

Supreme Court of Kentucky

IN RE:
ORDER AMENDING
KENTUCKY RULES OF EVIDENCE (KRE)

2007-02

In accord with KRE 1102(a), and the Chief Justice having reported to the Kentucky General Assembly proposed changes to KRE 103, KRE 404, KRE 410, KRE 701, KRE 702 and KRE 1103, and the General Assembly not having disapproved amendment to the Rules of Evidence by resolution during the 2007 Regular Session, the following Kentucky Rules of Evidence are hereby immediately effective:

A. KRE 103 Rulings on evidence

The amendments to subsections (1) and (2) of section (a) of KRE 103 shall read:

- (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
- (1) Objection. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
 - (2) Offer of proof. If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
- (b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

- (c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
- (d) Motions in limine. A party may move the court for a ruling in advance of trial on the admission or exclusion of evidence. The court may rule on such a motion in advance of trial or may defer a decision on admissibility until the evidence is offered at trial. A motion in limine resolved by order of record is sufficient to preserve error for appellate review. Nothing in this rule precludes the court from reconsidering at trial any ruling made on a motion in limine.
- (e) Palpable error. A palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered by a trial court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Evidence Rules Review Commission Notes (2007)

The 2007 amendment to this provision of the Rules makes two changes in the original (1992) rules on preserving errors for review. Both of the changes are in the first subsection of the provision (KRE 103(a)). None of the other subsections are affected by the 2007 amendment.

The first of the changes involves the requirement that a party make "specific" rather than "general" objections when the party desires exclusion of offered evidence. Under the 1992 version of this rule, a party was required to give grounds for objection only when requested to do so by the trial court; under the 2007 amendment, a party is required to state grounds for an objection in order to preserve error for review (and not just when requested to do so by the court) unless the ground for the objection was apparent from the context. The reasons for making this change include all of the following:

- (1) One of the reasons for requiring specific objections is to impose on lawyers an obligation to assist the trial judge with difficult issues of evidence law so that the judge may rule intelligently and quickly on those issues. This policy is sufficiently sound to require a statement of grounds in all instances and not merely upon request by the court.
- (2) The amendment brings KRE 103(a)(1) into alignment with FRE 103(a)(1). Uniformity with the Federal Rules has been consistently pursued by drafters of the Kentucky Rules and would be advanced by this amendment.

(3) The amendment would bring Kentucky law into alignment with the prevailing if not universal rule of other states and would bring the law into alignment with a proposal made by the drafters of the 1992 version of the Kentucky Rules. See Study Committee, Kentucky Rules of Evidence, Final Draft, pp. 2-4 (Nov. 1989).

The second of the changes involves the requirement that a party make a "proper offer" of proof in order to preserve error when offered evidence is excluded by the trial judge. Under the 1992 version of this rule, lawyers were required to use witnesses when making a record of evidence ruled inadmissible by the judge; the rule left no room for what is known widely as a "proffer" of evidence (i.e., where the lawyer states for the record what the witness would have said if allowed to testify). Under the 2007 amendment, lawyers are required to make the substance of excluded testimony "known to the court by offer" but are not required to do so through testimony of witnesses (thereby opening the door to the use of "proffers" of evidence). The reasons for this change include all of the following:

(1) It is more efficient and less burdensome to allow the lawyers to state for the record what a witness would say in testimony if permitted (using the "proffer") and should in some instances enhance the fluidity of the production of evidence, all without imposing any burden on the opposing party or on the affected courts (trial and appeal).

(2) The amendment brings KRE 103(a)(2) into alignment with FRE 103(a)(2), brings Kentucky's law into alignment with the law of most if not all other states, and adopts a position first advanced by the original drafters of Kentucky's Rules of Evidence. See Study Committee, Kentucky Rules of Evidence, Final Draft, pp. 2-3 (Nov. 1989).

(3) The amendment also serves to eliminate an ambiguity in KRE 103 because of the inconsistency of saying on the one hand that an offer of excluded evidence must come from the witness (as in the original version of KRE 103(a)(2)) but then saying on the other hand that the trial judge "may direct the making of an offer in question and answer form" (as has always been stated in KRE 103(b)).

B. KRE 404 Character evidence and evidence of other crimes

The amendments to subsection (1) of section (a) of KRE 404 shall read:

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

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

of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

- (2) Character of victim generally. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, other than in a prosecution for criminal sexual conduct, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
 - (3) Character of witnesses. Evidence of the character of witnesses, as provided in KRE 607, KRE 608, and KRE 609.
- (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
- (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
 - (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.
- (c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

Evidence Rules Review Commission Notes (2007)

The 2007 amendment to this rule makes a change with respect to the admissibility of evidence of the character of an accused (as provided in subsection (a)(1) of the provision) and leaves all of the other provisions of the rule unchanged.

The change expands the circumstances under which the prosecution is permitted to prove a defendant's character to show the commission of a criminal act. Under the 1992 version of this rule, the prosecution could not introduce evidence of a defendant's

character except in rebuttal of character evidence first offered by the defendant (i.e., the defendant's character was not in issue until he had put it in issue). The change opens the door for the prosecution to prove the bad character of a defendant after the defense has attacked the character of the victim (although keeping his own character out of the issues of the case).

The drafters of the Federal Rules made this same change in year 2000 and offered the following explanation for doing so:

"The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent disposition, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. . . . Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim." See Fed.R.Evid. 404, Advisory Committee Notes, 2000 Amendment.

Needless to say, the 2007 amendment to the Kentucky Rules serves to bring KRE 404(a)(1) into full alignment with its counterpart in the Federal Rules.

It needs to be noted, as stated in the commentary to the Federal Rules that "the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609." See Fed.R.Evid. 404, Advisory Committee Notes, 2000 Amendment.

C. KRE 410 Inadmissibility of pleas, plea discussions, and related statements

The amendments to sections (2), (4)(A) and (B) and new paragraph of KRE 410 shall read:

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

- (1) A plea of guilty which was later withdrawn;
- (2) A plea of nolo contendere in a jurisdiction accepting such pleas;

- (3) Any statement made in the course of formal plea proceedings, under either state procedures or Rule 11 of the Federal Rules of Criminal Procedure, regarding either of the foregoing pleas; or
- (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a plea or statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Evidence Rules Review Commission Notes (2007)

The overall purpose of KRE 410 is to bar the use of certain pleas and plea discussions when later offered into evidence in a civil or criminal trial. The 2007 amendment to this provision of the Rules makes two changes. The first change is minor but substantive and the second is solely for the purpose of correcting an error made in the original enactment of the Rules.

The first change is to eliminate some language that was unwisely added to the rule during the course of its original enactment, specifically the language prohibiting the use of "a plea under *Alford v. North Carolina*, 394 U.S. 956 (1969)." (A so-called "Alford plea" is a guilty plea by a criminal defendant who refuses to acknowledge guilt but waives trial and accepts all the consequences of a conviction.) This added language created a question as to whether prior convictions based on "Alford pleas" might be introduced as evidence (for impeachment purposes or to prove persistent felony offender status), which the Supreme Court has resolved in favor of admissibility. See *Pettway v. Commonwealth*, 860 S.W.2d 766 (Ky. 1993). The proposed change eliminates language from the rule that serves no useful purpose and simultaneously brings the Kentucky provision into alignment with its federal counterpart.

The second change is designed to correct an error that was made upon the original enactment of the Rules. By mistake, the last sentence of the provision (beginning with the words "However, such a statement is admissible:" and ending with the words "in the presence of counsel.") has been published as an exception applicable only to subsection (4) of the rule when it was intended by drafters, the Supreme Court, and the General Assembly to be an exception applicable to all of the subsections of the rule. See Study Committee, *Kentucky Rules of Evidence, Final Draft*, p. 33 (Nov. 1989). The proposed change modifies the rule as needed to accomplish its original objective,

while simultaneously achieving uniformity between the Kentucky and Federal Rules on this point.

D. KRE 701 Opinion testimony by lay witnesses

The amendments to sections (a), (b) and new section (c) to KRE 701 shall read:

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

- (a) Rationally based on the perception of the witness,
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Evidence Rules Review Commission Notes (2007)

With the adoption by the Kentucky Supreme Court of the analysis required by the decision in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), there was a risk that courts could be asked to avoid the reliability standards set out in that case by the simple process of offering "scientific, technical, or other specialized knowledge" evidence through a witness that an attorney sought to identify as a "lay witness." The Federal Rules of Evidence, Rule 701, avoided this error, by specifically adding language that excludes such evidence from the operation of Rule 701. The addition of subsection © to Kentucky Rule of Evidence, Rule 702, follows the exact language of the Federal Rule amendment. This subsection requires that an attempt to introduce testimony that is a part of "scientific, technical, or other specialized knowledge," must be tested for reliability under Rule 702.

The amendments to Rules 701 and 702 must be read together. The introduction and reliability of the evidence is determined not by asking whether the *witness* is lay or expert, but, instead, by asking whether the *testimony* to be offered is lay or "scientific, technical, or other specialized knowledge." If it is of the former, then Rule 701 is applicable. If it is of the latter, then Rule 702 must be used.

E. KRE 702 Testimony by experts

The amendments to KRE 702 shall read:

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

Evidence Rules Review Commission Notes (2007)

When the Kentucky Rules of Evidence were adopted in 1992, Ky. Rule 702 used the same language as Federal Rule of Evidence 702. In addition, the Kentucky Rule was interpreted to follow the traditional rule of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The "Frye Test" would allow admission of scientific evidence if it was generally accepted in the scientific community.

The United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) overruled the "Frye Test" and interpreted Federal Rule of Evidence 702 to require an analysis of factors by the trial judge in order to determine whether the scientific evidence was admissible. In order to admit such evidence the trial court was to act as a "gatekeeper" and make a preliminary determination that the underlying science was, in fact, "valid." In Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), the "Daubert Test" was extended to cover not only "scientific" evidence, but also any evidence of "scientific, technical, or other specialized knowledge."

In 2000, Rule 702 of the Federal Rules of Evidence was amended in order to codify the approach taken in Daubert. The items listed as numbers (1), (2), and (3) are not intended to specifically state the factors found in Daubert and Kumho Tire. They are, instead, intended to indicate that the court is to determine the reliability of such evidence based upon the flexible factors suggested by such cases. Although there is no attempt to codify the specific factors from that case, the purpose of the amendment is clearly stated by the Federal Advisory Committee Notes to that amendment.

No attempt has been made to "codify" these specific factors. Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every type of expert testimony. . . . The standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate.

In 1995, the Kentucky Supreme Court followed the lead of the United States Supreme Court and adopted the rationale of the Daubert decision as the appropriate interpretation of the language of Rule 702. Mitchell v. Commonwealth, 908 S.W.2d 100 (Ky. 1995). In 2004, the Kentucky Supreme Court restated the flexible standard

originally espoused in Daubert in Toyota Motor Corp. v. Gregory, 136 S.W.3d 35 (Ky. 2004).

The 2007 amendment to Kentucky Rule of Evidence, Rule 702 is designed to follow the development and adopts exact language set by the Federal Rules. The amendment will codify the approach taken in the Daubert case, followed in the Toyota Motor Corp. case and allow the trial court to act as gatekeeper to the introduction of "scientific, technical, or other specialized knowledge." The amendment does not specifically require the use of all or any one of the factors suggested by the court. It allows the trial court to use those factors that are appropriate to the case at trial.

F. KRE 1103 Evidence Rules Review Commission

The amendments to section (a) of KRE 1103 shall read:

- (a) The Chief Justice of the Supreme Court or a designated justice shall serve as chairman of a permanent Evidence Rules Review Commission which shall consist of the Chief Justice or a designated justice, one (1) additional member of the judiciary appointed by the Chief Justice, the chairman of the Senate Judiciary Committee, the chairman of the House Judiciary Committee, a member of the Board of Governors of the Kentucky Bar Association appointed by the President of the Kentucky Bar Association, and five (5) additional members of the Kentucky bar appointed to four (4) year terms by the Chief Justice.
- (b) The Evidence Rules Review Commission shall meet at the call of the Chief Justice or a designated justice for the purpose of reviewing proposals for amendment or addition to the Kentucky Rules of Evidence, as requested by the Supreme Court or General Assembly pursuant to KRE 1102. The Commission shall act promptly to assist the Supreme Court or General Assembly and shall perform its review function in furtherance of the ideals and objectives described in KRE 102.

All concur.

ENTERED: MAY 1 2007.



CHIEF JUSTICE