TENNESSEE RULES OF
EVIDENCE

THE HONORABLE JUDGE
BARRY R. TIDWELL

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TABLE OF CONTENTS

Rule 101: Scope.

These rules shall govern evidence rulings in all trial courts of Tennessee except as otherwise provided by statute or rules of the Supreme Court of Tennessee.

Rule 102: Purpose and construction.

These rules shall be construed to secure the just, speedy, and inexpensive determination of proceedings.

Rule 103: Rulings on evidence.

(a) **Effect of Erroneous Ruling.** — Error may not be predicated upon a ruling which admits or excludes evidence
unless a substantial right of the party is affected, and
(1) **Objection.** — In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context; or
(2) **Offer of Proof.** — In case the ruling is one excluding evidence, the substance of
the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.
Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) **Record of Offer and Ruling.** — The court may add any other or further statement which shows the character of the evidence,
the form in which it was offered,
the objection made,
and the ruling.
It shall permit the making of an offer in question and answer form.
If an issue arises concerning the privileged nature of a communication, the trial court may require the communication be reduced to writing for in camera review. If ruled not privileged, the communication can be divulged in open court and will become part of the record for appellate review. If ruled privileged, the trial court shall seal the writing reviewed in camera and attach it to the record for appellate review.

(c) **Hearing of Jury.** —In jury cases, proceedings shall be conducted to the extent practicable so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) **Plain Error.** —Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Rule 104: Preliminary questions.

(a) Questions of Admissibility Generally. —Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).

In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) Relevance Conditioned on Fact. —

When the relevance of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

In the court's discretion, evidence may be admitted subject to subsequent introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. —

Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury.

Hearings on other preliminary matters shall be so conducted when the interests of justice require or when an accused is a witness and so requests.

(d) Testimony of Accused. —

The accused does not by testifying upon a preliminary matter become subject to cross-examination as to other issues in the case.

(e) Weight and Credibility. —

This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 105: Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

1. The court **on request shall** restrict the evidence to its proper scope and instruct the jury accordingly, if evidence admissible for one purpose is not admissible for another purpose.
2. **Failure to request a limiting instruction waives this issue on appeal.** *See State v. Wingard*, 891 S.W.2d 628, 634 (Tenn. Crim. App. 1994).
    a. Upon timely objection, the trial court should exclude a prior inconsistent statement when offered as substantive evidence of guilt or innocence.
    b. Upon request, the court should instruct the jury that the prior statement may only be considered as reflecting upon the credibility of the witness. *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000).

Rule 106: Writings or recorded statements —Completeness.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

1. **Is the statement written?** The Rule of Completeness applies. *Denton v. State*, 945 S.W.2d 793, 801 (Tenn. Crim. App. 1996).
2. **If one part of written or recorded statement is introduced, the opposing party can introduce another portion when fairness so requires.**
3. The defense cannot introduce a separate self-serving statement of the defendant, however, as it is not an admission by a party-opponent under Tenn.R.Evid. 803(1.2)(A).
    a. There is nothing to guarantee its trustworthiness, and would open up the rule to obvious abuse. Otherwise "an accused could create evidence for himself by making statements in his favor for subsequent use at his trial to show his innocence." *State v. Brooks*, 909 S.W.2d 854, 862-3 (Tenn. Crim. App. 1995) *See also State v. Bolster*, 945 S.W.2d 776, 787-8 (Tenn. Crim. App. 1996) for a discussion of this issue.
    b. However, **if part of the same statement is self-serving, Rule 106 may apply**:
        i. "Rule 106 reflects the concern for fairness ..., that the trier of fact be permitted to assess related information without being misled by hearing only certain portions of evidence. .... Accordingly, it appears that where the prosecution introduces a statement made by the defendant, the trial court may in the interest of fairness order that the remainder of the statement be admitted as well under Rule 106. Indeed, it would not be consistent with fundamental fairness to allow the prosecution to introduce only the most incriminating portions of a defendant's statement without regard to the overall context or relevant exculpatory portions found in the same statement." *State v. Keogh*, 18 S.W.3d 175, 182-3 (Tenn. 2000).
        ii. Also, when offered to show the detective's bias [that he didn't investigate the alibi, etc.,] the statement is not hearsay, and should be allowed. *See State v. Bolster*, 945 S.W.2d 776, 784 (Tenn. Crim. App. 1996), containing a thorough discussion of self-serving defendant hearsay statements.

RULES 201 AND 202:
JUDICIAL NOTICE OF ADJUDICATIVE FACTS AND JUDICIAL NOTICE OF LAW

Rule 201:

Adjudicative facts:

The fact needs to be one not subject to reasonable dispute,

- in that it is either generally known within the territorial jurisdiction of the trial court
- or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Has a party requested the court take judicial notice?

- It can be taken without request

Has a party requested judicial notice and supplied the court with necessary information?

- If yes, the court **shall** take notice.

Has a party been given an oportunity to be heard?

- Party is entitled to this.

Is this a civil or a criminal case?

- If civil, court should instruct jury to accept **as conclusive** any fact judicially noticed.
- If criminal, court should instruct jury that it may, but is **not required** to, accept as conclusive any fact judicially noticed.

Rule 202:

Law:

1. It is **mandatory** to take judicial notice of
   a. The common law
   b. The constitutions and statutes of the US and every state, territory, and other jurisdiction of the US
   c. All rules adopted by the US Supreme Court or by the TN Supreme Court
   d. Any rule or regulation of which a statute of the US or the state of TN mandates judicial notice.
2. It is **optional** for a court to take judicial notice of the law when
   a. The parties offer reasonable notice to each other AND the subject matter is
      i. All other duly adopted federal and state rules of the court
      ii. All duly published regulations of federal and state agencies and proclaimations of the TN Wildlife Resources Agency
      iii. All duly enacted ordinances of municipalities or other governmental subdivisions
      iv. Any matter of law which would fall within the scope of this subsection but for the fact it has been replaced, superseded, or otherwise rendered no longer in force
      v. Treaties, conventions, the laws of foreign countries, international law, and maritime law.

Rule 201: Judicial notice of adjudicative facts.

(a) **Scope of Rule** —This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of Facts** —

A judicially noticed fact must be one not subject to reasonable dispute, in that it is either

(1) generally known within the territorial jurisdiction of the trial court or
(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary** —A court may take judicial notice whether requested or not.

(d) **When Mandatory** —A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to Be Heard** —

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice is taken.

(f) **Time of Taking Notice** —Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing the Jury** —In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

A judicially noticeable fact that is duly noticed by the trial court without timely objection is a part of the record as stated by the trial court and is in lieu of the "evidence" that T.C.A. § 40-35-210(g) otherwise requires. *State v. Nunley*, 22 S.W.3d 282, 1999 Tenn. Crim. App. LEXIS 712 (Tenn. Crim. App. 1999).

There was sufficient evidence to support a conviction for being a felon in possession of a firearm under T.C.A. § 39-17-1307, **because defendant did not object to the trial court taking judicial notice of a prior felony conviction,** and the fact that defendant knew a gun was located in his bedroom established constructive possession. *State v. Griggs*, -- S.W.3d --, 2006 Tenn. Crim. App. LEXIS 359 (Tenn. Crim. App. Apr. 17, 2006), appeal denied, -- S.W.3d --, 2006 Tenn. LEXIS 749 (Tenn. 2006).

Failure to Request Hearing.

The trial judge properly took judicial notice of the rendering of 300 drug-case indictments in the trial court during a two-year period; thus, the defendant's failure to request a Tenn. R. Evid. 201(e) hearing precluded appellate review of the underlying fact. *State v. Nunley*, 22 S.W.3d 282, 1999 Tenn. Crim. App. LEXIS 712 (Tenn. Crim. App. 1999).

Rule 202. Judicial notice of law.

(a) **Mandatory Judicial Notice of Law —**

The court shall take judicial notice of

(1) the common law,

(2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States,

(3) all rules adopted by the United States Supreme Court or by the Tennessee Supreme Court, and

(4) any rule or regulation of which a statute of the United States or Tennessee mandates judicial notice.

(b) **Optional Judicial Notice of Law —**

Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of

(1) all other duly adopted federal and state rules of court,

(2) all duly published regulations of federal and state agencies and proclamations of the Tennessee Wildlife Resources Agency,

(3) all duly enacted ordinances of municipalities or other governmental subdivisions,

(4) any matter of law which would fall within the scope of this subsection or subsection (a) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and

(5) treaties, conventions, the laws of foreign countries, international law, and maritime law.

(c) **Determination by Court —**

All determinations of law made pursuant to this rule shall be made by the court and not by the jury. In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

Note that judicial notice of ordinances is discretionary and requires notice to adverse parties.

Rule 401. Definition of "relevant evidence."

"Relevant evidence" –

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

The theoretical test for admissibility is a lenient one. Resolved any practical difficulties under Rule 403 or the exclusionary rules of legal relevancy – Rules 404 - 412.

To be relevant, evidence must tend to prove a material issue. This concept is found in the words, "any fact that is of consequence to the determination of the action."

Rule 402: Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible except as provided by

- the Constitution of the United States,
- the Constitution of Tennessee,
- these rules,
- or other rules or laws of general application in the courts of Tennessee.

Evidence which is not relevant is not admissible.

Once evidence satisfies the definition of relevance, it becomes admissible unless a rule excludes it.

RULE 403 – "PREJUDICE RULE"
BALANCING TESTS

"Relevant evidence may be excluded if its **probative value** is **substantially** outweighed by its **prejudicial effects.**"

Does the evidence have **probative value**?

1. How logically related is the evidence to the key disputes?
2. How important is the issue to the resolution of the case?
3. How necessary is the evidence?
    - How much other evidence with lower prejudicial effect has already been introduced or will be introduced?
4. Remoteness
    - How far removed is the evidence in space and time from the people, places, and events being litigated?

Is there a **prejudicial effect** of this evidence?

1. Will the evidence tend to **confuse** the issues? Will the evidence tend to **mislead** the jury?
    - This arises when evidence from a different case or relates to an issue that has been dismissed, severed, or stipulated is brought into evidence.
2. Will the evidence waste time?
3. Is there any other prejudicial effect?
4. "Unfair prejudice" is defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Daboecia*, 953 S.W.2d 649, 654 (Tenn. 1997)

Did the objection state which of the Rule 403 dangers he/she wishes to avoid?

Does the prejudicial effect SUBSTANTIALLY outweigh the probative value?

Policy favors admission over exclusion

Does the evidence have any conditional relevance?

- Is the connecting fact necessary to be in evidence before the evidence of the main fact?
- Judge can admit evidence "subject to connection" and allow the proponent to prove the connecting fact later.

Note: Many times the State will anticipate Defendant's proof that may or may not put on.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of

- unfair prejudice,
- confusion of the issues, or
- misleading the jury, or
- by considerations of
- undue delay,
- waste of time, or
- needless presentation of cumulative evidence.

1. Not all prejudice is unfair under this Rule.

2. **Rule 403's burden is "substantially outweigh,"** as opposed to Rule 404(b) is only "outweigh," as evidence of other bad acts carries a significant danger of unfair prejudice.

Admissibility of **photographs** is governed by *State v. Banks*, 564 S.W.2d 947 (Tenn. 1978). The judge must first determine that the photo is relevant, then whether the probative value is outweighed by unfair prejudice. In *Banks*, the Tennessee Supreme Court recognized "the inherently prejudicial character of photographic depictions of a murder victim...." In adopting Federal Rule of Evidence 403 as its test for admissibility, the court suggested a variety of factors for consideration by the trial judge. The "value of photographs as evidence, ... their accuracy and clarity ... whether they were taken before the corpse was moved ... [and] the inadequacy of the testimonial evidence in relating the facts to the jury" are appropriate factors." *Id.* at 951.

RULE 404(A) – CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT

Generally, character evidence is not admissible
for the purpose of proving action in conformity
with the character trait on a particular occasion.

EXCEPTIONS:

1. Character of the **Accused**
   a. Evidence of a pertinent character trait is admissible if offered by the accused or by the prosecution to rebut the same.

2. Character of the **Victim**
   a. Evidence of a pertinent character trait of the victim of crime offered by an accused or by the prosecution to rebut the same.
   b. Or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

3. Character of **Witness**
   a. *See Rule 607 (impeachment), Rule 608 (opinion, reputation, and specific instances of conduct) and Rule 609 (prior convictions).*

Remember –
Evidence of other crimes, wrongs, or acts may be admissible for purposes other than showing action in conformity therewith. *See Rule 404(b).*

RULE 404(B) –
EVIDENCE OF OTHER CRIMES, WRONGS, OR BAD ACTS

Evidence of other crimes is not admissible to prove the defendant has criminal tendencies.

PROCEDURE TO ADMIT 404(B) EVIDENCE:

FIRST –

- Determine if the evidence is **relevant** under 401.
- If not relevant, exclude it under 402.
- "Evidence which is not relevant is not admissible."

SECOND –

- Determine if the evidence **reflects** on the character of the defendant.
- If not, decide admissibility under 403.
    - Did the other crime occur at the same time as the crime charged? If so, ANALYZE UNDER 403! The evidence may be admissible to "complete the telling of the story."
      Example: episodes of abuse leading up to the charged offense.
- **Admit** unless "probative value is **substantially** outweighed by the danger of unfair prejudice."

THIRD –

If the evidence reflects on the defendant's **character**, use 404(b) and

1. **Hold a hearing** outside the jury's presence. Rule 404(b) places the burden upon the defendant to request a jury out hearing. *State v. Carroll*, 36 S.W.3d 854, 869 (Tenn. Crim. App. 1999).
2. **Exclude unless** you determine a there is a **material issue** (see below) other than conduct conforming to a character trait; **State on the record** the material issue, the ruling, and the reasons for admitting the evidence.
    a. To be admissible, the evidence of another crime, wrong, or bad act must fall within a material issue exception:

• **Motive**	• **Intent (*Common Plan*)**	• **Absense of Mistake / Accident**
• **Identity**	• **Plan (*Common Plan*)**	
• **Preparation**	• **Knowledge**	• **Opportunity**

Common Plan – look at the number of similarities between other crimes and the present offense.

3. **Exclude unless** finding proof of the other crime, wrong, or act to be **clear and convincing**.
4. **Still exclude** it if the probative value is **outweighed** by the danger of unfair prejudice. *State v. Hoyt*, 928 S.W.2d 935, 944 (Tenn. Crim. App. 1995).
    a. The trial judge should take a restrictive approach to 404(b) evidence "because 'other act' evidence **carries a significant potential for unfairly influencing a jury**."
    b. If the unfair prejudice outweighs the probative value **or is dangerously close to tipping the scales**, the judge must exclude it despite its relevance. *State v. Drinker*, 909 S.W.2d 13, 16 (Tenn. Crim. App. 1995).

Practice Tip:
Remember to **instruct the jury** as to how they are to consider other crimes. It is recommended that this instruction be given both **at the time the evidence is offered**, and then again **during the final jury instructions.** T.P.I - 42.10

404(B) ISSUES:

IS THE ISSUE **IDENTITY**? OTHER CRIMES ADMISSIBLE IF:

1. Identity is disputed.
2. Other crimes were committed reasonably close in time to the charged offense.
3. State can show the defendant committed the other crimes.
4. Crimes were committed in such a distinctive and unique way such that one can confidently say the same person committed all the crimes.

IS THE ISSUE **MOTIVE**? OTHER CRIMES ADMISSIBLE IF:

1. Motive is disputed.
2. Other crimes were committed reasonably close in time to the charged offense.
3. State can show that the defendant committed the other crimes.
4. Other crimes must establish a unique motive for the crime charged beyond the motives of others who commit this same crime.

IS THE ISSUE **MENS REA**? OTHER CRIMES ADMISSIBLE IF:

1. Defendant denies some aspect of mens rea.
    a. *Note* – many times the state will try to offer this testimony too early. The state should probably wait for rebuttal.
2. Other crimes were committed reasonably close in time to the charged offense.
3. State can show that the defendant committed the other crimes.
4. State can show that the defendant had the requisite knowledge or intent when the other crime was committed.

If evidence that the defendant has committed a crime **separate and distinct** from the one on trial is **relevant to some matter actually in issue in the case on trial**, and if **its probative value as evidence is not outweighed by its prejudicial effect** upon the defendant, then such evidence may be properly admitted. *State v. Howell*, 868 S.W.2d 238, 254 (Tenn. 1993)." *State v. Moss*, 13 S.W.3d 374, 383 (Tenn. Crim. App. 1999).

Rule 404 (b). Character evidence not admissible to prove conduct; exceptions; other crimes.

(b) Other Crimes, Wrongs, or Acts.–
Evidence of other crimes, wrongs, or acts
is not admissible to prove the character of a person
in order to show action in conformity with the character trait.

It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

(1) The court upon request must hold a hearing outside the jury's presence;
(2) The court must determine that
a material issue exists other than conduct conforming with a character trait
and must, upon request, state on the record
the material issue, the ruling, and the reasons for admitting the evidence;
(3) The court must find proof of he other crime, wrong, or act
to be clear and convincing; and
(4) The court must exclude the evidence
if its probative value is outweighed by the danger of unfair prejudice.

*** See appendix for case law relating to the weighing process, clear and convincing evidence of the act, unfair prejudice, self-defense, reasons for admissibility, prior acts against a victim, sex crimes, completion of the story, and other 404(b) questions.**

RULE 405. METHODS OF PROVING CHARACTER.

PROCEDURAL PREREQUISITES:

In order to prevent the jury from hearing inadmissible and potentially prejudicial allegations about the defendant's character,

1. FIRST, AN ATTORNEY MUST MAKE APPLICATION TO THE COURT
   a. Before utilizing a specific instance of conduct to impeach a character witness.
   b. Since the rule provides no time limit, application may be made immediately before the question is asked,
   c. If opposing counsel is unable to respond because of surprise, a recess may be appropriate.
2. SECOND, UPON REQUEST, **CONDUCT A JURY-OUT HEARING** TO DETERMINE WHETHER INQUIRIES INTO SPECIFIC INSTANCES OF CONDUCT ARE PERMISSIBLE.
   a. During this jury-out hearing, the trial court must determine whether the specific instance of conduct about which inquiry is proposed is relevant to the character trait about which the witness has testified.
   b. Due to the potential for evidence manufacturing, and because a person accused of a crime is more likely to be the subject of rumor and innuendo, reports of specific instances of conduct which do not arise until **after a crime has been committed are inherently suspect** and may not form the basis for inquiry under Rule 405.
3. EXERCISE CAUTION IF THE CHARACTER WITNESS FIRST HEARD REPORTS OF THE CONDUCT **AFTER THE CRIME OCCURRED.**
   a. If the witness first heard the specific instance of conduct after the crime occurred, the prosecution must offer some proof at the jury-out hearing to establish a reasonable factual basis that the specific instance of conduct had been reported before the crime occurred. *State v. Nesbitt*, 978 S.W.2d 872, 881-3 (Tenn. 1998).

When attempting to show **the victim was the first aggressor**, the defendant cannot use Rule 404(a)(2) to show specific bad acts in the past, but must instead use opinion and reputation evidence under 405(a). *See State v. ~~Rune~~ RuANE*, 912 S.W.2d 766, 779-81 (Tenn. Crim. App. 1995) for an excellent discussion of 404 vs. 405.

Rule 405

(a) Reputation or Opinion. —In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. After application to the court, inquiry on cross-examination is allowable into relevant specific instances of conduct. The conditions which must be satisfied before allowing inquiry on cross-examination about specific instances of conduct are:

(1) The court upon request must hold a hearing outside the jury's presence,

(2) The court must determine that a reasonable factual basis exists for the inquiry, and

(3) The court must determine that the probative value of a specific instance of conduct on the character witness's credibility outweighs its prejudicial effect on substantive issues.

(b) Specific Instances of Conduct. —In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

RULE 406 – HABIT AND CUSTOM

If a person **regularly** behaves a certain way, under certain circumstances similar to the ones at the time of the crime, it is admissible as habit evidence.

1. DOES A PERSON ***REGULARLY*** DO SOMETHING A PARTICULAR WAY?
   i. If yes, habit; if no, inadmissible character evidence.
   ii. *Note*: Be sure that the finding of a habit is clearly established by facts showing a ***specific*** and ***repetitive*** pattern of behavior.

2. IS THE DEFENDANT AN ORGANIZATION?
   i. If yes, a "custom" is an act that the organization always does.

3. DOES THE EVIDENCE QUALIFY AS OPINION EVIDENCE?
   i. Does the witness have personal knowledge of the person or organization whose conduct is at issue?
   ii. Has the witness observed a large number of situations similar to the one at issue?
   iii. Has the person or organization ***regularly*** responded to the situation in a particular way?

Witnesses may testify as to their own habits as well as the habits of others.

Tennessee has long admitted **animal habit**. *Copley v. State,* 281 S.W. 460 (1925), remains the leading case.

Rule 406. Habit; routine practice.

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

(b) A habit is a **regular response to a repeated specific situation.** A routine practice is a regular course of conduct of an organization.

Rule 407. Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove strict liability, negligence, or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving controverted ownership, control, or feasibility of precautionary measures, or impeachment.

Current Tennessee law exclude subsequent measures to remedy defects to prove negligence or culpable conduct. *Illinois Central Railroad Co. v. Wyatt,* 104 Tenn. 432, 58 S.W. 308 (1900). A specific exclusion in strict liability actions is included. See *Hall v. American Steamship Co.,* 688 F.2d 1062 (6th Cir. 1982) (admiralty). Manufacturers should be encouraged to improve product designs without fear of encountering damaging evidence.

A defendant who controverts ownership, control, or feasibility opens the door for the plaintiff to introduce subsequent remedial measures. Similarly, an expert who opines that a design could not be improved upon invites attack by the impeachment exception to this otherwise exclusionary rule.

Rule 408. Compromise and offers to compromise.

Evidence of

(1) furnishing or offering to furnish or

(2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim,

whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is **not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment.**

Evidence of conduct or statements made in compromise negotiations is likewise not admissible. **This rule does not require the exclusion of any evidence actually obtained during discovery merely because it is presented in the course of compromise negotiations.** This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution; however, **a party may not be impeached by a prior inconsistent statement made in compromise negotiations.**

Rule 409. Payment of medical and similar expenses.

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

The rule applies to civil, not criminal, trials

Rule 409.1 Expressions of Sympathy or Benevolence

(a) That portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault that is part of, or in addition to, any of the above shall be admissible.

(b) For purposes of this Rule:

(1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) "Family" means an injured party's spouse, parent, grandparent, stepparent, child, grandchild, sibling, half sibling, adopted sibling, or parent-in-law.

Rule 409.1 embraces only civil cases involving an "accident." It is inapplicable in criminal cases. It also extends only to "benevolent gestures"; it does not exclude statements of fault.

Rule 410. Inadmissibility of pleas, plea discussions, and related statements.

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

(1) A plea of guilty which was later withdrawn;

(2) A plea of *nolo contendere;*

(3) Any statement made in the course of any proceedings under Rule 11 of the Tennessee Rules of Criminal Procedure regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. Such a statement is admissible, however, in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

This rule is similar in effect to T.R.Crim.P. 11(e)(6), referred to in subsection (3).

Williams v. Brown, 860 S.W.2d 854 (Tenn. 1993), held misdemeanor traffic fine payments without court appearance inadmissible by analogy to Rule 410.

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon issues of negligence or other wrongful conduct. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

RULE 412 – RAPE SHIELD RULE

THIS RULE APPLIES IF THE DEFENDANT FACES CHARGES OF:

- aggravated rape (TCA § 39-13-502),
- rape (TCA § 39-13-503),
- sexual battery (TCA § 39-13-505),
- spousal sexual offenses (TCA § 39-13-507),
- rape of a child (TCA § 39-13-522),
- incest (TCA § 39-15-302),
- statutory rape (TCA § 39-13-506),
- sexual battery by an authority figure (TCA § 39-13-527),
- solicitation of minors for sexual acts (TCA § 39-13-528),
- aggravated sexual battery (TCA § 39-13-504),
- or the attempt of any of these charges

A. **PROCEDURE** TO ADMIT VICTIM'S SEXUAL BEHAVIOR —

a. Defendant must
   i. File a **written motion** to offer such evidence.
      1. No later than **ten (10) days** before the trial is scheduled to begin,
      2. The court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence:
         a. is newly discovered and **could not have been obtained earlier** through the exercise of due diligence, or
         b. that the issue to which the evidence relates has **newly arisen in the case.**
   ii. Served the motion on all parties, the prosecuting attorney, and the victim (via the prosecuting attorney's office);
   iii. Accompany the motion by **a written offer of proof,** describing the specific evidence and the purpose for introducing it.

b. If the defendant's motion complies with the requirements of this rule, the **court** shall:
   i. Hold a hearing **out of the presense of the public and the jury.**
      1. Victim may attend in person,
      2. Parties may call witnesses, including the alleged victim, and offer relevant evidence, and
      3. Accused may testify but the testimony during this hearing may not be used against the accused in any other proceeding, except that such testimony **except for impeachment purposes.**
      4. The hearing shall be on the record. but the **record shall be sealed** except for the limited purposes
         a. Facilitating appellate review,
         b. Assist the court or parties in their preparation of the case, and
         c. To impeach.
   ii. Determine whether the evidence described in the motion is admissible.
   iii. If evidence is admissible, Determine that the **probative value of the evidence outweighs its unfair prejudice to the VICTIM**

c. If evidence is admissible, the court must specifically order
   i. The specific evidence which may be offered, and
   ii. The specific areas with respect to which the alleged victim may be examined or cross-examined.

B. Does the defendant attempt to introduce **REPUTATION OR OPINION** evidence of the sexual behavior of an alleged victim other than the sexual act at issue? INADMISSIBLE.
   a. Admit ONLY if defendant satisfies the procedures of A (Rule 412(d)).

C. Does the defendant seek to offer evidence of SPECIFIC INSTANCES OF CONDUCT? INADMISSIBLE.
   a. Admit ONLY if defendant satisfies the procedures of A (Rule 412(d)) AND
   b. the evidence is:
      i. Required by the Tennessee or United States Constitution, or
      ii. Offered by the defendant on the issue of credibility of the victim,
         1. provided the prosecutor or victim has presented evidence as to the victim's sexual behavior,
         2. and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or
      iii. Sexual behavior with the accused, **on the issue of consent,** or
      iv. Sexual behavior with persons other than the accused,
         1. to rebut or explain scientific or medical evidence, or
         2. to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or
         3. to prove consent
            a. if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim
            b. that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

D. THREE EXCEPTIONS TO RULE 412 – if the behavior is the following, it defines a "pattern" of sexual conduct, which must be very unusual and distinctive,
   a. to rebut or explain scientific or medical evidence,
   b. to explain semen, injury, disease or knowledge of sexual matters, and
   c. if sex was so distinctive it agrees with the defendant's story and tends to prove consent. *State v. Sheline*, 955 S.W.2d 42, 46 (Tenn. 1997)
   d. Cross-examination will be limited if it violates Rule 412, **but under some instances it may violate the defendant's right to confrontation**. *Id.* at 47.

E. Rule 412, by its provisions, "recognizes that[,] despite the embarrassing nature of the proof, sometimes the accused **can only have a fair trial if permitted to introduce evidence of the alleged victim's sexual history.**" *State v. Brown*, 29 S.W.3d 427, 430 (Tenn. 2000)

While Rule 412 applies only to criminal prosecutions, a statute shields the civil plaintiff's sexual behavior in actions for sexual misconduct of therapists against patients. T.C.A. § 29-26-207 states that the victim's sexual history is not admissible as evidence except to prove that the sexual behavior occurred with the therapist prior to the provision of therapy to the patient by the therapist.

RULE 501 – PRIVILEGED COMMUNICATIONS

The content of communications made in the course of privileged relationships cannot be admitted into evidence if the privilege is properly asserted by the person who made the communication.

1. The communication must be confidential, satisfying both of the following:
   a. **Intent**: communication must have been intended to be confidential at the time it was made. Statements intended to be transmitted to others are not privileged.
   b. **Confidential in fact**: communication must have been confidential in fact and not overheard by third persons.

   Communications designed to further a fraud or criminal enterprise are not privileged.
2. Has the attorney claimed privilege on question by question basis or document by document basis?
3. The person objecting MUST be the person asserting his or her rights.
4. Has the privilege been waived?
   c. Can be implicit or explicit
   d. Subject-matter in issue waives
   e. Voluntary disclosure waives
   f. Introduction of evidence waives
   g. Failure to assert privilege waives
5. Privilege Not Found
   a. Physical evidence does not become privileged when client turns it over to attorney.
   b. If attorney was acting for two parties, there is no privilege for subsequent lawsuit between two parties.
   c. No privilege in lawsuits or other disputes between attorney and client, or
   d. No privilege for fee arrangements, the fact of representation, or identity of client.
   e. Communications intended to be made public are not privileged.
   f. Communications that further an ongoing or future crime or fraud are not privileged.

PRIVILEGES BY STATUTE

The following statutes relate to specific privileges:

1. ACCIDENT REPORT PRIVILEGE. T.C.A. § 55-10-114(B).
2. ACCIDENT REPORT PRIVILEGE, CIVIL SUITS. T.C.A. § 55-12-128.
3. ACCOUNTANT-CLIENT PRIVILEGE. T.C.A. § 62-1-116.
   a. Does not extend to cover papers and documents prepared independently of the audit and given to the accountant.
4. ATTORNEY CLIENT PRIVILEGE. T.C.A. § 23-3-105, § 23-3-107.
   a. Communications are confidential if made in the course of the professional relationship
      i. Attorney must have been consulted for professional reasons, though no suit need be pending.
   b. Covers agents of attorneys
   c. Covers agents of client
   d. Management of corporate clients hold privilege
5. ATTORNEY-PRIVATE DETECTIVE OR INVESTIGATOR PRIVILEGE. T.C.A. § 24-1-209.

PRIVILEGES BY STATUTE, CONTINUED

6. CHILD SEXUAL ABUSE EXCEPTION TO PRIVILEGES. T.C.A. § 37-1-614.
   a. Confidential communication is not excluded due to a privileged communication, except between attorney and client, in:
      i. any situation involving known or suspected **child sexual abuse** and
      ii. failure to report abuse as required by T.C.A. § 37-1-605,
      iii. failure to cooperate with the department in its activities pursuant to T.C.A. § 37-1-611(b), or failure to give evidence in any related judicial proceeding.
7. CLERGY PENITENT PRIVILEGE. T.C.A. § 24-1-206.
   a. The court must determine whether the person testifying is a priest, minister, or other **qualified religious leader.**
   b. The communicating party, or parties, **may waive the right of privilege**
      i. By declaration in open court, or
      ii. by an affidavit.
   c. Communication may be formal or as to a "guidance" conversation.
8. EXCEPTIONS TO EVIDENTIARY PRIVILEGE OF MENTAL HEALTH PROFESSIONALS (COMMITMENTS). T.C.A. § 33-3-114.
   a. Despite privileges including §§ 24-1-207, 63-11-213, 63-22-114, and 63-23-107, the qualified mental health professional may be compelled to testify in:
      i. Judicial commitment procedings if the service recipient is **in need of compulsory care and treatment** for mental illness, serious emotional disturbance, or developmental disability; and
      ii. When ordered to examine the service recipient if the service recipient was **advised that communications to the qualified health professional would not be privileged.**
9. DEAF PERSON-INTERPRETER PRIVILEGE. TCA § 24-1-103(F), TCA § 24-1-211(F)
10. DISCIPLINARY BOARD – COMPLAINANT PRIVILEGE. TENN.S.CT. RULE 9, §27.1.
11. GRAND JURY-WITNESS PRIVILEGE. T.R.CRIM.P. 6(K).
12. LEGISLATIVE COMMITTEE-WITNESS PRIVILEGE. T.C.A. § 24-7-113, § 24-7-114.
13. MEDICAL REVIEW REVIEW COMMITTEE-INFORMANT PRIVILEGE. T.C.A. § 63-6-219(E).
14. NEWS REPORTER'S PRIVILEGE. T.C.A. § 24-1-208.
   a. Limited Privilege regarding any information or the source of any information procured for publication or broadcast.
   b. Does not apply to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.
   c. Any person seeking information or the source thereof protected under this section may apply for an order divesting such protection.
      i. Such application shall be made to the judge of the court having jurisdiction over the hearing, action, or other proceeding in which the information sought is pending.
      ii. **The court must determine at a hearing, that, by clear and convincing evidence, the person seeking the information showed**:
         1. Probable cause that the source has information which is clearly relevant to a specific probable violation of law;
         2. The information sought cannot reasonably be obtained by alternative means; and
         3. A compelling and overriding public interest in the information.
         4. Any order of the trial court may be appealed to the court of appeals.

PRIVILEGES BY STATUTE, CONTINUED

15. PHYSICIAN-PATIENT PRIVILEGE.
    a. The communication must be confidential between the patient and the doctor.
    b. Is the patient is seeking compensation for her injuries through a lawsuit or other claim?
        i. Privilege is waived with respect to the condition and any matter causally and historically related to the condition put in issue by the pleadings.
16. PROFESSIONAL COUNSELOR/MARITAL AND FAMILY THERAPIST/CLINICAL PASTORAL THERAPIST – CLIENT PRIVILEGE. T.C.A. § 63-23-107.
17. PSYCHIATRIST-PATIENT PRIVILEGE. T.C.A. § 24-1-207.
    a. Communications in the course of and in connection with a therapeutic counseling relationship regardless of whether the therapy is **individual, joint, or group.**
    b. Exceptions:
        i. **Patient raises the issue** of the patient's mental or emotional condition;
        ii. Psychiatrist was ordered by the tribunal to examine the patient if the patient was advised that communications is not privileged; testimony is admissible only on patient's mental or emotional condition; and
        iii. To involuntarily hospitalize the patient, under § 33-6-103 or § 33-6-104, if the psychiatrist decides that the patient is in need of care and treatment in a residential facility.
            1. Unless otherwise ordered by the court, **limited to disclosures necessary to show the patient poses a substantial likelihood of serious harm requiring involuntary hospitalization** under § 33-6-103 or § 33-6-104.
    c. The court shall take **reasonable steps to prevent unnecessary exposure of personally identifiable patient information** to the public, including
        i. screening of questions in pre-hearing conferences and
        ii. in camera inspection of papers.
    d. Privileged communications may be disclosed to a potential victim under the following conditions:
        i. Such patient has made an actual threat to physically harm an identifiable victim or victims; and
        ii. The treating psychiatrist makes a clinical judgment
            1. that the patient has the apparent capability to commit such an act and
            2. that it is more likely than not that the patient will carry out the threat in the near future.
    e. TN Code §33-3-114. Exceptions:
        i. the qualified mental health professional may be compelled to testify in:
            1. If the mental health professional decides that the service recipient is in need of compulsory care and treatment, commitments for persons with:
                a. mental illness,
                b. serious emotional disturbance, or
                c. developmental disability to treatment
            2. When court ordered to examine the service recipient, but the service recipient must be advised that communications would not be privileged.
18. PSYCHOLOGIST/PSYCHOLOGICAL EXAMINER-CLIENT PRIVILEGE. T.C.A. § 63-11-213.
19. SOCIAL WORKER-CLIENT PRIVILEGE. T.C.A. §63-22-114.

20. SPOUSAL PRIVILEGE. T.C.A. § 24-1-201.
    a. Spousal privilege does not permit refusal to testify solely because spouse is a party.
    b. Spousal privilege does not apply to proceedings concerning abuse of a spouse or abuse of a minor in the custody of or under the dominion and control of either spouse.
    c. In a criminal proceeding,
        i. Communications are privileged if:
            1. The communications are **confidential;**
            2. Confidentiality is **essential to the full and satisfactory maintenance** of the marriage;
            3. The marriage is **valid**; the relationship ought to be **sedulously fostered** in the eyes of the community; and
            4. **The injury to the relation by disclosure of the communications outweighs the benefit gained for the correct disposal of litigation.**
        ii. If privileged, communication is inadmissible if either spouse objects.
    d. In a civil proceeding, confidential communications are inadmissible if either spouse objects, but does not apply to :
        i. Proceedings between spouses
        ii. Proceedings concerning abuse of a spouse or abuse of a minor in the custody of or under the dominion and control of either spouse,
        iii. Any insured's obligations under a contract of insurance in civil proceedings.

Rule 501. Privileges recognized only as provided.

Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

RULE 601: COMPETENCY AND PERSONAL KNOWLEDGE RULES

Competency is the minimal qualification someone must have to be a witness.

1. Did the witness take an oath to tell the truth?
2. Has the witness perceived something relevant to the case?
3. Does the witness remember what he or she perceived?
4. Can the witness communicate in some sensible way?
    a. Have drugs or alcohol use rendered the witness unable to communicate sensibly?
    b. If the witness is a young child,
        i. Is the child sufficiently intelligent to observe, recollect and narrate the facts, and
        ii. Does the child have a mral sense of obligation to tell the truth?
        iii. *The court may question the child to make a determination of competency.*
            1. Tenn. Supreme Ct. Rule 30 requires camera crews to limit the public presentation of children's testimony to audio.
5. Is the witness involved in the trial as a judge, juror, or attorney?
6. Is the witness disqualified by the dead man's statute?
    a. DEAD MAN'S STATUTE, T.C.A. § 24-1-203
        i. Is the action against an executor, administrator, or guardian in which judgments may be rendered for or against them?
            1. If so, neither party shall be allowed to testify against the other as to any transaction with or statement by the testitor, intestate, or ward.
        ii. Parties **may** testify if called to testify by the opposite party.

Rule 601. General rule of competency.

Every person is presumed competent to be a witness except as otherwise provided in these rules or by statute.

Virtually all witnesses may be permitted to testify: children, mentally incompetent persons, convicted felons. Rules 602 and 603 should be read in connection with this rule, however, because any witness must swear or affirm to tell the truth and must have personal knowledge of that truth.

Rule 602. Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703 relating to opinion testimony by expert witnesses.

Basic to relevancy concepts is that a witness must know about the subject matter of testimony. This is the familiar requirement of first-hand knowledge.

Under Rule 703, experts may base an opinion on the factual findings of others. Also, party admissions need not be based on first-hand knowledge.

Rule 603. Oath or Affirmation.

Before testifying, every witness shall be required to declare that the witness will testify truthfully by oath or affirmation, administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules and applicable statutes relating to qualifications as an expert and the administration of an oath or affirmation to make a true interpretation.

Interpreters must fulfill two requirements: expertise in translating and willingness to swear or affirm. T.C.A. § 24-1-211 details the qualifications of sign language interpreters.

Rule 605. Competency of Judge as Witness.

The judge or chancellor presiding at the trial may not testify in that trial. No objection need be made in order to preserve the point.

A judge could testify in a later collateral attack proceeding. The subsequent proceeding would not be "that trial."

The rule does not change a judge's power to notice facts or law under Rules 201 and 202.

See also Canon 3 of the Code of Judicial Conduct.

Rule 606. Competency of juror as witness.

(a) At the Trial. —

A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) Inquiry into Validity of Verdict or Indictment. —

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of

- whether extraneous prejudicial information was improperly brought to the jury's attention,
- whether any outside influence was improperly brought to bear upon any juror, or
- whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion;
- nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

After verdict, part (b) comes into play. A juror may testify or submit an affidavit in connection with a motion for new trial, but only in the limited circumstances of:

(1) "Extraneous prejudicial information"finding its way into the jury room,

(2) Improper outside pressure on a juror, or

(3) A quotient or gambling verdict.

This rule is the same as that adopted in *State v. Blackwell,* 664 S.W.2d 686 (Tenn. 1984).

RULE 607 – IMPEACHMENT

It is always proper to impeach a witness
to prove that the witness's testimony is unreliable and may be wrong.

Impeachment is the process of proving circumsantial evidence
that suggests to the jury a likelihood that the witness
does not understand the need to tell the truth, is mistaken, or is lying.

You can impeach a witness with evidence of:

1. RULE 608(A) – UNTRUTHFUL CHARACTER
   a. Shown via opinion or reputation evidence

2. RULE 608(B) – PRIOR ACT OF DISHONESTY OR FALSE STATEMENT
   a. May not be proved by extrinsic evidence.
   b. Must be probative of witness's truthfulness or untruthfulness.
   c. Jury out procedures required upon request.
   d. In criminal cases, the State must give accused reasonable written notice of impeaching conduct.

3. RULE 609 – PRIOR CRIMINAL CONVICTION
   a. State must give accused reasonable written notice of impeaching conviction.
   b. Conviction's probative value must outweigh any unfair prejudicial effect.
   c. Conviction is not applicable if **more than 10 years** passed since the later of conviction or release.

4. RULE 613 – INCONSISTENT STATEMENTS
   a. Upon request prior statements must be made available for opposing counsel's inspection
   b. Witness must be afforded opportunity to explain or deny
   c. Opposing party must have opportunity to interrogate witness concerning prior statement
   d. Rule 613 does not apply to prior statements a.k.a. admissions of a party opponent (*see Rule 803 concerning hearsay*)

5. RULE 616 – BIAS OR PREJUDICE:
   a. Personal, social, or political bias relevant to the case.
   b. Interest in the outcome.

6. RULE 617 – IMPAIRED CAPACITY:
   a. Drug, alcohol, or mental impairment
   b. Poor eyesight or hearing
   c. Poor opportunity to observe the events.

Rule 607. Who may impeach?

The credibility of a witness may be attacked by any party, including the party calling the witness.

A party may not call a witness to testify for the primary purpose of introducing a prior inconsistent statement that would otherwise be inadmissible. Impeachment cannot be a "mere ruse" to present to the jury prejudicial or improper testimony.

In such circumstances, striking the testimony and providing a curative instruction may be insufficient to render the error harmless, because the jury is unlikely to consider the prior statement for credibility purposes only and may view it as substantive evidence." *State v. Jones*, 15 S.W.3d 880, 882 (Tenn. Crim. App. 1999).

Obviously there is no choice over who witnesses facts. In some instances, rigid enforcement of the voucher rule has caused Constitutional error. See *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

RULE 608– CHARACTER EVIDENCE OF A WITNESS

SEE ALSO 404(A)(1)&(2)

Character is a pattern of any kind of behavior, whether it involves a issue of morality or not.

1. Is the behavior a "fixed disposition?"
    a. If so, then proceed to Rule 406, regarding habits.
    b. Habits are admissible.
2. Is the behavior a "tendency?"
    a. If so, it qualifies as character evidence.
    b. Character evidence is inadmissible to show a specific behavior.
3. Character evidence of a witness can be proved indirectly using:
    a. Reputation evidence
        i. must be testimony by a witness familiar with a given community and a particular person's reputation within that community
    b. Personal Opinion
        i. Must be testimony by witness having sufficient familiarity with defendant
    c. Specific acts that illustrate a character trait
        i. Only on cross, or if character trait is at issue.
4. Exceptions (4); character evidence is admissible when:
    a. Character is a material issue
        i. Defamation of character
        ii. Parental fitness in custody cases
        iii. Negligent hiring of an employee with bad character
        iv. Whether decedent was a good provider in a wrongful death case
        v. Habitual offender statutes
        vi. RICO requires proof of racketeering activity
        vii. Rebutting an entrapment defense by showing the defendant had propensity to commit crime
    b. Character evidence is offered to prove something other than the person's tendency to engage in that behavior.
    c. Criminal cases:
        i. Defendant can prove his own good character (general or specific) and the state may rebut the same.
        ii. Defendant can prove pertinent traits of the victim's bad character, and the state may rebut with the victim's good character.
        iii. Prosecution may prove peaceful character of the victim of a homicide
    d. Bad character of a witness with respect to truthfullness
5. If an exception applies, does the evidence fall within reputation or opinion evidence?
    a. Specific evidence of an act only applies when the character is directly at issue or during cross-examination.
6. If the character evidence is proved by reputation, has a foundation of the witness's knowledge been laid?
7. If the character evidence is proved by opinion, has it been shown the witness has known the person over a long enough period of time to know behavioral characteristics?
    a. *Note*: No minimum period of familiarity is required. A party need only demonstrate that the opinion is rationally based on the perception of the witness and would be helpful to the jury in determining the fact of credibility. *State v. Dutton*, 896 S.W.2d 114 (Tenn. 1995).
8. Does the evidence's probative value outweigh any prejudicial effect it may have?

RULE 608 PROCEDURE:

Where the state wishes to cross-examine about **conduct** probative solely of truthfulness or untruthfulness, the conditions which must be satisfied before allowing inquiry:

FIRST –

- *Upon request*, hold a hearing outside the jury's presence.
- Determine whether the alleged conduct has probative value.
- Determine whether a reasonable factual basis exists for the inquiry.

SECOND – TIME LIMIT

- The conduct must have occurred no more than 10 years before commencement of the action or prosecution.
- Evidence of a specific instance of conduct more than 10 years old can be admitted if:
    - the proponent must give the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and
    - the court must determine whether, in the interests of justice, that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

THIRD – WITNESS IS ACCUSED DEFENDANT

If the witness to be impeached is the accused in a criminal prosecution,

- the State must provide reasonable written notice of the impeaching conduct before trial,
- upon request, determine whether the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues.
    - You may rule prior to the trial but shall rule prior to the testimony of the accused.
    - If you determine such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of your determination.
    - The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 608. Evidence of character and conduct of witness.

(a) Opinion and Reputation Evidence of Character. —

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) the evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

(b) Specific Instances of Conduct. —

Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;

2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on the credibility outweighsits unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof if admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

Giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

(c) Juvenile Conduct. —

Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

RULE 609
IMPEACHMENT BY EVIDENCE OF CONVICTION OF A CRIME

PROCEDURAL PREREQUISITES:
It is permissible to admit evidence of a witness' conviction of a crime if the following are satisfied:

1. Witness must be asked about the conviction on cross-examination.
    a. If witness denies the conviction, the conviction may be established by public record.
    b. If witness denies being the person named in the public record of the conviction, identity may be established by other evidence.

2. APPLICABLE CONVICTIONS – Only some convictions are applicable:
    a. The crime must be punishable by death or imprisonment in excess of one year under the law with which the witness was convicted
    b. OR the crime must have involved dishonesty or false statement.

3. WITNESS IS ACCUSED DEFENDANT – Is the witness to be impeached the accused in a criminal prosecution?
    a. State must give the acused reasonable written notice of the impeaching conviction before trial.
    b. *Upon request,* court must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues.
    c. The accused need not testify to later challenge the propriety of the determination if court rules proof is admissible for impeachment purposes.

4. TIME LIMIT – The conviction in question must be less than ten years between the date of release from confinement and commencement of the action or prosecution (or if no confinement, ten years from conviction).
    a. If the conviction is more than ten years old, it may be admitted if the proponent gives the adverse party sufficient advance notice of intent to use the conviction to provide the adverse party with a fair opportunity to contest the use of such evidence and
    b. The court determines, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.
    c. PARDON – Evidence of conviction is not admissible if conviction has been the subject of only those pardons based on rehabilitation (if the convicted person has not been convicted of a subsequent felony) or based on a finding of innocence.

Make a FINDING OF FACT on the record of:
    d. relevance of the prior conviction to credibility and
    e. the amount of unfair prejudice. *State v. Dixon*, 983 S.W.2d 661, 674 (Tenn. 1999).

JUVENILE ADJUDICATIONS. — generally juvenile adjudications are not admissible.
    f. Evidence of a juvenile adjudication of a witness other than the accused in a criminal case may be admitted if conviction of the offense would be admissible to attack the credibility of an adult,
    g. and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

See also rule 403, 404(b).

Rule 609. Impeachment by evidence of conviction of crime.

(a) General Rule. —For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:

(1) The witness must be asked about the conviction on cross-examination. If the witness denies having been convicted, the conviction may be established by public record. If the witness denies being the person named in the public record, identity may be established by other evidence.

(2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.

(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial. The court shall rule prior to the testimony of the accused.If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

(b) Time Limit. —

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed between the date of release from confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release. Evidence of a conviction not qualifying under the preceding sentence is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

(c) Effect of Pardon. —

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon based on a finding of the rehabilitation of the person convicted and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon based on a finding of innocence.

(d) Juvenile Adjudications. —

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, allow evidence of a juvenile adjudication of a witness other than the accused in a criminal case if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

(e) Pendency of Appeal. —

The pendency of an appeal of a conviction does not render evidence of that conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.

Rule 611. Mode and order of interrogation and presentation.

(a) Control by Court. —

The court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel.

(b) Scope of Cross-Examination. —

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility, except as provided in paragraph (d) of this rule.

(c) Leading Questions. —

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop testimony. Leading questions should be permitted on cross-examination. When a party calls a witness determined by the court to be a hostile witness, interrogation may be by leading questions.

(d) Calling Adverse Party. —

When a party in a civil action calls an adverse party (or an officer, director, or managing agent of a public or private corporation or of a partnership, association, or individual proprietorship which is an adverse party), interrogation on direct examination may be by leading questions. The scope of cross-examination under this paragraph shall be limited to the subject matter of direct examination, and cross-examination may be by leading questions.

Part (d) is taken from T.R.C.P. 43.02.

RULE 612 – REFRESHING MEMORY

When a witness forgets something, refresh his or her memory.

1. Is the WITNESS SIMPLY FORGETTING something?
    a. Distinguish lack of memory from evasive responses or denials, which may lead to impeachment instead of refreshing recollection.
2. Has the attorney proven the witness has PERSONAL KNOWLEDGE?
3. Has the attorney laid a FOUNDATION?
    a. Only if a witness's memory requires refreshing should a writing be used by the witness.
    b. The direct examiner should lay a foundation for necessity, show the witness the writing, take back the writing, and ask the witness to testify from refreshed memory.
4. Refresh memory with the following:
    a. Ask a leading question.
    b. Show the witness a document.
    c. Use any other object or prop to refresh.
5. If the witness remembers, he/she can testify to the matter substantially from memory. NOT FROM READING THE DOCUMENT!
    a. When an opposing witness is having his memory refreshed, do not allow the witness to read from the document, as it is not the evidence. The memory is evidence.
    b. A good example of this type of evidence is in *State v. Matais*, 969 S.W.2d 418 (Tenn. Crim. App. 1997). **Only if the document is admitted as past recollection recorded, under TENN.R.EVID. 803(5), can it be made an exhibit.**
6. If a document is used, it is NOT ADMISSIBLE ON DIRECT, but must be turned over for cross.
7. If refreshment unsuccessful, can the document be admitted via a HEARSAY EXCEPTION?
    a. *See hearsay overview Rule 803 Exceptions-Recorded Recollection*

See also T.R.Crim.P. 26.2.

Rule 612. Writing used to refresh memory.

If a witness uses a writing while testifying to refresh memory for the purpose of testifying, an adverse party is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto.

Any portion withheld over objections shall be preserved and made available to the appellate court in the event of appeal.

If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires; in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

RULE 613. PRIOR STATEMENTS OF WITNESSES.

Rule 613 requires only an inconsistency in the testimony, not a contradiction. *State v. Jones*, 15 S.W.3d 880, 892 (Tenn. Crim. App. 1999).

a. PROCEDURAL PREREQUISITES –

A witness cannot be impeached with extrinsic evidence of a prior inconsistent statement unless

1. the witness is asked about that statement and
2. the witness denies or equivocates having made the statement. *State v. Martin*, 964 S.W.2d 564, 565 (Tenn. 1998).

b. EXAMINING WITNESS CONCERNING PRIOR STATEMENT. —

In examining a witness concerning a prior statement made by the witness, whether written or not,

1. the statement need not be shown nor its contents disclosed to the witness at that time,
2. but *on request* the same shall be shown or disclosed to opposing counsel.

c. EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF WITNESS.–

1. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until
   i. the witness is afforded an opportunity to explain or deny the same
   ii. and the opposite party is afforded an opportunity to interrogate the witness thereon,
   iii. or the interests of justice otherwise require.
2. This provision does not apply to admissions of a party-opponent as defined in Rule 803(1.2).
3. *State v. Martin*, 964 S.W.2d 564 (Tenn. 1998): "extrinsic evidence remains inadmissible until the witness either denies or equivocates as to having made the prior inconsistent statement."
4. Note that Rule 806 does not require a foundation before impeaching a hearsay declarant by inconsistent statement.

d. OPINIONS. — A prior statement in opinion form is admissible to impeach testimony.

FRESH COMPLAINT

The facts of the complaint, but not the details, are admissible on direct examination in the State's proof to rebut a possible negative inference of the victim's silence. *State v. Kendricks*, 891 S.W.2d 597 (Tenn.1994). After the victim's credibility has been attacked, but not before, details of the complaint are admissible as a prior consistent statement [but if this is done, always ask for an instruction that a prior consistent statement is not to be considered as substantive evidence]. *State v. Livingston*, 907 S.W.2d 392, 395 (Tenn. 1995). This rule applies to adult victims only.

The above rule of fresh complaint does not apply to child victims of abuse, whether sexual or non-sexual, because juries do not assume that a child will complain immediately, or that the child will fabricate. A child's statement may still be admissible under another hearsay exception, such as excited utterance, statement of condition, or statement for purposes of medical diagnosis and treatment. *See also State v. Speck*, 944 S.W.2d 598, 602 (Tenn. 1997). The line between an adult and a child for *Livingston* purposes is 13 years old. *State v. Schaller*, 975 S.W.2d 313, 321 (Tenn. Crim. App. 1997).

Rule 614. Calling and interrogation of witness by court.

(a) Calling by court. —

The court may not call witnesses except in extraordinary circumstances or except as provided for court-appointed experts in Rule 706, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. —

The court may interrogate witnesses.

(c) Objections. —

Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Ordinarily the trial judge may question but not call lay witnesses. Rule 706 details procedures for calling court-appointed expert witnesses in a bench trial.

In questioning a witness, the judge must avoid "commenting on the evidence" in violation of the Tennessee Constitution, Art. VI, Sec. 9.

RULE 615. EXCLUSION OF WITNESSES.

At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements.

THE COURT SHALL ORDER ALL PERSONS NOT TO DISCLOSE BY ANY MEANS TO EXCLUDED WITNESSES ANY LIVE TRIAL TESTIMONY OR EXHIBITS CREATED IN THE COURTROOM BY A WITNESS.

THIS RULE DOES NOT AUTHORIZE EXCLUSION OF

(1) a party who is a natural person, or
(2) a person designated by counsel for a party that is not a natural person, or
(3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

These persons may include the following:

A "party that is not a natural person" includes, among other entities, a corporation and the State of Tennessee. Consequently, the prosecuting attorney could designate a CRIME VICTIM, A RELATIVE OF A CRIME VICTIM, OR AN INVESTIGATING OFFICER. Like category (1), category (2) is a matter of right. Category (3), in contrast, is a matter of judicial discretion.

DEFENSE ATTORNEYS BEING POST-CONVICTED may be allowed to be present during the petitioner's proof if the State considers the attorney under attack to be essential to presentation of case. "Given the special circumstances which arise in a post-conviction proceeding in which a petitioner claims that his trial attorney was ineffective, it is entirely reasonable to conclude that the trial attorney's presence would be essential for the presentation of the state's case. *Palmer v. State*, 108 S.W.3d 887, 898 (Tenn. Crim. App. 2002).

A witness whose presense is "essential to the presentation of the party's cause" might be an expert witness a lawyer needs to help the lawyer understand opposing testimony. EXPERT WITNESSES GENERALLY SHOULD BE CONSIDERED "ESSENTIAL PERSONS" and therefore should not be sequestered. In *State v. Bane*, 57 S.W.3d 411, 423 (Tenn. 2001), the Court stated: "[W]e believe that the dangers Rule 615 is intended to prevent generally do not arise with regard to expert witnesses in any proceeding." Also, an expert witness who is to learn facts only through hearing testimony in court could be allowed to sit in the courtroom under this subsection. See Rule 703.

THIS RULE DOES NOT FORBID TESTIMONY OF A WITNESS CALLED AT THE REBUTTAL STAGE of a hearing if, in the court's discretion,

(1) counsel is genuinely surprised and
(2) counsel demonstrates a need for rebuttal testimony from an unsequestered witness.

Rule 616. Impeachment by bias or prejudice.

A party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness.

Bias is an important ground for impeachment. See *Creeping Bear v. State,* 113 Tenn. 322, 87 S.W. 653 (1905).

Rule 617. Impeachment by impaired capacity.

A party may offer evidence that a witness suffered from impaired capacity at the time of an occurrence or testimony.

Only impaired capacity at "occurrence or testimony" will impeach.

Rule 618. Impeachment of expert by learned treatises.

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice, may be used to impeach the expert witness's credibility but may not be received as substantive evidence.

Sale v. Eichberg, 105 Tenn. 333, 59 S.W. 1020 (1900); *McCay v. Mitchell,* 62 Tenn. App. 424, 463 S.W.2d 710 (1970).

RULE 701 – OPINION RULE

Lay witness opinions are those rationally based on the perceptions of the witness, which are helpful to the trier of fact.

OPINIONS ARE ADMISSIBLE IF ALL FOUR OF THE FOLLOWING CRITERA ARE MET:

1. Witness has personal knowledge of the event and observed the thing that is the subject of the opinion.
2. Witness has the necessary experience to enable him or her to form reliable opinions about the subject
    a. Common experience can be presumed, but specialized experience must be proved.
    b. Be sure that sufficient foundation for experience is laid.
3. Opinion must be rationally based on the perception of the witness.
4. Opinion must be helpful to clear understanding of the witness's testimony or the determination of a fact in issue.
    a. Questions asking witness to speculate certain facts will likely be inadmissible.

Objections to opinion testimony must be specifically stated, asserting the absence of one or more requisite factor above.

Rules of Thumb:

ADMISSIBLE:

1. Opinions of physical condition
2. Opinions of the value of one's own property
3. opinions of speed, distance, time, and other measurement
4. Opinions of the value of one's own property

NOT ADMISSIBLE:

1. Opinions of mental condition
2. Opinions about the future (Speculation)
3. Opinions **should not** usurp court function.
    a. Witness cannot ususally give opinion as to **legal conclusions** to be made by the court.

A lay witness may give opinion testimony in situations where that witness "cannot readily and with equal accuracy and adequacy" testify without an opinion." *State v. Dooley*, 29 S.W.3d 542, 549 (Tenn. Crim. App. 2000).

For example, judge should not have allowed a witness to testify a defendant was "weird" and suspected he shot the victim, but it would be permissible for him to describe weird conduct. *State v. Schafer*, 973 S.W.2d 269, 275 (Tenn. Crim. App. 1997).

Rule 701. Opinion testimony by lay witnesses.

(a) Generally.— If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are

(1) rationally based on the perception of the witness and

(2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

(b) Value. A witness may testify to the value of the witness's own property or services.

RULE 701 CASE LAW:

Rescue squad member who pulled defendant from car was allowed to give opinion as to his being the driver of car, as he had pulled hundreds of persons from cars. He would have qualified as an expert under 702 because of his extensive experience, skill and experience, but also his testimony was based on his perception and was helpful to gain a clear understanding of his testimony under 701(a). *State v. Lee*, 969 S.W.2d 414, 416 (Tenn. Crim. App. 1997).

RULES 702-706 – EXPERT WITNESSES

TEST FOR ADMISSIBILITY OF EXPERT (SCIENTIFIC OR TECHNICAL) TESTIMONY:
McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 264 (Tenn. 1997)

1. Evidence must be RELEVANT to a fact at issue. Tenn. R. Evid. 401, 402.
2. The expert must be QUALIFIED by specialized knowledge, skill, experience, training, or education in the field of expertise, and
   a. the testimony in question must **substantially assist** the trier of fact to understand the evidence or determine a fact in issue. Tenn. R. Evid. 702.
   b. Watch out for experts testifying outside the scope of their expertise.
3. When the expert witness offers an opinion or states an inference, THE UNDERLYING FACTS OR DATA UPON WHICH THE EXPERT RELIED MUST BE TRUSTWORTHY. Tenn. R. Evid. 703.
   a. The reliability of scientific evidence is determined by considering the following nonexclusive list of factors:
      i. whether the scientific evidence has been tested and the methodology with which it has been tested;
      ii. whether the evidence has been subjected to peer review or publication;
      iii. whether a potential rate of error is known;
      iv. whether the evidence is generally accepted in the scientific community; and
      v. whether the expert's research in the field has been conducted independent of litigation." *State v. Coley*, 32 S.W.3d 831, 835 (Tenn. 2000).
   b. Experts do not need personal knowledge.
   c. Opinion need not be based on admissible evidence. However, facts relied upon
      i. must be "reasonably relied upon by experts in the particular field" and
      ii. must be trustworthy.
   d. Non-scientific fields can be reliable as well, however:
      i. If science has shown the field to be unreliable, then no options allowed.
      ii. If the field is one in which expertise is accumulated from experience and science is not involved, the opinion must be reliable as that term is defined within the field.
4. Questions to determine reliability
   a. Is expert proposing to testify about matters growing naturally and directly out of research conducted independent of the litigation?
   b. Has the expert unjustifiably extrapolated from an accepted promise to an unfounded conclusion?
   c. Has the expert adequately accounted for obvious alternative explanations?
5. ULTIMATE ISSUE OF FACT
   a. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704. However, opinion testimony is not admissible on an ultimate issue if the jury could readily draw its own conclusions on the matter without the aid of the witness' opinion.
   b. Expert opinion testimony must "substantially assist the trier of fact to understand the evidence or determine a fact in issue . . ." The testimony of an ultimate issue does not substantially assist the jury in any way. Additionally, to state opinions relate to a "medical" as opposed to a "legal" definition of child abuse, are irrelevant to the case and potentially confusing to the jury." *State v. Turner*, 30 S.W.3d at 360.

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

RULE 702 LAW:

Experts cannot testify to whether or not the defendant was insane at the time of the crime. T.C.A. 39-11-501(c).

General and unparticularized expert testimony concerning eyewitness identification testimony, not specific to the witness in question, is inadmissible under 702. *State v. Coley*, 32 S.W.3d 831 (Tenn. 2000).

It is permissible for an expert to testify about DNA samples prepared by his underlings under 703, as the right of confrontation does not extend to these witnesses. Under evidentiary rule 703, "an expert witness may base an opinion upon clearly inadmissible hearsay, if the type of hearsay is one that would be reasonably relied upon by experts in that situation." *State v. Kennedy*, 7 S.W.3d 58, 66 (Tenn. Crim. App. 1999).

CHILD ABUSE EXPERTS

Having social worker testify to fact that abused children often forget dates of offenses is error, even if the witness is not qualified as an expert. *State v. Bolin*, 922 S.W.2d 870, 874 (Tenn. 1996). But a "child abuse expert" was approved to testify if she testifies only as a doctor and only testifies as to her actual observations. *State v. Lacy*, 983 S.W.2d 694 (Tenn. Crim. App. 1997)Lacy-983 SW2d 694-95. (Testifying to bruises and burns "that appeared to have been abusive in nature because of the pattern marks of the injuries" is permissible, but expert testimony describing the behavior of an allegedly sexually abused child is not reliable and should not be used.) Opinion if only based on observation of injuries is allowed, but opinion based on behavior is not. *State v. Ashburn*, 914 S.W.2d 108, 108 (Tenn. Crim. App. 1995).

No expert can give testimony about symptoms of post-traumatic stress syndrome exhibited by victims of child abuse. It does not "substantially assist" a jury because it attempts to evaluate the credibility of witnesses, a task which a jury is capable of performing without expert testimony, and it is not reliable proof as to the question of whether a defendant committed the specific crime of which he or she is accused. *State v. Ballad*, 855 S.W.2d 557, 562 (Tenn. 1993).

Rule 703. Bases of opinion testimony by experts. –

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

New Jersey Zinc Co. v. Cole, 532 S.W.2d 246 (Tenn. 1975), allows a treating doctor to base an opinion on reports of other professionals.

If the bases of expert testimony are not independently admissible, the trial judge should either prohibit the jury from hearing the foundation testimony or should deliver a cautionary instruction. Unfairly prejudicial facts or data should be dealt with under Rule 403. With respect to cross-examination, see Rule 705.

Rule 704. Opinion on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The Supreme Court has already approved this language. *City of Columbia v. C.F.W. Construction Co.,* 557 S.W.2d 734 (Tenn. 1977). But *Blackburn v. Murphy,* 737 S.W.2d 529 (Tenn. 1987), places limitations on lay witnesses testifying to some ultimate issues, such as whether an accident was unavoidable.

One ultimate issue is outside the scope of expert testimony. T.C.A. § 39-11-501 provides that "no expert witness may testify as to whether the defendant was or was not insane."

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give reasons without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Rule 706. Court-appointed experts.

(a) Appointment. —The court may not appoint expert witnesses of its own selection on issues to be tried by a jury except as provided otherwise by law. As to bench-tried issues, the court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court ordinarily should appoint expert witnesses agreed upon by the parties, but in appropriate cases, for reasons stated on the record, the court may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness's duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, the witness's deposition may be taken by any party, and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. —Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and condemnation proceedings. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. —Where a court-appointed expert is permitted otherwise by law to testify on an issue to be tried by a jury, no one may disclose to the jury the fact that the court appointed the expert witness.

(d) Parties' Experts of Own Selection. —Nothing in this rule limits the parties in calling expert witnesses of their own selection.

HEARSAY OVERVIEW

Hearsay is a statement, other than one made by the declarant while testifying at a trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c).

A statement is

1. an oral or written assertion or
2. nonverbal conduct of a person if it is intended by the person as an assertion.

An utterance must, in order to be an assertion, be offered with the intent to state that some factual proposition is true. *State v. Land*, 34 S.W.3d 516, 525 (Tenn.Crim.App.2000).

Hearsay is generally not admissible. Rule 802.

Hearsay objections are often made:

1. When a witness testifies he or she heard someone say something.
2. When any kind of written document is offered into evidence.

When hearsay evidence should not be admitted:

1. DEFINITIONAL: NON-HEARSAY
   a. The evidence does not fit the definition of hearsay under Rule 801 (a) – (c).
      i. The testimony is not the *content* of the statement, rather a description of the statement.
      ii. **Not offered for its truth**
         1. Notice
         2. Listener's state of mind
         3. Speaker's state of mind
         4. Statement motivates conduct
         5. Statement motivates another statement
      iii. **Not an assertion of fact**
         1. Street sgns
         2. Nonassertive conduct
         3. Independent legal significance
         4. Threats or promises
         5. Questions
         6. Commands

2. RULE 803 EXCEPTIONS

a. **Evidence may fall into one of the exceptions listed in Rules 803:**

i. PRIOR STATEMENT OF IDENTIFICATION BY WITNESS. RULE 803 (1.1).

1. Declarant must also be a witness.
2. Witnesses other than the declarant may testify about the identifying declaration.

ii. ADMISSION BY PARTY OPONENT. RULE 803 (1.2).

1. Own statement
2. Adopted statement
3. Authorized statement
4. Statement of agent in scope of agency
5. Statement of co-conspirator in the course of a conspiracy
6. Privity of estate

iii. EXCITED UTTERANCES. RULE 803 (2).

1. There must be a startling event or condition. *State v. Carpenter*, 773 S.W.2d 1 (Tenn. Crim. App. 1989).
2. The statement must "relate to" the startling event or condition.
3. The statement must be made while the declarant is under the stress or excitement from the event or condition. In *State v. Smith*, 857 S.W.2d 1, 9 (Tenn.)
4. Consider at conditions surrounding the utterance and their temporal proximity to the statement.

iv. STATEMENTS OF THEN-EXISTING EMOTIONAL, MENTAL, OR PHYSICAL CONDITIONS. RULE 803 (3).

1. Requires spontaneity and personal knowledge.
2. Statements of the victim expressing fear of the defendant are not admissible to show the defendant's guilt, only the victim's actions. *State v. Leming*, 3 S.W.3d 7, 17-18 (Tenn. Crim. App. 1998).
3. Includes declarations of present ("then existing") physical condition. The declaration need not be made to a doctor; any witness who overheard the hearsay statement could repeat it in court under this exception.

HEARSAY OVERVIEW: EXCEPTIONS, CONTINUED

v. STATEMENTS FOR MEDICAL DIAGNOSIS AND TREATMENT. RULE 803 (4).

1. Requires spontaneity and personal knowledge.
2. When a statement is made to someone who will not provide treatment, it is still admissible under Rule 803(4), "provided that such statements are for the purpose of diagnosis and treatment of a medical or physical problem." *State v. Williams*, 920 S.W.2d 247, 256 (Tenn. Crim. App. 1995) These statements are nontestimonial. *State v. Cannon*, 264 S.W.3d 287, 303 (Tenn. 2008).
3. **Courts must hold an evidentiary hearing outside the presence of the jury to determine statements of a child for the purpose of medical diagnosis and treatment.** *State v. McLeod*, 937 S.W.2d 867, 869 (Tenn. 1996).
    a. Statements of a child may not be admissible if patient is a small child and can't understand the importance of a medical history. *State v. Gordon*, 952 S.W.2d 817, 821-22 (Tenn. 1997).
    b. Courts should consider the **totality of the circumstances** to determine whether the statement was made for the purposes of diagnosis and treatment. A statement improperly influenced by another, one made in response to suggestive or leading questions, or inspired by a custody battle or family feud deserves especially careful scrutiny. *State v. Stinnett*, 958 S.W.2d 329, 332 (Tenn. 1997).

vi. RECORDED RECOLLECTION. RULE 803 (5).

1. Must be received as evidence only by adverse party.
2. The proponent must show 1) a written record 2) that the witness once had knowledge 3) an insufficient recollection at present 4) the statement was adopted by the witness 5) the record was made while memory was fresh and 6) it accurately reflected his knowledge. *State v. Matais*, 969 S.W.2d 418, 422 (Tenn. Crim. App. 1997).

vii. RECORD OF REGULARLY CONDUCTED ACTIVITY (BUSINESS RECORDS). RULE 803 (6).

1. the records "custodian or other qualified witness" must testify. "To be considered qualified, a witness must be personally familiar with the business's record-keeping systems and must be able to explain the record-keeping procedures." *Alexander v. Inman*, 903 S.W.2d 686, 700 (Tenn. App. 1995).
2. Record must be created at or near the time of the event, act or condition.
3. A person with personal knowledge of the recorded event must have transmitted the information
4. this person must have possessed a business duty to record the information
5. the record must have been made and kept in the regular course of business (*State v. Carroll*, 36 S.W.3d 854, 869 (Tenn. Crim. App. 1999) and not simply for litigation.
6. Foundation may be laid by live witnesses or through affidavit.
7. Computer records are not hearsay. *State v. Hall*, 976 S.W.2d 121, 147 (Tenn. 1998). Witness must testify that computer system is accurate.

HEARSAY OVERVIEW: EXCEPTIONS, CONTINUED

viii. PUBLIC RECORDS AND REPORTS. RULE 803 (8).
1. Statement must be within the scope of the responsibility of the government agency with official duty to report accurately. T.C.A. §§ 24-6-105 to 107.
2. Person furnishing the description must be a public official with personal knowledge.
3. Record must be "certified."
4. Limitations
    a. May not be used against a criminal defendant.
    b. May not be obviously untrustworthy.
    c. May not be police reports. *State v. Thompson*, 36 S.W.3d 102, 109 (Tenn. Crim. App., 2000). T.C.A. § 55-10-114(b) and T.R.Evid. 803(8).
    d. History in hospital records or autopsy reports that are 2nd and 3rd person hearsay are not admissible. *State v. Robinson*, 971 S.W.2d 30, 39 (Tenn. Crim. App. 1997).

ix. RECORDS OF VITAL STATISTICS. RULE 803 (9).

x. MARRIAGE, BAPTISMAL, AND SIMILAR CERTIFICATES. RULE 803 (12)

xi. FAMILY RECORDS. RULE 803 (13)

xii. RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY. RULE 803 (14).
1. Only admits the following facts from the instrumment:
    a. the contents of a certified copy are identical to the filed original,
    b. the original was executed, and
    c. the original was delivered (if that step is necessary).

xiii. STATEMENTS IN ACIENT DOCUMENTS AFFECTING AN INTEREST IN PROPERTY. RULE 803 (16).
1. If a document affects a property interest, and if it is thirty years old and authentic, the trier of fact may take as true statements within the document.

xiv. MARKET REPORTS AND COMMERCIAL PUBLICATIONS. RULE 803 (17).
1. Must be generally relied upon by the public.
2. Hearsay is not admissible just because it was written in a book. Learned treatises are not admissible for their truth.

xv. REPUTATION CONCERNING PERSONAL OR FAMILY HISTORY. RULE 803 (19).
1. There is no requirement this reputation existed prior to the controversy.

xvi. REPUTATION CONCERNING ANCIENT BOUNDARIES. RULE 803 (20).
1. Must be prior to controversy and existing 30 years.

xvii. REPUTATION AS TO CHARACTER. RULE 803 (21).
1. See also relevancy rules 404, 405, 408.

xviii. JUDGMENT IN PREVIOUS CONVICTION. RULE 803 (22).

xix. JUDGMENT AS TO PERSONAL OR FAMILY HISTORY OR BOUNDARIES. RULE 803 (23).

HEARSAY OVERVIEW: EXCEPTIONS, CONTINUED

xx. CHILDREN'S STATEMENTS. RULE 803 (25).

1. If alleged to be the victim of physical, sexual, or psychological abuse, the statement *must* be about the abuse.
2. Abuse must be a material issue in the case.
3. Only admissible in civil actions
4. Only admissible if circumstances surrounding the statement indicate trustworthiness; courts should balance under Rule 403 as well.
5. The issues about which statements are admissible are limited to:
    a. dependency and neglect
    b. Severe child abuse
    c. Termination of parental rights
    d. Statements about abuse or neglect in trials relating to custody, visitation, or parenting
6. Unless unavailable, children 13 and older must testify in court and their out-of-court statements are inadmissible.

RULE 804 (A) – DECLARANT UNAVAILABLE

DEFINITION OF UNAVAILABILITY. —

"Unavailability of a witness"includes situations in which the declarant:

1. Is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the declarant's statement; or
2. Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
3. Demonstrates a lack of memory of the subject matter of the declarant's statement; or
    a. Memory lapse, if demonstrated to the trial judge under Rule 104(a), is enough to get the contents of recorded recollection read to the jury, and the same condition should be enough to get cross-examining sworn former testimony before the jury.
    b. This also applies to declarations against interest and individual declarations of pedigree.
4. Is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity; or
5. Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process; or
6. For depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing.
    a. conforms with Tenn.R.Civ.P. 32 and Tenn.R.Evid. 804.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

THE HENDERSON RULE: When a declarant is unavailable,

1. the evidence must not crucial or devastating,
2. the State must have made a good-faith effort to obtain the declarant, and
3. the evidence must bear its own indicia of reliability.

State v. Henderson, 554 S.W.2d 117, 119-20 (Tenn. 1977), *cited in State v. Fillpot*, 882 S.W.2d 394, 406 n. 23 (Tenn. Crim. App. 1994).

RULE 804 (B) – EXCEPTIONS ADMITTED WHEN DECLARANT IS UNAVAILABLE

These HEARSAY EXCEPTIONS are only admissible with proof of a declarant's unavailability: *State v. Hall*, 8 S.W.3d 593, 603 (Tenn. 1999):

a. Former Testimony. Rule 804(b)(1).
   1. Allowed even if one of the present parties was not at the earlier hearing, but only if the former testimony is offered against the party common to both hearings.
   2. T.R.C.P. 32.01 contains the same principle of admissibility for depositions.
   3. Specifically requires "both an opportunity and a similar motive."

b. Statements made under belief of impending death; dying declarations. Rule 804(b)(2).
   1. The trial must be for homicide of the declarant, and the declaration is limited to circumstances surrounding the declarant's death. *State v. Lewis*, 235 S.W.3d 136, 147-50 (Tenn. 2007). *Crawford* doesn't apply.

c. Statements against interest. Rule 804(b)(3).
   1. This rule admits declarations against penal interest as well as those against pecuniary or proprietary interest. *Breeden v. Independent Fire Ins. Co.*, 530 S.W.2d 769 (Tenn. 1975); *Smith v. State*, 587 S.W.2d 659 (Tenn. 1979).
   2. Declarations against penal interest offered by the accused in a criminal prosecution do not have to be corroborated.

d. Statements of personal or family history. Rule 804(b)(4).
   1. When pedigree evidence is an individual's extrajudicial declaration rather than the community consensus, the declarant must be unavailable and must have spoken or written "before the controversy arose." The rule reflects Tennessee common law.
   2. There is no residual exception even where declarants are unavailable. Occasionally, however, constitutional considerations require a tribunal permit the accused in a criminal case to introduce trustworthy hearsay not falling within a traditional exception. See *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). See also F.R.Evid. 804(b)(5).

e. Forfeiture by wrongdoing. Rule 804(b)(6).
   1. *State v. Ivy*, 188 S.W.3d 132, 147 (Tenn. 2006), held that the following principles apply to the application of the forfeiture by wrongdoing exception:
      i. the rule does not limit the subject matter of the statements;
      ii. the rule is not limited to statements made when a formal charge or judicial proceeding is pending against the defendant;
      iii. the trial court must conduct a jury-out hearing to determine whether statements are admissible;
      iv. the trial court must find that a preponderance of the evidence establishes "that the defendant was involved in or responsible for procuring the unavailability of the declarant"; and
      v. the trial court must find that a preponderance of the evidence establishes "that a defendant's actions were intended, at least in part, to procure the absence of the declarant."
   2. 804(b)(6) allows a party offer any extrajudicial statement of declarant whose unavailability was procured by the opponent.

Rule 804. Hearsay exceptions; declarant unavailable.

a. Definition of Unavailability. —"Unavailability of a witness"includes situations in which the declarant

1. Is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the declarant's statement; or
2. Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
3. Demonstrates a lack of memory of the subject matter of the declarant's statement; or
4. Is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity; or
5. Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process; or
6. For depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing. .

Rule 804. (b). Hearsay Exceptions.

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

Rule 804 (b) (1). Former Testimony.

Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.

Rule 804 (b) (2) Statement Under Belief of Impending Death.

In a prosecution for homicide, a statement made by the victim while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.

Rule 804 (b) (3) Statement Against Interest.

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a

reasonable person in the declarant's position would not have made the statement unless believing it to be true.

"The defendant's argument that the letter purportedly written by Michael Andre Johnson was admissible as a declaration against penal interest is without merit. The defendant made no showing that Johnson was "unavailable" to testify, as is required by Rule 804 before such a statement can be admitted as an exception to the hearsay rule. No explanation was given as to why Johnson was not present at the trial. There was no showing that any attempt had been made to locate Johnson or that process had been issued to compel his attendance. Further, Johnson did not appear in court and assert his Fifth Amendment privilege against self-incrimination. Thus, the letter allegedly written by him was hearsay which was not admissible pursuant to an exception to the hearsay rule." *State v. Cureton*, 38 S.W.3d 64, 79 (Ct. Crim. App. 2000).

Rule 804 (b) (4) Statement of Personal and Family History.

A statement made before the controversy arose (A) concerning declarant's own birth, adoption, marriage, divorce, or legitimacy; relationship by blood, adoption, or marriage; ancestry; or other similar fact of personal or family history; even though the declarant had no means of acquiring personal knowledge of the matter asserted; or (B) concerning the foregoing matters, and death also, of another person if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Rule 804 (b) (6) Forfeiture by Wrongdoing.

A statement offered against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness. [As amended by order entered December 20, 1994, effective July 1, 1994; by order effective July 1, 1997; and by order effective July 1, 1998; as added by order entered January 26, 1999, effective July 1, 1999.]

Rule 805. Hearsay within hearsay.

Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules or otherwise by law.

The rule provides that out-of-court statement containing several levels of hearsay and multiple declarants is nonetheless admissible if a hearsay exception applies to each declarant's statement. Also, while not covered here, a particular declarant's statement in the chain may be admissible as nonhearsay.

Often hospital records contain a nurse's notation that a patient said something to the nurse. In that instance a court must deal with two hearsay declarations. The nurse's notation is admissible as a business record to the extent of showing what words were spoken. The patient's statement may then be admissible under the admissions exception to the declarations of physical condition exception.

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

The rule makes clear that hearsay declarants are subject to impeachment to the same extent as trial witnesses. if the method of impeachment is by prior inconsistent statement, such statement is not excluded for failure to provide the declarant an opportunity to explain. See Rule 613(b).

TESTIMONIAL VS. NON-TESTIMONIAL

Crawford Rule (Declarant Unavailable)

1. Is statement hearsay
2. Where testimonial statements are in issue only confrontation will satisfy constitutional concerns
3. If confrontation at trial is not possible the only way a testimonial statement can be admitted for truth of matter is:
   - The witness is unavailable to testify, and
   - The accused had prior opportunity to cross-examine witness

TESTIMONIAL: any statement given at a formal proceeding; statements made during police interrogations of suspect or arrestee; guilty plea allocutions; forensic lab reports; affidavits; witness statements to law enforcement officials, preliminary hearings, grand jury, formal trial – any statement that a reasonable declarant would believe may be later used in a criminal trial. Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency (911 calls).

Crawford Test

1. Is statement hearsay?
2. Is hearsay testimonial? If answer is yes, only admissible if:
   i. declarant is unavailable and:
   ii. declarant was subject to prior opportunity for cross-examination
   iii.

Hearsay mentioned as testimonial in Crawford

Plea allocutions, grand jury testimony, prior trial testimony of declarant that was not cross-examined by defendant

Non-testimonial hearsay (Crawford)

In furtherance of a conspiracy, business records plus split re forensic and autopsy reports

Is it testimonial?

- Involvement of government officers in production of testimonial evidence
- Statements that were made under circumstances which would lead an objective witness to believe the statement would be made available for use at a later trial
- Interrogation is being used in its colloquial sense (recorded statement, knowingly given in response to structured police questioning)
- Statements taken by police officers in the course are also testimonial under even a narrow standard
- No emergency in progress- perp fled, not likely to return; no physical violence; seems calm; no medical attention needed; time passed since incident; officers at scene

- Probably:

- All forensic lab reports – whether revealing drugs, fingerprints, firearms evidence, blood, DNA, etc. (The Court did not address such documents, but the very purpose for which most such reports are created is "testimonial")
- Affidavits
- Most (all?) witness statements made to police officers or other law enforcement officials in response to police questioning (although most would not survive a hearsay objection anyway)

- Perhaps:
  - Statements made by people in response to questions by public officials who are *not* law enforcement officers. (Example- when a Child Services worker interviews a mother during an investigation to determine whether the mother is capable of having custody. Ditto when the worker interviews the mother's neighbors).
  - Dying declarations made to police officers. But perhaps dying declarations are "sui generic" and thus are exempt from the Confrontation Clause altogether even though they are "testimonial."
  - Dying declarations made to non-police officers (may be classified as non-testimonial even if dying declarations to police officers are categorized as testimonial)
  - Excited utterances MADE TO POLICE OFFICERS although that's not altogether clear—see Scalia's reference to *White v. Illinois* in footnote 8. But excited utterances made to someone other than a police officer or public official presumably would not be considered "testimonial."
  - Any document falling within 803(9), 803(11)-(15), 803(22). The other exceptions listed here are private documents (church records, family records listing births, deaths, marriages, documents effecting an interest in property, etc.) and are rarely made with criminal litigation in mind. On the other hand, such records are made and kept with the purpose of providing "evidence" (albeit in a non-courtroom sense) of the events or relationships recorded therein.

NON-TESTIMONIAL: co-conspirator statements; any statement made "casually;" records not created for testimonial use; statements against interest *not* made to public officials

- Co-conspirator statements (in furtherance of the conspiracy)
- Any statement made "casually" rather than for purposes of "going on record" with a government agency or agent. This should include most statements that fit within the following exceptions (so long as not made to a police officer or other public official): 803(1)-(4).
- 803(6)-(8); 803(10), so long as the primary reason the record was not used as "evidence." But if the record was created with the expectation that it would be used as evidence, it should be classified as testimonial.
- When are out of court testimonial statements admissible?

- Accused had chance to cross-examine at time statement was made and witness is unavailable
- Statement not hearsay:
  - Not offered for the truth
  - Statement of co-conspirator made in furtherance of conspiracy
- Dying declaration
- Business records
- Perp at scene, not in custody, physical violence or threats, continuing danger close in time, no help at scene

Even if the statement satisfies a hearsay exception, testimonial statements are not admissible *unless:*

1. the party calls the declarant as a witness; or
2. establishes declarant unavailability and shows that the other party had an opportunity to cross-examine the declarant's testimonial statement; or
3. demonstrates that the statement is admissible for a non-hearsay purpose; or
4. demonstrates that the defendant has forfeited his confrontation clause objection by wrongdoing that prevented the prosecutor from eliciting the desired testimony from the declarant at trial

Crawford

Rule 803. Hearsay exceptions. —The following are not excluded by the hearsay rule:

Testimonial v. Non T

The latest significant case on *Crawford* is *State v. Cannon*, 254 S.W.3d 287, 302-03 (Tenn. 2008), which sets out the history as follows: Check for further updates

Prior to the release of our opinion in *Maclin*, the United States Supreme Court had granted certiorari in *Washington v. Davis*, 154 Wn.2d 291, 111 P.3d 844 (Wash. 2005) (en banc), *cert. granted*, 546 U.S. 975, 126 S. Ct. 547, 163 L. Ed. 2d 458 (2005); and *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 546 U.S. 976, 126 S. Ct. 552, 163 L. Ed. 2d 459 (2005), to expand on the testimonial/nontestimonial dichotomy. In this consolidated appeal, the United States Supreme Court abrogated our decision in *Maclin* by holding that:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224 (2006). Both *Davis* and *Hammon* concerned statements made by victims of domestic assault to the police or to persons viewed as agents of the police, e.g., 911 emergency operators. At issue in *Davis* were statements made by the victim to a 911 emergency operator, reporting that her former boyfriend was assaulting her. *Id.* at 2271. The 911 emergency operator asked a series of questions aimed at determining the nature of the complaint, whether the threat was ongoing, the identity of the assailant, and the location of the assailant. *Id.* The victim did not appear at trial, and over defense objection, the trial court allowed the prosecution to play an audio recording of the victim's 911 emergency call. *Id.* A jury convicted *Davis. Id.*

The primary purpose test adopted in *Davis* requires courts to examine the context in which a statement is given. The *Davis* Court recognized that the nature of police interrogations may change as they are conducted. The Court noted that the victim in *Davis* "was speaking about events as they were actually happening rather than 'describ[ing] past events[.]'" *Id.* at 2276 (emphasis in original). The Court held that the *Davis* victim's "interrogation objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency." *Id.* at 2277. Since the statements were made to obtain police assistance in an ongoing emergency, the Court held the statements were nontestimonial. *Id.*

After *Davis*, we again addressed the testimonial/nontestimonial dichotomy in *Lewis*. In *Lewis*, we recognized the Supreme Court's further departure from *Roberts* and acknowledged that the primary purpose test enunciated in *Davis* governs confrontation clause analysis. *Lewis*, 235 S.W.3d at 145. **To summarize then, under both the United States and the Tennessee Constitutions, the appropriate analysis for determining whether an out-of-court statement may be admitted into evidence without violating an accused's right of confrontation is as follows. A court must first determine whether the statement is testimonial or nontestimonial. Statements are testimonial if the primary purpose of the statement is to establish or to prove past events potentially relevant to later criminal prosecutions. A testimonial statement is inadmissible unless the State can establish that: "'(1) the declarant is unavailable and (2) the accused had a prior opportunity to cross-examine the declarant.'"** *Id.* at 143 (quoting *Maclin*, 183 S.W.3d at 345). If the statement is nontestimonial, the Confrontation Clause does not apply, and the statement must be analyzed under the "traditional limitations upon hearsay evidence." *Davis*, 126 S. Ct. at 2273; *see also Lewis*, 235 S.W.3d at 145 (holding that "[i]t is our view, therefore, that a *Roberts* analysis for nontestimonial evidence is not necessary to satisfy the state constitution's 'face-to-face' requirement and *Crawford* and its progeny establish appropriate guidelines").

RULE 901: AUTHENTICATION OR IDENTIFICATION

Rule 901(a):

Before a document or an item is admissible,
the party must identify or authenticate the item by presenting evidence
to support the matter in question is what the party claims.

Examples presented within Rule 901(b):

1. TESTIMONY OF A WITNESS WITH KNOWLEDGE
2. NON-EXPERT OPINION ON HANDWRITING
   - This opinion must be based on familiarity with the handwriting that was not acquired for the purpose of litigation.
3. COMPARISON BY THE TRIER OF FACT OR EXPERT WITNESS
   - The matter would be compared with other matters which have been authenticated.
4. DISTINCTIVE CHARACTERISTICS AND THE LIKE.
   - Appearance, contents, substance, internal patterns, or other characteristics taken in conjunction with circumstances.
   - Without drawing the boundaries of practical possibilities, the rule allows proof to the court of a myriad of distinctive characteristics that may convince the judge that a questioned document is authentic enough to let the jury consider it.
5. VOICE IDENTIFICATION
   - whether heard firsthand or through mechanical or electronic transmission or recording
   - by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
6. TELEPHONE CONVERSATIONS
   - by evidence that a call was made to the number assigned at the time to a particular person or business by a telephone company if
     - A Person - circumstances including self-identification show the person answering to be the one called or
     - A Business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
7. PUBLIC RECORDS OR REPORTS
   - A writing authorized by law to be recorded or filed and in fact recorded or filed in a public office (a purported public record, report, statement, or data compilation in any form) is from the public office where items of this nature are kept.
8. ANCIENT DOCUMENTS OR DATA COMPILATION
9. PROCESS OR SYSTEM
   - Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
   - All that the lawyer need do is introduce evidence satisfying the court that the computer system produces accurate information.
10. METHODS PROVIDED BY STATUTE OR RULE

Rule 901. Requirement of authentication or identification.

(a) General Provision. —The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.

(b) Illustrations. —By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. —Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. —Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Trier of Fact or Expert Witness. —Comparison by trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. —Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice Identification. —Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. —Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone company to a particular person or business if (A), in the case of a person, circumstances including self-identification show the person answering to be the one called or (B), in the case of the business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. —Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office (or a purported public record, report, statement, or data compilation in any form) is from the public office where items of this nature are kept.

(8) Ancient Documents or Data Compilation. —Evidence that a document or data compilation in any form (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where, if authentic, it would likely be, and (C) has been in existence thirty years or more at the time it is offered.

(9) Process or System. —Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods Provided by Statute or Rule. —Any method of authentication or identification provided by Act of Congress or the Tennessee Legislature or by other rules prescribed by the Tennessee Supreme Court.

RULE 902: SELF-AUTHENTICATION

A party intending to offer a self-authenticating record must provide ***written notice*** *to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.*

A party is not required to show extrinsic evidence of authenticity before admitting the following evidence:

1. DOMESTIC PUBLIC DOCUMENTS UNDER SEAL.
   - Bearing a seal of any state, district, commonwealth, territory, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands or of a political subdivision, department, office, or agency thereof.
2. DOMESTIC PUBLIC DOCUMENTS NOT UNDER SEAL.
   - Another public officer certifies under seal that the signer has the official capacity and that the signature is genuine.
3. FOREIGN PUBLIC DOCUMENTS.
   - May be certified by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States.
   - If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, they may be presumed authentic.
4. CERTIFIED COPIES OF PUBLIC RECORDS.
   - A copy (including data compilations in any form), certified as correct by the custodian by certificate.
5. OFFICIAL PUBLICATIONS.
   - Books, pamphlets, or other publications purporting to be issued by public authority.
6. NEWSPAPERS AND PERIODICALS.
7. TRADE INSCRIPTIONS AND THE LIKE.
   - affixed in the course of business and indicating ownership, control or origin.
8. ACKNOWLEDGED DOCUMENTS.
   - executed by a notary public.
9. COMMERCIAL PAPER AND RELATED DOCUMENTS.
   - See also T.C.A. § 47-3-307, signatures on commercial paper.
10. PRESUMPTIONS UNDER ACTS OF CONGRESS OR THE LEGISLATURE.
11. CERTIFIED RECORDS OF REGULARLY CONDUCTED ACTIVITY.
    - admissible under Rule 803(6) if accompanied by an affidavit of its custodian or other qualified person certifying that the record was made at or near the time of the occurrence of the matters from information transmitted by a person with knowledge of and a business duty to record or transmit those matters; was kept in the course of the regularly conducted activity; and was made by the regularly conducted activity as a regular practice.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required as to the following:

(1) Domestic Public Documents Under Seal. —A document bearing a seal purporting to be that of the State of Tennessee, the United States (or of any other state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands), or of a political subdivision, department, office, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. —A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. —A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make execution or attestation, accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may for good cause shown order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. —A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office (including data compilations in any form), certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or the Tennessee Legislature or rule prescribed by the Tennessee Supreme Court.

(5) Official Publications. —Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and Periodicals. —Printed material purporting to be newspapers and periodicals.

(7) Trade Inscriptions and the Like. —Inscriptions, sign, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Acknowledged Documents. —Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. —Commercial paper, including all signatures, and related documents to the extent provided by general commercial law.

(10) Presumptions Under Acts of Congress or the Legislature. —Any signature, document, or other matter declared by Act of Congress or the Tennessee Legislature to be presumptively or prima facie authentic.

(11) Certified Records of Regularly Conducted Activity.–The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit of its custodian or other qualified person certifying that the record– (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of and a business duty to record or transmit those matters; (B) was kept in the course of the regularly conducted activity; and (C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by statute.

In will contests, T.C.A. § 32-4-105 requires calling subscribing witnesses to a will.

ARTICLE 10 – CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS.

You can enter writings, recordings, and photographs with the following rules:

1. RULE 1002 – BEST EVIDENCE RULE.
   a. the original writing, recording, or photograph is required to prove its content.
   b. *State v. Harris*, 30 S.W.3d 345, 349 (Tenn. Crim. App. 1999): "As long as a proper foundation is presented for admission of a photograph into evidence, a defendant cannot complain successfully that the photograph is inadmissible simply because a "better picture" would have been more helpful to the defendant's theory of the case."

2. RULE 1003 – ADMISSIBILITY OF DUPLICATES.

   A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original.

3. RULE 1004 – BEST EVIDENCE EXCEPTIONS. The original is not required if:
   a. Originals Lost or Destroyed. — unless the proponent lost or destroyed them in bad faith.
   b. Original Not Obtainable.
   c. Original in Possession of Opponent.
      - At a time when an original was under the control of the party opponent, that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing but does not produce the original at the hearing.
   d. Collateral Matters.
      - The writing, recording, or photograph is not closely related to a controlling issue.

4. RULE 1005 – PUBLIC RECORDS. Certified copies are admissible if:
   a. Certified as correct in accordance with Rule 902.
   b. Testified to be correct by a witness who has compared the document with the original.
   c. This includes official record, a document authorized to be recorded or filed and recorded or filed, or data compilations of any form.
   d. If a copy which compiles with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

5. RULE 1006 – SUMMARIES.
   a. If, due to volume, a writing, recording, or photograph cannot conveniently be examined, a summary, chart or calculation is admissibile.
   b. The voluminous original shall be made available by other parties at reasonable times and places. The court may order that they be produced in court.

6. RULE 1007 – TESTIMONY OR WRITTEN ADMISSION OF PARTY. Contents are admissible dispite lack of production if admitted or given in testimony of a party opponent.

7. RULE 1008 – FUNCTIONS OF JURY AND COURT.
   a. If admissibility depends on the fulfillment of a condition of fact, whether condition was fulfilled is the court's determination in accordance with Rule 104.
   b. Trier of fact determines
      - whether item ever existed,
      - whether another item presented at trial is the original,
      - or whether evidence of contents correctly reflects the contents.

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

1. Writings and Recordings.
   - consist of letters, words, numbers, sounds, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.
   - Advisory Commission believes this definition is sufficiently broad to cover electronic imaging, a process by which documents are read into a computer by a scanner for electronic storage.
   - See also Uniform Photographic Copies of Business and Public Records as Evidence Act, T.C.A. § 24-7-119, effective April 29, 1998.
2. Photographs.
   - include still photographs, x-ray films, video tapes, and motion pictures.
3. Original.
   - the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original"of a photograph includes the negative or any print.
   - If data are stored in a computer or similar device, any printout or other output readable by sight and shown to reflect the data accurately is an "original."
4. Duplicate.
   - a copy produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.
   - Support for admissibility found in *Bolton v. State,* 617 S.W.2d 909 (Tenn. Crim. App. 1981).

Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or the Tennessee Legislature.

Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original.

This rule is the key to an understanding of the best evidence rule as the Commission contemplates it. Normally business people and lawyers accept machine copies as authentic. There is no reason why courts should not take the same approach in most instances. See Rule 1001(4) for the definition of "duplicate."

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of a writing, recording, or photograph is admissible if —

(1) Originals Lost or Destroyed. —All originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. —No original can be obtained by any available judicial process or procedure; or

(3) Original in Possession of Opponent. —At a time when an original was under the control of the party against whom offered, that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing but does not produce the original at the hearing; or

(4) Collateral Matters. —The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible may be proved by copy certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which compiles with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals or duplicates shall be made available for examination or copying, or both, by other parties at reasonable times and places. The court may order that they be produced in court.

Summaries of the contents of voluminous documents have long been admissible in Tennessee. *State ex rel. Stewart v. Follis,* 140 Tenn. 513, 521, 205 S.W. 444 (1918).

Rule 1007. Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony, deposition, or written admission of the party against whom offered, without accounting for nonproduction of the original.

This rule dispenses with the original document requirement in the circumstances described. Note that the proposed rule requires an unsworn statement of the contents of a document to be in writing.

Rule 1008. Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. When an issue is raised as to (a) whether the asserted writing, recording, or photograph ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Division of responsibility between judge and jury is similar to the traditional provisions of Rule 104.

THE DOCTRINE OF CURATIVE ADMISSIBILITY ("OPENING THE DOOR")

When evidence is ordinarily inadmissible, it can be introduced when the defense "opens the door," to counteract taking unfair advantage of the rules of evidence. "Most often employed in criminal cases where the "door" to a particular subject is opened by defense counsel on cross-examination, the doctrine of curative admissibility permits the State, on redirect, to question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by, the previous cross-examination. ....This doctrine provides that "where a defendant has injected an issue into the case, the State may be allowed to admit otherwise inadmissable evidence in order to explain or counteract a negative inference raised by the issue defendant injects." ..... (in the interest of fairness, otherwise inadmissible evidence may be admitted to the extent necessary to remove prejudice when a party opens the door to its admission); .... (doctrine of "curative admissibility" allows one party to introduce evidence that might otherwise be excluded to counter unfair prejudicial use of the same evidence by the opposing party).... In other words, "if A opens up an issue and B will be prejudiced unless B can introduce contradictory or explanatory evidence, then B will be permitted to introduce such evidence, even though it might otherwise be improper." .... The rule is derived from the fundamental guarantee of fairness. That is, the rule operates to prevent one party from manipulating the rules of evidence so as to leave the jury with feelings about the case that are unjustified, even though the jury's emotional response to the case is, theoretically, not a consideration in determining admissibility. .... Specifically, in a criminal case, "the rule operates to prevent an accused from successfully gaining exclusion of inadmissible prosecution evidence and then extracting selected pieces of this evidence for his own advantage, without the Government being able to place them in their proper context." ....Notwithstanding, the doctrine's applicability is limited by, "the necessity of removing prejudice in the interest of fairness." ....It is not an unconstrained remedy permitting introduction of inadmissible evidence merely because the opposing party brought out evidence on the same subject. The rule is protective and goes only so far as is necessary to shield a party from adverse inferences and is not to be converted into a doctrine for injecting prejudice. ....Only that evidence which is necessary to dispel the unfair prejudice resulting from the cross-examination is admissible. ....(introduction of incompetent or irrelevant evidence by a party opens the door to admission of otherwise inadmissible evidence only to extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence). Since the application of the doctrine of curative admissibility is based on the notion that the jury might be misled if contradictory evidence was excluded, the doctrine should not justify admission of that evidence when it is likely to do more harm in this respect than good. ....When constitutional rights are involved, the court must be particularly certain that the case is appropriate for curative admissibility by requiring a clear showing of prejudice before the open the door rule of rebuttal may be involved...." *State v. Land*, 34 S.W.3d 516, 530-32 (Tenn. Crim. App. 2000).

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CRAWFORD – Testimonial v. Non-Testimonial

The latest significant case on ***Crawford* is *State v. Cannon***, 254 S.W.3d 287, 302-03 (Tenn. 2008), which sets out the history as follows:
Prior to the release of our opinion in *Maclin*, the United States Supreme Court had granted certiorari in *Washington v. Davis*, 154 Wn.2d 291, 111 P.3d 844 (Wash. 2005) (en banc), *cert. granted*, 546 U.S. 975, 126 S. Ct. 547, 163 L. Ed. 2d 458 (2005); and *Hammon v. State*, 829 N.E.2d 444 (Ind. 2005), *cert. granted*, 546 U.S. 976, 126 S. Ct. 552, 163 L. Ed. 2d 459 (2005), to expand on the testimonial/nontestimonial dichotomy. In this consolidated appeal, the United States Supreme Court abrogated our decision in *Maclin* by holding that:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224 (2006). Both *Davis* and *Hammon* concerned statements made by victims of domestic assault to the police or to persons viewed as agents of the police, e.g., 911 emergency operators. At issue in *Davis* were statements made by the victim to a 911 emergency operator, reporting that her former boyfriend was assaulting her. *Id.* at 2271. The 911 emergency operator asked a series of questions aimed at determining the nature of the complaint, whether the threat was ongoing, the identity of the assailant, and the location of the assailant. *Id.* The victim did not appear at trial, and over defense objection, the trial court allowed the prosecution to play an audio recording of the victim's 911 emergency call. *Id.* A jury convicted *Davis. Id.*

The primary purpose test adopted in *Davis* requires courts to examine the context in which a statement is given. The *Davis* Court recognized that the nature of police interrogations may change as they are conducted. The Court noted that the victim in *Davis* "was speaking about events as they were actually happening rather than 'describ[ing] past events[.]'" *Id.* at 2276 (emphasis in original). The Court held that the *Davis* victim's "interrogation objectively indicate[d] its primary purpose was to enable police assistance to meet an ongoing emergency." *Id.* at 2277. Since the statements were made to obtain police assistance in an ongoing emergency, the Court held the statements were nontestimonial. *Id.*

After *Davis*, we again addressed the testimonial/nontestimonial dichotomy in *Lewis*. In *Lewis*, we recognized the Supreme Court's further departure from *Roberts* and acknowledged that the primary purpose test enunciated in *Davis* governs confrontation clause analysis. *Lewis*, 235 S.W.3d at 145. **To summarize then, under both the United States and the Tennessee Constitutions, the appropriate analysis for determining whether an out-of-court statement may be admitted into evidence without violating an accused's right of confrontation is as follows. A court must first determine whether the statement is testimonial or nontestimonial. Statements are testimonial if the primary purpose of the statement is to establish or to prove past events potentially relevant to later criminal prosecutions. A testimonial statement is inadmissible unless the State can establish that: "'(1) the declarant is unavailable and (2) the accused had a prior opportunity to cross-examine the declarant.'"** *Id.* at 143 (quoting *Maclin*, 183 S.W.3d at 345). If the statement is nontestimonial, the Confrontation Clause does not apply, and the statement must be analyzed under the "traditional limitations upon hearsay evidence." *Davis*, 126 S. Ct. at 2273; *see also Lewis*, 235 S.W.3d at 145 (holding that "[i]t is our view, therefore, that a *Roberts* analysis for nontestimonial evidence is not necessary to satisfy the state constitution's 'face-to-face' requirement and *Crawford* and its progeny establish appropriate guidelines").