

**GETTING IT IN AND KEEPING IT OUT: INTRODUCING EVIDENCE IN HEARINGS
AND AT TRIAL**

By

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Most evidence presentations seem to focus on proper objections and preserving the record at trial or in an evidentiary hearing by raising those objections. We have provided some material on those objections for your consideration here as well. The focus of this presentation, however, is on getting evidence in to the record, including surviving those objections which are raised.

Each year, the Family Law Section of the Fayette County Bar holds a panel discussion with the members of the Family Court Bench in the Fayette Circuit. At one of those sessions, one of our judges, called upon to share a “pet peeve,” reported frustration with the inability of counsel to introduce documentary evidence. A terribly unscientific survey followed, seeking to know what issues the judges were seeing in their courtrooms. The results were amazingly consistent. What follows is an attempt to address those concerns categorically.

A. Hitting the Steps Without Falling Down – Introducing Documentary Evidence.

Proper handling of exhibits is more than just following the rules of evidence or procedure, although those are certainly critical. There is a real physical choreography to proper introduction of exhibits that done correctly, can instill confidence in you for

both the court and your client. If you adhere to the same steps each time, the likelihood of tripping and falling are greatly reduced.

1. Have the Exhibit Marked and Ready To Go.

Different courts have different expectations in this regard. Some courts require that the exhibits be placed in notebooks and tabbed. In some courtrooms, only the clerk can mark an exhibit. In other courtrooms, you will need to mark the exhibit yourself. What that means is having the “original” or the one you intend to be in the record which will be shown to the witness, a copy for opposing counsel, and a copy for the judge. It is fine to affix an exhibit sticker to the one which will be actually introduced and make copies from that one or you can affix a sticker to every copy. The important part is that there be an exhibit sticker affixed and that you place the correct number on the exhibit as you rise to introduce it.

2. Give a Copy to Your Opponent.

True confessions: it is not technically necessary to show the exhibit to opposing counsel until you are ready to introduce it. But, if you want to ground your presentation of evidence to a halt, that is a great way to do it. It is better practice to give your opposing counsel a copy in route to the witness stand. In family law practice, our exhibits are almost always going to be documents or photographs. If you are introducing a physical object, simply remind counsel that this is the object you showed him at case management conference or otherwise produced for inspection prior to trial.

3. Give a Copy to the Judge.

Our judges are our finders of fact. They like to be in on the conversation. It is important the judge have the exhibit in hand to follow along both as foundation is being

laid and as the testimony concerning it unfolds. I usually give the judge the exhibit with the original exhibit sticker that I intend to have be the one in evidence. There are a couple of advantages. One, the judge sees the original sticker and knows to hand it to the clerk when it is introduced. Second, it allows you to leave the exhibits at the witness chair for use by subsequent witnesses should that be desired.

4. Lay the Foundation.

One of the most respected writers on the art of litigation is James W. McElhaney. McElhaney recommends checklists for everything and especially for laying foundations for the specific piece of evidence. Some generic items on that checklist might be these:

- a. lay the foundation before trial through admissions and stipulations whenever possible;

- b. prove authentication and firsthand knowledge. If you want to introduce a photo, you have to prove the witness either took it or that it is a “true and accurate” representation of the matter depicted;

- c. pick your theory of admissibility. In other words, know ahead of time if you will offer a document as prior recollection recorded, or a business record. When dealing with experts, remember that they can rely on hearsay in formulating their opinions if the hearsay is of a type and kind which persons in their field routinely rely upon;

- d. If the objection is to lack of foundation, make your opponent identify what is missing; and

- e. make your record if the objection is sustained. Remember, the objective is to get the evidence in. If you fail to do so, be sure you asked all the foundation questions necessary to preserve your record.

5. Move Its Introduction Into Evidence.

The best and most experienced fail to move an exhibit into evidence. You should keep a list of your exhibits by number as you go with a word or two to identify the exhibit. Then, as you move through your witness you can check off when it is admitted into evidence. Some attorneys wait until the end of the witness' testimony and others seek to admit as to each at the time it is presented. Whichever style suits you best, DO NOT let the witness off the stand without moving introduction of your exhibits.

B. Help yourself and the Court – Get That Summary Exhibit In.

KRE 1006 is a wonderful rule. The rule allows “the contents of voluminous writings, recordings or photographs which cannot conveniently be examined in court” to be presented in the form of a chart, summary or calculation. Judges love 1006 summaries. Before adoption of the rule, ALL the tax returns had to be introduced, all the business records had to be introduced and so forth. Indeed, our expense lists are really 1006 summaries. But there is a catch. A party intending to use such a summary at trial must give timely notice of that intent which must be filed with the court. The filing of final verified disclosures will suffice as notice as will timely provision of an exhibit list with the 1006 summary clearly described as such. Moreover, the “voluminous records” which are summarized must be provided for inspection to the other side. A KRE 1006 summary properly presented and introduced is evidence and comes in as such.

Contrast that with a pedagogical device. As a general proposition, these summaries are in the nature of argument and are not considered evidence.

C. Hear What?

The discussion of hearsay covers pages 689 through 908 of Robert G. Lawson's Kentucky Evidence Law Handbook, 2024 Edition. There is no hope for covering even a fraction of that in this presentation. However, our judges have focused on two specific concerns: replacing a proper hearsay exception with "it's not offered for the truth of the matter," and, how we deal with out of court statements from children.

The traditional definition of hearsay has two elements. One, it is a statement made out of court and, two, it is offered for the truthfulness of the matter asserted. Lawson, § 8.05[1]. Trying to make the distinction, is the statement offered for its truth or not, is not susceptible of quick application in the heat of trial. McElhaney suggests we employ the "real witness rule" instead. McElhaney's Litigation, 1995, p.228. The essence of the real witness rule is in the answer to the question, "whom do you want to cross-examine?" If the answer is, the guy on the witness stand, it is not hearsay. If the answer is the guy on the stand and the guy he talked to who isn't on the stand, then it is hearsay.

The real witness rule helps in answering the second question, is it offered for the truth, as well. In answering the question, whom do you want to cross-examine, you will do so based on whether it matters if the statement is offered for the truth. Do you want to prove that the bank account was actually closed or do you want to prove that your client was told that it was.

Theoretically, there may be many, many reasons why a statement might be relevant for something other than its truth. Learning these few will usually cover most situations:

1. A verbal act
2. A verbal part of an act
3. Knowledge
4. State of mind

When the very act of speaking or writing certain words is the relevant evidence, the truthfulness of those words is not at issue. The easiest examples are defamatory statements. If someone says, "Anita Britton is a harlot of the first order," and I prudently sue the one who said it, I am not trying to prove I am a harlot of the first order but rather that those defamatory words were spoken. The verbal act of offer and acceptance provides another example. When trying to prove fraudulent representations, you are trying to actually prove that a false statement was made. Verbal acts are not offered for their truthfulness and are not hearsay.

A verbal part of an act is when the words give context to the physical act. For example, I hand a judge a \$20.00 bill. Was it a bribe or was I purchasing tickets for Law Day? Without the words that accompany the act, the act has no context.

"Knowledge" might also be termed "notice." If your mechanic tells you your steering is about to go out on your vehicle and that vehicle is subsequently in an accident, your knowledge of a potential hazard may be relevant.

There is an exception to the hearsay exclusion for state-of-mind KRE 803(3). However, there are situations where the expression is not offered for its truthfulness. In a family law case where one party is trying to prove a gift, a statement from the donor that "I detest that boy. He is a lazy slug," is not offered for the truthfulness but rather

offered to demonstrate that one who harbors that state of mind likely did not make a gift of cash to the claimed recipient.

When confronted with a hearsay objection and you do not have an exception, you had better be able to persuade the court that the truthfulness of the statement is not the issue.

D. Confronting the Child Testimony Conundrum.

Children are considered less reliable witnesses than adults and younger children are considered less reliable than older children. Lawson, § 3.00[4][a], p. 330. Of course, we try to avoid having children testify to every extent possible. What that results in are some fairly strained efforts to get the child's wishes or statements into evidence. KRS 403.270 (2)(b), states that the wishes of the child as to his custodian is a relevant factor to be considered in determining the best interests of a child.

Add to the hearsay nature of the statements the incompetency issue and things get very interesting. The question of whether statements from an incompetent witness can be admitted into evidence under a hearsay exception was considered by the United States Supreme Court in Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed. 2d 638 (1990). A trial court declared a three-year-old child incompetent to testify but admitted out of court statements made by the child to a physician. The Supreme Court upheld the ruling. The Kentucky Supreme Court considered the same evidentiary issue of allowing an out-of-court statement of an incompetent witness to come in under a recognized exception to the hearsay rule in Souder v. Commonwealth, 719 S.W. 2d 730 (Ky. 1986). Following that decision, the Court has seemingly agonized over statements of children to medical personnel that identify the perpetrator of abuse rather than are for

the purpose of diagnosis or treatment. Finally, and most recently, in Sanchez v. Commonwealth, 680 S.W. 3d 911 (Ky. 2023), the Court exercised a measure of caution by indicating that there is no black letter rule on the use of KRE 803(4) in that statements of a child victim to medical personnel which identify an abuser are always inadmissible. That exception contained in KRE 803(4), covers statements for purposes of medical treatment or diagnosis. You should be aware that there is a statutory exception that applies only in temporary removal hearings. KRS 620.080(2) says that hearsay evidence (e.g., a child's statements about abuse to a social worker) is admissible only for good cause. Further complicating matters are the specific holdings concerning social workers, psychologists and "others." The Supreme Court of Kentucky has ruled that with respect to social workers, there is no exception to the hearsay exclusion (Colvard v. Commonwealth, 309 S.W.3d 239(Ky. 2010)); a statement made to a psychologist for diagnosis or treatment may be admitted under KRE 804(4), and may not be used to admit statements made to persons other than physicians.

Crushing a still prevalent urban myth of a particular age at which children suddenly become competent witnesses, the Kentucky Supreme Court held in Pendleton v. Commonwealth, 83 S.W.3d 522, 525 (Ky. 2002) that age is not determinative of competency and that there is no minimum age for "testimonial capacity," and that "[t]he competency bar [for child witnesses] is low." Harp v. Commonwealth, 266 S.W. 3d 813, 823 (Ky. 2008).

Still there is an avoidance factor with putting children in the role of witness and, more distressingly, in the role of choosing between parents. We have created work-arounds to various degrees of success. Custodial evaluators rely on the statements of

children as well as testing to develop their opinions. De facto friends of the Court will talk to children as a part of their investigative work. In both instances, creative lawyers (and witnesses) have found a way to communicate the wishes of children. A strict reading of the rules precludes hearsay that does not come in under a recognized exception to the hearsay rule. As the gatekeepers, our judges are tasked with making that determination in every case.

Of course, there are times we need to try to exclude improper evidence. What follows, with complete attribution and deep debt of gratitude to Jenny E. Scott, Attorney at Law, are standard objections and the grounds therefore.

OBJECTIONS

1. Ambiguous - Confusing question that is capable of being understood in more than one sense. Rule 611(a).
2. Argumentative - (1) Counsel's question is really argument to the jury in guise of a question (Example: Counsel summarizes facts, states conclusion, and demands witness agree with conclusion); or (2) excessive quibbling with witness. Rule 611(a).
3. Asked and Answered - Unfair to allow counsel to emphasize evidence through repetition. Greater leeway on cross-examination, however. Rule 611(a).
4. Assumes a Fact Not in Evidence - Fact not testified to contained in the question. Rule 611(a).

5. Authentication Lacking - Proof must be offered that the exhibit is in fact what it is claimed to be. Rule 901(a).
6. Best Evidence Rule - If rule applies, original document must be offered or its absence accounted for. If contents of document are to be proved, rule usually applies. Rule 1002.
7. Beyond Scope of Direct- Rules of Evidence allow cross-exam on any relevant matter, including credibility, however, judge has discretion to limit such questions. An objection may prompt judge to exercise this discretion. Rule 611(b).
8. Compound - More than one question contained in the question by counsel. Rule 611(a).
9. Conclusion - Except for expert, witness must testify to facts within personal knowledge; conclusions are for the jury - and counsel during closing argument. Rule 602; 701.
10. Confusing and Unintelligible - Unfamiliar words, disjointed phrases, or confusing evidence. Rule 611(a).
11. Counsel Testifying - Counsel is making a statement instead of asking a question. Rule 603.
12. Cumulative - Judge has discretion to control repetitive evidence. Repeated presentation of the same evidence by exhibits or by more witnesses is unfair and wastes time. Rule 611(a).
13. Foundation Lacking - No proper foundation for testimony or exhibit. (Example: Offer of "recorded recollection" without showing failure of memory; similar to objection for lack of authentication or personal knowledge.) Rule 602; 901(a).

14. Hearsay (question) - The answer would elicit hearsay, and no exception has been shown. Rule 802. Hearsay (answer) - Question did not call for hearsay, but witness gave it anyway. Consider making a motion to strike and asking judge to instruct jury to disregard the response. Rule 802.
15. Impeachment by Improper Means - Methods of impeachment are limited and specific. Rules 608-610.
16. "Improper" - When you are sure the question is improper, but cannot think of the correct basis for an objection, try "Objection, Your Honor, improper question." Judge may know the proper basis and sustain your objection, and if the judge asks for your specific basis, you have gained time to think about it. To be used very infrequently. Rule 103(c); 611.
17. Improper Characterization - The question or response has characterized a person or conduct with unwarranted suggestive, argumentative, or impertinent language. (Example: "He looked like a crook.") Rules 404-405.
18. Incompetent Witness - Lack of qualification such as oath or mental capacity. Also applies if judge or juror is called as a witness. Rule 601-606.
19. Irrelevant - Would not tend to make any fact that is of consequence more probable or less probable. Motion to strike may be appropriate. Rule 402.
20. Leading - Form of question tends to suggest answer. (Permitted, of course, on cross-examination). Rule 611 (c).
21. Misquoting Witness (or Misstating Evidence) - Counsel's question misstates prior testimony of witness. Similar to objection based on assuming fact not in evidence. Rule 103 (c); 611(a).

22. Narrative - Question is so broad or covers such a large time period it would allow witness to ramble and possibly present hearsay, irrelevant or incompetent evidence. Judge has broad discretion in this matter, however. Rule 611(a).
23. Opinion - Lay opinion or inference which is beyond the scope permitted by Rule 701; personal knowledge lacking; or expert witness has not been qualified as such. Rule 701; 702.
24. Prejudice Outweighs Probative Value - At the bench, out of the jury's hearing, argue that "the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." May apply to exhibits as well as testimony. (Don't let the jury hear you say that the evidence is prejudicial-they may be impressed.) Rule 403.
25. Privileged - Answer would violate valid privilege (lawyer-client, husband-wife, clergyman, etc.) Rule 501-508.
26. Speculation and Conjecture - Question requires witness who lacks personal knowledge to guess. Rule 602.
27. Unresponsive - Answer includes testimony not called for by the question. Especially applicable to voluntary response by hostile witness. Note: An objection based solely on this ground is generally deemed appropriate only if made by the examining attorney; therefore, opposing counsel should state some additional basis for the objection. Rule 103 (c); 611(a)