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UK CLE

EVIDENCE AND TRIAL PRACTICE

October 2001

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EVIDENCE AND TRIAL PRACTICE

October 2001

Presented by the
OFFICE OF CONTINUING LEGAL EDUCATION
UNIVERSITY OF KENTUCKY COLLEGE OF LAW

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EVIDENCE AND TRIAL PRACTICE
-2001-

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CASE LAW UPDATE - 2001

THE TOP 10 CASES THAT WILL CHANGE YOUR PRACTICE

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SECTION A

CASE LAW UPDATE - 2001

THE TOP 10 CASES THAT WILL CHANGE YOUR PRACTICE

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I. ADMINISTRATIVE LAW

A. United States v. Mead Corporation, ____ U.S. ____, 121 S.Ct. 2164 (2001) (Professor Rogers' pick) (8-1; Justice Souter with Scalia dissenting).

1. **FACTS**: The Harmonized Tariff Schedule of U.S. (HTSUS) permits the U.S. Customs Service, through its headquarters or any one of its 46 point of entry offices, "to classify and fix the rate of duty on imports, under rules and regulations issued by the [Treasury Secretary]." Id. at 2166. One regulation authorizes the Custom Service and all its offices to issue "ruling letters" that set the tariff classification for certain imports. Such letters apply only to the specific case before Customs. The "letters" are not subject to notice and comment before being issued, and may be modified or revoked without notice.

   Relying on a letter ruling, Mead Corporation imported spiral-bound day planners and three-ring appointment, phone and calendar binders duty free. However, in 1993, Customs changed its mind and issued a ruling letter classifying Mead's day planners as "bound" "diaries" subject to a four percent tariff.

2. **LOWER COURTS:** Mead filed suit and lost in the Court of International Trade, but prevailed before the Federal Circuit Court of Appeals. The Federal Circuit Court held that unlike Customs regulations, ruling letters should not receive the highest level of deference, accorded under Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The Court gave no deference to the ruling letter because it was not preceded by notice and comment under the Administrative Procedure Act.

3. **ISSUE AND HOLDING:** Going beyond the tariff issue to address when courts should defer to agency decisions, the Supreme Court granted certiorari "to consider the limits of [judicial] deference owed to administrative practice in applying a statute." Id. at 2171.

   a. The Court held that "administrative implementation of a particular statutory provision qualifies for Chevron deference [when a court must defer to an agency's interpretation of a statute it administers] when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Id.

b. "When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.'" Id., citing Chevron, 467 U.S. 843-44.

c. Contrast this with the Chevron Doctrine which created a two part test to determine judicial deference: first, whether Congress' intent was clear, and if so, the court and the agency must defer; and second, if Congress' intent is ambiguous, the court should give deference to the agency's interpretation if it is reasonable. Chevron, 467 U.S. at 843-844.

d. More specifically, the Court held the "letter rulings" were not entitled to Chevron style deference because the statute gave no indication that Congress intended to delegate authority to Customs to bind third parties by issuing letter rulings that carried the "force of law."

e. Nevertheless, the Court held that some deference is due these less formal agency actions under the doctrine announced in Skidmore v. Swift & Company, 323 U.S. 134 (1944).

f. Skidmore held that an agency's interpretation may merit some [intermediate] deference based on the consideration of such factors as its "power to persuade" based on the "writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight such as" the complexity of the regulatory scheme, the specialized expertise of the agency and, "the value of uniformity in its administrative and judicial understandings of what a national law requires." Id. at 2172 and 2175, quoting Skidmore, 323 U.S. 140.

   1. The "letter rulings" "are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines." Id. at 2175. As such, the letter rulings are entitled to some deference under Skidmore v. Swift & Company, 323 U.S. 134 (1944).

g. Mead also sanctioned an expansion in the application of the Chevron doctrine by noting such deference isn't limited to notice and comment rulemaking but may be established in a variety of ways.

4. **SIGNIFICANCE:** The lone dissenter, Justice Scalia characterized this case as "one of the most significant opinions ever rendered by the

Court dealing with judicial review of administrative action. Its consequences will be enormous, and almost uniformly bad." Id. at 2189.

a. Scalia argues that Mead, which restricts agency deference, and employs "th'ol' totality of the circumstances test" replaces the predictable and clear Chevron Doctrine. Id. at 2178.

i. "What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary." Id. at 2178.

ii. "And whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called Skidmore deference." Id.

b. Scalia predicted that the practical effects of Mead would be: "protracted confusion" because the Mead test is "wonderfully imprecise", Id. at 2181; "artificially induced increase in informal rulemaking" to obtain Chevron deference, Id. ; "the ossification of large portions of our statutory law" because "once the court has spoken, it becomes unlawful for the agency to take a contradictory position, Id. at 2181-2182; and, the Mead Doctrine "compounds the confusion it creates by breathing new life into the anachronism of Skidmore. . .[which is essentially] "a trifling statement of the obvious: A judge should take into account the well-considered views of expert observers." Id. at 2183.

II. CIVIL RIGHTS & FEDERAL CIVIL PROCEDURE

A. Reeves v. Sanderson Plumbing, 530 U.S. 133 (2000) (Professor Schwemm's pick) (9-0; O'Conner for a unanimous Court)

1. **FACTS:** After forty years with Sanderson Plumbing, a toilet seat and cover manufacturer, Roger Reeves, age 57 and co-worker Russell Caldwell, age 45, were terminated. After a three month audit, the Company said Reeves and Caldwell had failed to keep accurate time

and attendance records of the employees they supervised. Reeves had also been placed on probation for similar reasons two years earlier.

Reeves filed suit in federal court claiming a violation of the Age Discrimination Employment Act (ADEA). Allegedly Reeves' boss had made two discriminatory statements several months before Reeves dismissal. They were: that Reeves "must have come over on the Mayflower"; and that he was "too damn old to do his job." Sanderson said Reeves was terminated for poor work performance, i.e., a 1993 probation and the 1995 audit.

Reeves countered with evidence that he had accurately recorded the time and attendance of the employees under his supervision and any errors were the fault of the company's automated time card system. The court overruled Sanderson's two motions for judgments as a matter of law and the jury awarded Reeves $35,000. However, the Fifth Circuit concluded that Reeves had failed to introduce sufficient evidence for a jury to conclude his termination resulted from age-based discrimination.

2. **ISSUE:** The Supreme Court "granted certiorari to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination. . ., combined with sufficient evidence for a reasonable fact finder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." Id. at 141.

3. **HOLDING:** In addressing the evidentiary burdens required of a plaintiff in an ADEA case, a plaintiff's prima facie case of discrimination, combined with sufficient evidence for a reasonable fact-finder to reject the employer's nondiscriminatory explanation for its decision, may, in some cases, permit the trier of fact to conclude that the employer unlawfully discriminated. Id. at 147-148

   a. The Court added that "this is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Id.

   b. In Reeves, the Court clarifies the third stage of the McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Burdine v. Texas Department of Community Affairs, 450 U.S. 248 (1981), three-part test.

      i. First, the plaintiff must establish, by a preponderance of

the evidence, a prima facie case of employment discrimination. This creates a presumption of unlawful discrimination by the employer. If the employer doesn't rebut this evidence, and the jury believes the plaintiff, the court must enter judgment for the plaintiff because there is no remaining issue of fact. Burdine, at 254.

ii. The defendant must respond to the plaintiff's evidence by producing some evidence or a legitimate reason that its action was nondiscriminatory. Id. at 254-255.

iii. Then, the plaintiff must produce sufficient evidence to persuade the finder of fact that the employer terminated him for a discriminatory purpose by direct or indirect evidence. Id.

4. As to the burden of proof required, the Court acknowledged that ADEA cases rely on circumstantial evidence a great deal to prove discrimination. As such the Court held:

a. "[R]ejection of the employer's legitimate, nondiscriminatory reason for its action does not compel judgment for the plaintiff . . . it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation . . .Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination." Reeves, at 146-147.

b. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"

5. Under this analysis, the Court determined that Reeves successfully rebutted Sanderson's defense that Reeves had not been keeping accurate time and attendance records. Indeed, Reeves met his burden that proving Sanderson's reasons were pretextual because Sanderson conceded these facts under cross-examination. Id.

6. In Part II, the Court clarified the trial court's standard for granting a judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure.

a. Under Rule 50, a court should render a judgment as a matter of law when "a party has been fully head on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to

find for that party on that issue." Fed. Rule Civ. Proc. 50 (a).

b. "[I]n entertaining a motion for judgment as a matter of law, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. . .Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Id. at 150.

7. **SIGNIFICANCE:** Professor Schwemm says, Reeves "deals with what type of evidence is sufficient for a plaintiff in a discrimination case to get to a jury on the "pretext" issue after the defendant has come up with a "legitimate" reason for its action against the plaintiff. This is where most of the fight is in discrimination cases, since defendants always come up with a "legitimate" reason, and the plaintiff must then try to show that this is a "pretext" for the defendant's real motivation (i.e., discrimination).

a. Under Reeves, it will be easier for a plaintiff to reach the jury. Simply cross-examining the defendant's witnesses, without additional affirmative evidence, may produce sufficient evidence.

b. Reeves may reduce the success rates of summary judgment motions and motions for judgments as a matter of law.

III. CRIMINAL PROCEDURE

A. Dickerson v. United States, 530 U.S. 428 (2000) (Professor Fortune's pick) (7-2; Rehnquist; Scalia and Thomas dissenting)

1. **FACTS:** Dickerson was arrested for bank robbery after his license plate was spotted as he drove away from the bank. Ten F.B.I. agents came to his apartment, so he "voluntarily" accompanied them to the station. He was interrogated but no Miranda warnings were given. Agents then told Dickerson they had obtained a search warrant for his apartment so he made an incriminating statement and also implicated another in the

commission of the robbery. His lawyer made a motion to suppress the statement as a violation of Miranda, and the court granted the motion. The U.S. Government appealed solely on the issue of whether Miranda was properly applied.

2. **CONTEXT & PROCEDURE:** In 1968, shortly after the Miranda decision, Congress passed 18 U.S.C. § 3501 which stated that confessions should be admissible in federal court if they are voluntary, even if Miranda warnings are not properly given. In determining voluntariness, the court must consider the totality of the circumstances surrounding the confession, including five specified, but non-controlling, factors. The giving of the warnings was merely one of the factors the court had to consider.

   a. Since the passage of § 3501, The Justice Department has refused to invoke the law believing it to be unconstitutional. However, two conservative public interest groups filed amicus briefs in the Fourth Circuit arguing that the Court should apply § 3501 sua sponte, and admit the confession.

   b. The Fourth Circuit agreed that Dickerson had not received his Miranda warnings, but found that pursuant to § 3501, the confession was voluntary. The court then concluded that since Miranda was not a constitutional holding but merely an exercise of the Court's supervisory authority to regulate evidence and procedure, Congress could legislatively overrule Miranda . Dickerson v. United States, 166 F.3d 667 (1999). The Court granted certiorari.

3. **HOLDING:** Finding § 3501 to be unconstitutional, the Court held that "Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule Miranda ourselves. We therefore hold that Miranda and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts." Id. at 432.

   a. Court "concede[s] that there is language in some of [their] opinions to support [the] view" that Miranda is not a constitutional rule. Indeed, the Court on several occasions referred to the warnings as "prophylactic" "not themselves rights protected by the Constitution but

[are] instead measures to insure that the right against compulsory self-incrimination is protected." Oregon v. Elstad, 470 U.S. 298, 306 (1985).

b. Nevertheless, the Court held Miranda was a constitutional decision for a couple of reasons:

i. Miranda and its companion cases had applied to state court proceedings and petitions for writs of habeas corpus. Id. at 438-439.

ii. The Court also invited "legislative action to protect the constitutional right against coerced self-incrimination." Id. at 440.

c. Court also recognized that "the principles of stare decisis weigh heavily against overruling [Miranda] now." Id. at 443. "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture." Id.

3. **SIGNIFICANCE:** Professor Fortune says, "clearly, the most significant Criminal Procedure case in the last two years is the one that didn't change the law–that is Dickerson v. United States, which enshrined (is that too strong a word?) Miranda. Dickerson is interesting for the [majority] lineup, for Rehnquist's respect for stare decisis, for the rather unconvincing distinguishing of cases such as Elstad, and for the way in which the case arose. Fascinating case."

B. Apprendi v. New Jersey, 530 U.S. 466 (2000) (Professor Welling's pick) (5-4; Stevens; Scalia and Thomas each filed concurring opinions while O'Conner, Rehnquist , Kennedy and Breyer dissented)

1. **FACTS:** Apprendi was charged with several firearms offenses, committed on four different dates, for shooting several shots into an African-American family's home. The family had just recently moved into Apprendi's all white neighborhood in Vineland, New Jersey. None of the counts alleged that Apprendi had acted with a racially biased purpose. Apprendi entered a conditional guilty plea to three counts of possession of a firearm for an unlawful purpose which was punishable by five to ten years imprisonment. However, the prosecutor sought to enhance his sentence based on New Jersey's "hate crime" statute.

a. The statute provides for "an extended term of imprisonment if the trial judge finds, by a preponderance of the evidence, that the defendant in committing the crime acted with the purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." Id. at 468-469, quoting N.J. Stat. Ann. Section 2C:39-4(a).

b. Apprendi's was facing an enhanced sentence of imprisonment of "between 10 and 20 years." Id.

c. Apprendi challenged the enhancement, pursuant to the conditional plea, and presented evidence including his own testimony and the testimony of character witnesses to contradict the state's claim that he had shot into the house because the occupants were black.

d. The trial court found by a "preponderance of the evidence" that Apprendi's actions were racially motivated and enhanced his sentence to 12 years. Apprendi appealed arguing he had been denied his right to a jury determination beyond a reasonable doubt on each element of the offense.

2. The Court narrowly framed the question before it as, "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." Id.

3. **HOLDING:** The New Jersey statute is unconstitutional. Quoting Jones v. United States, 526 U.S. 227, 243, n.6, (which struck down a federal statute) the Court held that "under the Due Process Clause of the [Fourteenth] Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id. at 476.

a. "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490.

b. The Court noted that "[t]he relevant inquiry is not one of form, but of effect—does the required finding expose the defendant

to a greater punishment than that authorized by the jury's guilty verdict?" Id. at 494.

c. The Court's rationale was based on a review of the historical practice of American and English courts and precedent.

4. **CONCURRENCES:** In separate opinions, Justices Scalia and Thomas both concurred with the majority's opinion in full, but argued the Constitution requires the adoption of an even broader rule. Thomas wrote, "A 'crime' includes every fact that is by law a basis for imposing or increasing punishment. . .of whatever sort, including the fact of a prior conviction. . ." Id. at 501.

5. **DISSENTS:** In four separate opinions, the dissenters agreed that Apprendi will be remembered as a "watershed change in constitutional law." Id. at 523. O'Conner noted "the serious doubt that the holding cast[s] on sentencing systems employed by the Federal Government and States alike, [i.e., determinate sentencing through the U.S. Sentencing Guidelines.] " Id. O'Conner argues that by establishing a bright line constitutional rule that juries alone must determine the facts that increase the penalty, the majority implicitly overrules an entire line of cases underpinning a legislative determination of sentencing factors. Id. at 524-525.

a. However, the majority opinion makes clear that Apprendi's holding is much narrower: only those facts that increase **the maximum penalty range** are "elements of a crime" so that Guidelines should not be affected if the judge imposes a sentence within the penalty range.

6. **SIGNIFICANCE:** As Professor Welling points out "about 30% of the federal criminal caseload is drug prosecutions and most have been affected by Apprendi." Like the dissenters noted, the opinion may be "unworkable" because of all the factors that should be considered at sentencing; that it will be very costly to many states who will have to create bifurcated jury systems; and, that "the rule rests on a meaningless formalism" that is easily circumvented by a legislature who simply raises the statutory penalty range. Id. at 539.

a. Note KRS 532.031, Kentucky's hate crime statute, allows the sentencing judge to determine, "if, by a preponderance of the evidence presented at the trial, a hate crime was the primary factor in the commission of the crime,[then] the judge shall make a written finding of fact and enter that in the court record

and in the judgment. . .The finding. . .may be utilized by the sentencing judge as the sole factor for denial of probation, shock probation, conditional discharge, or other form of nonimpositon of a sentence of incarceration."

b. The finding can also be used by the parole board. KRS 532.031(4).

C. Kyllo v. United States, ___U.S. ___, 121 S. Ct. 2038 (2001) (Professor Connelly's pick, in hindsight) (5-4 decision; Scalia; Stevens, Rehnquist, O'Conner and Kennedy dissenting)

1. **FACTS:** Government agents "suspected" Kyllo was growing marijuana in his home, "which was part of a triplex." Id. at 2041. Using a thermal imaging device, the agents wanted to determine whether the amount of heat coming from Kyllo's home was consistent with the use of high density lamps necessary for a successful in-home marijuana growing operation.

The agents used the thermal imager from their car which was parked across the street from Kyllo's house. The device showed much higher amounts of heat coming from the garage roof and from a side wall of Kyllo's home as compared to the rest of the homes in the triplex.

Based on the Kyllo's utility bills, informants tips and the thermal scans the agents obtained a search warrant for Kyllo's house. When the warrant was executed, the agents found Kyllo was growing more than 100 marijuana plants using high intensity lamps. Kyllo was charged with the manufacture of marijuana and after his motion to suppress was denied, he entered a conditional guilty plea.

2. **ISSUE:** "This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment." Id. at 2040.

a. In other words, "what limits, if any, exist upon this power of technology to shrink the realm of guaranteed privacy." Id.

3. **HOLDING:** "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and presumptively unreasonable without a

warrant." Id. at 2046. As such, "the information obtained by the thermal imager. . .was the product of a search." Id. at 2043.

a. Scalia noted that "the advance of technology. . .[has] uncovered portions of the house and its curtilage that once were private," [but the Court has never determined] how much technological enhancement of ordinary perception. . . is too much." Id. at 2042.

   i. He focused on the sanctity of the home stating, "[a]t the very core of the Fourth Amendment stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion." Id.

b. He establishes a bright-line rule that "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted" while taking into account technology "already in use or in development." Id. at 2043.

c. Scalia rejects the dissent's and government's argument that "the thermal imaging must be upheld because it detected 'only heat radiating from the external surface of the house,'", and thus was in the public domain. Id. 2044. Noting the Court rejected this "mechanical interpretation. . . in Katz, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth." Id.

   i. "Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home." Id.

   ii. Also rejected the argument that the imager did not reveal any "intimate details." Scalia stated, "in the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." Id. at 2045.

4. **SIGNIFICANCE:** First, look at the improbable roster of the majority: Scalia, Souter, Thomas, Ginsburg and Breyer

Second, this is the first case to deal with high-tech surveillance since the Court's 1986 decision in Dow Chemical v. United States 476 U.S. 227 (1986) which upheld the taking of enhanced aerial photographs of Dow Chemical Company. In Kyllo, the Court distinguished Dow

based on the difference under the Fourth Amendment between a commercial establishment and a home. Id.

a. Given the recent terrorist attacks, this case is interesting for the breadth of the rule established, which I believe will now be read very narrowly. The majority wanted the opinion to "take account of more sophisticated systems that are already in development." Id. 2042.

b. The holding that the use of a thermal imager constitutes a search, applies to all "sense-enhancing technology" which is "not in general public use" to collect "information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area. Id. at 2043.

i. What does "sense-enhancing technology" encompass? What does "general public use" mean? What does information that would be "unknowable absent physical intrusion mean"?

IV. EMPLOYMENT / LABOR

A. Circuit City Stores, Inc., v. Adams, 532 U.S. 105, 121 S. Ct. 1302 (2001) (Professor Goldman's pick) (5-4; Kennedy with Souter, Stevens, Ginsburg and Breyer dissenting)

1. **FACTS:** In October, 1995, Adams applied for a job with Circuit City. He signed an application which stated: "I agree that I will settle any and all previously unasserted claims, disputes, or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator." Id. at 1306.

Adams was hired by Circuit City as a "sales counselor." However, two years later, Adams sued Circuit City in state court for employment discrimination alleging that he had been harassed for being gay. He also raised tort and contract claims.

Circuit City responded by filing suit in federal court to enjoin the state action and to compel Adams to resolve his claims through arbitration as required by the Federal Arbitration Act (FAA) and his signed application.

2. **ISSUE:** The FAA specifically excludes from coverage "contracts of employment of seamen, railroad employers, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. All circuits but the Ninth Circuit interpret this provision as "exempting contracts of employment of transportation workers, but not other employment contracts, from the FAA's coverage." Id. The Ninth Circuit holds that all employment contracts are beyond the FAA's reach. The Court decided which interpretation was correct.

   a. Adams asserted that all employment contracts were excluded from the FAA.

   b. Circuit City maintained that the exclusion should be limited to workers "actually engaged in the movement of goods in interstate commerce."

   c. The attorneys general of 22 states filed amicus briefs urging the Court against applying the FAA to employment contracts. They argued that the FAA's requirement of arbitration ran contrary to state laws which protect employees from any restriction of their right to pursue state discrimination claims in state court.

3. **HOLDING:** "§ 1 of the FAA which states that the Act shall not apply "to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," "exempts from the FAA only contracts of employment of transportation workers." Id. at 1311.

   a. In short, Arbitration clauses in employment contracts are enforceable under the FAA except for seamen, railroad employees, and other transportation employees.

   b. Using rules of statutory construction, the Court reasoned, if the phrase "any other class of workers engaged in foreign or interstate commerce"was intended to apply to all employees, there would be no reason to specifically list "seamen" and "railroad employees" in the statute. As such, the general phrase had to construed as applying only to occupations that were similar to the ones specifically listed.

   c. The Court also reaffirmed its views supporting the use of arbitration as a means of resolving employment disputes. Justice Kennedy wrote:

i. "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." Id. at 1313.

ii. Arbitration also avoids knotty choice-of-law questions and the bifurcation of proceedings in cases where state law precludes arbitration of some, but not all, employment claims. Id.

d. The Court expressly declined to address whether the FAA pre-empted state arbitration provisions since the issue was not before it.

e. Still stinging from Bush v. Gore, the dissent, which was composed of the same four justices, not only argued that the FAA only applied to commercial contracts, but added, "[w]hen the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences." Id. at 1318.

4. **SIGNIFICANCE:** Professor Goldman says, "In the next few years it is anticipated that arbitration provisions will become boilerplate in job applications, employee handbooks or simply as a separate document that must be signed to keep your job, since it generally is assumed that those selected to arbitrate such cases will be far less generous than juries in awarding damages in disputes such as those arising under the various civil rights laws and other worker protective legislation."

a. "The rationale of the majority opinion would extend employer imposed arbitration to all such employee claims. As such, it is also unclear, at this point in time, whether the Court will also enforce "employment contract" arbitration provisions to resolve such statutory disputes as those involving overtime pay, Plant Closing Act damages claims, Family Medical Leave Act claims, etc."

b. "This means that there will be a need to develop a whole new cadre of arbitrators for such cases and that general practitioners as well as specialists will be spending a lot more

time practicing before these private tribunals without the normal discovery tools, and with a lot more uncertainty concerning such matters as the evidentiary rules, standard of judicial review, scope of potential remedies, and the responsibility for paying the cost of the private tribunal."

c. Note that the Court has accepted certiorari in Equal Employment Opportunity Commission v. Waffle House, No. 99-1823. The issue is whether an employee's agreement to submit to workplace disputes, including discrimination claims, to arbitration prevents the EEOC from intervening. If the EEOC loses, by including an arbitration clause, employers can effectively protect themselves from the EEOC. The EEOC would suffer a great loss of influence.

V. EQUAL PROTECTION

A. Romer v. Evans, 517 U.S. 620 (1996) (Professor Bratt's No. 1 pick) (6-3 Kennedy; Scalia, Rehnquist and Thomas dissenting)

1. **FACTS**: In a statewide referendum, Colorado voters adopted a constitutional amendment (Amendment 2) which read:

"No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."

2. Evans and other "homosexual persons" including some governmental employees brought suit alleging "the enforcement of Amendment 2 would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation." Id. at 625. Some municipalities who had passed ordinances to protect gays and lesbians from discrimination but were forbidden to do so by Amendment 2 [also sued]. Id.

3. The Colorado Supreme Court held "Amendment 2 was subject to strict scrutiny under the Fourteenth Amendment because it infringed the [newly created] fundamental right of gays and lesbians to

participate in the political process." Id. (citations omitted). The Court then held that none of the state's asserted interests withstood strict scrutiny because the Amendment was not narrowly tailored to serve any compelling governmental interest.

4. **HELD**: The U. S. Supreme Court affirmed the judgment of the Colorado Supreme Court holding it violated the Equal Protection Clause but on different grounds, i.e., using the lowest standard of equal protection scrutiny, the rational basis test. Id. at 631.

   a. First, the Court rejected the State's argument that the Amendment only "puts gays and lesbians in the same position as all other persons. . .[and so] does no more than deny homosexuals special rights." Id. at 626. Such "special rights" are the "safeguards that others enjoy or may seek without constraint." As such, "2" imposes "a special disability upon [gays] alone." Id. at 631.

      i. Court adopted the Colorado Supreme Court's construction that the "immediate objective" of Amendment 2 is to repeal existing anti-discrimination laws and policies prohibiting discrimination based on sexual orientation. Id.

      ii. Amendment also prevents the government from adopting "similar, or more protective" laws or policies in the future. Id. at 627.

      iii. Consequently, Amendment 2 results in a "[s]weeping and comprehensive. . .change in the legal status "of homosexuals because they are put "in a solitary class with respect to transactions and relations in both the **private** and **governmental** spheres." Id.

   b. In discussing the rational basis test, the Court noted that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate [state] end. Amendment 2 fails, indeed defies even this conventional inquiry." Id. at 631 (citations omitted).

   c. The Court concluded Amendment 2 failed the rational basis test and so violated the Equal Protection Clause on two distinct grounds.

i. "First, the amendment. . .impos[es] a broad and undifferentiated disability on a single named group. . . [which] is an invalid form of legislation." Id. at 632.

1. Amendment 2 "is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence." Id. at 633.

2. "[G]overnment and each of its parts [must] remain open on impartial terms to all who seek its assistance. . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection." Id.

ii. Second, [t]he breadth of the amendment is so far removed from [the state's] particular justifications that we find it impossible to credit them. . . It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." Id. at 635.

1. The Court appears to say that the state's asserted interests, i.e., freedom of association, i.e., specifically landlords and employers who object to homosexuality on religious or personal grounds and "conserving state resources to fight discrimination against other groups" are simply pretexts. Indeed, the amendment "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected which isn't a rational basis for the law. Id. at 634.

d. **SIGNIFICANCE**: Professor Bratt says this is a landmark case for several reasons.

i. It is the first case to grant constitutional protection to

individuals on the basis of sexual orientation." By striking a state constitutional amendment using the most deferential test, Romer represents and emphasizes Equal Protection Clause principles: that states must extend the protection of their laws to all people who claim injury and seek a remedy; and that animosity toward or social condemnation of a class with a shared characteristic cannot constitute a permissible governmental purpose.

1. However, see Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997), cert. denied, 119 S.Ct. 365 (1998) (mem. opinion by Stevens, Souter, and Ginsburg, J.J.).

VI. FAMILY LAW

A. Troxel v. Granville, 530 U.S. 57 (2000) (Professor Graham really wouldn't pick this case, but didn't want to disappoint you)(O'Conner writing for the four-justice plurality of Rehnquist, Ginsberg and Breyer; Souter and Thomas concurred in the result and Scalia and Kennedy wrote separate dissents)

1. **FACTS:** Although unmarried, Tommie Granville and Brad Troxel had a long relationship that produced two daughters. When Brad and Tommie separated, Brad who lived with his parents, regularly brought his daughters to his parents home on the weekends for a visit. However, in 1993 Brad committed suicide. The Troxel's continued to see their grandchildren on a regular basis until Tommie Granville informed them that she was limiting the children's visits to one short visit a month. The Troxel's petitioned for visitation under Washington's third-party visitation statute. The trial court granted the petition, but the Washington Supreme Court reversed declaring the statute to be unconstitutional.

2. **THE STATUTE:** "Section 26.10.160(3) of the Revised Code of Washington permits 'any person' to petition a superior court for visitation rights 'at any time' whenever 'visitation may serve the best interest of the child.'" Id. at 59.

3. **ISSUE:** "[W]hether Section 26.10.160(3), as applied to Tommie Granville and her family violated the Federal Constitution." Id. at 63.

4. **HOLDING:** Citing a long list of decisions, the Court said, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Id. at 66. The Washington third party visitation statute, "as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right." Id. at 67.

   a. O'Conner found the "nonparental visitation statute" to be "breathtakingly broad." Id. The statute provided that "[a]ny person may petition the court for visitation rights at any time. That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review." Id.

   b. Moreover, once the visitation petition is filed, "a parent's decision that visitation would not be in the child's best interest is accorded no deference. . . any presumption of validity or any weight whatsoever." Id.

   c. The Court did not consider the "primary constitutional question passed on by the Washington Supreme Court– whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation." Id. at 73

5. **SIGNIFICANCE:** Professor Graham says aside from the fact six members of the Court had problems with the statute, the Court simply found the statute unconstitutional as applied. The practical lesson to be drawn from the case is that grandparents will face a bigger burden in trying to obtain more visitation. Under Troxel, a court must start with the presumption that the parents' decision regarding visitation is in the child's best interests. In order to override a parent's decision to decrease, but not eliminate, grandparent visitation, the grandparent will probably have to prove some physical or psychological harm to the child.

   a. More significant is KRS 403.340, the custody modification statute, which does not contain a presumption favoring the original custodian.

   b. Of more concern is KRS 61.690(2) which states: "A retirement allowance, a disability allowance, a member's accumulated contributions, or any other benefit under the [Kentucky Employees Retirement] system shall not be classified as

marital property or as an economic circumstance as provided in KRS 403.190 in an action for dissolution of marriage."

VII. HEALTH AND ENVIRONMENT

A. Friends of the Earth, Inc., et at., v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) (Professor Healy's selection) (7-2; Ginsburg with Scalia and Thomas dissenting)

1. **FACTS:** Laidlaw Environmental Services, who had obtained a permit to discharge treated water into the North Tyger River in South Carolina, had started to discharge pollutants, particularly mercury, into the water. These discharges repeatedly exceeded the limits set by the permit. Friends of the Earth and Citizens Local Environmental Action Network (referred to collectively FOE, along with the Sierra Club which joined the suit later) filed a citizen suit, after proper notice, against Laidlaw under the Clean Water Act. FOE alleged Laidlaw was not complying with the state's permit. FOE sought declaratory and injunctive relief. During the course of the suit, Laidlaw's violations continued, and the company was cited for 13 monitoring and 10 reporting violations.

   Laidlaw moved for summary judgment on the ground the FOE lacked Article III standing to bring the suit because they had not demonstrated a cognizable injury in fact. In response, the FOE submitted members' affidavits and depositions that expressed their fears that the river looked and smelled polluted, that they were afraid of the river's harmful effects, and that they used the river less often. Id. at 181.

   The District Court overruled the summary judgment "by the very slimmest of margins," and found the discharges "did not result in any health risk or environmental harm." Nevertheless, the court concluded Laidlaw had received an economic benefit and assessed a $405,800 civil penalty. Id. at 178. The court did not order injunctive relief because it found Laidlaw had achieved substantial compliance with its permit. Id.

   The Fourth Circuit vacated the district court's order and remanded with instructions to dismiss the action. The Court held that the case had become moot when Laidlaw complied with its permit. Id. 179.

2. **HOLDING:** "The appellate court erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the

defendant, albeit after commencement of the litigation, has come into compliance. . . A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. The Court of Appeals also misperceived the remedial potential of civil penalties. Such penalties may serve, as an alternative to an injunction to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation." Id. at173-174.

FOE had standing to bring this action. [T]he affidavits and testimony presented by FOE. . .assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than. . . mere 'general averments' and 'conclusory allegations'." Id. 183-184.

3. **SIGNIFICANCE:** Professor Healy says, Laidlaw will have a tremendous impact "on private enforcement of federal law." The case "undercuts a narrow view of the case or controversy requirement of Article III." In short, in Laidlaw the Court lowers the standing requirement for citizen suits which will allow plaintiffs to file suit under current environmental laws. It is a win for the environment after a string of narrow environmental standing decisions.

VIII. RELIGION & THE FIRST AMENDMENT

B. Mitchell v. Helms, 530 U.S. 793 (2000) (Professor Salamanca's distant 2nd pick. His 1st pick is Bush v. Gore) (6-3; plurality opinion by Thomas with Rehnquist, Scalia and Kennedy joining; O'Conner and Breyer in concurring in the result; and, Souter, Stevens and Ginsburg in dissent)

1. **FACTS:** Chapter 2 of the Education Consolidation and Improvement Act of 1981 (Chapter 2) allocates federal funds to state educational agencies which then allocates them to local educational agencies. Id. at 801-802. The local agencies, which are usually local school districts, lend support to individual elementary and secondary schools in the form of "library services and materials (including media materials), assessments, references materials, computer software and hardware for instructional use, and other curricular materials." Id. (statutory citations omitted).

After learning that about 30% of the total Chapter 2 funds in Jefferson Parish, Louisiana, went to private religious schools, petitioners filed suit alleging that Chapter 2, as applied, violated the Establishment Clause of the First Amendment. Id. Thomas noted that the case had

a "tortuous history over the next 15 years." Id. at 804.

2. **HOLDING:** Although no five members of the Court agreed on a single rationale for upholding the funding program as applied to Jefferson Parish, six justices did hold that the funding program was not a "law respecting an establishment of religion." Id. at 808.

   a. Thomas fashions a broad rule that focuses on two main criteria: the program must be neutral, i.e., it is permissible to send governmental aid to religious institutions, even if used for religious purposes, if the government program is neutral; and the government must not be involved in indoctrination.

      i. Neutrality undermines establishment claims.

   b. "In short, nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this Court bar it. This doctrine, born of bigotry, should be buried now." Id. at 829.

3. **SIGNIFICANCE:** It sounds as if the four members of the Plurality (and maybe O'Conner) believe school vouchers are constitutional. "[I]f numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, than a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment." Id. at 810.

   a. Thomas added: "Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program. . .and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones." Id.

   b. Case overrules two cases that would have prevented Louisiana's religious schools from receiving the funds.

   c. The Court has granted review of Zelman v. Simmons-Harris, No. 00-1751, and two related cases which raise the question whether a publicly funded school voucher program that can be used for parochial school tuition violates the Establishment Clause.

d. Professor Salamanca adds that Mitchell "provides further circumstantial evidence that the ground is crumbling beneath so-called 'strict-separationist' enforcement of the Establishment Clause. If so, other changes may follow, including a validation by the Court of a school voucher plan."

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RECENT DEVELOPMENTS IN THE LAW OF EVIDENCE

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RECENT DEVELOPMENTS IN THE LAW OF EVIDENCE

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RECENT DEVELOPMENTS IN THE LAW OF EVIDENCE

by

Professor Robert G. Lawson

(October 26, 2001)

I. Introduction: The cases selected for discussion were decided within the last two years (2000 and 2001). It would probably be a stretch to call any of them "landmark" decisions but they deal with important and interesting matters and deserve the attention of practicing lawyers and judges. There is a mixture of state and federal cases but even the latter provide helpful guidance to Kentucky lawyers and judges because of the great uniformity that exists between the Kentucky and Federal Rules and the tendency of Kentucky's courts to rely on federal case law in applying and construing the Kentucky Rules.

II. Demonstrative (or Real) Evidence: In this important area, the following cases should draw some attention from practitioners and judges:

A. Gorman v. Hunt, 19 S.W.3d 662 (Ky. 2000): The plaintiff Gorman was in her car on a busy highway when she saw a wallet in the center lane; she pulled to the shoulder, left her car to get the wallet, and was struck by defendant's vehicle as she tried to return to her car. The principal factual issue revolved around where the plaintiff was located when struck and whether defendant saw her in time to stop. In support of his version of where the plaintiff was at time of impact and what she was doing, defendant offered into evidence (via an expert witness) "posed photographs" purporting to show plaintiff's position relative to defendant's vehicle prior to and at the time of the impact. The photographs had been taken in a vacant lot, using a female stand-in for the plaintiff and a vehicle like the one driven by the defendant; the portrayal by the posed photographs were at odds with plaintiff's description of events but in accord with the view of defendant's expert as to how the accident occurred. The plaintiff objected to the photographs; the trial judge sustained the objection but permitted the expert to use them for demonstrative purposes during his testimony. The jury asked about the photos during deliberations (indicating their importance) and the trial judge told jurors that the photos were for purposes of demonstrating testimony and were not admitted into evidence. The jury found for the defendant, which led to appeal on the ground that the trial court erred in permitting the use of "posed photographs taken by one party to show the precise location of the parties at impact." In rejecting this appeal, the Supreme Court rendered an important decision on "posed photographs."

(1) *Background*: The plaintiff argued against use of the photographs on the basis of a longstanding prohibition in Kentucky law against the use of posed photographs. She

relied on the following cases that were described in the opinion:

(a) *Welch v. L.& N. R. Co.*, 173 S.W. 338 (Ky. 1912): The plaintiff in this case was struck by a train near a railroad track when two vehicles on the track collided. The trial produced an important dispute about where she stood at the time of the collision; she offered a posed photograph showing precisely where she said she stood at that moment. The supreme court held that the photos were inadmissible; it struggled with its reasoning, implied that the photos would be a hearsay statement by the photographer, but seemed in the end to say that posed photos are inadmissible because they are self-serving.

(b) *Tumey v. Richardson,* 437 S.W.2d 201 (Ky. 1969): The action here involved a collision of two vehicles, one of which was moved by a wrecker before a police officer could complete his investigation. The driver of the wrecker, at the direction of the officer, moved the vehicle back to the position he thought it had before being moved and a "posed photograph" was taken of the location of the vehicles. The trial court admitted the photograph over objection and this became an issue on appeal. The supreme court described the applicable law as requiring exclusion of a posed photograph but ruled in this instance that its admission did not constitute an abuse of the trial judge's discretion. The Court in *Gorman* conceded that this case (especially in light of some others that contradicted *Welch* and *Tumey*) left the law on posed photographs unclear.

So, the Court undertook in *Gorman* to reappraise its position on the admissibility of posed photographs.

(2) *Rationale*: The Court reconsidered its rationales for exclusion of posed photographs ("self-serving," "hearsay," and others) and found them unsupported and unsupportable. It paid particular attention to criticism of the notion that such photographs should be excluded because of the danger that witnesses might use them for purposes of distortion and misrepresentation, conceding that such exclusion would be equivalent to a trial judge ordering a witness from the stand because he/she was believed to be lying. It noted the great value of photographs ("a picture is worth a thousand words") and concluded that there is no valid reason for exclusion of such evidence and lots of reason for admitting it--"photographs frequently communicate the testimony of a witness to the jury more fully and accurately than the words in the testimony do." 19 S.W.3d at 668.

(3) *Holding:* "[W]e hold that the admissibility of a posed photograph is a matter within the sound discretion of the trial court, and its ruling will not be interfered with on appeal except upon a clear showing of an abuse of discretion."

(a) The Court noted that it is necessary, of course, to authenticate such a photograph (i.e., "verified testimonially as a fair and accurate portrayal of [what] it is supposed to represent." (This would be judged under KRE 901(a).)

(b) Such a photograph must be relevant under KRE 401; "if the fact to be evidenced by the photograph is itself not admissible, obviously it cannot be proved by photographs, or otherwise."

(c) Finally, said the Court, the trial "must determine that the photograph's probative value is not 'substantially outweighed by the danger of undue prejudice, confusion of the issues or misleading the jury, ... or needless presentation of cumulative evidence.'" (This balancing occurs under KRE 403.)

(4) *Additional Issues in Gorman v. Hunt:* While the treatment of the posed photographs issue is the most important aspect of this case, it involved two other evidence issues that are deserving of commentary:

(a) *Bases of Expert Testimony*: The defendant used an expert witness to testify as to where the impact point was between the plaintiff and defendant's vehicle. In giving his opinion on this matter, the witness relied "in large part" on a scuff mark in the highway which he attributed to the plaintiff. The plaintiff objected to this opinion because the expert witness lacked personal knowledge of the location of this scuff mark; it seems that he relied on the testimony of the police officer who had investigated the accident as to the location of this scuff mark.

(i) The Court used KRE 703 in rejecting plaintiff's argument. This rule clearly allows experts to rely on information made available to them at trial (through the testimony of a witness), which was the case with the police officer's testimony.

(ii) The Court quoted the part of KRE 703 that allows experts to rely on information not admissible as evidence if "of a type reasonably relied upon by experts in the particular field in

forming opinions." It seemed to indicate that the expert could have relied on this information under this part of the rule even if it had not been introduced as evidence.

(iii) Most authorities (federal and state) have disallowed opinions by accident reconstructionists based on information provided by participants or bystanders (reasoning that this is not the type that experts can reasonably rely upon in forming opinions). Whether such authorities would treat information from an investigating police officer differently is at least open to question. Since this part of *Gorman* is dictum, the Court should have chance for further consideration of this issue.

(b) *Hearsay in Business Record*: The plaintiff attempted to introduce into evidence a "business record" to prove that the defendant was driving above 50 mph at the time of impact. The record was a report filed by a member of the emergency squad that came to the scene to attend to the injured plaintiff; the report contained an entry saying that victim was struck by an auto traveling above 50 mph "according to bystander." The Court held the report inadmissible; the business record exception requires a showing of personal knowledge by either the maker of the record or the reporter of the information in the record and that requirement was not met in this instance. The Court could just as easily have ruled the record inadmissible because the bystander had no business duty to report the information in the record.

B. Gosser v. Commonwealth, 31 S.W.3d 897 (Ky. 2000): The defendant unintentionally killed a bystander when he fired a gun during the course of a fistfight involving himself and two others; the bystander was part of a crowd that was drawn to the fistfight. In defending a charge of wanton murder, the defendant claimed that he had fired the gun only to break up the fistfight (suggesting that the victim had been accidentally, not wantonly, killed). Two items of evidence came in for review on appeal:

(i) The prosecution introduced into evidence over objection photographs of the crime scene showing the positions of various witnesses (who gave testimony at trial), the three combatants (including the defendant), the victim, and various items of evidence; positions were shown by use of spray painted marks and colored flags. The photographs had been taken by police officers who had reconstructed the scene (as of the time of the shooting) with the help of a person who had been in attendance at the time of the crime; they were introduced through the testimony of one of the two

officers after he testified that the photographs fairly and accurately depicted the reconstruction as it appeared when photographed.

(ii) The prosecution also introduced a computer generated two-dimensional diagram of the crime scene and a computer generated three-dimensional diagram of the crime scene. The same officer was used to provide the foundation for these items, who testified that the location of persons and items on the diagrams were supplied to him by witnesses who had been at the scene.

The Supreme Court found error in the admission of all of these items and in the course of doing so, made interesting and helpful points about admissibility of such evidence (especially the computer generated graphics).

(1) *Photographs*: The Court held that the photographs were improperly admitted because they were used to show the location of persons and items at the time of the shooting and were introduced through the testimony of a witness (the officer who took the photographs) who was not present at the scene of crime and thus lacked personal knowledge of the matters represented in the photographs. "His testimony to that effect was based on hearsay."

(a) The Court went out of its way to make the point that photographs (or diagrams) prepared in advance of trial on the basis of hearsay provided to the maker of the photograph or diagram is no reason to exclude the item so long as the information represented in the photograph or diagram is presented at trial through the testimony of someone with personal knowledge.

(b) Had the prosecution used the witnesses who knew the scene to authenticate the photographs as fair and accurate representations of what they purported to show (location of persons and places at the time of crime), it would have been perfectly proper to admit them into evidence as exhibits.

(2) *Computer-Generated Graphics and Animations:* The Court noted the ever-growing tendency of lawyers to use this type of evidence in litigation (in Kentucky and elsewhere), noted that it had never addressed issues concerning admissibility of such evidence, and undertook to make some observations on the subject and to offer some guidance. The opinion is not likely to be the Court's last word on the subject but it is a beginning.

(a) *Two Categories:* The Court said that this evidence can be grouped into two categories for purposes of

analysis: "(1) demonstrative; and (2) substantive. Demonstrative ... usually consists of still images or animations which merely illustrates a witness's testimony. Substantive ... uusually consists of computer simulations or recreations, which are prepared by experts and which are based on mathematical models in order to recreate or reconstruct an incident or event." 31 S.W.3d at 902. The Court then said that the rules on admissibility depend upon the category in which the computer generated evidence falls.

(b) *Analogous to Photographs*: The Court indicated that its approach to admissibility of this evidence would be much like its approach to introduction of photographs, as explained in the pre-Rules case of *Litton* v. *Commonwealth*, 597 S.W.2d 616 (Ky. 1980). In *Litton*, the Court addressed issues concerning the admissibility of photographs taken by an automatic camera during a burglary. In dealing with admissibility of this photo, the Court noted the difference between the way it was to be used and the way most photographs are used:

> "Photographs are most commonly admitted into evidence as demonstrative evidence on the theory either that they are merely a graphic portrayal of oral testimony or that a qualified witness adopts the photograph as substitute for words....
>
> Photographs can be admitted as real evidence in a proper case .... 597 S.W.2d at 618.

In the first situation (demonstrative), the photograph is merely a pictorial representation of a witness's testimony; in the second, the photograph is offered as independent evidence (something other than testimony of a witness). In *Gosser*, the Court suggested that this distinction should be helpful in dealing with computer generated diagrams and animations.

> Footnote: It is not easy to imagine a computer generated diagram or graphics comparable to the photo in *Litton* (where the photograph stood as evidence on its own, independent of a witness's testimony). It is easy to imagine such evidence being used for purposes of demonstrating matters observed by witnesses and reported to the triers of fact via the computer medium and it is easy to imagine such evidence being used by an expert witness in presenting testimony that reconstructs an automobile accident or some similar occurrence.

(c) *Gosser's Computer Generated Evidence*: The diagrams offered by the police in this case were demonstrative

in their use (merely illustrative of the testimony of witnesses). Before such evidence may be admitted, it must be authenticated (under KRE 901); a witness must testify that the computer generated evidence is a fair and accurate representation of what it portrays (which can only be done by one who has personal knowledge of that information). It is not necessary to show how the diagram was produced, how the information was put in the computer, etc. Because the police officer who was used as the authenticating witness lacked knowledge of the contents of the diagram, they were inadmissible as offered and should have been excluded.

C. Additional Observations About Computer Evidence: The following observations are about the most frequently proffered computer generated evidence:

(1) *Computer Generated Business and Public Records:* More often than not, records offered into evidence under the business and public records exceptions are likely to be generated by computer. Two decades ago, when such records were out-of-the ordinary, courts tended to impose special authentication, best evidence, and hearsay constraints on their use. Presently, truthworthiness of computer printouts is presumed (because they are used in the ordinary course of business) and such records are routinely admitted under the hearsay exceptions for business and public records (upon a showing of the requirements for these exceptions).

(2) *Charts, Graphs and Diagrams*: Such items as these, that once were drawn by hand, are commonly generated by computer these days. If a witness having personal knowledge testifies that such chart, graph, or diagram fairly and accurately portrays a matter that is relevant to the litigation, the item is admissible and should be admitted as an exhibit, subject of course to exclusion under KRE 403 (which requires a consideration of probative value against the danger of undue prejudice, confusion of issues, etc.). The foundation or authentication requirement is no different for computer generated evidence of this type and non-computer generated charts, graphs, and diagrams.

(3) *Animations and Simulations*: A computer generated animation is merely a sequence of illustrations that creates the illusion that the illustrated matters are in motion. Once authenticated by knowledgeable witnesses as a fair-and-accurate portrayal, they should be easily admissible for illustrative purposes. A computer generated simulation is based on a set of mathematical assumptions and is designed to replicate physical events pertinent to the litigation; reliability of the simulation depends upon the assumptions containing all relevant elements and interactions in the

events purported to be simulated.

(a) It is hard to imagine that the latter type of computer generated evidence could be introduced other than as part of expert testimony. Admissibility, of course, would depend upon satisfaction of the *Daubert* test that applies to all expert testimony. Reliability would be the primary focus and could not be satisfied unless all relevant external factors surrounding the event were built into the animation or simulation.

(b) The animations and simulations may be accompanied by prerecorded narrations, which would pose problems under the hearsay rule and which leads to discussion of the next case.

D. Fields v. Commonwealth, 12 S.W.3d 275 (Ky. 2000): Police, while investigating a burglary, entered a residence through an open window, found the defendant in the house with jewelry and others items in his pocket, and found the body of the female occupant of the house in her bed with a knife buried to its hilt in her temple. The defendant was taken into custody and charged with the murder after confessing to the killing at the scene (so said the police officer). The officer then proceeded immediately to reconstruct by videotape everything he did from the entry into the house through the open window, to discovery of the defendant in the house, to defendant's confession of the killing, and to the body in the bed (ending the videotape with a 20 second shot of the victim's head with the knife visible in her temple); the video reconstruction was filmed by a technician and included a full contemporaneous narration by the police officer of what was being filmed (in addition to the officer's report of the defendant's confession). At trial, the prosecution played the videotape for the jury during opening statement, replayed it during the testimony of the police officer, and then replayed it again during closing argument, all after the trial court had rejected a defense motion in limine to exclude the videotape or at least the narrative portion of it.

(1) *Videotape Reconstruction of Crime Scene:* The Supreme Court held that there would have been no error in admission of the video portion of the reconstruction (upon proper authentication). It is just as admissible as a photograph would have been; used as a pictorial representation of the police officer's testimony at trial, there would have been no difficulty in admission of the evidence.

(2) *Audio Narration on the Videotape*: The problem with this part of the reconstruction was that it constituted out-of-court statements being used to prove the truthfulness of their contents (hearsay) and did not fall within any of the long list of exceptions to the hearsay rule. It was, said

the Court, nothing more than a prior consistent statement of the witness (police officer), one that would not qualify for admission under the Rules provision allowing such statements to be admitted to rebut express or implied claims of recent fabrication or improper influence or motive even if it had been so offered (which it wasn't) or under any other rule of evidence law.

III. Privileges: While no landmark privileges decisions have been rendered over the last couple of years, there are some that deserve the attention of lawyers and judges.

A. Hodge v. Commonwealth, 17 S.W.3d 824 (Ky. 2000): In this double murder prosecution, the defendant sought access to psychiatric records of one of the witnesses who testified against him, wanting to examine the records to see if they contained any information that would reflect on the witness's credibility; the trial judge examined the records in camera, determined that they contained no information that the defendant should have, and denied him access to the records. The Supreme Court affirmed this ruling in an opinion that expresses important positions on the psychotherapist-patient privilege defined in KRE 507.

(1) *The Privilege*: KRE 507 creates a privilege (which existed by statute before the Rules) for confidential communications to a "psychotherapist" to obtain diagnosis or treatment of mental conditions. The rule defines three narrow situations in which the privilege is inapplicable (involuntary hospitalization of the patient, court-ordered examination of the patient, and where the patient's mental condition is asserted as a claim or defense). As the Court noted in *Hodge*, "there is no exception [in KRE 507] applicable to a scenario where the patient is merely a witness in a civil or criminal case." 17 S.W.3d at 844.

(2) *"Qualified" Privileges*: Some privileges are defined to be absolute (invulnerable to claims of needs for evidence except in specifically defined situations) while others are said to be "qualified" (always subject to evidentiary needs that outweigh the need for confidentiality). The lawyer-client privilege is an absolute privilege; the work-product privilege is qualified. Except for one, the privileges of the Kentucky Rules of Evidence are defined to be absolute privileges; the one exception is KRE 506's counselor-client privilege, which explicitly provides that there is no such privilege when the judge finds "[t]hat the need for the information outweighs the interest protected by the privilege." KRE 506(d)(2). As defined in KRE 507, the patient-psychotherapist privilege is not qualified.

(3) *Holding*: In its opinion in *Hodge*, the Supreme Court construed the patient-psychotherapist privilege of KRE 507

as a qualified privilege, "subject to a criminal defendant's right to obtain exculpatory information ... and to confront the witnesses against him." 17 S.W.3d at 844. Specifically, it indicated that a defendant would be able to penetrate the privilege to obtain information bearing on the credibility of prosecuting witnesses.

(a) The Court seemed to base its construction of the privilege on the constitutional rights of a criminal defendant (i.e., the due process right to exculpatory evidence in the hands of the prosecution and the right of confrontation). This would suggest that the Court might not so qualify the privilege in a civil case.

(b) The decision leaves completely open the interesting question of whether other privileges in the Rules that are absolute (lawyer-client, spousal privileges, etc.) would have to give way to claims by a defendant in a criminal case of a need for the privileged information to impeach the credibility of witnesses.

(4) *A Footnote*: *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), is a landmark federal case involving the patient-psychologist privilege. It did not involve a a claim to privileged information by a criminal defendant but did involve a claim that the privilege should give way to need for evidence in litigation. The U.S. Supreme Court rejected the claim on the following ground:

"Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.... [I]f the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is very little better than no privilege at all.'" 518 U.S. 17-18.

B. Haney v. Yates, 40 S.W.3d 352 (Ky. 2000): After a taxicab driven by Yates (an independent contractor) and owned by Yellow Cab Company (who leased the cab to Yates) collided with and killed a pedestrian, Haney (as administratrix of pedestrian's estate) sued Yates and Yellow Cab for wrongful death. Soon after the accident, Yates gave a written statement to Yellow Cab's Safety Department about the accident. When plaintiff attempted to discover this statement, the defendant Yates sought from the Court of Appeals a writ of prohibition, arguing that the statement was protected by the attorney-client privilege and thus

beyond the scope of discovery. The Court of Appeals granted the writ, relying on the pre-Rules case of *Asbury* v. *Beerbower,* 589 S.W.2d 216 (Ky. 1979). The Supreme Court reversed.

(1) *Asbury*: The plaintiff in this case sought discovery of a statement made by an insured to his insurance adjuster after an accident but before suit was filed and defense counsel retained. The insurance policy required cooperation between the insured and insurer, which caused the court to conclude that this would give an insured reason to presume that the statement was made for the dominant purpose of transmitting it to an attorney for protection of the insured. The Court held in this case that the lawyer-client privilege extended to a confidential statement made by an insured to an insurer for the dominant purpose of transmitting it to an attorney.

(2) *Holding*: Relying on the fact that Yellow Cab was self-insured, Yates argued that his communication with the self-insured entity was analogous to a statement by an insurer to an insured and thus should be protected under the attorney-client privilege as construed in *Asbury* v. *Beerbower*. The Supreme Court disagreed, noting that Yates had produced no evidence showing a dominant purpose to communicate with an attorney, that Yellow Cab was self-insured but was not an insurer, and that *Asbury* would not be extended to the facts of this case. In reaching its conclusions, as it has often done, the Court reminded us that privileges should and will be strictly construed to avoid a loss of relevant evidence.

(3) *Footnote*: In its opinion, the Court said it did not need to decide whether *Asbury* survived adoption of KRE 503 but did comment that drafters of Kentucky's Rules had opined that the holding in *Asbury* is consistent with the content of the Rule. The language of the Rule seems convincing on this point; KRE 503(b)(2) extends the privilege to communications "between the client and a representative of the client" and KRE 503(a)(2) defines representative of the client as "a person having authority to obtain professional legal services ... on behalf of the client."

C. In re Pioneer Hi-Bred Intern., Inc., 238 F.3d 1370 (Fed. Cir. 2001): This case involves an issue about the lawyer-client privilege that could constitute a trap for unwary practitioners. Confidential communications between lawyer and client were disclosed in this case to expert witnesses and were subsequently sought by the opposing party during discovery proceedings.

(1) *Disclosure to Third Persons:* It is well-known that any disclosure of privileged communications to persons outside the relationship serves to waive the protection of the privilege. It is also well-known that the involvement of third persons necessary to the rendition of legal services

(such as law clerks, paralegals, investigators) leaves the confidentiality of the relationship intact. One might believe that disclosure to experts is a part of the lawyer's rendition of legal services and thus might remain protected.

(2) Not so says this and other federal cases. "[B]ecause any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public ..., there is a waiver to the same extent as with any other disclosure." 238 F.3d at 1375-76.

D. Rehling v. City of Chicago, 207 F.3d 1009 (7th Cir. 2000): The lawyer-client privilege is designed to guard against compelled disclosure of communications by a client to a lawyer. In this case, the trial court used the lawyer-client privilege as the basis for exclusion of communications by lawyer to a client, raising the question of whether the privilege can be used to shield against disclosure of information running from the lawyer to the client. The Court stated the governing law in these words:

> "... Although the attorney-client privilege generally attaches only to statements made by the client, statements made by the lawyer to the client will be protected in circumstances *where those communications rest on confidential information obtained from the client ... or where those communications would reveal the substance of a confidential communication by the client* .... 207 F.3d at 1019.

Kentucky's case law has never been crystal clear on this point and the same is probably true of the language in KRE 503. The latter is susceptible to an interpretation like the one set out above, although it could have been stated more clearly. It shields from forced disclosure "confidential communication made for the purpose of facilitating the rendition of professional legal services ... *between* the client ... and the client's lawyer." While this probably looks to some like communications running from the client to the lawyer (the normal situation), it is at least arguable that the word "between" can be construed to cover communications running in both direction, an interpretation that would clearly be more in line with the underlying objective of facilitating the work of the lawyer by encouraging full and unimpaired disclosure by the client to the lawyer.

IV. Miscellaneous:

A. Daubert Litigation: In the now-famous *Daubert* case, the Supreme Court underscored the importance of a trial judge's role in determining admissibility of expert testimony. It should be remembered that the lawyers on one side of this case urged the Court to limit the trial court's decision to one of determining

relevance, arguing that a greater screening role for the trial court would be "inimical to the search for truth." The Court rejected this argument and found in Rule 702 clear recognition of an important screening role for the trial judge, a role that the Court characterized as a "gatekeeping" obligation. Almost from the beginning, there has been intensive litigation in the federal courts over the nature of this gatekeeping responsibility and recently over whether the trial judge is obligated to conduct a so-called "Daubert" hearing. The following is an indication of where the case law may be headed in this regard, although the final word is surely yet to be formulated:

(1) In *Padillas* v. *Stork-Gamco, Inc.*, 186 F.3d 412 (3d Cir. 1999), after a trial court excluded expert testimony without a hearing and granted a summary judgment, the Third Circuit reversed and remanded for an *in limine* hearing. In an earlier case, this Court had emphasized the importance of a detailed factual record in these cases and of giving the parties an opportunity to be heard on admissibility. In this case, concerned with the process by which a trial court must exercise its gatekeeping role under *Daubert,* the Court "stressed the importance of *in limine* hearings under Rule 104(a) in making the reliability determinations required under Rule 702 and *Daubert.*" 186 F.3d at 417. In a more recent opinion, this Court made the following statement on the subject:

> "[W]e [earlier] expressed our belief that an *in limine* hearing is important ... because of the District Court's 'independent responsibility for the proper management of complex litigation,' and because the plaintiff 'need[s] an opportunity to be heard' on the critical issues of scientific reliability and validity.... Moreover, an opportunity to demonstrate the expert's 'good grounds' is particularly important when the court's ruling on admissibility turns, in large part, upon 'the factual dimensions of the expert evidence.' We did not intend to suggest than an *in limine* hearing is always required for *Daubert* gatekeeping. Rather, we held that 'when the ruling on admissibility turns on factual issues,... failure to hold [an *in limine*] hearing may be an abuse of discretion." *In re TMI Litigation,* 199 F.3d 158, 159 (3d Cir. 1999).

(2) In *Clay* v. Ford Motor Co., 215 F.3d 663 (6th Cir. 2000), the Sixth Circuit reviewed a trial court decision explicitly refusing a request by the defendant for an *in limine* hearing on the admissibility of plaintiff's expert testimony. The Court said that "[d]istrict court judges *must determine* whether an expert's testimony is both relevant and reliable when ruling on its admission." 215 F.3d at 667. However,

said the Court, "[t]he district court is not obligated to hold a *Daubert* hearing ...." *Id.* In a slightly later case, however, the Sixth Circuit reversed a summary judgment that had been granted after excluding expert testimony without a *Daubert* hearing:

> "Although we have explained that '[t]he district court is not obligated to hold a *Daubert* hearing,' ... a district court should not make a *Daubert* determination when the record is not adequate to the task....
>
> ... A district court should not make a *Daubert* ruling prematurely, but should only do so when the record is complete enough to measure the proffered testimony against the proper standards of reliability and relevance.... With a more complete record before the district court, Jahn will have an adequate opportunity to defend the admissibility of her expert's testimony, and Equine Services will have an adequate opportunity to argue against it." *Jahn* v. *Equine Services, PSC,* 233 F.3d 382 (6th Cir. 2000).

(3) In *Kumho Tire Co., Ltd.* v. *Carmichael,* 526 U.S. 137 (1999), the United States Supreme Court engaged in some discussion about the kinds of factors that trial court judges should take into account in determining reliability of non-scientific expert testimony (it being noted that *Daubert* had provided four factors for consideration with scientific testimony). In this discussion, the Court made the following general statement about the process by which the gatekeeping obligation is to be performed:

> "The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable." 526 U.S. at 152.

Although the focus in *Kumho* was on the kind of factors that ought to be taken into account in determining reliability, some federal courts have relied upon this quotation to hold that "the district court is not required to hold an actual hearing to comply with *Daubert.*" *Nelson* v. *Tennessee Gas Pipeline Company,* 243 F.3d 244, 249 (6th Cir. 2001). The following statement may fairly well summarize the position that seems now to prevail in the federal courts:

> "It is within the discretion of the trial court to determine *how* to perform its gatekeeping function under *Daubert*.... The most common method for fulfilling this

function is a *Daubert* hearing, although such a process is not mandated.... The district judge may also satisfy its gatekeeping role [without such a hearing] ... so long as the court has sufficient evidence to perform 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Goebel* v. *Denver and Rio Grand Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000).

(4) The Kentucky Supreme Court has not addressed the hearing issue comprehensively but has rendered two decisions that are pertinent to the discussion:

(a) In *Fugate* v. *Commonwealth*, 993 S.W.2d 931 (Ky. 1999), the defendant argued on appeal against the admissibility of expert testimony grounded in DNA testing. He seemed to base his claim mostly on lack of qualifications of the expert to render the evidence admissible under *Daubert*; the trial court held a hearing and after the hearing ruled the evidence admissible. The Supreme Court made the following statement in its opinion (while sustaining the trial court's admission of the evidence) about preliminary hearings concerning the admissibility of this kind of evidence:

> "We are persuaded by authoritative case law from other jurisdictions that the reliability of DNA comparison analysis using the RFLP and PCR methods has been sufficiently established as to no longer require a *Daubert* hearing....
>
> In view of the fact that this Court will no longer require a pretrial *Daubert* hearing in every case involving the admission of DNA evidence ..., to that extent, the decision in *Mitchell* is overruled. 993 S.W.2d at 937.

It is not clear why the Court made this statement since there was a preliminary hearing in *Fugate* relating to admissibility under *Daubert*, although it may have simply been a precursor to the case described below.

(b) In *Johnson* v. *Commonwealth*, 12 S.W.3d 258 (Ky. 2000), obviously in an effort to facilitate rulings on the admissibility of expert testimony, the Court held that "once an appropriate appellate court holds that the *Daubert* test of reliability is satisfied, lower courts can take judicial notice of the reliability and validity of the scientific method, technique, and theory at issue." 12 S.W.3d at 261. What the Court seem to have headed off with this decision was the necessity to determine in every case the reliability of

such scientific methods as DNA testing, blood typings, breathalyzer tests, fingerprinting, fiber and ballistics analysis, etc. The decision is not broad enough to resolve the broader issues of when a hearing is required to perform the gatekeeping obligation imposed on judges by *Daubert*.

B. Hearsay Tidbits: There are no recent hearsay landmark cases to report. The following are worthy of note:

1. Osborne v. Commonwealth, 43 S.W.3d 234 (Ky. 2001): The decision in this case produced two hearsay rulings:

(a) Grand jury testimony may not be introduced against a criminal defendant under the former testimony exception to the hearsay rule since the defendant was not present at the grand jury proceeding and thus had no opportunity to test the evidence through cross-examination, the most fundamental requirement of the exception.

(b) Under the declarations against interest exception, at least in criminal cases and probably all cases, "each statement within the broader narrative must be examined individually to determine whether it is, in fact, self-inculpatory. If not, it is inadmissible." 43 S.W.3d at 241.

2. Manning v. Commonwealth, 23 S.W.3d 610 (Ky. 2000): The hearsay in this case was an out-of-court statement by defendant's common law wife to a police officer reporting that the defendant had admitted to her that he had killed the victim (his father by adoption). When called as a witness, the common law wife claimed loss of recollection of both the statement made to her by the accused and her statement to the police officer. The trial court allowed the police officer to testify to what the common law wife said about the defendant's admission.

(a) *Loss of Recollection as Inconsistency*: The Supreme Court held the statement admissible as a prior inconsistent statement by the witness. It embraced an earlier pre-Rules decision by the Court of Appeals, *Wise* v. *Commonwealth*, 600 S.W.2d 470 (Ky.App. 1978), finding inconsistency in a loss of recollection claim that seems under the circumstances to be untrue--"reasoning that no person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, 'I don't remember.'" 23 S.W.3d at 613.

(b) *Hearsay Within a Business Record:* The defendant argued on appeal that error had been committed when the trial judge refused admission to a police report containing a statement about the crime by an unidentified declarant. As the Court

has often done recently, it held that the mere fact that a statement is contained in a business or public record does not make it admissible. Hearsay within a business or public record may be admitted only if it is admissible under some hearsay exception.

C. Preserving Errors and Other Procedural Matters: The following decisions on procedural matters are worthy of mention if not discussion. Most are criminal cases but address matters that are applicable in civil cases.

1. Turner v. Commonwealth, 5 S.W.3d 119 (Ky. 1999): The defendant was charged with murder of his father, which he alleged resulted from a beating of his father by some unknown assailant. The victim had been beaten severely but was alive when taken to a hospital emergency room. In response to questioning by a police officer, the victim identified the defendant as his assailant ("my son Joe"), an out-of-court statement offered into evidence by the prosecution as a dying declaration. In a hearing on the admissibility of the hearsay, as proof that the victim spoke under consciousness of impending death (the pivotal requirement for dying declarations), the prosecution called as witnesses on this issue a nurse who was present when the statement was made and a physician who was not present but had performed an autopsy on the victim. The nurse expressed the opinion that the victim knew he was dying when he made the statement and the physician expressed the opinion that the victim (given the nature of his injuries) must have known that his death was imminent. The trial court found the statement admissible and defendant was convicted. On appeal, he argued that the nurse was not qualified to express the opinion she gave and that the physician's opinion was flawed in that he failed to speak of "reasonable medical probability."

(a) Trial judges often have to decide facts to determine the admissibility of evidence. Whether or not a declarant makes a statement under consciousness of impending death is such a fact. KRE 104(a) says that in making these determinations the trial court is not bound by the rules of evidence law.

(b) KRE 104(a), said the Court in *Turner*, rendered the issue concerning admissibility of the opinions unimportant, since "a trial judge is not bound by the rules of evidence in ruling on admissibility of evidence." 5 S.W.3d at 123.

2. Commonwealth v. Alexander, 5 S.W.3d 104 (Ky. 1999): The defendant was driving a police car under flashing light and siren on a city street when he collided with another car and caused the death of its driver; he was traveling between 90 and 100 mph at the time of the collision. A key witness against the defendant was the police officer who investigated the accident and filed a police report. In his direct testimony, this witness described the scene, the methods of his investigation, and the sequence of

events leading up to the collision; he said nothing about whether the defendant or the other driver was at fault in the accident. On cross-examination, defense counsel cross-examined the witness about his police report and specially about whether he had not in his report identified the other driver as the one "at fault;" no objection was made to this questioning and the witness admitted that he had so indicated on his report. On redirect examination, the witness was asked if it was still his opinion that the other driver was at fault, and over objection, answered that he now believed that the defendant was at fault. The defendant sought relief on appeal because of the admission of this opinion about fault in the accident. The Commonwealth argued that the defense had "opened the door" on this matter and thereby lost the right to object to the inadmissible opinion. The Court of Appeals held for the defendant but the Supreme Court reversed.

(a) *"Opening the Door":* The "opening the door" concept is a kind of waiver of objections to inadmissible evidence; it describes what happens when one party introduces improper evidence and another undertakes to refute or contradict the improper evidence with other improper evidence. It is well-settled that the second line of evidence can be admitted on the ground that the first line "opened the door."

(b) *Need for Objection*: There has long been disagreement over whether to allow a party to rely on "opening the door" when no objection was made to the evidence that is alleged to have opened the door. The defendant in *Alexander* tried to foreclose admission of the witness's opinion on fault (to refute his earlier cross-examination) by arguing that the prosecution had failed to object to the cross-examination. The Court rejected the argument, saying "we are not aware of any case law holding that a trial court loses discretion to admit evidence to which the door has been opened merely because no objection was made at the time the door was opened." 5 S.W.3d at 106.

(c) *A Footnote*: There is a concept that is related to the "opening the door" concept that is sometimes referred to as the "invited error" concept. A party who asks questions of witnesses (usually on cross-examination) will have no grounds for objection to answers to those questions so long as the answers are responsive to the questions. The Supreme Court recognized this related concept in *Mills* v. *Commonwealth,* 996 S.W.2d 473, 485 (Ky. 1999): "'One who asks questions which call for an answer has waived any objection to the answer if it is responsive.'"

3. Ohler v. United States, 529 U.S. 753 (2000): Defense counsel in this case made a motion in limine to exclude evidence of the defendant's prior conviction for impeachment under Rule 609. The trial court denied the motion (indicating that the

conviction would be admitted). In an apparent attempt to remove the sting of the conviction if introduced by the prosecution on cross, defense counsel elicited from the defendant on direct the fact of the earlier conviction. The Supreme Court held that by taking the initiative to introduce the conviction himself the defendant lost his right to challenge admissibility of the evidence on appeal. There is no comparable ruling under Kentucky law but one should not be surprised if this position ultimately makes its way into decisions of Kentucky courts.

-THE KENTUCKY RULES OF EVIDENCE -

LOOKING BACK AT IMPORTANT DECISIONS AND AHEAD TO LIKELY CHANGES

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SECTION C

THE KENTUCKY RULES OF EVIDENCE – LOOKING BACK AT IMPORTANT DECISIONS AND AHEAD TO LIKELY CHANGES

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THE KENTUCKY RULES OF EVIDENCE--LOOKING BACK AT IMPORTANT DECISIONS AND AHEAD TO LIKELY CHANGES

by
Justice William S. Cooper
and
Professor Robert G. Lawson

I. Scope, Structure, and Interpretation of the Rules:

A. Introduction: The first cases to be discussed in this presentation were selected because they have implications for law practice under the Rules of Evidence that extend far beyond the specific evidence rulings that brought them to the Supreme Court for resolution. Because these implications are sometimes subtle and hardly ever obvious, the broader importance of the decisions can easily go unappreciated and for that reason are worthy of some special attention by lawyers and judges.

B. Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997): This case involved a prosecution for sodomy and sexual abuse of a child who testified that the defendant Stringer subjected her to acts of sexual contact and oral sodomy. A medical examination of the child produced evidence that she had suffered "tearing in the vaginal area as well as some stretching and partial destruction of the hymen." To corroborate the child's version of events, the prosecution was allowed to introduce testimony from a physician that he had examined the child before trial and that his physical findings were compatible with events reported by the child. The defendant argued for reveral of his conviction on the ground that the physician's testimony had been admitted in violation of the prohibition against opinion testimony on the ultimate facts of a case. The Supreme Court rejected this argument and ruled the testimony admissible. *Stringer* has important and far-reaching implications for practice under the Kentucky Rules of Evidence.

1. The holding of *Stringer* is that an expert witness is not barred from testifying to an opinion simply because that opinion constitutes an ultimate fact for the jury. Without regard to the broader implications described below, this was a very important evidence ruling and a sound one. Kentucky has had a long history of difficulty with the question of whether or not to permit opinion on ultimate facts, first saying no, then saying yes, and then saying no again. It can be said that no one ever forumulated a good rationale for blanket exclusion of opinion on this ground. Thus, it is no surprise that by the time of *Stringer*, Kentucky may well have been the only jurisdiction in the nation excluding expert opinion solely because it involved the ultimate facts of a case. The decision certainly did not plow new ground in the world of evidence law but was an extremely important modification of then-existing Kentucky law.

Footnote: It should be noted that *Stringer* does not hold that expert opinion on the ultimate facts of a case is admissible, only that it is not inadmissible solely because it involves facts which the jury will ultimately have to decide. This is a distinction that needs to be underscored.

2. *Stringer* is at least as important, however, for what it says or implies about the comprehensiveness of the Rules of Evidence, the significance of the pre-Rules case law on evidence, and the power of the Supreme Court to add to the law of evidence other than through formal amendment to the Rules of Evidence. The situation that confronted the Court in this case brought some if not all of these fundamental issues to the forefront. Before the adoption of the Rules, Kentucky's common law included a prohibition against expert opinion on ultimate facts. Drafters of the Rules proposed a rejection of this common law principle in favor of Federal Rule 704 which provides that expert testimony is not subject to objection because it embraces an ultimate issue. However, this proposal was rejected (at the initiative of the Supreme Court itself) and as they were adopted into law the Rules were simply silent with respect to admission or exclusion of expert opinion on ultimate facts.

a. The following statement captures the Court's ruling: "Our failure to adopt proposed KRE 704 simply left the 'ultimate issue' unaddressed in the Kentucky Rules of Evidence and, therefore, subject to common law interpretations by proper application of the rules pertaining to relevancy, KRE 401, and expert testimony, KRE 702."

b. Two dissenters protested (in separate opinions) that the Court had acted under the guise of interpretation of the Evidence Rules and had in fact amended the Rules in violation of the requirement that amendments by made by joint action of the Supreme Court and General Assembly.

3. *What does Stringer mean?*

a. Does this decision mean that the Court has a common law authority to create evidence law outside the confines of the Evidence Rules (i.e., through common law precedent rather than formal amendment of the Rules)?

i. Commentators on the Federal Rules have argued over this question ever since adoption of the Federal Rules. One view is that the Rules are complete and preempt the field of evidence law;

the other view is that courts must have authority to deal with novel issues as they arise and that the Rules are not impaired by exercise of such authority.

ii. In some respects, the Rules seem to preempt the field. KRE 402 seems to leave no room for exclusionary rules of evidence unless found in the Constitution, statutes, rules of court, or the evidence rules. KRE 802 seems to leave no room for hearsay exceptions unless found in the Rules of Evidence or other rules of court.

iii. In other respects, the Rules seem not to preempt the field. For example, they contain no provisions on impeachment by bias or interest, none on impeachment by contradiction on collateral facts, etc. Also, it is arguable that the Rules themselves contemplate expansion under the common law tradition, for KRE 102 says that the rules shall be construed "to secure ... promotion of growth and development of the law of evidence to the end that the truth may be ascertained...."

iv. Professor Lawson says that the *Stringer* ruling is narrow and that it is "inconclusive" with respect to the question of whether the Supreme Court can expand upon the Rules by judicial decision. Lawson, *Interpretation of the Kentucky Rules of Evidence--What Happened to the Common Law?*, 87 Ky.L.J. 517, 524 (1998-99).

C. Garrett v. Commonwealth, 48 S.W.3d 6 (Ky. 2001): The defendant was prosecuted for commission of sodomy and sexual abuse for acts committed upon his biological daughter. At trial, the alleged victim testified about various sexual acts by the defendant upon her over a period of about six years (fondling, oral sodomy, and sexual intercourse); other witnesses testified to observations tending to corroborate the testimony of the child. The child had been taken to a physician for a physical examination after the defendant's arrest. This physician testified that the victim's pelvic examination was normal and that she had an intact hymen (neither of which rules out the possibility of sexual abuse including intercourse) and that no treatment was rendered to the child. More importantly, the physician was permitted to testify that the child had given her a history of being sexually abused over a period of years (but not the child's identification of the defendant as the actor and not the details of the sexual acts). The importance of *Garrett* (at least for our discussion) is the Supreme Court's response to the defense's argument that the physician's testimony about

what the child said was admitted in violation of the hearsay rule, an argument that required the Court's consideration of the hearsay exception for statements made by patients to physicians for purposes of diagnosis or treatment.

1. *Introduction*: The decision in *Garrett* is important because of what it says about admissibility of hearsay but also because of what it says about the structure and interpretation of the Evidence Rules. It is necessary in describing *Garrett* to delve into some history concerning treatment of this kind of hearsay under Kentucky law.

2. *History*:

a. Early Kentucky case law on this subject adopted the traditional view that a physician who had been consulted for *treatment* (a so-called "treating" physician) could testify to case history related by the patient but that a physician consulted for the purpose of *evaluation* (so-called "testifying" physician) could not testify to case history.

b. The Federal Rules, adopted in the 1970's, eliminated this distinction and allowed testimony about case history from both treating and testifying physicians.

c. In 1990, two years before Kentucky adopted its Evidence Rules, the Supreme Court decided *Drumm* v. *Commonwealth*, 783 S.W.2d 380 (Ky. 1990). In this case, the Court "purported" to follow the federal rule but adopted what can only be described as a middle ground between the early Kentucky law and the federal rule; statements of case history to a so-called "testifying physician" were presumably admissible but could be excluded if prejudicial effect outweighed probative value. *Drumm* seemed to impose an exercise of caution on trial judges by announcing that statements made by patients to a "testifying" physician have "less inherent reliability than evidence admitted under the traditional common-law standard underlying the physician treatment rule."

d. In 1992, Kentucky adopted KRE 803(4), which carves from the hearsay rule an exception for statements made for purposes of medical treatment or diagnosis (including case history). It is identical to the federal rule described above and thus says nothing about the distinction between "treating" and "testifying" physicians.

e. The Supreme Court rendered several decisions involving this problem between 1992 (the enactment date of the Rules) and the arrival of *Garrett* for decision. In these cases, the Court adhered to the hybrid rule that had been adopted in *Drumm*. *See e.g., Miller v. Commonwealth,* 925 S.W.2d 449 (Ky. 1995); *Bell v. Commonwealth,* 875 S.W.2d 882 (Ky. 1994).

3. *Garrett's Hearsay Ruling*: The Court held that the "hybrid" rule of *Drumm* was inconsistent with KRE 803(4) and that the decision in that case had not survived the adoption of the Rules of Evidence. The consequences of this decision may be summarized as follows:

a. In dealing with admissibility of statements made to physicians, no distinction is to be made between "treating" and "testifying" physicians. KRE 803(4) requires inquiry as to whether such statements were "made for the purposes of medical treatment or diagnosis" and whether they are "reasonably pertinent to treatment or diagnosis."

b. Such statements, even when they satisfy the requirements set out above, are subject to exclusion under KRE 403 only if the trial judge finds that probative value is substantially outweighed by the danger of undue prejudice. Under *Drumm,* the trial judge was obligated to exclude such evidence upon a finding that prejudicial effect outweighed probative value. The *Garrett* balancing test is more clearly favorable toward admission of the evidence than was the *Drumm* test.

c. The parties argued in *Garrett* over whether the physician/witness was a treating or nontreating physician. KRE 803(4) can be applied without concern over this distinction. The Court did not indicate one way or another as to whether KRE 403 can be applied without making this distinction. One could argue that an assessment of "probative value" (an element of the balancing test) cannot be made without consideration of this factor.

d. The Court held that the trial court in *Garrett* had not abused discretion in ruling the victim's statements to the physician admissible.

f. *Footnote*: In the pre-Rules case of *Big Sandy Community Action Program* v. *Chaffins*, 502 S.W.2d 526 (Ky. 1973), the Supreme Court held that a

testifying physician (as opposed to a treating physician) could not express an opinion about a patient's condition if it was based on "case history." The *Garrett* opinion makes note of this earlier case but stops short of deciding whether or not it survived adoption of KRE 702 and 703.

4. *Broader Implications of Garrett*: What *Garrett* says about the structure and interpretation of the Rules is at least as important as its narrow hearsay ruling and on this subject may be as significant as *Stringer*.

a. In considering whether the *Drumm* rule survived adoption of the Evidence Rules, the Court focused on the comprehensiveness of the Rules. It relied on KRE 402, which requires admission of relevant evidence unless there exists an applicable rule of exclusion in a constitutional provision, statute, Evidence Rule, or rule of court. It noted that this fundamental provision leaves no room for an exclusionary rule based on pre-existing case law.

i. Relying on the famous *Daubert* case, the Court said that "when there is an adopted Rule of Evidence that speaks to the contested issue, the adopted Rule occupies the field and supercedes the former common law interpretation."

ii. By footnote, the Court noted that in *Stringer* the Rules had not addressed the issue in that case. The implication is that in these situations there is no "occupation of the field" and no structural hindrance to gap-filling by judicial decision making in a given case.

iii. In this opinion or in *Stringer*, the Court mentioned several issues where there are gaps in the Rules: admissibility of bias evidence for impeachment, admissibility of habit evidence, and whether eavesdroppers can testify to otherwise privileged information.

b. With respect to interpretation of the Evidence Rules, *Garrett* provides guidance on at least the following matters (more subtle than explicit):

i. On the question of how the Rules relate to the pre-existing common law, the Court cites and quotes an often-quoted statement that was made first by the principal drafter of the

Federal Rules: "Preexisting common law remains only as a body of knowledge existing 'in the somewhat altered form as a source of guidance ....'" At least some members of the Court had not always adhered to this view. *See e.g., Moseley v. Commonwealth,* 960 S.W.2d 460 (Ky. 1997) (dissenting opinion) (using pre-Rules case law to support admissibility of hearsay not covered by hearsay exceptions in the Rules).

ii. Rule 1104 says that the commentary to the Rules may be used in their interpretation (meaning a commentary prepared by drafters to explain the rules). When it adopted the Rules, the Court acknowledged the existence of this commentary but explicitly noted that it had "neither adopted nor approved the Commentary." In *Garrett*, the Court twice relied on this commentary in construing and applying the Rules, seeming to reflect an increasing tendency to look to this source for guidance. Because there has never been an official publication of this commentary (because of the Court's action upon adoption of the Rules). Access to the commentary may be more limited than it should be but there are a couple of unofficial publications in which the commentary can be found without great difficulty.

iii. The Court said that Kentucky's Rules were intended to conform to the Federal Rules and quoted a statement from the commentary to Kentucky's Rules that federal case law would provide "invaluable assistance" in applying the Kentucky Rules. It is thus unsurprising that in *Garrett* alone, one finds reliance on the language of the Federal Rules, Advisory Committee Notes on those Rules, and decisions of federal court construing the Rules.

II. Other Important or Notable Decisions Since Adoption of the Rules:

A. Prater v. C.H.R., 954 S.W.2d 954 (Ky. 1997): In this parental rights termination case, the C.H.R. was permitted at trial to introduce (over objection) its own pre-trial case report (which included observations by social workers, statements by a relative about physical and sexual abuse of the children, findings of an examination of the children by a clinical social worker, and medical records produced by an examining physician).

In an appeal of a termination order, the parents argued that admission of the report violated the hearsay rule because the report was a public record declared inadmissible by KRE 803(8), while C.H.R. argued that it was a business record and was admissible under KRE 803(6). In resolving this appeal, the Supreme Court rendered one of its most important decision on admissibility of hearsay evidence under the Rules. It also offered some insights on how it would approach interpretation and application of the Rules.

1. *The Problem*: The C.H.R. case report looks more like a "public record" than a "business record" and would clearly qualify as a "public record" under KRE 803(8), which defines the hearsay exception for public records. However, this provision explicitly removes from its coverage any public record offered into evidence by the agency that prepared it in any case in which the agency is a party. Because C.H.R. prepared the report in *Prater* and was also a party to the lawsuit, the report was clearly not admissible under KRE 803(8). KRE 803(6), the provision defining the business records exception, contains no provision comparable to the one that made it impossible to rely on the public records exception. The question framed for the Court by the facts and C.H.R.'s argument was whether a public record can be admitted into evidence under the business records exception to the hearsay rule.

2. *The Ruling*: The Court noted that the word "business" in KRE 803(6) is broad enough to include a public agency, noted that pre-Rules case law had used the business records exception for public records, and held that the report in question could be admitted into evidence under the business records exception (provided it satisfies the requirements of this exception). More generally, the Court makes the important, if not crucial, point that the exceptions to the hearsay rule operate independently of each other. In other words, if a declaration against interest is not admissible under the exception carrying this name (not satisfying some requirement), it can be considered for admission under the exception for excited utterances; if former testimony is not admissible under the former testimony exception (because the declarant is available), it can be considered for admission under the exception for prior inconsistent statements.

3. *Footnote*: It should be noted that the record that produced this important decision (favoring admission of public records under the business records exception) was ruled partially if not mostly inadmissible under the latter exception. The problem with the case report from C.H.R. was that it contained information provided by persons who were not acting under a business duty; as everyone should know, such information may not be admitted under the business

record and must be removed from an admissible business record unless there exists some other hearsay exception to render the information admissible.

B. Rabovsky v. Commonwealth, 973 S.W.2d 6 (Ky. 1998): The defendant was alleged to have killed her husband by a lethal injection of insulin. He was taken from his home in a state of unconsciousness after defendant had called an emergency squad and remained in a comatose state in a hospital for 10 days prior to his death. During this hospitalization, blood samples were collected from the victim on six occasions and sent to an independent laboratory (which in turn sent it to another laboratory) for analysis. His treating physician, and 2 other physicians, diagnosed the victim's cause of death as hypoglycemia due to external administration of a massive dose of insulin. The state introduced evidence tending to show that the defendant had motive, opportunity and animus to kill the victim and it introduced records of the blood tests described above, which supported the state's allegation that the victim had died from a lethal injection of insulin. The defense objected to introduction of these records; they were admitted into evidence under the business records exception and, in addition, were used by the expert witnesses as the basis for their opinions on cause of death. The records were admitted without any preliminary evidence as to who collected the blood samples, how they were stored, how they got to the laboratories, or what methods were used to test the samples (i.e., without proof of what was called before the Evidence Rules "chain of custody"). Defendant appealed his conviction on the ground that the blood test evidence was inadmissible. The Supreme Court reversed the conviction.

1. *Chain of Custody*: Kentucky's pre-Rules case law required preliminary proof of "chain of custody" for tangible evidence such as the blood samples in this case. The words "chain of custody" are not found in the Evidence Rules. But an obligation to provide a foundation for introduction of real or demonstrative evidence (showing its integrity and its relationship to the case) is contained in the language of KRE 901(a): "The <u>requirement</u> of authentication or identification as a <u>condition precedent</u> to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The old common law "chain of custody" requirement, said *Rabovsky*, "is an integral part of the authentication [or identification] requirement of KRE 901(a)."

2. *Types of Evidence*: *Rabovsky* recognizes that the integrity of some real evidence can be shown without proof of chain of custody ("weapons or similar items of physical evidence, which are clearly identifiable and distinguishable" by visual examination) and exempts such

evidence from the chain of custody requirement. On the other hand, because satisfactory integrity cannot be shown in any other way, "a chain of custody is required for blood samples and other specimens taken from a human body for the purpose of analysis." "The purpose of requiring proof of the chain of custody of a blood sample is to show that the blood tested in the laboratory was the same blood drawn from the victim."

3. *Nature of the Requirement*: Drawing on pre-Rules Kentucky case law and federal case law, the Supreme Court said that "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that "the reasonable probability is that the evidence has not been altered in any material way." 973 S.W.2d at 9.

4. *Ruling:* The blood tests records in *Rabovsky* had been admitted in the face of a "total failure of the Commonwealth to establish a chain of custody of the blood samples." In finding error, the Court quoted from one of its earlier opinions: "We think that surely it is unnecessary to delve into the literature of the law in order to document the point that this type of carelessness in the development of important evidence during the course of a trial simply will not do." *Henderson v. Commonwealth*, 507 S.W.2d 454, 461 (Ky. 1974).

C. Slaven v. Commonwealth, 962 S.W.2d 845 (Ky. 1997): The defendant was alleged to have killed a gas station attendant in the course of robbery. He denied the charge and defended on grounds of alibi (claiming that he had been with his wife at the time of the killing). His wife offered no testimony at trial, invoking her privilege not to testify against her spouse. The prosecution introduced fourteen out-of-court statements that had been made by the wife, most of which had allegedly occurred near the time of the robbery and killing and many of which contradicted the defendant's claim that he was with his wife when the crimes were committed. Following his conviction, the defendant argued (among other things) that the introduction of his wife's out-of-court statements violated his spousal privileges under KRE 504. The Supreme Court rendered several important decisions concerning the privileges in responding to this argument.

1. *Background:* KRE 504 creates (or recognizes) two separate spousal priviliges. One is a "testimonial privilege," providing a witness-spouse the right to refuse testimony against a spouse and a party-spouse the right to preclude adverse testimony from the other spouse. The other is a "marital communications privilege," providing a spouse the right to preclude evidentiary use of confidential

communications between spouses during marriage. In *Estes* v. *Commonwealth*, 744 S.W.2d 421 (Ky. 1987) (a pre-Rules case construing a spousal privilege statute similar to KRE 504), the Supreme Court held that a spouse's right to preclude adverse testimony from a spouse also included a right to preclude any and all out-of-court statements made by that spouse and offered into evidence under hearsay exceptions.

2. *Testimonial Privilege and Hearsay*: The Court in *Slaven* rejected the defendant's argument that KRE 504(a) extended beyond spousal testimony to include spousal hearsay, overruling *Estes* to the extent it held to the contrary. This, said the Court, would "ignore the almost universal rule that privileges should be strictly construed, because they contravene the fundamental principle that 'the public ... has a right to every man's evidence.'" *Slaven*, 962 S.W.2d 853.

3. *Marital Communications Privilege and Hearsay*: The Court added, however, that a spouse's privilege against disclosure of confidential marital communications could operate to exclude certain kinds of hearsay statements by the other spouse. Kentucky law has for quite a long time construed this spousal privilege to cover not only verbal communications between spouses but also actions by spouses in the presence of each other because of the confidentiality expected in the marriage relationship; as stated in *Slaven*, "anything done or said between spouses in private was considered confidential in the absence of evidence of a contrary intention." 962 at 852. And since the protection of a privilege cannot be lost through an unauthorized voluntary disclosure by a third person, the marital communication privilege could operate to exclude spousal hearsay reporting activities that would qualify for protection under the privilege. As stated by the Court in *Slaven*, "we conclude that an out-of-court statement of a witness who is precluded from testifying because of invocation of the spousal privilege is admissible if that statement falls within a recognized exception to the hearsay rule and *if it does not divulge a confidential marital communication*."

D. Kentucky's "Daubert" Progeny: The Supreme Court has embraced all of the essentials of the famous federal case of *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

1. *Daubert* rejected the general scientific acceptance test for admissibility of expert testimony in favor of an approach that requires the trial judge to determine if the testimony is reliable (considering several non-exclusive factors that are pertinent to reliability of such testimony) and relevant to the issues of the case. The Kentucky

Supreme Court embraced this test in the case of *Mitchell v. Commonwealth*, 908 S.W.2d 100 (Ky. 1995).

2. In *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575 (Ky. 2000), the Supreme Court embraced a position taken earlier in the federal courts (in the "Kumho Tire" case) that the *Daubert* reliability test would apply to all types of expert testimony and not merely to expert testimony about scientific matters. In this same case, the Court made the very important point that "Daubert" decisions would be reviewed on appeal under an abuse of discretion standard--"whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles."

3. In its most recent significant decision concerning this area of the law, the Supreme Court addressed the important question of whether or not trial courts must hold "Daubert" hearings in all instances in which expert testimony is offered into evidence. *Johnson v. Commonwealth*, 12 S.W.3d 258 (Ky. 2000). Obviously recognizing the enormous waste of time and resources that would flow from a different ruling, the Court held that "once an appropriate appellate court holds that the *Daubert* test of reliability is satisfied, lower courts can take judicial notice of the reliability and validity of the scientific method, technique, and theory at issue." 12 S.W.3d at 261. In situations of this type, however, the Court said that judicial notice would serve only to shift to the opponent of the evidence the burden to prove that such evidence is no longer deemed scientifically reliable.

III. Modifications Under Consideration:

A. Introduction: KRE 1102 requires for amendment of the Evidence Rules joint action by the Supreme Court and General Assembly. KRE 1103 creates an advisory committee on the Rules called the Evidence Rules Review Commission. It is anticipated that this body will regularly weigh the need to modify the Rules of Evidence either at its own initiative or in response to initiatives taken by others. The Commission membership includes judges, lawyers, professors, and members of the General Assembly. The Commission was inactive for nearly seven years but has been meeting regularly for about a year and has under consideration a number of proposals and recommendations for changing the Evidence Rules.

B. KRE 412 (Rape and similar cases; admissibility of victim's character and behavior.): This provision of the Rules is commonly known as the "rape shield law." It prohibits the use of evidence of bad character (both general character and specific acts of sexual behavior) of rape and other sexual crimes victims,

subject to certain narrowly-defined exceptions; it is applicable only in criminal prosecutions for specifically designated sexual offenses (those defined in KRS Chapter 510, attempt or conspiracy to commit such crimes, and incest). The provision was borrowed mostly from the original version of the Federal Rules; initiative for modifying the provision is attributable at least in part to the fact that its federal counterpart has been modified in very significant ways. The Evidence Rules Review Commission is strongly leaning toward a recommendation that would make the following changes in KRE 412:

1. The most significant change would expand the coverage of the rule to all civil and criminal cases "involving alleged sexual misconduct." As stated above, the rule currently applies only in prosecution for sex crimes; the modified rule would apply in all criminal cases and, perhaps more importantly, in civil cases in which plaintiffs make claims for damages for sexual assault or sexual harassment.

2. The current provision has three criminal case exceptions to the shield against evidence of a victim's character: (i) specific acts to prove that someone other than the accused was the source of semen, injury, or other physical evidence, (ii) specific acts between accused and victim to prove consent, and (iii) other evidence directly pertaining to the offense charged. Under these exceptions, however, the trial judge is required to balance the probative value of the evidence against the danger of unfair prejudice and admit it only if its probative value outweighs the risk of prejudice.

   a. The recommended modification would retain these exceptions but would make a significant change in the formula that ultimately determines admissibility of the evidence.

   b. The recommended modification (unlike the current rule) would use the balancing test of KRE 403 for this determination, meaning that the evidence would have to be admitted unless the trial judge found that its probative value was substantially outweighed by its prejudicial effect.

   c. Upon careful comparison of the existing and proposed rules, one can see that the modified rule is somewhat more favorable toward admission under the exceptions than is the current rule.

3. As indicated above, the most important change in the rule is its expansion to civil litigation. With respect to this expansion, the recommended modification provides no specific exceptions to the exclusionary shield but authorizes a trial judge to admit such evidence upon a finding that "probative

value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party." It should be noted that this balancing test tilts more strongly against admission than does the test that would be applicable under the modification in criminal cases.

C. KRE 608 (Evidence of Character): The Commission has under consideration a proposal to recommend substantial overhaul of this current provision of the Rules. This rule is intended to provide for the admission/exclusion of character evidence offered for credibility purposes; however, it was butchered before being enacted into law, has caused difficulty for lawyers and courts, and has needed modification from the date of enactment of the Rules.

1. Here is the way the current rule reads: "The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to the limitation that the evidence may refer only to general reputation in the community."

a. It is easy to see the internal contradiction in the provision, saying on the one hand that credibility may be attacked by "opinion" but saying on the other hand that it must refer "only to general reputation in the community."

b. The provision is actually more flawed in what it fails to do. It does not deal with the longstanding notion that rehabilitation must await impeachment, says nothing about the use of specific acts to impeach, and does not identify the type of character that may be proved by reputation (i.e., "truth and veracity" versus "character in general").

2. The modification that the Commission has under review is almost identical to a recommendation that had been made by the original drafters of Kentucky's Rules (and that is very similar to a provision that has worked well as part of the Federal Rules). It reads as follows:

> (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 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.

3. It is almost impossible to compare in any helpful way this provision with the current KRE 608 (because of the flaws of the latter). If one compares this with the law that existed before adoption of the evidence rules, two things would stand out:

a. The recommended modification would allow for the use of personal opinion about character for credibility (i.e., "I believe that the witness is a truthful [or untruthful] person."), while the pre-Rules Kentucky law confined this kind of testimony to general reputation in the community (i.e., "I know the witness's reputation in the community for truthfulness and it is bad"). (It should be noted that the Rules of Evidence--KRE 405--allow for opinion to be used when character is offered for substantive use.)

b. Most importantly, the recommended modification would allow impeachment by use of specific bad acts on cross examination (i.e., "did you lie on the loan application for the car?"). No such inquiry was allowed before the Rules were adopted and none is allowed at the present time (not so much because of KRE 608 but moreso because Civil Rule 43.07 has been construed to prohibit such impeachment). If the Evidence Rules Review Commission ultimately decides to recommend this modification, it would do no more than merely bring Kentucky law into line with the Federal Rules and with the law of most if not all other states.

D. Evidence of Other Crimes in Rape, Child Molestation, and Civil Cases: The Commission has been urged to adopt for Kentucky provisions that are comparable to Rules 413, 414, and 415 of the Federal Rules of Evidence.

1. FRE 413 provides that in criminal cases involving sexual assault crimes, the prosecution may introduce evidence of

the defendant's commission on other occasions of sexual assault. FRE 414 provides that in criminal cases involving child molestation, the prosecution may introduce evidence of the defendant's commission on other occasions of crimes of child molestation. FRE 415 provides that in civil cases in which damages are claimed for sexual assault or child molestation, the plaintiff may introduce evidence of the defendant's commission of sexual assault or child molestation on other occasions.

2. Admissibility of evidence of this type, in both criminal and civil cases, is determined under the provisions of KRE 404(b), which provides for the general exclusion of such evidence while allowing it to be admitted if it has some special connection to the case (i.e., to prove motive, intent, absence of mistake, etc.). The shield provided by this provision is designed to guard against the danger of prejudice to the defendant that would almost surely follow the introduction of evidence such as that covered by the above-described federal rules.

3. FRE 413, 414, and 415 were enacted into law by Congress over the objection of the Judicial Conference of the United States (which is comprised of federal judges and lawyers who practice in the federal courts) and the A.B.A. Criminal Justice Section. The objection of these bodies resulted from concerns over prejudice to defendants and from a belief that KRE 404(b) provides a sound basis for dealing with the admissibility of this kind of evidence.

THE ABA ETHICS 2000 REPORT

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SECTION D

THE ABA ETHICS 2000 REPORT

The ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) capped a four year study of the 1983 ABA Model Rules of Professional Conduct (substantially adopted in Kentucky) with a report to the ABA, which was discussed at the August 2001 ABA meeting of the House of Delegates. The House worked its way through proposed Rule 1.10, and will resume consideration at the mid-year meeting. Once review is complete, the entire document will be voted on, probably at the August 2002 convention.

My impressions of the Ethics 2000 project:

1) Ethics 2000 proposes reasonable solutions to four "hot-button" issues: the duty of confidentiality (1.5), screening (1.10), the lying client (3.3), and the mis-addressed fax (4.4). At the 2001 annual convention, the ABA rejected screening and modified the Ethics 2000 proposals on confidentiality. The lying client and mis-addressed fax issues are yet to be discussed. There is a useful addition to Rule 5.5 (Unauthorized Practice) to attempt to define what an out-of-state lawyer may do in a state in which the lawyer is not admitted.

2) The other proposed changes improve the language of the rules without, for the most part, working substantive changes. Example: the proposal eliminates the confusing format of current Rule 1.7 (Conflicts).

3) The comments are great -- much more complete than the comments to the present rules -- and could serve as a text for folks who use the rules.

Following is a section by section analysis, with reference to Kentucky rules.

Rule 1.2. (scope of representation). Proposed comment [11] would restate the "noisy withdrawal" requirement when a lawyer discovers that he has been assisting the client in criminal or fraudulent activity. The lawyer must withdraw and,

> "in some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud."

Rule 1.3: (diligence) Proposed comment [5] suggests that sole practitioners prepare a plan for death or disability which designates another lawyer to review client files, notify clients, and determine whether there is need for emergency action.

Rule 1.5 (fees) – as proposed, the rule would have required that most fee arrangements be in writing. By a vote of 129-108, the ABA House of Delegates inserted the word "preferably" before ""in writing."

Proposed Comment [6] would make it clear that a contingent fee may be charged in a post-judgment representation to collect child support or maintenance. (This is consistent with Kentucky's version of Rule 1.5)

Rule 1.6 (confidentiality) – as proposed by the Ethics 2000 Commission, Rule 1.6 would have allowed (but not required) lawyers to reveal confidential information:

1) to prevent reasonably certain death or substantial bodily harm;

2) to prevent the client from committing a crime or fraud seriously injurious to another's interest in the course of which the client has used the lawyer's services;

3) to prevent, mitigate or rectify substantial injury to another that has or will result from the client's crime or fraud in the course of which the client used the lawyer's services.

4) to secure legal advice about the lawyer's compliance with the rules

5) as necessary in matters of dispute between lawyer and client (not a change in 1.6)

The ABA House of Delegates adopted (1) and (4), rejected (2), and (3) was withdrawn.

Rule 1.7 (conflicts). The proposed rule is clearer than current Rule 1.7 and reads as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Note that the proposed rule requires written informed consent.

Proposed comment [22] deals with the interesting question of a consent to a future conflict. The issue arises in cases in which the attorney wants to be free to represent Client A against Client B if litigation arises. May the attorney obtain the informed consent of B in advance. Comment [22] cautiously endorses such waivers by sophisticated clients.

May a lawyer take conflicting legal positions -- for example, argue in case 1 for dram shop liability and in case 2 against dram shop liability. Proposed comment [24] represents a substantial improvement over the present comment.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

Rule 1.8 (Specific Conflict Rules)

Subsection (c) would provide that a lawyer may not solicit a gift, including a testamentary gift, from a client. The comments make it clear that this means a gift to the lawyer or to a relative of the lawyer. The provision would not prevent the lawyer from accepting an unsolicited gift, though the comments caution that such gifts might be considered the product of undue influence.

Subsection (j) would prohibit sexual relations with a client unless the relationship existed when the client -lawyer relationship was established. The ABA rejected several motions to delete this provision, including one alleging it would be onerous for lawyers in small rural communities

The proposed rules would delete the special rule (current 1.8(i)), which deals with the "lawyer-spouses on opposite sides of the v" issue. The explanation is that the present rule is unnecessary -- that conflicts of this type are better analyzed under the general rule (1.7). Proposed Comment [11] to Rule 1.7 would replace 1.8(i). That comment provides:

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

Rule 1.9 (Former Clients)

No substantive changes are proposed. The proposed comments would further develop the meaning of "substantially related" and would eliminate the comment which attempts to distinguish between the duty of loyalty and the duty of confidentiality (present Comment [10])

Rule 1.10 (Imputation of Conflicts)

The Ethics 2000 commission amendment to Rule 1.10 would allow a firm to "screen" an "infected" lawyer joining the firm to avoid disqualifying the firm. Screening is allowed by Rules 1.11 and 1.12 (government lawyers and judges joining firms), and by Kentucky's version of 1.10 -- in 1999, the Kentucky Supreme Court amended 1.10 to give the okay to screening as a way to avoid disqualification.

The ABA House of Delegates rejected screening by a 176-130 vote.

Rule 1.11 (Government lawyers)

Proposed comment [5] appears to reject imputed disqualification when a lawyer moves from one governmental agency to another (e.g. public defender to prosecutor).

Rule 1.12 (Judges)

The proposed rule would extend to arbitrators and mediators.

Rule 1.13 (Organization as Client)

No substantive changes proposed

Rule 1.14 (Client under Disability)

No substantive changes proposed. The comments are more complete than the current comments.

Rule 1.15 (Safekeeping property)

No substantive changes proposed.

Rule 1.16 (Withdrawal)

No substantive changes proposed.

Rule 1.17 (Sale of Law Practice)

No substantive e changes.

Note -- The ABA added Rule 1.17 to the Model Rules in 1990. Kentucky did not adopt the rule..

Proposed Rule 1.18 (Duties to Prospective Client) – no corresponding rule.

The proposed rule would attempt to protect prospective clients' confidential information. It would allow screening and consent by the prospective client to the use of the information. This is an attempt to deal with the difficult issue of conflicts checks and follows an ABA ethics opinion on the matter.

Proposed Rule 2.1 (Advisor)

No substantive changes proposed

Proposed 2.2 (Intermediary)

The Commission recommends deletion of this provision and moving the discussion to Rule 1.7 (Conflicts).

Rule 2.3 (Attorney as Evaluator)

No substantive changes proposed

Rule 2.4 (Attorney as Third Party Neutral)

Increasingly, attorneys are hired to mediate disputes. This rule would require lawyers to inform the parties that the lawyer is not representing them.

Under the definition of "tribunal," lawyers in a mediation or non-binding arbitration would not have the same special duty of candor required in proceedings before a court. Comment [5].

Rule 3.1 (Meritorious Claims)

The proposal would strike the provision in the current comment which characterizes actions taken to harass or injure as "frivolous." This is consistent with the objective approach -- is there a basis in law and fact for the position taken in the pleading?

Rule 3.2 (Expediting Litigation)

No substantive changes proposed.

Rule 3.3 (Candor toward the Tribunal)

The rule would attempt to deal with the difficulties presented by the language of the present rule, which requires remedial action if the lawyer "has offered" false evidence. The recurring issue is whether a lawyer can be said to have "offered" false evidence if the lawyer didn't elicit it – it was volunteered by the witness. The proposed rule would require remedial action if the lawyer, the lawyer's client or a witness called by the lawyer offers false evidence.

The definition of tribunal is any body which can issue a legal binding decision, which would include administrative proceedings.

The proposed rule would also require lawyers to attempt to prevent their clients from engaging in criminal or fraudulent conduct.

The proposed rule would allow lawyers to decline to present testimony reasonably believed to be false. With respect to a defendant in a criminal case, however, the attorney must know the testimony to be false before refusing the client the right to testify.

Note -- Unlike ABA Rule 3.3, the Kentucky version of the rule does not require a lawyer to tell the court of adverse authority not disclosed by the opponent.

Rule 3.4 (Fairness to the opponent)

No change proposed.

Note – The Kentucky version of 3.4 differs from the ABA model in two particulars. Unlike ABA 3.4. our rule makes it unethical for a lawyer to threaten disciplinary or criminal charges solely to obtain an advantage in a criminal or civil case. The ABA rule is silent on the matter.

Second, unlike the ABA, the Kentucky rule does not prohibit requesting witnesses not to speak to

the other side. The ABA rule prohibits the practice unless the potential witness is a relative or employee of the client and even then only if it's in the best interests of the potential witness not to cooperate.

Rule 3.5 (Impartiality of the Tribunal)

The proposed rule would provide that a lawyer shall not communicate with a juror after verdict if prohibited by law or court order (which seems unnecessary) or if the communication involves coercion misrepresentation, etc.

3.6 (Trial Publicity)

No change proposed.

Note – the Kentucky rule does not incorporate the changes made in ABA 3.6 after Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

Rule 3.7 (Lawyer as Witness)

No change proposed

Rule 3.8 (Duties of Prosecutor)

No substantive change proposed

Note -- the Kentucky version of 3.8 is somewhat narrower than ABA 3.8

Rule 3.9 (Layer appearing before the Legislature or an Administrative Agency)

No substantive change proposed.

Rule 4.1 (Truthfulness in Dealing with Others).t

No substantive change proposed.

Rule 4.2 (Communications with represented persons)

No substantive change proposed. Proposed note [6] would make a subtle change in the categories of employees who are "off limits" in suits against represented organizations. No longer would mere witnesses be off limits. The proposed note(showing additions and deletions) is as follows:`

[6] In the case of ~~an~~ a represented organization, this Rule prohibits communications ~~by a lawyer for another person or entity concerning the matter in representation~~ with ~~persons having a managerial~~

~~responsibility on behalf~~ a constituent of the organization~~, and with any other person~~ who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with ~~that~~ the matter may be imputed to the organization for purposes of civil or criminal liability ~~or whose statement may constitute an admission on the part of the organization~~. Consent of the organization's lawyer is not required for communication with a former constituent. If ~~an agent or employee~~ a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4, Comment [2].

Rule 4.3 (Dealing with Unrepresented Persons)

The proposed rule would add a sentence to the effect that a lawyers shall not give advice to an unrepresented person (other than the advice to get a lawyer) if the unrepresented person and the client's interests might conflict.

Rule 4.4 (Respect for Rights of Third Persons).

The proposed rule would attempt to deal with a "hot-button" issue that has been mooted at CLE programs for years: the "misaddressed fax." The rule and notes would provide:

(b) A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Commentary

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission

subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Rule 5.1 (Supervisory Responsibilities)

No substantive change proposed.

Rule 5.2 (Responsibilities of a Subordinate Lawyer)

No change proposed.

Rule 5.3 (Responsibilities regarding non-lawyer assistants).

No substantive change proposed.

Note: – Kentucky has a very fine paralegal rule (SCR 3.700)

Rule 5.4 (Professional Independence)

No substantive change proposed.

Rule 5.5 (Unauthorized Practice)

The proposed rule would attempt to deal with the interstate practice issue. Of particular note is the subsection which would say that a lawyer does not engage in unauthorized practice if

the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice;

The explanatory note to this subsection states:

[5] Paragraph (b)(2)(ii) recognizes that the complexity of many matters requires that a lawyer whose representation of a client consists primarily of conduct in a jurisdiction in which the lawyer is admitted to practice, also be permitted to act on the client's behalf in other jurisdictions in matters arising out of or otherwise reasonably related to the lawyer's representation of the client. This conduct may involve negotiations with private parties, as well as negotiations with government officers or employees, and participation in alternative dispute-resolution procedures. This provision also applies when a lawyer is conducting witness interviews or other activities in this jurisdiction in preparation for a litigation or other proceeding that will occur in another jurisdiction where the

lawyer is either admitted generally or expects to be admitted pro hac vice.

Rule 5.6 (Restrictions on the Right to Practice)

No substantive change.

Rule 5.7 (ABA rule regarding law-related services)

No change proposed.

Note -- Kentucky does not have this rule.

Rule 6.1 (Pro bono Service)

No change proposed. The ABA rule is more strongly worded than the Kentucky rule.

Rule 6.2 (Accepting appointments)

No change

Rule 6.3 (Membership in Legal Services Organizations)

No change.

Rule 6.4 (Law Reform Activities)

No change

Rule 6.5 – a new rule intended to encourage lawyers to provide short term representation to clients in nonprofit programs. This is not a proposal for a general "lawyer-temp" rule.

Rule 7.1 (Communications about Lawyers' Services)

No substantive change, though the subsections are dropped into the comments.

Rule 7.2(Advertising)

Would specifically allow lawyers to pay the usual charges of a "qualified" lawyer referral service -- one that has been approved by the appropriate regulatory authority.

Note -- Kentucky's advertising rules are very different from ABA Rule 7.2.

Rule 7.3 (Solicitation)

The proposed rule would allow lawyers to solicit other lawyers and close friends (in addition to family members and former clients).

Rule 7.4 (Specialization)

No substantive change.

Rule 7.5 (Firm names)

No substantive change.

Rule 7.6 (Political Contributions)

No change. The ABA added this rule to the Model Rules in 2000; if adopted by the states it would attempt to address the perceived problem of lawyers donating to candidates in order to obtain legal business. Current ABA 7.6 provides as follows:

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Rule 8.1 (Bar Admission)

No change.

Rule 8.2 (Statements about judges and public officials)

No change.

Rule 8.3 (Reporting misconduct)

No substantive change proposed.

Note -- Kentucky does not require lawyers to report the misconduct of other lawyers.

Rule 8.4 (Misconduct)

No substantive change.

Rule 8.5 (Choice of Law)

USING EXHIBITS AND DEMONSTRATIVE EVIDENCE AT TRIAL

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SECTION E

USING EXHIBITS AND DEMONSTRATIVE EVIDENCE AT TRIAL

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USING EXHIBITS AND DEMONSTRATIVE EVIDENCE AT TRIAL

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(Rev. 10/08/01)

A. PURPOSE - TO COMMUNICATE AND PERSUADE

"The practice of admitting photographs and models in evidence in all proper cases should be encouraged. Such evidence usually clarifies some issue, and gives the jury and the court a clearer comprehension of the physical facts than can be obtained from the testimony of witnesses." *Cincinnati, N.O. & T.P. Ry. Co. v. Duvall,* 263 Ky., 387, 92 S.W.2d 363 (1936).

B. EXHIBITS - REAL EVIDENCE

1. Rule of Admissibility: Exhibits, like any evidence, must be relevant (KRE 401 and 402), not unduly prejudicial (KRE 403) and authentic (KRE 901 and 902). *And see Gorman v. Hunt,* Ky., 19S.W.3d 662, 669 (2000).

2. Introducing Exhibits at Trial:

   (a) Exhibit is marked (preferably in advance);

   (b) Witness identifies exhibit;

   (c) Witness authenticates exhibit;

   (d) Move Court for introduction;

   (e) Publish to jury (?).

3. Pre-trial "admission" of Exhibits:

   Most Courts issue a scheduling order which requires the parties to identify and produce exhibits days or weeks before trial. Frequently, the scheduling order provides that Exhibits not specifically objected to will be admitted into evidence. Exhibits not objected to are then generally admitted without foundation requirements.

4. Methods of Authentication:

(a) Requests for Admission (CR 36)

-"including the genuineness of any document"
-copies of any such documents "shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying."

5. Exhibits Go To The Jury Room

6. Rejected Exhibit – Offer of Proof:

If the Court sustains an objection to the exhibit, and it cannot be introduced through another witness, then the exhibit should be marked "tendered – not introduced," and placed in the record by an offer of proof. *See* KRE 103(a)(2).

C. VISUAL AIDS - DEMONSTRATIVE EVIDENCE

1. A visual aid is not evidence. Visual aids are not "introduced" and do not go to the jury room.

2. Demonstrative evidence is appropriate if it aids the jury's understanding, or assists the witness' explanation.

3. Use of demonstrative evidence is within the discretion of the trial court.

4. The visual aid, or a photograph of the visual aid, should be put in the Court record for appeal purposes. *See Meglemry v. Bruner*, Ky., 344 S.W.2d 808, 809 (1961).

D. KENTUCKY CASE LAW: EXHIBITS and DEMONSTRATIVE EVIDENCE

1. Use at trial:

Voir dire

Writing amount of damages sought on blackboard during voir dire is permitted. *Eichstadt v. Underwood*, Ky., 337 S.W.2d 684, 687 (1960).

Opening Statement

Showing object to jury during opening statement permissible – at least where object is later introduced into evidence. *Shelton v. Comm.*, 280 Ky. 733, 134 S.W.2d 653, 659 (1939).

Closing Argument

Showing object or reading from document in closing argument is permissible – even where object or document not formally introduced as an exhibit, so long as the object or document was referred to or read from by a witness. *Edwards v. Whitley City Sales,* Ky., 246 S.W.2d 1018, 1020 (1952); *Jones v. Driver,* 282 Ky. 82, 137 S.W.2d 729, 731 (1940).

Using magnetized blackboards and toy automobiles during closing argument to illustrate argument is permissible. *Ramey v. Ruth,* Ky. 376 S.W.2d 292, 294 (1964).

Playing brief portion of witnesses' videotaped trial testimony in closing argument permitted. *Owensboro Mercy Health System v. Payne,* Ky. App., 24 S.W.3d 675, 678 (2000).

Court Record

In *Meglemry v. Bruner,* Ky., 344 S.W.2d 808, 809 (1961), the Court discussed how the use of "charts, diagrams or sketches in the trial to illustrate or demonstrate oral testimony is helpful to a better understanding by the jury... ." The Court commented "on the obvious difficulty of understanding the evidence (on appeal) where such maps or drawings are not in the record."

2. Specific Issues.

Blackboard

Writing amount of damages sought on blackboard during voir dire is permitted. *Eichstadt v. Underwood,* Ky., 337 S.W.2d 684, 687 (1960).

Using magnetized blackboards and toy automobiles during closing argument to illustrate argument is permissible. *Ramey v. Ruth,* Ky. 376 S.W.2d 292, 294 (1964).

Court recognized "the common practice of admitting free sketches on a blackboard." *Severance v. Sohan,* Ky., 347 S.W.2d 498, 502 (1961). *And see Meglemry v. Bruner,* Ky., 344 S.W.2d 808 (1961).

Body Part

Jury's view of plaintiff's scar permissible. *Wheeler v. Helterbrand,* Ky., 358 S.W.2d 501, 502 (1962).

Books

If book qualifies as a learned treatise, the book or the relevant portions may be read into evidence, but may not be introduced as an exhibit. KRE 803(18).

Computer Generated Visual Evidence (CGVE)

May be demonstrative or substantive. *Gosser v. Comm.*, 31 S.W.3d 897, 901-903 (2000).

Deposition

Generally not allowed as an exhibit. *Wright v. Premier Elkhorn Coal Co.*, Ky. App., 16 S.W.3d 570 (1999).

Drawings

Court recognized "the common practice of admitting free sketches on a blackboard." *Severance v. Sohan*, Ky., 347 S.W.2d 498, 502 (1961). *And see Meglemry v. Bruner*, Ky., 344 S.W.2d 808 (1961).

Exemplar Parts or Products

Model wheel assembly properly admitted into evidence as it was a true replica and useful to aid the jury. *Hogan v. Cooke Pontiac*, Ky., 346 S.W.2d 529, 532 (1961).

Prejudicial error for trial court to disallow model (exact facsimile of steps on train platform) as real evidence. *Cincinnati, N.O. & T.P. Ry. Co. v. Duvall*, 263 Ky. 387, 92 S.W.2d 363, 366 (1936).

Experiments

Where allegedly defective appliance was experimented upon and results of experiments were introduced into evidence, fact that appliance was not shown to be in substantially same condition as at time of event at issue is not ground for objection when relative conditions of appliance at times of test and accident were made plain to jury. *Current v. Columbia Gas of Ky.*, Ky., 383 S.W.2d 139 (1964). *And see Bradshaw v. Bradshaw*, Ky., 435 S.W.2d 765, 767 (1968) (Courtroom experiment with ladder).

Criteria for admissibility of experiment and evidence thereon are whether such evidence tends to enlighten the jury and enable them to consider more intelligently the issues of the case, or whether the evidence afforded by experiment is more reliable or

satisfactory than oral testimony. *Lincoln Taxi Co. v. Rice*, Ky., 251 S.W.2d 867 (1952). (Court held that evidence of police officer's "experiment" concerning who had the "green light" was improperly admitted.)

Witness' testimony regarding an out of court experiment in which the circumference of the witness' head was measured, and prosecutor's comment regarding this in closing argument was found to be irrelevant and reversible error because there was no evidence that the decedent's head was ever measured or similar to the witness' head. *Meredith v. Com.*, Ky., 959 S.W.2d 87, 92 (1998).

Expert Reports

Not admissible as an exhibit. Hearsay, even if expert testifies at trial. *Wright v. Premier Elkhorn Coal Co.*, Ky. App., 16 S.W.3d 570, 571 (1999).

Can't use notarized letter of non-testifying doctor to cross-examine an expert. *Hawkins v. Rosenbloom*, Ky. App., 17 S.W.3d 116, 117 (1999).

Hospital Records

"It is now well settled that the medical record of a patient in a hospital is admissible in evidence under the regular business entries exception to the hearsay rule." *Baylis v. Lourdes Hosp., Inc.*, Ky., 805 S.W.2d 122, 123 (1991).

"Upon matters properly included therein, medical records are entitled to the same dignity as other forms of evidence produced at trial." *Baylis, id.*

Admission of hospital chart is within court's discretion. *Young v. J.B. Hunt Transp., Inc.*, Ky., 781 S.W.2d 503 (1989).

Mere compliance with KRS 422.300 does make the record admissible, if inadmissible for other reasons. *Phipps v. Winkler*, Ky. App., 715 S.W.2d 893 (1986).

KRS 422.300. Use of photostatic copies of medical record.

KRS 422.305. Subpoena of (medical) records.

KRS 422.310. Personal attendance of custodian of hospital records, when.

KRS 422.320. Return of medical records to court clerk.

Learned Treatises

"If admitted, the statements (contained in published treatises, etc.) may be read into evidence but may not be received as exhibits." KRE 803(18)

Life Expectancy Table

Court may take judicial notice of life expectancy/mortality tables. *Morris v. Morris,* Ky., 293 S.W.2d 243 (1956).

Maps

Admission of map into evidence was proper where engineer testified that it "fairly and accurately represented the area in question." *Severance v. Sohan,* Ky., 347 S.W.2d 498 (1961).

Models

Model wheel assembly properly admitted into evidence as it was a true replica and useful to aid the jury. *Hogan v. Cooke Pontiac,* Ky., 346 S.W.2d 529, 532 (1961).

Prejudicial error for trial court to disallow model (exact facsimile of steps on train platform) as real evidence. *Cincinnati, N.O. & T.P. Ry. Co. v. Duvall,* 263 Ky. 387, 92 S.W.2d 363, 366 (1936).

Motion Pictures/Video

Generally governed by the rules that relate to photographs. *Columbia Gas of Kentucky v. Tindall,* Ky., 440 S.W.2d 785 (1969). (Not reversible error for trial court to refuse showing of film).

In *Reffitt v. Hajjar,* Ky. App., 892 S.W.2d 599, 606 (1994), a wrongful death case, the Court held that it was proper to show the jury a videotape depicting medical treatment received by plaintiff's decedent for purposes of establishing pain and suffering. The Court also held that video depicting still photographs of plaintiff's decedent was proper, except for "the coffin scene."

Video of Hospital walk-through, to show distance between two points was admissible. *Owensboro Mercy Health System v. Payne,* Ky. App., 24 S.W.3d 675, 678 (2000).

Playing brief portion of witnesses' videotaped trial testimony in closing argument permitted. *Owensboro Mercy Health System v. Payne,* Ky. App., 24 S.W.3d 675, 678 (2000).

Photographs

"Must be relevant to some material issue and not be prejudicial either by distortion or cumulative effect or grotesqueness." *Robinette v. Comm. Dept. of Highways,* Ky., 380 S.W.2d 78 (1964).

In *Paducah Area Public Library v. Terry,* Ky. App., 655 S.W.2d 19 (1983), the Court held that post-accident photographs of the plaintiff were probative to aid the jury "in determining the extent of the injuries and the degree of pain and suffering."

Trial court's refusal to allow introduction of photographs of deceased to show pain and suffering upheld. *Clark v. Hauck Mfg. Co.,* Ky., 910 S.W.2d 247, 253 (1995). Court stated there was "ample evidence as to pain and suffering presented to the jury through the deposition testimony of (the treating physician and the medical records.)"

Photographs of deceased child properly admitted. *Reffitt v. Hajjar,* Ky. App., 892 S.W.2d 599, 606 (1994).

Refusal to admit posed photographs shown to be exact and precise reproductions of events is prejudicial error. *Cincinnati, N.O. & T.P. Ry. Co. v. Duvall,* 263 Ky. 387, 92 S.W.2d 363 (1936).

"The mere fact that a photograph was taken at a time different from the date of the incident in question does not render it inadmissible if it can be established as a substantial representation of the conditions as they then existed." *Turpin v. Commonwealth,* Ky., 352 S.W.2d 66, 67 (1961).

Fact that photograph is more effective than oral description, and to that extent calculated to excite passion and prejudice, does not, standing alone, render it in admissible. *City of Louisville v. Yeager,* Ky., 489 S.W.2d 819 (1973).

"Merely because photographs are gruesome or revolting, they should not be inherently excluded." *Clark v. Hauck Mfg. Co.,* Ky. 910 S.W.2d 247, 253 (1995).

Photographs of partial reconstruction of scene of accident are admissible where testimony is given to authenticate them as fair and accurate representations, and some variance in testimony as

to precise distance between objects goes to weight, not admissibility. *Tumey v. Richardson,* Ky., 437 S.W.2d 201 (1969).

The admissibility of photographs is within the sound discretion of the trial court. *Tumey, supra,* at 205.

Posed photographs are treated as any other photographs. See *Gorman v. Hunt,* Ky., 19 S.W.3d 661, 668 (2000).
Requirements for Admissibility: (1) authentic, i.e., a fair and accurate representation of what the photo purports to depict; (2) relevant; and, (3) its probative value must not be substantially outweighed by danger of undue prejudice. *Gorman v. Hunt,* Ky., 19 S.W.3d 662, 669 (2000).

Crime scene reconstruction photographs must be authenticated by a witness having personal knowledge of the subject matter before being admitted into evidence (and trial court erred in admitting the unauthenticated photos). *Gosser v. Com.,* Ky., 31 S.W.3d 897, 901 (2000).

Standards

"'Guidelines for Standards of Care and Management Standards in the Post Anesthesia Care Unit,' published by the American Society of Post Anesthesia Nurses" was a helpful guide for measuring the appropriate standard of care and was properly admitted as an exhibit. *Davenport v. Ephraim McDowell Mem. Hosp.,* Ky. App., 769 S.W.2d 56, 61 (1989). *And see Owensboro Mercy Health System v. Payne,* Ky. App., 24 S.W.3d 675, 679 (2000).

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." KRE 1006. Rule 1006 requires "timely written notice" of a party's intention to use a summary, and that the underlying documents be made available to the other parties.

Where a fact can be ascertained only by the inspection of numerous documents made up of many detailed statements, a summary of those documents is admissible if prepared and offered by a competent witness who has examined the documents and summarized the results. *Municipal Paving Co. v. Farmer,* Ky., 255 S.W.2d 618, 620 (1953).

For a summary to be admissible, documents upon which the summary is based must be made accessible to the opposing party

in order that correctness of the summary may be tested on cross-examination. *Municipal Paving Co., supra.*

Summary of nurse's recovery room experience properly made an exhibit. *Davenport v. Ephraim McDowell Mem. Hosp.,* Ky. App., 769 S.W.2d 56, 62 (1989).

It was improper to admit as an exhibit a summary of a witness' testimony prepared by defense counsel during cross-examination of plaintiff's expert which accentuated defendant's theory of the case. The Court stated: "A trial attorney's handwritten notes of selected portions of a witness' testimony are shrouded in a slanted subjectivity, regardless of the witness' authentication. ... The harm of allowing counsel's notes to be taken into the jury room is worsened by the fact that when it is the court's imprimatur stamped upon the notes there is a high likelihood that a jury will be unduly impressed with an inordinate perception of their significance. Counsel should withhold summary of the evidence until closing argument." *Davenport v. Ephraim McDowell Mem. Hosp.,* Ky. App., 769 S.W.2d 61 (1989).

Video

See "Motion pictures."

X-Rays

Generally must be authenticated by physician with knowledge of the injury. *Consolidated Coach Corp. v. Saunders,* 229 Ky. 284, 17 S.W.2d 233 (1929); *Armstrong v. McGuire,* Ky., 317 S.W.2d 902 (1958) (X-ray photograph was competent proof).

3. Other Legal Sources

-Lawson, *The Kentucky Evidence Law Handbook,* Chapter 11 (1993).
-Osborne, *Trial Handbook for Kentucky Lawyers,* Chapter 31 (1992).

E. JURY VIEW OF SCENE

1. KRS 29A.310(3) provides:

When necessary the judge may authorize the jury to view the real property which is the subject of the litigation, or the place in which any material fact occurred, or the place in which the offense is charged to have been committed.

2. Purpose of view:

In this state, that purpose is to enable the jurors better to understand and weigh the evidence adduced in the courtroom. *Commonwealth, Dept. of Highways v. Farra,* Ky., 338 S.W.2d 696 (1960). What is observed by the jury in the course of the view is not evidence. *Pierson v. Commonwealth,* Ky., 350 S.W.2d 487 (1961). *And see Comm., Dept. of Highways v. Hackworth,* Ky., 400 S.W.2d 217, 220 (1966).

The site viewed by the jury should have been helpful in determining how the accident occurred or might have occurred, and the probable benefits to the jury would substantially outweigh any potential prejudice to (plaintiff) in this case. *Thomas v. Surf Pools, Inc.,* Ky. App., 602 S.W.2d 437 (1980).

3. Trial Court's discretion:

Site view within discretion of the trial court. *Illinois Basin Oil Ass'n. v. Lynn,* Ky., 425 S.W.2d 555 (1968).

But see, Nash v. Searcy, 75 S.W.2d 1052, 256 Ky. 234 (1934), which held that the trial court abused its discretion in not permitting jury to view allegedly dangerous stairway.

F. EXHIBITS THROUGH PRE-TRIAL DISCOVERY

1. Deposition (CR 30)

"The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition." CR 30.02(5)

2. Interrogatory (CR 33)

Interrogatory No. : Please list and describe each and every authoritative text or exhibit which the defendant intends to offer into evidence at the trial of this case or intends to use or refer to at any deposition in this case.

Interrogatory No. : Do you contend that defendant was not at fault in causing or contributing to the motor vehicle collision as alleged in the complaint? If so, identify each witness (name, address and telephone number) and document which supports this contention.

Interrogatory No. __: Do you contend that plaintiff was not injured as alleged in the complaint? If so, identify each witness (name, address and telephone number) and document which supports this contention.

3. Request for Production (CR 34)

Request No. __: Copies of any photographs, video tapes or any other type of photographic representation which depicts the plaintiffs or shows the nature or extent of the injuries to plaintiff.

Request No. __: All exhibits, models, photographs or other documents or things by whatever name called, that the defendant or its attorneys intend to rely upon to demonstrate and/or support facts relevant to this lawsuit, whether in deposition or trial.

4. Request for Admission (CR 36)

May request other party to admit "the genuineness of any documents described in the request." CR 36.01(1)

5. Pretrial Order (CR 16)

-watch out for Local Rules

-to exchange witness and exhibit list

-real (exhibits) vs. demonstrative (visual aids)

G. MOTION IN LIMINE

1. KRE 103(d) provides "for a ruling in advance of trial on the admission or exclusion of evidence."

H. TRIAL TIPS

1. Have exhibits pre-marked.

2. Have trial schedule with a list of which exhibits are to be introduced through each witness.

3. Any exhibit worth showing is worth enlarging (with exceptions).

4. For oversize exhibits, a reduced copy or a photograph of the exhibit should be tendered to the Court so that it may be transmitted with the record on appeal.

5. **MORE IS NOT BETTER.**

I. EXAMPLES OF "LIABILITY" EXHIBITS

1. Collision diagram from police report
2. Photograph(s) of scene
3. Photograph(s) of vehicles
4. Defective product vs. safe product
5. Smoking gun documents

J. EXAMPLES OF "DAMAGE" EXHIBITS

1. Past Medical Expenses
   -summary of bills (Exhibit 1)
   -supporting bills
2. Future Medical Expenses
   -itemized list
   -life table
3. Wage Loss
   -chart (Exhibit 2)
4. Permanent Impairment
   -past earnings chart (Exhibit 3)
   -W-2's
   -tax returns (?)
   -summary of economist report
5. Pain and Suffering
   -medical records
   -photographs
   -medical illustrations
   -x-rays
   -positives of x-rays

MEDICAL EXPENSES

HOSPITALS:

Lake Cumberland Regional Hospital P.O. Box 620 Somerset, KY 42502-0620	3/20/99 thru 4/13/99	$89,237.92
	5/14/99	1,783.66
	6/01/99 thru 6/08/99	8,874.75
	2/03/00	302.00
Cardinal Hill Rehabilitation Hospital 2050 Versailles Road Lexington, KY 40504	4/13/99 thru 4/29/99	35,020.00
	8/25/99	37.00
University of Kentucky Hospital P.O. Box 119 Lexington, KY 40588-0119	4/30/99	372.00

PHYSICIANS:

Melanio Medroso, M.D. Southeastern ER Physicians P.O. Box 30188 Nashville, TN 37241	3/20/99	522.00
Amr O. El-Naggar, M.D. 110 Hardin Lane, Ste. 1 Somerset, KY 42503	3/20/99	100.00
	3/21/99	200.00
	4/02/99	150.00

EXHIBIT 1

MISCELLANEOUS:

Somerset-Pulaski Co. EMS P.O. Box 3348 West Somerset, KY 42564-3348	3/20/99	348.00
	4/13/99	458.00
Lifeline Home Healthcare P.O. Box 938 Somerset, KY 42502	5/04/99 thru 5/13/99	646.55
Laboratory Corp. of America 4500 Conaem Drive Louisville, KY 40213-1955	5/06/99	161.25
Burgess Drug No. 2 U.S. Highway North Whitley City, KY 42653	5/10/99	10.17
	6/08/99	15.22 14.59 75.46
Rap-U-Save Plaza P.O. Box 930 U-Save Plaza, Rt. 27 Whitley City, KY 42653-0930 (606) 376-3307	7/08/99	22.98 14.98 23.98 78.69
	8/11/99	78.76 22.98
	9/10/99	22.98 23.98
Daugherty's Drug Store P.O. Box 548 Pine Knot, KY 42653	9/23/99	65.00
	10/13/99	9.00 5.10
	11/03/99	10.00 65.00
	11/11/99	9.00 5.10

9/27/00	5.10
	65.00
10/18/00	11.00
	6.00
10/28/00	5.10
	11.00
11/27/00	6.80
	50.00
	11.00
	5.10
	$147,098.35

PAST WAGE LOSS

(From Date of Injury Thru 12/31/95)

Dates	No. Wks.		Average Weekly Wage		Wage Loss
5/11/92 thru 12/31/92	33	x	$682.13	=	$22,510.29
1/01/93 thru 12/31/93	52	x	$682.13	=	$35,470.76
1/01/94 thru 12/31/94	52	x	$628.13	=	$35,470.76
1/01/95 thru 12/31/95	52	x	$628.13	=	$35,470.76
			TOTALS:		$128,922.57

EXHIBIT 2

10 Year Earnings Summary: 1982 - 1992

Year	Employer		Earnings
1982	South Kentucky RECC 925 N. Main Street Somerset, KY 42501		$ 16,362.75
1983	" "		17,607.76
1984	" "		19,107.87
1985	" "		19,831.03
1986	" "		21,452.25
1987	" "		22,616.38
1988	" "		22,782.61
1989	" "		25,717.95
1990	" "		26,631.06
1991	South Kentucky RECC	11,402.64	
	Bluegrass Electrical P.O. Box 1526 Somerset, KY 42501	5,859.00	
	Shely Construction Co. P.O. Box 12108 Lexington, KY 40580	74.00	
	Perdue Power Line Const. P.O. Box 1564 Paintsville, KY 41240	5,046.00	22,381.64

EXHIBIT 3

VIEWS FROM THE BENCH ABOUT TRIAL AND APPELLATE PRACTICE

Hon. James E. Keller
Kentucky Supreme Court
Frankfort, Kentucky

and

Hon. William S. Cooper
Kentucky Supreme Court
Frankfort, Kentucky

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SECTION F

VIEWS FROM THE BENCH:
A SURVEY OF CLERKS, JUDGES AND JUSTICES

PRIOR TO TRIAL:

1. **READ THE ADVANCE SHEETS.** ("It's embarrassing when a case in the advance sheet is directly in point and the lawyer has not read it, but the opposing lawyer has. I sure hope my doctor isn't like that.")

2. **NEVER TAKE A CASE WHEN:**
   - **A GROWN MAN COMES TO YOUR OFFICE WITH HIS MOTHER;**
   - **THE CLIENT SAYS HE WANTS A LAWYER WHO WILL DO "WHATEVER IT TAKES" TO WIN;**
   - **THE CLIENT SAYS MONEY IS NO OBJECT — IT IS A MATTER OF PRINCIPLE;**
   - **THE CLIENT SAYS HE CAME TO YOU BECAUSE ALL OF THE OTHER LAWYERS ARE "IN ON IT TOGETHER," OR ALL ARE CROOKED OR INCOMPETENT, ETC.**

3. **MEET AND BE NICE TO THE GATEKEEPERS — CLERKS, BAILIFFS, AND JUDGE'S STAFF.** ("You be nice to the clerks. They will be nice to you." "Don't [anger] the deputy clerks. If they like you, they can try to keep you in the good graces of the judge(s); Food, especially fattening donuts are always accepted by the clerks." "Show respect for clerks and deputies, they are trying to help you." "Don't be afraid to tell the clerk you are a new attorney and will need help." "It's the deputy clerks that really run the court system. Judges and circuit clerks think they do but it 'isn't so.'" "Out-of-town attorneys can help themselves by assisting the bench clerk with names and titles of co-counsel. Business cards still help!")

4. **IDENTIFY YOURSELF TO THE COURT.** ("There are so many new attorneys we don't always remember their names.")

5. **DO NOT MAIL IN WRONG DOLLAR AMOUNT TO FILE LAWSUIT.** ("[Complaint] sits around the office until they send in balance.")

6. **DO NOT REQUEST ENTIRE FILE FROM CLERK IF TWO OR THREE PAGES WILL SUFFICE.**

7. **DO NOT NEEDLESSLY FAX COPIES OF MOTIONS TO BE HEARD.** ("It is double work to handle a faxed copy of a motion and receive the original via first class mail the next day.")

8. **KNOW THE LOCAL RULES AND PRACTICES.** ("Most are reduced to writing and are available - if [you] have a question, a simple phone call to the clerk could save a lot of confusion." "[C]heck with local counsel as to not only local rules, but

customs and practices before that particular judge." "[F]ully acquaint yourself and staff (paralegals and runners) of the local practice on submission of motions and orders . . . .")

9. **HAVE RIGHT CASE NUMBER AND DIVISION ON YOUR FILINGS.** ("This is especially a problem when cases are consolidated.")

10. **HAVE CORRECT NUMBER OF COPIES OF PLEADINGS; BE SURE TO SIGN AND DATE PLEADINGS; BE PREPARED TO PAY FOR COPIES OR CERTIFICATIONS, DO NOT EXPECT TO RECEIVE THEM FREE.** ("These fees are set by the State and are not freebies.")

11. **INCLUDE SELF-ADDRESSED STAMPED ENVELOPES FOR RETURNING COPIES OF DOCUMENTS, ETC.**

12. **DO NOT ABUSE YOUR USE OF THE CLERK'S OR JUDGE'S OFFICE.** ("Remember, the Clerk's office is NOT an extension of your office. We want to help, however, we can not provide a workstation, typing service, phone, legal assistance, advice, etc.")

13. **NO DRIVE UP WINDOWS ON THE COURTHOUSE.** ("It seems to me that attorneys now believe every dispute they have justifies calling the court or just dropping in for an on the spot resolution. Everything really can't be an emergency. Perhaps that term needs some clarification for some folks.")

14. **WATCH OTHER TRIALS AND ARGUMENTS.** ("If you want to be a litigator, come and watch other attorneys try cases. It is amazing what you can learn, both good and bad, from watching others. . . . Don't limit yourself to how others in your firm do something or some (compensated) know it all seminar instructor who can't even find Kentucky on a map tells you.")

15. **DO NOT SEND AN UNPREPARED ASSOCIATE TO COVER A MATTER.** ("I'm always amazed at the number of times an associate or other partner are sent to cover a matter before and simply say - 'I know nothing about this file - just sent to cover' motion or whatever.")

16. **AFTER ANSWER FILED, INITIATE CONTACT WITH OPPOSING COUNSEL.** ("Initiate contact . . . within 30 days of the filing of the answer to plan a discovery schedule for the case. Discuss 'holding' certain dates on your respective calendars for depositions of the parties and contacting expert witnesses who have busy schedules immediately to obtain a mutually agreeable date on their calendars.")

17. **IF LACK OF COOPERATION FROM OTHER SIDE IN DISCOVERY, MOVE COURT FOR TRIAL DATE.**

18. **TALK TO OTHER SIDE <u>BEFORE</u> COMING TO COURT FOR A HEARING.**

("Don't use the scheduled hearing time to try and settle....negotiate in advance.")

19. **IF CASE IS ACTIVE WITH NUMEROUS MOTIONS, OBTAIN HEARING TO ADDRESS ALL PENDING MOTIONS.** ("This concentrated approach is more efficient for the Court and counsel than a continuing stream of appearances at every other motion hour.")

20. **NOTIFY COURT IMMEDIATELY IF CASE IS SETTLED.** (The failure to notify immediately of settlement "causes the Clerk a lot of unnecessary work" and costs the state. "An order of settlement does not do it. A judge signs thousands of orders and may not realize that an order settles a case sit for trial.")

21. **WITHDRAW OFFER IN CRIMINAL CASE IF OFFER NOT ACCEPTED ON OR BEFORE CERTAIN DATE.**

22. **KNOW CONTENTS OF PRETRIAL ORDERS, PARTICULARLY CUTOFFS FOR DISCOVERY.** ("Most motions to exclude witnesses or evidence are brought about by sloppy practice and require the trial court to balance litigants need to fully present their case vs. the other side's right to timely discovery." "Upon receipt of [order], enter all dates on your [calendar] immediately. Compare those dates to your discovery plan to ascertain that you can meet all deadlines without resort to motions before the Court.")

23. **COMPLY WITH DISCOVERY AND DISCLOSURE DEADLINES.**
    - **IF PROBLEM MEETING DEADLINE, DISCUSS FIRST WITH OPPOSING COUNSEL.**
    - **FILE MOTION FOR EXTENSION OF TIME IN ADVANCE OF DEADLINE.**
    - **READ FRATZKE v. MURPHY, Ky., 12 S.W.3D 269 (1999).** ("By omitting [from her response to defendant's interrogatories] an amount for any damage claim other than her medical expenses incurred to date, Fratzke effectively stated that her claim for her unliquidated damages was nothing. Thus, under [CR 8.01(2)], Fratzke's claim for unliquidated damages at trial could not exceed $0.00." Id. at 271).

24. **SUMMARIES ARE EXTREMELY VALUABLE FOR THE TRIAL ATTORNEY, AND WHILE KRE 1006 AUTHORIZES THE USE OF SUMMARIES, THE RULE REQUIRES THAT TIMELY WRITTEN NOTICE MUST BE GIVEN OF THE INTENTION TO USE A SUMMARY, PROOF OF WHICH SHALL BE FILED IN THE RECORD.**

25. **KRS 422.300 - 330 (CERTIFICATION PROCEDURE FOR MEDICAL CHARTS AND RECORDS) ONLY APPLY TO HOSPITALS AND NOT A PHYSICIAN'S OFFICER RECORDS. SEE, HOWEVER, KRE 902(11) FOR SELF-AUTHENTICATION OF BUSINESS RECORDS ON THE CERTIFICATION OF THE CUSTODIAN.**

26. **A BRIEF SHOULD BE BRIEF; USE FOOTNOTES FOR RELATED POINTS.** ("Lawyers should make every effort to keep their briefs as concise as possible. It's a fact of life that judges have only a limited amount of reading time, and a short brief is far more likely to be read fully. Lawyers should concentrate on presenting concise arguments.")

27. **AVOID EXCESSIVE ADVOCACY.** ("Some briefs are so filled with advocacy that the case as presented by one side and then the other is hardly identifiable as the same case. Excessive advocacy in which the facts are slanted or distorted or the law distorted or incomplete causes courts to distrust the advocate.")

28. **CITE A CASE, STATUTE OR OTHER AUTHORITY FOR YOUR POSITION WHEN ARGUING MOTIONS.** ("Never assume the Judge knows the law or the facts of the case. Always cite where you found the law and your interpretation of the law." "Insisting to the judge that 'It's the law in Kentucky' or 'All the judges do it this way' is simply not enough. Your presentation on the issue should be (1) ' The law in Kentucky is set forth in . . .' (2) ' Judge, I cannot find any Kentucky precedent on this issue but in .....' or (3) 'I have found no reported cases on this particular issue but by analogy . . .'")

29. **PROVIDE COURT WITH COPIES OF CITED CASES (EXCEPT <u>STEELVEST</u>) AND STATUTES.**

30. **HAVE ANSWERS FOR THE QUESTIONS THAT YOU KNOW WILL LIKELY BE ASKED BY THE JUDGE.** ("How much time do you need?" "How much bond can your client make?" "Can your client pay the fine today?")

31. **PROOFREAD ALL PREPARED EXHIBITS.** ("A paralegal or secretary error is ultimately a lawyer error and leaves a negative impression with the jury.")

32. **PRE-MARK EXHIBITS.** ("It saves a little time on each item and that can become significant where there are many exhibits and/or it is a long trial.")

33. **NOTIFY CLERK OR COURT ADMINISTRATOR OF EQUIPMENT NEEDS BEFORE TRIAL.**

34. **ASK FOR JURY INFORMATION SHEETS BEFORE TRIAL.**

35. **KNOW YOUR WITNESSES.** ("I feel that attorneys need to know their witnesses better. By this I mean they should meet with all witnesses and get to know the strengths and weaknesses of their testimony." "[I]nterview[] witnesses . . . in advance [of trial]. [T]his is more of a problem in District Court cases.")

36. **VISIT CRIMINAL DEFENDANTS IN JAIL.** ("Often that is all that is required to keep them happy.")

37. **BE PRESENT FOR JURY ORIENTATION.** ("[I]t is important for [lawyers] to be present on . . . the day of jury orientation for the jury panel for that month so that they can hear what the judge tells the jury about jury service, the trial process, burdens of proof, etc.; and [they] therefore do not engage in a lot unnecessary repetition when conducting voir dire or making opening statements, etc. . . . It also gives the jury the impression that the lawyer is interested in the proceedings and what the judge has to say and provides a good reference point when conducting voir dire.")

AT TRIAL OR ORAL ARGUMENT:

38. **GROOM AND DRESS APPROPRIATELY FOR COURT.** ("Can't have the plaintiff or defendant looking better than their attorney.")

39. **DO NOT FILE PRETRIAL MOTIONS OR TRIAL MEMORANDA THE MORNING OF THE TRIAL.** ("I detest holding hearings while juries wait to start the trial, and generally will not give much attention to motions such as this." "We are not speed readers, and would prefer to have [trial memoranda] at the pretrial, or at least some reasonable time before the trial.")

40. **BE ON TIME — BE ON TIME — BE ON TIME.** ("I often wonder how some attorneys ever fly anywhere. Do they hold the plane until they arrive?")

41. **PREPARATION, PREPARATION, PREPARATION.** ("It is so obvious and sometimes embarrassing when one attorney is shooting from the hip versus the attorney who is well prepared and knows the facts of the case and the law supporting their argument." "As a judge, nothing is more distracting to either the court or the jury than a lawyer who has no idea what he or she needs to prove nor how to prove it properly." "The first order of business should be preparing Jury Instructions as obviously their client's 'story' to the jury must fit within the contest of the Jury Instructions. For me, the next step would be preparing the opening statement---the story that counsel intends to tell the jury. With those two critical outlines begin the detail work of figuring out exactly what witnesses are needed & in what order so that the client's 'story' can be presented to the jury through legally admissible evidence.")

42. **TREAT WITNESSES WITH RESPECT AND BE CONSIDERATE OF THEM AND THEIR TIME.**
    - **DO NOT LEAVE IN WITNESS ROOM WHILE YOU GO OFF TO LUNCH.**
    - **DO NOT LEAVE IN HALL DURING 4-DAY TRIAL.**
    - **DO SCHEDULE THEIR APPEARANCE IF POSSIBLE.**

43. **BE COURTEOUS AND POLITE TO THE COURT AND OPPOSING ATTORNEY.** ("Jurors like nice people and want to help them.")

44. **BE CANDID WITH COURT, I.E., DO NOT ARGUE WHEN YOU HAVE NO**

ARGUMENT. ("Pick your battles. You can't be right 100% of the time, every time. Know when to back off." "[C]ounsel should strive at all times to maintain credibility with court. Beyond truthfulness, which is essential, it includes not making frivolous arguments, and upholding the dignity of the judicial process. Lawyers who have maintained their credibility are clearly much more effective in their arguments and in their representation of their clients." "Don't represent to the Court what your client tells you is the gospel. It will make a liar out of [you].")

45. **ADDRESS ALL REMARKS AND ARGUMENTS TO THE COURT, NOT TO OPPOSING COUNSEL.** ("Do not argue with opposing counsel." "Avoid inappropriate language or disparaging personal remarks toward other counsel, parties or witnesses.")

46. **ARGUE IN THOUGHTFUL, DIGNIFIED MANNER; DO NOT BECOME LOUD OR EXCITED.** ("Speak to be heard by the judge, jury, witness . . . . Resist the temptation to speak when it is not necessary.")

47. **DO NOT RIDE A HORSE TO DEATH — DO NOT RIDE A DEAD HORSE.** ("One juror observed while he understood the attorney had to stress his point, the attorney had continued to the point that the jurors felt as if their intelligence was being questioned. I am sure that is a fine line to walk." "If it is important, it needs to be stated ONCE." "Pick the best witness to illicit a point of evidence and bring it in through that person only." "[D]on't put on repetitive witness[es] stating the same thing.")

48. **DO NOT INTERRUPT OPPOSING COUNSEL AND <u>NEVER</u> <u>EVER</u> INTERRUPT THE JUDGE.** ("Judges and juries share a distaste for this practice.")

49. **WHEN THE JUDGE INDICATES HE OR SHE HAS HEARD ENOUGH, STOP.**

50. **WHEN A JUDGE ASKS A QUESTION, ANSWER IT AS SUCCINCTLY AS POSSIBLE.** ("[I]f the judge asks a question, listen to and then answer THAT question, with no 'spin' or 'evasion.'")

51. **WRITE IN A SIMPLE PLAIN STYLE AND AVOID DRAMATIC AGGRESSIVE ARGUMENTS.**

52. **KEEP IT SIMPLE WITHOUT TALKING DOWN TO JURORS.**

53. **DO NOT ASK JURORS IF THEY WILL HOLD IT AGAINST YOU BECAUSE YOU ARE NOT FROM THEIR COUNTY.** ("Nothing will turn a jury off faster than this question.")

54. **AVOID REACTING TO RULINGS OR ARGUMENTS BY OTHER SIDE BY "LOOKS OF DISBELIEF," "ROLLING OF EYES," "SNICKERING," ETC.** ("I find certain reactions by lawyers to rulings irritating and to some extent a lack of respect. Lawyers should try not to react in such ways. At trial, the jury may not like it. At a hearing, the judge may not like it." "Don't pout. . . . If a Judge makes a ruling you disagree with do not get mad and pout. Make your record and take

care of it on appeal." "The Judge won't rule to create a personal affront, so you shouldn't create one either." "If you are the smartest lawyer in the courtroom everyone will figure it out without you telling them." "Jurors are more comfortable with attorneys who treat each other with civility.")

55. **BE PROFESSIONAL AND COURTEOUS; DO NOT BE NASTY TO OPPOSING COUNSEL OR THE COURT.** ("[I]t gets an attorney nowhere to be nasty to opposing counsel or the court. As obvious as that may seem, it is sometimes surprising how acerbic lawyers can be both in court and in writing." "Maintain an appropriate sense of humor. It makes everyone's life a lot easier." "Just because the other side is a jerk does not mean you are required to lower yourself to that level." "[S]nide remarks aimed at insulting a witness, litigant or adversary . . . [are] counterproductive with me.")

56. **OBJECT, OBJECT, OBJECT -- PRESERVE THE RECORD.** ("Do insist that the judge rule on your objection. It takes courage but you have to preserve your record." Don't wait for a judge to look at you [before] you object.")

57. **KNOW HOW TO USE INCONSISTENT STATEMENTS AND DEPOSITIONS TO IMPEACH.** ("Most lawyers don't know how.")

58. **DEPOSITION OF PARTY MAY BE USED BY ADVERSE PARTY FOR ANY PURPOSE.** (However, this does not include swatting the opposing lawyer on the head with it.)

59. **TENDER JURY INSTRUCTIONS ON DISK IN ADDITION TO WRITTEN INSTRUCTIONS.**

60. **DO NOT REFER TO JURORS BY THEIR FIRST NAMES.** ("I know that some attorneys consider this the first step in establishing some rapport with the jury. However, I have discussed this with other court personnel and with past jurors and the consensus is that that is a little too familiar in a jury trial . . . . To show proper respect to jurors is essential to get them on your side and this small gaffe at the outset of a trial should be avoided.")

61. **DO NOT, UNDER ANY CIRCUMSTANCE, DIRECT ANY COMMENT TO A JUROR EXCEPT DURING VOIR DIRE.** ("Do not hand exhibits to jurors.")

62. **DO NOT EMBARRASS A JUROR.** ("I have heard attorneys ask the voir dire panel 'Is there anyone on the panel who thinks it is against the law to drink and drive?' . . . [T]hese [type] questions place the juror in the position of having to raise his or her hand to expose an ignorance of the law. It is always bad form to embarrass a juror and that is what these type of questions do.")

63. **AVOID FAMILIARITY WITH OPPOSING COUNSEL AND WITNESSES.** ("The use of first names for adults shall be avoided.")

64. **REQUEST PERMISSION BEFORE APPROACHING BENCH OR WITNESS.**

65. **CONTROL YOUR CLIENT AND WITNESSES.** ("I wish that lawyers would inform their client-litigants and 'their' witnesses not to ask if they can speak out in court during arguments between lawyers or when they haven't been asked a question.")

66. **DO NOT USE REBUTTAL TO REPEAT EARLIER ARGUMENT.**

67. **REMEMBER: JURORS WATCH YOU, YOUR CLIENT AND YOUR WITNESSES IN AND OUT OF THE COURTROOM.** ("A woman with a back injury does not wear high heels; no 'high fiving' outside the courtroom; proper clothing.")

68. **DO NOT THANK THE JUDGE FOR EACH RULING.**

69. **DO NOT FORGET TO STAND WHEN JURY/JUDGE ENTERS OR LEAVES COURTROOM.**

70. **STAND WHEN ADDRESSING COURT OR EXAMINING A WITNESS.**

71. **DO NOT ASK THE COURT IN THE HEARING OF THE JURY TO DECLARE A WITNESS AS AN "EXPERT."**

72. **KNOW THE STANDARD OF REVIEW.** ("[S]et forth the standard of review in [your] brief and emphasize it early during [the] oral argument."

73. **DO NOT FUDGE ON BRIEF'S LENGTH.** ("Tricks such as small type size and numbering pages with "I, ii, iii, etc., are not appreciated.")

74. **MAKE PROPER USE OF APPENDIX.** ("Attach to the brief any orders, pleading, exhibits, foreign cases, etc., that are important to your case if you want them to be read. Don't bury the important items with extra documents just to increase your poundage." "If a jury trial, always attach jury instructions.")

75. **SET OUT RELEVANT STATUTE OR RULE FULLY.** ("If you do not set out the relevant statute or rule fully and your opponent does, the judge is more likely to keep your opponent's brief before him or her when reviewing the matter or listening to arguments.")

76. **OBTAIN SECOND OPINION BEFORE APPEALING.** ("While many counsel fear losing a client, many clients would be better served if their trial counsel sought a second opinion in preparing an appeal.")

77. **STATE YOUR POSITION ON AN ISSUE BEFORE YOUR SUPPORTING ARGUMENT.**

78. **AVOID EMOTIONAL JURY-TYPE ARGUMENTS TO JUDGES.**

79. **PRESERVE BENCH CONFERENCE.** ("[W]hen it is your turn to voice your objection, step closer to the bench microphone so that your words are . . . picked

up on the video recording.")

80. **PRESERVE PRETRIAL AND POST TRIAL HEARINGS.** ("[D]o not take for granted that [all hearings] [are] being video taped. . . . To be on the safe side at the beginning of your hearing, inform the Court you want [the] hearing recorded.")

81. **PHOTOGRAPH LARGE EXHIBITS.** ("[B]y providing [photographs of introduced exhibits], the Clerk when preparing the record will be able to put all your trial exhibits with the appealed record. This will allow the appellate judges to get a complete look at all the exhibits introduced at trial and make a complete appellate record.")

82. **CONDUCT EXHIBIT COUNT WITH CLERK AT END OF TRIAL.** ("[B]e sure all exhibits are in the clerk's possession and [the] record sheet of exhibits show correctly what is introduced and what was just marked for identification.")

83. **REVIEW APPELLATE RECORD WITH CLERK.** (This allows the attorney "to be sure everything is in the record.")

84. **STATE BASIS FOR OBJECTION.** ("[I]t would benefit the trial court and the appellate court if the objection referred to a specific rule of evidence instead of using general terms such as excited utterance, business record or whatever rule the attorney is relying on for a favorable ruling." "Please object with specific reasons instead of just saying, 'I object.'")

85. **DO NOT ASK A QUESTION WITHOUT A REASON.** ("I was talking to several judges and attorneys and one of the topics/complaints was the asking of a question with no idea as to the reason for the question." "The lawyer who asks questions simply to ask questions, with no idea as the reason for such questions, demonstrates that she or he is not prepared.")

86. **USE TIME LIMITS.** ("I just completed a week long trial as special judge . . . and imposed strict time limits on the lawyers. Otherwise, the trial would still be going! Time limits are a very practical tool in keeping trials on schedule.")

87. **DO NOT LEAN ON THE BENCH; DO NOT LET YOUR CLIENTS LEAN ON THE BENCH.** ("It is not a leaning post.")

88. **USE DEMONSTRATIVE EVIDENCE.** ("A picture is worth a thousand words; in the courtroom it may be worth thousands of dollars." "When preparing for trial, one of the first things a lawyer should consider is what demonstrative evidence he or she can use to present the client's case. Jurors like photographs; so, invest in a camera.")

89. **HAVE THE RULES OF EVIDENCE AND LAWSON'S WITH YOU.** ("You don't go to Bible study without the Bible, and you shouldn't go to trial without Lawson's.")

90. **WHEN ALL ELSE FAILS, READ THE RULES.**