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Chapter 8
Witnesses

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I. [8.1] Introduction and Scope

Intended as a practical guide to the examination of witnesses in civil trials, this chapter is written primarily for the less experienced trial lawyer. With civil trials becoming less frequent, however, even experienced lawyers can benefit from a review of basic principles before re-entering the courtroom after an involuntary hiatus.

Many lawyers view opening statement and closing argument as the most important parts of a trial even if—as trial judges are wont to say—these presentations are “not evidence.” Logically and legally, of course, the presentation of evidence is the crucial element of any party’s case, making the testimony of witnesses the undeniable heart of any trial.

II. [8.2] Preparing A Witness to Testify

A. [8.3] Have a Plan

The foundation for a successful examination is careful preparation. Lawyers rarely bungle the examination of witnesses as a result of too much preparation, and preparation necessarily implies a plan. The prepared lawyer has a plan for each witness, integrated into a plan for the trial as a whole, designed to insure that the key facts are not omitted and the story is coherent. In general, short and succinct testimony is preferable to long and convoluted, but the subject matter of a case does not always lend itself to short and succinct. Regardless of the number of witnesses or length of the trial, however, each witness should undergo adequate preparation.

For each witness to be called at trial:

1. List the facts and exhibits that make the witness necessary; if there are no such facts or exhibits, do not call the witness.
2. If the witness is capable, allow him or her to outline the key points you want to cover; otherwise, prepare the outline yourself.
3. Review the outline with the witness to insure that you know exactly what the witness is going to say.
4. If appropriate, *i.e.*, if the witness can be trusted, explain your theory of the case and your purpose for asking each question.

5. Identify all pre-trial statements or depositions, and make sure the witness reviews them.
6. If the witness's trial testimony might differ from previous statements or testimony, make sure the witness can explain the reasons for any difference.

B. [8.4] Practical Pointers to Give the Witness

Most witnesses have never testified, either in court or by deposition. If a witness falls into this category, don't forget to give practical advice:

1. Dress appropriately.
2. Get sufficient rest to be fresh and alert.
3. Follow your oath and tell the truth
4. Pay attention to the questions and do not volunteer information not called for.
5. Do not hesitate to say you do not understand a question or need it clarified..
6. Do not guess. If you don't know the answer to a question, say so.
7. Take your testimony seriously by choosing your words carefully.
8. Stop talking if an objection is made, and listen to the judge if he or she speaks.
9. If the questioner is asking a leading question, *i.e.*, a question that suggests the answer, only agree with those statements or words that you would say on your own.
10. Do not argue with the questioner, but do not be afraid to stand your ground if you know you are telling the truth.
11. If you need to clarify, explain, or correct an answer, ask for permission.
12. Ask for or refer to any documents you might need to insure the accuracy and truthfulness of your answers.
13. Look at the jury while you are testifying. They will be judging your testimony and your credibility, not the lawyers or the judge.

C. [8.5] Role Playing

An apprehensive, anxious witness whose testimony can make or break a case may need to practice. Bringing in a questioning attorney with whom the witness is not familiar, and asking that attorney to practice examination and cross-examination, can be highly beneficial. Practice courtrooms heighten the realism of such role playing, and the questioning can be videotaped for later critique. Most—but not all—witnesses improve when they see themselves as others see them. Take care, however, that such techniques do not destroy the self-esteem of a fundamentally insecure witness.

III. [8.6] Order of Presentation

The order of witnesses at trial is governed primarily by the story being told. Unfortunately, many factors can interfere with the preferred order. Travel, work schedules, and unanticipated complications can force a trial lawyer to change the order of witnesses, but optimal

presentation always starts with understanding the legal requirements.

A. [8.7] Past Rule

Until 1998, KRS 421.210(3) required that:

No person shall testify for himself, in chief, in an ordinary action, after introducing other testimony for himself in chief; nor in an equitable action, after taking other testimony for himself, in chief.

For many years, this statute prevented a party from first hearing other witnesses testify and then conforming his or her testimony to theirs. The constitutionality of this statute was seriously questioned by the appellate court in *Parrigin v. Sawyer*, 457 S.W.2d 504 (Ky. 1970), as "an attempt by the legislative branch to regulate the internal procedures of the judicial system which cannot be done under the doctrine of separation of powers." *Id.* at 508. Without declaring the statute unconstitutional, the court held that the order in which parties testified is within the discretion of the trial court. Still, most trial courts expected, if not required, a party representative to be the first witness during the case in chief.

In 1998, the General Assembly repealed KRS 421.210, leaving the order of proof governed by CR 43.02(c).

B. [8.8] Generally

In most cases, the plaintiff will be required to put on his or her evidence first. CR 43.02(c) provides:

The party on whom rests the burden of proof in the whole action must first produce his evidence; the adverse party will then produce his evidence. The party who begins the case must ordinarily exhaust his evidence before the other begins.

C. [8.9] Plaintiff's Order of Presentation

It is crucial that the plaintiff's theory of the case be presented in an orderly, logical and concise fashion. In its simplest form, the plaintiff's case can be divided into three areas of testimony.

1. Have the plaintiff tell the jury who he or she is. Give the jury the plaintiff's background. Humanize the plaintiff at every opportunity. (This should have already begun during opening statement.) Help the jury to like the plaintiff and to have sympathy for, or compassion for, the plaintiff.
2. Have the plaintiff and your witnesses tell the jury what happened to require the plaintiff to be in court. This is the liability part of your case.
3. Have the plaintiff and your witnesses tell the jury what damages plaintiff has suffered as a direct result of defendant's actions. This

establishes damages.

Be flexible and creative. Anticipate occasions when you will have to call a witness whose testimony is out of this logical order. If you know this in advance, explain to the jury in opening statement that because of Dr. Jones' schedule she will be called during the liability portion of the trial, even though she will discuss the damages the plaintiff has suffered.

Be creative. Some lawyers will call a damage witness immediately after the plaintiff testifies to create an impact with the jury in those cases where the damages are catastrophic. This method is often successful in encouraging empathy with the plaintiff and in stimulating the jury's interest in discovering why this happened to the plaintiff.

D. [8.10] Defendant's Order of Presentation

Often, much of a defendant's theory of the case can be presented during cross-examination of plaintiff's witnesses. As a consequence, defendants can and frequently do trim their witness lists at the close of a plaintiff's case in chief to avoid re-opening issues deemed "won" on cross-examination. These judgment calls are assessable only in hindsight.

Otherwise, defendants generally present witnesses in the same order as plaintiffs, witnesses on liability followed by witnesses on damages. This can help the jury recall the defendant's evidence during deliberations and more readily match it to the plaintiff's.

In cases where damages are more hotly contested than liability, a defendant can elect to call damage witnesses immediately after the close of the plaintiff's case to create a stark contrast between the parties' opposing views. Alternatively, in cases where liability is more hotly contested—and often where damages are not contested at all—defendant's witnesses may not discuss or venture opinions on anything but liability. If liability is strongly contested, the defendant may elect to conclude the evidence in chief by calling the most convincing liability witness last.

E. [8.11] Right to Call Rebuttal Witnesses

Each party is entitled to call witnesses in rebuttal after the opposing party has concluded his or her case in chief. CR 43.02(c) and (d). The trial court has the power to regulate rebuttal evidence to prohibit repetitious or cumulative evidence. *Prudential Ins. Co. of America v. Asbury*, 291 Ky. 400, 164 S.W.2d. 957 (1942).

Unless good cause is shown, evidence which should have been offered in chief is not permitted to be introduced as rebuttal. *Sea v. Commonwealth, Dept. of Highways*, 418 S.W.2d. 766 (Ky. 1967). This rule, like all other rules pertaining to the order of presentation of witnesses, is within the sound discretion of the court. *Marlowe Constr. Co. v. Jacobs*, 302 S.W.2d. 612 (Ky. 1957).

F. [8.12] Right to Reopen

After a party rests, a request to reopen the case and introduce additional evidence is solely within the discretion of the trial court, not a matter of right. CR 43.02(d) provides that

after the introduction of evidence in chief:

The parties will then be confined to rebutting evidence, unless the court, for good reasons in furtherance of justice, permits them to offer evidence in chief.

In *Logan v. Logan*, 432 S.W.2d. 34 (Ky. 1968), the court held that the right to reopen should not be allowed except in extraordinary circumstances to prevent manifest injustice. If it appears that a party desiring to reopen the case inadvertently omitted evidence, rather than deliberately engaged in unfair tactics, the right to reopen should be granted. *Fayette County Bd. of Educ. v. Phillips*, 439 S.W.2d. 319 (Ky. 1969). When a party discovers that evidence has been inadvertently omitted, that party must move the court to reopen before the jury is instructed on the law of the case. *Id.*

G. [8.13] Separation of Witnesses or "Invoking the Rule"

The separation of witnesses rule exists to prevent a witness from having an opportunity to be schooled by the testimony of others. To have non-party witnesses excluded from the courtroom during the course of trial, counsel need only say "Your Honor, I would like to invoke the Rule" or "I move for the separation of witnesses." It is generally preferable to request separation before opening statements to preclude expected witnesses from hearing even a forecast of the evidence.

KRE 615 makes the exclusion mandatory and removes the separate of witnesses from the trial judge's discretion in the absence of one of the enumerated exceptions. *Smith v. Miller*, 127 S.W.3d 644 (Ky. 2004). KRE 615, Exclusion of Witnesses, provides:

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

- (1) A party who is a natural person;
- (2) An officer or employee of a party which is not a natural person designated as its representative by its attorney; or
- (3) A person whose presence is shown by a party to be essential to the presentation of the party's cause.

Once the rule is invoked, counsel is responsible to ensure that all witnesses remain outside the courtroom until they testify. It is advisable to request the court to instruct the witnesses not to discuss the case or their testimony with one another until all witnesses have testified. This is particularly important because KRE 615 does not prevent the interaction of witnesses outside the courtroom. *Woodard v. Commonwealth*, 219 S.W.3d 723 (Ky. 2007). This rule, however, should not restrict the lawyers from discussing testimony with witnesses before they testify. *Reams v Stutler*, 642 S.W.2d. 586 (Ky. 1982).

If the rule is violated, the court has broad discretion to decide whether a witness violating the rule should be permitted to testify. *Sanders v. Drane*, 432 S.W.2d. 54 (Ky. 1968).

Application of the exclusionary rule to Rule 26 experts is uneven. Many courts refuse to apply the rule to experts, recognizing that expert witnesses usually read pre-trial depositions and the opposing party's expert witness disclosures in the course of formulating their opinions. Under these circumstances, an expert can be deemed "a person whose presence is . . . essential to the presentation of the party's cause." On the other hand, if only one party's expert was deposed before trial, counsel might persuade the court that separation of experts is necessary to maintain a level playing field.

H. [8.14] Primacy and Recency

Another consideration when planning the order of proof are the well-known principles of primacy and recency. The human memory recalls best what is heard first and last.

Effective story telling, therefore, begins interestingly (primacy) to gain the listener's attention and ends memorably (recency) in a way the listener will not soon forget. So, whatever you do or however you do it, make your witnesses' testimony interesting and memorable.

Often, a jury's most lasting impression of a case is formed when the named party testifies. If the named party does well, call next those witnesses whose testimony is useful but not crucial and conclude with the strongest and most convincing witness.

IV. [8.15] Direct Examination

The purpose of direct examination is to present a party's case to the jury in a clear and concise manner.

A. [8.16] Form of Questions

As a general rule, the party calling a witness must use non-leading questions to interrogate the witness; that is, you may not ask questions which suggest the desired answer. *See* Section [8.19], *infra*. Questions which call for a "yes" or "no" answer are not necessarily leading, *e.g.*, "Did you or did you not see Mr. Smith's car go through the red light?" or "Did Mr. Smith's car go through the red light?" Such questions are generally acceptable, whereas "You saw Mr. Smith's car run the red light, didn't you?" or "You saw Mr. Smith's car run the red light, didn't you—yes or no?" are leading questions and are improper on direct examination.

Non-leading questions that must be answered "yes" or "no" run the risk of appearing to put words in the witness's mouth and restricting the witness's opportunity to speak to the jury. If the witness appears honest and intelligent, and is able to articulate well, use open-ended, non-leading questions that let the witness explain the "who," "what," "which," "when," "where," "how," and "why." To keep the jury interested, vary the form of the questions.

B. [8.17] Methods for Direct Examination

To acclimate a witness to the court room environment, ask some general background

questions of the witness such as: who the witness is, where he or she lives, whether married or not, whether the witness has children, what the witness does for a living, or any other general questions that help relax the witness before starting the substantive questions. This also humanizes the witness and helps establish rapport with the jury.

Once the witness appears settled and relaxed, proceed to ask the witness substantive questions. Always have an outline of questions or points to cover, the one reviewed with the witness before hand, and avoid surprising the witness with questions on topics not previously reviewed. The surprise might prove unpleasant. On the other hand, do not be so wedded to the outline that you are incapable of taking advantage of specific responses to present the testimony in a more persuasive manner.

In some instances, direct examination may be as simple as, "Tell the jury what happened." Although generally effective and credible, a well-rehearsed response to this type of question may come across to the jury as being "canned." A witness's narrative testimony also may prompt opposing counsel to object to those portions of the witness's testimony deemed inadmissible. Frequent interruptions can frustrate the witness and the jury, and may reduce the effectiveness of the witness's testimony. When using the narrative method, counsel should interpose a question now and then to maintain control and to keep the witness from rambling.

C. [8.18] Leading Questions

1. [8.19] Defined

A leading question is one that suggests to the witness the answer which the examining party desires. KRE 611(c) states,

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

A party engaged in direct examination of a witness may not lead the witness unless permitted by the trial court. KRE 611(c). Although leading questions are "not to be commended," a trial court will not be reversed unless there has been a clear abuse of discretion and a "shocking miscarriage of justice has resulted." *Askew v. Commonwealth*, 437 S.W.2d 205, 209 (Ky. 1969).

2. [8.20] Exceptions to Prohibition

a. [8.21] Preliminary Questions

The trial court may permit the examiner to ask the witness leading preliminary questions since answers to such questions generally are not unfairly prejudicial to the adverse party. KRE 611(c) ("Leading questions should not be used on the direct examination of a witness except as

may be necessary to develop the witness's testimony").

b. [8.22] Rules of Evidence

KRE 611(c) provides three (3) additional exceptions whereby the examiner may ask leading questions, or when a party calls: "(a) a hostile witness; (b) an adverse party; or (c) a witness identified with an adverse party." These are discussed in turn below.

i. [8.23] Unwilling or Hostile Witnesses

The first exception to the rule prohibiting leading questions is when the examiner seeks to declare the witness unwilling or hostile. KRE 611(c). An unwilling or hostile witness may include a witness who has failed to appear pursuant to a subpoena; repeatedly refuses to answer questions; one who is antagonistic to the party or to the examiner; or one whose previous statements (usually in writing) are inconsistent with the testimony at trial. *Askew v. Commonwealth, supra*. This rule does not permit the examiner to call the adverse party's expert witness and examine that witness by leading questions on the premise that the expert witness is hostile to the examiner's case because the expert's opinions differ from the examiner's expert's opinions. *Reams v. Stutler, supra*.

ii. [8.24] Cross-Examination by Adverse Party or a Witness Identified with an Adverse Party

KRE 611(c) provides two other exceptions. Leading questions are allowed on "when a party calls...an adverse party, or a witness identified with an adverse party." This rule seems simple enough when only two adverse parties are involved. All parties have a right to cross-examine the opponent's witnesses on relevant matters testified to on direct examination. Problems arise when co-party A, often a co-defendant, is allowed to cross-examine a witness of co-party B, whose testimony the co-party A is not trying to test. In many instances, the interests of the co-parties are similar if not the same. Although no Kentucky cases appear to be on point, the party affected by this type of cross-examination may object and argue that the interests of the parties are not truly adverse and leading questions are therefore improper.

The same principle applies to co-party plaintiffs. For example, if the co-plaintiffs are the driver and the passenger of a vehicle that collides with defendant driver's vehicle, the court will likely submit to the jury an instruction on comparative negligence. If the plaintiff passenger, for strategic reasons, chooses not to sue plaintiff driver, should plaintiff passenger be permitted to ask leading questions of the co-plaintiff's witnesses? The answer will turn on whether there is true adversity between the plaintiffs.

In a co-party situation, counsel is well-advised to ask for a ruling from the trial court before trial to help insure smooth examination of witnesses and to avoid repetitive objections at trial.

iii. [8.25] Special circumstances

Kentucky courts have also been known to permit leading questions under special circumstances. Generally, the court will permit leading questions of persons of young age,

Hardy v. Commonwealth, 719 S.W.2d 727 (Ky. 1986); persons of subnormal intelligence, *Clements v. Commonwealth*, 424 S.W.2d 825 (Ky. 1968); of confused and elderly persons, *Embry v. Turner*, 185 S.W.3d 208 (Ky. App. 2006); and professionals and expert witnesses, *Brewster v. Commonwealth*, 568 S.W.2d 232 (Ky. 1978). Leading questions have also been held proper to refresh a witness's memory. *Blankenship v. Commonwealth*, 234 Ky. 531, 28 S.W.2d 774 (1930).

iv. [8.26] Adverse party

Kentucky law also allows a party to call an adverse party during its case in chief. *Charash v. Johnson*, 43 S.W.3d 274 (Ky. 2000); *Commonwealth, Dep't of Highways v. Brumfield*, 418 S.W.2d 231 (Ky. 1966).

This rule of law is based on CR 43.06, which has since been deleted from the Kentucky Rules of Civil Procedure. CR 43.06 provided that a party may call the adverse party as if on cross-examination and interrogate the party witness by use of leading questions and contradict and impeach the party witness in all respects as if the party witness had been called by the opposing counsel. This method was limited to calling:

...an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association or an administrative officer of the State or any political subdivision thereof, which is an adverse party...*Id.*

Under this Rule, if the party called an adverse party as if on cross-examination and examined the adverse party by use of leading questions, the adverse party could then be examined by the use of leading questions from his or her own lawyer "only upon the subject matter of his examination-in-chief." *Id.* All other interrogation of the adverse witness had to be conducted by non-leading questions.

To date, no Kentucky case has addressed this issue since CR 43.06 was deleted from the Civil Rules in 2004.

D. [8.27] Right to Call Adverse Party As If on Cross-Examination

Kentucky law allowing a party to call an adverse party as if on cross-examination does not change the rules regarding competency, relevancy or materiality of the party's testimony. *Moorman Mfg. Co. v. Harris*, 280 Ky. 845, 134 S.W.2d 936 (Ky. 1939). A tactic often used by a plaintiff's lawyer is to call the defendant or defendants as if on cross-examination. There are several reasons for using this tactic. First, by calling a defendant as if on cross, the defendant may be caught unprepared to testify and make a poor impressions on the jury. Second, because the line of questioning usually focuses only on the plaintiff's claim, the defendant might be forced to admit key elements of the plaintiff's case before presenting the defendant's version of events. Third, the defendant's testimony on specific points might be necessary to avoid a directed verdict. Fourth, if the defendant has any surprises in store for the plaintiff, an examination during the plaintiff's case might flush them out and give the plaintiff time to adjust.

There are also sound reasons for not calling the defendant as if on cross-examination.

Calling the opposing party always creates the risk of disrupting the orderly presentation of the plaintiff's case. In many instances, a defendant who is likeable, sympathetic, articulate, or believable can actually damage a plaintiff's case. And a defendant with a surprise in store for the plaintiff can inflict even more damage. Therefore, the wisdom of calling a defendant during the plaintiff's case in chief is another one of those judgment calls that is assessable only in hindsight.

After the adverse party, usually the defendant, has testified, the defendant's lawyer may ask the defendant leading questions on cross-examination only upon the subject matter of the defendant's examination-in-chief. See Section [8.26], *infra*.

E. [8.28] Redirect Examination

No specific civil rule gives the parties the right of redirect examination. This right developed from the common law and cases interpreting CR 43.02, which gives the court broad powers in regulating the order of proof so as to expedite the trial and to allow the jury to have a clear view of the whole evidence. CR 43.02(d) provides that the party, for good reasons and in furtherance of justice, may be permitted by the court to offer evidence-in chief.

The purpose of permitting redirect examination is to allow a witness to clarify or explain relevant matters upon which he or she was cross-examined. Generally, the witness will be subject to redirect examination only upon those matters about which he or she was cross-examined. *White v. Commonwealth*, 292 Ky. 416, 166 S.W.2d 873 (1942). The trial court has broad discretion in permitting or denying redirect examination of issues not inquired about in cross-examination. *Chesapeake & O.R. Co. v. Lynch*, 28 Ky. L.R. 467, 89 S.W. 517 (1905); *Reed v. Commonwealth*, 738 S.W.2d 818 (Ky. 1987).

F. [8.29] Examination by Jurors

Very little Kentucky law exists on the right of a juror to examine a party or a witness. The trial court has broad discretion on whether to permit a juror to ask questions of the witness. Although the trial court has a responsibility to insure that any question asked is proper and not incompetent, irrelevant or otherwise objectionable, it is ultimately the lawyer's responsibility to object to the juror's question. *Louisville Bridge & Terminal Co. v. Brown*, 211 Ky. 176, 277 S.W. 320 (1925). In *Slaughter v. Commonwealth*, 744 S.W.2d 407 (Ky. 1987), a criminal case, the court held that it was not necessary for the juror's question to be put in writing.

As a practical matter, a trial court usually will not let a juror ask a question of the witness without first hearing the question outside the presence of the jury to determine if the question is proper. An objection to the substance of the question should be lodged, if necessary, outside the presence of the juror seeking to ask the question to avoid alienating the juror by your objection, especially if the court does not permit the juror to interrogate the witness. Often, the court will rephrase the question to avoid any objection as to form or substance.

G. [8.31] Introducing Exhibits

1. [8.32] Generally

A comprehensive discussion of the proper foundation, relevance, and probative value of

exhibits is beyond the scope of this chapter. Knowing how to lay a proper foundation is more or less “checklist law,” and there is nothing more disruptive and credibility consuming than when a trial lawyer cannot properly mark (or pre-mark) a proposed exhibit, ask the witness the necessary and proper foundational questions, and obtain an exhibit’s admission into evidence. Simple omissions, such as failing to show an exhibit to opposing counsel or omitting a foundation element, can inflict considerable damage during examination of a witness.

2. [8.33] Pretrial Practice

Many trial courts require that all exhibits intended for use at trial be properly identified and exchanged between the parties prior to trial. Often, this is done at the pretrial conference. Another reason for exchanging a list of exhibits with opposing counsel prior to trial is to obtain an agreement as to their admissibility. If there is an agreement as to the exhibits to be introduced as evidence, additional time will be saved at trial.

3. [8.34] Joint Exhibits

It is better practice to exchange exhibits that the parties intend to use at trial and to reach an agreement as to the marking of those exhibits for identification. In some instances, both parties will seek to introduce the same exhibits. In those cases, lawyers will often agree to have those exhibits marked as joint exhibits. Pre-marking exhibits for identification avoids wasted time and interruptions and demonstrates to the jury that you are well prepared to try your case. Pre-marked exhibits also can be helpful in the event of appeal.

4. [8.35] Introducing the Exhibit at Trial

After pre-marking exhibits for identification, introduce the exhibit as follows:

1. Before showing the exhibit to the witness, show it to opposing counsel. If the exhibit has already been pre-marked for identification, refer to it as "Exhibit No. " or "Joint Exhibit No."
2. Ask the witness to identify or describe the exhibit in general terms, then lay a proper foundation for admission.
3. Move the exhibit’s admission into evidence.
4. If you have exhibits of particular importance that you wish the jury to view while your witness is testifying, move the court for leave to pass the exhibits to the jury. Some trial courts will allow a pause for the jurors’ examination of the exhibit and some will not. Not every exhibit warrants halting the testimony for juror examination, but ask the trial court for a pause if a pause is in your best interests.
5. With the variety of technology available today—both low tech and high tech—there is no excuse for depriving a jury of close examination of important exhibits. Photographs, high resolution

cameras, flat display screens, and computer software of all kinds can render vivid and understandable virtually any document or object.

An example of the procedure for introducing exhibits is as follows:

Q: I hand you a document (describe it, *i.e.*, photograph, letter, contract, etc.) which has been marked for identification as Exhibit No. _____. Do you recognize this document?

A: Yes.

Q: Without reading to the jury the document marked for identification as Exhibit No. _____, tell the jury what the document is.

A1: It is a sales contract that I signed with the defendant; or

A2: It is a letter that I received from the defendant; or (IF THE EXHIBIT IS A PICTURE)

A3: It is a picture showing where the accident occurred.

Q: Does that picture represent fairly and accurately the scene where the accident occurred?

A: Yes.

Q: Your Honor, I offer into evidence the document (photograph, letter, contract, etc.) marked for identification as Exhibit No. _____.

or,

Q: I move that the document (photograph, letter, contract, etc.) previously marked for identification as Exhibit No. _____ be introduced into evidence as Exhibit No. _____.

H. [8.36] Assuming Facts Not in Evidence

Asking a lay witness questions that assume facts which have not been introduced into evidence is improper both on direct and cross-examination. This can occur in the most benign circumstances. For example, a witness might be asked if he or she saw the car speeding when there is, as yet, no evidence of "speeding." If, however, a previous witness has testified to the existence of a fact (or lay opinion) counsel is permitted to inquire of other witnesses about facts already adduced.

I. [8.37] Present Recollection Refreshed

There is a major distinction between the evidentiary principles of present recollection refreshed and past recollection recorded. In past recollection recorded, the witness, after being shown the item of writing, still cannot recall the relevant facts about which he or she is being questioned. Past recollection recorded permits the introduction of the writing into evidence as an exception to the hearsay rule. *See* Sections [8.68] – [8.70], *infra*.

By contrast, present recollection refreshed involves the testimony of the witness and not the introduction of the writing itself. Often a witness is unable to remember an event or fact about which an inquiry is made and in such instances the witness may be shown a writing which revives or refreshes his or her memory. *Blair & Franse Const. Co. v. Allen*, 251 Ky. 366, 65 S.W.2d 78 (1933). It is not necessary that the witness prepared the writing or that the witness believes the contents of the writing to be true. In fact, the writing may be prepared by someone else. The only requirement is that the writing refreshes the witness's recollection.

If it appears that the writing does not refresh the witness's recollection and, instead, the witness is merely reciting what is contained in the writing, the witness's testimony about it will not be permitted.

The elements for laying the foundation for introducing testimony by using present recollection refreshed are as follows:

1. The witness is unable to recall the fact or event.
2. The witness states that a certain writing exists which can refresh the witness's memory.
3. The examiner presents the writing to the witness.
4. The witness reviews the writing.
5. The witness states that the writing refreshes his or her memory.
6. The witness then testifies from his or her refreshed recollection of the fact or event.

A witness cannot read aloud what is contained in the writing. In fact, the general rule requires the witness to surrender the writing before testifying. The purpose of this requirement is to ensure that the writing serves only to jog the witness's memory; the evidence which the jury must consider is the witness's testimony, not the writing.

KRE 612 provides that if a writing is used to refresh a witness's memory, an adverse party is entitled to have the writing produced, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. KRE 612. To maintain a good record for appeal purposes, it is better to mark the writing as an exhibit for purposes of identification

An example of refreshing a witness's recollection is as follows:

Q: Are you telling this court that you do not presently recall (the fact or the event)?

A: That's correct.

Q: Would your recollection be refreshed if you were to look over the (document or writing) you previously prepared?

A: Yes.

Q: I then show you what has been marked for identification purposes as Exhibit No. ___ and I ask if you can identify it?

A: Yes, I recognize this.

Q: Without reading or divulging the contents of the (document or writing), tell us what this (document or writing) is.

A: I remember writing this shortly after the event occurred.

Q: Please review this (document or writing) and, after you have finished, I have some questions to ask you.

Q: Now, after having read the (document or writing), is your memory now refreshed?

A: Yes.

Q: Now what is your answer to my earlier question, which I will now repeat?

If the witness testifies that, after having read or reviewed the writing, it did not refresh the witness's recollection, then you have laid the foundation for introducing the writing into evidence as past recollection recorded. *See* Sections [8.68] – [8.70], *infra*.

V. [8.38] Relevancy

Relevance is the evidentiary standard that controls all witness testimony. Therefore, it is important to determine that the evidence a witness intends to give is relevant to the issues in controversy.

A. [8.39] The Standard

To be admissible, evidence must have probative value: that is, it must be material and have some logical connection to the fact that is to be proven. This is the criteria by which courts judge the admissibility of evidence.

The Kentucky Rules of Evidence define relevant evidence as having:

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

KRE 401.

The standard for admissibility of relevant evidence is most simply stated in KRE 402 as follows:

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

Once the evidence sought to be introduced is shown to be material and logically relevant, the evidence must still be legally relevant before it can be admitted. KRE 403 states:

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

1. [8.40] Discretion of the Court

The trial court has broad discretion in determining whether an item of evidence is relevant and therefore admissible. Few cases are reversed on evidentiary issues of relevancy unless there has been a clear showing of abuse of discretion. *Glens Falls Ins. Co. v. Ogden*, 310 S.W.2d 547 (Ky. 1958); KRE 401 and 402.

2. [8.41] Kentucky State Court Decisions

Until the adoption of the Kentucky evidence rules, Kentucky courts essentially followed the federal doctrine of relevance as defined in FRE 401 and stated in FRE 402 and 403. There was no precise test for relevancy approved by the Kentucky appellate courts until that time. Generally, the rule was to admit evidence which tended to prove or disprove an issue in controversy. *O'Bryan v. Massey-Ferguson Inc.*, 413 S.W.2d 891 (Ky. 1966). There had to be a logical relationship between the item of evidence sought to be introduced and the ultimate material fact to be decided by the court or jury.

KRE 401-403 is identical to the federal rules and, therefore, the adoption of the evidence rules did not change Kentucky law.

B. [8.42] Objections

As with exhibits, a full discussion of all the evidentiary grounds for objecting to oral or written evidence is beyond the scope of this chapter. Some basic principles are noteworthy, however.

1. [8.43] Form of Objections

An objection to the form of a question is waived if not timely made. An objection to the form is warranted if a question is vague, ambiguous, compound, or improperly leading.

An objection to the substance of a question also must be timely made to avoid waiver. Objections to the substance of a question include:

- A. The testimony is immaterial (does not make the existence of a material fact more or less probable) or has no logical connection with a material fact in controversy.
- B. The testimony is inadmissible (e.g., hearsay).
- C. The testimony is unfairly prejudicial (*not* “unduly” prejudicial) because any probative value is substantially outweighed by the unfair prejudice it will cause., such as
 - 1) it will confuse the issues
 - 2) it will mislead the jury
 - 3) it will result in an undue delay of the trial
 - 4) it will result in a waste of time
 - 5) it is a needless presentation of cumulative evidence.

If a party is unable to object in a timely manner before the testimony (usually because there was no basis for objecting to the question), an objecting party must proceed promptly with a motion to strike evidence already admitted. *Stark’s Adm’x v. Herndon’s Adm’r*, 166 S.W.2d 828 (Ky. 1942).

2. [8.44] Responses

While almost impossible to anticipate every objection, thorough preparation often equips trial counsel with a trial brief or memorandum with authorities supporting each element of proof necessary to prevail at trial. So armed, ask the court for an opportunity to be heard and to furnish the law in support of your position.

If your opponent concedes that the evidence is, or may be, relevant but seeks to oppose its introduction because it is unfairly prejudicial, then explain to the court why the evidence is not unfairly prejudicial or confusing or misleading or otherwise so objectionable as to be excluded.

C. [8.45] Character Evidence

From a credibility standpoint, once any witness takes the stand and testifies, that

witness's truthfulness becomes an issue for the court or jury. In civil actions, however, the introduction of character evidence as an attack on veracity is generally inadmissible absent a very direct and relevant connection with the evidence offered. KRE 404; *Ellis v. Ellis*, 612 S.W.2d 747 (Ky. Ct. App. 1980), *cert. denied*, 452 U.S. 940, 6 L.Ed.2d 955, 101 S. Ct. 3085 (1981).

Evidence in a personal injury action as to the plaintiff's good moral character is not admissible except in rebuttal for impeachment purposes. *Ratliff v. Line*, 451 S.W.2d 391 (Ky. 1970).

1. [8.46] Exceptions to Prohibition on Introduction of Character Evidence

There are two recognized exceptions to the introduction of character evidence in civil cases.

a. [8.47] General Reputation for Untruthfulness

The first exception, in KRE 608, permits the impeachment of a witness by evidence of the witness's general reputation for untruthfulness. This is rare evidence to possess. A witness may not be impeached by specific bad acts unless it is by evidence of a felony conviction. KRE 608 and 609.

A witness may not introduce evidence of his or her good reputation for honesty and truthfulness unless that reputation has been put into issue by the opposing party. Once the witness's reputation has been attacked, then the witness may introduce evidence in rebuttal. *Citizens Bank of Morehead v. Hunt*, 287 Ky. 646, 154 S.W.2d 730 (1941).

b. [8.48] Character Put in Issue by Pleadings

The second exception is when the character of the party is put into issue by the pleadings. An example is a case for defamation in which the plaintiff alleges damages to reputation and character. A defense to the claim may be the truth of the assertion by the defendant, thereby making an issue of the plaintiff's character. In such cases, evidence of the plaintiff's character may be admissible. *Louisville Times Co. v. Emrich*, 252 Ky. 210, 66 S.W.2d 73 (1933). Another example is a suit for false arrest where the claim for damages is injury to reputation; likewise, evidence of plaintiff's reputation is admissible. *Daugherty v. Kuhn's Big K Store*, 663 S.W.2d 748 (Ky. Ct. App. 1983). The same is true in a malicious prosecution case. *Massey v. McKinley*, 690 S.W.2d 131 (Ky. Ct. App. 1985).

Although specific acts are not admissible to prove that a witness's character is good or bad, they might be admissible for some purpose other than to prove character, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. KRE 404(b). An example is when a plaintiff alleges emotional injuries and the defendant is seeking to show that those emotional injuries were caused by some act other than the defendant's. Moreover, KRE 405(c) authorizes the use of particular acts to prove character when character or a trait of character is an element of a charge, claim, or defense. KRE 405(c).

2. [8.49] Method of Proving Character

When permitted by the court, the proper method of introducing evidence of character is by evidence of a witness's reputation in the community or personal opinion as to the person's character. The evidence may be received in the form of opinion or reputation, but it may only refer to the witness's general reputation. KRE 404, 405, and 608. In most instances, that evidence will be of truthfulness, honesty and integrity.

In permitting a witness to testify about the character of another witness, the court must allow the witness so testifying to rely upon hearsay evidence, namely, whether the witness's reputation in the community is good or bad. The examining party must lay a proper foundation before inquiring into the reputation of a witness.

There are different requirements for laying a foundation depending on whether the evidence of reputation is good or bad. Testimony that the other witness's reputation in the community is bad is admissible only if the witness testifying has direct knowledge of that person's character. This knowledge may come from the character's reputation in the community as to what neighbors and friends think. Testimony that one's reputation in the community is good is admissible only if the witness can show that he or she was in such a position that he or she would probably have heard something derogatory of the person had it been said.

In examining the witness as to another witness's character or reputation, it is important to keep in mind that it is not what that particular witness may think about a person, but what the community thinks about a person. The courts define the community as being the area where the person is well known. *Wilson v. Commonwealth*, 475 S.W.2d 895 (Ky. 1971). Evidence of general reputation of a person within one's family is not admissible. *Adcock v. Commonwealth*, 702 S.W.2d 440 (Ky. 1986).

If the reputation is bad, evidence of that can be introduced in several ways.

- Q. Tell us where you live.
- Q. Is the defendant (or witness) a member of the community in which you live (or a neighbor of yours)?
- Q. As a member of the community, do you know the defendant's reputation within the community for (a) truthfulness; (b) honesty; (c) integrity; (d) etc.?
- A. Yes.
- Q. And is that reputation good or bad?
- A. His reputation is bad.

If the character's reputation is good, then this can be brought out as follows:

- Q. Tell us where you live.

Q. Is the defendant (or witness) a member of the community in which you live (or a neighbor of yours)?

Q. As a member of the community, are you so situated that you would have heard something derogatory about the defendant's or witness's reputation for: (a) truthfulness; (b) honesty; (c) integrity; (d) etc.?

A. Yes.

Q. Have you ever heard of anything derogatory or bad about the defendant's (or witness's) reputation?

A. No.

Although the courts prohibit the use of particular acts to prove character, such acts are admissible when cross-examining the character witness. A character witness may be asked on cross-examination about whether he or she has heard of or knows about relevant specific instances of conduct if there is a good faith basis for asking pursuant to KRE 405(b). This is more likely to occur in criminal cases. *See* Lawson, KENTUCKY EVIDENCE LAW HANDBOOK § 2.20(5)(a) (2003).

If the witness knows the person whose character is being attacked, under the Federal Rules of Evidence you may ask:

Q. Do you know the defendant (or witness)?

Q. How do you know the defendant (or witness)?

Q. Do you have an opinion about the defendant (or witness's): (a) truthfulness; (b) honesty; (c) integrity; (d) etc.?

Q. What is it? And what is the basis for your opinion?

D. [8.50] Habit, Similar Occurrences, Custom

Both character evidence and evidence of habit may be used as circumstantial proof of conduct in civil cases. There are, however, major differences between the admissibility of character evidence and habit evidence. Character evidence is admissible only to prove a person's reputation in the community and not for proof of specific acts. Habit evidence, on the other hand, is admissible to prove or disprove specific conduct of a person or business organization. To do this, specific acts are required as an element of proof, such as frequently repeated patterns of conduct or custom. You may not introduce character evidence to prove habit or custom. *Daugherty v. Kuhn's Big K Store*, 663 S.W.2d 748 (Ky. Ct. App. 1983).

1. [8.51] Evidence of Habit

Kentucky only recently adopted the view that habit evidence is admissible. KRE 406,

adopted in 2006, states,

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

To lay the proper foundation for the introduction of habit evidence, the questioner must establish the following:

1. That the witness has been familiar with the person or the business organization for a substantial period of time;
2. That, based upon the opinion or personal knowledge of the witness, the person or business organization has had a habit of engaging in a specific type of conduct or business practice; and,
3. The witness has observed the person or business organization acting in conformity with the specific habit on prior occasions.

2. [8.52] Similar Circumstances

Kentucky courts are reluctant to allow introduction of evidence of similar circumstances, but narrow precedent supports the introduction of evidence of the dangerous conditions of the defendant's premises to show knowledge of the owner as to the existence of the dangerous conditions, *Urban v. Walker*, 403 S.W.2d 11 (Ky. 1966), and *Harris v. Thompson*, 497 S.W.2d 422 (Ky. 1973); evidence of prior use of alcohol and marijuana to show user's awareness of the effect of them, *Lee v. Butler*, 605 S.W.2d 20 (Ky. Ct. App. 1979); and, evidence of other acts of a defendant insurer to prove that the insurer acted in bad faith, *Kentucky Farm Bureau Mut. Ins. Co. v. Rodgers*, 179 S.W.2d 815 (Ky. 2005).

The Federal Rules do not provide for the introduction of evidence of similar occurrences or custom. Evidence of this nature, if admissible, comes in under the rules of relevance found in FRE 401-403.

3. [8.53] Custom

Evidence of a business custom or practice, if relevant to the issues in the case, may be admitted to establish the duty between the parties or to establish the particular custom or business practice. KRE 803(6); *Texaco, Inc. v. John Martin, Distributor, Inc*, 472 S.W.2d 674 (Ky. 1971); *R.H. Kyle Furniture Co. v. Russell Dry Goods Co.*, 340 S.W.2d 220 (Ky. 1960).

Proof of custom might occur as follows:

- Q. When you received the defendant's order for the goods, what did you do?
- A. As always, we would type the order into the computer.
- Q. What would you do with the order slip?
- A. We would keep it for 30 days until after the goods were shipped, then we would discard it.
- Q. Before shipping the goods, what, if anything, would you do by way of acknowledging the order?
- A. We always send an acknowledgment of the order, thanking the customer for their business. This is sent out on a computerized form letter.
- Q. Is this done in every instance?
- A. Yes.
- Q. And did you do that in the case involving this defendant?
- A. Yes. Our computer shows that an acknowledgment letter of the order was sent out on (month, day and year).

VI. [8.54] Authentication of Documents

Kentucky Rules of Evidence 901-903 provide for the authentication and identification of documents.

A. [8.55] Basic Steps

Until a document or article is authenticated, it is inadmissible. To authenticate a document or article of evidence, the offering party must show that it is genuine. KRE 901. If there is no objection, the document or article is admitted into evidence without any additional proof as to its genuineness.

If there is an objection, and the trial court overrules the objection, an opposing party may still introduce evidence attacking the authenticity of the document or article. Although the document or article is admitted, a jury issue is created as to whether the document or article is genuine.

B. [8.56] Methods of Authenticating Documents

The different methods for authenticating a document or other article pursuant to KRE 901 and 902 are highlighted below.

a. [8.57] Direct testimony

Direct testimony by a witness with personal knowledge of the genuineness of the document can be elicited from the person who prepared the document or witnessed it being prepared. KRE 901(b)(1) and (2).

If the item is a writing that the witness acknowledges having written, the writing may be introduced as follows:

Q. I hand you a document which has been marked for identification purposes as Exhibit No. _____. Can you identify it?

A. Yes. It is a letter that I wrote to the defendant.

Q. Is it in your handwriting (or is that your signature)?

A. Yes.

Q. Your Honor, I move to introduce into evidence the letter dated _____ and marked for identification purposes as Exhibit No. _____.

After the exhibit has been introduced into evidence, either have the witness read the letter or have it passed to the jury.

Q. Please read to the jury the letter marked as Exhibit No. _____.

or

Q. Your Honor, I move that the jury be permitted to examine the letter marked as Exhibit No. _____.

If the item is a writing that the witness observed being written, a signature can be authenticated by one who actually witnessed the signing. *Whinery v. Crawford*, 273 Ky. 325, 116 S.W.2d 631 (1938):

Q. I show you a document previously marked for identification as Exhibit No. _____. Can you identify this document?

A. Yes.

Q. How can you identify it?

A. I recognize the document because I witnessed my father writing it and signing it. Furthermore, I recognize it as being in his handwriting.

Q. Your Honor, I move to introduce into evidence the letter dated _____ and marked for identification purposes as Exhibit No. ____.

After the exhibit has been introduced into evidence, you should then either have the witness read the letter or have it passed to the jury.

Q. Please read to the jury the letter marked as Exhibit No. ____

or

Q. Your Honor, I move that the jury be permitted to examine the letter marked as Exhibit No. ____.

Any person with personal knowledge of the writing of another may testify as to the genuineness of that person's handwriting. KRE 901(b)(2); *Apple v. Commonwealth*, 296 S.W.2d 717 (Ky. 1956); *Pioneer Coal Co. v. Polly*, 208 Ky. 548, 271 S.W. 592 (1925). For example:

Q. I hand you a document marked as Exhibit No. _____. Can you identify this document?

A. Yes.

Q. How can you identify it?

A. I recognize this document because it is in my father's handwriting, which I am completely familiar with, and it bears his signature.

Q. Your honor, I move the introduction of Exhibit No. ____.

Q. Please read to the jury the letter marked as Exhibit No. ____;
or, Your Honor, I move that the jury be permitted to examine the letter marked as Exhibit No. ____.

To establish that the witness is sufficiently familiar with the author's handwriting, the witness must testify that he or she has observed the author's handwriting on prior occasions. This is true even when the person has never seen the author actually sign anything, for example where a corporate executive or corporate secretary has received writing from the alleged author over a period of time sufficient to reliably establish the person's handwriting. In those instances, the following is an example of questions to ask:

Q. I show you a document which has been marked for identification purposes as Exhibit No. _____. Do you recognize the handwriting?

A. Yes.

- Q. Whose handwriting is this?
- A. It is Mr. Jones' handwriting.
- Q. How do you know that?
- A. I recognize Mr. Jones' handwriting because I have received memos from him and letters with his signature.

If the document is either printed or in someone else's handwriting but has been signed, then you may ask:

- Q. I show you a document previously marked for identification purposes as Exhibit No. _____. Can you identify this document?
- A. Yes.
- Q. What is it?
- A. It is a contract which contains Mr. Jones' signature.
- Q. How do you know Mr. Jones' signature?
- A. I recognized Mr. Jones' signature because I have received numerous letters and memos from him with his signature on them.

b. [8.58] Expert testimony

Expert testimony is another way to authenticate a document or article. The witness must first be qualified as an expert in handwriting, KRE 901(b)(3), 702 and 703, then presented with specimens of the handwriting at issue:

- Q. I hand you what has been marked for identification purposes as Exhibits Nos. ___ and ___ and ask you if you can tell the jury what they are.
- A. They are handwriting specimens of Mr. Jones' furnished to me by his wife.
- Q. What did you do with them?
- A. I examined them, working on comparisons to the letter that you have asked me to examine, to determine if it is the handwriting of Mr. Jones.

Q. Do you have an opinion based upon your experience and training as a handwriting specialist as to whether the letter purportedly written by Mr. Jones and identified as Exhibit No. ___ is in the same handwriting as Exhibits ___ and ___ previously handed to you.

A. It is my opinion that all three documents are in the handwriting of Mr. Jones.

Q. What is the basis for your opinion?

A. (The expert then explains the basis for his or her opinion.)

Q. Your Honor, I move to have the documents previously marked as Exhibits ___ and ___ introduced into evidence.

C. [8.59] Records

1. [8.60] Public Records

If the item is a public record, KRE 901, 902, 1005, and Civil Rule 44.01 provide mechanisms whereby such a document may be introduced as evidence. Usually, a public record is an attested copy of the original accompanied by a certificate that the attesting officer is, in fact, the legal custodian of the document. If the document to be introduced is from out-of-state, then the Civil Rule provides for its admission if accompanied by a certificate that such officer has custody of the document and attests that it is a true copy of the original. If the document is a judicial document, it may be introduced with a certificate showing that it was signed by the judge of a court of record of the district or political subdivision in which the record is kept and is authenticated by the seal of the court.

KRE 901(7) allows for the introduction of legislative records and all legally recorded instruments, such as deeds, wills, and records of state administrative agencies.

KRE 901 does not, however, do away with other rules governing admissibility of documentary evidence, *Commonwealth v. Willis*, 719 S.W.2d 440 (Ky. 1986), such as the Best Evidence Rule, KRE 1002.

2. [8.61] Business Records

If the item to be introduced is a business record, the following questions may be asked pursuant to KRE 902(11):

Q. I show you a document previously marked for identification as Exhibit No. ____. Do you recognize this document?

A. Yes.

- Q. How can you identify this document?
- A. I am the bookkeeper of Co., Inc., and this is a copy of the original in my file.
- Q. Was the record made and maintained under your direction, control, and supervision?
- A. Yes. This is a form record which I instruct all of my employees to fill out whenever there is an injury incident on our premises.
- Q. Was this record made as a memorandum record of the event that took place on or about (month, day, year)?
- A. Yes.
- Q. Was this memorandum made near in time to the event described?
- A. Yes.
- Q. Was this record the type of record made and maintained in the regular course of your business?
- A. Yes.

3. [8.62] Hospital Records

KRS 422.300-.330 provide that hospital records may be authenticated for evidentiary purposes without having the custodian of the records make a personal appearance in court. This can be done either by a certification from the custodian or by deposition of the custodian, at the custodian's election. The custodian must be able to certify that the records are genuine copies of the originals kept in the ordinary course of the hospital's business.

To provide for the self-authentication of hospital records, a subpoena *duces tecum* requiring their production must be served upon the custodian of the records. If the records sought to be introduced are psychiatric records, a properly authorized release by the patient must be delivered to the institution 30 days prior to the date the records are subpoenaed for certification or for introduction by deposition. KRS 422.310.

Although KRS 422.300-.330 is a convenient device for authenticating medical records; it does not insure their admissibility or abrogate other rules of evidence relating to the admission of documentary evidence. *Young v. J.B. Hunt Transp., Inc.*, 781 S.W.2d 503 (Ky. 1989).

a. [8.63] Introducing Hospital Records Through Deposition of Custodian

The following questions may be posed to a custodian of hospital records who elects not

to certify the records in accordance with KRS 422.300-305:

- Q. State your name.
- Q. By whom are you employed?
- A. General Hospital.
- Q. What do you do there?
- A. I am the medical records librarian.
- Q. Are you here under a subpoena *duces tecum* to produce the entire hospital records of Mr. Smith?
- A. Yes.
- Q. Do you have Mr. Smith's entire hospital records regarding his stay at General Hospital from _____ to _____?
- A. Yes.
- Q. Under whose custody are these records kept?
- A. Mine.
- Q. I hand you copies of these hospital records marked for identification purposes as Exhibit No. __ and ask you if these copies are true and complete copies of the originals which are kept by you at General Hospital.
- A. Yes.
- Q. Were these hospital records of Mr. Smith made in the regular course of business at or near the time recorded?
- A. Yes.

b. [8.64] Admissibility

Although properly authenticated hospital records are an exception to the hearsay rule, they must still be competent, relevant, and material before they can be admitted. *Phipps v. Winkler*, 715 S.W.2d 893 (Ky. Ct. App. 1986); *Beckner v. Palmore*, 719 S.W.2d 288 (Ky. Ct. App. 1986).

If an opposing party is seeking to introduce the medical records, there may be a reason for objecting to the admissibility of certain records if they are being used for impeachment on a collateral issue or contain matters which are incompetent, irrelevant, or immaterial.

When seeking to use the content of properly authenticated hospital records, someone competent to testify as to their content must be on the stand. Medical records custodians generally are not qualified on medical content or meaning. This is especially true for handwritten portions of the records such as nursing notes.

VII. [8.65] Hearsay

Hearsay is an oral or written statement made by an out-of-court declarant offered to prove the truth of the matter asserted. Generally, hearsay is inadmissible unless an exception applies. KRE 802. The Hearsay Rule does not prohibit evidence of an out-of-court statement if offered to prove only that the statement was made or the conversation took place, since the evidence is not then offered to prove the truth of the matter asserted in the statement.

A basic test for determining the admissibility of an out-of-court statement, written or oral, is: If it matters whether the declarant is telling the truth, the statement is hearsay and should not be admitted into evidence unless an exception to the Rule applies.

A. [8.66] Purpose of Hearsay Rule

The most important reason for excluding an out-of-court statement made by a declarant who is unavailable at trial is that an adverse party cannot test the credibility or truthfulness of the statement by cross-examination. Other reasons are that the declarant's statement is usually not made under oath and the jury is not able to observe the demeanor of the declarant and judge his or her credibility.

B. [8.67] Exceptions to Hearsay Rule

There are numerous exceptions to the Hearsay Rule treated elsewhere in this volume, and counsel should also consult Lawson, *KENTUCKY EVIDENCE LAW HANDBOOK* §§ 8.00-.90 (2003).

Exceptions to the Hearsay Rule generally involve two elements:

1. There must be a showing of necessity, mainly that the evidence cannot be offered in non-hearsay form; and
2. There must be some alternative guarantee of reliability or trustworthiness of the evidence being offered.

1. [8.68] Past Recollection Recorded

a. [8.69] The Doctrine

The past recollection recorded doctrine, codified in KRE 803(5), allows for a document to be read into evidence as an exception to the Hearsay Rule if the witness identifies the document as a record made in the past, although the witness is unable to recall the particular facts or events recorded in the document. The document itself cannot be received as an exhibit unless offered by an adverse party. There are four essential elements of proof for the introduction of a document under the past recollection recorded doctrine:

1. The witness must have had first-hand knowledge of the event.
2. The witness must presently lack a recollection of the event.
3. The witness must have reviewed the document and still not be able to completely or accurately recall the event even after reviewing the document.
4. The witness must vouch for the accuracy of the document and testify that it was made at or near the time of the event, when the matter was fresh in the witness's memory.

The witness need not have prepared the document so long as the witness can vouch for its accuracy and the witness viewed it at or near the time it was prepared.

b. [8.70] Method of Introducing Document

An example of an examination of a witness using the past recollection recorded doctrine follows.

- Q. I hand you what has been marked for identification purposes as Exhibit No. ___ and ask you to read it. Can you identify this document?
- A. Yes, it is a memorandum to the file which I wrote shortly after the conversation between the plaintiff and the defendant.
- Q. Having read the memorandum identified as Exhibit No. __, do you now have an independent recollection of the conversation between the plaintiff and the defendant?
- A. No, I still can't recall anything that was said between them that day. It was so long ago.
- Q. I hand you again the memorandum identified as Exhibit No. _ and ask you who wrote it?
- A. I did.
- Q. When did you write it?
- A. That same day right after the meeting between plaintiff and defendant.
- Q. What was the reason for writing this memorandum?

A. It was part of my job as secretary to record any business meetings between the plaintiff and the defendant.

Q. Is this an accurate copy of the original memorandum to the file?

A. Yes, because it is in the form that I prepare memoranda to the file and it contains my handwritten initials which I recognize.

Q. Have you changed or made any alterations to this memorandum since you first prepared it?

A. No.

Q. Please read the memorandum to the jury.

Q. Is what you just read to the jury true and correct as to what you wrote about the conversations between the plaintiff and the defendant shortly after they occurred on (month, day, year)?

A. Yes.

2. [8.71] Learned Treatises

a. [8.72] Generally

A learned treatise may be admitted as an exception to the Hearsay Rule pursuant to KRE 803(18) (discussed in **Chapter 9**, *infra*). For the treatise to be admissible, a qualified witness must testify that the treatise is a reliable authority on the subject matter, and an expert witness must introduce the treatise. In practice, the expert witness who lays the foundation is usually—but not always—the expert witness through whom the treatise is admitted. Because a learned treatise may be used during either direct or cross-examination, a party’s own expert is often the foundational witness and the treatise is thereafter used to cross-examine an opposing expert. Note that both the Kentucky and Federal Rules of Evidence prohibit the jury from taking the treatise to the jury room during deliberations, a practice reflecting the frequency with which portions of learned treatises—not the whole text—are offered pursuant to this rule.

b. [8.73] Method of Introducing Learned Treatise into Evidence

Cross-examining with a learned treatise can be tricky, however, depending on the testifying witness’s willingness to go along with the contents of the treatise:

Q. Dr. Einstein, I hand you a book entitled PRINCIPIA, authored by Isaac Newton, and ask you if you are familiar with this book?

- A. Of course.
- Q. Is this book on classical physics recognized as a reliable authority on the subject?
- A. Yes, indeed, it was written by a very famous and well recognized mathematician and natural philosopher.
- Q. Do you subscribe to the explanation of planetary motion described in this book?
- A. Yes, I do, so far as it goes.
- Q. I am going to read a statement that appears in the English translation of Sir Isaac Newton's original work in Latin [reads].
- Q. Do you agree with that statement?
- A. Yes, so far as it goes, but Sir Isaac's calculus did not take into account the fourth dimension, the dimension of spacetime., because that dimension was not generally known until the publication of my general theory of relativity.

c. [8.74] Practical Pointers

Always consider enlarging the pages of the treatise so that a jury can follow along as the words are read into evidence by the witness. This allows the jury to see the treatise and helps compensate for the jury's inability to take the treatise (or the enlargements) back to the jury room.

VIII. [8.75] Cross-Examination

A. [8.76] Right of Cross-Examination

The right to cross-examine the adverse party and the adverse party's witnesses is fundamental and absolute. *Harvey v. Commonwealth*, 423 S.W.2d 535 (Ky. 1967). It is the principal means by which a witness's truthfulness and accuracy can be tested. Our courts recognize cross-examination as the most effective means of discovering the truth. *See, e.g., Louisville & N.R. Co. v. Gregory*, 284 Ky. 297, 144 S.W.2d 519 (1940).

B. [8.77] Scope of Cross-Examination

The scope and duration of cross-examination fall within the trial court's discretion. *Perry v. Ernest R. Hamilton Assoc., Inc.*, 485 S.W.2d 505 (Ky. 1972); *Commonwealth, Dep't of Highways v. Smith*, 390 S.W.2d 194 (Ky. 1965).

Kentucky generally permits "wide open" cross-examination, although KRE 611(b) carries a caveat:

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

The wide-open rule of cross-examination is in contrast to the Federal Rules of Evidence which follow the majority of jurisdictions that limit cross-examination to the subject matter of direct examination and to matters affecting the credibility. FRE 611(b).

1. [8.78] Limitations on Scope of Cross-Examination

There are some notable limitations on the scope of cross-examination. If a party has been called as if upon cross-examination, the usual rule is that the party may be cross-examined only upon matters brought out in direct. *Commonwealth, Dep't of Highways v. Brumfield*, 418 S.W.2d 231 (Ky. 1966). In addition, after the examiner has had sufficient and ample opportunity to cross-examine the adverse party or adverse party witnesses upon all matters material to the case, the trial court has the right to limit the scope and duration of further cross-examination. This right, which is highly discretionary, finds support in *Island Creek Coal Co. v. Rodgers*, 644 S.W.2d 339 (Ky. Ct. App. 1982), and *Ford Motor Co. v. Zipper*, 502 S.W.2d 74 (Ky. 1973), which acknowledge the trial court's power to control the scope of cross-examination. KRE 611(b).

The trial court's rulings as to the scope and duration of cross-examination will not be reversed unless there is a clear showing of abuse of discretion and prejudice. *Island Creek Coal Co. v. Rodgers, supra*. Accordingly, the trial court may curtail cross-examination to stop repetitious questioning of the witness, terminate cross-examination on matters not material to those at issue in the case, protect witnesses from harassment and embarrassment, and avoid a waste of time.

2. [8.79] Avowals or Proffers Where Right to Cross-Examine Is Limited

If the right to cross-examine an adverse party or adverse witness is restricted, and counsel believes the restriction erroneous, the long-standing Kentucky practice is to offer the evidence by avowal, or proffer, to preserve the matter for appeal. For avowals and proffers, see Section [8.110], *infra*. Traditionally, failure to preserve the error by avowal waives any objection on appeal. *Commonwealth, Dep't of Highways v. Cottrell*, 400 S.W.2d 228 (Ky. 1966).

In 2007, KRE 103(a) was amended with the apparent intention of relaxing the long-standing avowal requirement. In lieu of an offer of proof, if the ruling is one excluding evidence, error is preserved if "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." In *Hyman & Armstrong P.S.C. v. Gunderson*, ___ S.W.3d ___ (Ky. 2008), 2008 Ky. LEXIS 114 *32, Kentucky's Supreme Court was disinclined to stretch the new language very far ("Appellants thereafter failed to put the desired cross-examination . . . in the record by avowal. Hence, the issue is not subject to our review."). Accordingly, an offer by avowal is still necessary practice.

3. [8.80] The Open Door Rule

Evidence not ordinarily be admissible can become admissible if a party "opens the door." When this occurs, the party cross-examining may inquire into those matters "opened up" which ordinarily would not be the subjects of cross-examination.

Accordingly, trial counsel should be careful to admonish all witnesses not to volunteer testimony the court has ruled inadmissible or which can reasonably be anticipated the court will rule inadmissible.

4. [8.81] Right to Recross

Re-cross is widely limited to matters brought out on re-direct examination. The right to re-cross a witness on matters not brought up on re-direct is within the sound discretion of the court. *Higgs' Ex'x v. Higgs' Ex'x*, 286 Ky. 236, 150 S.W.2d 681 (1941).

C. [8.82] Purpose of Cross-Examination

Generally, there are two fundamental purposes in cross-examining a party or witness: (1) to secure admissions of fact or opinion; and, (2) to discredit or impeach. Impeachment is accomplished by demonstrating to the jury that the adverse witness is untruthful, possesses a faulty memory, is biased or prejudiced, or is unreliable or inaccurate.

D. [8.83] Preparing for Cross-Examination

1. [8.84] Strategic Considerations

The key to successful cross-examination is preparation. The goal is to prepare a cross-examination so that any responses from the witness will support your theory of the case.

Therefore, when preparing for cross-examination, ask:

1. Can cross-examination of this witness secure admission of any fact supporting my client's theory of the case?
2. Can cross-examination of this witness weaken my opponent's theory of the case?

If the answers to these questions are "no," cross-examination may have no useful purpose. Questioning adverse witnesses always carries some risk, but questioning adverse witnesses without a useful purpose in mind is arguably foolhardy

In deciding at trial whether to cross-examine, weigh the risks of (a) having the witness reinforce favorable testimony before the jury and further reinforcing your opponent's theory or theme of the case; (b) impeaching your own witnesses by the witness's convincing testimony on cross-examination; (c) failing to impeach the witness and evoking empathy for the witness from the jury; (d) opening up a matter omitted by your opponent or previously held to be inadmissible; or (e) failing to cross-examine the witness and having the jury conclude that the witness's

testimony was correct.

Of course, lawyers can disagree on whether in any given instance a witness should be cross-examined. Some believe that they must ask something—anything—of a witness on cross-examination because the jury expects it. One of the most difficult decisions made during trial, therefore, is deciding whether to cross-examine, and the decision is yet another judgment call assessable only in hindsight.

2. [8.85] Before Trial

The cardinal rule of cross-examination is mastery of the facts. In preparing for cross-examination, counsel should takes steps to insure that he or she:

1. Knows every fact;
2. Thoroughly understands the adverse witness's proposed testimony;
3. Knows why the adverse witness is being called to testify;
4. Selected the testimony that, with a high degree of reliability, can be extracted by cross-examination; and,
5. Outlines the cross-examination.

3. [8.86] During Trial

During direct examination, counsel should:

1. Listen carefully to the witness;
2. Make notes of key points or statements made by the witness to integrate into the planned cross-examination or, alternatively, to use during closing argument. Avoid taking such copious notes that they become a distraction from listening to and watching the witness testify. Obsessive note taking can cause counsel to miss something important about the witness or fail to hear a critical part of the testimony.
3. Observe the jury from time to time to gauge reactions to the testimony. A sense of how the jury reacted to the testimony can be useful during cross-examination.

[8.87] Specific Goals

Before asking a witness a single cross-examination question, know your specific goals. Before trial, counsel should identify specific goals of the cross-examination under consideration,

and while the witness is testifying on direct, the planned goals or objectives should be re-assessed. Invalid or moot goals should be abandoned before beginning the cross. Suggested considerations include:

1. Is this witness competent to testify?
2. Is this witness mistaken in his or her recollection of the events?
3. Is this witness biased or prejudiced? How so?
4. Is this witness lying on one or more material matters? How so?
5. Has this witness given a prior inconsistent statement?
6. Can this witness be discredited? How so?
7. Is this witness's testimony so unbelievable or improbable that it will be discounted by the jury?
8. Will this witness discredit witnesses who will testify or who have already testified by reinforcing previous testimony?
9. Can this witness support the testimony of witnesses who have testified or who will testify?
10. Can this witness be helpful in any other way? How so?

E. [8.88] The Dos and Don'ts of Cross-Examination—Tactical Considerations

The styles of cross-examination are nearly as numerous as the examiners. A particular style of cross-examination reflects the examiner's personality, intellect, habits, and grasp of the issues. Mastery of cross-examination does not come from reading books on the subject, although many fine books can be enormously helpful. Mastery comes from observation and practice—mostly practice.

Here's a dozen suggested dos and don'ts, every one of which can be considered a rule begging to be broken if the right circumstance comes along.

1. [8.89] Dos and Don'ts

1. Ask short, simple questions and avoid compound, confusing questions.
2. Use simple words.
3. Ask leading questions to which you know the answer.

4. Use the smallest feasible increments to reach the intended goal. Cross-examination should be like building a wall one brick at a time.
5. Avoid broad, open-ended questions.
6. Be flexible. Remain capable of using the answer the witness provides—even if it is unanticipated.
7. Seek agreement from the witness before getting into likely areas of disagreement.
8. If the witness gives an unexpected answer that hurts your case, keep a poker face. Excitement, surprise, or astonishment will only reinforce the answer.
9. Be brief. Concentrate on the questions that must be asked and resist the temptation to ask everything that might be.
10. Finish strong. To the extent possible, plan a strong last question for each witness.
11. Don't forget closing argument. Resist the temptation to make cross-examination into a closing argument.
12. Know when to stop. When the goal is met, sit down.

2. [8.90] Dangerous Tactics

Observation of others invariably generates a list of “uh oh” moments that any aspiring trial lawyer should commit to memory. For example:

1. Conducting discovery during cross-examination is fraught with danger and should be avoided whenever possible.
2. Asking the witness "why?" may be fine during discovery but not during cross-examination when you don't know the answer.
3. Arguing with a witness, especially a sympathetic witness, can easily evoke sympathy for the underdog, and the lawyer is not likely to be the underdog.
4. Misstating the facts not only damages credibility, it gives the witness an opportunity to correct the questioner—exactly the opposite of the usual goal.

5. Unintentionally allowing the witness to repeat his or her testimony misses the point of cross-examination.
6. Underestimating the jury's grasp of the case can make an examiner look foolish. In other words, don't belabor the issue; move on to the next point.
7. Losing your temper is unprofessional and discourteous.
8. Opening the door to otherwise inadmissible evidence is a terrible feeling; avoid it.

3. [8.91] Controlling the Witness

The only way to assure complete control of a witness during cross-examination is to ask no questions. Alternatively, questions that are brief, concise, and narrow can go a long way to keeping an adverse witness on track.

When confronted with a recalcitrant or deliberately difficult witness, one or more of these techniques might be useful:

1. If the witness will not answer the question, repeat it politely; make it obvious to the jury that the witness is avoiding the question.
2. If the witness answers a question you did not ask, be firm that the witness answer your question. Body language can be useful (e.g., crossing your arms or sitting down) to communicate that the witness is wasting the jury's time.
3. If the witness is persistently unresponsive, make an objection and move to strike the answer.
4. If you must object and turn to the court for help, try to be sure that the judge will sustain the objection. Consider asking to approach the bench and requesting an admonition before making an objection in open court.
5. Ignore questions asked of you by the witness. Alternatively, tell the witness that the Rules do not permit you to do so.

F. [8.92] Impeachment

A witness may be impeached by any party, regardless of who calls the witness to testify. KRE 607.

Inconsistencies in a party's testimony, either on direct examination, cross-examination, or

reexamination, go to that party's credibility as a witness. *Carl Constr. Co. v. Bain*, 235 Ky. 833, 32 S.W.2d 414 (1930).

"A witness can be impeached by showing that [the witness] has been previously convicted of a felony but the particular felony conviction cannot be identified if the witness admits the prior conviction." KRE 609(a); *Stacy v. Manis*, 709 S.W.2d 433, 434 (Ky. 1986), citing *Commonwealth v. Richardson*, 674 S.W.2d 515 (Ky. 1984).

1. [8.93] Methods of Impeachment

Successful impeachment of a witness or party can discredit of the testimony. The most common methods of impeaching a witness are by:

1. prior inconsistent statements, written or unwritten;
2. the inaccuracy of the observation of the events in dispute;
3. a lack of recollection;
4. bias, prejudice, or hostility;
5. a prior conviction; or
6. character evidence.

2. [8.94] Impeachment Impermissible on Collateral Matters

A witness may not be impeached upon collateral matters. The witness may be asked about a collateral matter for impeachment purposes, but independent evidence may not be introduced to impeach the witness upon the collateral matter. *Baker Pool Co. v. Bennett*, 411 S.W.2d 335 (Ky. 1967).

3. [8.95] Basic Steps in Impeaching a Witness

There are three basic steps to impeaching a witness: (1) committing the witness to a present in-court statement; (2) introducing or reading the contradictory statement or evidence; and (3) resolving the contradiction. This last step is optional and often is not used.

When impeaching a witness, do not confront the witness with the contradictory statement or evidence until you thoroughly lock the witness into the in-court statement you intend to attack. Once the witness is committed to the statement, confront the witness with the prior contradictory statement or evidence. Rarely does an examiner choose to let the witness reconcile the contradiction; that's usually attempted on re-direct. Some lawyers ask the witness confronted with contradictory statements which one is true, the statement made then or the statement made now. This question invites explanation by the witness and can spoil the effect of the contradiction.

4. [8.96] Prior Inconsistent Statements

KRE 613(a) controls the procedure for impeaching a witness with a prior inconsistent statement:

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

A prior inconsistent statement may be either written or oral. If it is written, it must be the witness's statement but it does not necessarily have to be signed by the witness. If it is not signed, counsel must show that the statement has been adopted by the witness as being true.

a. [8.97] Elements of Proof

To properly impeach a witness,

1. Have the witness repeat or acknowledge the statement.
2. Ask the witness if he or she made any contrary statement.
3. Ask the witness whether on such a date, at such a place and time, he or she made a contradictory statement.
4. Produce the written statement to the witness.
5. Ask the witness to acknowledge having made the statement.
6. Ask the witness if changes were made since the statement was made or signed.
7. Ask the witness if the statement was true at the time it was made.
8. Introduce or read the written statement.

If the witness denies making the statement, be prepared to produce a rebuttal witness to prove the witness made or wrote the statement.

b. [8.98] Examples of Impeachment by Use of a Prior Inconsistent Written Statement

- Q. You testified earlier today and told this jury under oath that you saw the plaintiff's vehicle cross the center line and force the defendant's vehicle into the plaintiff's lane of travel, correct?
- A. Yes, that's what I saw.
- Q. You are sure about that?
- A. Absolutely.
- Q. Did you ever make a statement to the contrary?
- A. Not that I recall.
- Q. Well, did you or didn't you?
- A. Not that I recall.
- Q. If you had made a contrary statement, you would have remembered it, wouldn't you?
- A. Yes.
- Q. Because seeing a head-on collision is something you don't see very often, is it?
- A. True.
- Q. And so, if you had made a statement different from what you testified to today, then it would have been important enough that you would have remembered it?
- A. Well, yes.
- Q. And you don't remember making a statement contrary to what you have testified?
- A. No.
- Q. Do you remember on December 6, 2007, at your office giving a statement about what you saw regarding this collision?
- A. No, I don't.

- Q. I hand you a handwritten statement already given to opposing counsel and marked for identification purposes as Exhibit No. _____. Would you examine this statement and tell the jury if you recognize it?
- A. Yes, it looks like something I wrote.
- Q. Is it in your handwriting?
- A. Yes.
- Q. Is it about what you saw or didn't see concerning this collision?
- A. Yes.
- Q. You haven't made any additions or deletions to that statement, have you?
- A. No.
- Q. When you wrote that statement, those statements were true, weren't they?
- A. Yes.
- Q. Read the first two sentences of the second paragraph: "I heard the collision while working in my backyard. I didn't see anything about how the accident occurred."
- Q. Your Honor, I move to have Exhibit No. ____ introduced into evidence.

If the statement was written by someone else but signed or initialed by the witness, then include in your questioning:

- Q. Would you examine the statement and tell the jury if you recognize it?
- A. Yes, it has my signature on it.
- Q. At the time you signed it, you read the statement, didn't you?
- A. Yes.
- Q. You made some changes in the statement because there are some words crossed out and your initials appear in the corrections, don't they?

A. Yes.

Q. You knew that what you were signing was true at the time you signed it, didn't you?

A. Yes.

Q. You could have made any other changes to the statement if you feel they weren't correct, couldn't you?

A. Yes.

Q. And you didn't?

A. No.

Q. Again, that was because everything contained in that statement was true, wasn't it?

A. Yes.

c. [8.99] Examples of Impeachment by Use of Prior Inconsistent Oral Statement

Q. Mrs. Black, you testified earlier today that when you went into the defendant's store you saw the plaintiff lying on the floor and there were no caution buckets or warning signs nearby indicating that the floor had just been mopped, didn't you?

A. That's right. There wasn't anything there to warn anyone about that slick floor.

Q. And you are sure about that, aren't you?

A. Absolutely, I told the manager afterwards he should have had something to warn people coming into the store.

Q. Do you recall ever making a statement that the first time you saw the plaintiff was when the ambulance people were carrying her out on a stretcher?

A. No—I never said any such thing.

Q. Do you know Mrs. White?

A. Yeah, I know her.

Q. Who is she?

A. She is my neighbor.

Q. Are you and Mrs. White on good terms as neighbors?

A. I would say so.

Q. Do you recall telling Mrs. White anything about what you saw that day in the grocery store?

A. No, we've never talked about it.

Q. Well, to be specific about it, do you recall telling Mrs. White the afternoon of the plaintiff's fall in Jack's Corner Grocery that you first saw the plaintiff when the ambulance people were carrying her out on a stretcher?

A. No.

Q. That's all. Thank you.

To impeach this witness, you must call Mrs. White, to whom the statement has been made as a rebuttal witness.

Q. What is your name?

A. Mrs. White.

Q. Do you know Mrs. Black?

A. Yes.

Q. How long have you known her?

A. About 10 years, as long as we have been neighbors.

Q. Are you on good terms with Mrs. Black?

A. Oh yes, we visit each other several times a week.

Q. Did Mrs. Black ever discuss with you the incident involving a fall at Jack's Corner Grocery?

A. Yes, I remember that on the day the lady fell Mrs. Black told me she had been down to the grocery.

Q. What did Mrs. Black tell you about what happened?

A. She told me she didn't know how the lady fell. That the first time she saw the lady, the ambulance people were carrying her out on a stretcher.

Q. That's all, thank you.

d. [8.100] Examples of Impeachment by Use of Prior Inconsistent Sworn Testimony

After the witness testifies inconsistent with his or her deposition, ask the following questions:

Q. Do you recall giving your deposition on December 6, 2007, at defendant's lawyer's office?

A. Yes.

Q. The defendant's lawyer was sitting beside you when you testified, wasn't she?

A. Yes.

Q. And when you gave your testimony that day, you were under oath and swore to tell the truth, didn't you?

A. Yeah.

Q. And you knew that your testimony was important to this case if someone was taking your deposition?

A. I guess so.

Q. Well, you knew it was important enough to tell the truth, didn't you?

A. Yeah, I knew that.

Q. Please turn to page _ of your deposition and tell me if you were asked this question under oath and gave this answer, "Question: [Read the question]" and "Answer: [Read the answer]"?

A. Yeah.

Q. Did I read your sworn testimony correctly?

A. Yes, that's what I said.

If the witness denies giving the answer to the question or claims that he or she doesn't remember giving that answer, consider asking the court for the standard admonition regarding

deposition testimony. Some lawyers go so far as calling the court reporter on rebuttal.

5. [8.101] Examples of Impeachment by Showing Interest or Bias

The following questions might be used to show interest or bias:

Q. You are the plaintiff's cousin, aren't you?

A. Yes.

Q. You grew up together, went to school together, didn't you?

A. Yeah.

Q. In fact, you told Mr. Jones about a year ago that it wasn't fair that your cousin would be crippled for the rest of his life, didn't you?

A. Yeah, I told him that.

Q. You also told him that you would do whatever to see that he got some money, didn't you?

A. I might have said that, but that doesn't mean I would come in here and lie.

Q. But you did tell that to Mr. Jones, didn't you, yes or no?

A. Yes.

Q. And you would like to see your cousin get some money here today, wouldn't you?

A. Yes, of course.

6. [8.102] Examples of Impeachment of a Hostile Witness

Q. You and I have met before, haven't we?

A. Yeah, I remember you.

Q. In fact, I came to your home after calling you and asking you if I could meet with you to discuss this accident, didn't I?

A. Yes, that's right.

Q. I also had my paralegal with me and I introduced her to you, didn't I?

- A. Yes.
- Q. I told you that I represented Mr. Smith, who was seriously hurt when your neighbor, Mr. Jones, backed over Mr. Smith while he was walking past the driveway, didn't I?
- A. Yeah.
- Q. I asked you if you saw the accident, didn't I?
- A. I'm not sure. Maybe you did.
- Q. In fact, I asked you to tell me everything you knew about how Mr. Smith got hurt, didn't I?
- A. Well, I didn't want to get involved.
- Q. Actually, you refused to talk with me, didn't you?
- A. That's my right.
- Q. You wouldn't let me in your house?
- A. That's my right.
- Q. Didn't you also tell me that you didn't want to say anything that would hurt Mr. Jones because he is your neighbor and you two have been friends for a long time?
- A. I might have said that.
- Q. That's true today, isn't it? You don't want to say anything which will cause this jury to find against him, do you?
- A. Well—uh.
- Q. In fact, your testifying here today is an attempt to help your neighbor, isn't it?
- A. Well, I told him I would come here and testify.
- Q. You weren't subpoenaed, were you? You volunteered to come here and testify, didn't you?
- A. Yes.

Q. But you wouldn't talk to me and my paralegal, Mrs. _____, two years ago when the events were fresh in your mind, would you?

A. [No answer] No further questions.

IX. [8.103] Objections

The ability to make and meet objections at trial is one of the most taxing skills for the trial lawyer. As with examination of witnesses, knowing when and how to object or to meet your opponent's objections comes with preparation, practice, and experience.

A. [8.104] Preparation

Often, evidentiary issues develop before trial that obviously can be problems during trial. Prepare to meet those objections either by filing a motion *in limine* and asking the court to prohibit the matter from being brought before the jury, or prepare a short memorandum of law, often called a "pocket memorandum," to be kept in your pocket until the issues arises.

There are advantages and disadvantages to filing a motion *in limine*. The advantage is knowing beforehand how the court will rule. Additionally, a motion offers the court an opportunity to rule with some reflection rather than in haste during trial. The disadvantage is that such a motion educates your opponent. If the court sustains the objection, your opponent has an opportunity to find a way around the problem and, ultimately, get the evidence admitted. Another disadvantage is that it may tip your hand. This is especially true when you hope to catch your opponent off guard and you are sure the law supports your position. By waiting until trial to object, your opponent may not be able to find an alternative method of introducing the evidence. By having a trial brief in support of your objection, you enhance the probability of the trial court sustaining your position.

B. [8.105] Reasons for Objecting

The basic reasons for objecting are to control the information the jury receives and to preserve an issue for appeal. There are other reasons for objecting less important than the first two: to protect your party or witnesses from harassment or embarrassment or to expose your opponent's unfair tactics. Lawyers can object for reasons, not necessarily legitimate or proper reasons, such as: to coach a witness; to give a witness a moment to reflect on the answer about to be given; to throw opposing counsel off balance in his or her line of questioning; to interrupt opposing counsel's train of thought; or, to confuse the jury by disrupting the orderly flow of information.

C. [8.106] When to Object

Often, either the judge or counsel forewarn the jury that, because of rules of procedure or evidence, it may become necessary during the course of trial to object. With so many television shows and films focusing on courtroom trials, however, explaining the role of objections is increasingly unnecessary.

Counsel should object when damaging evidence is being introduced that is inadmissible under the Rules of Evidence or by law, or when otherwise admissible damaging evidence is being introduced improperly, or when the record on appeal must be preserved. Failure to timely object when it appears that the evidence is inadmissible waives the objection. *Sallee v. Ashlock*, 438 S.W.2d 538 (Ky. 1969). The trial court must be given an opportunity to correct the error.

D. [8.107] When Not to Object

Nothing is more distracting or irritating than when a lawyer constantly objects with no good reasons for doing so. Juries may be inclined to believe that when lawyers object they are trying to hide information from the jury.

Even when there is a valid reason for objecting, there are times when you should not:

1. When it appears that the witness's testimony is not harmful.
2. When it appears that objecting may highlight the harmful testimony and the jury is not paying attention.
3. When it appears that objecting may alienate you or your client, especially if repeated earlier objections were overruled by the court.
4. When it appears that your opponent is opening the door on an issue into which you would not have been permitted to inquire.

E. [8.108] How to Object

Pursuant to KRE 103(a) (1), counsel must state the grounds for an objection. If an objection narrowly made is overruled, the error on appeal is limited to the objection lodged. *Crain v. Dean*, 741 S.W.2d 655 (Ky. 1987).

The technique for objections includes:

1. Object immediately to prevent the witness from answering the question. If the witness answers before you have had an opportunity to object, consider requesting that the court admonish the jury not to consider the answer. A request to admonish the jury can also reinforce the information which the jury is supposed to disregard.
2. If permitted, state the objection clearly so that the court and the jury understand the basis for your objection. In many jurisdictions, however, counsel must approach the bench before making objections—a practice that inevitably slows the pace of a trial and often frustrates the jury.

3. Ask to approach the bench if any important objection is overruled so you can supply the court with supporting legal authority. Be careful not to request a sidebar too often or use it to argue with the court.
4. If the court does not rule on your objection, you must request upon a ruling; otherwise, the claimed error is waived on appeal. *Moore v. Collins*, 314 S.W.2d 207 (Ky. 1958).
5. When the court rules against you on an evidentiary matter, and opposing counsel is engaged in a line of questioning which is objectionable, it is not necessary to repeat the objection each time a question is asked. Ask the court to have the record note your continuing objection to the line of questioning.

F. [8.109] What to Do When You Are Overruled

When the trial court overrules your objection, move on to the next question. Do not react to the trial court's ruling with anger, frustration, or any indication that the ruling has harmed your case. This merely reinforces with the jury the fact that you lost your objection and that it must have hurt your case.

G. [8.110] Avowals and Proffers

If you are attempting to introduce evidence and the court sustains your opponent's objection, put the evidence in by avowal or proffer to preserve the error for appeal. *Underhill v. Stephenson*, 756 S.W.2d 459 (Ky. 1988).

An avowal is introduction of evidence by testimony of the witness. A proffer is offered by counsel without a formal interrogation of the witness; in other words, counsel merely states into the record what a witness would say if permitted to testify.

In the past, Kentucky required only a general objection. But KRE 103 was amended by the Kentucky Supreme Court in 2007 and the amendment changed this requirement to bring Kentucky's Rule into conformity with its federal counterpart. Thus, KRE 103(a)(1) requires parties to use "specific" rather than "general" objections when seeking exclusion of evidence. KRE 103(a)(1) ("If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.").

Before the 2007 amendments, counsel could not put into avowal evidence of what the witness is expected to testify. *Herbert v. Commonwealth*, 566 S.W.2d 798 (Ky. Ct. App. 1978). An amendment to KRE 103 allowed counsel to make the proffer. Remember, all testimony by avowal must be introduced outside the presence of the jury. *Commonwealth, Dep't of Highways v. Cottrell*, 400 S.W.2d 228 (Ky. 1966).

H. [8.111] Checklist of Common Objections

The following are common objections encountered or made during trial:

1. Ambiguous (unintelligible)
2. Argumentative
3. Exhibit not properly authenticated
4. Violates the best evidence rule
5. Impeaching the witness on a collateral fact (matter)
6. Calls for a conclusion or opinion
7. Cumulative
8. Assumes a fact not in evidence
9. No proper foundation laid to ask the question
10. Too general
11. Harassing (abusive)
12. Hearsay
13. Inflammatory nature outweighs its probative value
14. Immaterial
15. Irrelevant
16. Leading
17. Misquotes the witness
18. Multiple question
19. Violates the parol evidence rule
20. Not within witness's personal knowledge
21. Privileged communication
22. Witness not qualified to testify or express an opinion
23. Beyond the scope of direct examination

24. Calls for speculation
25. Calls for an opinion on the ultimate issue

X. [8.112] Conclusion

Like many other aspects of trial law, the savvy management of witnesses—either supportive or adverse—requires a combination of legal know-how, preparation, good judgment, intuition, and luck.

Regardless of a lawyer’s educational background or years of practice, more experience in witness management is invariably helpful and less experience is frequently a handicap. Whenever possible, therefore, even though opportunities to develop appropriate skills often do not involve a trial, a lawyer seeking expertise with witnesses should take advantage of every situation and practice, practice, practice.