

**KENTUCKY BAR ASSOCIATION
KENTUCKY RULES OF EVIDENCE**

**ARTICLE IV
RELEVANCY AND RELATED SUBJECTS**

KRE 406 Habit; routine practice

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

COMMENT

Most jurisdictions (perhaps all but Kentucky and one other) recognize the propriety of proving that a person acted in a particular way on a given occasion by showing that he had a "habit" of so acting. At the same time, most if not all jurisdictions refuse to allow litigants to prove that a person acted in a particular way on a given occasion by showing that he had a particular trait of character (except in criminal cases pursuant to KRE 404). Evidence that a person habitually stops at a railroad crossing before moving across, offered to show that he stopped on a given occasion, is a classic illustration of the former; evidence that a person has a general disposition toward carefulness, offered to prove that he stopped at a crossing on a given occasion is an illustration of the latter.

Rule 406 authorizes the introduction of evidence of a person's habit (and the routine practice of an organization) without opening the gates to the introduction of evidence of character or generalized disposition. The provision contains no definition of "habit" or "routine practice" but the following definition from the Advisory Committee Notes on Federal Rule 406 is both helpful and typical:

"Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." Fed.R.Evid.. 406, Advisory Committee's Note.

It is contemplated that testimony about a driver's specific behavior (such as

activating turn signals) would be admissible under the provision but that testimony about a driver's general behavior (such as always driving carefully) would be inadmissible.

The provision does not attempt to address the following questions:

(1) How many times does a response to a specific stimulus have to occur in order to constitute a habit for purposes of the rule? (2) How much behavioral uniformity is required for multiple repetitive responses to qualify as habitual under the rule? With respect to these questions, drafters of the Federal Rules made the following points:

“ . . . The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion . . . While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.” FedR.Evid. 406, Advisory Committee's Note.

Evidence authorities believe that the lack of certainty on these points is insufficient reason for an exclusion of all habit evidence and that these are matters that can be resolved by the trial judge (as he/she resolves other matters of relevance) on a case-by-case basis. The same is true with respect to matters involving the methods by which habit can be proved (a single witness who has seen 50 responses or 50 witnesses who have seen 1 response). With respect to all such matters, the trial judge is well-suited to resolve issues bearing on admissibility and, of course, the trial judge has the discretion under Rule 403 to exclude such evidence when its probative value is substantially outweighed by such undesirable effects as undue delay, waste of time, confusion of the jury, and others.

Rule 406 is borrowed from the Federal Rules without modification.

Rule 406 changes Kentucky law. The Supreme Court ruled repeatedly during the last century that evidence of habit could not be used to prove conduct in conformity with habit. See e.g., Lexington R. Co. v. Herring, 96 SW. 558 (Ky. 1906); Cincinnati, N.O. & T.P. Ry. Co. v. Hare's Adm'x, 178 S.W.2d 835 (Ky. 1944). Recently, however, a majority of the Court expressed the view that habit evidence should be admissible to prove conduct in conformity with habit, although a majority held that such evidence could not be admitted without explicit authorization for such in the Rules of Evidence. See Burchett v. Commonwealth, 98 S.W.3d 492 (Ky. 2003). Rule 406 adopts the view of the Court's majority and brings Kentucky law into line with that of nearly all other states and the Federal Rules.

HISTORY: Adopted by Supreme Court Order 2006-06, eff. 7-1-06