such as activating turn signals) would be admissible under the provision but that testimony about a driver's general behavior (such as always driving carefully) would be inadmissible.

The provision does not attempt to address the following questions: (1) How many times does a response to a specific stimulus have to occur in order to constitute a habit for purposes of the rule? (2) How much behavioral uniformity is required for multiple repetitive responses to qualify as habitual under the rule? With respect to these questions, drafters of the Federal Rules made the following points:

"... The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion ... While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated." Fed.R.Evid. 406, Advisory Committee's Note.

Evidence authorities believe that the lack of certainty on these points is insufficient reason for an exclusion of all habit evidence and that these are matters that can be resolved by the trial judge (as he/she resolves other matters of relevance) on a case-by-case basis. The same is true with respect to matters involving the methods by which habit can be proved (a single witness who has seen 50 responses or 50 witnesses who have seen 1 response). With respect to all such matters, the trial judge is well-suited to resolve issues bearing on admissibility and, of course, the trial judge has the discretion under Rule 403 to exclude such evidence when its probative value is substantially outweighed by such undesirable effects as undue delay, waste of time, confusion of the jury, and others.

Rule 406 is borrowed from the Federal Rules without modification.

***

DISCUSSION:

Effective date —KRE 406 applies in all cases in which the trial first occurred on or after July 1, 2006. For cases involving re-trials, where the original proceedings occurred after July 1, 1992, but prior to July 1, 2006, the 1992 rules apply. *Terry v. Commonwealth*, 153 S.W.3d 794, 802 (Ky.2005) (at the time of trial in this case, habit evidence was not admissible). In cases where the first trial occurred prior to July 1, 2006, the question of habit is addressed under KRE 401, 402, and 403. *Stringer v. Commonwealth*, 956 S.W.2d 883, 892 (Ky.1997). In cases involving proceedings first occurring prior to 1992, common law applies.

NOTES

Specific Applications:

Interpreting the new rule
At the time of updating this manual, there was one reported case interpreting the new KRE 406. *Bloxam v. Berg*, 230 S.W.3d 592 (Ky.App.2007)(habit evidence regarding doctor's habitual use of marijuana admissible under KRE 406, but excluded under KRE 403).

Predating the new rule
(a) Habit is defined as a person's regular conduct in response to a particular situation. *Sherroan v. Commonwealth*, 142 S. W. 3d 7 (Ky.2004). Kentucky common law excludes the introduction of habit evidence to prove action in conformity with the habit. *St. Clair v. Commonwealth*, 140 S. W. 3d 510 (Ky.2004); *Burchett v. Commonwealth*, 98 S.W. 3d 492 (Ky.2003); *Thomas v. Greenview Hospital*, 127 S.W. 3d 663 (Ky. App.2004).

(b) The ban on habit evidence does not preclude reliance on business custom in cases involving introduction of records under KRE 803(6). *Brooks v. LFUCG*, 132 S.W. 3d 790 (Ky.2004).

(c) Some rules informally permit habit evidence, including the "signature/m.o." exception to KRE 404(b), and the prior sexual relationship exception in KRE 412(b)(1)(A). These differ from habit because they involve specific examples of repetitive activity.

KRE 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.

HISTORY: Amended by Supreme Court Order 2006-06, eff. 7-1-06; 1992 c 324, § 6, 34, eff. 7-1-92; 1990 c 88, § 17

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

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

Another possible use is impeachment. Of course, these matters must be "at issue" and "of consequence to the determination of the action." A limiting instruction will be necessary in the case of impeachment.

KRE 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

NOTES

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.

DISCUSSION:
KRE 408 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 does not preclude admission for some other purpose. *God's Center Foundation v. LFUCG*, 125 S.W. 3d 295 (Ky. App.2003). Such evidence is available to show the bias or prejudice of a witness (the witness is testifying because not offered enough to compromise the claim) or an attempt to obstruct criminal investigation or prosecution (an attempt to buy off the witness).

The rule operates much like KRE 410 re: plea bargaining. *See Sloan v. Commonwealth*, 2004 WL 595648 (Ky.App.2004) (unreported). (citing 408 and listing cases finding a due process violation **when a police promise not to prosecute was fraudulent** because beyond the officer's authority: *State v. Sturgill*, 469 S.E.2d 557 (N.C.App.1996); *Commonwealth v. Stipetich*, 652 A.2d 1294 (Penn.1995); *People v. Gallego*, 424 N.W.2d 470 (Mich.1988); *People v. Fisher*, 657 P.2d 922 (Colo.1983).

KRE 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.

DISCUSSION:
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.

KRE 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;

(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 plea or statement is admissible (i) 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 (ii) 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.

HISTORY: Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 7, 34, eff. 7-1-92; 1990 c 88, § 20

NOTES

DISCUSSION:

The 2007 amendment eliminates language prohibiting the use of "a plea under *Alford v. North Carolina*, 394 U.S. 956 (1969)." With the amendment, it is now clear that prior convictions based on "Alford pleas" are admissible for impeachment purposes or to prove persistent felony offender status. *See also*, *Pettiway v. Commonwealth*, 860 S.W.2d 766 (Ky.1993). The amendment clarifies that the last paragraph, beginning with the words "However, such a plea or statement…" applies to all subsections of the rule.

Rule 410 insulates the defendant from later use of withdrawn guilty pleas and nolo contendere 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. To be covered, the plea discussion must be with the prosecutor, or the prosecutor's agent. *Bratcher v. Commonwealth*, 151 S.W.3d 332, 342 (Ky.2004). Pleas that are never withdrawn are not exempted by this rule. *Porter v. Commonwealth*, 892 S.W.2d 594, 597 (Ky.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 v. Commonwealth*, 896 S.W.2d 4, 5 (Ky.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 v. Commonwealth*, 896 S.W.2d at 6. The rule applies to discussions held before or after formal charges are filed. *Roberts v. Commonwealth*, 896 S.W.2d at 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

A defendant's statements during plea discussions with a police detective acting with the express authority of the commonwealth attorney are protected by this rule. *Roberts v. Commonwealth*, 896 S.W.2d at 6.

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 v. Commonwealth*, 860 S.W.2d 766, 767 (Ky.1993).

Statements made during withdrawn pleas or *Alford* pleas

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

During a PSI investigation

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

Prior pleas

The rule does not preclude the use of nolo contendere pleas themselves as evidence of prior convictions in KRS 532.055 or KRS 532.080 hearings. The rule is addressed to statements made by the defendant, not to criminal convictions. *Pettiway v. Commonwealth*, 860 S.W.2d 766, 767 (Ky.1993) and *Whalen v. Commonwealth*, 891 S.W.2d 86, 89 (Ky.App.1995) authorize use of prior pleas in sentencing, despite the fact such use is certainly an admission.

NOTES

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

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

KRE 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.

DISCUSSION:
This rule primarily supports the public policy of mandatory insurance for automobiles and generally encourages insurance. It does so by denying a party the inference that insureds tend to be less careful than uninsureds, and preventing knowledge of insurance coverage to cause the jury to impose liability without regard to fault. *Robinson v. Lansford*, 222 S.W.3d 242 (Ky.App.2006).

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

Exceptions
Proof of insurance is admissible as evidence of **ownership, agency, or control of property**, as well as credibility of a witness. *Baker v. Kammerer*, 187 S.W.3d 292, 295 (Ky.2006). If there is other evidence to prove these points, however, 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. *Earle v. Cobb*, 156 S.W.3d 257, 261-262 (Ky.2004).

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

KRE 412 Rape and similar cases; admissibility of victim's character and behavior

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

(b) Exceptions:
- **(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:**
  - **(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;**
  - **(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and**

NOTES

(C) any other evidence directly pertaining to the offense charged.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

DISCUSSION:

This rule ensures that the prosecuting witness is not put on trial by the defense through irrelevant evidence. *Anderson v. Commonwealth,* 63 S.W. 3d 135 (Ky.2001). It was adopted to end the practice of deeming the chastity of an adult female relevant to "the reasonableness of her story" and allowing instances of prior "unchastity" as evidence bearing on this point. *Roberson's New Kentucky Criminal Law and Procedures,* 2 Ed., 779-784 (1927). The rule attempts to strike a balance between the defendant's right to confront the witness and to present a defense, and the need to shield the jury from irrelevant, salacious details about the prosecuting witness.

Impeaching witness credibility

Lying about one's virginity puts that past sexual history "in evidence." But the trial court must decide what is more important, impeachment, or the purpose of the Rape Shield Law. *Woodard v. Commonwealth,* 219 S.W.3d 723 (Ky.2007) (no abuse of discretion to exclude impeachment on an "irrelevant matter" of lying re: virginity).

Witness reputation

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

A rule of exclusion

The rule prescribes rigid procedural steps which must be taken to introduce evidence on the limited subjects the rule permits. **Rule 412 is a rule of general exclusion**, subject to **three exceptions**. *Garrett v. Commonwealth,* 48 S.W. 3d 6 (Ky.2001).

Three Exceptions:

1) Identification of semen, or cause of injuries

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

2) Sex with the accused, consent

KRE 412(b)(1)(B) permits proof of specific acts of sexual behavior **with the accused** as evidence of consent. In cases where the prosecuting witness is deemed legally incapable of giving consent, such evidence would be **irrelevant**. *Cf., Hillard v. Commonwealth,* 158 S.W.3d 758, 762-763 (Ky.2005) (such evidence was irrelevant to prove A.W.'s sexual orientation, relationship with other witness, and /or bias against defendant). **Sexual thoughts** about the accused qualify for admission under this exception. *Commonwealth v. Young,* 182 S.W.3d 221 (Ky.App.2005) (sexual fantasy about defendant police officer).

NOTES

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

Rape shield does not always apply
A defendant was denied the right to a fair trial and the right to present a defense when the trial court excluded evidence of prior sexual contact between the complaining witness —who was under age— and her brother, without first determining the relevance of such evidence. *Barnett v. Commonwealth*, 828 S.W.2d 361 (Ky.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.

Underage victim's sexual behavior that occurred prior to the age of consent is not barred, because such behavior cannot possibly be the victim's fault. *Barnett v. Commonwealth*, 828 S.W.2d 361 (Ky.1992). *See also, State v. Budis*, 593 A.2d 784, 791-792 (N.J.1991) (citing similar cases from Arizona, Maine, Massachusetts, Nevada, New Hampshire, New York and Wisconsin, plus law review articles).

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 entitle a defendant to present evidence of fabrication. *Mack v. Commonwealth*, 860 S.W.2d 275, 277 (Ky.1993). In *Mack*, the victim's privacy rights had to give way to the defendant's rights under the state and federal Constitutions to a fair trial, including the right to confront witnesses.

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

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

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

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

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

NOTES

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

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

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

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

Once the evidence qualifies as relevant and admissible, ordinary KRE 403 balancing applies, favoring admission unless the potential for misuse substantially outweighs the probative value of the evidence.

Using record of hearing for impeachment, substantive evidence
KRE 412(c)(2) mandates sealing the record of the hearing unless the judge rules otherwise. Obviously, the record could be used to impeach the prosecuting witness at trial. KRE 801 A(a)(1); 106. If the prosecuting witness suffers loss of memory at trial but testified on that subject at the hearing, the video tape or transcript could be introduced as substantive evidence under KRE 801 A(a)(1), 804(a)(3), and 804(b)(1). However, until the judge authorizes such use, the record remains unavailable. Refusal to allow impeachment with the prior hearing could implicate the defendant's 6th Amendment right of confrontation.

Role of the Commonwealth's Attorney
The attorney for the Commonwealth represents the **government**. KRS 15.725; SCR 3.130 (1.13). The prosecutor is not the lawyer for the prosecuting witness at the hearing prescribed by 412(c)(2). The government's lawyer should be limited to explaining how the introduction of the proposed evidence will deny his client, the government, a fair trial, not how it will affect the prosecuting witness. ■

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

- Charles Dickens, *Great Expectations*

NOTES

ARTICLE V: PRIVILEGES

NOTES

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

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

KRE 501 General rule

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

(1) Refuse to be a witness;
(2) Refuse to disclose any matter;
(3) Refuse to produce any object or writing; or
(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

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

Whether a privilege exists is preliminary question for the court, per KRE 104. KRE 104(a) requires the court look at the **facts and circumstances** surrounding the relationship **not the substance** of the privileged conversation. *U.S. v. Zolin*, 491 U.S. 554, 109 S.Ct 2619, 105 L.Ed.2d 469 (1989).

Privileges generally apply to **communications – written and oral.** However, an argument exists that the privileges extend to nonverbal actions and knowledge gathered through observation.

Privilege **does not apply where confidentiality is compromised**, to wit: by the presence of a third party not essential to the communication.

Only the **holder of the privilege may assert it.** See the specific rules to determine holder.

Privileges **only** apply **where** the **need** for **confidentiality** exists. Example: when a client sues his attorney, the need for confidentiality of the communications does not exist. Thus, the privilege is waived.

KRE 502 (Number not yet utilized.)

KRE 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;

NOTES

Rule 503

(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.

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

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

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

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

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

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

NOTES

Exceptions to the privilege

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

Where the **lawyer and client are adverse parties**, there is no point having a privilege because information that would be privileged would also be essential to the disposition of the case. In *Rodriguez v. Commonwealth*, 87 S.W. 3d 8 (Ky.2002), the court held that the privilege is waived "automatically" when a client testifies adversely to her attorney. However, the court also held that the waiver was **limited to the matters raised by the client** and could not be deemed a "blanket" waiver.

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

Successor counsel

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

Work product

Work product belongs to the attorney, not the client. Disclosure cannot be compelled against the attorney's wishes. *Morrow v. B, T, & H*, 957 S.W.2d 722 (Ky.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).

KRE 504 Husband-wife privilege

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

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

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

- **(1) In any criminal proceeding in which sufficient evidence is introduced to support a finding that the spouses conspired or acted jointly in the commission of the crime charged;**
- **(2) In any proceeding in which one (1) spouse is charged with wrongful conduct against the person or property of:**
  - **(A) The other;**
  - **(B) A minor child of either;**
  - **(C) An individual residing in the household of either; or**
  - **(D) A third person if the wrongful conduct is committed in the course of wrongful conduct against any of the individuals previously named in this sentence. Or**
- **(3) In any proceeding in which the spouses are adverse parties.**

(d) Minor Child. The court may refuse to allow the privilege in any proceeding if the interests of a minor child of either spouse may be adversely affected.

NOTES

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

Are they spouses? Assertion of the privileges requires claimant to prove the existence of a valid, ongoing marriage **at the time spousal testimony is sought.** The privilege **does not survive divorce**.

Separation/filing for divorce. Under federal law, the privilege does not apply. No Kentucky case addresses whether separation and or filing for a divorce is sufficient to overcome the privilege. *Gonzalez De Alba v. Commonwealth,* 202 S.W.3d 592, 596 (Ky.2006).

Either privilege must be asserted in a timely fashion by the party holding the privilege. *White v. Commonwealth,* 132 S.W. 3d 877 (Ky. App.2003). A wife cannot assert the husband's "spousal" privilege and vice versa. *Pate v. Commonwealth,* 134 S.W. 3d 593 (Ky.2004).

Subsection (b) protects confidential communications "made privately by an individual to his or her spouse," but only those not meant to be divulged. *Slaven v. Commonwealth,* 962 S.W.2d 845, 853 (Ky.1997). In *White v. Commonwealth,* 132 S. W. 3d 877 (Ky. App.2003), the court held that statements made in the presence of others indicated that they were not intended to be confidential.

The marital privilege is given to the maker of the statement or the person's guardian, conservator or personal representative.

Privilege does not apply where:
The Commonwealth introduces a *prima facie* case that the spouses are conspirators or accomplices in a crime that is the subject matter of the case. *Pate v. Commonwealth,* 134 S.W. 3d 593 (Ky. 2004).

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. *Lester v. Commonwealth,* 132 S.W. 3d 857 (Ky. 2004).

The judge also may refuse to allow the privilege "in any other proceeding" if the interest of a minor child of either spouse may be adversely affected. Obviously, if the spouses are adverse parties it would be unfair to afford either of them a privilege.

KRS 620.030 imposes a duty on practically every adult to report child abuse to police, or to the commonwealth's and county attorneys. KRS 620.050(2) expressly states that the husband/wife and any professional/client/patient privileges except the attorney/client and clergy/penitent privileges do not excuse a person from the duty to report. These privileges will not apply "in any criminal proceeding in district or circuit court regarding a dependent, neglected or abused child." *Mullins v. Commonwealth,* 956 S.W. 2d 210 (Ky.1997), points out the privilege exists to preserve marital harmony, and is subject to exceptions, including KRS 620.050 where a child is involved. In *Carrier v. Commonwealth,* 142 S.W. 3d 670 (Ky.2004), a case involving KRE 507, the court held that the existence of a privilege is not a ground for failing to comply with the statute. The court appears to make a distinction between the simple fact of reporting and the disclosure of any other information.

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

NOTES

KRE 505 Religious privilege

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

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

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

DISCUSSION:

Under subsection (a), communication does not have to be in the nature of confession or absolution. It is enough 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*, 892 S.W.2d 542 (Ky. 1994).

If the person makes a statement in the course of seeking spiritual advice, counsel, or assistance, it falls under the privilege. The privilege may be claimed by the person making the communication, his guardian, his conservator, or his personal representative. The clergyman may claim the privilege, but only on behalf of the person making the statement.

A member of the clergy who confronts a defendant with a victim's allegations is not acting as a spiritual advisor under the rules. *Commonwealth v. Buford*, 197 S.W.3d 66 (Ky.2006)

There are no exceptions to this privilege.

KRE 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;**

NOTES

(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.

DISCUSSION:

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."

The rule provides that a person who consults or interviews the counselor for the purpose of obtaining "professional services" may refuse to disclose and prevent any other person from disclosing a confidential communication, that is, one not intended to be disclosed to third persons except persons who were present at the time to "further the interest of the client" in the consultation or interview. Typically, counselors work in group sessions and in the case of school counselors, probably need to have the parents present many times during the course of advising and assisting students. Therefore, the privilege is written widely enough to cover all these situations.

Under subsection (c) the client, his guardian, conservator or personal representative may claim the privilege. The counselor or the counselor's employer may claim the privilege on behalf of the client.

This rule has more exceptions than the others. If the client asserts a physical, mental or emotional condition as an element of a claim or defense, the client cannot claim the privilege.

If the client has died and if any party to the litigation raises the client's mental, physical or emotional condition, the privilege does not apply.

NOTES

In any case, if the judge finds the communication is relevant to an essential issue and there is no alternate means to obtain the "substantial equivalent" of the communication, and the need for information outweighs the interests protected by the privilege, then the privilege may be overcome. The rule provides that the court may receive evidence *in camera* to make findings under this rule. *Barroso v. Commonwealth*, 122 S.W. 3d 554 (Ky.2003).

KRE 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.

DISCUSSION:

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

NOTES

NOTES

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

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

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.

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

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

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

KRE 508 Identity of informer.

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

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

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

(2) Testimony on relevant issue. If it appears that an informer may be able to give relevant testimony and the public entity invokes the privilege, the court shall give the public entity an opportunity to make an in camera showing in support of the claim of privilege. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavits. If the court finds that there is a reasonable probability that the informer can give relevant testimony, and the public entity elects not to disclose this identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one (1) or more of the following:

(A) Requiring the prosecuting attorney to comply;
(B) Granting the defendant additional time or a continuance;
(C) Relieving the defendant from making disclosures otherwise required of him;
(D) Prohibiting the prosecuting attorney from introducing specified evidence; and
(E) Dismissing charges.

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

DISCUSSION

The Government (Kentucky, United States or any other state) 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.

Privilege applies in civil and criminal cases. KRE 101; 1101.

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

What can the government refuse to disclose? Definitely the identity of the informant. However, it appears the Commonwealth can also refuse to answer questions that would lead to the identity of the informant. *Thompkins v. Commonwealth*, 54 S.W. 3d 147 (Ky.2001).

Mere tipster. Relying on *Roviaro v. United States*, 353 U.S. 53 (1957), Kentucky holds that a "mere tipster" need not be disclosed. *Taylor v. Commonwealth*, 987 S.W.2d 302, 304 (Ky.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.

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

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

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

NOTES

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.

KRE 509 Waiver of privilege by voluntary disclosure

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

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

KRE 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.

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

KRE 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 there from.
(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 there from.

DISCUSSION:
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**. On this matter, the **prosecutor**, by virtue of her office, is under a **strict obligation not to comment on silence**. *Niemeyer v. Commonwealth*, 533 S.W. 2d 218 (Ky.1976). No inference concerning any issue may be drawn from it. This part applies to juries, and to judges making rulings on motions for directed verdict.

Subsection (c) entitles any party, upon request, to an instruction that no inference may be drawn from a claim of privilege. ■

NOTES

ARTICLE VI. WITNESSES

NOTES

KRE 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.

DISCUSSION:

Under KRE 601(a) every person is legally competent to serve as a witness unless some other law declares otherwise. Rules 605 and 606 declare the trial judge and the jury incompetent, but only re: the trial where they are performing these functions. *Marrs v. Kelly,* 95 S.W. 3d 856 (Ky.2003). Ethical rules may prevent judges from testifying at all. KRE 601(b) prescribes the minimum abilities a witness must possess in order to "testify as a witness." KRE 601 presumes witnesses competent and authorizes disqualification only upon proof of incompetency. *Price v. Commonwealth,* 31 S.W. 3d 885 (Ky.2000). There is no minimum age. *Pendleton v. Commonwealth,* 83 S.W. 3d 522 (Ky.2002)*; cf., B.B. v. Commonwealth*, 226 S.W.3d 47 (Ky.2007) (four-year-old child incompetent to testify, based on responses at hearing). The determination of competency is left to the discretion of the trial judge at a hearing outside the presence of the jury. *Jarvis v. Commonwealth*, 960 S.W.2d 466, 468 (Ky.1998).

(a) The defendant has a constitutional right to testify. *Rock v. Arkansas*, 483 U.S. 44 (1987) (14th Amendment due process, 5th Amendment right against self-incrimination, and 6th Amendment right to compulsory process); *Riley v. Commonwealth*, 91 S.W. 3d 560 (Ky.2002) (citing *Rock*, and Ky. Const. §11). A defendant in a criminal case is a competent witness because KRE 601(a) and KRS 421.225 make him so. Under 421.225 the defendant testifies **only at his own request**.

(b) A lawyer is a competent witness for any purpose. But a lawyer who is called as a "necessary" witness is bound by SCR 3.130(3.7)(a) to disqualify as counsel, and by SCR 3.130(1.6) and KRE 503 to maintain confidentiality of any information gained thru representation. *Caldwell v. Commonwealth,* 133 S.W. 3d 445 (Ky.2004).

(c) A child is presumed competent to testify under KRE 601(a). "The competency bar is low with a child's competency depending on her level of development and upon the subject matter at hand." *Pendleton v. Commonwealth,* 83 S.W. 3d 522 (Ky.2002). Interviewing techniques may affect whether the child is reporting from memory or reacting to cues and hints by the interviewer. *See*, *dissent* in *Pendleton*; *see also*, *B.B. v. Commonwealth*, above, finding a four-year-old incompetent.

(d) A witness who undergoes hypnosis may be disqualified under the totality of circumstances test. *Roark v. Commonwealth,* 90 S.W. 3d 24 (Ky.2002). Considerations are whether the hypnosis was part of the investigation, whether there was a pre-hypnosis description, whether the hypnotist was a "forensic" hypnotist and whether the session was recorded. No single consideration is determinative, and the list is not exhaustive.

(e) If a judge determines under KRE 601(b) that a 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 judicial discretion is in determining capacity, which is reviewed under the usual deferential standard.

(f) To disqualify a witness, a party must demonstrate that the witness (1) was unable to perceive accurately the matters about which he proposes to testify, (2) presently lacks the ability to

recall these facts, (3) cannot, in some meaningful way, communicate these facts to the jury, or (4) does not understand the obligation to tell the truth.

(g) **A jailhouse informant, or snitch,** is not incompetent to testify under KRE 601. *West v. Commonwealth*, 161 S.W.3d 331 (Ky.App.2004) (refusing to impose stricter scrutiny).

(h) A witness who is drunk, insane, brain-damaged, or otherwise mentally incompetent at the time of the 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 can rely on what the person has to say. Warning: courts may be reluctant to disqualify victim witnesses who have suffered brain damage from an assault. **Ask for a psychological exam by an expert, and a witness competency hearing.**

(i) If the person demonstrates marginal capacity, the judge must perform balancing under KRE 401-403. But KRE 601 is used to exclude witnesses "grudgingly," reaching only "incapable" witnesses rather than merely "incredible" witnesses. *Price v. Commonwealth*, 31 S.W. 3d 885 (Ky.2000). If you fail to disqualify a witness entirely, you can still **present the competency expert at trial, to impeach the witness's credibility**.

(j) In federal courts, *Morgan v. Foretich*, 846 F.2d 941, 946 (4th Cir.1988)(excited utterance by child) is still cited for the proposition that a hearsay declarant's incompetency does not necessarily preclude introduction of that person's hearsay statements. But the federal rule lacks KRE 601's subsection (b), which plainly lists who may be disqualified. This is a critical difference. The declarant is the real witness, and the person testifying about the declarant's out of court statements merely a conduit. If the declarant is incompetent to testify, the declarant's statements should not be related second-hand. *See B.B. v. Commonwealth*, above, in which the court ruled the hearsay should not have been admitted.

KRE 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.

DISCUSSION:

Witnesses who have heard, seen, smelled, felt, or tasted –*i.e.*, used their five senses to gain information— are more reliable than witnesses who are relating what someone else told them. Even in hearsay cases, a witness must show first-hand knowledge of the out-of-court statement. This 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 inadmissible. *Woodard v. Commonwealth*, 219 S.W.3d 723 (Ky.2007) (disallowing lay opinion that prior abuse investigations were "unsubstantiated"); *Perdue v. Commonwealth*, 916 S.W.2d 148, 157 (Ky.1995). If the adverse party does not object, the jury and the prosecutor may use second-hand testimony for any purpose. *Id., cf., Kentucky Bar Ass'n v. Craft*, 208 S.W.3d 245, 263 (Ky.2006) (despite lack of preservation, finding violation of KRE 602 & dismissing disciplinary proceeding because evidence was hearsay from a person with Alzheimer's).

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

(c) The second sentence of KRE 602 excuses formal foundation through testimony of the witness. Thus if a store video shows the witness looking at the robber, further testimony as to personal knowledge is superfluous.

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

NOTES

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

(f) The judge determines personal knowledge as a KRE 104(b) question, that is, by asking whether the jury reasonably could believe the offered facts (*i.e.*, presence at the event) making personal knowledge possible. Credibility plays no part in this, or any other, KRE 104 determination. The only question is whether there is testimony or evidence establishing the predicate facts to allow the jury to make a rational inference of personal knowledge.

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

KRE 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.

DISCUSSION:

Section 5 of the Kentucky Constitution prohibits diminution of rights on the basis of religious belief or unbelief. To accommodate this mandate, KRE 603 allows a witness to promise to testify truthfully either by oath or affirmation. The rule simply requires the judge to be satisfied that the witness at least is aware of the obligation to tell the truth.

(a) Lawyers are prohibited under KRE 603 from making assertions of fact at trial as to the content of prior conversations with a witness, in leading questions posed to that witness. *Holt v. Commonwealth*, 219 S.W.3d 731 (Ky.2007) (reversing and remanding). The practice makes a witness of the attorney, allows the lawyer's credibility to be substituted for that of the witness, and violates both hearsay and the KRE 603 "oath and affirmation" rule. *Id*.

(b) The theory underlying KRE 603 is that the promise will "awaken" the witness's conscience and notify the witness of the duty to tell the truth. The "conscience awakening" part of the rule is undercut by the existence of rules like KRE 613, 801A, and 804, which provide remedies for untruthful testimony. The notice operates as a veiled threat that lies may be punished as perjury. KRS 523.020(1).

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

KRE 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.

DISCUSSION:

KRE 601(b) requires the ability to communicate with the jury either directly or through an interpreter. KRE 604 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 may be employed** for any and all meetings and conferences between client and attorney. KRS 30A.425.

(b) **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); Amended Order 2004-3, Amendments to the Rules of Administrative Procedure, Part IX (Procedures for Appointment of Interpreters). If the interpreter appointed is unqualified, a defendant is not effectively "present for trial" as provided by RCr 8.28(1).

NOTES

(c) **Non-English speaking defendants** cannot validly waive ***Miranda*** rights unless a **qualified** interpreter is available to explain them. *United States v. Castorena-Jaime*, 117 F.Supp.2d 1161, 1171 (D.Kansas2000) (language barriers may impair a suspect's ability to act knowingly and intelligently); *People v. Mejia-Mendoza*, 965 P.2d 777 (Colo.1998) (translator merely read, in Spanish, a Miranda warning card, which was printed in English, to which the defendant never responded). *People v. Aguilar-Ramos*, 86 P.3d 397 (Colo.2004), (Spanish-speaking Mexican national did not validly waive Miranda rights, despite being given a Spanish version of the Miranda rights waiver form, which he subsequently signed).

(d) **Statements to police** without a qualified interpreter present are equally suspect.

(e) When **interpretation for two or more hours** is required **without breaks**, a team of two interpreters should be appointed. Section 6 of Amended Order 2004-3. Interpreters must be Qualified Level I interpreters pursuant to Rule of Administrative Procedure, Part IX, Section 8.

(f) **Interpreters should not paraphrase witnesses or ask clarifying questions** of witnesses in violation of Canon 1 of the Code of Professional Responsibility for Interpreters. Counsel should also object when the interpreter **fails to provide simultaneous interpretation**, or **does not interpret** at all.

(g) **Interpreted attorney-client conversations** are **privileged** by KRE 503(a)(2)(B). The interpreter is considered the representative of the client. KRS 30A.430 prohibits examination of interpreters concerning privileged conversations without the consent of the client. The interpreter cannot be required to testify to any other privileged communication (*e.g.*, religious privilege) without the permission of the client. See Article 5.

KRE 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.

DISCUSSION:

A judge is more than an umpire for resolving evidentiary disputes. KRE 611(a) makes judges ultimately responsible for the quality of the evidence heard by the jury, and for ensuring that the evidence is effective for the ascertainment of the truth. KRE 605 prevents judges from testifying at trials where they are presiding. *Marrs v. Kelly*, 95 S.W. 3d 856 (Ky.2003). The second sentence of the rule makes an objection unnecessary.

(a) There could be scenarios in which a judge is the best —perhaps the only— witness. A judge might overhear the defendant threaten the life of a witness, or overhear the victim tell the prosecutor he really can't say the defendant is the one who robbed him. Such evidence— if adduced through the presiding judge—would be nearly unimpeachable. Cross-examination would be so difficult and so unlikely to counteract the judge's testimony, that the drafters decided the presiding judge's testimony cannot be allowed.

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

(c) A judge may not testify in a case where he or she is presiding. Canon 5 of SCR 4.300, Code of Judicial Conduct, as well as KRE 605. But a judge may testify in a "subsequent and separate proceeding" of that case (such as an RCr 11.42 proceeding). Lawson *Kentucky Evidence Law Handbook*, 3d Ed.1993 at 151, and *Bierman v. Klapheke*, 967 S.W.2d 16 (Ky.1998).

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

(e) Even if the presiding judge testifies, the rule language does not indicate 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) But 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.

NOTES

KRE 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.

DISCUSSION:
This rule prevents a juror from testifying as a witness at a trial where the juror is also sworn to be the finder of fact. The considerations underlying KRE 605 also underlie this rule.

(a) RCr 10.04 prohibits examination of a juror except to establish that the verdict was decided "by lot." Under RCr 10.04, "evidence of another juror as to anything that occurred in the jury room" is incompetent to impeach the jury's verdict. *Hicks v. Commonwealth*, 670 S.W.2d 837, 839 (Ky.1984). **Nonetheless,** courts should consider juror testimony concerning **overt acts of misconduct by which extraneous and potentially prejudicial information was presented to the jury,** including juror testimony showing that a newspaper article relevant to the case was read aloud in the jury room. *Mattox v. United States*, 146 U.S. 140, 148 (1892); *Doan v. Brigano*, 237 F.3d 722, 732 (6th Cir.2001), *abrogated on other grounds as recognized by Maples v. Stegall*, 340 F.3d 433 (6th Cir.2003) (declaring unconstitutional in violation of right to confront, an Ohio rule similar to RCr 10.04); *see also, Commonwealth v. Wood*, 230 S.W.3d 331 (Ky.App.2007) (jury's use of a dictionary was an "overt act" about which a court could receive testimony in order to ensure a fair trial).

(b) The **"appearance of evil,"** *i.e.*, a clearly wrongful act, may create an exception to the rule that a jury cannot impeach its own verdict. *Young v. State Farm Mutual Automobile Insurance Co.*, 975 S.W.2d 98, 99-100 (Ky.1998) (patently improper conduct of the bailiff warranted application of the "appearance of evil" exception to the rule that a jury could not impeach its own verdict); *Dillard v. Ackerman*, 668 S.W.2d 560, 562-63 (Ky.App.1984) (appellate court "would be helpless to redress the wrong caused unless we had a doctrine to apply such as the 'appearance of evil principle.'").

(c) Nothing in KRE 606 prohibits a **grand juror** from testifying as to the proceedings by which an indictment was returned. However, 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 (no one may refuse to be a witness) to force that grand juror to testify. The party must first apply to the grand jury presiding judge, the chief judge of the circuit, or to the judge presiding over the action to obtain grand juror testimony.

(d) **KRE 606 does not apply to grand jury witnesses**. In *Purcell v. Commonwealth*, 149 S. W. 3d 382 (Ky.2004), the prosecutor played the defendant's grand jury testimony during the government's case in chief. While the statement qualified as a party admission under KRE 801A, the opinion is silent as to how the secrecy barrier of RCr 5.24(1) was avoided. Perhaps the prosecutor applied to the grand jury judge for permission to use the statement.

KRE 607 Who may impeach

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

DISCUSSION:
Prior to 1953, impeaching one's own witness was prohibited. After 1953, it was allowed under CR 43.07 by any means except evidence of particular wrongful acts. CR 43.07 was abrogated by the Supreme Court as of January 1, 2005. Since then, KRE 607 authorizes impeachment of any witness by any party by any method authorized by law.

(a) Credibility may be impeached in any number of ways, under KRE 104(e)(evidence of bias, interest, or prejudice), KRE 608 (character evidence), KRE 609 (prior convictions), KRE 801A (prior inconsistent statements) or case law.

(b) **Bias-interest-prejudice** These terms in KRE 104(e) allow 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. *Miller v. Marymount Medical Center*, 125 S. W. 3d 281 (Ky.2003); *Motorists Mutual Ins. Co. v. Glass*, 996 S.W.2d 437, 447

NOTES

(Ky.1997)*; Weaver v. Commonwealth*, 955 S.W.2d 722, 725 (Ky.1997); *Commonwealth v. Maddox*, 955 S.W.2d 718, 720-721 (Ky.1997).

(c) **Inconsistent statements** KRE 801A(a)(1) states that a prior inconsistent statement of a witness is admissible as long as the defendant has an opportunity to cross-examine the witness at trial regarding the prior statement and a proper foundation is laid. See also KRE 613. Prior inconsistent statements can be admitted not just to impeach witnesses, but also **as substantive evidence**. *Manning v. Commonwealth*, 23 S.W.3d 610, 613 (Ky.2000). If inconsistent statements are introduced for impeachment only (a rare occurrence), a limiting instruction is required.

(d) **Character for untruthfulness** By the methods permitted in KRE 608, a party may demonstrate that no one else believes the witness, supporting the inference that the jury should not believe the witness either.

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

(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 may also be used to impeach under this heading.

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

(h) Nothing in Article 6 limits the kind of evidence that may be used to impeach. If a witness denies making a deal with the Commonwealth, the impeaching party has the right to prove otherwise through **stipulation** of the Commonwealth or introduction of **testimony**. **Tape recordings** or testimony by witnesses who heard out of court statements may be 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) **Even evidence of interracial sexual relations** offered to show a reason to lie has been upheld as appropriate. *Olden v. Kentucky*, 488 U.S. 227 (1988) (reversing a decision to exclude). KRE 403 and 611(a) give a judge discretion to limit the extent of relevant cross- examination and production of relevant evidence. But the 6th Amendment of the U.S. Constitution gives the defendant a right to confront witnesses, present a defense, and undermine evidence presented against him. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky.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 "not-hiding-anything" rapport with the jury.

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

(l) A party cannot use supposed impeachment to introduce otherwise inadmissible evidence. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky.1997); *Slaven v. Commonwealth*, 962 S.W.2d 845, 858 (Ky.1997). Kentucky 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*, 975 S.W.2d 888, 893 (Ky.1998). Subterfuge is also forbidden by SCR 3.130(3.4)(e).

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

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

NOTES

KRE 608 Evidence of character

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

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

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

DISCUSSION:

Evidence of a witness's character or a trait of character may not be introduced to prove action in conformity with character under KRE 404(b) **except as authorized under KRE 607, 608, and 609**. KRE 608 tells how to attack character. Effective July 1, 2003, Rule 608 allows opinion as well as reputation evidence, and allows specific instances of conduct to be explored (only) in cross-examination. Now, it is permissible to testify that "X might tell you the truth, and again she might not," and probably permissible to opine outright, "I think X is a liar." *Stewart v. Commonwealth*, 197 S.W.3d 568 (Ky.App.2006). *Cf.*, *Lanham v. Commonwealth*, 171 S.W.3d 14, 23 (Ky.2005) (improper for a witness to characterize the testimony of another witness as "lying").

Reputation or Opinion

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

(b) "**Community**" is not limited to a physical location, and includes any group of people suited to be aware of the witness's reputation. *Vaughn v. Commonwealth*, 230 S.W.3d 559 (Ky.2007) (child's grade-school class qualified as "community").

(c) **If —and only if— a witness's veracity is attacked** under this rule, the proponent of that witness may rebut by introduction of reputation or opinion evidence that the witness is truthful. *Brown v. Commonwealth*, 983 S.W.2d 513 (Ky.1999) (reversible error to allow witness for prosecution to testify holding a bible –citing KRE 607); *cf.*, *Anderson v. Commonwealth*, 231 S.W.3d 117 (Ky.2007) (harmless error to allow evidence of defendant's past criminal conduct because of counsel's statement during voir dire that he would testify).

(d) There's a big difference between an opinion that a witness is a liar in general and an opinion that the witness is lying about something in the particular case. The former is permitted by KRE 608. The latter is forbidden by KRE 401-403 and KRE 702. A witness cannot be asked if another witness is lying. *Lanham v. Commonwealth*, 171 S.W.3d 14, 23 (Ky.2005)

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

Specific Instances

(f) Subsection (b) excludes extrinsic evidence of specific incidents to attack or support the credibility of the witness. The only exception is a prior felony conviction under KRE 609.

(g) But since July 1, 2003, a judge may allow a party to cross-examine a witness by describing specific instances of conduct that may bear on truthfulness or untruthfulness, and to ask if the witness is aware of these incidents. *Fairrow v. Commonwealth*, 175 S.W.3d 601, 605-606

NOTES

(Ky.2005). *E.g.*, an expert witness may be confronted with prior contradictory opinion testimony under 608(b).

(h) Under KRE 608, a witness on *direct* examination cannot be asked about specific incidents. Such instances of misconduct can be raised only on cross examination.

(i) KRE 608(b) involves a three part analysis. First, the specific incident must relate to the veracity of the witness. Second, the attorney must have a factual basis for believing that the incident occurred and the witness has some reason to know about it. Third, the proponent must convince the judge to permit the cross examination. Get a certified copy of the expert's prior contradictory testimony.

(j) If the witness denies knowledge of the specific incident raised on cross, the inquiry ends. The rule prohibits introduction of extrinsic evidence for any purpose. *Blair v. Commonwealth*, 144 S.W. 3d 801 (Ky.2004). But refreshing memory should be allowed.

KRE 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.

DISCUSSION:

The theory is that a person who suffers a felony conviction of any type is less deserving of belief.

(a) If a party desires to impeach a witness with a prior felony conviction that is less than 10 years old, KRE 609(a) provides that it "shall be admitted." Ordinary KRE 401-403 balancing and analysis does not apply to these convictions.

(b) Evidence of a prior conviction cannot come in against someone who does not become a witness. *Anderson v. Commonwealth*, 231 S.W.3d 117 (Ky.2007) (defendant did not take the stand); *Polk v. Greer*, 222 S.W.3d 263 (Ky.App.2007).

(c) A party may ask a witness if he has been convicted of a felony, but cannot inquire further, or offer extrinsic evidence on the nature of a party's criminal record **once the party has acknowledged the prior conviction**. *Dickerson v.Commonwealth*, 174 S.W.3d 451 (Ky. 2005) (applying reasoning in *Old Chief v. U. S.,* 519 U.S. 172, 190-91 (1997) and finding that where a defendant offered to stipulate to a prior conviction relevant to defendant's status, trial court abused its discretion by permitting government to prove the nature of the offense over defendant's objection); *see also*, *Polk v. Greer*, 222 S.W.3d 263, 265 (Ky.App.2007) (after Polk admitted prior felony in voir dire, Greer called Polk a persistent felon in opening statement, —reversed).

(d) Remoteness is the only consideration for exclusion. If a conviction is more than ten years old, 609(b) says it is **not admissible unless** the judge determines that the probative value of the conviction substantially outweighs its prejudicial effect. *Holt v. Commonwealth*, 250 S.W.3d 647 (Ky.2008) (abuse of discretion to allow convictions 24 and 25 years old). This is the reverse of ordinary KRE 403 balancing. *Miller v. Marymount Medical Center,* 125 S. W. 3d 274 (Ky.2004). The burden is on the party desiring to use the conviction. *McGinnis v. Commonwealth*, 875 S.W.2d 518, 528 (Ky.1994).

(e) Remote convictions are excluded because the jury "might associate prior guilt with current guilt." *Perdue v. Commonwealth*, 916 S.W.2d 148, 167 (Ky.1995). But the rule against remoteness has also been applied to bar impeachment evidence against an aaltperp whose guilt was not at issue**.** *Commonwealth v. Bowles*, 237 S.W.3d 137, 140 (Ky.2007) (counsel who failed to object to

NOTES

disallowance of 18-year-old conviction showing an alternate perpetrator m.o. was not ineffective).

(f) KRE 609 does not permit identification of the crime unless (1) the witness under cross-examination has denied the conviction or (2) the **witness** wishes to identify the nature of the conviction for tactical reasons. *Blair v. Commonwealth*, 144 S.W. 3d 801 (Ky.2004); *Caudill v. Commonwealth*, 120 S.W. 3d 635 (Ky.2003); *Slaven v. Commonwealth*, 962 S.W.2d 845, 859 (Ky.1997).

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

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

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

(j) A conviction cannot be used if it was pardoned, annulled, or otherwise set aside based on innocence. Reversal on appeal or dismissal for insufficient evidence satisfies the last requirement of the rule. A pardon from the governor under Section 77 of the Constitution qualifies, but a restoration of rights under Section 145 does not.

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

(l) KRS 610.320(4), a juvenile statute that allows use of prior juvenile adjudications to impeach, has similarly been ruled unconstitutional, but only in an unpublished Court of Appeals opinion. *White v. Commonwealth*, 2004 WL 405980 (Ky.App.2004). The Commonwealth has conceded that use of a juvenile adjudication to impeach is reversible error. *Barroso v. Commonwealth*, 122 S. W. 3d 554 (Ky.2003).

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

KRE 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.

DISCUSSION:

Section Five of the Ky. Const. prohibits diminution of civil rights, privileges or capacities because of religious belief or disbelief. Thus a witness is not disqualified to testify and cannot be cross-examined on religious beliefs for the purpose of discrediting the witness. *L & N R. Co. v. Mayes*, 80 S.W. 1096 (Ky.1904). Rule 610 codifies this constitutional principle.

(a) Evidence of religious beliefs or opinions is not admissible to undermine or bolster credibility of a witness. *Cf*., *Pogue v. Commonwealth*, 2006 WL 3231397 (Ky.App.2006) (Unreported) (unpreserved error including juror's reference to another juror's religion and belief he would not lie, and evidence the organization Pogue allegedly stole from was Christian did not impermissibly bolster witnesses based on religion, and did not violate KRE 610). Evidence of religious beliefs or opinions to prove other matters is admissible if it satisfies other evidence rules.

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

NOTES

KRE 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.

DISCUSSION:

KRE 611 (along with KRE 102, 106, and 403) gives the judge guidance on what to do when evidence questions are not clearly governed by the Rules. It does not supersede the general order of proceedings set out in RCr 9.42, or the other Rules of Evidence. KRE 611(b) and (c) deal with cross-examination. But KRE 611(a) imposes a mandatory duty on judges to exercise reasonable control over the introduction of evidence.

611(a)

(a) The judge "shall exercise reasonable control" to make interrogation and presentation of evidence "effective for the ascertainment of the truth." This language is so broad that it can cover sweeping questions like introduction of oral statements to explain portions of written statements as well as small problems like objections to compound questions. See also KRE 106, 612, 803 and 804. Such matters are within the sound discretion of the judge, and will not be overturned unless discretion was abused. *Soto v. Commonwealth,* 139 S.W. 3d 827 (Ky.2004). Judges are encouraged to use KRE 403 to guide decisions under this rule. *Commonwealth v. Maddox*, 955 S.W.2d 718, 721 (Ky.1997).

(b) Judges may limit cross examination for any of the three purposes specified by KRE 611(a). *Caudill v. Commonwealth*, 120 S. W. 3d 635 (Ky.2003). But denial of effective cross-examination is reversible without showing prejudice. *Eldred v. Commonwealth*, 906 S.W.2d 694, 702 (Ky.1994). Also, the 6th Amendment of the U.S. Const. and §11 of the Ky. Const. preserve a criminal defendant's right to confront witnesses. *Crawford v. Washington*, 541 U.S. 36 (2004); *Rogers v. Commonwealth*, 992 S.W.2d 183, 185 (Ky.1999).

(c) But limits on cross become unreasonable and violate the right to confront, depending on the circumstances. When the jury is given enough information to make the desired inference, the right of confrontation is upheld. *Weaver v. Commonwealth*, 955 S.W.2d 722, 726 (Ky.1997). It was not a denial of confrontation rights to require counsel —rather than a pro se defendant— to cross-examine a child victim and was reasonable under KRE 611. *Partin v. Commonwealth*, 168 S.W.3d 23 (Ky.2005). If cross examination creates a reasonably complete picture of the witness's veracity, the constitutional confrontation requirement has been met. *Bratcher v. Commonwealth*, 151 S.W. 3d 332 (Ky.2004). The defendant has a constitutional right to "reasonable" cross examination that includes questions tending to show the witness's bias, animosity or any other reason that the witness would testify falsely. *Beaty v. Commonwealth*, 125 S.W. 3d 196 (Ky.2003). Limits on cross-exam may also violate due process. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).*Greene v. McElroy*, 360 U.S. 474, 496 (1959); *DeGailey v. Commonwealth*, 508 S.W.2d 574 (Ky.1974).

(d) "Invited error" and "opening the door" are often associated with KRE 611(a). Courts allow inadmissible as well as admissible evidence in rebuttal when a party has introduced inadmissible evidence. This is to "neutralize or cure any prejudice…." *Commonwealth v. Alexander*, 5 S.W. 3d 104, 105 (Ky.1999); *see also Commonwealth v. Gaines*, 13 S.W. 3d 923, 924 (Ky.2000).

(e) "Opening the door" can result from intentional or inadvertent blurts by a witness, or inquiry into subjects previously ruled irrelevant or otherwise inadmissible.

NOTES

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

(g) A judge can give limiting instructions *sua sponte*, without request of a party. KRE 611(a) and KRE 105 can be read together to impose a duty to do so. Certainly the Rule authorizes it. Evidence of limited admissibility is effective for the ascertainment of the truth only when properly limited by admonition. The second sentence of KRE 105(a)(requiring preservation) is a penalty on appeal, not a restriction on the trial judge.

(h) Needless consumption of time can be minimized by the judge, who has power to control presentation of evidence under KRE 611(a)(2). The judge has an ethical duty under SCR 4.300(3)(A)(4) to accord every person "and his lawyer" full right to be heard according to law. KRE 611(a)(2) does not authorize the judge to practice the case for the parties or to exclude evidence simply because production of the evidence might delay proceedings. A two-week recess until a witness could be called and examined was upheld in *M. J. v. Commonwealth*, 115 S.W. 3d 830 (Ky.App.2002).

(i) New evidence on redirect can be allowed, within the trial court's discretion. *Brown v. Commonwealth*, 174 S.W.3d 421, 431 (Ky.2005).

(j) Whether to prohibit —or not to prohibit— attorneys from speaking with a witness during a recess is within the court's discretion under KRE 611(a). *St. Clair v. Commonwealth*, 140 S.W. 3d 510 (Ky.2004). *But see*, *Geders v. U. S.*, 425 U.S. 80, 91 (1976) (barring attorney/ client contact during overnight recess violates 6th Amendment); *cf.*, *Beckham v. Commonwealth*, 248 S.W.3d 547 (Ky.2008) (no 6th Amendment or *Geders* violation when court did not limit *all* communication with counsel during overnight recess, but only forbade discussion re: ongoing testimony).

(k) Extrinsic evidence under KRE 106 may cause delays to obtain evidence. The judge has authority under this section to require introduction of the evidence later.

(l) Bickering or brow-beating between a lawyer and witness. KRE 611(a)(3) authorizes the judge to control improper behavior. SCR 3.400(3)(A)(8) places a burden on the judge to control proceedings so that lawyers refrain from "manifesting bias or prejudice against parties, witnesses, counsel or others unless race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status or other similar factors are issues in the proceeding."

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

(n) An accurate transcript or testimony of a participant to supplement or substitute for a tape are options within the judge's discretion. The judge may use these to fill in the inaudible portions. However, a witness cannot "interpret" the tape, and must testify from memory. *Gordon*, 916 S.W.2d at 180. Federal practice authorizes the use of such composite tapes. *U.S. v. Scarborough*, 43 F.3d 1021, 1024 (6th Cir. 1994).

611(b)

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

(p) There are two limitations. The judge may preclude cross-examination on matters not raised on direct "in the interests of justice," and prohibit leading questions except when cross is on the same subject matter of direct. Both KRE 611(a) and 403 authorize the judge to place "reasonable" limits on the timing and subject matter of cross-examination; *see also Embry v. Turner*, 185 S.W.3d 209 (Ky.App.2006) (judgments will not be reversed because of leading questions unless there's a shocking miscarriage of justice); and *Moody v. Commonwealth*, 170 S.W.3d 393 (Ky.2005) (cross-exam denied only with respect to collateral issues does not implicate the 6th Amendment right to confront).

(q) Examination and cross-examination of a child in a sexual offense prosecution may occur outside the courtroom and outside the presence of the defendant, who may watch via TV. See

NOTES

1996 amendment to KRS 431.350. This was upheld in *Stringer v. Commonwealth*, 956 S.W.2d 883, 886 (Ky.1997); *see also Commonwealth v. M. G.*, 75 S. W. 3d 714 (Ky. App.2002). Section 11 of the Ky. Const. expressly gives a criminal defendant the right to "meet the witnesses face to face." KRS 431.350 does not square with the §11 and should be objected to at trial as unconstitutional, with written notice to the AG.

611(c)

(r) **Leading questions** "should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." Failure to abide by KRE 611(c) in this regard can be "significant." *Holt v. Commonwealth*, 219 S.W.3d 731 (Ky.2007) (unsworn prosecutor asked whether witness recalled telling the prosecutor the opposite of his testimony —reversed).

(s) **Defined.** A leading question is one that suggests the answer to the witness. "You were robbed on March 15th, weren't you?" is leading. "Did anything happen to you on March 15th?" is not.

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

(u) **The Rule permits leading questions "to develop the testimony."** In other words, 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*, 962 S.W.2d 870, 874 (Ky.1998).

(v) **A hostile witness may be led on direct examination** when his answers or lack of answers show that the witness will not testify fairly and fully in response to open-ended questions. A witness is not hostile simply because of association with the other side in a case. Hostility must be shown by refusal to answer fully and fairly before the request to use leading questions is made.

(w) **The lead officer or detective,** if identified as the representative of the Commonwealth, or as a person essential to 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.

KRE 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.

DISCUSSION:

This is a special version of the rule of completeness, 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 discovery, the adverse party, in fairness, should have a chance to see the complete document. The rule does not describe what "refreshing" is. It at least implies that refreshing is permitted. *Purcell v. Commonwealth*, 149 S. W. 3d 382 (Ky.2004). The first phrase, "except as otherwise provided…" subordinates relief under this rule to the relief provided for in RCr 7.24 and 7.26 governing discovery and document production.

NOTES

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

(b) There is no set procedure. At minimum the proponent should show that the witness had cause to know the subject matter, but that for some reason, (stage fright, passage of time, illness, etc.), 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.

(c) 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.

(d) If the witness cannot remember, the proponent can try leading questions, a writing, a photograph or any other prompt. There is no requirement that it be prepared by the witness or that the witness even know of its existence. **If memory is not refreshed,** then a "recorded recollection" may come in as a hearsay exception under KRE 803(5).

(e) The difference between refreshed memory and past recollection recorded is discussed in *Disabled American Veterans, Dept. of Kentucky, Inc. v. Crabb*, 182 S.W.3d 541 (Ky.App.2005). A refreshed memory is only possible when the witness has some memory of the event, capable of being refreshed. Past recollection recorded is only admissible when the witness has "insufficient recollection to enable the witness to testify fully and accurately."

(f) If refreshing fails, the witness is disqualified to testify, for lack of personal knowledge. KRE 602. 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 move to strike under KRE 103(a), or move for mistrial, if a limiting instruction to ignore the testimony will not suffice.

(g) A witness who cannot testify from memory may still be the conduit for recorded recollection under KRE 803(5), if he can testify to the foundational requirements of that rule.

(h) Who may examine the "memory prompt?" This depends on its "use." 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, if the prompt was "used" to refresh memory, the adverse party is entitled to look at it. The adverse party may ask about use of prompts in a pretrial motion or elicit this information on cross-examination. KRE 612 differs from the federal rule —which contains a specific subsection allowing the judge to order access to statements. The Kentucky language mandates access if the prompt is "used."

(i) Parts of the "prompt" may be irrelevant. Upon request, the judge is required to make an in camera inspection to determine if some parts should be deleted before the "prompt" writing is turned over to the adverse party. Presumably this is a KRE 401-403 determination.

(j) Parts of the prompt may be privileged. 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.

(k) Police officers present a problem of "hybrid" testimony. They often say they don't remember all the details of an investigation. They then proceed to testify, reading from their case file as a crib sheet. This hybrid form of testimony is not personal knowledge, refreshed memory, or recorded recollection. The judge has authority to allow it under KRE 611(a) & (b) if it will contribute toward ascertainment of truth and avoid wasted time. But the judge must consider the likelihood that the jury will be misled. The judge should require the proponent first to show:

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 the officer's 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 the writing or prompt will be used only to fill in occasional details.

5. That the jury will be able to distinguish the portions of testimony that come from personal knowledge from the portions derived from other sources.

NOTES

KRE 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.

DISCUSSION:

KRE 613 lists the foundation requirements for impeachment with out-of-court statements. Traditionally juries were allowed to consider such statements only as "straight impeachment" re: the credibility of present testimony, and this use has survived. But for years Kentucky has also allowed prior inconsistent statements to be considered **as substantive evidence**. *Jett v. Commonwealth*, 436 S.W.2d 788 (Ky.1969). Not surprisingly, substantive use of out-of-court statements has eclipsed straight impeachment. KRE 801A(a)(1) embodies *Jett* and rejects the more limited federal approach to substantive use.

KRE 613(b) exempts party admissions under KRE 801A(b) from the foundation requirement.

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

(b) The examiner must notify the witness of the **time, place and circumstances** of the other statement, to refresh his recollection as to the making and substance of the other statement. Failure to lay the KRE 613 foundation renders the issue unpreserved, and unreviewable. *Gray v. Commonwealth*, 203 S.W.3d 679 (Ky.2006).

(c) The foundation is not elaborate:

1. Witness testifies that defendant is the person who robbed him.

2. Examiner asks the following questions:

A. *"Do you recall talking about this case with Officer X on March 15, 2005 at LMPD Headquarters?" "Yes."*

B. *"Were Detectives Y and Z there also?" "Yes."*

C. If the other statement is in writing it is presented to the witness to review.

D. If not in writing, the examiner asks *"Did you tell them that you could not identify the robber because he wore a mask?"*

E If in writing, the examiner reads exactly what is on the page: *"Did you tell them "I, uh, I could not say because, um, um, he had like a mask that he was wearing'."*

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

(e) If the prior statement is a writing, the foundation is laid by showing the witness the writing, establishing that the witness wrote it, and offering an opportunity to explain it. *Commonwealth v. Priddy*, 184 S.W.3d 501 (Ky.2005).

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

(g) When it is the prosecutor to whom the witness has told a different story, the rule still applies. The prosecutor may not –in the guise of questioning the witness—insert her own testimony as to what the witness said. *Holt v. Commonwealth*, 219 S.W.3d 731 (Ky.2007). The proper procedure is for the prosecutor to ask the witness if he or she made an earlier statement, and to identify the location, persons present, and approximate time. The witness can be asked to repeat that statement. If the witness denies the statement or repeats it in a materially different form, *another* who was present during the conversation (not the prosecutor) may testify as to its content. *Id.* at 738-739.

NOTES

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

(i) **Absence of impeached witness.** This rule and KRE 801A(a) presume that the maker of the different statement will be present and subject to questioning. *Thurman v. Commonwealth*, 975 S.W.2d 888, 893 (Ky.1998). But the second sentence of KRE 613 allows introduction of the different statement when the witness is not present if the judge finds that the "impeaching party has acted in good faith."

(j) **The statements need not be outright contradictory.** KRE 613 uses the word "different." KRE 801(a)(1) uses the word "inconsistent" to describe the types of statements that trigger impeachment. Both words imply that the in-court testimony differs from the out-of-court statement by adding or deleting some details. 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).

(k) **There is no 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.

(l) **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.

KRE 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.

DISCUSSION:

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

(a) **Adversary presentation of evidence** avoids undue influence of the trial judge on the fact-finding process. *Whorton v. Commonwealth*, 570 S.W.2d 627, 634 (Ky.1978) (dissent). The judge has the duty to ensure that the jury is not misled. KRE 403. The judge must be careful not to cross the line between judge and advocate, and become, in the jury's view, an advocate for one side. *Terry v. Commonwealth*, 153 S.W.3d 794 (Ky.2005) (cautioning a judge who asked an eyewitness 103 questions, that on re-trial he should consider that KRE 613 advises judges should question witnesses "sparingly").

(b) KRE 614(c) **allows jurors to submit written questions** to the judge who will decide whether the questions may be asked. The requirement of written questions avoids juror "blurts" that may precipitate motions for mistrial. As with judge questions, the danger with juror questions is that jurors may be transformed from neutral fact finders to inquisitors or advocates. This is fine in the jury room after the case is submitted, but not before.

(c) To avoid problems of diplomacy, KRE 614(d) allows **delayed objection**.

NOTES

KRE 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.

DISCUSSION:

The judge has authority to exclude witnesses from the courtroom during the testimony of other witnesses *sua sponte*, and must exclude witnesses upon the request of a party. Note: KRE 615(1) is unnecessary in a criminal case because §11 of the Ky. Const. 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"

(a) The 1st Amendment of the U.S. Const. and §11 Ky.Const. give both the defendant and the general public a constitutional right to demand admission of relatives, friends and the general public to all criminal trials. If the exclusion of a specific witness is not truly necessary to protect the integrity of the fact finding process, the constitutional right of openness should prevail.

(b) Scope of rule. The rule does not reach separated witnesses who get together outside the courtroom. *Woodard v. Commonwealth*, 219 S.W.3d 723 (Ky.2007). Witnesses who remain in the courtroom after their testimony, and are not recalled, do not violate this rule. *Johnson v. Commonwealth*, 180 S.W.3d 494 (Ky.App.2005). Nor did a defendant who spoke with a prospective witness during a recess violate the rule, when he had not yet testified. *Smith v. Miller*, 127 S.W.3d 644 (Ky.2004).

(c) The prosecutor may designate a police officer under KRE 615(2) as the representative of the state to be exempted from a separation order. *Dillingham v. Commonwealth*, 995 S.W.2d 377, 381 (Ky.1999); *Justice v. Commonwealth*, 987 S.W.2d 306, 315 (Ky.1998). The Commonwealth is not a "natural person" and therefore an individual involved in the investigation may qualify as its officer or employee. The alleged victim of a crime cannot be designated as a representative. *Mills v. Commonwealth*, 95 S.W. 3d 838 (Ky.2003); but *cf., Hatfield v. Commonwealth*, 250 S.W.3d 590 (Ky.2008) (witness who was victim's grandfather could remain in courtroom as Com.'s representative, failure to make finding under 615(3) was harmless).

(d) A police officer exempted from separation is the Commonwealth's agent. His relevant out-of-court statements are thus exempted from the hearsay exclusionary rule. KRE 801A(b)(4). Relevant statements of such an officer can be introduced without any showing of inconsistency, and without a KRE 613(a) foundation.

(e) Expert witnesses are often exempted from exclusion, and sit at counsel table or remain in the courtroom, because otherwise they cannot testify based on observations made during trial. An expert is not exempted from separation because of status as an expert witness. The party wishing to excuse the expert from separation must obtain the judge's permission under KRE 615(3).

(f) Sanctions. The rule does not specify a sanction, but penalties can range from contempt for the one violating the separation order to prohibition of that witness's testimony, in the discretion of the judge. *Smith v. Miller*, 127 S.W.3d 644 (Ky.2004) (reversing contempt order against prosecutor, because it found he did **not** violate the separation rule). *See also, Alexander v. Commonwealth*, 220 S.W.3d 704 (Ky.App.2007) (a violation without prejudice entitles a party to no relief). ■

NOTES

ARTICLE VII.
OPINION AND EXPERT TESTIMONY

KRE 701 Opinion Testimony by lay witnesses

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

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

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

(c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

HISTORY: Amended by Supreme Court Order 2007-02, eff. 5-1-07

2007 Amendment Subsection (c) was added effective May 1, 2007. In cases tried prior to May 1, 2007, lay opinion is evaluated under the old Rule. *Richards v. Commonwealth*, 2007 WL 4462348, Fn. 3 (Ky.2007) (Unreported) (allowing lay footprint evidence, but suggesting it would *not* qualify under the amended Rule). Even prior to the addition of sub-section (c), a witness relying on special knowledge or experience always had to qualify as an expert before giving expert opinion. KRE 701 has never been a halfway house for failed expert witnesses. *Griffin Industries, Inc. v. Jones*, 975 S.W.2d 100 (Ky.1998).

DISCUSSION:

KRE 701 **rejects** the common law presumption that lay opinion testimony is not admissible. Under KRE 701 lay opinion is admissible if the proponent can meet the requirements of the Rule, and probative value is not substantially outweighed by potential to mislead the jury. KRE 403. The Rule is "more inclusory than exclusory." *Clifford v. Commonwealth*, 7 S.W.3d 371, 374 (Ky.1999).

Lay Opinion, three requirements

The proponent of lay opinion must show that the witness **1)** "**perceived**" facts or an event in such a way that the witness can draw a reasonable inference from it. Unlike an expert, a lay witness may not rely on hearsay or hypothetical premises. *Mondie v. Commonwealth*, 158 S.W.3d 203 (Ky.2005); *Young v. Commonwealth*, 50 S.W.3d 148 (Ky.2001). Lay opinion must **2)** be "**helpful**" to determining a fact in issue or understanding the witness' testimony. "Helpfulness" is determined first by ordinary considerations of relevancy under KRE 401 and 402, *i.e.*, the opinion must bear on a matter of "consequence to the determination of the action." Also, the witness must be in a better position than the jurors to determine the issue. *Nellum v. Commonwealth*, 2007 WL 2404485 (Ky.2007) (Unreported) (error to allow witness to opine that defendant's face looked discolored, when jury could see for itself). Assuming a showing of relevancy and helpfulness is made, the opinion is admissible, **3) subject to KRE 403 balancing**.

Collective Facts

The "collective facts rule" is a corollary to the lay opinion rule. It permits a lay witness to state a conclusion or opinion to describe an observed phenomenon when there is no other feasible way to communicate the observation to the trier of fact. *Fulcher v. Commonwealth*, 149 S.W.3d 363, 372 (Ky.2004) (deputy sheriff "smelled ammonia").

Lay Opinion Subjects

Modern technology. Knowledge of modern telephone features is common enough that non-expert testimony about local telephone features such as "star 67" or "star 69" is allowed so long as the witness has personal knowledge of the feature and how it works. Such testimony is not "opinion or inference." A lay witness can testify that the call was a star-67 call and that star-67 prevented the caller's phone number from showing up on caller-ID. *Bratcher v. Com*. 151 S.W.3d 332, 355 -356 (Ky.2004).

NOTES

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

Sanity of another**.** *Brown v. Commonwealth*, 934 S.W.2d 242, 248 (Ky.1996).

Something ***"looks like"*** blood. *Crowe v. Commonwealth*, 38 S.W.3d 379 (Ky.2001).

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

***Emotional reaction, lack of*.** Eyewitness testimony describing defendant's apparent lack of reaction or surprise at death of his family was admissible. But precluding him from presenting expert psychological evidence to explain his observed lack of emotional reaction was reversible error. *McKinney v. Commonwealth*, 60 S.W.3d 499 (Ky.2001)

***Signature similarities*.** By a bank manager who knew what the valid signature looked like. *Hampton v. Commonwealth*, 133 S.W.3d 438 (Ky.2004).

Ultimate issue

A lay witness may testify to an opinion on an ultimate issue. *McKinney v. Commonwealth*, 60 S.W.3d 499, 504 (Ky.2001).

Inadmissible Lay Opinion Subjects

Whether another witness is lying. *Cf., Lanham v. Commonwealth*, 171 S.W.3d 14, 23 (Ky.2005) (in taped interview, officer's questions expressing disbelief of defendant were mere "context" for defendant's answers).

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

KRE 702 Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

HISTORY: Amended by Supreme Court Order 2007-02, eff. 5-1-07 to add three conditions: "if (1) …, (2)…, and (3) …." The purpose of the amendment is to confirm the trial court's role as "gatekeeper." See, *e.g*., Advisory Committee Note to 2000 Amendments to Fed.R.Evid. 702.

DISCUSSION:

This Rule applies to "all expert testimony," not just scientific testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). KRE 702 comes into play when *doubt* is raised as to validity or reliability of proposed opinion testimony. Counsel may raise doubt not only re: new or developing areas of knowledge, but also re: long-accepted areas. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 fn. 11 (1993). Under *Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky.1999) if an area is already established as reliable, no inquiry is necessary. As to such an area, the burden shifts to the opponent of the evidence to establish by a preponderance that it is **unreliable**. Reliability under KRE 702 is a sub-set of KRE 104(a) reliability, and *Daubert* hearings are often called "104(a)" hearings.

Federalize

Defendants have a federal constitutional right to present a defense. They have a right to be tried based on reliable evidence, and not to be tried on unreliable evidence. To federalize and preserve evidence issues for federal review, cite *Rock v. Arkansas*, 483 U.S. 44, 56 (1987) (right to present defense was violated by ban on hypnotically refreshed testimony); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (right to present a defense was denied by exclusion of evidence); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (excluding hearsay violated due process); *Chambers v. Mississippi*, 410 U.S.

NOTES

284 (1973) (exclusion of **reliable** evidence bearing on guilt violates due process) and *Ege v. Yukins*, 485 F.3d 364 (6th Cir.2007) (allowing **unreliable** bite-mark evidence violated *Chambers* and due process). Unreliable evidence also lessens the Commonwealth's burden of proof by allowing the jury to base guilt on that, rather than on the elements, in violation of the 14th Amendment, and Kentucky Constitution §§ 2 and 11.

KRE 702 —line by line…

a) "If scientific, technical, or other specialized knowledge…"
If the topic is scientific, technical, or "other specialized," then Rule 702 applies. (But see, experience-based expertise, below.) "Scientific" implies "a grounding in the methods and procedures of science." *Daubert*, 509 U.S. at 589-590. "Technical" or "other specialized" knowledge refers to **all other** topics proposed as the basis of expert opinion evidence. This is plainly stated in the second paragraph of *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

Kentucky considers certain areas of knowledge "established" as reliable under Rule 702. In *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky.1999), the Kentucky Supreme Court took judicial notice that the RFLP and PCR methods of DNA testing have achieved scientific reliability, and thus a *Daubert* hearing is no longer required prior to admitting such evidence. In *Johnson v. Commonwealth*, 12 S.W.3d 258, 262 (Ky.1999), the Court took judicial notice that microscopic hair analysis, and numerous other areas have "achieved the status of scientific reliability." See list below, for current status of the various areas.

KRE 701 and 702 occupy the field for all opinion evidence, and draw a line between lay and expert opinion. To qualify under the more free-wheeling KRE 702 expert opinion rule —which allows hearsay and hypotheticals as a basis for opinion— the area of knowledge must be scientific, technical, or otherwise specialized. If it is not one of these, opinion can only qualify under KRE 701, as lay opinion.

b) "…will assist the trier of fact to understand the evidence or to determine a fact in issue…"
Expert testimony is limited to subjects the average juror doesn't know much about. *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky.2004). The core concept is assistance to the jury that doesn't waste time (KRE 403) or over-emphasize anything (KRE 611). Relevance to an issue "of consequence" is essential. If proposed evidence does not meet KRE 401's definition of relevance, it is excluded under KRE 402.

c) "…a witness qualified as an expert by knowledge, skill, experience, training, or education…"
"Adequate" rather than "outstanding" qualifications are required. For instance, an ER nurse who never worked in a nursing home was qualified to opine regarding nursing home care standards, based on some training in wound care, practical experience in recognizing and treating pressure ulcers, and familiarity with nursing procedures. *Thomas v. Greenview Hospital*, 127 S.W.3d 663 (Ky.App.2004), *overruled on other grounds in, Lanham v. Commonwealth*, 171 S.W.3d 14, 20 (Ky.2005). The fact a witness is not a specialist goes only to the weight of the testimony. *Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675, 677-78 (Ky.App.2000). Less educated experts can qualify through training and/or experience alone, e.g., law enforcement officers. *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky.2004)(opinion on the meaning of entries in a drug dealer's papers); *Fulcher v. Commonwealth*, 149 S.W.3d 367 (Ky.2004) (something smelled like ammonia).

d) …"may testify thereto in the form of an opinion or otherwise…"
A qualified expert may testify the same as a fact witness based on perceptions, and may also testify to opinion based on his or her qualifications, on matters observed in court, on hearsay, and/or on hypotheticals. See KRE 703.

e) "…if (1) the testimony is based upon sufficient facts or data…"
Expert testimony must have an adequate basis of facts or data. To allow expert testimony without a sufficient basis *in the record* is an abuse of discretion. *Commonwealth v. Christie*, 98 S.W.3d 485, 488-89 (Ky.2002). The court must conduct *some adequate inquiry*, and must establish on the record the basis for admission or exclusion. *City of Owensboro v. Adams*, 136 S.W.3d 446 (Ky.2004). The

NOTES

record must demonstrate that the court had an adequate basis for making its decision, enough to allow for appellate review. The record should contain, *e.g.*, "proposed expert's reports, affidavits, deposition testimony, and existing precedent." *Christie*, 98 S.W.3d at 488-89.

Insist on an *adequate* basis. An accident reconstructionist was allowed to base an opinion on a mere photograph of a defendant's vehicle. *Coulthard v. Commonwealth*, 230 S.W.3d 572, 582 (Ky.2007). A criminal defendant has been required to come up with more. In *Worley v. Commonwealth*, 2008 WL 2610236 (Ky.App.2008) (NOT FINAL) (defense expert who did not examine the gun, and relied on a limited factual basis, not allowed). ***Make a record*:** Under KRE 702 the material on which your expert relied must be preserved in the record for appeal. *City of Owensboro v. Adams*, 136 S.W.3d 446, 451 (Ky.2004).

f) "…[if] (2) the testimony is the product of reliable principles and methods,

To be admissible, expert opinion requires proof that it's based on reliable principles and methods. If a scientific or technical method is unproved, or there's some new question about it, the judge must hold a *Daubert* hearing, or inquiry. The "central inquiry" will be "an assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue." *Toyota Motor Corporation v. Gregory*, 136 S.W.3d 35, 39 (Ky.2004).

Usually, trial courts will consider the five *Daubert* factors:

> (1) whether a theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a high known or potential rate of error, 4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within the relevant scientific, technical, or other specialized community.

Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575, 578-79 (Ky.2000) (*citing Daubert*, 509 U.S. at 592-94).

It may be error to rely "too heavily" on the *Daubert* factors, which "may or may not be pertinent in assessing reliability depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Miller v. Eldridge*, 146 S.W.3d 909, 918-919 (Ky.2004). The list is not binding, and other factors of a court's choosing may be considered. *Kumho Tire*, 526 U.S. at 150; *Brown-Forman Corporation v. Upchurch*, 127 S.W.3d 615, 621 (Ky.2004). It is possible that **none** of the *Daubert* factors may apply. Where testimony describes the "manifest characteristics of a particular subject" and does not involve theories, processes, or methods of novel or controversial origin, "actual experience and **long** observation" may be sufficient. *Kurtz v. Commonwealth*, 172 S.W.3d 409, 412 (Ky.2005)(emphasis added) (child memory expert allowed to rely on extensive experience). Insist on **long** observation as a basis for experience-based opinion. *Cf., Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky.2006) (child abuse expert allowed to opine based on reading "some periodicals," and observing two cases).

g) "…[if] (3) the witness has applied the principles and methods reliably to the facts of the case."

"Nothing in either *Daubert* or the Federal Rules of Evidence requires a … court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." *General Electric v. Joiner*, 522 U.S. 136, 146 (1997). If a proposed expert has not reliably ***applied*** the principles and methods of the field, a court may preclude opinion testimony. *Ragland v. Commonwealth*, 191 S.W.3d 569, 580 (Ky.2006) (expert conclusions re: lead bullet analysis drawn by "ipse dixit" from CBLA results). There must be "a link between the facts or data the expert has worked with and the conclusion the expert's testimony is intended to support." *United States v. Mamah*, 332 F.3d 475, 478 (7th Cir.2003).

****

The Gatekeeper

The trial judge is the 'gatekeeper" responsible for determining the reliability of evidence under KRE 702 and 104(a). *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky.2004). A court cannot abdicate its

NOTES

duty as gatekeeper. Even if the court foregoes a full *Daubert* hearing, it must conduct *some adequate inquiry*, and establish on the record **the basis** for admission or exclusion. *City of Owensboro v. Adams*, 136 S.W.3d 446 (Ky.2004). The gate-keeping duty is the duty to exclude opinion evidence that is not substantiated by a reliable basis.

But according to *Commonwealth v. Martin*, — S.W.3d ——, 2008 WL 2388382, (Ky.App.2008) (NOT FINAL) (reversing trial court decision to bar Shaken Baby Syndrome opinion) if qualified experts disagree, the court doesn't have to decide anything. Rather, in such a circumstance, the answer is to open the gate, let the experts fight it out, and let the jury decide whose opinion is reliable. "The gate-keeping function of the court was never meant to supplant the adversarial trial process." *Id. Martin* is pending on a motion for discretionary review. If it is upheld, the "gate" will be wide open, whenever two "qualified" experts disagree.

The *Daubert* inquiry

If there is serious doubt re: admissibility of KRE 702 expert opinion, a judge should hold a formal KRE 104(a) hearing. If the subject matter has already been held reliable by a published Kentucky appellate decision, the court *may* hold a *Daubert* hearing, or not, in its discretion. *Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky.1999). At the hearing, or inquiry, a four-part test applies. First, the witness must be qualified to render an opinion on the subject matter. Second, the subject matter must satisfy the requirements of *Daubert*. Third, the subject matter must satisfy the test of relevancy set forth in KRE 401, subject to balancing under KRE 403. Finally, the opinion testimony must assist the trier of fact. *Stringer v. Commonwealth*, 956 S.W.2d 883, 891 (Ky.1997).

1) *Burden of proof* At a *Daubert* inquiry, the burden of proof is on the proponent of the evidence to establish reliability by a preponderance. *Daubert*, 509 U.S. at 593, fn. 10. In cases involving accepted areas of knowledge, Kentucky shifts this burden to the objecting party to prove by a preponderance that the theory or opinion is no longer reliable. *Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky.1999). This conflicts with fn. 10 in *Daubert*, which makes no allowance for burden-shifting.

2) *Findings of fact* Formal findings are preferred, but it's enough if the trial court "affirmatively state[s] on the record that it ha[s] reviewed the material submitted by the parties... and concluded that the testimony was reliable." *City of Owensboro v. Adams*, 136 S.W.3d 446, 451 (Ky.2004). To allow expert testimony without a sufficient basis *in the record* is an abuse of discretion. *Commonwealth v. Christie*, 98 S.W.3d 485, 488-89 (Ky.2002).

3) *Conclusions of law* A trial court "need not recite any of the *Daubert* factors, so long as the record is clear that the court effectively conducted a *Daubert* inquiry." *Miller v. Eldridge*, 146 S.W.3d 909, 921-22 (Ky.2004).

4) *Appellate standard of review* A ruling on the **reliability** of KRE 702 evidence under *Daubert* will be upheld if it is supported by substantial evidence, *Miller v. Eldridge*, 146 S.W.3d at 917, subject to the appellate court's ability to take judicial notice to support some other conclusion. *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky.1999). The ruling as to the **relevance** of the scientific evidence is reviewed under an abuse of discretion standard. *Id*.

Fighting hostile experts - Examination

Impeachment, in-depth **cross-exam**, presentation of **contrary qualified expert opinion,** and **qualified contrary material** are your best weapons. You may call an expert witness to criticize the method or theory which underlies your opponent's expert testimony. *U.S. v. Velasquez*, 64 F.3d 844 (3rd Cir. 1995). An expert is also subject to all the usual forms of impeachment and contradiction. Look at the sections on KRE 607 and 608, which allow evidence of bias, interest, or prejudice, and allow both opinion and reputation evidence for truthfulness, as well as specific instances, to be inquired into on cross. *Miller v. Marymount Medical Center,* 125 S.W.3d 281 (Ky.2004) (approving asking expert re: compensation). Do some research and get your hands on transcripts to see what this expert has sworn to at other hearings. An expert may be impeached by prior inconsistent statements, contradicted by the testimony of another expert, or by the learned treatise method. KRE 803(18). (KRE 803 (18) Learned treatises. To the extent called to the attention of an expert witness

NOTES

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**. (emphasis added))

You can question the reliability of the expert, the expert's field, the expert's performance in the instant case, and reliability of any matter relied on, *i.e.*, the individual pieces of *supporting* evidence.

Federalize. The 6th Amendment right to confront includes the right to confront and cross-examine opposing witnesses. *Olden v. Kentucky*, 488 U.S. 227 (1988). Denial of cross-examination also violates due process. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).*Greene v. McElroy*, 360 U.S. 474, 496 (1959); *DeGailey v. Commonwealth*, 508 S.W.2d 574 (Ky.1974). ***Preserve.*** Put the desired cross-examination and material in the record by **avowal**. *Noel v. Commonwealth*, 76 S.W.3d 923 (Ky.2002); KRE 103(a)(2).

Supporting evidence

Animal studies, medical literature reviews, general chemical properties of drugs, ADRs reported to the FDA, the "general acceptance" by relevant associations, medical texts, individual experiments, and scientific observations are all appropriate material for experts to consider and rely on, and all can be used for cross-examination. KRE 803(18) learned treatise material may be used for cross-exam, and may be **read** to the jury. Under Rule 803 these materials may not be introduced and placed in the jury's hands, unless they qualify under KRE 703(b), which allows an expert's supporting materials to go to the jury if they are "determined to be trustworthy, necessary to illuminate testimony, and unprivileged." *See also, Hyman & Armstrong, P.S.C. v. Gunderson* — S.W.3d ——, 2008 WL 1849798 (Ky.2008) (NOT FINAL) (supporting materials going to the jury must individually qualify under *Daubert*).

Alphabetical Topics

Accident reconstruction

Though not listed in *Johnson,* accident reconstruction "science" is not generally questioned by Kentucky courts. In *Allgeier v. Commonwealth*, 915 S.W.2d 745, 747 (Ky.1996), a police officer who was not qualified as a reconstructionist was nonetheless allowed to give an opinion. And in *Coulthard v. Commonwealth*, 230 S.W.3d 572, 582 (Ky.2007) an accident reconstructionist was allowed to state the cause of an accident based on his review of nothing more than a photo of the vehicle. Answer: get a defense expert.

Arson. Arson investigation is junk science. *See Modern Scientific Evidence*, Faigman, et al., 2007-2008, Vol. 5, Chapter 38 on Fires, Arsons and Explosions. Several courts have thrown out arson expert opinion. *Pride v. BIC Corp.*, 218 F.3d 566 (6thCir.2000) (methods of arson experts were inadequate to support their conclusions); *Weisgram v. Marley*, 169 F.3d 514 (8th Cir.1999), aff'd, 528 U.S. 440 (2000) (arson experts unqualified to opine re: cause of fire); *Comer v. American Electric Power*, 63 F.Supp.2d 927 (N.D.Ind. 1999) (expert's personal knowledge was speculation); *cf., Yell v. Commonwealth*, 242 S.W.3d 341(Ky.2007)(unsuccessful challenge to arson sniffer dog). Conclusions about "V-patterns" and "low burns" are included in the LEAA 1977 list of discredited myths about arson. *Modern Scientific Evidence*, Vol. 5, § 38.30, p. 126. Concluding that there are multiple origins of a fire because there are multiple V-patterns is reliable only when the fire is extinguished prior to "total room involvement." Once a fire has reached "flash point," items near the top of the room catch fire and fall down, causing secondary ignitions, and additional V-shaped burn patterns. *Modern Scientific Evidence*, § 38.31, p. 127.

Ballistics

Trial courts may take judicial notice that ballistics is a reliable forensic science. *Johnson v. Commonwealth*, 12 S.W.3d 258, 262 (Ky.1999) (dicta). But ballistics is under fire. The FBI discontinued Comparative Bullet Lead Analysis (CBLA) testing in September of 2005. Since "the FBI Laboratory that produced the CBLA evidence now considers such evidence to be of insufficient reliability… a finding [to the contrary] would be clearly erroneous…." *Ragland v. Commonwealth*, 191 S.W.3d 569, 580 (Ky.2006).

NOTES

Ballistics experts continue to assert, as do their manuals and literature, that "scientific principles" underlie the field. But they **cannot identify** those principles, which consist of no more than elementary principles of physics that govern the transfer of impressions to a bullet and casing when a gun is fired. *U.S. v. Glynn,* 578 F.Supp.2d 567 (S.D.N.Y.2008). Press ballistics experts on **cross-examination** to admit what they do is largely subjective, and a different examiner might see the lands and grooves, for instance, differently. Good arguments can be made to limit the **degree of certainty** that a ballistics expert is allowed to claim. *U. S. v. Monteiro*, 407 F.Supp.2d 351, 355 (D.Mass.2006) (no current reliable scientific methodology permits testimony that a casing and a particular firearm 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty).

Bite mark

In *Wheeler v. Commonwealth,* 121 S.W.3d 173, 183 (Ky.2004), the Court held that a physician – through medical training—was qualified to testify that an injury on the defendant's arm was **not** a bite mark. *But see Ege v. Yukins*, 485 F.3d 364 (6th Cir. 2007) (bite-mark evidence is so unreliable and prejudicial that it violates due process). Seek a *Daubert* hearing. Get an expert generally qualified in scientific method to debunk reliability of bite-mark forensics.

Blood spatter

A physician can be qualified by training and "on-the-scene observations" to testify about blood spatter at a crime scene. *Wheeler v. Commonwealth,* 121 S.W.3d 173, 183 (Ky.2004). In *Woodall v. Commonwealth*, 63 S.W.3d 103 (Ky.2001) the court rejected argument that a serologist relied on assumptions and improperly engaged in crime scene reconstruction in testifying that a bloodstain was made by the victim's face. A witness need not qualify as an expert to testify about his observation of blood spatters. *Thompson v. Commonwealth,* 147 S.W.3d 22 (Ky.2004). But *cf.*, *Dougherty v. Commonwealth*, 2006 WL 3386576, 1 (Ky.2006) (Unreported) where Kentucky Supreme Court found reversible error in admitting sheriff deputy's testimony on blood spatter without first qualifying him as an expert witness. To be safe, get your own expert.

Blood tests, presumptive.

Expert testimony based on presumptive blood tests lacks scientific reliability, lacks probative value, is irrelevant, and prejudicial. *State v. Kelly*, 770 A.2d 908 (Conn.2001). Even though presumptive luminol blood tests have been tested, peer reviewed, and generally accepted as an investigative tool, they are nevertheless per se too unreliable to be admissible **at trial**. *State v. Moody*, 573 A.2d 716, 722-723 (Conn.1990). **But beware**, and *cf.*, *Murphy v. Commonwealth*, 2008 WL 1850626, 3 (Ky.2008) (Unreported) (upholding introduction of presumptive blood test results, stating that deficiencies in "this type of evidence" go to weight, not admissibility).

Breath tests

Results of a ***preliminary*** **breath test (PBT) are "clearly inadmissible** to prove guilt or for sentencing purposes." The pass/fail result of a PBT is (only) admissible for the limited purpose of establishing probable cause for an arrest at a hearing on a motion to suppress. *Greene v. Commonwealth*, 244 S.W.3d 128, 134 -135 (Ky.App.2008)

Courts may take judicial notice that (non-preliminary) breath testing is a reliable science. *Johnson v. Commonwealth*, 12 S.W.3d 258, 262 (Ky.1999) But *cf.*, *Commonwealth v. Davis*, 25 S.W.3d 106 (Ky.2000) (breath tests admissible if machinery was "properly checked and in proper working order at the time of conducting the test.").

Breathalizer, "BAC," "Intoxilyzer" breath tests **(non-preliminary)**

The evidence necessary to lay a proper foundation for admission of a breath test at trial:

1) That the machine was properly checked and in proper working order at the time of conducting the test.
2) That the test consisted of the steps and the sequence set forth in 500 KAR 8:030(2).
3) That the certified operator had continuous control of the person by present sense impression for at least twenty minutes prior to the test and that during the twenty minute period the subject did not have oral or nasal intake of substances which will affect the test.

NOTES

Rule 702

4) That the test was given by an operator who is properly trained and certified to operate the machine.
5) That the test was performed in accordance with standard operating procedures.
Commonwealth v. Roberts, 122 S.W.3d 524, 528 (Ky.2003).

The 500 KAR 8:030 § 1(2) five sequential steps are: (a) Ambient air analysis; (b) Alcohol simulator analysis; (c) Ambient air analysis; (d) Subject breath sample analysis; and (e) Ambient air analysis. When all five are reflected on the test ticket printout, a proper foundation for the admission of the BAC test results has been laid. *Lewis v. Commonwealth*, 217 S.W.3d 875, 877 (Ky.App.2007).

Burn injuries
Despite complete failure to satisfy even one *Daubert* factor, Dr. Betty Spivack's opinion that certain injuries were caused by a BIC lighter was admissible because it was supported by two "published case reports" documenting burns inflicted by cigarette lighters and upon her own experience, *i.e.*, she had seen "**two cases**" involving the same type of burns where there had been an admission that a cigarette lighter was used. *Ratliff v. Commonwealth*, 194 S.W.3d 258 (Ky.2006). Experience-based expertise should require more basis than this. Get a counter-expert.

Canine scent tracking —see "dog" rule

Causation
Medical causation. Medical testimony about causation of injury must qualify under *Daubert*. C*ity of Owensboro v. Adams*, 136 S.W.3d 446, 450-451 (Ky.2004). Medical causation must be proved to a reasonable medical probability. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky.2004), but *perhaps* **not to a scientific certainty:**

> *Daubert* does not require proof to a scientific certainty, or even proof convincing to the trial judge. The trial judge is not required to find that the proffered opinion is scientifically correct, but only that it is trustworthy because it is **tied to good scientific grounds**. What *Daubert* does require is that the expert's opinion be **based on sound methodologies of the type used by experts in the field** in which the opinion is offered. There can be little question that scientists routinely use animal studies, case reports, and pharmacological comparisons of similar classes of drugs to infer conclusions, which are expressed in peer-reviewed journals and textbooks. Unquestionably, epidemiological studies provide the best proof of the general association of a particular substance with particular effects, but it is not the only scientific basis on which those effects can be predicted. **In science, as in life, where there is smoke, fire can be inferred, subject to debate and further testing.**

Hyman & Armstrong, P.S.C. v. Gunderson 2008 WL 1849798 (Ky.2008) (NOT FINAL), *quoting Brasher v. Sandoz Pharmaceuticals Corporation*, 160 F.Supp.2d 1291,1296 (N.D.Ala.2001) (emphasis added).

***Non-medical causation*.** Non-medical experts have not (to date) so readily been allowed to testify as to causation. *E.g.*, an accident reconstruction expert invades the province of the jury by opining on the cause of an accident or the fault of drivers. *Renfro v. Commonwealth*, 893 S.W.2d 795 (Ky.1995). **But note well:** *Renfro* was decided prior to *Stringer v. Commonwealth*, 956 S.W.2d 883, 890-891 (Ky.1997), which allows opinion evidence that goes to the "ultimate issue" of guilt.

Child Sex Abuse Accommodation Syndrome (CSAAS)
A social worker's opinion that a child exhibited signs of being sexually abused was inadmissible. The child's hearsay statements regarding alleged abuse were also inadmissible as excited utterances. *R.C. v. Commonwealth*, 101 S.W.3d 897 (Ky.App.2002); *see also, Miller v. Commonwealth*, 77 S.W.3d 566 (Ky.2002) (testimony by police sergeant that in 90% of the cases she investigated, there was a delay between the sexual abuse and the child's report of the sexual abuse, was improper evidence of the habits of others).

NOTES

Beware: a person familiar with the victim *before and after* may testify to observed changes in the victim's behavior in the wake of alleged abuse. Such changes may be indicative that something of a traumatic nature has occurred and thus can be relevant "to prove that [the victim] was sexually assaulted." *Dickerson v. Commonwealth*, 174 S.W.3d 451, 472 (Ky.2005).

Computer Generated Visual Evidence (CGVE)
In *Gosser v. Commonwealth*, 31 S.W.3d 897, 902 (Ky.2000), the Court indicated computer-generated visuals that merely illustrate testimony are admissible if they are fair and accurate representations. **But** visuals that purport to be **scale models**, or **simulations** require **more** to meet *Daubert: i.e.*, testimony concerning the development, testing, error rate, acceptance of the program by others in the field and the peer review of the computer simulation methodology. *Citing*, *Livingston v. Isuzu Motors, Ltd.*, 910 F.Supp. 1473, 1494-95 (D.Mont.1995).

Crime scene reconstruction, re-enactment
In *Woodall v. Commonwealth*, 63 S.W.3d 103 (Ky.2001) serologist testimony concerning crime re-enactment was admissible. But in *Price v. Commonwealth*, 59 S.W.3d 878 (Ky.2001) reenactment of a crime during closing argument, with victim's participation, was improper, but harmless. In another case, reconstruction expert testimony was held okay despite lack of all of the documentation and analysis generally performed in a formal accident reconstruction. *Coulthard v. Commonwealth*, 230 S.W.3d 572, 582 (Ky.2007). **Empirical models may be excluded.** *Cf. Wilhite v. Rockwell Intern Corp.*, 83 S.W.3d 516 (Ky.2002) (exclusion of empirical model constructed for that case and untested in any other forum).

Differential diagnosis
Differential diagnosis, well-recognized and widely-used, calls for listing the known possible causes of a disease and eliminating causes until left with the one most likely. *Hyman & Armstrong, P.S.C. v. Gunderson* — S.W.3d ——, 2008 WL 1849798 (Ky.2008) (NOT FINAL). Differential diagnosis has been accepted by many courts as reliable. *Kennedy v. Collagen Corp.*, 161 F.3d 1226 (9th Cir.1998); *Glaser v. Thompson Med. Co., Inc.*, 32 F.3d 969 (6th Cir.1994); *Perkins v. Origin Medsystems, Inc.*, 299 F.Supp.2d 45 (D.Conn.2004).

DNA
Kentucky initially approached admissibility of DNA cautiously, due to its novelty, and determined admissibility on a case by case basis. *Harris v. Commonwealth*, 846 S.W.2d 678, 681 (Ky.1992), overruled in part by *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101-102 (Ky.1995). DNA has come to represent the gold standard of genetic identification. *See, e.g., Fugate v. Commonwealth*, 993 S.W.2d 931, 936-937 (Ky.1999) (overruling *Mitchell* and holding that because of the widespread recognition of DNA evidence as valid and scientifically reliable such evidence is admissible per se without a *Daubert* inquiry). The same cautious approach should be urged for other "novel" forensic expertise that hurts our clients.

The "Dog" rule —see experience-based expertise
In Kentucky, *Daubert* does not apply to opinion regarding dog behavior because this is "not science," but "experience-based knowledge." The Court requires mere "foundational evidence" for such evidence. A trained dog handler may opine after merely stating 1) the dog's scent tracking record; 2) the qualifications of its handler, and 3) the dog's training and history. *Debruler v. Commonwealth*, 231 S.W.3d 752, 756 (Ky.2007) If the *DeBruler* foundation is met, an arson sniffer dog's "alerts" are so reliable they can be introduced despite 100% negative lab results contradicting them. *Yell v. Com.*, 242 S.W.3d 331 (Ky.2007).

Preserve "dog" expertise for federal habeas. If the 6th Circuit thinks bite mark evidence is too prejudicial, one wonders what it would think about "dog" evidence like that in *DeBruler* and *Yell*. **Federalize** by citing *Ege v. Yukins*, 485 F.3d 364 (6thCir.2007) (allowing unreliable bite-mark evidence violates due process) and *Chambers v. Mississippi*, 410 U.S. 284 (1973) (exclusion of reliable evidence bearing on guilt violates due process). Argue, too, that unreliable evidence lessens the Commonwealth's burden of proof by encouraging the jury to base guilt on unsubstantiated, unreliable material**,** rather than on the elements, violating the 14th Amendment, and Kentucky Constitution §§ 2 and 11.

NOTES

Rule 702

Emotional reaction, lack of
Trial court ruling excluding defense expert psychological evidence to explain defendant's observed lack of emotional reaction was prejudicial and amounted to **reversible error.**
McKinney v. Commonwealth, 60 S.W.3d 499 (Ky.2001)

Empirical models —see crime scene reconstruction

"Experience-based" expertise
In Kentucky, when expert testimony consists of personal observation of certain "actions," and interpretation of these actions based on "experience and training," such expertise is **not** subject to *Daubert* or *Kumho Tire*. *DeBruler* holds that a field of expertise that does not rely on any scientific technique, theory or methodology, is an investigative technique, not a scientific procedure. *Debruler*, 231 S.W.3d at 756 -757. This is incorrect. *Daubert* applies to **all** expertise. *Kumho Tire*, 526 U.S. at 141. In **every** case, "[a] trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony." *Kumho Tire*, 526 U.S. at 152.; *Cf., Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky.2000) (adopting *Kumho Tire* and holding that a trial court "**may** consider one or more" *Daubert* factors to evaluate **any** expertise) (emphasis added). State courts have wide latitude in applying *Daubert*, so Kentucky can probably deny it is applying *Daubert*, and call factors "foundation requirements," if it so chooses.

Handwriting Analysis
Under the *Johnson* judicial notice rule, handwriting analysis need not be subjected to a *Daubert* procedure. *Florence v. Commonwealth*, 120 S.W.3d 699, 701 (Ky.2004). The burden is on the opposing party to show unreliability by a preponderance. *Id.* But KRE 702 requires proof that the expert has applied the "principles and methods" of the field "reliably to the facts of the case." Hence, counsel should press handwriting experts to articulate principles and methods. Like ballistics, handwriting analysis is more an art than a science. Argue handwriting match opinion is the pure "ipse dixit" of the expert. Federalize by citing *General Electric v. Joiner*, *supra*.

Hair analysis, microscopic
Kentucky has judicially noticed hair analysis by microscopic comparison as "reliable." *Johnson v. Commonwealth*, 12 S.W.3d 258, 262 (Ky.1999). Despite the contrary unpublished opinion in *Murphy v. Commonwealth*, 2008 WL 1850626, 3 (Ky.2008) (Unreported) (upholding introduction of microscopic hair analysis despite inconclusive DNA results), counsel should argue hair analysis is "preliminary testing," reliable enough for probable cause, or a suppression hearing, or for determining which hairs merit "real" DNA testing, but not a reliable enough basis for an identification, or finding of guilt. See preliminary testing. **Use a defense expert.** In *Bussell*, the defense expert found that three of the Commonwealth's expert's hair comparisons were invalid. The defense expert found the prosecution expert's approach to hair comparison "quite disturbing" because there was no indication in her notes that a comparison microscope had been used. *Commonwealth v. Bussell*, 226 S.W.3d 96, 104 -105 (Ky.2007) (upholding grant of new trial).

Homicide by heart attack
A medical examiner, forensic pathologist may express an opinion as to the "manner of death," in this case "homicide by heart attack," *i.e.*, an opinion that the manner of a disputed death was homicide, *i.e.*, due to an act or omission of another, as opposed to natural causes or suicide. *Baraka v. Commonwealth*, 194 S.W.3d 313 (Ky.2006).

Hypnosis
No *Daubert* inquiry need be conducted when the defendant *agrees* to admissibility. *Roark v. Commonwealth*, 90 S.W.3d 24 (Ky.2002). Admission of post-hypnotic identification and testimony was neither clearly erroneous, nor an abuse of discretion. "Totality of circumstances" is the standard for hypnotically induced, refreshed, or enhanced recollection. *Id.* A witness cannot be impeached with a transcript of statements she made under hypnosis. *Roark v. Commonwealth*, 2004 WL 314731 (Ky.2004) (Unreported).

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

NOTES

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

Luminol —See blood tests, preliminary tests

Medical causation —See causation

Paternity presumption
Introduction of paternity test results based on a 50% presumption that sexual intercourse occurred, resulting in a 99.74% likelihood that the defendant was the father of his minor stepdaughter's child, should not have been admitted because they violated the presumption of innocence, lessened the prosecutor's burden and violated due process. This unpreserved argument **lost** on appeal in *Butcher v. Commonwealth*, 96 S.W.3d 3 (Ky.2002). Butcher's stepdaughter's testimony, alone, could have convicted him. The issue is worth raising again, on closer facts.

Pedophile profile
In *Tungate v. Commonwealth*, 901 S.W.2d 41, 4244 (Ky.1995), the court upheld **exclusion** of a psychiatrist's "profile" or list of "indicators" of pedophilia, saying that "it will require much more by way of scientific accreditation and proof of probity" to justify admission.

Polygraph
Evidence obtained as a result of a polygraph examination is still inadmissible in Kentucky. *Garland v. Commonwealth*, 127 S.W.3d 529 (Ky.2004). If the *Martin* decision is upheld (see Shaken Baby Syndrome, below) counsel could argue polygraph evidence should be allowed, because the dispute over reliability of polygraphs is merely a dispute between "qualified" experts on both sides.

Preliminary tests, in general (including microscopic hair, fiber, presumptive blood, unconfirmed sniffer dog evidence, etc.) Preliminary, presumptive test results **should be excludable at trial** because they are by definition unreliable, lack probative value, and are often highly prejudicial. *Thacker v. Commonwealth*, 2003 WL 22227194 (Ky.2003) (Unreported) (upholding exclusion of presumptive **toxicology** test results). Similarly, mentioning a preliminary **breath** test (PBT) at trial is allowed, but specific **results** of a PBT or any breathalyzer not specified in KRS 189A.104 as proven reliable is inadmissible. *Williams v. Commonwealth*, 2003 WL 1403336 (Ky.App.2003) (Unreported) Other courts have also concluded that presumptive tests are too unreliable to be relevant. *State v. Kelly*, 770 A.2d 908 (Conn.2001) (presumptive blood test results not allowed); *United States v. Hill*, 41 M.J. 596 (Army Ct.Crim.App.1994) (evidence of luminal preliminary blood test results not allowed).

But beware: There is a recent negative Ky. case, unreported, **allowing** introduction of presumptive, preliminary blood test results *at trial*, despite the fact that they were highly prejudicial. *Murphy v. Commonwealth*, 2008 WL 1850626, 3 (Ky.2008) (Unreported) (upholding introduction of presumptive blood test results on grounds that deficiencies in "this type of evidence" go to weight, not admissibility). Similarly, *Yell v. Commonwealth*, 242 S.W.3d 331 (Ky.2007) upholds introduction *at trial* of sniffer arson dog alerts preliminary to the real lab testing *that debunked them*. Counsel should continue to raise and preserve objection to all prejudicial preliminary test results. **Federalize**: *Chambers v. Mississippi*, 410 U.S. 284 (1973) (exclusion of reliable evidence violates due process); *Ege v. Yukins*, 485 F.3d 364 (6th Cir.2007) (unreliable evidence violates due process).

Sex offender, risk assessment
Trial judge correctly accepted the results of the risk assessment evaluation without qualifying the tests pursuant to *Daubert*. *Hyatt v. Commonwealth*, 72 S.W.3d 566, 575 (Ky.2002). Evidence rules do not apply in pre-trial proceedings.

Shaken Baby Syndrome
The old theory that shaking alone can cause subdural hematomas and retinal hemorrhages in infants has been discredited. Evidence of **Shaking with Hard Impact** is now believed to be required. A third sub-theory, Shaking with Soft Impact (with a changing table, or bed) has not been

NOTES

Rule 702

established as reliable. In *Commonwealth v. Martin*, — S.W.3d ——, 2008 WL 2388382 (Ky.App.2008) (NOT FINAL) the Court of Appeals *overturned* a trial court decision to **bar** Shaken Baby Syndrome opinion in the absence of any evidence of hard impact. *Martin* holds that if qualified experts disagree, the answer is to let them fight it out in front of the jury. The case is pending on a motion for discretionary review. Meanwhile, counsel should object to SBS opinion and seek a *Daubert* hearing in any case that lacks external physical evidence of **hard impact**.

Practice note: As a matter of equal protection, counsel should seek funding for an expert with the **same experience and national stature** as the Commonwealth's expert to address the national, and international research status of SBS, or any similarly questionable forensic "science."

Toxicology —see preliminary tests

Tree, wood analysis

In *Bussell*, a defense expert conducted tests using a method of analysis generally accepted in the scientific community since 1970, and concluded that no one could say to any degree of certainty that the bark on Bussell's car came from the tree located where the victim's body was discovered. The bark on Bussell's car could have come from any one of seven species of tree. *Commonwealth v. Bussell*, 226 S.W.3d 96, 105 (Ky.2007).

Voiceprint analysis

The FBI has determined that voiceprint analysis is not reliable. *U. S. v. Angleton*, 269 F. Supp. 2d 892 (S. D.Tex.2003). Under *Ragland v. Commonwealth*, 191 S.W.3d 569, 580 (Ky.2006)(throwing out lead bullet analysis following the lead of the FBI) since the FBI considers voiceprints unreliable, under *Ragland*, a finding to the contrary would be "clearly erroneous."

KRE 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.

DISCUSSION:

The Commentary says "trial judges should take an active role in policing the content of the expert witness' direct testimony." An expert may rely on information that ordinarily could not be mentioned in front of the jury, KRE 703(a), and may let the jury know the basis of his conclusions, even if it would ordinarily be inadmissible. KRE 703(b).

(a) Under KRE 703(a), an expert may base an opinion on facts or data either perceived by the witness or "made known." *Baraka v. Commonwealth*, 194 S.W.3d 313, 314 (Ky.2006) (medical examiner based opinion that death was "death by heart attack," in part on disputed information provided by police). Obviously an expert may speak from personal knowledge, as in the case of a chemist testifying about a chemical analysis that she personally conducted. Under KRE 615(3), an "essential" expert witness may also sit in the courtroom to hear facts or data introduced into evidence. In addition, the witness can be given a list of facts either before or during trial and, on those facts, give a hypothetical opinion. An expert may rely on hearsay or other evidence not necessarily admissible under the evidence rules "if of a type reasonably relied upon by experts in the field."

(b) Subsection (a) requires the judge to decide whether inadmissible supporting information actually is "of a type reasonably relied upon in the particular field in forming opinions or inferences..." This is a KRE 104(a) determination. In *Parrish v. Kentucky Board of Medical Licensure*, 145

NOTES

S.W.3d 401, 410 (Ky.App.2004), an expert witness was entitled to rely on American College of Radiology standards because they were of the type reasonably relied on by experts in the field of radiology."

(c) Contact expert witnesses before trial to obtain some idea of what will be relied on. You may not be allowed to introduce articles, etc. not provided to opposing counsel in discovery. Decide what you want in, and out. Look at KRE 803(18) and KRE 703(b). Does the supporting material individually meet *Daubert*?

(d) Under KRE 703(b), otherwise inadmissible supporting materials may be introduced "at the discretion of the court," for the limited purpose of illustrating the opinion, or explaining why the witness reached the opinion.

(e) If supporting evidence is trustworthy, necessary to illuminate the testimony, and unprivileged, it may be introduced. On request the judge can admonish the jury to limit use of this evidence to "evaluating the validity and probative value of the experts' opinion or inference."

(f) The judge must also subject supporting materials to KRE 403 balancing. The Commentary notes that "under proper circumstances, a portion of the basis of an expert's opinion might be excluded even though independently admissible as evidence." Obviously, the drafters intend for very limited introduction of otherwise inadmissible evidence under Subsection (b).

(g) Under KRE 703(c), cross-exam is not to be limited. If an adverse party is willing to go into otherwise inadmissible matters to attack an expert's opinion, this is allowed.

(h) Bootstrapped hearsay is a problem commonly arising in sexual abuse/assault cases, where a physician testifies the victim described the identity of the assailant, and other harmful details. Usually, such out of court statements are excludable on relevance or hearsay grounds. KRE 401; 801A(a)(2). But if the doctor *relied* on the statements in forming a diagnosis, KRE 703(b) could be a ground for relating these statements to the jury. If such statements come in, **get an admonition** limiting them to nonsubstantive use, as an explanation of the reason that the witness reached a particular conclusion.

KRE 704 (Number not utilized.)

"Ultimate Issue"

DISCUSSION:
As originally proposed in 1989 Kentucky's rule paralleled the language of FRE 704, which approves "ultimate issue" testimony (except re: a defendant's mental state). The rule was not adopted, but for several years, Kentucky's common law continued to preclude opinion testimony on an "ultimate issue." In *Stringer v. Commonwealth*, 956 S.W.2d 883, 890-891 (Ky.1997), the Kentucky Supreme Court approved "ultimate issue" evidence, lifting the "ultimate issue" prohibition.

(a) Under *Stringer*, expert opinion evidence is admissible if (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 versus prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

(b) The ultimate issue in a criminal case is guilty or not guilty. *Commonwealth v. Alexander,* 5 S.W.3d 104 (Ky.1999). Opinions or testimony as to guilt or innocence are still **excluded** because they are not helpful. KRE 702. The line between ultimate issue opinion and opinion that a client is guilty is a fine line.

KRE 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.

NOTES

DISCUSSION:
This rule permits flexibility in the presentation of an expert's testimony. 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. Since RCr 7.24(1)(b) and RCr 7.24(3)(A)(i) provide for pretrial discovery of reports of scientific tests and experiments and of physical or mental examinations, an adverse party theoretically knows of the opinion in advance and can object to the inference or opinion before the witness testifies.

(a) The rule gives leeway to the proponent of the expert, but leaves the final decision as to how the expert testifies to the judge. The judge can always "require otherwise."

(b) "Expert testimony must be cross-examinable." *Sanborn v. Commonwealth*, 892 S.W.2d 542, 550 (Ky.1994) (citing KRE 705). An adverse party may establish the underlying facts or data on cross-examination if they are not brought out by the proponent. *Hart v. Commonwealth*, 116 S.W.3d 481 (Ky.2003) (autoradiograms and computer printout re: DNA). **But beware:** because counsel failed to take the necessary steps to preserve the autoradiogram and computer printout by avowal, the Court had no means to discern prejudice. *Hart v. Commonwealth*, 116 S.W.3d at 484.

(c) If the expert will not consent to an interview or will not provide adequate information before trial begins, the adverse party should file a pretrial motion *in limine* seeking the expert's underlying supportive material. Discovery responses are only the beginning in planning the cross examination of an expert witness.

KRE 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.

DISCUSSION:
It is best for criminal defendants that this procedure never be used. Indigents may apply for funds to hire an expert pursuant to KRS 31.185. The 6th Amendment and §11 of the Kentucky Constitution guarantee a defendant compulsory process of witnesses who have something relevant and important to say. A court-appointed expert who testifies in a way that damages your client would be perceived as the judge's witness with no axe to grind. You could not impeach such an expert by questions about identification with the opposing party, retention on behalf of a class or type of plaintiff or defendant, or the amount and contingency of payment for services. ■

NOTES

ARTICLE VIII. HEARSAY

NOTES

KRE 802 excludes "hearsay" by declaring it inadmissible unless it falls under an exception established by a court rule. Rule 802 does not supersede other rules. Rather, hearsay issues require at minimum a three-step analysis.

1. The proponent first must show **relevance**, KRE 401-402, and overcome any objections of the opponent [typically Article IV or VI objections], before the hearsay question can be considered. If the evidence is irrelevant or the witness is incompetent, the hearsay nature of the evidence really does not matter.
2. But if the proponent makes the first required showing, then he must show that the proposed hearsay evidence falls under one of the recognized hearsay **exception**s.
3. If the proponent makes the first two showings, the opponent of the evidence may still argue under KRE 403 that the evidence is **more prejudicial than probative** and should be excluded. This analysis applies to all hearsay issues.

KRE 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.

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

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

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

Unsworn statements made in court are subject to hearsay analysis. Depositions are hearsay.

A statement is hearsay if it is (1) an out of court statement offered in evidence and (2) "to prove the truth of the matter asserted." Both conditions must be met before the statement is subject to the hearsay exclusionary rule. *Perdue v. Commonwealth*, 916 S.W.2d 148, 156 (Ky.1995); *Garland v. Commonwealth*, 127 S. W. 3d 529 (Ky.2004). If an out of court statement is introduced simply to show that it was made or to show the effect it had on the person who heard it, (assuming that these matters are relevant in the first place), it is not considered hearsay. It is not being offered for the truth of the matter asserted. *Caudill v .Commonwealth,* 120 S. W. 3d 635 (Ky.2003)*; Miller v. Marymount Medical Center,* 125 S. W. 3d 274 (Ky. 2004); *Turner v. Commonwealth,* 153 S.W. 3d 823 (Ky.2005).

"Investigative hearsay." If statements on which the officer relied are properly admissible under this concept, they are not hearsay because they are not offered to prove the truth. They are introduced only to explain the officer's actions. This exception/restriction applies to all witnesses, not just police officers. *See*, *Stringer v. Commonwealth*, 956 S.W.2d 883, 887 (Ky.1997); *Slaven v. Commonwealth*, 962 S.W.2d 845, 859 (Ky.1997). **However,** the actions of the officer must be at issue in the case for the statements to be relevant in the first place. KRE 401; *Daniel v. Commonwealth*, 905 S.W.2d 76, 79 (Ky.1995*); Stringer v. Commonwealth*, 956 S.W.2d 883, 887 (Ky.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.

KRE 801A Prior statements of witnesses and admissions

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

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

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

DISCUSSION:

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

NOTES

Prior Statements

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

Prior statements need not be given "under oath" at legal proceedings or depositions. *Thurman v. Commonwealth*, 975 S.W.2d 888, 893-894 (Ky.1998*)*.

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

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.

Prior consistent statements

Consistent statements may be used upon proper foundation **but only** for purposes of rebutting an express or implied charge against the declarant/witness of (1) recent fabrication or (2) improper influence or motive. Prosecutors in particular have often overlooked the limitation to rebuttal use and the limited issues for which the Rule provides exemption from the Hearsay Exclusionary Rule. Kentucky follows *Tome v. U.S.*, 513 U. S. 150 (1995), which limits consistent statements to those made before the motive for fabrication existed. *Slaven v. Commonwealth*, 962 S.W.2d 845, 858 (Ky.199*7)*.

Prior Identification

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

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

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

Party Admissions

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

NOTES

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

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

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

The foundation for **"admission by silence"** requires proof that the party heard the statement, understood what the statement was, and remained silent. *Blair v. Commonwealth*, 144 S.W. 3d 801, 806 (Ky.2004*); Terry v. Commonwealth*, 153 S.W. 3d 794 (Ky.2005). Giving an answer unresponsive to the allegation can be an adoptive admission. *Dant v. Commonwealth*, 258 S.W.3d 12 (Ky.2008). However, a statement is not an adoptive admission if the party was somehow deprived of the freedom to act or speak against the accusation. *Commonwealth v. Buford*, 197 S.W.3d 66 (Ky.2006).

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).

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); *Gerlaugh v. Commonwealth,* 156 S.W. 3d 747, 753 (Ky.2005).
2. The judge may consider the proffered statement as evidence that the conspiracy existed because the Rules of Evidence do not apply to KRE 104(a) determinations. KRE 1101(d)(1); *Gerlaugh, p. 754*.
3. But Kentucky requires additional independent proof of an existing conspiracy before the finding can be made. *Gerlaugh, p. 754*.
4. The judge must also find that the proffered statement was made while the conspiracy was going on and that it was "in furtherance" or served some purpose for the success of the conspiracy. Casual comments about the crime may not be in furtherance. *Monroe v. Commonwealth*, 244 S.W.3d 69 (Ky.2008).
5. If the proponent meets the requirements and KRE 403 does not justify exclusion, co-conspirator statements may be introduced.

KRE 802 Hearsay rule

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

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

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

NOTES

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

KRE 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

NOTES

nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or other data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community,

NOTES

concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

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

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

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment under the law defining the crime, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused.

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

DISCUSSION:

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.

803(1) Present Sense Impression

Declarant must make the proffered statement contemporaneously with, or immediately after, an event or condition. *Bray v. Commonwealth*, 68 S.W.3d 375(Ky.2002). The declarant's statement of pain upon being shot would be an obvious use of this exception as would the declarant's perception of the defendant as the shooter. A person's inquiry as to the source of blood, under the circumstances qualifies as an explanation of a condition made while the witness was perceiving the incident. *Caudill v. Commonwealth*, 120 S. W. 3d 635 (Ky.2004). The Commentary states that the underlying rationale for this exception is the lack of opportunity to fabricate. (Commentary to 1989 Final Draft, Kentucky Rules of Evidence. p. 83). If this is so, the time requirement for this exception is critical. Only a "slight lapse" of time is permitted. The proponent of the evidence must establish this by more than "generally" questioning witnesses as to the circumstances: the testimony as to time and circumstances must be rather detailed. *Jarvis v. Commonwealth*, 960 S.W.2d 466, 469-470 (Ky.1998); *Fields v. Commonwealth*, 12 S.W.3d 275, 279-280 (Ky.2000).

803(2) Excited Utterance

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 the declarant actually was placed under stress by the event, and the statement flowed therefrom. The key is the "duration of the state of excitement," although it is not the only consideration. The trial court should consider the following factors when analyzing the issue: lapse of time between act and declaration, the opportunity, likelihood or inducement to fabricate, place of declaration, whether declaration was made in response to question, whether declaration was against interest or was self-serving, presence of visible results of act to which utterance related, and emotional state of victim. *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky.2007). *See also Jarvis v. Commonwealth*, 960 S.W.2d 466, 470 (Ky.1998).

However, this is not a bright-line test for admissibility. *Soto v. Commonwealth*, 139 S. W. 3d 827, 860 (Ky.2004).

NOTES

803(3) Then Existing Mental, Emotional, or Physical Condition

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

803(4) Statements for Purposes of Medical Diagnosis or Treatment

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

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

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

Change in law: If the child is incompetent to testify at trial, any statements made to treating physicians are not admissible. *BB v. Commonwealth*, 226 S.W.3d 47 (Ky.2008) overruling *Souder v. Commonwealth*, 719 S.W.2d 730 (Ky.1986) and *Edwards v. Commonwealth*, 833 S.W.2d 842 (Ky.1992).

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.

Statements identifying perpetrator. 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 allowed 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.

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

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

NOTES

803(5) Recorded Recollection

This exception deals with admitting into evidence that which refreshed the witness's recollection. These documents may be read into evidence, but only the adverse party may introduce them as exhibits. *See Hall v. Transit Authority*, 883 S.W.2d 884, 887 (Ky. App.1994).

803(6) Records of Regularly Conducted Activity

The proponent of the evidence must show that the record was created as part of a "regularly conducted business activity" and that it was the "regular practice" of that business entity to make records of its activities. These two requirements exist to keep out records created for the purpose of influencing later litigation. The rule permits records in "any form" of acts, events, conditions, opinions or diagnoses made in the course of the business activity "at or near the time" of occurrence, or from information transmitted by a person with knowledge. The record maker need not have any personal knowledge about the information. *Welsh v. Galen of Virginia*, 128 S. W. 3d 41 (Ky. App.2001). Almost any regular activity can qualify as a business under the rule. For example, in *Kirk v. Commonwealth*, 6 S.W.3d 823, 828 (Ky.1999), a deceased medical examiner's autopsy report, including his opinions, was admissible. However, opinions and findings contained in the records are not admissible if the maker of the record would not be allowed to testify about the result if he/she were present to testify. In the case of physical evidence where authentication evidence is lacking, the fact that the results are stored in the business records does not make those results admissible. *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 9 (Ky.1998)*;Fields v. Commonwealth*, 12 S.W.3d 275, 280, 284 (Ky.2000). Both the maker of the record and the person providing the information must have been acting under a business duty for the observation/statement to be admissible. *Thacker v. Commonwealth*, 115 S. W. 3d 834 (Ky.App.2003). If either the maker or the recorder is not under such a duty, the business record is not admissible. The rule also requires, even if the recorder is under some duty to record the information, that it must be the organization's normal business to do so – it may not be some isolated decision to record that type of data. *Brooks v. LFCUCG*, 132 S.W. 3d 790 (Ky.2004). The rule makes a provision for hospital records that will still be obtained and presented to the court under KRS 422.300 *et. seq*

803(7) Absence of Entry in Business Record

This rule deals with the absence of information that would usually be found in well-kept records of the particular business or other operation. The inference is that the absence of a specific entry indicates that an act was not done. To introduce evidence under the rule, the party must satisfy the foundation requirement set out in KRE 803(6), and must authenticate the records either through the testimony of the keeper of the records, or under KRE 902.

803(8) Public Records and Reports, and (9) Records of Vital Statistics

Public records are treated like business records, but they have their own rule numbers. This record exception is important because it allows the introduction of public records without cumbersome foundation requirements. However, it is important to note that under KRE 803(8) **no one may introduce investigative reports by police** or other law enforcement officers under this exception. They **might be** admissible under KRE 106 or KRE 612. But they may not be introduced under this rule. The government is prohibited from introducing its own investigative reports and fact-findings under this rule. These excluded matters may become relevant and therefore admissible due to an action of the adverse party, but they may not be introduced as a matter of course as an exception to the hearsay rule. *Skeans v. Commonwealth*, 915 S.W.2d 455 (Ky.1995); *Prater v. CHR*, 954 S.W.2d 954, 958 (Ky.1997); *Skimmerhorn v. Commonwealth*, 998 S.W.2d 771, 776 (Ky.App.1998).

Records from the Department of Corrections are public records. *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky.2005)

803(10) Absence of Entry in Public Record

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.

NOTES

Rule 803(10)

803(18) Learned Treatise

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

803 (22)

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

KRE 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.

(5) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

NOTES

DISCUSSION:

The focus of this inquiry is on the availability of declarant's testimony, not the declarant himself. The witness may be physically present but some reason either unable to testify or has changed the substance of his testimony. In these circumstances, 804 applies.

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

(b) 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.
The witness cannot refuse in advance. The refusal must follow an explicit order to testify.

(c) 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).
This decision is one for the judge under KRE 104(a.) The judge may disbelieve and refuse to find the witness unavailable.

(d) 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.

(e) A party wishing to rely on Subsection(a)(5) should be able to show that a subpoena was timely issued and that good faith efforts to serve it failed. U.S. Supreme Court precedent says that this much is necessary to protect the defendant's right of confrontation. *Ohio v. Roberts*, 448 U.S. 56 (1980). The fact that the Commonwealth has attempted to subpoena a witness without success is insufficient for the defendant's attempt to show that the witness is unavailable: the defendant must make his or her own independent efforts to have the witness served. *Justice v. Commonwealth*, 987 S.W.2d 306, 313 (Ky.1999).

1) RCr 7.02 requires personal service. A mailed subpoena, even if the witness agrees to it, is invalid. Thus, the witness cannot be considered properly summoned and cannot be considered unavailable.

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

804 (b)(1) Former Testimony

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

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

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

NOTES

804 (b)(2) Statement Under Belief of Impending Death

In *Wells v. Commonwealth*, 892 S.W.2d 299, 302 (Ky.1995), the court held that statements made by the deceased to a 911 operator and to EMTs within minutes of the stabbing and later statements to a detective after being told his condition was critical and that he could die at any minute, qualified for exemption under this rule. The **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. *Turner v. Commonwealth*, 5 S.W.3d 119 (Ky.1999), provides an excellent discussion of this exception.

804 (b)(3) Statement Against Interest

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

In *Terry v. Commonwealth*, 153 S. W. 3d 794 (Ky.2005), the court noted that statements that qualify under this rule cannot be used against codefendants.

It is insufficient the statement merely potentially subjects a declarant to criminal penalties, to wit: possible perjury charges are insufficient. *Osborne v. Commonwealth*, 43 S.W.3d 234 (Ky.2001).

804 (b)(4) Personal or Family History

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.

804(b)(5) Forfeiture by Wrongdoing

As noted in *Crawford v. Washington*, statements are admitted under this rule to penalize a party that procured the absence of the witness by improper means. It is a forfeiture rule, not a hearsay exception. The proponent of a statement under this rule must show that the adverse party (1) either engaged in, or acquiesced in someone else's, wrongdoing, (2) that the wrongdoing was intended to procure the witness's absence, and (3) that it actually was the cause of the witness's absence. This seemingly rigorous set of requirements is rendered less onerous by the fact that that the decision is a preliminary one governed by *KRE 104(a)* to which the rules of evidence (save privileges) do not apply. KRE 1101(d)(1). **This should be applied only where the purpose of any wrongful act was to silence the witness.** This does not mean every statement by a murdered victim comes in. Underwood and Weissenberger *Kentucky Evidence Courtroom Manual*, 2007-2008 edition, p. 514.

KRE 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.

DISCUSSION:

Under the Rules, hearsay statements contained in other hearsay statements may be admitted. This Rule continues the Common Law precedent that multiple hearsay statements may be admitted if they individually qualify under an exception. *Terry v. Commonwealth*, 153 S.W. 3d 794, 798 (Ky.2005). This rule is another indication that hearsay exceptions apply to a single remark and that **each remark must stand or fall** on its own. *Thurman v. Commonwealth*, 975 S.W.2d 888, 893 (Ky.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.

NOTES

KRE 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.

DISCUSSION:

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.

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.

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.

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).

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.

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.

Crawford Considerations

In *Crawford v. Washington*, 541 U. S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held the 6th Amendment confrontation clause prohibits admission of an out of court "testimonial" statement at a criminal trial except (1) where the declarant appears as a witness and can be cross examined about the statement or (2) where the declarant does not appear as a witness but the adverse party had an opportunity to cross examine the declarant at an earlier proceeding. §11 of the Kentucky Constitution also embodies the right to confrontation.

Crawford rejects the *Ohio v. Roberts*, 448 U. S. 56 (1980); reliability test for testimonial statements. *Crawford* does not give a comprehensive definition of a "testimonial" statement. "[I]n-court testimony or its functional equivalent – that is material such as affidavits, custodial examinations, prior testimony …, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" are testimonial statements. *Crawford* at 1364. "Extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions" are also testimonial. *Crawford* at 1374.

Non-testimonial statements include business records, co-conspirator statements. *Crawford* at 56. In *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-74, 165 LEd.2d 224 (2006), the U.S. Supreme Court held "[s]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." If the statements are non-testimonial there isn't a confrontation issue.

The Kentucky Supreme Court addresses *Crawford* in *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky.2004) and *Rankins v. Commonwealth*, 237 S.W.3d 128 (Ky.2007).■

NOTES

ARTICLE IX.
AUTHENTICATION AND IDENTIFICATION

NOTES

KRE 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.

Discussion:

Article IX requires the party offering tangible evidence to show that the object is what the party claims it is. The trial court determines relevance questions under Article IV. If the object is a writing containing statements, it must also satisfy one of the hearsay exceptions under Article VIII. This Article provides a way to avoid calling witnesses for the sake of identifying objects about whose authenticity there is little doubt.

The Commentary says that authentication and identification under this rule is a matter of conditional relevancy to be determined under KRE 104(b). *Johnson v. Commonwealth*, 134 S. W. 3d 563 (Ky.2004). In these circumstances, the judge makes a determination that the proponent of the evidence has introduced enough evidence to allow a reasonable jury to conclude that the object is what it is claimed to be.

901 (a)

States the basic principle of authentication. The proponent of the evidence must make a prima facie showing that the object in question is what its proponent claims. *Johnson v. Commonwealth*, 134 S.W. 3d 563 (Ky.2004). This rule applies to **any tangible objects that may be introduced, murder weapons, drugs, blood stained clothes and any other objects**. The only thing necessary to support admission into evidence is production by the Commonwealth of evidence that would allow the jury, if it wants to, to decide that the pistol introduced is the one that was taken from the scene or that the dope presented in court is the dope that was taken from the defendant's pocket. *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky.1998). *But see Gerlaugh v. Commonwealth*, 156 S.W.3d 747 (Ky.2005) (the Commonwealth failed to provide evidence that the gun found in defendant's car nine days after the robbery was the pistol used in the robbery).

Generally, there is **no strict chain of custody rule**. In *Rabovsky*, the court noted that a chain is not necessary to qualify guns or other easily identified items for admission.

Exception: A **chain is required for blood, human tissue samples, drugs or similar items. Chain need not be perfect.** *Muncy v. Commonwealth*, 132 S.W. 3d 845 (Ky. 2004); *Parson v. Commonwealth*, 144 S.W. 3d 775 (Ky.2004). 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. Foundation is sufficient if evidence demonstrates a reasonable assurance that the condition of the item remains the same formt he time it was obtained until its introduction at trial. *Penman v. Commonwealth*, 194 S.W.3d 237 (Ky.2006).

Chain of custody defects go to the **weight** of the evidence, **not** its **admissibility**. *Penman v. Commonwealth*, 194 S.W.3d 237 (Ky.2006).

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

A **replica** may be introduced upon a **showing** that it is **similar to the original** object. *Allen v. Commonwealth*, 901 S.W.2d 881, 884 (Ky.App1995), contains a foundation colloquy for replicas. (Does this look like the original? Is there any difference in this and the original? Is it about the same as the original?)

901(b)

Provides examples of ways in which to authenticate items. The methods listed here are exclusive. *Soto v. Commonwealth,* 139 S.W. 3d 827 (Ky. 2004). Any witness with knowledge that the matter is what it is claimed to be may testify and this may satisfy the foundation burden.

Handwriting. Any lay person familiar with the handwriting of another, as long as that person knew the handwriting before the litigation began, may testify concerning "the genuineness" of handwriting. An expert witness may also do so. *Soto v. Commonwealth,* 139 S. W. 3d 827 (Ky.2004).

Contents of letter may be proved by identification of information in the letter uniquely within the knowledge of the writer. *Johnson v. Commonwealth,* 134 S.W. 3d 563 (Ky.2004).

Voice Identification. Any person who testifies that she knows a voice may identify it.

Telephone conversation. A party may prove the identity of the person on the other end by showing that the call was made to the assigned number and that the circumstances, which may include the other person identifying himself, show that the person answering was the one called. In case of a business, if the call was made to the correct number and the conversation related to business usually conducted over the phone, the foundation burden is met. *Soto v. Commonwealth*, 139 S.W. 3d 827 (Ky.2004).

Constitutional consideration. Court can compel a handwriting or voice specimen of a defendant without violating the defendant's Fifth or Sixth Amendment rights. *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967).

NOTES

Public Record. 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.

Process or System. 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**.

Breathalyzer Results. In DUI cases, the foundation for introduction of breathalyzer results can be established solely by testimony as long as the service record of the machine and the test paper are also admissible. The service technician need not appear. *Commonwealth v. Roberts*, 122 S.W. 3d 524 (Ky.2003).

Catchall. 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*, 875 S.W.2d 882, 887 (Ky.1994).

KRE 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

NOTES

records (those from offices outside the territorial jurisdiction of the United States) may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of office. A written statement prepared by an official having the custody of a record that after diligent search no record or entry of a specified tenor is found to exist in the records of the office, complying with the requirements set out above, is admissible as evidence that the records of the office contain no such record of entry.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Books, newspapers, and periodicals. Printed materials purporting to be books, newspapers, or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law before a notary public or other officer authorized by law to take acknowledgements.

(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by the general commercial law.

(10) Documents which self-authenticate by the provisions of statutes or other rules of evidence. Any signature, document, or other matter which is declared to be presumptively genuine by Act of Congress or the General Assembly of Kentucky or by rule of the Supreme Court of Kentucky.

(11) Business records.

(A) Unless the sources of information or other circumstances indicate lack of trustworthiness, the original or a duplicate of a record of regularly conducted activity within the scope of KRE 803(6) or KRE 803(7), which the custodian thereof certifies:

(i) Was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

(ii) Is kept in the course of the regularly conducted activity; and

(iii) Was made by the regularly conducted activity as a regular practice.

(B) A record so certified is not self-authenticating under this paragraph unless the proponent makes an intention to offer it known to the adverse party and makes it available for inspection sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to challenge it.

(C) As used in this paragraph, "certifies" means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury, and, with respect to a foreign record, a written declaration which, if falsely made, would subject the maker to criminal penalty under the laws of that country. The certificate relating to a foreign record must be accompanied by a final certification as to the genuineness of the signature and official position:

(i) Of the individual executing the certificate; or

(ii) Of any foreign official who certifies the genuineness of signature and official position of the executing individual or is the last in a chain of certificates that collectively certify the genuineness of signature and official position of the executing individual.

A final certification must be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by an officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of office.

DISCUSSION:

This rule allows a party to introduce certain documents without bringing a witness to the hearing to identify them. This type of self-authentication is premised on a belief that there is no good reason to require production of another witness where items have already been identified by satisfactory means outside of court. The most important parts for purposes of criminal practice deal with **public documents** which may be introduced under KRE 902(1) or (2) **upon seal and attestation of the keeper of the document**. *Young v. Commonwealth*, , 968 S.W.2d 670 (Ky.1998).

NOTES

Rule 902

Subsection (4) illustrates the means by which a party may introduce official records or show that no such record is found. The keeper of the official records may issue a certificate attesting to the accuracy of the copy of the record (which is allowed as a matter of course under KRE 1005). *Munn v. Commonwealth*, 889 S.W.2d 49, 51 (Ky.App.1994); *Davis v. Commonwealth*, 899 S.W.2d 487, 489 (Ky.1995). When this is done, the record is deemed "self-authenticating." *Soto v. Commonwealth*, 139 S. W. 3d 827 (Ky.2004).

The last important self-authentication provision is KRE 902(11) which is designed to facilitate the production of **business records** of the type admissible under KRE 803(6) or 803(7) upon **certification by the custodian** that the record was made at or near the time of occurrence of the matters involved, either by or from information transmitted by a person with knowledge of the event, **is a record kept in the course of a regularly conducted activity, and was made as a regular practice**. *Commonwealth v. Roberts*, 122 S. W. 3d 524 (Ky.2003); *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 9 (Ky.1998); *Dillingham v. Commonwealth*, 995 S.W.2d 377, 383 (Ky.1999). In short, the custodian of business records need not be produced at trial if the record is certified. *Merriweather v. Commonwealth*, 99 S.W. 3d 448 (Ky.2003). However, there is a **notice requirement** which requires the proponent to let the adverse party know that the record is coming in and to produce the record at such time before introduction that the adverse party has a "fair opportunity" to challenge it. For **straight business records, the certification must be a "written declaration under oath subject to the penalty of perjury**."

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

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

Establishing authenticity does not mean the document is admissible. *Matthews v. Commonwealth*, 163 S.W.3d 11 (Ky.2005)

KRE 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.

DISCUSSION:
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. ■

NOTES

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

NOTES

KRE 1001 Definitions

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, Photostatting, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

DISCUSSION:

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."**

KRE 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.

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

The rule requires a party to introduce the most authentic evidence which is within their power to produce. *Johnson v. Commonwealth*, 231 S.W.3d 800, 805 (Ky.App.2007).

KRE 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.

DISCUSSION:
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.

KRE 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.

DISCUSSION:
This rule lists the instances in which the original is not required and in which other evidence concerning the writing, recording or photograph may be presented. Obviously, if the original is lost or destroyed other evidence of the contents must be provided. However, the proponent should be ready to **show that they were lost or destroyed for reasons other than his own bad faith**. The subpoena power of Kentucky ends at its borders. RCr 5.06; RCr 7.02(5). Sometimes documents can be obtained under the *Uniform Act to Secure the Attendance of Witnesses.* KRS 421.230 -270.

NOTES

Subsection (2) excuses the absence of the original only if the original cannot be obtained by "any" procedure. It seems that a party would have to at least **try the statutory procedure** to meet this requirement. If there is no way to obtain the original by judicial process then necessity requires introduction of other evidence. Finally**, if the adverse party has the original and will not give it up, it is only fair to allow the proponent to introduce other evidence** about the contents of the writing, recording or photograph. If the writing, recording or photograph bears only on some collateral issue, the judge should be given some latitude in deciding whether the original is really necessary to make this point.

KRE 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.

DISCUSSION:
This is a practical rule which recognizes that official records and documents ordinarily will not be available because they cannot be removed from their official depository. This rule does away with the requirement of an original and authorizes the use of copies certified under KRE 902 or copies attested as correct by witnesses who have made comparison of the documents. Although the Commentary says that there should be no preference of the alternatives, it seems obvious that there is a good deal less chance for error in a photocopy made under KRE 902 and this should be normal practice for most attorneys. *Skimmerhorn v. Commonwealth*, 998 S.W.2d 771, 776 (Ky.App.1998). The comparison spoken of in this rule must be made by and testified to by an "appropriate" official of the agency possessing the records. *Munn v. Commonwealth*, 889 S.W. 2d 49 (Ky. App.1994).

KRE 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.

DISCUSSION:
This rule exists to avoid burying the court and the jury with more information than either can handle. This rule **allows** a party to present **a chart, a written summary, or a set of calculations** to present the information to the jury in a comprehensible form. Convenience, not necessity, is the standard. Of course a **proper foundation must be laid** establishing the correctness of the exhibit itself. The party intending to use a summary must give **"timely" written notice** to the opposing party and shall **file this notice with the court** as proof of having done so. All information relied upon must be made available for examination or copying or both by other parties. In certain circumstances, the judge may order that the supporting information be produced in court so that the basis of the summary can be verified. This means that the **originals** of the **summarized material must be made available to the adverse party**. **An exhibit prepared under this rule cannot be admitted if any of the originals on which it is based are inadmissible unless they are admissible under KRE 703 as information used by experts**. It is not necessary to produce everyone who worked on the chart or summary, but someone with sufficient knowledge should be produced at trial or hearing.

NOTES

KRE 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.

DISCUSSION:
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.

See for example, *Johnson v. Commonwealth*, 231 S.W.3d 800 (Ky. App.2007), (the defendant admitted during her testimony her husband's recitation of the terms of her husband's power of attorney did not require the Commonwealth produce the original power of attorney document).

KRE 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.

DISCUSSION:
This rule sets out a special description of judge and jury duties. 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.**■

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

- Learned Hand

NOTES

ARTICLE XI. MISCELLANEOUS RULES

NOTES

KRE 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.

DISCUSSION:
This rule must be read together with KRE 101. This rule emphasizes that these rules apply to the Court of Justice. As such, they do **not** apply to **parole revocation hearings, administrative hearings, or any other type of executive branch proceeding** unless those agencies enact regulations to adopt them. KRE 1101(c) makes it clear that privileges apply at all stages of "all actions, cases and proceedings" conducted in the Court of Justice. The important part of the rule for criminal defense lawyers is subsection (d) which lists the instances in which the rules do not apply.

Under KRE 104, the **rules do not apply** when the judge is making a **preliminary determination of the admissibility of evidence**. This includes **suppression hearings** under RCr 9.78. *Kotila v. Commonwealth*, 114 S.W. 3d 226 (Ky.2003).

Grand juries are not bound by the rules because of the nature of the proceeding. The requirement that the grand jury consider only "lawful" evidence was done away with when the Rules of Criminal Procedure were adopted in 1963. The grand jury may ask the judge or the prosecutor for advice on evidence questions, RCr 9.58; RCr 5.14(1), but there is **no requirement that the grand jury follow the Rules of Evidence.**

In **summary contempt** proceedings, for acts or omissions in the presence of the judge, the **rules do not apply**. The judge is both witness and factfinder. Other criminal **contempt** proceedings, **for acts** or omissions **outside the presence of the judge**, are not mentioned here, and therefore **are subject to the rules**. **Privileges apply in both** kinds of contempt proceedings.

Subsection (5) provides a list of the criminal proceedings at which the rules except for privileges do not apply.

(1) Extradition or rendition on governor's warrants are not covered,

(2) The only stated purpose of **preliminary hearings** under RCr 3.14(1) is to determine whether there is probable cause to bind a person over for further proceedings. The Criminal Rule has long authorized use of hearsay testimony and the Evidence Rules make a provision for this. *White v. Commonwealth*, 132 S.W. 3d 877 (Ky. App.2003). In *Barth v. Commonwealth*,

80 S.W. 3d 390 (Ky.2001), the Court held that because KRS 640.010 mandates application of the Rules of Criminal Procedure to **transfer hearings**, otherwise inadmissible hearsay might be used to support the decision to transfer. The alternate ground, that KRS 1101(d) exempts such hearings from the Rules, is plainly wrong. A transfer hearing under the Unified Juvenile Code is not a "criminal case." It is a special statutory proceeding.

(3) While it is true judge sentencing does not involve all due process requirements guaranteed for trial, it is important to keep in mind that a judge may not impose a sentence on material misinformation. *U.S. v. Tucker*, 404 U.S. 443 (1972). Unreliable evidence must be excluded regardless of the provisions of KRE 1101(d)(5). However, *Douglas v. Commonwealth*, 83 S.W. 3d 462 (Ky.2002), holds that a judge need not conduct a *Daubert* hearing before imposing a sex offender assessment rating.

(4) Although there are no cases specifically saying so, reliable evidence is required in proceedings to grant, deny or revoke probation because they are elements of judge sentencing.

(5) *Carrier v. Commonwealth*, 142 S.W. 3d 670 (Ky. 2004), holds that the rules do not apply in **proceedings to obtain a search warrant**.

(6) The liberty of an arrested person should not be taken away without application of all safeguards necessary to an accurate determination of the facts. As the rule is written now, bail can be denied or revoked based solely on the statements of an officer reading from a case file. Section 1(1) of the Constitution proclaims individual liberty as the first (and therefore most important) right. Section 16 creates a presumption in favor of release on bail in almost all criminal cases. The liberty interest of the defendant, who is clothed with the presumption of innocence at this point, demands that the bail determination be made with a high degree of reliability. Judges should require the presence of witnesses with personal knowledge subject to cross-examination at all bail hearings. A bail ruling based on hearsay almost always will violate Sections 1(1) and 2 of the Constitution.

KRE 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.

NOTES

DISCUSSION:
Both the Supreme Court and the General Assembly may propose rule changes. The rules of evidence, with the exception of privileges, are primarily issues of practice and procedure and therefore are assigned to the Supreme Court of Kentucky under Section 116 of the Constitution. *Manns v. Commonwealth*, 80 S. W. 3d 439 (Ky.2002). However, neither the court nor the General Assembly has power to amend or create rules unilaterally. *Weaver v. Commonwealth*, 955 S.W. 2d 922 (Ky.1999). Inferior courts have no authority to amend or create rules. Any proposed changes should be presented to the Evidence Rules Commission authorized by KRE 1103.

Not all changes in evidence law come about by rule modification. In *Stringer v. Commonwealth*, 956 S.W.2d 883 (Ky.1997), the Supreme Court did away with the "ultimate issue" prohibition in expert testimony cases, a principle which was not covered by any specific rule. The court reasoned that evidence principles not preempted by enactment of rules remain within the court's authority to change by case precedent as long as the court does so with due regard to rules of evidence in existence. The most recent controversy in this area deals with "habit evidence." *Thomas v. Greenview Hospital, Inc.*, 127 S.W.3d 663 (Ky. App.2004).

In *Stidham v. Clark*, 74 S.W. 3d 719 (Ky.2002), the Court observed that the sole means of creating privileges in Kentucky is by the rules amendment process.

KRE 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, a member of the Board of Governors of the Kentucky Bar Association appointed by the President of the Kentucky Bar Association, and five (5) additional 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.

HISTORY: Amended by Supreme Court Order 2007-02, eff. 5-1-07; 1992 c 324, § 27, 34, eff. 7-1-92; 1990 c 88, § 75

DISCUSSION:
The Evidence Rules Commission is the initial screening body that will review any proposals to change the Kentucky Rules of Evidence.

KRE 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.

DISCUSSION:
The general rule in Kentucky is that a Commentary is not binding unless the adopting entity expressly says that it is. Although it does not have the force of law, the Commentary is perhaps the best evidence of what Lawson and the other drafters intended the rules to mean. *Commonwealth v. Maricle*, 10 S.W. 3d 117 (Ky.1999). It is occasionally cited in opinions. *St. Clair v. Commonwealth*, 140 S.W. 3d 510 (Ky.2004). Where rules have been amended or added to, *e.g.*, KRE 608, KRE 804(b)(5), any earlier Commentary must be disregarded. ■

NOTES

TABLE OF CASES

TOPICS/TRANSLATION TABLE

SUBJECT	RULE
Accident Reconstruction	702
Admission of Evidence	104; 611
Admissions	801A
Admonitions	105
Argumentative Question	611
Asked and Answered	403/611
Attorney Client Privilege	503
Assumption of Facts	611
Authentication of Evidence	901; 902
Avowal	103(a)
Bad Acts	404(b); 608
Ballistics	702
Best Evidence Rule	1001; 1002
Bias	607; CR 43.07
Bite mark identification	702
Bolstering	402; 608; 801A(a)(2)
Blood spatter	702
Breath testing	702
Business Records	803(6); 901; 902
Chain of Custody	901
Character Evidence Inadmissible	404(a)
Character Evidence Accused	404(a)(1)
Character Evidence Witness	404(a)(2)
Character Evidence Opinion/Reputation	405
Character Evidence Specific Acts	608; 405(c)
Character Evidence Foundation	602; 608
Claim valuation	702
Clergy Privilege	505
Cocaine manufacture	702
Collective Facts	701
Co-defendant Statement	804(b)(3)
Comment on Privilege	511
Competence of Witness	601; 602
Compromise of Claim	408
Conclusion of Law	701; 702
Conditional Admission	104(b)
Confidential Informant Privilege	508
Confidential Informant Testimony	403
Confusion of Issues	403; 611
Counselor Privilege	506
Court Records	803(8); (9); (10); 902
Cross-examination	611(b)
Cumulative Evidence	403
Daubert hearings	702
DNA	702
Duplicates	1003
Excited Utterance	803(2)
Exclusion of Evidence	403
Exclusion of Witness	615
Exhibits	901
Existing Physical/Emotional Condition	803(3)
Experts	702, et seq.
Experts, Court-appointed	706
Expert Qualifications	702
Expert/Hearsay	703
Expert Not Helpful	702
Expert, Voir Dire of	705
Fibert Analysis	702
Fingerprint Analysis	702
Flight	402; 403
Footprint analysis	702
Former Testimony	804(b)(1)
Guilty Pleas and Negotiations	410
Habit Evidence	401; 402
Hair analysis	702
Handwriting	702; 901(b)(2); (3)
Hearsay	Article 8
Hearsay Definition	801
Hearsay Exceptions Declarant Available	803
Hearsay Exceptions Declarant Unavailable	804
Hearsay Exclusionary Rule	802
Hearsay Within Hearsay	805
HLA Blood typing	702
Hypothetical Questions	705; 703(a)
Identification Hearsay	801A(a)(3)
Inaudible Sting Tapes	401
Insufficient Identification	901
Impeachment – Strict	607; 611
Impeachment – Witness Lying	403
Impeachment Bias	607
Impeachment – Extrinsic Evidence	608; CR 43.07
Impeachment Own Witness	607
Impeachment Prior Statements	613; 801A(a); 804(b)
Impeachment Methods	CR 43.07
Impeachment Collateral Matter	403; 607
Impeachment Prior Convictions	609
Impeachment Specific Acts of Misconduct	608; CR 43.07
Impeachment, Witness Lying	403
Incompetent Witness	601; 403
Insurance	411
Investigative Hearsay	801
Irrelevant Evidence	401; 402
Judge as Witness	605
Judgment of Prior Conviction	803(22)
Judicial Notice	201; 702
Juror as Witness	606
Lay Opinion	701
Lay technical opinion	701
Leading Questions	611
Learned Treatises	803(18)
Limited Admissibility	105; 611(a)
Marijuana, testing	702
Marital Privilege	504
Medical Expenses	409
Medical Diagnosis or Treatment Statements	803(4)
Medical Records	901; 803(6)
Mental Condition of Accused	701; 702
Misleading Jury	403
Motion in Limine	103(d)
Non-responsive Answer	611
Objections	103(a); RCr 9.22
Opening the Door	106; 611
Opinion, Basis of	703
Opinion, Disclosure of Basis	705
Opinion re: Age	701
Opinion re: Cause of Accident	702
Opinion re: Crime Scene	701
Opinion re: Eyewitness Identification	702
Opinion re: Guilt	704

SUBJECT	RULE
Opinion re: Intoxication	701
Opinion re: Mental , Emotional State	701
Opinion re: Physical suffering	701
Opinion re: Sanity	701
Opinion re: Sexual Devices	701
Opinion re: Speed	701
Opinion re: Smell	701
Opinion Testimony – Lay	701
Opinion Testimony – Expert	702
Other Crimes/Acts	404(b); 608
Other Crimes – Notice	404(c)
Other Crimes Offered on Stipulated Point	403
Past Recollection Recorded	803(5)
Pedophilia Indicators	702
Personal Knowledge	602
Photographs	403; 901
Plea Bargains	410
Prejudicial Effect Outweighs Value	403
Preliminary Rulings on Admissibility	104
Present Sense Impression	803(1)
Presumptions	301
Prior Consistent Statement	801A(a)(2)
Prior Inconsistent Statement	613; 801A(a)(1)
Prior Inconsistent Statement Foundation	613
Privilege Comment on	511
Privilege Only Rule or Statute	501
Privilege Right to All Evidence	501
Privilege Restoration	510
Privilege Waiver	509
Psychotherapist Privilege	507
Public Records	803(8);(9); 901; 902; (10)
Rape Shield	412
Redaction	804(b)(3)
Relevance	401; 402
Religious Belief	610
Rule of Completeness	106; 611(a)
Scientific Evidence	702
Separation of Witnesses	615
Sexual Conduct	412
Silence in face of accusation	801A(b)(2)
Social Science Syndromes	702
Speculation Objection to	602; 701; 702
Statement Against Interest	804(b)(3)
Summaries	1006
Suppression Hearing	103; 104; RCr 9.78
Tape Recordings (see also Redaction)	401
Truthfulness of Other's Testimony	701; 702; 402
Ultimate Issue	704
Unavailable Witness	804(a)