

Evidence Boot Camp

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Susan L. Kay

Some Underlying Principles of the Rules of Evidence

- Competing tension between the need to tell a narrative in a compelling manner and the constraints of the Rules of Evidence
- Discretion of the trial judge
- The trial is the main event – objections must be made appropriately and preserved at trial
- Rules of Evidence are not self-enforcing – onus is on the lawyers to understand and apply them

Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 524 (Tenn. 2010)

- The abuse of discretion standard of review envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal. It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. Thus, it does not permit reviewing courts to second-guess the [trial court] . . . or to substitute their discretion for the [trial] court's. The abuse of discretion standard of review does not, however, immunize a lower court's decision from any meaningful appellate scrutiny. dispositions.

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- Discretionary decisions must take the applicable law and the relevant facts into account. An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision.

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- A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence. To avoid result-oriented decisions or seemingly irreconcilable precedents, reviewing courts should review a [trial] court's discretionary decision to determine (1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the [trial] court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the [trial] court's decision was within the range of acceptable alternative

Rule 103

- Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected AND
- 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
- 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. . .

Rule 104

- (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 it is not bound by the rules of evidence except those with respect to privileges.
- (b) Relevancy conditioned on fact.
- When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Rule 403

- 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.**
- Rule 403 applies to every piece of evidence unless there is another balancing test provided by a specific rule (e.g., 609)

STATE OF TENNESSEE V. QUINTIS MCCALED, 582 S.W.3d 179 (Tenn. 2019)

- “In our view, the proper construction of Rule 403 permits the trial court to exclude evidence if its probative value “is substantially outweighed by the danger of unfair prejudice” that will arise or is likely to arise in conjunction with the admission of the evidence. No evidence is admitted in a vacuum, and the admission of all evidence is subject to the possibility of attack on cross-examination. A trial court’s contemplation of “unfair prejudice,” therefore, may extend beyond merely the impact of a prosecution witness’ testimony on direct examination (or the impact of an exhibit admitted through that witness). Accordingly, as the trial court did in this case, the trial court may consider not only the impact of the evidence itself but the impact of the potential cross-examination resulting from the admission of the evidence.”

Hearsay : a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”

Clearly hearsay

- Statement is explicitly introduced to prove the truth of the matter
- ABUSE OF DISCRETION TO FIND THIS TO BE NON-HEARSAY

Clearly Not Hearsay

- The truth of the matter is not at all related to the purpose for which the statement is introduced
- ABUSE OF DISCRETION TO FIND THIS TO BE HEARSAY

Admissible Hearsay

- Rule 803: exceptions to the hearsay rule that do not depend on the unavailability of the declarant (some require that the declarant be present and available for cross-examination).
- Rule 804: exceptions to the hearsay rule that only apply when the declarant is unavailable

Admission by a party Opponent

- A statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability, or (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy, or (F) a statement by a person in privity of estate with the party. An admission is not excluded merely because the statement is in the form of an opinion.

Excited Utterance

- Excited Utterance:
- Tennessee Rules do not include an exception for present sense impression (as do the Federal Rules)
- Declarant must still be under stress of the exciting event (no specific time limit)
 - More stressful the situation, the longer the stress may last

Mental Emotional, or Physical Condition

- A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove a fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Mutual Life Insurance Co. of New York v. Hillmon, 145 U.S. 285 (1892)

- What was said: “I am going to leave Wichita with Hillmon.”
- State of Mind exception allows statement of intention to be introduced to show intention, so statement is admissible to show Walters intended to leave Wichita with Hillmon.
- Admissibility of statement to show he actually went out of Wichita is question of relevance. Does his intention (to leave Wichita) have any tendency to make the existence of any fact of consequence to the lawsuit (whether he actually left Wichita) more or less probable.
- Unfortunately courts have collapsed the two analysis and consider this to be only a hearsay issue.
- Although Walters was going to leave Wichita with Hillmon, that fact was not necessary to be proven by Walters’ words, as there was other proof that Hillmon was at Crooked Creek.

Medical Diagnosis and Treatment

- Statements made:
- for the purpose of medical diagnosis and treatment
- describing medical history, past or present symptoms, pain or sensations or the inception or general character of the cause or external source
- insofar as reasonably necessary to diagnosis and treatment.

Past Recollection Recorded and Present Recollection Refreshed

Present Recollection Refreshed – is not hearsay

- Witness must be on the witness stand
- Actual testimony is that given by the witness once the witness's recollection has been refreshed
- Hearsay is not involved since the testimony comes from the witness on the stand
- Adverse party has right to inspect the document, and to cross examine the witness about the document
- Document or thing which refreshed recollection is not admitted into evidence unless done so by adverse party

Past Recollection Recorded – is hearsay

- Witness [declarant] must be on the witness stand
- Actual testimony is the past recollection recorded
- Past recollection recorded is admitted as an exception to the hearsay rule
- Adverse party has opportunity to cross-examine the witness about the past recollection recorded
- Recorded testimony is admitted into evidence, but is not given to the jury unless requested by the adverse party

Business Records

- A memorandum, report, record, or data compilation, in any form,
 - of acts, events, conditions, opinions, or diagnoses,
 - made at or near the time
 - by, or from information transmitted by, a person with knowledge,
 - and a business duty to record or transmit
 - if kept in the course of a regularly conducted *business* activity,
 - and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation,
 - all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with [Rule 902\(11\)](#), [Rule 902\(12\)](#), or a statute permitting certification,

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The term "business" as used in this paragraph includes *business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.*

Government Records

- Records, reports, statements, or data compilations,
 - in any form,
 - of public offices or agencies, setting forth
 - (A) the activities of the office or agency, or
 - (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel, or
 - (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law,unless the sources of information or other circumstances indicate lack of trustworthiness.

In re Joseph G., 2013 Tenn. App. LEXIS 500 (July 31, 2013)

- email contained in DCS file was hearsay and did not satisfy business records exception; email identified neither the sender nor her position and could not be considered a “record;” email was sender’s interpretation of information she gained from other unidentified people.

Children's Statements

- Statements about abuse or neglect
- offered in a civil action . .
- made by a child alleged to be the victim of physical, sexual or psychological abuse or neglect

Provided that the circumstances indicate trustworthiness.

Declarants of age thirteen or older at the time of the hearing must testify unless unavailable . . . otherwise this exception is inapplicable to their extrajudicial statements.

Prior Inconsistent Statements of a Testifying Witness

- A statement otherwise admissible under 613(b) and
 - the declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement
 - the statement must be an audio or video recording, a written statement signed by the witness or a statement made under oath
 - the judge must conduct a hearing outside the presence of the jury to determine by a preponderance of evidence that the prior statement was made under circumstances indicating trustworthiness.

Memories

- Standard for having sufficient memory
 - *Cranford*: must be subject to cross examination
 - 801(d)(1) [*prior statement by a witness*]: must be subject to cross examination concerning the statement
 - 803(5) [*recorded recollection*]: once had knowledge about a matter but now has insufficient recollection to testify fully and accurately; but generally must now be able to say that the statement was accurate when made
 - 804(a) [*unavailability for purposes of introduction of 804 hearsay*]: testifies to a lack of memory of the subject matter of the statement

Unavailability Under 804

- 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.
- 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.

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.

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.

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.

Character Evidence – when admissible

- Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
 - (1) *Character of Accused*. In a criminal case, evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same or, if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
 - (2) *Character of Alleged Victim*. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
 - (3) *Character of Witness*. Evidence of the character of a witness as provided in Rules 607, 608, and 609.
- 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.

How Admitted?

- 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.

404(b) evidence

- 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 the 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.

Expert Testimony

- 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.

Bases of Expert Testimony

- 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. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

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- 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.