University of Kentucky
UKnowledge

Law Faculty Scholarly Articles | Law Faculty Publications

1999

Interpretation of the Kentucky Rules of Evidence—What Happened to the Common Law?

Robert G. Lawson
University of Kentucky College of Law, lawsonr@uky.edu

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

Part of the Courts Commons, and the Evidence Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Robert G. Lawson, *Interpretation of the Kentucky Rules of Evidence—What Happened to the Common Law?*, 87 Ky. L.J. 517 (1999).

This Article is brought to you for free and open access by the Law Faculty Publications at UKnowledge. It has been accepted for inclusion in Law Faculty Scholarly Articles by an authorized administrator of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Interpretation of the Kentucky Rules of Evidence—What Happened to the Common Law?

Notes/Citation Information

Kentucky Law Journal, Vol. 87, No. 3 (1998-1999), pp. 517-582

This article is available at UKnowledge: https://uknowledge.uky.edu/law_facpub/152

KENTUCKY
LAW JOURNAL

VOLUME 87 | 1998-99 | NUMBER 3

ARTICLES

Interpretation of the Kentucky Rules of Evidence–What Happened to the Common Law?

BY ROBERT G. LAWSON*

INTRODUCTION

The Kentucky Rules of Evidence, which became effective on July 1, 1992,[1] dramatically transformed the method by which lawyers and judges address evidence issues. Before the adoption of the Rules, the law of evidence consisted mostly of a vast collection of common law rulings, accumulated over two centuries and inaccessible to lawyers and judges for all practical purposes. In addressing an evidence issue, participants had to first deal with the problem of "finding" the law–distilling from a morass of conflicting common law precedents the ones applicable to the issue at hand, a task regularly producing contention rather than agreement and, more often than not, a level of uncertainty as to the correct rule for the problem.[2]

---

* Dorothy Salmon Professor of Law, University of Kentucky and one of the two principal drafters of the Kentucky Rules of Evidence. B.S. 1960, Berea College; J.D. 1963, University of Kentucky.

[1] *See* KY. R. EVID. [hereinafter K.R.E.] 107(b).

[2] One can only speculate as to the amount of time expended on this task before the adoption of the Rules. The following observation was made before the adoption of evidence rules for federal courts: "Some United States district judges have

The Evidence Rules, on the other hand, substitute for this enormous collection of cases a set of carefully defined provisions that are readily accessible to all participants and that provide a clear starting point for the analysis of most evidence issues. In so doing, the Rules have transformed the task of resolving evidence problems from one of "finding" the law to one of "interpreting" the law–determining the meaning of a Rule and extending that meaning to the concrete facts and circumstances of the case. In making the law more accessible, however, the Rules have exacted the cost of adding great significance to a host of questions concerning the proper approach to their interpretation.

More than six years have elapsed since the adoption of the Rules. Until recently, the Supreme Court of Kentucky had encountered very few cases, if any, raising fundamental questions concerning interpretation of the Rules. These questions include the following: Should the Rules be viewed as statutes or rules of court?[3] Are courts bound to construe the Rules in accordance with their "plain meaning?"[4] How much, if any, of the common law of evidence survived adoption of the Rules? Do courts (especially the Supreme Court of Kentucky) have any power to create new evidence rules and expand evidentiary doctrine outside the confines of the Rules themselves? Through five years and nearly one hundred cases involving the Rules, the Supreme Court of Kentucky resolved specific evidence issues without confronting such far-reaching questions concerning its interpretive approach to the Rules. Calendar year 1997 brought this luxury to an end, as the court addressed the most important of these questions and rendered its most important evidence decisions since the adoption of the Rules.

---

estimated that at least fifty percent of their time since they have been on the bench has been occupied with trying to determine the correct rule of evidence to apply in a specific situation." Thomas F. Green, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 79, 99 (1961).

[3] This is a particularly pertinent question in Kentucky since the Rules of Evidence were simultaneously enacted by the General Assembly and adopted by the supreme court. *See infra* notes 66-71 and accompanying text. Whether or not the question is important, however, is a more debatable point.

[4] The Supreme Court of Kentucky maintains that it construes and enforces statutes in accordance with their "plain meaning," unless such construction would produce an absurd result. *See, e.g.*, Lynch v. Commonwealth, 902 S.W.2d 813, 814 (Ky. 1995); Commonwealth v. Shivley, 814 S.W.2d 572, 573-74 (Ky. 1991); Commonwealth v. Whitlow, 223 S.W.2d 1003, 1004 (Ky. 1949). Whether or not the court actually complies with this canon of construction is at least a debatable issue.

The purpose of this Article is to focus some attention on the broad subject of how best to approach the interpretation of Kentucky's Rules of Evidence. Part I sets the stage for this discussion by providing a description of two recent supreme court decisions that raise truly far-reaching issues concerning interpretation of the Rules. Part II digresses from the main subject in order to provide necessary background about the legislative history of the Rules–the unusual method by which they were adopted, the reasons for use of that method, and the extent to which objectives were achieved. Part III reviews United States Supreme Court decisions interpreting the Federal Rules of Evidence, a recognized and accepted source of guidance for interpretation of the Kentucky Rules. Part IV reviews varying approaches to interpretation of evidence rules suggested by legal scholars. Parts V and VI discuss the interpretive approach that seems to be developing in Kentucky and identifies the crucial issues yet to be confronted and resolved. Part VII concludes the Article with an examination of evidence issues that are most likely to generate future interpretation issues for the Supreme Court of Kentucky.

I. RECENT DECISIONS AND FAR-REACHING ISSUES

A. Stringer v. Commonwealth[5]

Before the adoption of the Rules of Evidence, Kentucky's common law included a general prohibition against expert opinion on the ultimate facts of a case.[6] Drafters of the Rules recommended abandoning this prohibition in favor of the language found in Federal Rule 704,[7] which provides that expert testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[8] The recommendation was enacted by the General Assembly in 1990,[9] but was deleted from the Rules before their final approval in 1992,[10] clearly because of resistance by the supreme court.[11] As

---

[5] Stringer v. Commonwealth, 956 S.W.2d 883 (Ky. 1997), *cert. denied*, 118 S. Ct. 1374 (1998).

[6] *See, e.g.*, Pendleton v. Commonwealth, 685 S.W.2d 549, 553 (Ky. 1985); Hampton v. Commonwealth, 666 S.W.2d 737, 742 (Ky. 1984). See also ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK 309-13 (3d ed. 1993), for a full discussion of the history and application of the rule.

[7] *See* EVIDENCE RULES STUDY COMM., KENTUCKY RULES OF EVIDENCE 70-71 (Final Draft 1989) [hereinafter STUDY COMM.].

[8] FED. R. EVID. 704.

[9] *See* Act of Mar. 19, 1990, ch. 88, § 52, 1990 Ky. Acts 176, 191.

[10] *See* Act of Apr. 9, 1992, ch. 324, § 30, 1992 Ky. Acts 921, 936.

[11] *See* Stringer v. Commonwealth, 956 S.W.2d 883, 896-97 (Ky. 1997) (Stumbo, J., dissenting), *cert. denied*, 118 S. Ct. 1374 (1998); Newkirk v.

enacted, the Rules were simply silent with respect to expert opinion on ultimate facts.[12]

Stringer was prosecuted for sodomy and sexual abuse of a child who was enrolled in a day care center owned and operated by his sister. The child testified at trial that the defendant subjected her to acts of sexual contact and oral sodomy while transporting her from the day care center to her home.[13] A medical examination of the child produced evidence that she had suffered "tearing in the vaginal area as well as some stretching and partial destruction of the hymen."[14] To corroborate the child's version of events, the prosecution was permitted, over objection, to introduce testimony from the examining physician that his physical findings were fully compatible with the events reported by the alleged victim.[15] The significance of *Stringer* arises out of the supreme court's opinion on the admissibility of this latter testimony.

The defendant argued on appeal that the physician's testimony violated the prohibition against expert opinion on ultimate facts, supporting his position with case law dated both before and after the adoption of the Rules.[16] The court accepted the position that the testimony qualified as expert opinion on an ultimate fact but rejected the argument that such testimony may not be admitted into evidence. It overruled the prior decisions cited by the defendant, abandoned the prohibition against expert opinion on ultimate facts, and brought Kentucky law into line with that of most, if not all, other jurisdictions.[17]

Commonwealth, 937 S.W.2d 690, 694 (Ky. 1996) ("[T]here is no ambiguity in our decision to eliminate the proposed Rule 704 from the Kentucky Rules of Evidence.").

[12] The silence is plainly indicated in the Rules themselves. Kentucky's Rules have the same numbering system as the Federal Rules. In the provisions on expert testimony, the numbers run from Rule 701 to 706. In this sequence, however, the number 704 is not utilized because there is no Kentucky counterpart to the federal provision on ultimate facts.

[13] *See Stringer*, 956 S.W.2d at 885.

[14] *Id.* at 889.

[15] *See id.*

[16] *See id.* (citing Alexander v. Commonwealth, 862 S.W.2d 856 (Ky. 1993), *overruled by Stringer*, 956 S.W.2d at 883; Brown v. Commonwealth, 812 S.W.2d 502 (Ky. 1991), *overruled by Stringer*, 956 S.W.2d at 883).

[17] The court described the admissibility requirements for expert opinion as follows:

> Expert opinion evidence is admissible so long as (1) the witness is qualified to render an opinion on the subject matter, (2) the subject matter satisfies the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (3) the

Stringer is extremely important for its holding that experts may testify to opinions on ultimate facts.[18] It is considerably more important, however, for what it says about the interpretation of the Rules and especially about their relationship to the common law rules predating their adoption, matters that undoubtedly created heated debate and division on the court. The interpretation issue was whether the prohibition against opinion on ultimate facts could be changed by decision of the court rather than by formal amendment of the Rules of Evidence. The court ruled as follows: "Our failure to adopt proposed KRE 704 simply left the 'ultimate issue' unaddressed in the Kentucky Rules of Evidence and, therefore, subject to common law interpretation by proper application of the rules pertaining to relevancy, KRE 401, and expert testimony, KRE 702."[19] Two members of the court protested, concluding in separate opinions that under the guise of interpretation, the majority had amended the Rules of Evidence in violation of the requirement that amendments be made by joint action of the supreme court and General Assembly.[20]

> subject matter satisfies the test of relevancy set forth in KRE 401, subject to the balancing of probativeness against prejudice required by KRE 403, and (4) the opinion will assist the trier of fact per KRE 702.

Id. at 891 (citation omitted).

[18] The merits of this ruling are beyond the scope of discussion in this Article. The decision is undeniably sound, however. It overrules a position that had been abandoned by most, if not all, other jurisdictions decades ago and that has been universally condemned by evidence scholars. *See* LAWSON, *supra* note 6, at 310; MCCORMICK ON EVIDENCE 19-21 (John William Strong ed., 4th ed. 1992); 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 704A (Joseph M. McLaughlin ed., 2d ed. 1998); 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1920-21 (James H. Chadburn rev., 1978). The supreme court's prior decisions were confusing and inconsistent, as described in *Stringer*, and vividly indicated that the court had been unable to comply with its own broad prohibition against the admission of expert opinion on ultimate facts. *See Stringer*, 956 S.W.2d at 889-92. More importantly, the new position does not open the floodgates to expert opinion on ultimate facts. It merely provides, as the federal provision says, that expert testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704.

[19] *Stringer*, 956 S.W.2d at 891-92.

[20] *See id.* at 896 (Lambert, J., concurring) ("Sadly, and despite its protest to the contrary, the majority in this case has amended the Rules of Evidence by adoption of Rule 704, contrary to the express provisions of KRE 1102 and 1103."); *id.* at 897 (Stumbo, J., dissenting) ("In direct violation of KRE 1102, the majority's opinion does precisely what this Court refused to do when we rejected proposed

B. Moseley v. Commonwealth[21]

Moseley was charged with murdering a woman with whom he was cohabiting. He admitted causing the death but claimed in defense that the shooting had been accidental.[22] The prosecution was permitted to introduce evidence of several out-of-court statements by the victim recounting multiple acts of violence by the defendant upon the victim. Upon appeal of his conviction, Moseley argued that the out-of-court statements had been admitted in violation of the hearsay rule; in rebuttal, the Commonwealth argued that the statements were admissible under the state of mind exception to the hearsay rule.[23] The supreme court reversed the conviction in a 4-3 decision and remanded for a new trial. It ruled that the victim's out-of-court statements constituted hearsay that was not admissible under "any applicable exception to the hearsay rule,"[24] a ruling with no special implications for the Rules of Evidence.

The importance of *Moseley* to the present discussion rests in a dissenting opinion that stirs issues about the Rules of Evidence that are no less fundamental than the ones addressed in *Stringer*. In an opinion reflecting the views of three members of the court, Justice Johnstone conceded in dissent that "the statements admitted against Moseley do not fall under any of the hearsay exceptions set forth in the Kentucky Rules of Evidence."[25] He also conceded that "[t]here is no catch-all or residual hearsay exception in Kentucky,"[26] at least not in the Rules.[27] Yet, he stated

---

KRE 704.").

[21] Moseley v. Commonwealth, 960 S.W.2d 460 (Ky. 1997).

[22] *See id.* at 461.

[23] *See id.* at 462.

[24] *Id.*

[25] *Id.* at 463 (Johnstone, J., dissenting).

[26] *Id.* (Johnstone, J., dissenting).

[27] The Federal Rules have a "residual exception" that is designed to admit reliable hearsay otherwise not admissible under specifically stated exceptions. *See* FED. R. EVID. 807. In pre-Rules decisions, the supreme court rebuffed all efforts to have such an exception added to the common law of evidence. *See, e.g.*, Wager v. Commonwealth, 751 S.W.2d 28, 29 (Ky. 1988); Estes v. Commonwealth, 744 S.W.2d 421, 423 (Ky. 1988); Bussey v. Commonwealth, 697 S.W.2d 139, 141-42 (Ky. 1985). The drafters recommended a residual exception for the Kentucky Rules. *See* STUDY COMM., *supra* note 7, at 92. The recommendation was enacted into law in 1990, but deleted from the Rules before their final approval in 1992. *See* Act of Mar. 19, 1990, ch. 88, § 59, 1990 Ky. Acts 176, 195-96; Act of Apr. 9, 1992, ch. 324, § 23, 1992 Ky. Acts 921, 932-33. The supreme court is undoubtedly entitled to credit for this outcome.

for himself and two other justices that the hearsay is admissible nonetheless: "Further, I would find [the victim's] out-of-court statements admissible under existing Kentucky case law notwithstanding the fact that they do not fall under any of the established hearsay exceptions."[28] Not admissible under the Rules of Evidence but admissible under the "existing Kentucky case law," said the dissent, a conclusion made especially remarkable by the fact that the "existing case law" in this instance predated, and apparently survived, the codification that produced the Rules.[29]

C. *The Broader Issues*

The interpretation issue most explicitly raised by the *Moseley* dissent is whether common law precedents survived the adoption of the Rules. In an article about interpretation of the Federal Rules, one of the principal players in that reform effort stated that "no common law of evidence remains" after the Rules,[30] and the United States Supreme Court has quoted the statement approvingly.[31] *Moseley*'s dissenters obviously disagree. How and why the particular hearsay law in question survived adoption of the Rules was not addressed in the opinion. How much of the preexisting common law remains in effect under the Rules was also not addressed. How much of this viewpoint might be acceptable to other members of the court, if any, is unclear, since the majority opinion never really joined issues with the dissent over the relationship of the Rules and preexisting common law. The issue is a fundamental one, however, and is sure to resurface for further consideration by the court.

The interpretation issue most explicitly raised by *Stringer* is whether or not the supreme court has a common law power to create new evidence rules. Commentators strongly disagree over whether such a power survived

---

[28] *Moseley*, 960 S.W.2d at 464 (Johnstone, J., dissenting).

[29] The dissent cited the following cases as holding that hearsay from a victim describing prior violence by the defendant is admissible: *Smith v. Commonwealth*, 904 S.W.2d 220 (Ky. 1995), and *Matthews v. Commonwealth*, 709 S.W.2d 414 (Ky. 1985). *See Moseley*, 960 S.W.2d at 464 (Johnstone, J., dissenting). The opinion did not discuss the legitimacy of such a rule or its constitutionality under the Confrontation Clause, although serious doubts exist on both points.

[30] Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 NEB. L. REV. 908, 915 (1978); *see also* Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 REV. LITIG. 129 (1987) [hereinafter Imwinkelried, *Federal Rule of Evidence 402*] (discussing how Federal Rule of Evidence 402 abolishes all common law evidentiary rules).

[31] *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 588 (1993).

adoption of the Federal Rules of Evidence.[32] It is argued on the one hand that the Rules preempt the field in order to achieve "a truly codified body of Evidence Law."[33] It is argued on the other that the Rules contemplate growth through "the development of novel evidentiary doctrines . . . preserved in case law precedent."[34] *Stringer*'s answer to the question is narrow and inconclusive,[35] although both the majority and the dissenters agree that the issue is sure to resurface in other situations.[36]

Stringer and *Moseley* both raise an interpretation issue that is more fundamental and perhaps more important than either of the issues described above. How much weight must courts give to the text of a provision when interpreting the Rules of Evidence? More narrowly stated, the question is whether the supreme court is bound by "plain meaning" when interpreting the Rules. The necessity for thoughtful attention to this question is vividly illustrated by the situations in *Moseley* and *Stringer*, although inadequately addressed in both instances.

The evidence question in *Moseley* was admissibility of hearsay. The dissenters conceded that the evidence was not admissible under any of the hearsay exceptions defined in the Rules but found it admissible under preexisting common law rules.[37] They seem not to have weighed the following provision of the Rules in their analysis: "Hearsay is not

---

[32] *See, e.g.*, Edward J. Imwinkelried, *A Brief Defense of the Supreme Court's Approach to the Interpretation of the Federal Rules of Evidence*, 27 IND. L. REV. 267 (1993) [hereinafter Imwinkelried, *A Brief Defense*]; Glen Weissenberger, *Are the Federal Rules of Evidence a Statute?*, 55 OHIO ST. L.J. 393 (1994) [hereinafter Weissenberger, *Are the Federal Rules of Evidence a Statute?*].

[33] Imwinkelried, *A Brief Defense*, *supra* note 32, at 293.

[34] Weissenberger, *Are the Federal Rules of Evidence a Statute?*, *supra* note 32, at 398.

[35] Justice Cooper, speaking for the majority, recognized authority in the court to deal with issues left "unaddressed" in the Rules but used the words "common law interpretation" to describe what the court proceeded to do in the case. *See* Stringer v. Commonwealth, 956 S.W.2d 883, 891-92 (Ky. 1997), *cert. denied*, 118 S. Ct. 1374 (1998). The dissenters expressed no general view on the authority of the court to create evidence rules through decisional law but concluded in this instance that the court could act only through proper amendment of the Rules.

[36] *See Stringer*, 956 S.W.2d at 892 ("We note that the rules, as adopted, also left open other issues, *e.g.*, the 'habit' rule (proposed KRE 406) and the 'eavesdropper' rule (proposed KRE 502); and that still other evidence issues, *e.g.*, bias of a witness, are not specifically addressed in the rules . . . .").

[37] *See* Moseley v. Commonwealth, 960 S.W.2d 460, 464 (Ky. 1997) (Johnstone, J., dissenting).

admissible except as provided by these rules or by rules of the Supreme Court of Kentucky."[38] The words "these rules" obviously mean the Rules of Evidence; the words "rules of the Supreme Court" most likely mean rules formally promulgated by the court.[39] The words "case law" are missing from the exceptions list. This omission creates a real challenge for interpreters who seek to admit hearsay under preexisting common law rulings. The position of *Moseley*'s dissenters becomes considerably more difficult to justify if the text of the Rules means very much in their interpretation.

The evidence question in *Stringer* was admissibility of expert opinion on ultimate facts. While the preexisting law prohibited such testimony, the Rules contain no prohibition on the subject. Did the preexisting law and the prohibition against such opinion survive adoption of the Rules? A pivotal provision of the Rules that seemed to play no role in the analysis of either the majority or the dissenting opinions reads 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."[40] The evidence in *Stringer* was relevant. The text of this provision calls for admission of such evidence absent an exclusionary rule in one of the following places–constitution, statute, evidence rules, or court rules. It contains no mention of exclusion on the basis of case law (preexisting or otherwise) and thus leaves no room for exclusion in *Stringer,* if interpretation of the Rules is governed by their "plain meaning."

This interpretation issue–the weight to be accorded the text of the Rules–will ultimately have to be more clearly resolved by the court. As discussed in Part VII below, there is a lengthy list of evidence issues that are highly likely to produce *Stringer*-like interpretation issues for the court. In these situations and others not so foreseeable, admissibility of evidence will depend upon the extent to which the court adheres to, or ignores, the "plain meaning" of provisions of the Rules of Evidence. As a prelude to discussion of this and the other issues described above, it is necessary to

---

[38] K.R.E. 802.

[39] The following statement suggests that the drafters of the proposed rules had these interpretations in mind for the provision: "It recognizes that hearsay is admissible under exceptions defined in these rules (namely Rules 803 and 804) as well as other rules promulgated by the Supreme Court (e.g., Civil Rule 32)." STUDY COMM., *supra* note 7, at 80.

[40] K.R.E. 402.

provide some background concerning the methods by which the Rules came into existence.

II. ENACTMENT OF THE RULES[41]

A. *Preliminary Stages*

An "Evidence Rules Study Committee" was appointed in 1987 to begin work on an evidence code for Kentucky's court system.[42] Its membership included experienced trial lawyers from various practice groups, trial and appellate judges, members of the legislature, and law professors.[43] The Study Committee was given no formal charge upon its appointment but generally understood that its task was to prepare a set of proposed rules for submission to the supreme court; it began its assignment without consideration of the advisability of codification in this area of the law.[44]

The objectives of the Study Committee were partially defined by the condition of the existing law. The law before the Rules consisted of a mixture of statutes and common law precedents, with substantially more of the latter than the former. The common law portion was so complex, voluminous, and inaccessible that practitioners acted more on instinct than principle in dealing with evidence issues, and few judges could have entertained realistic expectations of mastering more than a small part of the law of evidence. Uncertainty in the law led to unpredictability of what a judge might do with evidence issues in a given case and to disparities in the resolution of such issues from one trial court to another. Reduction of this common law mass to a simpler, more accessible body of rules was first and foremost among the objectives of the Study Committee.

---

[41] Unfortunately, not much of the history surrounding adoption of the Rules is documented. The author of this article served as the chair of the study committee described below and was one of the two principal drafters of the Rules. Some of what is described below is recorded in letters and memoranda in his files, while some is based on personal recollection.

[42] The Study Committee was appointed under the authority of the Kentucky Bar Association with the blessing of the Kentucky Supreme Court. In fact, the very first request for this author to participate in the rules project came from the chief justice of the court.

[43] *See* STUDY COMM., *supra* note 7, at v.

[44] The advisability of codification was never debated. Practitioners were pushing hard for codification, probably because of positive experiences with the Federal Rules, which were more than 10 years old by this time. The supreme court was supportive of codification, but not unanimously.

Two early decisions made by the Study Committee further defined its objectives. It decided "to strive for uniformity with the Federal Rules of Evidence and to propose a departure from the Federal Rules only for good reason,"[45] seeking through this approach even greater predictability for evidence decisions.[46] In addition, it decided that a complete and coherent code of evidence could not be achieved without undertaking reform of the statutory portion of the existing law.[47] The first decision made it much easier to prepare rules for submission to the supreme court while the second complicated the enactment process by requiring official action by both the supreme court and General Assembly.

The Study Committee began drafting its proposals in early fall 1987 and concluded the first phase of its work in early summer 1989. An initial draft of its proposals was transmitted to the supreme court on June 28, 1989.[48] The Study Committee met with the court on multiple occasions, received comments and suggestions on the initial draft, modified the original proposals as suggested by the court, and in November 1989, published its final draft of the Kentucky Rules of Evidence.[49] The final draft included a drafter's commentary on each proposal, similar to the Advisory Committee Notes that had proved to be so helpful in the application of the Federal Rules.[50] It was transmitted to the court, given to

---

[45] STUDY COMM., *supra* note 7, at 1.

[46] *See id.* ("The Federal Rules have been in operation since 1975; several states have adopted Rules patterned after the Federal Rules. As a result, there is a substantial and growing body of case law construing these Rules, case law which can be of invaluable assistance in the application of a new set of evidence rules for Kentucky.").

[47] Statutes affecting admissibility of evidence numbered above 50 before adoption of the Rules. Provisions existed on business and public records, testimony from a former trial, reputation and prior acts of a rape victim, hearsay from victims of child sex abuse, testimonial privileges of several kinds, statements and acts by persons dead at the time of trial, and other important subjects.

[48] *See* Letter from Robert G. Lawson to Robert F. Stephens, Chief Justice (June 28, 1989) (on file with author).

[49] *See* STUDY COMM., *supra* note 7.

[50] *See id.* at 1.

> Most codes of evidence . . . contain only broad general rules of evidence law, leaving the judiciary room to flesh out the general rules through appellate opinions. . . . With this in mind, the Study Committee carefully prepared for each rule a commentary which should be used in application and construction of that rule.

Id.

members of the General Assembly, and circulated to the bench and bar for consideration, discussion, and comment. After being favorably received by lawyers and judges, it became the proposal that was formally presented for enactment into law.

B. Rules or Statutes?

Does the legislature enact evidence rules as statutes, or does the supreme court adopt them as rules of practice? This question surfaced early, complicated the efforts of the Study Committee, and endured to the end as the only serious obstacle to adoption of an acceptable set of rules. The supreme court was already engulfed in controversy over a similar separation-of-powers issue[51] and thus was especially interested in the approach to be used for enactment of the Rules. The General Assembly was expected to develop an equal interest in the subject once asked to repeal or modify more than fifty statutes to make room for the adoption of an integrated evidence code.

The approach used to adopt the Federal Rules provided unclear guidance for drafters of the Kentucky Rules. The Federal Rules had been promulgated by the United States Supreme Court and transmitted to Congress like other rules of court, with the anticipation that they would take effect on a specified date unless disapproved.[52] Instead, Congress enacted a statute deferring the effective date of the Rules until expressly

---

[51] The legislature had enacted a statute requiring bifurcated proceedings in the sentencing of felony offenders. *See* KY. REV. STAT. ANN. § 532.055(1) (Michie 1996). The Supreme Court thought that the legislation impinged on its rulemaking authority but sustained its constitutionality by resorting to the concept of "comity," a ruling that divided the court and created unusually heated debate over the proper boundary between legislative and rulemaking authorities. *See* Boone v. Commonwealth, 780 S.W.2d 615 (Ky. 1989); Commonwealth v. Hubbard, 777 S.W.2d 882 (Ky. 1989); Huff v. Commonwealth, 763 S.W.2d 106 (Ky. 1988); Commonwealth v. Reneer, 734 S.W.2d 794 (Ky. 1987).

[52] *See* Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183 (1973); *see also* 1 WEINSTEIN & BERGER, *supra* note 18, at xxi ("The Supreme Court promulgated the Rules of Evidence on November 20, 1972, and transmitted them to Congress on February 5, 1973, to take effect on July 1, 1973, unless disapproved by Congress within ninety days . . . ."); Glen Weissenberger, *The Supreme Court and the Interpretation of the Federal Rules of Evidence*, 53 OHIO ST. L.J. 1307, 1319-20 (1992) [hereinafter Weissenberger, *The Supreme Court*] (discussing whether the Supreme Court possessed the authority to prescribe rules of evidence).

enacted into law by Congress.[53] Both before and after this action, powerful opinions were expressed on both sides of the authority question.[54] The Supreme Court's version of the rules was assigned to a congressional committee, public hearings were held, revisions were made, and in January of 1975, the rules were enacted into law by act of Congress.[55] Most of what the Supreme Court adopted and transmitted to Congress survived intact,[56] but the fact remains that the Federal Rules of Evidence exist as statutes of Congress and not as rules of practice of the Supreme Court.

The assumption of authority by Congress over the Federal Rules has been widely accepted.[57] A similar assumption of authority by the Kentucky

---

[53] *See* Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973).

[54] For example, in dissenting from the Supreme Court's transmittal of the Rules to Congress, Justice William O. Douglas wrote "that fashioning rules of evidence is a task for the legislature, not for the judiciary." Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 185 (1973). Judge Albert Maris, who had played a prominent role in formulating the rules as chairman of the Standing Committee of the Conference on Rules of Practice and Procedure, testified before Congress that "the Advisory Committee which prepared the rules, and our standing Committee which reviewed them, all are fully satisfied that rules of evidence are, by their nature and operation, basically procedural, and, therefore, within the rule-making power of the Court." *Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 73, 76 (1973) (statement of Judge Albert B. Maris). Chief Justice Warren Burger, speaking on the matter of congressional intervention, said that "the rulemaking process is functioning as its designers intended." *Rules of Evidence (Supplement): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 8, 9 (1973) (message from the Chief Justice).

[55] *See* Pub. L. No. 93-595, 88 Stat. 1926 (1975).

[56] *See* Weissenberger, *The Supreme Court*, *supra* note 52, at 1320.

> While Congress thereafter revised the Supreme Court's version of the Rules in specific, isolated provisions, it did not reconstruct the design of the Rules. Its modifications were limited to the revision of the specific text of discreet [sic] provisions of the Federal Rules of Evidence, and the vast majority of the Supreme Court's version of the Federal Rules of Evidence, as well as the integrity of the structure of the Rules, were left intact by Congress when the Rules became effective on January 2, 1975.

Id. (footnote omitted).

[57] *See, e.g.*, Cleary, *supra* note 30, at 910 ("The primacy of the Congress with regard to procedural matters has never been seriously contested."); Weissenberger, *The Supreme Court*, *supra* note 52, at 1321 ("From the perspective of constitutional and statutory powers, little doubt exists that Congress possesses the ultimate

General Assembly would be more suspect. While the United States Constitution says nothing about judicial rulemaking authority, the Kentucky Constitution explicitly delegates to the Supreme Court of Kentucky the authority to "prescribe . . . rules of practice and procedure for the Court of Justice."[58] Although ambiguity in the words "practice and procedure" leave the scope of this rulemaking authority uncertain,[59] most lawyers and judges would conclude "that the law of evidence is predominantly procedural."[60] The problem for drafters of evidence rules is that hardly any thoughtful commentator would conclude that the law of evidence is exclusively procedural.[61] While some rules easily qualify as "practice and procedure" (e.g., scope of cross-examination, competency of witnesses, authentication of writings, etc.), others exist for reasons that have little or nothing to do with an "orderly dispatch of judicial business"[62] and look at least as much like substance as procedure:

> The best example is that of privilege. Opinions of highly respectable commentators have differed on this subject. The difficulty arises out of the fact that rules of privilege do not have as their purpose the ascertainment of an objective factual picture to which rules of law may apply. Quite the contrary, they knowingly sacrifice the truth (or at least possible sources of it) because it is felt that some other public interest overrides the need for truth. It must be said, however, that even the law of privilege is at least half-procedure, for a truth-seeking interest is being weighed against a truth-obstructing interest to establish the lines we seek.[63]

Other evidence rules that reflect a public policy override of the "orderly dispatch of judicial business" include rape shield laws, dead man statutes,

---

authority in the rule-making process.").

[58] KY. CONST. § 116.

[59] As stated by the supreme court: "Inevitably, there is and always will be a gray area in which a line between the legislative prerogatives of the General Assembly and the rule-making authority of the courts is not easy to draw." Commonwealth v. Reneer, 734 S.W.2d 794, 797 (Ky. 1987) (quoting *Ex parte* Auditor of Public Accounts, 609 S.W.2d 682, 688 (Ky. 1980) (emphasis in *Reneer* omitted)).

[60] Green, *supra* note 2, at 102.

[61] *See id.* at 107; Ronan E. Degnan, *The Feasibility of Rules of Evidence in Federal Courts*, 24 F.R.D. 341, 346-47 (1959); Charles W. Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429, 435 (1957); Thomas Fitzgerald Green, Jr., *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 482, 482-84 (1940).

[62] Joiner, *supra* note 61, at 435.

[63] Degnan, *supra* note 61, at 346-47 (footnote omitted).

and spousal testimony laws, all of which existed as statutes when evidence law reform began in Kentucky.

The difficulty, then, for reformers of this law was partially political and partially legal. The supreme court was engulfed in controversy over the scope of its rulemaking authority, reform and integration of the law of evidence could not occur without General Assembly participation, and the division of responsibility between the judiciary and the legislature was unclear and unsettled. The end product was uncertainty about the approach to reform rather than the need for reform. The following statement about evidence reform in a sister state describes the viewpoint of the Study Committee as it looked for an effective approach to reform in Kentucky: "All hands agree that the time is ripe for a general housecleaning in the law of evidence. It will indeed be tragic if the house is not swept because its inmates are unable to agree on who is to wield the broom."[64] Success had been achieved at the federal level by a wielding of the broom in partnership, described by Chief Justice Burger as "a joint enterprise, between Congress and the Judicial Branch."[65] The Study Committee believed that a similar approach would solve the problems described above and produce for Kentucky a coherent and integrated code of evidence.

A more complete partnership than existed with respect to the Federal Rules was contemplated for Kentucky. The Study Committee recognized that the supreme court had greater interest in evidence rules than the General Assembly and superior ability to formulate rules needed for an effective adjudicatory system. It had already submitted the proposed rules to the court for review and revision; it planned to submit the revised proposals to the General Assembly for enactment and to conclude the process with an adoption of the rules by the court under its rulemaking authority. The principal objectives were a joint enactment of the proposed rules by the General Assembly and the supreme court, a repeal and/or modification of all statutes that were incompatible with the proposed rules, and the adoption of an integrated set of evidence rules satisfying the basic needs of the adjudicatory system.

C. Enactment

The rules proposed in the Study Committee's final draft were submitted to the General Assembly and enacted into law in 1990 with few

---

[64] Lewis Tyree, *A Symposium on the Uniform Rules of Evidence: The Opinion Rule*, 10 RUTGERS L. REV. 601, 619 (1956).

[65] *Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 8 (Supp. 1973) (message from the Chief Justice).

modifications.[66] The enactment, however, was given a deferred effective date (July 1, 1992)[67] to provide time and opportunity for reconsideration of the rules in 1992. There was no reason for the supreme court to take action in response to this enactment and none was taken. The deferred effective date provided an opportunity for the court to circulate the enacted rules among the bench and bar for additional comment,[68] which resulted in further modification of the rules informally approved earlier by the court.

The General Assembly subjected the 1990 enactment to greater review in 1992, conducted public hearings on the rules, adopted the modifications suggested by the supreme court, revised its earlier enactment in a few important respects, and put its final seal of approval on the rules with a vast majority of the proposals of the Study Committee (and the supreme court) fully intact.[69] On May 12, 1992, the supreme court entered an order adopting "so much of the Kentucky Rules of Evidence as enacted . . . by the General Assembly, as comes within the rule making power of the Court, pursuant to Ky. Const. § 116."[70] The Kentucky Rules of Evidence became law upon the entry of this order, jointly approved by the General Assembly and the supreme court.

The product of this complex process met all of the important objectives of the reform effort. As planned, it produced Rules that closely paralleled the Federal Rules of Evidence in structure and content. It codified a vast body of common law rulings and made the state's evidence law more accessible to judges and lawyers and thus more susceptible to effective application. It consolidated case law and statutes into an integrated code and rested that code in a single location. It emerged from the process somewhat bruised and battered but provided for the state "an eminently practical set of [evidence] principles, easily understood and easily applied in most cases."[71]

III. INTERPRETING THE FEDERAL RULES

A. *Introduction*

Some of the most important judicial consideration of the issues raised by *Stringer* and *Moseley*, and clearly the most comprehensive, has occurred

---

[66] *See* Act of Mar. 19, 1990, ch. 88, 1990 Ky. Acts 176.

[67] *See id.* § 7, Rule 107(2), 1990 Ky. Acts at 178.

[68] The proposed rules were circulated to members of the bench and bar and, at the direction of the supreme court, discussed and debated at both the 1990 and 1991 conventions of the Kentucky Bar Association.

[69] *See* Act of Apr. 9, 1992, ch. 324, 1992 Ky. Acts 921.

[70] Order, Supreme Court of Kentucky, May 12, 1992.

[71] WEINSTEIN & BERGER, *supra* note 18, at xxii.

in the construction of the Federal Rules of Evidence by the United States Supreme Court. There is exceptional relevance of these cases to the present discussion because of the substantial similarity between the Federal and Kentucky Rules, because the Kentucky Supreme Court relies on these cases when construing the Kentucky Rules, and because the best scholarly analysis on interpretation of evidence rules focuses on what the United States Supreme Court has done and said on the subject.

The decisions discussed below were selected for the purpose of shedding light on the issues suggested by *Stringer* and *Moseley*–how much weight must be accorded the "text" of the Rules of Evidence; to what extent did preexisting common law survive adoption of the Rules; and does the supreme court have a common law power to create rules of evidence outside the confines of the Kentucky Rules? They are described in the order in which they were rendered so that any evolution occurring in the approach to interpretation of the Rules might be observable.

B. United States v. Abel[72]

Abel was prosecuted for bank robbery, Ehle testified against him after pleading guilty to the offense, and Mills testified that Ehle had said that he would falsely implicate Abel in the robbery in order to curry favor with the government.[73] The prosecution was then permitted to introduce evidence indicating that Abel and Mills were members of a secret prison gang with a creed requiring members to lie for each other, obviously for the purpose of impeaching the testimony of Mills. Abel was convicted, obtained a reversal in the Ninth Circuit, but lost when the government appealed to the Supreme Court.[74]

The evidence question in *Abel* was admissibility of extrinsic evidence of bias for impeachment of witnesses. The interpretation issue resulted from the fact that the Federal Rules (and the Kentucky Rules) contain no specific provision on impeachment by bias while containing provisions on impeachment by use of character, criminal convictions, and religious beliefs and opinions. What happened to the universally accepted common law rule authorizing the admission of evidence of bias for impeachment? The Court quoted approvingly the following comment by the Reporter for the Advisory Committee on the Rules: "In principle, under the Federal Rules no common law of evidence remains. . . . In reality, of course, the

---

[72] United States v. Abel, 469 U.S. 45 (1984).

[73] *See id.* at 47.

[74] *See id.* at 47-49.

body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers."[75] It found room for impeachment by bias in the general provisions on relevancy,[76] believed it unlikely that drafters would have intended to scuttle impeachment by bias, and referred to preexisting common law in finding that no error occurred when the defendant's witness was impeached by use of extrinsic evidence of bias.[77]

The significance of *Abel* with respect to interpretation of the Rules is debatable. It has been said that the Court relied on pre-Rules cases to support its decision and thus "superimposed common-law evidence principles on the Federal Rules of Evidence,"[78] but it has also been said that the decision was based entirely on Rule 402 and that the Court's references to common law precedents were mere "makeweights."[79] *Abel* is clear in one important respect, however. It suggests that the codification that produced the Federal Rules (and the Kentucky Rules) may have left gaps in the law that will have to be filled by reliance on pre-Rules precedents, liberal construction of broad provisions of the Rules,[80] or judicial creation of evidence rules in the traditional common law fashion.

C. Bourjaily v. United States[81]

The evidence issue in this case was the admissibility of out-of-court statements under the Rules' co-conspirators exception to the hearsay rule.[82]

---

[75] *Id.* at 51-52 (quoting Cleary, *supra* note 30, at 915).

[76] The Court found evidence of bias relevant under the definition of "relevance" in Rule 401 and noted that "Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, Act of Congress, or by applicable rule." *Id.* at 51.

[77] *See id.* at 51-52.

[78] Weissenberger, *The Supreme Court*, *supra* note 52, at 1331.

[79] Imwinkelried, *A Brief Defense*, *supra* note 32, at 284 ("In *Abel*, there was no need to resort to any common-law precedent; even if there had not been a single prior common-law precedent permitting bias impeachment, the Chief Justice's Rule 402 analysis would still be valid.").

[80] One could argue that Rules 401, 402, and 403 are broad enough to resolve all conceivable evidence issues. The first defines relevance, the second provides that relevant evidence is admissible, and the third defines general conditions under which relevant evidence may be excluded.

[81] Bourjaily v. United States, 483 U.S. 171 (1987).

[82] The exception requires "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2)(E).

The dispute was over whether the hearsay itself could be used to prove prerequisites of the exception, a practice called "bootstrapping." Supreme Court cases predating adoption of the Rules required independent evidence of all prerequisites needed for admissibility of evidence (i.e., prohibited "bootstrapping").[83] The interpretation issue was whether or not this preexisting case law had been trumped by the enactment of Rule 104, which provides that in determining issues upon which admissibility of evidence depends, a court "is not bound by the rules of evidence."[84]

The defendant tried to make something of the fact that neither the drafters of the Rules nor Congress had manifested an intention to abandon the "bootstrapping" prohibition. In response, the Court expressed an approach to interpretation of the Rules that has been described as "overtly plain meaning jurisprudence":[85]

> It would be extraordinary to require legislative history to *confirm* the plain meaning of Rule 104. The Rule on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. We think that the Rule is sufficiently clear that to the extent that it is inconsistent with . . . *Glasser* and *Nixon*, the Rule prevails.[86]

Justice Blackman wrote in dissent that the majority had reached its conclusion "solely on the basis of its 'plain meaning' approach,"[87] which he described as "an overly rigid interpretive approach."[88] If not this (i.e., solely plain meaning), the majority clearly made a decision in which great-if-not-overwhelming weight was accorded to the literal words of the applicable rule.

D. United States v. Owens[89]

The decision in *Owens* was rendered within a year of *Bourjaily*. The defendant was tried for a brutal assault on a prison guard who suffered

---

[83] *See* United States v. Nixon, 418 U.S. 683 (1974); Glasser v. United States, 315 U.S. 60 (1942).

[84] FED. R. EVID. 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . . In making its determination it is not bound by the rules of evidence except those with respect to privileges.").

[85] Andrew E. Taslitz, Daubert*'s Guide to the Federal Rules of Evidence: A Not-So-Plain-Meaning Jurisprudence*, 32 HARV. J. ON LEGIS. 3, 11 (1995) [hereinafter Taslitz, Daubert*'s Guide to the Federal Rules of Evidence*].

[86] *Bourjaily*, 483 U.S. at 178-79.

[87] *Id.* at 196 (Blackmun, J., dissenting).

[88] *Id.* at 187-88.

[89] United States v. Owens, 484 U.S. 554 (1988).

major memory loss as a result of the assault. The guard identified the defendant as his assailant in an FBI interview a few weeks after the assault but at trial was unable to identify the defendant as his assailant, although he was able to recall that he had identified the defendant in the earlier interview.[90] The trial judge permitted the guard to testify to his earlier identification even though he admitted during cross-examination that he recalled nothing of the assault and little of the prior identification.[91] The trial judge acted under Rule 801(d)(1)(C), which permits the introduction of out-of-court identifications if the identifier "is subject to cross-examination concerning the statement."[92]

Defendant argued on appeal that the evidence was erroneously admitted because the victim was not "subject to cross-examination concerning the statement" since his memory loss precluded testing and exploration of the basis for his out-of-court identification. The Ninth Circuit agreed, ruling the evidence inadmissible for lack of meaningful cross-examination.[93] The Supreme Court reversed:

> It seems to us that the more natural reading of "subject to cross-examination concerning the statement" includes what was available here. Ordinarily a witness is regarded as "subject to cross-examination" when he is placed on the stand, under oath, and responds willingly to questions.... Rule 801(d)(1)(C), which specifies that the cross-examination need only "concer[n] the statement," does not on its face require more.[94]

---

[90] *See id.* at 555-56.

[91] The following is the Supreme Court's description of the victim's testimony on direct and cross:

> At trial, Foster recounted his activities just before the attack, and described feeling the blows to his head and seeing blood on the floor. He testified that he clearly remembered identifying respondent as his assailant during his May 5th interview with Mansfield. On cross-examination, he admitted that he could not remember seeing his assailant. He also admitted that, although there was evidence that he had received numerous visitors in the hospital, he was unable to remember any of them except Mansfield, and could not remember whether any of these visitors had suggested that respondent was the assailant.

Id. at 556.

[92] FED. R. EVID. 801(d)(1).

[93] *See Owens*, 484 U.S. at 561.

[94] *Id.* at 561-62.

Commentators vary over how wedded the Court was in this case to the plain language of the Rule.[95] The opinion clearly shows consideration of the rationale for the provision as well as its legislative history (i.e., more than "plain meaning"). But, in final analysis, it is difficult to deny that the controlling factor in the decision was the "natural reading" of the text of the Rule.

E. Huddleston v. United States[96]

Huddleston was rendered on the heels of *Owens*. The defendant was prosecuted for sale and possession of stolen goods; he defended by claiming lack of knowledge that the goods were stolen.[97] The prosecution was permitted to introduce evidence of other similar crimes by the defendant to show knowledge of the stolen nature of the goods.[98] The trial court relied on Rule 404(b), which precludes the use of such evidence to show criminal predisposition but allows it for proof of other material facts including knowledge.[99] The defendant argued that the evidence should have been excluded because the prosecution had not proven his guilt of the other similar crimes. No such requirement was imposed by the Rule, but a majority of federal courts had ruled that other crimes evidence could not be admitted without a trial court finding that the defendant had in fact committed the other crimes.[100] The added requirement had been imposed "because evidence of other crimes presents unique dangers to a fair verdict."[101]

---

[95] *See* Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence,* 68 TEX. L. REV. 745, 755-58 (1990) [hereinafter Jonakait, *Plain Meaning*]; Taslitz, Daubert*'s Guide to the Federal Rules of Evidence, supra* note 85, at 17-20.

[96] Huddleston v. United States, 485 U.S. 681 (1988).

[97] *See id.* at 684.

[98] *See id.* at 683.

[99] *See* FED. R. EVID. 404(b) ("Evidence of other crimes . . . is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .").

[100] Some cases required proof by a preponderance of evidence while others required proof beyond a reasonable doubt. A minority of cases required only evidence sufficient for the jury to find guilt of the other crimes. *See Huddleston,* 485 U.S. at 685 n.2.

[101] Jonakait, *Plain Meaning, supra* note 95, at 753.

The Supreme Court disagreed and ruled the evidence admissible without a finding of guilt by the trial court.[102] Its explanation was loaded with "plain meaning" references:

> We reject petitioner's position, for it is inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b).... The text [of this Rule] contains no intimation . . . that any preliminary showing is necessary before such evidence may be introduced for a proper purpose....
>
> Petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred . . . superimposes a level of judicial oversight that is nowhere apparent from the language of that provision....[103]

The Court explained that its ruling was supported by the structure of the Rules and by legislative history, indicating less than blind adherence to the plain language of the Rule[104] but not enough to keep the decision from being described as a "mechanical application of the Rule's literal language."[105]

F. Green v. Bock Laundry Machine Co.[106]

In this case, which was decided shortly after *Bourjaily*, *Owens*, and *Huddleston*, the Court rendered a decision reflecting lesser commitment to a plain meaning approach to the Rules. It involved a products liability action by a prison inmate who had been injured on work release while using a machine manufactured by the defendant.[107] The plaintiff was

---

[102] The Court ruled that since evidence of other crimes is not relevant unless the defendant committed the act, the trial court must employ Rule 104(b) on "conditional relevance" and limit admissibility to situations in which "the jury can reasonably conclude that the act occurred and that the defendant was the actor." *Huddleston*, 485 U.S. at 689.

[103] *Id.* at 687-88.

[104] *See* Taslitz, Daubert*'s Guide to the Federal Rules of Evidence*, *supra* note 85, at 23 ("Thus, the Court once again was able to justify a pro-prosecution result partly by relying on plain meaning. Nevertheless, it also relied, as in other leading plain-meaning cases, on legislative history and sound policy. These inquiries belie a straight-forward concern with plain meaning.").

[105] Jonakait, *Plain Meaning*, *supra* note 95, at 755.

[106] Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989).

[107] *See id.* at 506.

impeached by the introduction of prior felony convictions after the trial court had rejected his request for exclusion on grounds of prejudice.[108] As it then read, Rule 609 left no room for the exclusion of such evidence at the discretion of the judge absent a finding that probativeness was outweighed by prejudice *to the defendant*. After a jury verdict for the defendant and an appeal on the ground that the admission of his prior convictions constituted reversible error, the Supreme Court had to decide if it would construe the Rule in accordance with its literal language and allow a court to exclude felony convictions of a civil defendant but not a civil plaintiff.

The language of the Rule was clear, but it produced an irrational and unfair result and, for that reason, was more than the Supreme Court could accept:

> No matter how plain the text of the Rule may be, we cannot accept an interpretation that would deny a civil plaintiff the same right to impeach an adversary's testimony that it grants to a civil defendant. . . . Evidence that a litigant or his witness is a convicted felon tends to shift a jury's focus from the worthiness of the litigant's position to the moral worth of the litigant himself. It is unfathomable why a civil plaintiff–but not a civil defendant–should be subjected to this risk. Thus we agree . . . that as far as civil trials are concerned, Rule 609(a)(1) "can't mean what it says."[109]

The Court used the word "ambiguity" to describe the Rule, looked at legislative history surrounding its adoption, and concluded that it was "meant to authorize a judge to weigh prejudice against no one other than *a criminal defendant*."[110] Justice Scalia, who normally advocates plain meaning interpretation, concurred on the ground that the Rule, literally construed, would have produced "an absurd, and perhaps unconstitutional, result."[111] Plain meaning construction has always been subject to an exception for absurd results.[112] *Green* may reflect this and little more.

---

[108] *See id.*

[109] *Id.* at 510-11 (footnotes omitted).

[110] *Id.* at 521 (emphasis added).

[111] *Id.* at 527 (Scalia, J., concurring).

[112] *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 490 (1943); Commonwealth v. Whitlow, 223 S.W.2d 1003, 1004 (Ky. 1949).

G. United States v. Salerno[113]

Three years after *Green*, the Supreme Court rendered a decision much more like its earlier ones. The defendants in *Salerno* were indicted for multiple federal crimes arising out of bid rigging on construction projects.[114] The evidence issue revolved around the admissibility of testimony given before a grand jury by witnesses who invoked their privilege against self-incrimination when subpoenaed to testify at trial. The testimony had been taken under grant of immunity, was favorable to the position taken by the defendants at trial, and was offered into evidence under the former testimony exception to the hearsay rule, which requires, among other things, a "similar motive to develop the testimony by direct, cross, or redirect examination."[115] The trial court ruled the evidence inadmissible, concluding that the similar motive requirement had not been satisfied.[116] The Second Circuit reversed the defendants' convictions because of error in excluding the grand jury testimony. It agreed that the similar motive requirement had not been met but ruled the hearsay admissible nonetheless, holding that this element of the exception "should 'evaporat[e]' when the Government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial."[117]

The Supreme Court was urged "not to read Rule 804(b)(1) in a 'slavishly literal fashion'"[118] and to hold that the Rule "does not require a showing of similar motive in all instances."[119] The Court concluded otherwise and reversed:

> We again fail to see how we may create an exception to Rule 804(b)(1). . . . In this case, the language of Rule 804(b)(1) does not support the respondents. Indeed, the respondents specifically ask us to ignore it. Neither *Dennis* nor anything else that the respondents have cited provides us with this authority.[120]

---

[113] United States v. Salerno, 505 U.S. 317 (1992).

[114] *See id.* at 318-19.

[115] FED. R. EVID. 804(b)(1).

[116] *See Salerno*, 505 U.S. at 320 ("The District Court . . . [stated] that the 'motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial.'").

[117] *Id.* at 320.

[118] *Id.* at 321.

[119] *Id.* at 322.

[120] *Id.* at 324.

Defendants invited the Court to depart from the Rules of Evidence in order to maintain adversarial fairness. This, said the Court, would exceed its authority and its approach to interpretation of the Rules: "[W]e must enforce the words that [Congress] enacted."[121]

H. Daubert v. Merrell Dow Pharmaceuticals, Inc.[122]

The plaintiffs sued for damages for birth defects allegedly caused by a drug manufactured by the defendant and used to combat nausea during pregnancy.[123] The defendants moved for summary judgment after discovery, claiming that the plaintiffs would not be able to produce evidence of causation, and supported the motion with evidence that more than thirty scientific studies had been done on the drug without finding a causal relationship with birth defects.[124] The plaintiffs responded to the motion with affidavits from experts who testified that the drug caused birth defects, supporting this claim with unpublished studies not shown to have been generally accepted as reliable in a relevant scientific community.[125]

The trial court ruled the testimony inadmissible and granted summary judgment to the defendants, reasoning that the plaintiffs had not satisfied the "general scientific acceptance" requirement enunciated in the pre-Rules case of *Frye v. United States*.[126] After the Ninth Circuit affirmed, the Supreme Court granted certiorari to review a sharp division in lower courts over whether the common law general scientific acceptance requirement had survived adoption of the Rules, a division undoubtedly caused in part by the absence of any mention of the requirement in either the Rules or the

---

[121] *Id.* at 322.

[122] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[123] *See id.* at 582.

[124] *See id.*

[125] The affidavit testimony of the plaintiffs' experts was based on the following data: (a) *in vitro* (test tube) studies showing a link between the drug and tissue malformations; (b) *in vivo* (animal) studies showing the same; (c) pharmacological studies of the chemical structure of the drug and its comparison with substances known to cause birth defects; and (d) recalculations of published epidemiological data. None of this data had been published or subjected to peer review. *See id.* at 583-84.

[126] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Advisory Committee Notes.[127] The Court held that the *Frye* requirement had not survived adoption of the Rules and reversed.[128]

The Court spoke about its general approach to interpretation of the Rules: "We interpret the legislatively enacted Federal Rules of Evidence as we would any statute."[129] Again showing its tendency to adhere to the text of the Rules, the Court noted that the expert testimony rule (Rule 702) says nothing about a "general scientific acceptance" requirement. It focused on Rule 402,[130] described it as "the baseline" of the Rules,[131] and ruled that the *Frye* requirement would be incompatible with the Rules.

The Court also spoke about the relationship between the common law and the Rules. It again quoted the "no common law of evidence remains" statement by the Rules Advisory Committee Reporter,[132] said that the "Rules occupy the field" and that the common law serves "as an aid to their application,"[133] and provided added explanation for its earlier decisions in *Abel* and *Bourjaily*:

> We found the common-law precept at issue in the Abel case entirely consistent with Rule 402's general requirement of admissibility, and considered it unlikely that the drafters had intended to change the rule. In Bourjaily, the Court was unable to find a particular common-law doctrine in the Rules, and so held it superseded.[134]

---

[127] Some commentators viewed the silence as a rejection of the *Frye* requirement. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE 702-36 (1st ed. 1991); 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE 86-90 (1978). Others viewed the silence as an acceptance of the pre-Rules requirement. *See* 1 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE 818 (1st ed. 1977 & Supp. 1989); STEPHEN A. SALTZBURG & KENNETH R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 452 (3d ed. 1982).

[128] The substantive rulings in this case on the admissibility of expert testimony grounded in science are as significant as any ruling ever rendered under the Federal Rules, but they have limited importance to a discussion of the Supreme Court's approach to interpretation of the Rules and need not be described in detail.

[129] *Daubert*, 509 U.S. at 587.

[130] As stated earlier, this Rule calls for admission of relevant evidence unless explicitly excluded by the constitution, a statute, an evidence rule, or a rule of court. *See supra* note 40 and accompanying text.

[131] *Daubert*, 509 U.S. at 587.

[132] *See supra* note 75 and accompanying text.

[133] *Daubert*, 509 U.S. at 587-88.

[134] *Id.* at 588 (citations omitted).

The Court found in *Daubert* an applicable rule (Rule 702), silence in that provision with respect to *Frye*, and nothing in the Rules as a whole or their drafting history to suggest intention to assimilate the "general scientific acceptance" requirement into the Rules. As in *Bourjaily*, the common law rule was superseded by the adoption of the Rules.

I. Williamson v. United States[135]

Harris was stopped on a public highway and found in possession of cocaine–nineteen kilograms in two suitcases in the trunk of his rented car. He told police authorities he was delivering the drugs to Williamson but refused to permit his statement to be recorded on tape or in writing.[136] Williamson was prosecuted for drug offenses as a result of Harris's accusation. Harris was granted immunity and ordered to testify, was held in contempt of court when he refused, but persisted in his refusal to testify at trial.[137] The trial court allowed the prosecution to introduce Harris's oral statement to the police into evidence–applying the hearsay exception for statements against interest as defined in Rule 804(b)(3)–and Williamson was convicted.[138] He appealed and ultimately reached the Supreme Court with his argument that admission of the hearsay violated the terms of Rule 804(b)(3).

The interpretation issue in *Williamson* was whether a statement inculpating the declarant (its "self-inculpatory" part) and another person (its "non-self-inculpatory" part) qualifies for admission against the second person under the following language of the Rule: "A statement which . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."[139] In a splintered decision, the Court held that the Rule extends only to self-inculpatory parts of such a statement and "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory."[140] Writing for the majority, Justice O'Connor looked first to the text of the provision ("we must first deter-

---

[135] Williamson v. United States, 512 U.S. 594 (1994).
[136] *See id.* at 597.
[137] *See id.*
[138] *See id.* at 597-98.
[139] FED. R. EVID. 804(b)(3).
[140] *Williamson*, 512 U.S. at 600-01.

mine what the Rule means by 'statement'"[141]) and then to the principle underlying the Rule when the text fails to resolve the issue.[142] It is proper, she implied, to look to the Advisory Committee Notes accompanying the Rules for guidance, but not when "the policy expressed in the Rule's text points clearly enough in one direction that it outweighs whatever force the Notes may have."[143]

Justice Kennedy, in a concurring opinion, disagreed with the majority that only self-inculpatory parts of a statement like that of Harris can be admitted under the hearsay exception. He saw more ambiguity in the text of the Rule than the majority, less guidance in underlying policy, clearer direction in the Advisory Committee Note on this Rule, and an approach to interpretation of the Rules that included a clearer role for the Advisory Committee Notes:

> When as here the text of a Rule of Evidence does not answer a question that must be answered in order to apply the Rule, and when the Advisory Committee's Note does answer the question, our practice indicates that we should pay attention to the Advisory Committee's Note. We have referred often to those Notes in interpreting the Rules of Evidence, and I see no reason to jettison that well-established practice here.[144]

J. Tome v. United States[145]

The following facts generated a prosecution for sexual abuse of a child: Tome divorced his wife in 1988 and won physical custody of his four-year-old daughter. He successfully resisted efforts to have this custody changed in 1989, although custody was awarded to the mother for the summer of 1990.[146] During this summer period, the child disclosed sexual abuse by her father, first telling her mother and babysitter, and then telling a social

---

[141] *Id.* at 599.

[142] The Rule, Justice O'Connor says, is based on the notion that reasonable people tend not to make self-inculpatory statements unless they are believed to be true, a principle that does not, she says, extend to non-self-inculpatory parts of a statement. *See id.*

[143] *Id.* at 602.

[144] *Id.* at 614-15 (Kennedy, J., concurring).

[145] Tome v. United States, 513 U.S. 150 (1995).

[146] *See id.* at 153.

worker and three pediatricians. The mother reported the allegations to police authorities and physical examinations confirmed that the child had been subjected to vaginal penetrations.[147] Tome denied the charges and claimed that the child had concocted the allegations to avoid a return of custody to him.[148]

The child testified on direct examination that the sexual acts were committed. The defense engaged in cross-examination, implying that her testimony was a fabrication "motivated by a desire to live with her mother."[149] The prosecution offered into evidence the out-of-court statements made by the child to her mother, babysitter, social worker, and physicians. The trial court ruled the hearsay admissible under Rule 801(d)(1)(B), which permits the introduction of prior consistent statements offered to rebut charges of recent fabrication or improper influence or motive.[150] This overruled a defense objection that such statements are not admissible if made after a witness's motive to lie arose. Tome appealed his conviction. The Tenth Circuit affirmed, but the Supreme Court granted certiorari and reversed, construing Rule 801(d)(1)(B) as applicable only to prior consistent statements made before the alleged motive to fabricate arose (i.e., as having a "premotive requirement").

The text of the Rule says nothing of a premotive requirement (like *Bourjaily* and *Daubert*). "Plain meaning" interpretation might have seemed to require a conclusion that postmotive statements are also admissible. Justice Kennedy, writing for the majority, looked to other sources of interpretation to find a premotive requirement in the Rule. It is significant, he said, that the "language of the Rule bears close similarity to the language used in many of the common-law cases that describe the premotive requirement."[151] It is important, he said, that the premotive requirement is confirmed upon examination of the content of the Advisory Committee Notes:

> We have relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules. . . . Where . . . "Congress did not amend the Advisory Committee's draft in any way . . . the Committee's commentary is particularly relevant in determining the meaning of the

---

[147] *See id.*
[148] *See id.*
[149] *Id.* at 154.
[150] *See id.*
[151] *Id.* at 159.

> document Congress enacted. . . ." The Notes are also a respected source of scholarly commentary.[152]

In a concurring opinion, Justice Scalia condemned heavy reliance on the Advisory Committee Notes[153] but confirmed that the common law of evidence has an important role to play in the interpretive approach to the Rules: "It is well established that 'the body of common law knowledge' must be 'a source of guidance' in our interpretation of the Rules."[154]

K. United States v. Mezzanatto[155]

The interpretation issue of this case was similar to that of *Tome.* Mezzanatto was apprehended with controlled substances in his possession, was charged with a trafficking offense, and thereafter sought to negotiate a guilty plea. Before entering negotiations, the prosecutor demanded and obtained agreement from the defendant that statements made during the negotiations could be used at trial for purposes of impeachment, should trial become necessary.[156] During the negotiations, after making incriminating statements, the defendant made statements known to be false, and the prosecution terminated the bargaining. Statements made by the defendant during the plea negotiations were introduced at trial to impeach his testimony and he was convicted.[157] On appeal of his conviction, he argued that his statements were admitted in violation of Rule 410, which says, as he argued, that "any statement made in the course of plea discussions" is not admissible against a participant in those discussions.[158] The Ninth Circuit held that this provision precluded enforcement of the prenegotiations agreement between the defendant and prosecutor and

---

[152] *Id.* at 160 (citations omitted).

[153] *See id.* at 167-68 (Scalia, J., concurring).

> [T]he Notes are assuredly persuasive scholarly commentaries–ordinarily *the* most persuasive–concerning the meaning of the Rules. But they bear no special authoritativeness as the work of the draftsmen . . . . It is the words of the Rules that have been authoritatively adopted–by this Court, or by Congress . . . . [T]he Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear.

Id. (Scalia, J., concurring).

[154] *Id.* at 168 (Scalia, J., concurring).

[155] United States v. Mezzanatto, 513 U.S. 196 (1995).

[156] *See id.* at 198.

[157] *See id.* at 199.

[158] FED. R. EVID. 410.

reversed.[159] The Supreme Court granted certiorari and reversed the Ninth Circuit, concluding that the defendant could and did waive the exclusionary protection provided by Rule 410.

The Rule speaks in absolute terms, says nothing of waiver, and would require exclusion of the evidence if literally construed.[160] The Court found support for a nonliteral construction in matters of policy[161] and in the text of the Rule.[162] More importantly perhaps, it found that literal construction of the Rule was precluded by the background against which it was enacted: "Because the plea-statement Rules were enacted against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties, we will not interpret Congress' silence as an implicit rejection of waivability."[163]

L. Summary and Conclusions

The Court's approach to interpretation of the Rules is not easy to decipher from its opinions. One writer has said that the interpretations are "ad hoc" and that the Court "has not used one methodology, but several, and has not indicated which methodology should be generalized to other evidentiary disputes."[164] Still, if one keeps in mind that the Court decides specific issues and does not purport to formulate interpretive strategies for application in all situations, there is guidance in its decisions for state courts trying to resolve difficult issues under rules patterned after the federal model.

---

[159] *See Mezzanatto*, 513 U.S. at 199.

[160] In a dissenting opinion, Justice Souter stated that "[b]elievers in plain meaning might be excused for thinking that the text answers the question." *Id.* at 212 (Souter, J., dissenting).

[161] The Court considered the policy behind the Rule (promoting settlement of cases) and found its interpretation supportive of that policy. It also viewed its construction of the Rule supportive of the system's overriding policy of fostering the search for truth. *See id.* at 204-06.

[162] After noting that the Rule precludes the use of statements "against" a defendant but not on behalf of a defendant, the Court stated that the provisions under discussion "expressly contemplate a degree of party control that is consonant with the background presumption of waivability." *Id.* at 206.

[163] *Id.* at 203-04.

[164] Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 553 (1996) [hereinafter Jonakait, *Text, Texts, or Ad Hoc Determinations*].

The Court says that "[w]e interpret the legislatively enacted Rules of Evidence as we would any statute"[165] and that "we turn to the 'traditional tools of statutory construction' . . . in order to construe their provisions."[166] It has spoken of adherence to "plain meaning" but has regularly, if not routinely, considered nontextual sources of interpretation when construing the Rules–the drafters' Advisory Committee Notes, preexisting common law rules, structure of the Rules, their impact on the adversarial system, and relevant evidentiary policies. Although the Court may be less wedded to the text of the Rules than it once was,[167] the most important factor in the interpretation of the Rules continues to be the language of the Rules and the Court's perception of its plain meaning.

The Court seemed to say in *Abel* that codification had produced an incomplete code[168] but then said in *Daubert* that "the Rules occupy the field."[169] It has rendered a variety of interpretations in the face of silence on an issue–impeachment by bias survived adoption of the Rules without being mentioned (*Abel*), the general scientific acceptance requirement did not survive codification at least partly because of not being mentioned (*Daubert*), a "premotive requirement" for prior consistent statements is embraced by the Rules without mention (*Tome*), and silence with respect to waiver of evidentiary protections will not be interpreted as "an implicit rejection of waivability" (*Mezzanatto*). Recent decisions are more consistent with the suggestion in *Abel* that the Rules are incomplete than with the statement in *Daubert* that they occupy the field, although the issue remains unsettled and intermingled with questions concerning the relationship of the Rules to the common law of evidence.

The Court has said that "no common law of evidence remains" after adoption of the Rules.[170] It has revived preexisting common law rules not explicitly codified in the Rules, however, by purporting to use them as a "source of guidance" in interpreting provisions of the Rules.[171] It has not

---

[165] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993).

[166] Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988) (citation omitted).

[167] *See* Edward J. Imwinkelried, *Moving Beyond "Top Down" Grand Theories of Statutory Construction: A "Bottom Up" Interpretive Approach to the Federal Rules of Evidence*, 75 OR. L. REV. 389 (1996) [hereinafter Imwinkelried, *Moving Beyond "Top Down" Grand Theories*]; Andrew E. Taslitz, *Interpretive Method and the Federal Rules of Evidence: A Call for a Politically Realistic Hermeneutics*, 32 HARV. J. ON LEGIS. 329 (1995) [hereinafter Taslitz, *Interpretive Method*].

[168] *See* United States v. Abel, 469 U.S. 45, 51-52 (1984).

[169] *Daubert*, 509 U.S. at 587.

[170] *Abel*, 469 U.S. at 51 (quoting Cleary, *supra* note 30, at 915).

[171] *See supra* text accompanying note 75.

said unequivocally that courts lack power to create new evidence rules through the common law process, although its statement in *Daubert* that the "Rules occupy the field"[172] may have come close. Its decisions have been read by one writer as creating a distinction between "common law that is supplemental to and consistent with the Federal Rules, and common law that is inconsistent with a specific Rule,"[173] a distinction that recognizes the survival of some common law rules and the reality that drafters of the Rules could not have anticipated every evidence issue in the universe.

IV. SCHOLARLY DEBATE AND DISAGREEMENT

A. Introduction

How best to approach interpretation of evidence rules has been heavily debated by evidence scholars. The debaters have dissected the cases described above line-by-line, concurring on some important points, but disagreeing strongly as to the proper overall approach to the interpretation of rules of evidence. In the course of the debate, they have identified the important questions, formulated potential interpretive approaches, and contributed in a variety of ways to a better understanding of problems that arise with the interpretation of evidence rules. The products of this debate are particularly insightful and informative in the early stages of formulating an approach to interpretation of such rules (which is where we are in Kentucky at this moment) and for that reason are briefly described in this section of the Article.

B. "Plain Meaning"

Early indications that the Supreme Court would look to "plain meaning" when interpreting the Federal Rules established "plain meaning" interpretation as a universal point of embarkation for the formulation of interpretive approaches for rules of evidence. In its purest form, this approach would require courts to apply the literal text of a provision, except in cases of absurd results, and permit them to look for meaning beyond the text only if the literal language of the rule was first determined to be ambiguous.[174] Text would control above all else–legislative history,

---

[172] *Daubert*, 509 U.S. at 587.

[173] 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 6 (7th ed. 1998).

[174] *See* Imwinkelried, *Moving Beyond "Top Down" Grand Theories*, *supra* note 167, at 396.

structure of the rules, common law background, evidentiary policy, etc. A modified version would permit courts to examine extrinsic materials (without finding ambiguity) but require enforcement of "literal language unless the legislative history of a provision explicitly indicates that the legislators intended another meaning."[175] It is assumed, under both versions, that there is inherent meaning in the language of statutes or rules created by lawmakers and that the interpretation task is merely to discover (not create) meaning.

The Supreme Court's early interpretations of the Federal Rules (*Bourjaily*, *Huddleston*, *Owens*, and *Green*) showed at least what has been called "an affinity for plain meaning."[176] Rulings tracked the literal language of the Rules closely and the accompanying explanations sounded like plain meaning jurisprudence. Although some differences of opinion surfaced as to whether or not these decisions actually reflected a commitment to plain meaning construction,[177] there was enough belief that they did to arouse opposition to the approach, led primarily by Professors Jonakait[178] and Weissenberger.[179]

---

[175] Jonakait, *Plain Meaning*, *supra* note 95, at 746.

[176] Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years–The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 866 (1992).

[177] *See, e.g.*, Jonakait, *Plain Meaning*, *supra* note 95, at 745; Taslitz, Daubert*'s Guide to the Federal Rules of Evidence*, *supra* note 85, at 3.

[178] Jonakait clearly saw an embrace of plain meaning in early Supreme Court interpretations of the Federal Rules: "The Supreme Court has imposed the plain-meaning standard of statutory construction on the Federal Rules of Evidence. The Court has indicated that the plain language of the Rules now controls outcomes without regard to policy, history, practical operation of the law of evidence, or new conditions." Jonakait, *Plain Meaning*, *supra* note 95, at 745. He saw in later cases a confusing lack of consistency in the Court's approach to the Rules: "[T]he Court's recent evidence cases only present a confusion picture. Sometimes the text is absolute, sometimes it is not, and the Court has done little to define when the words of the Rules will not control future issues." Jonakait, *Text, Texts, or Ad Hoc Determinations*, *supra* note 164, at 591.

[179] Weissenberger's opposition to the early decisions of the Supreme Court included but was not limited to criticism of plain meaning interpretation of the Rules. He believed that the Rules were not like statutes and opposed the use of statutory interpretation principles (such as the plain meaning rule) in their construction. *See* Weissenberger, *The Supreme Court*, *supra* note 52, at 1307.

Critics of plain meaning argue that "words simply do not have plain meaning."[180] Jonakait offered far more powerful criticism of plain meaning interpretation of evidence rules, arguing that it takes away the "evidence law's dynamic quality,"[181] diminishes its "capacity for orderly growth,"[182] and produces "decisions without any consideration of the wisdom of the results."[183] Weissenberger argues that evidence rules are designed only to serve as a general "source of guidance" for trial judges,[184] that they have "a level of judicial flexibility that is antithetical to statutory construction principles [including the plain meaning doctrine],"[185] and that they "should be interpreted in a generous fashion."[186] Both argue that plain meaning construction of evidence rules leaves courts without adequate capacity to modify evidence practices and thereby stifles necessary development of the law.[187]

C. *Practical Reasoning*

Professor Scallen believes that the Supreme Court has embraced "a 'plain meaning,' textualist approach to interpretation"[188] of the Federal Rules, has struggled with its approach, and has created "a level of serious confusion"[189] with respect to interpretation of the Rules. She echoes the common criticisms of plain meaning–i.e., words have no plain meaning, close adherence to text produces harsh results, decisions ignore evidentiary policy, and the law loses its dynamic quality.[190] She argues that the Federal Rules were designed to leave trial courts with "guided" discretion over evidence issues and to permit "growth and change [in evidence law] by the common law method–by the case-by-case elaboration of doctrine based

---

[180] Eileen A. Scallen, *Classical Rhetoric, Practical Reasoning, and the Law of Evidence*, 44 AM. U. L. REV. 1717, 1746 (1995) [hereinafter Scallen, *Classical Rhetoric*].

[181] Jonakait, *Plain Meaning*, *supra* note 95, at 749.

[182] *Id.* at 784.

[183] *Id.* at 785.

[184] Weissenberger, *The Supreme Court*, *supra* note 52, at 1325.

[185] *Id.* at 1326.

[186] Weissenberger, *Are the Federal Rules of Evidence a Statute?*, *supra* note 32, at 398.

[187] *See id.* at 402; Jonakait, *Plain Meaning*, *supra* note 95, at 784-85.

[188] Scallen, *Classical Rhetoric*, *supra* note 180, at 1759.

[189] *Id.* at 1738.

[190] *See id.* at 1747.

upon consideration of a wide array of data sources."[191] Professor Scallen proposes as an alternative to plain meaning interpretation an approach labeled "practical reasoning."

Scallen's alternative is different from plain meaning in both approach and philosophy. It would expand the "data sources" that courts could consider in the interpretation of evidence rules and would recognize a fundamentally different role for the interpreters of such rules. These differences are more completely and accurately described by Scallen herself:

> The practical reasoning approach recognizes that . . . interpretation is a process of argumentation and persuasion. Under this approach interpretation becomes a genuine process of "construction": The interpreter uses all of the possible sources of a legal text's meaning, such as its language, the language of related texts, evidence of the intentions of the drafters of the text, the historical context of the text, previous interpretations of the text, the instrumental aspects of potential interpretations, and the evolution of the language of the text over time to "construct" the meaning of the text in a particular situation.[192]

Under plain meaning doctrine, courts endeavor to find the inherent meaning of a statute or rule. Under Professor Scallen's alternative, a court "is not discovering the true or correct interpretation . . . [but rather] is constructing the best interpretation possible in a particular context."[193] This is not to suggest that text counts for nothing under this alternative. Scallen describes text as "the touchstone"[194] (where courts would first look) and even argues that it "deserves the greatest relative weight when it is clear."[195] But at the end of the process, "meaning . . . is created rather than found."[196]

---

[191] Eileen A. Scallen & Andrew E. Taslitz, *Reading the Federal Rules of Evidence Realistically: A Response to Professor Imwinkelried*, 75 OR. L. REV. 429, 440 (1996).

[192] Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee Notes*, 28 LOY. L.A. L. REV. 1283, 1301 (1995) [hereinafter Scallen, *Interpreting the Federal Rules of Evidence*].

[193] Scallen, *Classical Rhetoric*, *supra* note 180, at 1759.

[194] *Id.* at 1751.

[195] Scallen & Taslitz, *supra* note 191, at 440.

[196] Imwinkelried, *Moving Beyond "Top Down" Grand Theories*, *supra* note 167, at 392.

D. Politically Realistic Hermeneutics

Professor Taslitz has plain meaning interpretation in mind when he says that "an 'objective,' mechanical interpretation of statutes is . . . impossible."[197] It is fiction, he argues, to assume that the drafters of evidence rules "fully contemplated the meaning of the words used in the rules, as applied to specific cases";[198] instead, they intended only "to create a system of guided discretion for trial judges, limited appellate review, and room for case-by-case growth of the law of evidence."[199] Textual analysis, he argues, "is rarely so straightforward as the term 'plain meaning' suggests,"[200] often defeats the drafters' intent, and forecloses a consideration of perfectly reasonable sources of meaning such as legislative history, common law precedents, and evidentiary policy. Unlike other plain meaning critics, Taslitz does not see in Supreme Court interpretations of the Federal Rules a "single-minded devotion to plain meaning"[201] or the inflexibility that would accompany a "primarily text-based approach to interpreting the Rules."[202] He sees instead an approach that "weighs a wide variety of sources in addition to text, including committee reports, other legislative history, and sound policy,"[203] what he dubs "the core" of an alternative method of construing evidence rules called " 'politically realistic hermeneutics.' "[204]

Like Scallen, Taslitz advocates consideration of a wide range of data sources–text, legislative history, common law roots, broad purposes, practical limitations, evidentiary policies, structure of the rules, and others;[205] "even in 'clear' cases, it is important to examine all sources to ensure that 'plain' meaning does not contravene legislative will."[206] Text is important to determinations of meaning under this approach–"deserves

---

[197] Taslitz, Daubert's *Guide to the Federal Rules of Evidence*, *supra* note 85, at 6.

[198] Scallen & Taslitz, *supra* note 191, at 439.

[199] Taslitz, *Interpretive Method*, *supra* note 167, at 396.

[200] Taslitz, Daubert's *Guide to the Federal Rules of Evidence*, *supra* note 85, at 35.

[201] *Id.* at 5.

[202] *Id.* at 27.

[203] Taslitz, *Interpretive Method*, *supra* note 167, at 330.

[204] *Id.*

[205] Taslitz, Daubert's *Guide to the Federal Rules of Evidence*, *supra* note 85, at 77.

[206] Scallen & Taslitz, *supra* note 191, at 440.

special weight because it is formally enacted into law"[207]–but is considerably less important than under plain meaning interpretation:

> [T]he court should seek guidance from the Advisory Committee Notes, from a special attention to the policies underlying the particular rule, from a reference to common law antecedents and developments, and from a sensitivity to the need for rules that allow for case-by-case fine-tuning by trial judges exercising their sound discretion. . . . While the text of a rule may (and should) set the outer boundaries for interpretation, *it can be no more than a starting point.*[208]

The interpreter's role under this approach would be as creative as it would be under "practical reasoning." Meaning would emerge from a mental engagement of the interpreter with the author of the text. As stated by Taslitz, the interpreter "creates meaning from the interaction between his own values, his knowledge of the world, and his understanding of the speakers' [drafters'] goals as revealed by the political context in which they spoke."[209] This, he argues, is what the Supreme Court actually does when interpreting the Federal Rules, although it disguises its approach with claims of adherence to plain meaning interpretation.[210]

E. Moderate Textualism

The most comprehensive and compelling analysis of the proper approach to interpretation of evidence rules has been produced by Professor Imwinkelried,[211] who argues for an approach called "moderate textualism." After describing "strict textualism" as an approach requiring a finding of ambiguity as "a condition precedent to considering extrinsic material,"[212] Imwinkelried defined moderate textualism in a statement offered in defense of the Supreme Court's early reliance on plain meaning interpretation:

---

[207] Taslitz, *Interpretive Method*, *supra* note 167, at 394.

[208] *Id.* at 398-99 (emphasis added).

[209] *Id.* at 366.

[210] *See* Taslitz, Daubert*'s Guide to the Federal Rules of Evidence*, *supra* note 85, at 5.

[211] *See* Imwinkelried, *Moving Beyond "Top Down" Grand Theories*, *supra* note 167, at 389 (summarizing both his work and that of other scholars).

[212] Imwinkelried, *A Brief Defense*, *supra* note 32, at 269-70.

> [T]he Supreme Court has embraced a more moderate version of textualism; as under the legal process tradition, the Court routinely considers extrinsic legislative history material. However, the Justices otherwise have invoked a generally textualist approach to interpretation.... The majority has said in so many words that the Rules should be interpreted according to their plain meaning unless a literal construction would result in an absurd, perhaps unconstitutional, result. In short, the presumption is that statutory language is to be given its plain meaning. Albeit rebuttable, the presumption is a strong one, yielding only in extraordinary cases when the legislative history manifests a very clearly expressed contrary intention. Hence, under the moderate textualist view, although the judge may consider extrinsic legislative history material as a matter of course, the material is only a secondary interpretive aid of far less importance and entitled to much less weight than the apparent plain meaning of the statutory text. *The text "enjoys preeminence."*[213]

It is true, according to Imwinkelried, that the mental gymnastics of interpretation are complex and clearly extend beyond the mechanical discovery of intrinsic meaning of text.[214] It is also true, he says, that the Federal Rules of Evidence are "special" statutes, drafted mostly by lawyers for interpretation by lawyers.[215] However, they are statutes and therefore generally consist of language that was deliberately and carefully chosen by drafters and that was reviewed under a microscope by the enacting authority.[216] In this situation, he argues, "text demands great weight."[217]

F. Conclusions

There is agreement on significant points. It is accepted that evidence rules are different from other enactments ("special"[218] or "peculiar

---

[213] *Id.* at 270-71 (emphasis added) (footnotes omitted).

[214] *See* Imwinkelried, *Moving Beyond "Top Down" Grand Theories*, *supra* note 167, at 417 ("Professor Taslitz is also on firm ground when he adds that meaning emerges from the interplay between the statute writer and reader. The meaning is constructed from a complex communicative process involving three distinct components: the statute writer, the intended reader, and their search for common ground." (footnotes omitted)).

[215] *See id.* at 423.

[216] *See id.* at 419.

[217] *Id.* at 418.

[218] *See* Scallen, *Classical Rhetoric*, *supra* note 180, at 1752 (stating the Rules are "statutes written mostly by and for the use of courts"); Taslitz, Daubert*'s Guide*

hybrid"[219]) and that interpretive approach is affected by this uniqueness.[220] It is well accepted that courts can look beyond text to other sources of interpretation and may do so without a finding of ambiguity. Legislative history, preexisting common law, drafters' purpose, and evidentiary policies are among the extrinsic aids that may be considered. Additionally, it is accepted that the drafters' notes accompanying the Federal Rules (Advisory Committee Notes) are entitled to special weight in the interpretation of those Rules.[221] Supreme Court interpretations of the Federal Rules are in accord with these propositions.

The significance of agreement on these points is dwarfed by the significance of disagreement over the proper role of text in the interpretation equation:

> [H]ow much relative weight should the courts accord to the rules' text? Compared to other sources of meaning, how much does the rules' text "count"? In the analysis, is the text 'no more than a starting point,' or is there a strong presumption that text controls–a presumption that yields only in extraordinary cases? . . . [S]harp disagreement exists on this question.[222]

Some argue that evidence rules were designed to guide rather than restrict courts and that text serves only to fix "outer boundaries for interpre-

---

to the Federal Rules of Evidence, *supra* note 85, at 32 (discussing Weissenberger's argument that "the Rules are a statute of a special kind"); Weissenberger, *Are the Federal Rules of Evidence a Statute?*, *supra* note 32, at 397 (arguing that the Rules are "predominantly traceable not to the legislative branch but rather the judicial branch").

[219] *See* Imwinkelried, *Moving Beyond "Top Down" Grand Theories*, *supra* note 167, at 410 (stating that the "circumstances surrounding the creation of the rules underscores their special character").

[220] *See id.* at 423.

> In the case of the Federal Rules, the statutes address a single class of readers, not the general public. According to Professor Cleary, "[T]he audience for the Rules of Evidence is a very specialized one of judges and lawyers. . . ." They constitute a specialized interpretive community with their own technical conventions.

Id. (footnotes omitted).

[221] *See id.* at 411; Scallen, *Interpreting the Federal Rules of Evidence*, *supra* note 192, at 1301.

[222] Imwinkelried, *Moving Beyond "Top Down" Grand Theories*, *supra* note 167, at 395 (footnotes omitted).

tation."[223] Imwinkelried argues that codification was intended to provide code-like evidence rules ("in the same category as the UCC and ERISA"[224]) and that text does not yield to other sources of interpretation except in extraordinary cases; in other words, "the presumption is that statutory language is to be given its plain meaning."[225] The Supreme Court has never suggested that the Federal Rules serve only to establish the "outer boundaries" of interpretation; it has often spoken of adherence to plain meaning interpretation and in most instances has employed an interpretive approach along the lines suggested by Imwinkelried.

V. INTERPRETING THE KENTUCKY RULES

A. Introduction

The Supreme Court of Kentucky has rendered more than one hundred decisions involving the Kentucky Rules of Evidence. It has rendered rulings on specific issues in most instances without saying much about its approach to interpretation of the Rules. It has painted a faint picture of its interpretive approach, however, and has revealed at least some of the important data sources to which it will look when interpreting the Rules. It has not used the words "plain meaning" in its opinions but has indicated in other ways the extent to which it will adhere to the text of the Rules. It has begun to define the relationship of the Rules to the preexisting common law but has left the most crucial questions about this relationship unsettled, as discussed in Part VI below.

B. Extrinsic Sources of Interpretation

General: Scholars agree that all relevant sources of meaning should be used in the construction of evidence rules. The Supreme Court of Kentucky has used a wide assortment of nontextual materials in its interpretation of Kentucky's Rules and has done so without any suggestion that consideration of such materials is dependent upon a finding of textual ambiguity.

---

[223] Taslitz, *Interpretive Method*, *supra* note 167, at 399.

[224] Imwinkelried, *Moving Beyond "Top Down" Grand Theories*, *supra* note 167, at 418.

[225] Imwinkelried, *A Brief Defense*, *supra* note 32, at 270.

Drafters' Commentary: The Rules contain an explicit reference to the use of commentary in their interpretation.[226] The commentary to which reference is made was prepared by the Rules' drafters and submitted to both the General Assembly and supreme court.[227] In its order adopting the Rules, the court acknowledged the existence of the commentary but announced that it had "neither adopted nor approved the Commentary."[228] The commentary was never officially published because of this event and has remained hidden from the view of the lawyers and judges who frame evidence issues for appellate review. It has influenced the court on a few occasions[229] but has not played as much of a role in the interpretation of the Rules as drafters had anticipated.

Legislative History: As described earlier, the Evidence Rules were twice enacted into law by the General Assembly, leaving a very clear paper trail all the way from the drafters' proposals to the Rules finally enacted into law by order of the Supreme Court of Kentucky.[230] It is elementary that interpreters look to legislative history for the meaning of legal text, and it should come as no surprise that the supreme court would recognize both the importance of the legislative history described above and the propriety of employing that history in the interpretation of the Rules.[231] Beyond this

---

[226] *See* K.R.E. 1104 ("The commentary accompanying the Kentucky Rules of Evidence may be used as an aid in construing the provisions of the Rules, but shall not be binding upon the Court of Justice.").

[227] *See* STUDY COMM., *supra* note 7.

[228] Order, Supreme Court of Kentucky, May 12, 1992.

[229] The court cited the study containing the commentary in *Slaven v. Commonwealth*, 962 S.W.2d 845, 852 n.2 (Ky. 1997), used the commentary to interpret a provision of the rape shield provision (K.R.E. 412) in *Violett v. Commonwealth*, 907 S.W.2d 773, 776 (Ky. 1995), and seemed to rely on the commentary (without citing it) in *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954, 957-60 (Ky. 1997).

[230] *See* Act of Apr. 9, 1992, ch. 324, 1992 Ky. Acts 921 (second enactment); Act of Mar. 19, 1990, ch. 88, 1990 Ky. Acts 176 (first enactment); STUDY COMM., *supra* note 7 (drafters' proposals).

[231] *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998), *cert. denied*, 119 S. Ct. 1056 (1999), is an illustrative case. In this case, the defendant made an argument that required construction of K.R.E. 608, a provision of the Rules that was seriously battered and bruised during the enactment process. The court found meaning in an obscure provision by examining legislative history that included a review of the federal rule on the same subject, a provision of the 1990 enactment of the Kentucky Rules, and the final product that emerged from the 1992 enactment. *See id.* at 29-30.

standard use of legislative history, it is clear that some unwritten history has also played a role in interpretation of the Rules. As described in Part II above, the court was involved in every facet of the process that produced the Rules. Justices who participated in that process, who still comprise a majority, have memories of what they believe the court intended with respect to individual provisions of the Rules and, on important occasions, have resorted to these unrecorded memories in interpreting and applying the Rules.[232]

Federal Materials: Drafters correctly anticipated that federal materials would provide "invaluable assistance" to interpreters of the Kentucky Rules.[233] The Supreme Court of Kentucky, at one time or another, has relied upon all of the following in interpreting the Kentucky Rules–the Advisory Committee Notes that accompany the Federal Rules,[234] comparisons between federal and state rules on the same subject,[235] and federal decisions construing provisions that have Kentucky counterparts.[236] More notably perhaps, the court relied on *Tome v. United States*[237] in construing the Kentucky provision on prior consistent statements[238] and fully incorporated

---

[232] *See, e.g.*, Stringer v. Commonwealth, 956 S.W.2d 883, 891-92 (Ky. 1997), *cert. denied*, 118 S. Ct. 1374 (1998); Newkirk v. Commonwealth, 937 S.W.2d 690, 694 (Ky. 1996).

[233] *See* STUDY COMM., *supra* note 7, at 1 ("The Federal Rules have been in operation since 1975; several states have adopted Rules patterned after the Federal Rules. As a result, there is a substantial and growing body of case law construing these Rules, case law which can be of invaluable assistance in the application of a new set of evidence rules for Kentucky.").

[234] *See* Jarvis v. Commonwealth, 960 S.W.2d 466, 469 (Ky. 1998) (finding guidance in these Notes in addressing a hearsay issue where there was "a dearth of case law in this Commonwealth").

[235] *See, e.g.*, Thurman v. Commonwealth, 975 S.W.2d 888, 893-94 (Ky. 1998), *cert. denied*, 119 S. Ct. 1150 (1999).

[236] *See* Roberts v. Commonwealth, 896 S.W.2d 4, 5 (Ky. 1995) ("There are no Kentucky authorities on point. Therefore, we are free to look to federal authorities for interpretations of the federal counterparts . . . ."); *see also* Rabovsky v. Commonwealth, 973 S.W.2d 6, 10-11 (Ky. 1998) (relying on Hiram Ricker & Sons v. Students Int'l Mediation Soc'y, 501 F.2d 550, 554 (1st Cir. 1974)); Brock v. Commonwealth, 947 S.W.2d 24, 28 (Ky. 1997) (relying on an interpretation of FED. R. EVID. 103(e) to interpret K.R.E. 103(e)); Smith v. Commonwealth, 920 S.W.2d 514, 517 (Ky. 1995) (relying on Tome v. United States, 513 U.S. 150 (1995)).

[237] Tome v. United States, 513 U.S. 150 (1995).

[238] *See* Smith v. Commonwealth, 920 S.W.2d 514, 517 (Ky. 1995).

the landmark *Daubert* case into state law when construing Kentucky's provision on expert testimony.[239]

Preexisting Common Law: The court has noted more than once that the Rules resulted from "codification,"[240] a reminder that the drafters "were working old ground"[241] and left behind a substantial "body of common law knowledge [that] continues to exist . . . in the somewhat altered form of a source of guidance"[242] for interpretation of the Rules. It is no surprise, therefore, that the preexisting common law has been more heavily used to interpret the Rules than all other nontextual sources of interpretation combined. The court has relied on preexisting precedents when applying broad provisions of the Rules,[243] has looked to the preexisting law for definition of terms contained in the Rules,[244] has used it to resolve

---

[239] *See* Mitchell v. Commonwealth, 908 S.W.2d 100, 101-02 (Ky. 1995); *see also* Stringer v. Commonwealth, 956 S.W.2d 883, 891 (1997), *cert. denied*, 118 S. Ct. 1374 (1998) (adopting the enumerated requirements of *Daubert*); Collins v. Commonwealth, 951 S.W.2d 569, 575 (Ky. 1997) (stating that Kentucky has adopted the *Daubert* analysis).

[240] *See, e.g.*, Moseley v. Commonwealth, 960 S.W.2d 460, 462 (Ky. 1997); Harrison v. Commonwealth, 858 S.W.2d 172, 175 (Ky. 1993); Funk v. Commonwealth, 842 S.W.2d 476, 480 (Ky. 1992).

[241] Cleary, *supra* note 30, at 909.

[242] *Id.* at 915.

[243] For instance, *Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998), *cert. denied*, 119 S. Ct. 1056 (1999), involved K.R.E. 404(b), which excludes evidence of "other crimes" to prove conformity with character while permitting it to be used for other purposes. The court relied on pre-Rules decisions in holding that a defendant's procurement of perjured alibi testimony (for an earlier phase of the case) could be admitted to prove the defendant's consciousness of his own guilt. *See id.* at 29-32. In *Rabovsky v. Commonwealth*, 973 S.W.2d 6 (Ky. 1998), the court construed Rule 901(a), which requires records to be authenticated before introduction into evidence; the records were blood test results alleged to have been produced by analysis of the victim's blood. *See id.* at 7. The question was whether authentication required proof of "chain of custody" of the blood; the court relied on preexisting common law decisions in imposing a chain of proof requirement. *See id.* at 8-11. Finally, in *Jarvis v. Commonwealth*, 960 S.W.2d 466 (Ky. 1998), the court reached into the preexisting common law for a set of guidelines for consideration in determining if an out-of-court statement qualifies as an excited utterance under Rule 803(2). *See id.* at 471.

[244] For example, *Slaven v. Commonwealth*, 962 S.W.2d 845 (Ky. 1997), involved K.R.E. 504 which creates a privilege for confidential spousal communications without defining "communication." In this case, the court used the preexisting common law definition of communication in its construction and

ambiguity in provisions of the Rules,[245] and, in a variety of situations, has used the preexisting law as background and context for interpretation of the Rules.[246] So far, the court has done so without unraveling much of what is clearly a complex relationship between the Rules and the preexisting law, something that must occur before the adjudicatory system can maximize the benefits of the codification that produced the Rules.

C. *Relative Weight of Text*

The Supreme Court of Kentucky often speaks of "plain meaning" construction of statutes[247] but has never once used these words with reference to the Evidence Rules. It has spoken emphatically about literal text in a few cases[248] but has said nothing explicit about the relative weight of text in the interpretation equation. One can easily see, upon review of the case law, that text is by far the most important element of the equation, more important than all extrinsic sources of interpretation combined. Beyond this conclusion, which is not particularly telling,[249] the extent to

---

application of the Rule. *See id.* at 851. Additionally, in *Brock v. Commonwealth*, 947 S.W.2d 24 (Ky. 1997), the court construed Rule 801A(a)(1) which renders prior inconsistent statements of a witness admissible. In this case, the court borrowed from the preexisting law a definition of inconsistency. *See id.* at 27-28.

[245] *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996), is illustrative. The question in this case was whether an offering party can preserve error for review without an avowal by the witness whose testimony has been excluded. Rule 103(a) could be read to require avowal by the witness or to allow the record to be made by avowal of counsel. The court relied on pre-Rules case law to conclude that "[a] reviewing court must have the words of the witness." *Id.* at 223.

[246] *See, e.g.*, *Slaven*, 962 S.W.2d at 845 (construing Rule 504 on spousal privileges in the light of a preexisting statute and common law decisions on a number of important issues); Moseley v. Commonwealth, 960 S.W.2d 460 (Ky. 1997) (construing the language of the state of mind exception to the hearsay rule–Rule 803(3)–in light of the landmark case from which it emanated).

[247] *See, e.g.*, Lynch v. Commonwealth, 902 S.W.2d 813, 814 (Ky. 1995); Commonwealth v. Shivley, 814 S.W.2d 572, 573-74 (Ky. 1991).

[248] *See, e.g.*, Jarvis v. Commonwealth, 960 S.W.2d 466, 469 (Ky. 1998) ("The language of the rule makes clear that time is an important element of the exception."); *Moseley*, 960 S.W.2d at 462 ("KRE 803(3), by its very language, only applies to prove the state of mind of the *declarant*. . . .").

[249] Even strong opponents of plain meaning interpretation of evidence rules concede that text is more important than other sources of meaning: "It just begs the question to say that text of a Federal Rule of Evidence deserves primary importance; of *course* it does." Scallen & Taslitz, *supra* note 191, at 442.

which the court will demand adherence to the literal text of the Rules is yet to be revealed. Signals are mixed in the various decisions rendered to date.

In an overwhelming percentage of cases, interpretations by the court have closely tracked the literal language of the Rules.[250] The court has resisted fudging on text when impairment to plain meaning would be barely noticeable. In *Slaven v. Commonwealth*,[251] for example, it rejected what would have been an extremely modest expansion of the language of the hearsay exception for present sense impressions.[252] It has also resisted the temptation to fudge on the language of the Rules when offered plausible grounds for doing so. In *Thurman v. Commonwealth*,[253] for example, it rejected without much consideration an invitation to disregard the literal language of the hearsay exception for prior inconsistent statements in order to protect the fundamental values of the hearsay rule itself.[254] But for the cases described in the next para-

---

[250] *See, e.g.*, Rabovsky v. Commonwealth, 973 S.W.2d 6, 10-11 (Ky. 1998) (holding medical records about nonmedical events not admissible since K.R.E. 803(6) requires that such records be made in "the regular practice of that business activity"); Brock v. Commonwealth, 947 S.W.2d 24, 30 (Ky. 1997) (holding that tape recording can qualify for admission as a past recollection recorded since the definition of this exception in K.R.E. 803(5) reads "memorandum *or* record"); Partin v. Commonwealth, 918 S.W.2d 219, 222 (Ky. 1996) (holding that the homicide victim's manifestation of fear of the defendant is not covered by K.R.E. 801(a)'s definition of hearsay as including "nonverbal conduct of a person, if it is intended by the person as an assertion").

[251] Slaven v. Commonwealth, 962 S.W.2d 845 (Ky. 1997).

[252] K.R.E. 803(1) limits the exception to statements made "while the declarant was perceiving the event . . . or immediately thereafter." K.R.E. 803(1). The court ruled against use of the exception in the following situation:

> Caudill testified that she talked to Becky again between 10:00 p.m. and 11:00 p.m. and that Becky told her that Appellant had come home and was passed out. If the statement had been that Appellant was *at* home and was passed out, it would have been admissible as a present sense impression. However, it was inadmissible hearsay to the extent that it related a past event.

Slaven, 962 S.W.2d at 854.

[253] Thurman v. Commonwealth, 975 S.W.2d 888 (Ky. 1998), *cert. denied*, 119 S. Ct. 1150 (1999).

[254] K.R.E. 801(d)(1)(A) provides for unqualified admissibility of a witness's prior inconsistent statements. The court was urged to limit admissibility to

graph, the court's interpretation of the Rules points unerringly to the conclusion that text is more important than everything else and is more often than not singularly decisive.

In only two instances has the court interpreted the Rules in contradiction of their plain meaning. In *Roberts v. Commonwealth*,[255] the interpretation issue was whether Rule 410's exclusion of statements made "in the course of plea discussions *with an attorney* for the prosecuting authority"[256] is applicable to statements made to a police officer acting under the express authority of the prosecuting attorney. Relying on extrinsic sources of interpretation,[257] the court ignored the literal text of the Rule and held the statements inadmissible.[258] In *Tamme v. Commonwealth*,[259] the interpretation issue arose when the prosecution introduced "other crimes" evidence under Rule 404(b) without giving pretrial notice of its intention to do so;[260] it was clear that no notice had been given, although such notice is required by the plain language of K.R.E. 404(c),[261] but it was also clear that the defendant had actual notice of the "other crimes" evidence and the likelihood that it would be used at trial.[262] Strict adherence to literal text

---

situations in which the offering party had as a primary objective impeachment of the witness's testimony in order to protect the values behind the prohibition against the use of hearsay evidence. *See id.* at 893-94.

[255] Roberts v. Commonwealth, 896 S.W.2d 4 (Ky. 1995).

[256] K.R.E. 410(4) (emphasis added).

[257] The court found support for its interpretation in two sources–federal cases construing an identical federal rule and the purpose behind the adoption of an exclusionary rule for statements resulting from plea bargaining. *See Roberts*, 896 S.W.2d at 6.

[258] *See id.*

[259] Tamme v. Commonwealth, 973 S.W.2d 13 (Ky. 1998), *cert. denied*, 119 S. Ct. 1056 (1999).

[260] The evidence used against the defendant showed that he had procured and used perjured testimony in an earlier trial of this murder prosecution, with the evidence obviously being used to show consciousness of guilt, which is an appropriate use of such evidence under Rule 404(b). *See id.* at 29.

[261] "[I]t shall give reasonable pretrial notice to the defendant of its intention to offer such evidence." K.R.E. 404(c).

[262] The defendant had in fact moved before trial (in limine) to have the evidence ruled inadmissible under Rule 404(b), which shows the defendant's pretrial notice of the evidence and the likelihood of its use at trial and perhaps the reason for the prosecution's failure to give notice. *See Tamme*, 973 S.W.2d at 31-32.

would have resulted in a finding of error; the court looked beyond text, considered the purpose behind the Rule,[263] and found no error to have been committed.[264]

How much text counts in the court's interpretation equation, when all is weighed, is yet unclear. Interpretations have tracked the literal language of the Rules too closely and too often for text to be viewed as a mere "starting point." *Tamme* and *Roberts*, where text yielded to extrinsic sources of interpretation, reflect some resistance to "plain meaning" interpretation, but the circumstances of these cases were sufficiently unusual and extraordinary to blur the significance of the decisions. A good opportunity to consider the relative importance of text–with advocates sharply focused on the issue and outcome hanging in the balance–has not yet presented itself to the court. *Stringer* had the ingredients, as discussed in Part VI below, but the issue failed to materialize as the court's attention drifted away from the text of the Rules. Because other issues like that of *Stringer* await resolution, as described in Part VII, it is only a matter of time until a clearer picture emerges of the relative weight of text in the court's interpretive approach to the Rules.

D. Prater v. Cabinet for Human Resources[265]

Most of the cases construing the Rules reveal bits and pieces of an interpretive approach–importance of preexisting law, use of legislative history, relative weight of text, etc. In a few cases, however, the bits and pieces coalesce to reveal a composite of this approach, best illustrated by the parental rights termination case of *Prater v. Cabinet for Human Resources*. In this case, the trial court permitted the plaintiff (C.H.R.) to introduce into evidence a "case report" of its own investigation of the defendant's treatment of his children.[266] The report qualified as a "public record" but was inadmissible under the public records hearsay exception, as defined in K.R.E. 803(8).[267] The defendant argued that it had to be

---

[263] *See id.* at 31 ("'The intent of [KRE 404(c)] is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion in limine and to deal with reliability and prejudice at trial.'" (quoting LAWSON, *supra* note 6, at 106)).

[264] *See id.* at 31-32.

[265] Prater v. Cabinet for Human Resources, 954 S.W.2d 954 (Ky. 1997).

[266] *See id.* at 956.

[267] The record satisfied the general requirements of K.R.E. 803(8) for admission of public records but was offered into evidence by the agency that made the record

excluded under this provision of the Rules, while the plaintiff argued that, although it was a public record, it could be admitted under the business records exception to the hearsay rule, defined in K.R.E. 803(6).[268] Viewed narrowly, *Prater* required the court to define the relationship of two important hearsay exceptions; viewed broadly, it required the court to define the relationship of all hearsay exceptions to each other. The Rules define more than thirty hearsay exceptions but say absolutely nothing about their relationship to each other, a combination which made the issue in *Prater* both important and difficult.

In its analysis, the court recognized that the Rules provided no definitive answer to the issue and that it would have to look to extrinsic sources of interpretation for resolution of the problem. It considered the background against which the Rules were enacted, finding in the preexisting law both a public and business records hearsay exception and preexisting case law support for use of the business records exception to admit public records,[269] including C.H.R. records in parental rights termination cases.[270] The court examined legislative history,[271] looked to the federal

---

and thus was inadmissible under the following exclusionary language of the rule:

> The following are not within this exception to the hearsay rule:
>
> . . .
>
> (B) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party;
>
> . . . .

K.R.E. 803(8).

[268] *See Prater*, 954 S.W.2d at 957. K.R.E. 803(6) is broadly applicable to records of regularly conducted business activity, with requirements that are generally designed to assure that the records are reliable enough for use in litigation; it has no categorical exclusions similar to those contained in K.R.E. 803(8) and relied upon by the defendant in *Prater*. It defines "business" so that a public agency would easily qualify–"business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." K.R.E. 803(6).

[269] *See Prater*, 954 S.W.2d at 957 (citing Garner v. Commonwealth, 645 S.W.2d 705 (Ky. 1983); O.C.E. v. Department for Human Resources, 638 S.W.2d 282 (Ky. App. 1982)).

[270] *See id.* (citing L.K.M. v. Department for Human Resources, 621 S.W.2d 38 (Ky. App. 1981); Cabinet for Human Resources v. E.S., 730 S.W.2d 929 (Ky. 1987)).

[271] It found that the drafters of Kentucky's Rules, departing from the norm, had used the Uniform Rules of Evidence as the model for Kentucky's public records exception to the hearsay rule. *See id.*

rules for guidance,[272] and examined academic treatises on the rules under consideration;[273] it found guidance in the design of the applicable provisions[274] and in the evidentiary policies reflected in those provisions.[275] Last, but not by any means least, the court weighed the text of the Rule and concluded that records not admissible under the public records exception may be introduced under the business records exception if the requirements of the latter are fully satisfied.[276]

---

[272] In this regard, the court found a more restrictive definition of the public records exception in the Kentucky Rules: "Thus, while FRE 803(8) is available to admit investigative reports of public agencies in any civil action, KRE 803(8) is available to admit such reports only if the agency is not a party or if the report is offered by another presumably adverse party." *Id.*

[273] *See id.* (citing ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.80, at 284 (2d ed. 1984)).

[274] The focus of the court's attention was on K.R.E. 803(8)'s prohibition against the use of "[i]nvestigative reports prepared by . . . an agency when offered by it in a case in which it is a party." K.R.E. 803(8). It would have been easy to view the provision as a general exclusionary rule against such evidence. The court seems to have seen in the structure of the hearsay provisions separation and independence of the individual hearsay exceptions: "Appellant's interpretation overlooks the fact that KRE 803(8) does not purport to exclude these types of records and reports from introduction as evidence. The rule merely excludes KRE 803(8) as a vehicle available for accomplishing their introduction." *Prater*, 954 S.W.2d at 957.

[275] The court saw the policy behind K.R.E. 803(8)'s prohibition against an agency's use of its own investigative reports as a safeguard against self-serving hearsay–"prepared by a government agency which intends to use it as evidence in a case in which that agency is a party." *Prater*, 954 S.W.2d at 958. It saw in K.R.E. 803(6) a policy of dealing with the same risk through more demanding prerequisites for admission of the hearsay–(1) a foundation requirement that does not exist for public records, (2) a showing that the record was made by someone acting under a business duty, and (3) a showing that it was made at or near the time of the event recorded. *See id.* By seeing equivalent safeguards against unreliable evidence in the two provisions, the court was able to more easily consider treating the two exceptions as separate and independent means of admitting hearsay.

[276] K.R.E. 803(8) defines three instances in which public records may not be introduced into evidence even if the elements of the public records exception can be shown to exist. Referring to such records, the text of the provision says that they "are not within *this exception* to the hearsay rule." K.R.E. 803(8) (emphasis added). It was with specific reference to this language that the court said that "[t]he rule merely excludes KRE 803(8) as a vehicle available for accomplishing their introduction." *Prater*, 954 S.W.2d at 957.

The interpretive approach of *Prater* involved a use of the widest possible range of extrinsic sources of interpretation–legislative history, drafters' commentary, federal rules, preexisting common law precedent, structure/design of the rules, and evidentiary policies. The text of the applicable rule played a more weighty role than the secondary sources of meaning and was probably the decisive factor in the decision; since the secondary sources complemented the text of the rule, there was no reason for concern over which of the two deserved the greatest weight in the interpretation equation and no need to decide if literal text ever yields to extrinsic sources of interpretation. As indicated earlier, the court has yet to grapple with these far-reaching and fundamental issues.

VI. EVIDENCE RULES AND THE COMMON LAW

A. Codification

The Kentucky Rules, as well as the Federal Rules, can properly be viewed as a codification of preexisting common law principles.[277] They mostly reaffirm preexisting doctrine and were not in any sense crafted from "whole cloth"; the supreme court has described them as a codification.[278] Whether properly characterized as a codification or not, the enactment of the Rules effectuated a disconnection with the past and a transformation of the preexisting common law principles from binding precedent to something having a significantly lesser standing in the law. This transformation has been described by one scholar as a "body of common law knowledge continu[ing] to exist, though in the somewhat altered form of a source of guidance [for interpreting the Rules]."[279]

The Supreme Court of Kentucky, in applying the Rules, has not always acted as though a transformation of this magnitude occurred upon the adoption of the Rules. It has occasionally rendered decisions without even acknowledging the existence of applicable provisions of the Rules, relying instead on decisions predating the adoption of the Rules.[280] More impor-

---

[277] There was some statutory evidence law that was incorporated into the Rules and modified, but it was very small in comparison to the preexisting common law of evidence.

[278] *See* Harrison v. Commonwealth, 858 S.W.2d 172, 175 (Ky. 1993); *see also* Funk v. Commonwealth, 842 S.W.2d 476, 480 (Ky. 1992) (describing the Rules as "codifying our previous decisions on this subject").

[279] Cleary, *supra* note 30, at 915.

[280] *See, e.g.*, Bart v. Commonwealth, 951 S.W.2d 576, 579 (Ky. 1997) (holding that no abuse of discretion had occurred in finding testimonial competency of a

tantly, it has occasionally adhered to preexisting common law decisions that clearly conflict with provisions of the Rules. In *Slaven v. Commonwealth*,[281] the court followed preexisting law at the expense of a new definition of statements against interest; the preexisting law required the makers of such statements to know they were speaking against their interest,[282] while K.R.E. 804(b)(3) "adopts a standard of measurement that is objective–'a reasonable person in the declarant's position.' "[283] In *Funk v. Commonwealth*,[284] when defining judicial authority to exclude relevant evidence because of undue prejudice, the court borrowed from preexisting common law a yardstick that is significantly different from the one required by the Rules; the preexisting law rested discretion upon a finding that probativeness *outweighed* undue prejudice,[285] while K.R.E. 403 rests discretion upon a much more demanding finding that undue prejudice *substantially outweighs* probativeness.[286] The preexisting common law looked more like precedent than a source of guidance in these cases. But the court did not in any case focus sharply on the relationship between the Rules and preexisting common law and seems not to have expressed any view on whether or not pre-Rules common law doctrine survived the adoption of the Rules, which brings us back to the *Moseley*[287] dissent.

The question in *Moseley* was admissibility of hearsay evidence, excluded by the majority but believed to be admissible by the dissenters under preexisting common law precedent rather than the Rules. The Rules contain more than thirty hearsay exceptions–carefully defined, deeply

---

child witness, relying on a 1977 case for the competency standard rather than the one defined in K.R.E. 601); Brown v. Commonwealth, 934 S.W.2d 242, 248 (Ky. 1996) (holding that lay opinion on insanity is admissible, citing three cases decided before adoption of the Rules but not K.R.E. 701, which defines the admissibility of lay opinion).

[281] Slaven v. Commonwealth, 962 S.W.2d 854 (Ky. 1997).

[282] *See id.* (citing Fisher v. Duckworth, 738 S.W.2d 810 (Ky. 1987)).

[283] LAWSON, *supra* note 6, at 423.

[284] Funk v. Commonwealth, 842 S.W.2d 476 (Ky. 1992).

[285] *See id.* at 481("[T]he trial court must decide whether the *probative* value of the evidence outweighs its *inflammatory* nature. If it does, the evidence is admissible. Otherwise it is not." (citing Commonwealth v. Morrison, 661 S.W.2d 471, 473 (Ky. 1983))).

[286] *See* K.R.E. 403. In other instances involving this issue, the court has defined trial court authority under the yardstick contained in K.R.E. 403. *See, e.g.*, Bell v. Commonwealth, 875 S.W.2d 882, 887 (Ky. 1994) (discussing the trial court's determination under K.R.E. 403).

[287] Moseley v. Commonwealth, 960 S.W.2d 460 (Ky. 1997).

rooted in tradition, and plainly suggesting that drafters of the Rules exercised what the United States Supreme Court described as "careful judgment as to what hearsay may come into evidence and what may not."[288] Could they have possibly contemplated additional exceptions left preserved in the preexisting common law? On this point, there is no room for reasonable doubt, given the content of K.R.E. 802: "Hearsay is not admissible except as provided by these rules or by rules of the Supreme Court of Kentucky."[289] There is no indication that the dissenters in *Moseley* confronted the plain text of this provision, and no indication that they carefully considered the serious ramifications of concluding that preexisting common law principles survive adoption of the Rules.[290] Adherence to preexisting doctrine might possibly be necessary and justifiable in areas where the Rules are incomplete, as discussed below. In areas where the Rules are comprehensive, with hearsay being perhaps the best example, the preservation of preexisting principles can serve only to undermine the codification effort that produced the Rules.

B. New Common Law Rules

Do the Rules retain or abolish the common law power to create new evidentiary doctrine? Professor Cleary, official Reporter for the Advisory Committee that drafted the Federal Rules, spoke to the issue shortly after their adoption: "[U]nder the Federal Rules no common law of evidence remains."[291] Probably no issue has been more heatedly debated than this one, sparked by seemingly contradictory provisions of the Rules, powerful arguments on both sides of the question, and the obvious importance of the issue to the operation and effect of the Rules.

The most compelling case for survival of a common law power to create new rules is made by Professor Weissenberger, who believes that support for survival is found in the structure, history, and content of the Rules. The Rules, he contends, "were designed as general rules with intentional broad gaps,"[292] clearly contemplating that "the broad range of judicial powers exercised under the common law were intended to be integral in the operation of the Federal Rules of Evidence."[293] Moreover, he argues, the Kentucky Rules explicitly provide for such power in the

---

[288] United States v. Salerno, 505 U.S. 317, 322 (1992).

[289] K.R.E. 802.

[290] *See Moseley*, 960 S.W.2d at 463-64 (Johnstone, J., dissenting).

[291] Cleary, *supra* note 30, at 915.

[292] Weissenberger, *The Supreme Court*, *supra* note 52, at 1329.

[293] *Id.* at 1334.

following provision: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and *promotion of growth and development of the law of evidence* to the end that the truth may be ascertained and proceedings justly determined."[294] Of the federal counterpart to this rule, he says, "I cannot escape an interpretation of the phrase 'growth and development of the law of evidence' as one which authorizes the development of novel evidentiary doctrines. Growth cannot be achieved but through these evidentiary principles, preserved in case law precedent."[295]

The case against survival of a common law power to create new rules, at least an unlimited one, is persuasively made by Professor Imwinkelried, who argues that survival would undermine the primary objective of codification ("simplification of American evidentiary doctrine"[296]) and "fl[y] in the face of legislative history."[297] More pointedly, he argues, survival of the power would violate the plain text of Rule 402, which he calls "the keystone of the structure of the Federal Rules":[298]

> 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.[299]

Weissenberger's view is "unsound" and "flawed," he argues, because it "overlooks the central importance of . . . Rule 402."[300] The omission of "case law" and "common law" from the list of exceptions to its rule on admissibility was purposeful, he argues, and "deprives the courts of the power to enforce uncodified exclusionary rules of evidence,"[301] either preexisting or newly created.[302]

---

[294] K.R.E. 102 (emphasis added).

[295] Weissenberger, *Are the Federal Rules of Evidence a Statute?*, *supra* note 32, at 398.

[296] Imwinkelried, *A Brief Defense*, *supra* note 32, at 294.

[297] Imwinkelried, *Federal Rule of Evidence 402*, *supra* note 30, at 136-37.

[298] Imwinkelried, *A Brief Defense*, *supra* note 32, at 273.

[299] K.R.E. 402.

[300] Imwinkelried, *A Brief Defense*, *supra* note 32, at 272.

[301] *Id.*

[302] "First, Rule 402 has a prospective effect: it precludes trial judges from future creation of new exclusionary rules of general applicability. Second, and more importantly, the Rule impliedly repeals prior decisional admissibility rules that

There is no easy choice between the two views. The first adds flexibility that could lead to better decision making in given instances; the second assures greater certainty of the law and more predictable rulings on evidence issues, both of which are important if not crucial to litigants. The first undermines the objectives of codification, at least to some extent, and would make selection of the second easier, quite easy in fact, if the codification that produced the Rules is sufficiently comprehensive to resolve most of the evidence issues that are likely to arise.

C. Completeness of the Rules

A perfect codification would produce rules that would resolve every conceivable problem. Kentucky's Rules are very comprehensive in most areas–hearsay, best evidence, opinion, and authentication; unlike their federal counterparts, they are even fairly complete in the area of privileges.[303] They are noticeably incomplete in only one area–testimonial credibility; they provide for impeachment by felony convictions but in most other respects are silent on the subject. The Kentucky Rules contain no rule on impeachment by bias, interest, or corruption, none on impeachment by contradiction, and an inadequate one on the use of character for credibility purposes.[304] Undoubtedly, smaller gaps exist in other parts of the Rules, although probably none approaching the magnitude of what exists in the credibility area. All of these omissions raise the same crucial question. Do the Rules succumb to the common law for resolution of issues not explicitly addressed in the Rules?[305]

United States v. Abel[306] framed this question for consideration by the United States Supreme Court. In this case, evidence of bias was admitted to impeach a key defense witness over objection that the silence of the Federal Rules on this subject meant that impeachment by bias was impermissible. The Supreme Court acknowledged that the Rules "do not

---

have not been codified." Imwinkelried, *Federal Rule of Evidence 402*, *supra* note 30, at 137 (footnotes omitted).

[303] Federal Rule 501 explicitly defers to the common law for definitions of privileges. *See* FED. R. EVID. 501. Kentucky Rules 501 through 511 provide substantial coverage of the law of privileges. *See* K.R.E. 501-511.

[304] *See* K.R.E. 608.

[305] Stated differently, the inquiry would have two parts–(1) was there survival of common law precedent in areas not explicitly addressed by the Rules, and (2) do courts have a common law power to create new evidence doctrine for such areas.

[306] United States v. Abel, 469 U.S. 45 (1984).

by their terms" deal with impeachment by bias[307] but held that evidence of bias is admissible nonetheless. In reaching this conclusion, the Court clearly looked to the preexisting common law for guidance, using the words "state of unanimity"[308] to describe that law, and wrote an opinion showing very heavy reliance on pre-Rules decisional law, leaving room for argument that the Rules do indeed yield to the pre-Rules common law in some instances.[309] A different reading of *Abel*–unsupportive of this argument–is clearly possible, perhaps even compelling.

In its analysis, the Court plainly looked beyond the pre-Rules common law for support of its decision, citing in its opinion post-Rules lower court decisions, multiple treatises, Advisory Committee Notes, and other authorities. It quoted the famous Cleary statement that "no common law of evidence remains"[310] and clearly grounded its decision in the Rules rather than the preexisting law: "We think the lesson to be drawn from all of this is that it is permissible to impeach a witness by showing his bias *under the Federal Rules of Evidence* just as it was permissible to do so before their adoption."[311] The Court found the evidence admissible under the most basic provisions of the Rules–relevant under Rule 401 and admissible under the broad umbrella of Rule 402: "Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, Act of Congress, or by applicable rule."[312]

The Rules occupy the whole field, argues Imwinkelried, and the decision in *Abel* is confirmation of that:

> Evidence of the witness' bias was logically relevant to a fact in dispute. Logically relevant evidence is presumed admissible under Rules 401-02. If there is no [explicit] statutory exclusionary rule barring the evidence . . . , the evidence is admissible. The Court described that sequence of analysis in *Abel* . . . . When an item of evidence passes the muster of that

---

[307] *Id.* at 49.

[308] *Id.* at 50.

[309] Weissenberger says about *Abel* that "[t]he Court concluded that because the common law of evidence allowed the showing of bias, the testimony was admissible." Weissenberger, *The Supreme Court*, *supra* note 52, at 1331. Similar observations have been offered by others: "Some evidence questions simply lie outside the rules. For example, in *United States v. Abel* . . . the Court analyzed and applied a principle of evidence–impeachment for bias–that is not delineated in the Rules." Becker & Orenstein, *supra* note 176, at 866 (footnotes omitted).

[310] *Abel*, 469 U.S. at 51.

[311] *Id.* (emphasis added.)

[312] *Id.* at 51.

> sequence of analysis, Rules 401-02 are ample statutory authorization for the admission of the evidence. A "doctrine of admissibility" does not need any statutory sanction other than Rules 401 and 402.[313]

Rule 402's role is huge under this view. It operates as a residual rule of admission and in the same breath forecloses the exclusion of relevant evidence except under the authority of explicit rules of exclusion contained in the Constitution, statutes, court rules, or rules of evidence. It confers a quality of completeness upon the Rules and makes it feasible to embrace the view that "no common law of evidence remains," should one be so inclined.

D. Stringer v. Commonwealth[314]

Are expert witnesses foreclosed from testifying to opinions on ultimate facts? *Stringer* framed this question. Kentucky's Rules are silent on the subject, whereas the preexisting common law required exclusion; "legislative history" had produced a widespread belief that the preexisting law had survived adoption of the Rules.[315] The Supreme Court of Kentucky held that experts may testify to opinions on ultimate facts in an opinion reflecting serious debate and division over its authority to adopt this position without a formal amendment to the Rules. All that the court has said to date on the important issues discussed in this part of the Article is contained in one paragraph of *Stringer*.

The court announced its rejection of the ultimate issue rule, summarized the requirements for expert opinion testimony, and then made the following statements:

> *Brown v. Commonwealth, supra,* and *Alexander v. Commonwealth, supra,* are overruled insofar as they hold otherwise. Our departure from the "ultimate issue" rule does not contravene KRE 1102 and 1103 [covering amendment of the Rules]. Our failure to adopt proposed KRE 704 simply left the "ultimate issue" unaddressed in the Kentucky Rules of Evidence and, therefore, subject to common law interpretation by proper application

---

[313] Imwinkelried, *A Brief Defense, supra* note 32, at 288 (footnotes omitted).

[314] Stringer v. Commonwealth, 956 S.W.2d 883 (1997), *cert. denied,* 118 S. Ct. 1374 (1998). See *supra* Part I.A for a full description of this case.

[315] As described in Part I above, drafters had recommended a provision that would have eliminated the prohibition, but it was not included in the final version of the Rules, at the initiative of the supreme court. *See supra* notes 6-12 and accompanying text.

> of the rules pertaining to relevancy, KRE 401, and expert testimony, KRE 702. If we had wished to adopt a rule of evidence precluding any expert opinion embracing the ultimate issue, it would have been a simple matter to have done so when we approved the Rules of Evidence and submitted them to the legislature in 1991. We note that the rules, as adopted, also left open other issues, *e.g.*, the "habit" rule (proposed KRE 406) and the "eavesdropper" rule (proposed KRE 502); and that still other evidence issues, *e.g.*, bias of a witness, are not specifically addressed in the rules, but are resolved by proper application of other rules, such as KRE 401.[316]

Does the court imply, by overruling *Brown* and *Alexander* (pre-Rules cases), that preexisting common law rules survived the codification that produced the Rules? Perhaps, although there is no indication the court gave this issue much, if any, consideration.[317] Alternatively, does the decision imply that the supreme court retains a common law power to superimpose evidence doctrine on the Rules? Partial dissenters argued that the court had exercised such a power, in violation of the amendment provisions of the Rules;[318] the majority disagreed and described its decision as nothing more than a "proper application of the rules pertaining to relevancy, KRE 401, and expert testimony, KRE 702,"[319] keeping its silence with respect to the broader question of whether there remains after the Rules a common law power to create evidence doctrine.

The court appears not to have considered the applicability of the "keystone" provision of the Rules–K.R.E. 402. Had its attention been drawn to this provision, it would have found added support for its decision and a more compelling need to address the issues under discussion, as well as the issue of how much weight to accord the literal text of the Rules. All relevant evidence is admissible, under K.R.E. 402, unless the United States Constitution, the Constitution of Kentucky, an act, a court rule, or an

---

[316] *Stringer*, 956 S.W.2d at 891-92.

[317] Preexisting common law decisions remain as "sources of guidance" even if one concludes that "no common law remains after the Rules." *See supra* text accompanying note 75. In overruling *Brown* and *Alexander*, the court merely makes it clear that they may no longer be regarded as "sources of guidance" in applying the opinion provisions of the Rules. The first sentence of the quotation from *Stringer* could mean this and nothing more.

[318] *See Stringer*, 956 S.W.2d at 896 (Lambert, J., and Stephens, C.J., concurring in result only) ("Sadly, and despite its protests to the contrary, the majority in this case has amended the Rules of Evidence by adoption of Rule 704, contrary to the express provisions of KRE 1102 and 1103.").

[319] *Id.* at 891-92.

evidence rule provides to the contrary. There was no doubt about relevance in *Stringer* and no ground for exclusion except the common law prohibition against expert opinion on ultimate issues. To have ruled in favor of exclusion, the court would have been compelled to disregard the text of the Rule and embrace the idea that common law rules did indeed survive adoption of the Rules.

VII. CONCLUSION

A. Introduction

The *Stringer* case and the *Moseley* dissent raise crucial issues concerning the relationship of the Rules of Evidence to the preexisting common law doctrine from which the Rules are derived. *Stringer* commences discussion of the subject but leaves the most significant questions unanswered; further discussion by the supreme court is both needed and inevitable. This Article has strived to advance the discussion by sharpening the focus of the inquiry, drawing needed attention to overlooked provisions of the Rules, and examining the results of a federal experience with the same problems. It now concludes with a description of particular aspects of the Rules that are most likely to engage the supreme court in further discussion of the important issues identified and described above.

B. Habit

Kentucky's pre-Rules case law required exclusion of evidence of habit when offered to prove action in conformity therewith on a particular occasion.[320] Probably no other state required exclusion of such evidence and it is almost a certainty that Kentucky's rule was ignored regularly and routinely.[321] Drafters of Kentucky's Rules recommended a provision

---

[320] *See, e.g.*, Cincinnati, N.O. & T.P. Ry. Co. v. Hare's Adm'x, 178 S.W.2d 835 (Ky. 1944) (ruling habitual stopping of vehicle before crossing specific railroad tracks inadmissible), *overruled in part by* Louisville & Nashville R.R. Co. v. Fisher, 357 S.W.2d 683 (Ky. 1962); Lexington Ry. Co. v. Herring, 96 S.W. 558 (Ky. 1906) (holding habitual boarding of a moving street car inadmissible).

[321] It is commonplace for witnesses to have no memory of what they did on a given occasion with respect to routine matters (e.g., adhering to speed limits, checking vital signs of a patient, verifying bank statements, giving directions to technicians, etc.) but to have good and clear memory of what they ordinarily do in such situations. Most lawyers would not even think of raising questions about the admissibility of such evidence.

admitting habit evidence;[322] however, the recommendation was deleted from the Rules before their adoption,[323] leaving them silent with respect to admission or exclusion of such evidence. Because evidence of habit is clearly probative and often needed in litigation, the significance of this silence will have to be addressed by the supreme court.

There is an exact duplication of the interpretation problem of *Stringer* in this situation–preexisting common law at odds with the overwhelming weight of authority, rejection of an explicit proposal for change, and no specific treatment of the subject in the Rules. More importantly, the uncodified preexisting law is exclusionary in its effect and directly collides with the plain language of K.R.E. 402. In examining this problem with its sights on Rule 402, the supreme court would have to speak more directly than it has to date about the relationship of the Rules to the preexisting common law and about the relative weight of text in the interpretation of the Rules.

C. Eavesdroppers and Privileges

Kentucky's pre-Rules law extended no protection to privileged communications overheard by eavesdroppers.[324] Drafters of the Rules recommended codification of this preexisting law[325] but the proposal was deleted from the Rules before their enactment,[326] leaving them silent on an important subject and creating another interpretation problem for the supreme court, one that is quite different from the problem in *Stringer* and illustrative of problems where survival of preexisting common law is unaffected by K.R.E. 402.

It is important to note that Rule 402 operates to abolish only uncodified rules that are exclusionary in effect. The eavesdropper rule is inclusionary, not exclusionary, and is thus unaffected by this "keystone" provision of the Rules, although this fact does not by any means suggest that the preexisting law survived adoption of the Rules. Evidentiary policy favors the preexist-

---

[322] *See* Act of Mar. 19, 1990, ch. 88, § 16, 1990 Ky. Acts 176, 180.

[323] *See* Act of Apr. 9, 1992, ch. 324, § 30, 1992 Ky. Acts 921, 936.

[324] *See, e.g.*, Vanhorn v. Commonwealth, 40 S.W.2d 372 (Ky. 1931) (involving attorney-client communication); Ratcliffe v. Commonwealth, 21 S.W.2d 441 (Ky. 1929) (involving attorney-client communication); Commonwealth v. Everson, 96 S.W. 460 (Ky. 1906) (involving husband-wife communication).

[325] *See* Act of Mar. 19, 1990, ch. 88, § 24, 1990 Ky. Acts 176, 182.

[326] *See* Act of Apr. 9, 1992, ch. 324, § 30, 1992 Ky. Acts 921, 936.

ing rule,[327] which might indicate that a persuasive argument could be made for viewing the preexisting law as a "source of guidance" in the interpretation of the privileges provisions. Two considerations work against this outcome: one specific to the issue, and one with broader and more important implications for the subject under discussion.

It would be difficult to embrace a preexisting rule without taking into careful account the rejection of the drafters' proposal by the General Assembly and supreme court, for this rejection would seem to express some degree of "legislative intent" to abandon the earlier position. While *Stringer* indicates that this consideration is not alone determinative of an interpretation decision,[328] there exists in this instance a more serious obstacle to an interpretation of the Rules preserving eavesdropper testimony.

With one exception,[329] the privileges provisions are textually unfriendly to eavesdropper testimony, providing privilege holders with a right "to refuse to disclose and *to prevent any other person from disclosing*" protected confidential communications.[330] Although arguments might be formulated for excepting eavesdroppers from the italicized text of these provisions,[331] it is at least doubtful that the supreme court could be

---

[327] Privileges generally exist to allow free disclosure of information between parties to protected relationships. They deprive the tribunal of probative evidence and thus are given no broader application than needed to preserve the protected relationship. Eavesdroppers are not known to the parties involved in the protected relationship; admission of their testimony should have no adverse effect on free disclosure.

[328] The situation in *Stringer* also involved the rejection of a drafters' recommendation. The dissenters used this factor in support of their position but were unpersuasive with the majority: "If we had wished to adopt a rule of evidence precluding any expert opinion embracing the ultimate issue, it would have been a simple matter to have done so when we approved the Rules of Evidence and submitted them to the legislature in 1991." Stringer v. Commonwealth, 956 S.W.2d 883, 892 (Ky. 1997), *cert. denied*, 118 S. Ct. 1374 (1998).

[329] K.R.E. 504, which defines the husband-wife privilege, is unlike the other privilege provisions of the Rules, undoubtedly because of the fact that a substantial modification of the drafters' recommendation occurred during the course of enacting the Rules. *Compare* Act of Mar. 19, 1990, ch. 88, § 26, 1990 Ky. Acts 183, *with* Act of Apr. 9, 1992, ch. 324, § 30, 1992 Ky. Acts 924.

[330] K.R.E. 503 (attorney-client privilege) (emphasis added); *see also id.* 505 (religious privilege); *id.* 506 (counselor-client privilege); *id.* 507 (psychotherapist-patient privilege).

[331] It can be shown that the italicized text was not aimed at the problem of eavesdropper testimony, for it was in the package of proposals that included the

persuaded to disregard both the "plain language" of the Rules and the "legislative history" that is compatible with that language. In any event, resolution of the "eavesdropper" problem is likely to reveal a good deal about the supreme court's view of plain meaning interpretation of the Rules.

D. *Impeachment on Collateral Facts*

Kentucky's pre-Rules common law included a prohibition against impeachment through contradiction on collateral facts.[332] It served to keep litigation within reasonable bounds,[333] while leaving room for legitimate challenge to the credibility of witnesses.[334] It was difficult to apply, mostly because of the obscurity of the term "collateralness,"[335] but it played an important if not pivotal role in the pre-Rules litigation process. Nevertheless, it was not adopted as a part of the Rules. Without the benefit of focused argument on the issue, the supreme court has indicated that the

---

rejected proposal on eavesdroppers. *See* STUDY COMM., *supra* note 7, at 38-53. Moreover, it is clear that the italicized text would be needed for effective privileges even if eavesdropper testimony is ruled admissible; for example, it would be needed to empower a client to prevent testimony from an attorney about communications protected by the attorney-client privilege. The text, in other words, would not be totally deprived of meaning if interpreted to permit eavesdropper testimony.

[332] *See, e.g.*, Miller v. Commonwealth, 45 S.W.2d 461 (Ky. 1932), *overruled in part by* Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); Cincinnati, N.O. & T.P. Ry. Co. v. Prewitt's Adm'r, 262 S.W. 1 (Ky. 1924).

[333] Baker Pool Co. v. Bennett, 411 S.W.2d 335, 338 (Ky. 1967) ("[T]he issues in a cause would be multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points.").

[334] It did this in part by permitting impeachment by contradiction on collateral facts if it could be accomplished on cross-examination of the witness being impeached. *See, e.g.*, Harris v. Commonwealth, 11 S.W.2d 410 (Ky. 1928); Hayden v. Commonwealth, 131 S.W. 521 (Ky. 1910).

[335] The pre-Rules common law did utilize the common definition of collateralness, which asks "[c]ould the fact, as to which the prior self-contradiction is predicated, have been shown in evidence for any purpose *independently* of the self contradiction?" Commonwealth v. Jackson, 281 S.W.2d 891, 894 (Ky. 1955) (quoting 3 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 692 (3d ed. 1940)), *overruled in part by* Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969).

preexisting law survived adoption of the Rules,[336] a position that clearly appears to be soft enough for reconsideration.

K.R.E. 402 is plainly applicable on its face to the problem under discussion. The preexisting law in question was exclusionary and had its effect on evidence that is undeniably relevant. Under the terms of Rule 402, such evidence is admissible unless its exclusion is required by either the federal or state constitution, a statute, a court rule, or an evidence rule. Simply stated, the plain language of the Rule leaves no room for the survival of the prohibition against impeachment by contradiction on collateral facts, or any other common-law based exclusionary rule for that matter. It does not, in achieving this fundamental codified objective, leave the system vulnerable to an endless proliferation of collateral issues.

One of the sources of exclusionary rules recognized by K.R.E. 402 is "these rules" (the Evidence Rules). In "these rules," one finds a provision that defines a much improved approach to dealing with the evil of issue proliferation. K.R.E. 403 authorizes trial judges, at their discretion, to exclude relevant evidence having a probative worth that is "substantially outweighed" by the danger of, among other things, "confusion of the issues." Under the preexisting law, an objection to evidence of contradiction would have required the trial court to undertake the near-impossible task of distinguishing collateral and noncollateral facts.[337] Under Rule 403, upon such an objection, the court weighs the probativeness of the evidence (for impeachment purposes) against the undesirable effect of issue proliferation, excluding it only if the latter substantially outweighs the former. Rule 403 is probably less exclusionary than the preexisting common law rule but should produce more carefully reasoned admissibility decisions once trial judges grow more accustomed to its use in this context. It is unlikely, however, that this improved approach will be

---

[336] *See* Slaven v. Commonwealth, 962 S.W.2d 845, 858 (Ky. 1997) ("This evidence was properly excluded for several reasons. First, it was an attempted impeachment on a collateral fact.").

[337] *See* LAWSON, *supra* note 6, at 178.

> A fact is collateral in this context if it could not be introduced into evidence for some purpose absent the contradiction. This is an obscure definition that has to be applied in an almost endless variety of factual situations. . . . Determining collateralness under this definition is free of difficulty only in obvious situations.

Id.

employed in the trial courts before the supreme court clarifies its position on the survival or demise of the preexisting rule.[338]

E. Rehabilitation Before Impeachment

The pre-Rules common law required the exclusion of evidence of character for truthfulness except when offered to rebut evidence of character for untruthfulness,[339] a universally embraced exclusionary rule grounded in undisputably sound evidentiary policy.[340] It was recommended by drafters of the Rules, in a provision addressing all aspects of character and credibility,[341] but was not included in the final version of the Rules.[342] The omission resulted from action on the floor of the General Assembly that produced the most ambiguous and inadequate rule in the entire set of Rules,[343] leaving gaps in the law on character and credibility, and an interpretation issue that provides an opportunity to make an important

---

[338] While there is no Kentucky case law supportive of this use of Rule 403, one can find several cases in which the federal counterpart has been used to address issues arising from impeachment by contradiction on collateral issues. *See, e.g.*, United States v. Kozinski, 16 F.3d 795, 806 (7th Cir. 1994); United States v. Beauchamp, 986 F.2d 1, 4 (1st Cir. 1993); United States v. Tarantino, 846 F.2d 1384, 1409 (D.C. Cir. 1988); United States v. Solomon, 686 F.2d 863, 873 (11th Cir. 1982); United States v. Harris, 542 F.2d 1283, 1317 (7th Cir. 1976).

[339] *See, e.g.*, Shell v. Commonwealth, 53 S.W.2d 524 (Ky. 1932); Ellis v. Ellis, 612 S.W.2d 747 (Ky. App. 1981).

[340] *See* LAWSON, *supra* note 6, at 173 ("Permitting credibility to be bolstered ahead of attack would waste enormous amounts of time, increase risks of unfair prejudice, and add unnecessarily to the difficulty and complexity of litigation.").

[341] *See* STUDY COMM., *supra* note 7, at 58.

[342] The enacted provision on character evidence for credibility purposes, K.R.E. 608, says nothing about the order in which such evidence must be introduced, unlike the proposal from which it was drawn. *See* K.R.E. 608. If taken literally, the enacted provision permits bolstering of character before it is attacked.

[343] *See* LAWSON, *supra* note 6, at 201.

> No provision of the Kentucky Rules of Evidence suffered as much alteration in the enactment process as KRE 608. The enacted rule surfaced on the floor of the legislature at the last minute and got adopted without any scrutiny by the drafters of the Rules. The end result is a provision that is grossly incomplete, inconsistent on its face, and inexplicably at odds with parallel provisions of the Rules dealing with the substantive use of character evidence.

Id.

concluding point about the relationship between preexisting common law doctrine and the Rules.

The preexisting rule under discussion–no bolstering by proof of character before impeachment–is an exclusionary rule that would perish under the dictates of K.R.E. 402; character for credibility is relevant and none of the Rule's listed sources of exclusion closes the door to admission. However, if any situations exist in which the command of this "keystone" should surrender to uncodified rules of exclusion, this one would surely qualify. The adopted provision on character–K.R.E. 608–is so obscure than even diehard textualists would concede that courts might be justified in looking beyond the text of the Rules for a solution to the problem.[344] The preexisting law was grounded in sound policy, recommended by the drafters of the Rules, endorsed by the supreme court, but left uncodified as a result of incompetence and nothing more.[345] In other words, one can find in this situation several good reasons to revive the preexisting rule and to disregard the command of K.R.E. 402 to admit all relevant evidence not excluded by a constitution, statute, court rule, or evidence rule. On the other hand, if so inclined, one can find at least equally good reason for adhering to the text of this pivotal provision of the Rules.

It goes without saying that the Rules are not set in concrete. Drafters contemplated that conflicts, inconsistencies, and undesirable results would surface in the use of the Rules over time and that periodic repair would be needed. They added to the Rules themselves an amendment process that accounts for the unique method by which the Rules came into being and that recognizes the judiciary's special capability to formulate evidence

---

[344] *See* Imwinkelried, *Moving Beyond "Top Down" Grand Theories*, *supra* note 167, at 418.

> Embarrassingly, some legislation includes provisions which are linguistically incoherent. The drafting is poor and sloppy. When a court realistically concludes that the statute *sub judice* falls into this category, the text can hardly command great respect. Unless the court is willing to go to the extreme of invalidating the legislation due to linguistic incompetence, the court must fill the gaps left by the statutory text. The legislative default invites, even forces, the court to engage in policymaking.

Id. (footnotes omitted).

[345] There is no record of how proposed Rule 608 came to be modified and adopted in its present form. However, there is no indication that anyone or any group wanted to eliminate the prohibition against bolstering credibility by use of character before impeachment on that ground.

rules needed for an efficient, effective adjudicatory system. The key component of this process is an Evidence Rules Review Commission that was created to work with the supreme court and General Assembly on necessary modifications of the Rules.[346] The Commission is perfectly positioned to monitor the operation of the Rules, to formulate and initiate proposals to modify them, to correct problems like the one under discussion in relatively short order, and to reduce the cost of adherence to the command of K.R.E. 402 to a minimal level.

Unfortunately, if not astonishingly, the amendment provisions of the Rules have never been activated, although the supreme court retains absolute control over such activation. The chief justice chairs the Commission, appoints six of its eight members, and holds exclusive authority to call the Commission into operation.[347] There was no appointment of members to the Commission for five years after adoption of the Rules[348] and there have been no meetings of the Commission to date. As a result, there has been minimal oversight of the Rules, no substantial review of their effectiveness, and no consideration of needed modifications, although the need for modification has existed since the moment of adoption.

The General Assembly has no serious interest in evidence rules and no real capability of dealing with evidence issues even if interested; although the supreme court is best at dealing with cases and controversies, it has a history of dealing in the abstract with rules of practice and procedure and an indisputable ability to deal competently with evidence issues. The Rules' drafters believed that the court would have serious interest in the Evidence Rules and that control over the amendment process should rest with the court. There is hope yet that the court will manifest such interest and take the necessary actions to prevent an erosion of the substantial benefits of having a comprehensive code of evidence.

---

[346] *See* K.R.E. 1102(c) ("Neither the Supreme Court nor the General Assembly should undertake to amend or add to the Kentucky Rules of Evidence without first obtaining a review of any proposed amendments or additions from the Evidence Rules Review Commission described in KRE 1103."); *see also* K.R.E. 1103 (providing rules for the membership, meetings, and duties of the Evidence Rules Review Commission).

[347] *See* K.R.E. 1103.

[348] *See* Letter from Robert Stephens, Chief Justice, to Robert G. Lawson (Apr. 3, 1997) (on file with author).