Tennessee Judicial

Benchbook

2022 Edition

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PREFACE

This benchbook is designed to be a general guide for judges with civil and/or criminal jurisdiction. Although the benchbook is an excellent resource, judges should not rely exclusively on it. The benchbook is designed to guide judges to the relevant rules, statutory provisions, and case law, and should be considered as a starting point for additional research.

HOW TO USE THIS BOOK

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TENNESSEE JUDICIAL BENCHBOOK

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CHAPTER 1

ETHICS

Special thanks to Judge Ross Dyer, Judge Dee Gay, Board of Judicial Conduct Chief Disciplinary Counsel Marshall Davidson, and Board of Judicial Conduct Assistant Disciplinary Shane Hutton for their review and edits of this chapter.

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Socrates once said, "Four things belong to a judge: to hear courteously; to answer wisely; to consider soberly; and to decide impartially."

1.01 GENERAL

Judges must be prepared to serve as role models for the justice system both on and off the bench. To the extent judges are viewed as ethical and honest, the system is more likely to be viewed as ethical and honest. Conversely, if judges seem injudicious, public trust and confidence in the justice system will falter.

A judge's professional and personal activities are directly affected by the unique role he or she has assumed. For example, judges often must scrutinize their attendance at public or political gatherings. They must monitor their expressions of personal opinion when the subject might affect the citizen's view of the justice system. Virtually everything a judge does, on and off the bench, must be re-examined in light of the high ethical standards required of members of the judiciary.

Above all, judges must strive to maintain independence, integrity, and impartiality. Each of these ethical mandates requires the judge to be mindful of situations in which disqualification is required, when conflicts might affect a judge's ruling, and when politics might interfere with the appropriate disposition of a case. Thus, judges must be aware of disqualification standards. They must recognize that conflicts may arise because of personal, financial, or family relationships. Judges must also remain cognizant of the limits placed on their political activities both during and after a

campaign. More subtle ethical issues faced by judges include whether judges can serve as employment or educational references, whether judges may raise funds for charitable organizations, and whether judges can engage in extra-judicial employment. Assistance in answering all of these questions can be found in the multiple resources governing judicial conduct in the State of Tennessee.

1.02 GOVERNING STANDARDS

The basic standards governing the conduct of judges are found in Article 6, Section 11 of the Tennessee Constitution, Title 17 of the Tennessee Code, and the Code of Judicial Conduct as adopted and amended by the Supreme Court of Tennessee. *See* Tenn. Sup. Ct. R. 10.

A. Constitutional standards

Article 6, Section 11 of the Tennessee Constitution provides for the mandatory recusal of judges from cases in which they are interested, related to a party, or in which they have either served as counsel or as a judge in a lower court, except with the consent of all the parties. A separate provision, Article 6, Section 9, prohibits judges from commenting on the evidence in a jury trial.

B. Statutory and rule standards

1. The Tennessee Board of Judicial Conduct

The body designated to monitor and enforce judicial ethics is the Tennessee Board of Judicial Conduct, a panel of eight current or former judges from various courts, two attorneys, and six lay members or citizens. Tenn. Code. Ann. § 17-5-201. The Board is given the power to investigate, hear, and rule upon complaints filed against judges. Tenn. Code Ann. § 17-5-301. The Board has the authority to appoint disciplinary counsel, whose duties include receiving, screening, and investigating complaints against judges, making recommendations to investigative panels of the Board as to disposition of complaints, and filing and prosecuting formal charges. Tenn. Code Ann. § 17-5-301.

Judicial offenses of which the Board of Judicial Conduct may take cognizance are set out in Tenn. Code Ann. § 17-5-301. If a formal charge of misconduct is brought against a judge, the Board of Judicial Conduct, through a hearing panel, may dismiss the charges at the conclusion of the hearing or impose sanctions. Tenn. Code Ann. § 17-5-308.

The Board of Judicial Conduct's investigatory and adjudicatory powers are set out in detail in Tennessee Code Annotated, Title 17, Chapter 5. The Board is required to file certain information concerning complaints received and the disposition of such complaints with the civil justice and criminal justice committees of the house of representatives and the judiciary committee of the senate on a monthly basis, with additional reporting requirements to be filed quarterly. Tenn. Code Ann. § 17-5-202. These reports may be found on the Administrative Office of the Court's website here https://www.tncourts.gov/boards-commissions/court-judiciary/statistical-reports .

A decision of the Board of Judicial Conduct may be appealable to the Supreme Court within fourteen (14) days of the entry of judgment by the Board of Judicial Conduct. The appeal is a de novo review of the record made before the Board of Judicial Conduct with no presumption of correctness as to the Board's findings or conclusions. The Supreme Court's decision is final, except that in the event the Supreme Court affirms a recommendation of removal, the question of removal must be transferred to the legislature for final determination. Tenn. Code Ann. §§ 17-5-309, 310.

2. Statutory Provisions

Two additional statutes impose obligations upon trial judges. One requires judges to hold court at regular times unless prevented by sickness or necessity from doing so. The other provides that failure to open court within the first three days of each regular term without sufficient excuse, according to the statute, is punishable by a deduction of $100 in salary. Tenn. Code Ann. §§ 17-1-201, 202.

3. Supreme Court Rules

The Code of Judicial Conduct, found in Rule 10 of the Rules of the Tennessee Supreme Court , establishes standards for the ethical conduct of judges. A violation of the code may result in a charge of misconduct by the Board of Judicial Conduct. Tenn. Code Ann. § 17-5-301(j)(1)(C).

The code, which was revised effective July 1, 2012, contains four canons, which are broad statements for ethical conduct. Under each canon are specific rules to provide clarity to specific areas of judicial conduct. The 2012 revisions added new sections to the beginning of the Rule titled "Preamble," which provides an overview of the need and purpose of the Code of Judicial Conduct, "Scope," which provides additional guidance in the interpretation and application of the Code of Judicial Conduct, "Terminology," which provides definitions for certain terms used in the Code of Judicial Conduct, and "Application," which establishes various types of judges and the applicability of the Code of Judicial Conduct to each defined type of judge. The Application section will be of particular interest to both Continuing Part-Time Judges and Pro Tempore Part-Time Judges. The canons, rules, and application sections are authoritative and are intended to be binding upon judges. The commentary, conversely, is offered as an explanation of the canons and rules and identifies aspirational goals for judges. Judges should strive to exceed the standards of conduct established by the Code, holding themselves to the highest ethical standards.

C. Other Supreme Court Rules

Rule 11 of the Rules of the Tennessee Supreme Court provides for supervision of the judicial system. Provisions of that rule applicable to trial judges are those that pertain to timeliness of decisions and the disposition of motions. Cases cannot be held under advisement for more than sixty (60) days. Matters that delay the trial date or final disposition must be decided in thirty days absent the most compelling of reasons. Tenn. Sup. Ct. R. 11, §III(d). The rule provides a method for applying to either the presiding judge or the supervising circuit justice to force compliance with the deadlines. Tenn. Sup. Ct. R. 11, §III(d).

Additionally, some portions of Rule 8 of the Rules of the Tennessee Supreme Court, Rules of Professional Conduct, apply directly to judges.

1.03 RESOURCES

The Supreme Court has established a Judicial Ethics Committee charged with issuing formal opinions upon the request of any judge governed by the Code of Judicial Conduct. The committee's membership and responsibilities are set out in Rule 10A of the Rules of the Tennessee Supreme Court. An indexed compilation of Opinions issued by the Judicial Ethics Committee, as well as the names of the members of the Committee, are available on the Administrative Office of the Courts' website here https://www.tncourts.gov/boards-commissions/boards-commissions/judicial-ethics-committee .

1.04 TRANSITION FROM LAWYER TO JUDGE

It is clear that full-time judges cannot practice law. This absolute prohibition for trial judges appears in a statute passed by the Tennessee Legislature in 1817 which provides in relevant part, "[j]udges and chancellors are prohibited from practicing law in any of the courts of this state." Tenn. Code Ann. § 23-3-102. *See also* Tenn. Code Ann. § 17-1-105.

Canon 3, Rule 3.10 provides that "[a] judge shall not practice law." Excluded from the "practice of law" are *pro se* representations and uncompensated drafting and reviewing of documents for family members, or advising family members. Newly appointed or elected judges, then, must discontinue the practice of law. The Code of Judicial Conduct and statutory law are specific as to this obligation. Specifically, "[a] newly elected or appointed judge can practice law only in an effort to wind up his or her practice, ceasing to practice law as soon as reasonably possible and in no event longer than 180 days after assuming office." Tenn. Sup. Ct. R. 10, RJC 3.10. No new cases can be accepted. *See* Tenn. Code Ann. §§ 17-1-105, 23-3-102. Continuing Part-Time Judges and Pro Tempore Part-Time Judges should note the limitations on the application of this rule found in the Application section of the Code of Judicial Conduct.

1.05 ADJUDICATIVE RESPONSIBILITIES

A. Generally

Canon 2 begins with Rule 2.1, which makes the straight-forward observation that the performance of a judge's official duties takes "precedence over a judge's personal and extrajudicial activities." Judges' duties are adjudicative, administrative, and disciplinary. In the area of adjudicative responsibilities, a judge is required to promptly, efficiently, and fairly hear and decide matters assigned, be faithful to the law, and competent in it. Additionally, a judge must exercise judicial independence and "shall not be swayed by partisan interests, public clamor, or fear of criticism." Tenn. Sup. Ct. R. 10, RJC 2.4.

Rule 2.6 admonishes judges to accord to every person or the person's lawyer the "right to be heard according to law." Tenn. Sup. Ct. R. 10, RJC 2.6(A). The right to be heard by a constitutionally

qualified judge is a constitutional right in Tennessee which can only be waived personally by a party. *State v. Blackmon*, 984 S.W.2d 589 (1998). The waiver must clearly appear on the record.

It is a judge's responsibility to maintain order and decorum, be patient, dignified and courteous to all who come before the judge, perform judicial duties without bias or prejudice, and require lawyers to refrain from manifesting bias and prejudice. Tenn. Sup. Ct. R. 10, RJC 2.3 - 2.6.

B. *Ex Parte* Communications

A judge shall not initiate, permit, or consider *ex parte* or other extra-judicial communications concerning a pending or impending proceeding. Tenn. Sup. Ct. R. 10, RJC 2.9. Exceptions to the *ex parte* contact rule are contacts that concern scheduling, administrative or emergency matters not dealing with the merits of a case. Even under these circumstances, however, the judge has to reasonably believe that no party will gain an advantage as a result of the contact and must promptly notify the other parties and allow them to respond. *Id.* A judge may engage in *ex parte* communications when the law expressly allows. *Id.*

A judge does not violate the fair hearing or *ex parte* communication concerns by seeking the "advice of a disinterested expert on the law," provided the judge "gives notice to the parties" and affords them a "reasonable opportunity to respond." Tenn. Sup. Ct. R. 10, RJC 2.9(A)(2). A judge may consult with other judges or with court personnel whose duties require them "to aid the judge in carrying out the judge's adjudicative responsibilities." Tenn. Sup. Ct. R. 10, RJC 2.9(A)(3). Importantly, "[a] judge shall not investigate facts in a matter independently." Tenn. Sup. Ct. R. 10, RJC 2.9(C).

C. Public Comment

Judges are frequently asked questions about their decisions or pending litigation. Judges are not prohibited from making public statements in the course of their official duties or from explaining court procedures. Tenn. Sup. Ct. R. 10, RJC 2.10(D). However, they are prohibited and are required to prohibit their staff from making public comments about pending or impending proceedings that "might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in **any** court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing". Tenn. Sup. Ct. R. 10, RJC 2.10(A)-(C) (emphasis added). A judge should exercise great caution in providing comments, including comments on social media, about a case to make certain the comment will not affect the fairness of the proceeding.

D. Disqualification

The right to be heard can only be meaningful if the hearing is before a fair and impartial judge. In recognition of this fundamental right, the Tennessee Constitution provides that no judge may sit in a case in "which [the judge] may be interested"; in which either of the parties is "connected with [the judge] by affinity [or] consanguinity, within such degrees as may be prescribed by law"; in which the judge "may have been of counsel"; or in which the judge "may have presided in any inferior Court." Tenn. Const. Art. 6, Section 11.

The Code of Judicial Conduct adds to the constitutional and statutory disqualification provisions by a general disqualification of a judge whose "impartiality might reasonably be questioned" or a judge who has either a "personal bias or prejudice" against a party or lawyer or personal knowledge of disputed facts. Tenn. Sup. Ct. R. 10, RJC 2.11(A). In addition to this general rule of disqualification is a list of specific interests and relationships that require disqualification. Tenn. Sup. Ct. R. 10, RJC 2.11.

1. Disqualification due to questioned impartiality

Often the answer to whether the judge should be disqualified is less than clear. For example, should a judge preside over a case in which a former law partner or associate is involved? Should a judge hear a case against a bank where a family member has a loan? Should a judge continue to hear a case in which the judge has been verbally abused by a defendant during the course of a long and difficult criminal trial?

The test in these circumstances is found in the Code's requirement that a judge should be disqualified when the judge's "impartiality might reasonably be questioned." The judge should ask: "would an objective person, knowing all the relevant facts, reasonably question my impartiality?"

The test for disqualification is not a subjective one, but an objective one. Thus, even an appearance of impropriety, absent actual impropriety should result in the judge's disqualification. *See Kinard v. Kinard*, 986 S.W.2d 220 (Tenn. App. 1998); *Alley v. State*, 882 S.W.2d 810 (Tenn. Crim. App. 1994).

In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the United States Supreme Court held that a judge who had endured a series of personal attacks during the course of a criminal trial should have stepped aside and allowed another judge to hear the charge of contempt against the defendant. Even though the judge could have addressed each instance of contempt as it occurred, the Court held that, under the Due Process Clause, the substitution of another judge would have avoided any possibility of reprisal by the offended judge or of injury to the authority of the court. *Id.*

2. Disqualification due to family relationships

Under the Tennessee Constitution, a judge is disqualified when related to a party within the sixth degree of affinity or consanguinity computed by civil law. Tenn. Const. Art.VI, § 11. *See also* Tenn. Code Ann. §17-2-101(2). A separate statutory disqualification prohibits a judge from sitting in a felony criminal case in which the victim upon whose property the felony was committed is related to the judge within the sixth degree of affinity or consanguinity. Tenn. Code Ann. §17-2-101(5).

Under the Code of Judicial Conduct, a judge is disqualified if the judge knows that the judge, the judge's spouse, child, or any other member of the judge's household living with the judge has an economic interest in the subject matter in controversy or in a party. A judge is also disqualified under the Code when the judge, judge's spouse, or any person within the third degree of relationship to either the judge or spouse is a party (or an officer, director, or trustee of a party), a lawyer in the case, has more than a de minimus interest in the outcome of the proceeding, or, to

the judge's knowledge, is likely to be a material witness. Tenn. Sup. Ct. R. 10, RJC 2.11(A)(2)-(3).

3. Disqualification due to financial interests

A judge's disqualification from a case is mandatory if the judge, the judge's spouse, domestic partner, parent or child, or any other member of the judge's family "residing in the judge's household" has an economic interest in the subject matter in controversy or in a party. Tenn. Sup. Ct. R. 10, RJC 2.11(A)(3). An economic interest includes more than de minimus ownership, an equitable interest, or certain relationships as officers, directors, and active participants. Tenn. Sup. Ct. R. 10, RJC 2.11(A)(2)-(3). The Code of Judicial Conduct places a duty on every judge to "keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household." Tenn. Sup. Ct. R. 10, RJC 2.11(B).

4. Remittal of disqualification

In the event the Code of Judicial Conduct suggests that a judge should be disqualified under Rule 2.11, the judge may disclose the reason for the disqualification on the record and ask the parties to consider, outside the judge's presence, whether to waive disqualification. If all parties agree to waive the disqualification, the agreement shall be incorporated in the record and the judge may participate in the proceeding. Tenn. Sup. Ct. R. 10, RJC 2.11(C). This remittal of disqualification procedure does not apply when the disqualification is based on the judge's bias or prejudice against a party or lawyer, or personal knowledge of the facts; or when a judge participated in a judicial settlement conference. Under those circumstances, disqualification cannot be waived. *Id.*

1.06 DISCIPLINARY RESPONSIBILITIES

Rule 2.15 sets out a judge's responsibility to report potential ethical violations of other judges or lawyers. Tenn. Sup. Ct. R. 10, RJC 2.15. In addition, a judge has a duty to take appropriate action with regard to a lawyer or another judge whom the judge reasonably believes to be impaired by drugs or alcohol, or by a mental, emotional or physical condition. Tenn. Sup. Ct. R. 10, RJC 2.14. Such action may include a confidential referral to a lawyer or judicial assistance program. *Id.*

1.07 ADMINISTRATIVE RESPONSIBILTIES

A judge is required to make appointments in a manner that is impartial and on the basis of merit, avoiding nepotism, favoritism, and unnecessary appointment. Tenn. Sup. Ct. R. 10, RJC 2.13(A). Similar standards are applicable to community resources that may be required as a condition or requirement of litigation. Tenn. Sup. Ct. R. 10, RJC 2.13(D).

Administrative duties associated with supervising court staff or court officials require that the judge ensure that such persons act in a manner consistent with the judge's obligation under the Code of Judicial Conduct. Tenn. Sup. Ct. R. 10, RJC 2.12(A). Should a judge serve as presiding judge or have other supervisory authority for the performance of other judges, then the supervising judge is required to take reasonable measures to ensure that the supervised judges properly discharge their judicial duties, including promptly disposing of matters before them. Tenn. Sup. Ct. R. 10, RJC 2.12(B).

1.08 EXTRA-JUDICIAL ACTIVITIES

In addition to dictating standards for on-the-bench behavior, the Code of Judicial Conduct also provides standards which must be followed when a judge is not acting in a judicial capacity. A judge is required to conduct personal and extra-judicial activities so as to assure that they minimize the risk of conflict with the obligations of judicial office. Tenn. Sup. Ct. R. 10, RJC 3. Any extra-judicial activity should not interfere with the proper performance of judicial duties, lead to frequent disqualification of the judge, or undermine judicial independence or impartiality. Tenn. Sup. Ct. R. 10, RJC 3.1

Canon 3 provides specific guidance in the following areas: appearing before governmental bodies (3.2), testifying as a character witness (3.3), appointments to governmental positions (3.4), use of non-public information (3.5), affiliation with discriminatory organizations (3.6), participation in civic or other public organizations (3.7), appointments to serve as a fiduciary (3.8), service as a mediator or arbitrator (3.9), practice of law (3.10), financial activities (3.11) and compensation, reimbursement and reporting requirements related to compensation (3.12 – 3.15). Tenn. Sup. Ct. R. 10, RJC 3.2 – 3.15.

1.09 POLITICAL ACTIVITY

In an effort to remove judges from the influence of politics, the Code of Judicial Conduct provides in Canon 4 that a judge, or candidate for judicial office, is, except as permitted by law, prohibited from participating in political or campaign activity that is inconsistent with the independence, impartiality, and integrity of judicial office. Tenn. Sup. Ct. R. 10, Canon 4. Therefore, a judge may not hold office in a political organization, give speeches on behalf of a political organization, publicly endorse or oppose another candidate for any non-judicial public office, solicit funds or pay an assessment to a political organization, or make a contribution to a political candidate. Tenn. Sup. Ct. R. 10, RJC 4.1. The prohibition against contributing to a political candidate is qualified by language in Rule 4.2, which allows a judge or judicial candidate to purchase tickets for and attend political gatherings, identify himself as a member of a political party, and make contributions to a political organization or candidate up to the limitations established in Tenn. Code Ann. § 2-10-301 *et seq.* Tenn. Sup. Ct. R. 10, RJC 4.2.

Although many of Tennessee's judges must seek election to office, the Code of Judicial Conduct carefully proscribes the conduct of those seeking judicial positions. Judges, or those seeking judicial office, are required to "act at all times in a manner consistent with the

independence, integrity, and impartiality of the judiciary." Tenn. Sup. Ct. R. 10, RJC 4.2(A)(1). Compliance with all campaign, campaign finance and fund raising laws and regulations is also required. Tenn. Sup. Ct. R. 10, RJC 4.2(A)(2).

Canon 4 provides specific guidance in the following areas: 1) general requirements (including judicial candidates) (4.1)[1], political and campaign activities (4.2), activities of candidates for appointed office (4.3), campaign committees (4.4) and activities of judges who become candidates for non-judicial office (4.5).

1.10 SOCIAL MEDIA

The use of social media such as Facebook, Twitter, Instagram, LinkedIn, and TikTok have become commonplace among judges. The use of social media by judges may implicate multiple Rules of the Code of Judicial Conduct. Judges are expected to maintain the highest standards of conduct and dignity of judicial office at all times. Preamble, Tenn. Sup. Ct. R. 10. Thus, the Code of Judicial Conduct applies to both the professional and personal conduct of a judge. Tenn. Sup. Ct. R. 10, RJC 1.2, cmt. 1. There is no exception to this principle for the use of social media.

The Tennessee Supreme Court recently cautioned that "[l]awyers who choose to post on social media must realize they are handling live ammunition[.]" *In Re Sitton*, 618 S.W.3d 288, 304 (Tenn. 2021). The same is true for judges. Judges choosing to participate in inherently public platforms must exercise extreme caution and carefully evaluate whether their social media communications foster public confidence in the integrity, independence, and impartiality of the judiciary. *See State v Madden*, No. M2012-02473-CCA-R3-CD, 2014 WL 931031, at *8 (Tenn. Crim. App. Mar 11, 2014) (while judges may utilize social media, they must "at all times remain conscious of the solemn duties they may later be called upon to perform."). What may seem as appropriate social media conduct of a lawyer or a private citizen may be prohibited by the Code of Judicial Conduct. "A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code." Tenn. Sup. Ct. R. 10, RJC 1.2, cmt. 2.

1.11 COMPENSATION FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES

A judge may receive compensation for permissible extra-judicial activities. All such compensation, however, must be reported. A statute requires that all judges file annual financial disclosure statements with the Secretary of State. *See* Tenn. Code Ann. §8-50-502 *et seq*. The Administrative Office of the Courts furnishes the annual disclosure forms via electronic mail to

[1] RJC 4.1(A)(8) states that "except as permitted by law, or by RJCs 4.2, 4.3 and 4.4, a judge or judicial candidate shall not: personally solicit or accept campaign contributions other than through a campaign committee authorized by RJC 4.4." In March 2022, the legislature passed and the Governor signed into law Public Chapter 668, which allows judicial candidates to personally solicit and accept campaign contributions. As a result, the Judicial Ethics Committee issued Advisory Opinion 22-1 which discusses the relationship between the new statute and RJC 4.1(A)(8) and the Code as a whole. The opinion can be found here https://www.tncourts.gov/sites/default/files/docs/advisory_opinion_22-01.pdf .

the judges in January each year. Reimbursements in excess of actual expenses incurred should be treated as compensation and reported as well.

1.12 USE OF STATUS OF OFFICE

A judge may not use the status or prestige of office to advance the judge's personal or economic interests or allow others to do so. For example, judges are generally not allowed to encourage members of the public to attend fundraising events, to promote businesses of others, or encourage members of the public to donate money to civic organizations. The comments to this rule state specifically that judicial letterhead "must not be used for conducting a judge's personal business." Tenn. Sup. Ct. R. 10, RJC 1.3. However, in recognition of the fact that judges are often in a position to lend valuable information about the employment potential of others, the comments further provide that a judge may serve as a reference or provide a letter of recommendation based on the judge's personal knowledge. *Id.* Judges may also participate in the judicial selection process by providing information on the qualities and abilities of a judicial candidate to the appointing authority or screening committee. *Id.*

1.13 JUDICIAL IMMUNITY

Judges are not liable for their judicial acts, even if those acts were allegedly done maliciously or corruptly so long as the acts were not in clear absence of all jurisdiction. Immunity for judicial acts is absolute. Immunity for non-judicial acts, however, is qualified so that a judge whose non-judicial acts violate clearly established law may be liable for damages that result from the acts. In order to determine whether absolute or qualified immunity exists for a judge's acts, the test is whether the acts in question were a part of or integral to the judicial decision making process. If so, absolute immunity exists. If, instead, the acts were administrative or not part of a judge's function at all, qualified immunity only will apply. *Barrett v. Harrington*, 130 F.3d 246 (6th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1997) (holding that a general sessions judge is absolutely immune for requesting investigation of a litigant believed to be a threat to the judge, but not immune for comment to the media about the litigant); Tenn. Op. Atty. Gen., No. 99-001 (Jan. 19, 1999).

CHAPTER 2

COURTROOM SECURITY

Special thanks to AOC Communications Director Barbara Peck for her edits and review of this chapter.

Contents **Section**

2.01 SCOPE

Courts should be conducted in dignified and secure surroundings. A courthouse should be designed and operated in a manner that limits the opportunities for violence and disruption. Plans should be in place to deal with security emergencies quickly and safely. Security programs, however, should not interfere with the maintenance of courtroom dignity and respect for individual rights.

2.02 SECURITY STANDARDS

The Tennessee Judicial Conference and Tennessee General Sessions Judges Conference adopted minimum security standards to promote the security and safety of the judiciary, court personnel, and the public. The conference recognized that the cost of these standards is more than offset by the security and protection that the standards offer against bodily injury, loss of life, and destruction of property. They are as follows:

Minimum Courtroom Security Standards

1. Silent bench and court clerk's public transaction counter panic button connected directly to the sheriff's department or police department.
2. A bullet-proof bench and court clerk work area in courtrooms.
3. Availability of armed, uniformed guard (court officer) in each courtroom during court sessions.
4. Court security training for court officers. Court security briefing on annual basis for judicial staff and courthouse personnel.
5. Hand-held detectors (minimum of 2) and/or magnetometers in each county to assure the safety in each courthouse or courtroom.
6. Each court building shall have signage posted at each court access entrance stating that all persons are subject to search by security personnel. Prohibited items are subject to seizure and forfeiture. Prohibited items include, but are not limited to, the

following: firearms; other forms of weaponry; and any item(s) that can be transformed into a weapon.

7. Hand held inspection security mirror to be used to view under courtroom seating and other areas for safety in the courthouse and/or courtroom(s).

2.03 SECURITY PROCEDURES

The Tennessee Judicial Conference and Tennessee General Sessions Judges Conference have also adopted minimum security procedures.

They are as follows:

Minimum Courtroom Security Procedures

1. Contact liaison on court security in the state court administrator's office for information on court security.
2. Conduct periodic security evaluations in each courtroom.
3. Prior to any new courtroom construction or courtroom renovation, the state court administrator should be consulted on matters relating to court security.
4. Medical and family data on each judge to be kept in the clerk's office including blood type, allergies or reactions to medications, and any other type of medical problems that should be known in case of an emergency, and the names, addresses, and telephone numbers of the next of kin.
5. An emergency procedures plan for each courtroom and judge's chambers for incidents involving hostage taking, fires, bomb threats, general evacuation and power failure or other sudden emergencies to be made known to all court personnel.
6. Establish a courtroom security plan that covers everything from firearm exhibits to who has courtroom keys.
7. Establish well-defined procedures for the transportation and handling of prisoners. The transportation of prisoners through areas where the public is present should be avoided. A holding cell should be provided convenient to the courtroom if the jail is not convenient.
8. A mobile security plan or team should be available for trials that are perceived as being extremely high risk.
9. All judicial staff employees should receive an orientation on courtroom security.

2.04 LEGISLATIVE REQUIREMENTS

State law requires that each county establish a court security committee. The committee is required to examine the facilities and determine the security needs for the courtrooms. After examination, the committee is required to review the standards for security and procedure outlined by the Tennessee Judicial Conference and report its findings each year to the county legislative body and the Administrative Office of the Courts. County legislative bodies are directed to consider the

security needs in preparing their budgets and are required to report action taken to meet the security needs to the Administrative Office of the Courts each year. The Administrative Office of the Courts must then report on each county's compliance to the General Assembly each year. Tenn. Code Ann. § 16-2-505(d)(2), (3), (4).

The legislature passed a law, effective July 1, 2008, which requires deputy sheriffs newly assigned to courts to provide courtroom security to complete 40 hours of basic training in courthouse security within 12 months of assignment to the courtroom security detail. Further, the legislation requires that each year after the initial 40-hour training is completed, deputies assigned to provide courtroom security must complete a minimum of 16 hours of training specific to courthouse security (The Peace Officer Standards and Training Commission must approve this training). Tenn. Code Ann. § 5-7-108(a)(2).

2.05 THE JUDGE AND COURTROOM SECURITY

A judge must exercise caution when establishing obvious and heightened security measures for individual cases, particularly those tried by a jury. While the judge must take appropriate steps to assure that the courtroom is safe, judges should guard against making assumptions about security needs based solely on the background of a particular party. If the judge is alerted or becomes aware of the need for heightened security measures based on some objective factors or if some overt sign of danger is observed, the judge should impose special security measures. If possible, the judge should avoid security measures that indicate to the jury that a party is dangerous and/or cause the jury to prejudge the party.

The nature of the case or information about the case may sometimes cause a judge to regulate passage into and out of the courtroom. The judge may want to limit the times at which people can exit and enter the courtroom and may want to limit the number of spectators to the number of available seats. In all such circumstances, the judge must be prudent and fair in the selection and operation of the procedures used and must also assure that the individuals charged with implementing the procedures understand this necessity.

Judges who have a handgun carry permit are authorized to carry a weapon while in the actual discharge of official duties as a judge. Tenn. Code Ann. § 39-17-1306.

2.06 THE JUDGE AND THE COURT OFFICER

A judge is often best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes. If special security measures are required in a particular case, those measures and the reasons for their necessity should be described completely on the record.

Under Tennessee law, the sheriff is responsible for court officer duties unless the county legislative body appoints someone else to perform them. Tenn. Code Ann. § 5-7-108. Judges should thoroughly discuss routine security measures with their court officers. In the event the need arises for additional security measures, the judge should fully inform the court officer.

2.07 GENERAL SUGGESTIONS

The security and privacy of judges may be protected by isolating their chambers and access ways including parking lots, building entrances, corridors, and elevators. The removal of names from entrance ways, parking places, and house directories may be employed as a precautionary measure. Facilities for jurors should isolate the jurors from lawyers, witnesses, parties, and the media.

2.08 COURTROOM SECURITY COSTS

Statutory authority exists to collect monies earmarked for courtroom security. These collections come from two different types of court costs. First, Tenn. Code Ann. § 8-21-401(i)(3) requires that a court cost of $7.00 be collected for continuances. Of the $7.00 continuance fee, $2.00 is earmarked for use by the local government for courtroom security. The statute requires that this $2.00 continuance fee be taxed for each continuance and collected at the conclusion of the case. Tenn. Code Ann. § 8-21-401(i)(3). Second, effective July 1, 2008, local governing bodies are authorized to adopt a litigation tax of $25.00 for all civil and criminal cases. Proceeds of this litigation tax are to be used for courtroom security. Tenn. Code Ann. § 67-4-601(b)(6). However, effective July 1, 2012, this litigation tax may also be used "for the purpose of obtaining and maintaining software and hardware associated with collecting, receiving and maintaining records for law enforcement agencies including county sheriff offices, jails and municipal or metropolitan police departments." Tenn. Code Ann. § 67-4-601(b)(7)(B). This may reduce the amount of money available to use for court security.

CHAPTER 3

DISQUALIFICATION AND SUBSTITUTION OF JUDGES

Contents **Section**

3.01 GROUNDS OF LEGAL INCOMPETENCY AND DISQUALIFICATION PROCEDURES

A. Grounds for Disqualification

Judicial incompetency refers to the lack of ability, legal qualification, or fitness to discharge the required duties of a judge. Unless the parties consent, no judge or chancellor is competent to sit when the judge or chancellor:

(a) has an interest in the event of any cause;
(b) is connected with any party, by affinity or consanguinity within the sixth degree computing by the civil law;
(c) has been of counsel in the cause;
(d) has presided over the same cause in an inferior court; or
(e) in criminal cases for felony, where the person upon whom, or upon whose property, the felony has been committed, is connected with the judge or chancellor by affinity or consanguinity within the sixth degree, computing by the civil law.

Tenn. Code Ann. § 17-2-101; Tenn. Const. Art. VI § 11.

The Code of Judicial Conduct ("Code") also provides guidance regarding disqualification. Tenn. Sup. Ct. R. 10, RJC 2.11. The comments to Tenn. Sup. Ct. R. 10, RJC 2.11 provide additional explanation regarding certain scenarios pertaining to disqualification.

Blanket disqualification "simply because a litigant, in a contested matter, is a licensed attorney" is not listed or contemplated by the Code as a basis for recusal. "Rather, judges should review the matters in conjunction with the Code and consider them on a case-by-case basis." Additionally, the Code "requires recusal if the judge, while associated with a lawyer or law firm, can be said to have obtained actual or inferred knowledge of the matter before him". However, "the Code does not require recusal simply because a judge was associated with the lawyer appearing before the court." Judicial Ethics Committee's Opinion No. 22-02.

B. Disqualification Procedures

Tennessee Supreme Court Rule 10B establishes procedures for seeking disqualification or recusal of judges of courts of record, appellate court judges, judicial officials for courts other than courts of record, and an expedited appeal process for decisions on motions for recusal or disqualification. *See* Tenn. Sup. Ct. R. 10B. In addition, Tenn. Sup. Ct. R. 11, § VII sets out the procedure to follow upon recusal for the appointment or designation of a substitute judge.

Administrative Office of the Courts ("AOC") Policies 4.01 and 4.02, revised versions effective September 1, 2022, provide additional information for the designation process.

1. Courts of Record

A party may file a written motion seeking the disqualification or recusal of a judge of a court of record, or a court acting as a court of record (e.g., a general sessions court exercising domestic relations jurisdiction, etc.), supported by a sworn affidavit that states all personal knowledge relating to the motion. The motion should state all factual and legal grounds in support of disqualification of the judge and include an affirmation that the motion is not made for any improper purpose. The motion must be filed promptly after a party learns or reasonably should have learned of the facts that are basis for the recusal, but no later than ten days before trial, absent a showing of good cause supported by an affidavit. A party represented by counsel may not file a pro se motion for recusal or disqualification. Tenn. Sup. Ct. R. 10B, § 1.01.

While the motion is pending, the judge whose disqualification is sought is not permitted to take any action on the case, except for good cause, which must be stated in the order in which such action is taken. Tenn. Sup. Ct. R. 10B, § 1.02. The judge must "act promptly" on the motion, entering a written order granting or denying the motion. When denying the motion, the order shall include the grounds upon which the motion is denied. Tenn. Sup. Ct. R. 10B § 1.03.

When a judge recuses from a case, whether by granting a party's motion or upon the Court's own initiative, the recusing judge shall not participate in selecting his or her successor unless all parties agree to allow the judge to participate. If the parties agree, the judge may seek interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(1) . Otherwise, the presiding judge or presiding judge pro tempore of the judicial district may enter an interchange order in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(2) or (3), in sequential order. If such an interchange cannot be obtained, the presiding judge or presiding judge pro tempore shall request a designation by the Chief Justice by using the designation request form appended to Tenn. Sup. Ct. R. 10B. Tenn. Sup. Ct. R. 10B, § 1.04 and Tenn. Sup. Ct. R. 11, § VII(c)(4). If the presiding judge is the only judge in the district, the judge shall skip the first steps and request a designation by the Chief Justice pursuant to Tenn. Sup. Ct. R. 11, § VII(c)4.

To request a designation by the Chief Justice, a copy of the order of recusal and any other pertinent details must be sent via email to the AOC to DesignationRequests@tncourts.gov .

2. Appellate Court Judge or Supreme Court Justice

The process for seeking the disqualification or recusal of a Judge on the Court of Appeals, Court of Criminal Appeals or a Justice of the Supreme Court is similar to process for seeking the disqualification or recusal of a judge of a court of record. A motion stating factual and legal grounds for disqualification, supported by a sworn affidavit of personal knowledge and certifying that the

motion is not filed for an improper purpose must be filed with the appropriate court. A party represented by counsel may not file a pro se motion for recusal or disqualification. Tenn. Sup. Ct. R. 10B, § 3.01. The judge or justice must "act promptly" to enter a written order denying or granting the motion, stating specific grounds if the motion is denied. Tenn. Sup. Ct. R. 10B, §§ 3.02, 3.03.

3. Judicial Officers other than Judges of a Court of Record

The process for seeking the recusal or disqualification of a judicial official that presides over a tribunal that is not a court of record or an appellate court is similar to the process utilized for judges of courts of record and appellate court judges and justices. The process set out in Tenn. Sup. Ct. R. 10B, § 4 applies to general sessions courts (when not exercising jurisdiction that belongs to a court of record), municipal courts, judicial commissioners, magistrates, masters and other judicial officers. One significant difference in the process for these types of officials is that the motion for recusal or disqualification may be made either orally or in writing. In either case, the motion should be supported by an affidavit under oath or a declaration under penalty of perjury. The motion shall state with specificity the factual and legal grounds for the disqualification and certification that the motion is not being made for an improper purpose. A party represented by counsel cannot make a pro se motion for recusal or disqualification. Tenn. Sup. Ct. R. 10B, § 4.01. A judicial officer is not permitted to make further orders in the case except for good cause stated in the order taking action, while the motion for recusal is pending. Tenn. Sup. Ct. R. 10B, § 4.02. The judicial officer must act promptly to enter a written order denying or granting the motion. A notation on the warrant, citation or other pleading is sufficient to meet the written order requirement. Tenn. Sup. Ct. R. 10B, § 4.03.

When a judge recuses from a case, whether by granting a party's motion or upon the Court's own initiative, the recusing judge shall not participate in selecting his or her successor unless all parties agree to allow the judge to participate. If the parties agree, the judge may seek interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(1). If the recusing judge is the only general sessions or juvenile judge in the county, the judge shall skip the first steps and request a designation by the Chief Justice pursuant to Tenn. Sup. Ct. R. 11, §VII(c)4, using the designation request form appended to Tenn. Sup. Ct. R. 10B.

To request a designation by the Chief Justice, a copy of the order of recusal and any other pertinent details must be sent via email to the AOC to DesignationRequests@tncourts.gov .

4. Appeals of Orders Denying a Motion for Recusal

An appeal may be sought as of right from an order denying a motion for recusal or disqualification in a court of record. An accelerated interlocutory appeal may be sought by filing a petition for recusal appeal in the appropriate appellate court within twenty-one days of the trial court's entry of the order. An appeal on the recusal motion may also be sought at the conclusion of the case. However, these two alternative methods of appeal are the exclusive methods of appellate review of any issue concerning the denial of a motion for recusal or disqualification. Tenn. Sup. Ct. R. 10B, § 2.01. The Supreme Court Rule establishes the requirements for the contents of the petition and the filing of an appellate bond. Tenn. Sup. Ct. R. 10B, § 2.02. The trial court proceedings are not automatically stayed by the filing of an appeal. However, either the trial court or appellate court may issue a stay upon the motion of a party or the Court's own initiative. Tenn. Sup. Ct. R. 10B, § 2.04. The appellate court may find that the petition and supporting documents are sufficient to require no answer from the other parties and act summarily on the appeal, order the other parties file an answer, or require further briefing by the other parties pursuant to a schedule set by the court. S. Ct. R. 10B, §

2.05. The appellate court may act without oral argument, reviewing the record *de novo*. Orders on the appeal must state with particularity the basis for the ruling. S. Ct. R. 10B, § 2.01. A decision by the appellate court on the issue of disqualification or recusal may be appealed to the Supreme Court by permission, and will be reviewed *de novo*. S. Ct. R. 10B § 2.07.

When appealing the denial of a motion for recusal or disqualification of a judge of Court of Appeals or Court of Criminal Appeals, the party may file a motion seeking *de novo* review by the other judges of the court within fifteen days of the order. If the motion for review is denied, an accelerated appeal as of right lies to the Tennessee Supreme Court and may be sought within 15 days of the denial of review. S. Ct. R. 10B, § 3.02.

An appeal from the denial of a motion for recusal or disqualification of a justice of the Supreme Court, the party may file a motion, within fifteen days of the order of denial, seeking a *de novo* review of the order by the remaining justices of the Supreme Court. S. Ct. R. 10B, § 3.03.

Appeals from other judicial officials depend upon the forum of the court where the motion for recusal or disqualification is sought. The laws applicable to appeals from the forum court are applicable to appeals of the order on the motion for recusal. S. Ct. R. 10B, § 4.04.

5. Ethical Complaints

The provisions of Tennessee Supreme Court Rule 10B do not affect the right of any person to file an ethical complaint against a judge with the Board of Judicial Conduct. Such complaints must be filed pursuant to the process established by Title 17, Chapter 5, Tennessee Code Annotated and the Rules of Procedure adopted by the Board of Judicial Conduct. Tenn. Sup. Ct. R. 10B, § 5.

3.02 SPECIAL JUDGES

A. Trial Judges

When a judge of a trial court fails to attend, or is unable to hold court, the following procedure shall be followed, in the sequence designated, for the selection of a substitute judge:

1) The judge shall seek to interchange with another trial court judge;

2) The judge shall apply to the presiding judge or presiding judge pro tempore of the judicial district to effect an interchange with an active judge of that judicial district;

3) The presiding judge or presiding judge pro tempore of the judicial district shall effect an interchange with a judge from another judicial district by requesting assistance from other presiding judges;

4) The presiding judge or presiding judge pro tempore of the judicial district shall request from the AOC the designation of a judge by the Chief Justice.

Tenn. Sup. Ct. R. 11, § VII(c).

As noted in AOC Policy 4.01, § VI(C), the AOC, absent special circumstances, cannot secure a replacement when the regular judge's absence results from:

1) Attendance at a conference, educational seminar or speaking engagement;
2) Attendance at an annually scheduled state or local bar association meeting
3) Scheduled vacation; or
4) Regularly scheduled administrative days or weeks in which the judge rotates off the bench to handle administrative matters.

Special judges may be utilized to alleviate congestion and delay in the disposition of litigation and to try cases for any judge who, for any reason is unable to do so. In both circumstances, the Chief Justice assigns a special judge to hear the case. Tenn. Code Ann. §§ 17-2-109 - 110.

Separate statutes give the governor the power to commission a special judge to serve in the place of an incompetent, sick, or disabled judge. Tenn. Code Ann. §§ 17-2-105 - 116. The statutes require that the governor appoint someone with the qualifications required of a chancellor or judge. Tenn. Code Ann. § 17-2-116 (a)(1).

B. General Sessions Judges

1. General Procedure

If a general sessions or juvenile court judge finds it necessary to be absent from holding court, the judge may seek a special judge in accordance with the requirements of and in the numerical sequence provided by Tenn. Code Ann. § 16-15-209(a).

1) The judge shall attempt to interchange with another current general sessions or juvenile court judge, either within the county or outside the county. If another judge cannot serve by interchange, the judge may seek to find a former or retired judge who will, by mutual agreement, sit as special judge by designation of the Chief Justice of the supreme court;

2) The judge may request assistance from the AOC in locating a judge to sit as special judge by designation of the Chief Justice of the supreme court;

   As noted in AOC Policy 4.02, § VI(C), the AOC, absent special circumstances, cannot secure a replacement when the regular judge's absence results from:

   1) Attendance at a conference, educational seminar or speaking engagement;
   2) Attendance at an annually scheduled state or local bar association meeting
   3) Scheduled vacation; or
   4) Regularly scheduled administrative days or weeks in which the judge rotates off the bench to handle administrative matters.

3) ***Only after exhausting the procedures set out above***, a judge may appoint a lawyer ***from a list, on a rotating basis***, of lawyers that have been previously approved by the

judge or judges of the district or county who are constitutionally qualified, in good standing, and possess sufficient experience and expertise.

Tenn. Code Ann. § 16-15-209 (emphasis added). Lawyers appointed as special judge are subject to the limitations discussed in the subsection 3 which follows.

The statute provides separate provisions for the appointment of special judges in Shelby County. *Id.* at (e) - (h).

2. "Sudden and Unexpected Emergency"

Notwithstanding the procedures set out in the General Procedure section above, a general sessions or juvenile court judge who encounters a sudden and unexpected emergency which causes the judge to be absent from court may forego the procedural requirements of those subsections and appoint a lawyer in accordance with Tenn. Code Ann. § 16-15-209(a)(3). The circumstances requiring the appointment of a lawyer pursuant to this subsection shall be entered upon the minutes or other permanent record of the court in addition to the information required in subdivision (a)(3). Tenn. Code Ann. § 16-15-209(d).

3. Limitations on Lawyers Sitting as Special Judge

A lawyer who serves as a special judge in general sessions or juvenile court is subject to the following limitations:

1) The lawyer may preside only if the parties and counsel are notified that the duly elected or appointed judge will be absent and that a practicing lawyer will serve as a special judge;

2) The parties choose to proceed and not to continue the case pending return of the duly elected or appointed judge; and

3) The lawyer shall not approve the payment of attorney's fees, involving an indigent defense claim or any discretionary fees. A special judge shall approve fees only when the exact amount is set by statute.

4) At the opening of any court session presided over by a lawyer appointed pursuant to this procedure, an announcement shall be made to persons in attendance conveying the information contained in numbers (1) and (2) above. The making of such an announcement constitutes compliance with the notice requirements.

Tenn. Code Ann. § 16-15-209(a)(3). There are specific provisions concerning appointment, service requirements and/or limitations, and reporting requirements on the use of special judges in general sessions courts that are applicable to Shelby County. These provisions are found in Tenn. Code Ann. § 16-15-209(e)-(h).

3.03 INTERCHANGE

Judges may interchange with each other whenever personal convenience, may require. A judge sitting for another by interchange need not be commissioned by the governor and has the same power and jurisdiction as the judge or chancellor in whose place the judge is acting. Tenn. Code Ann. § 17-2-206. Interchange occurs between judges. You do not need to contact the AOC or Chief Justice for approval or formal action.

State judges have an affirmative duty to interchange if a judge has died, is unable to hold court, if two or more judges have agreed to a mutually convenient interchange, or if the Chief Justice has assigned the judge by order and pursuant to Tennessee Supreme Court Rule 11 to another court. Tenn. Code Ann. § 17-2-202. Special judges appointed under Sections 17-2-116 - 117 have the same power to interchange as elected judges. Tenn. Code Ann. § 17-2-207.

Likewise, a statute specifically allows judges of general sessions courts and juvenile courts to interchange with each other as cause or mutual convenience may require. Except for residence requirements, the judge sitting by interchange must possess all of the qualifications of the regular judge. Tenn. Code Ann. § 17-2-208. In addition, general sessions judges are authorized to sit by interchange for municipal court judges. Tenn. Code Ann. § 16-18-312.

3.04 SENIOR JUDGES

The utilization of senior and retired judges must be requested and scheduled through the Administrative Office of the Courts. Such requests must be sent via email to DesignationRequests@tncourts.gov.

CHAPTER 4

OATHS

Contents **Section**

4.01 OATHS OF OFFICE

Every person elected or appointed to any "office of trust or profit" under the Tennessee Constitution or laws must take an oath of office and an oath to support the United States and Tennessee Constitutions. Tenn. Const. Art. 5, § 1. The oath of office, if not otherwise specified by statute, is: "I do solemnly swear that I will perform with fidelity the duties of the office to which I have been appointed (or elected), and which I am about to assume." Tenn. Code Ann. § 8-18-111.

4.02 JUDGES

Every judge before beginning the duties of office must take an oath or affirmation to support the United States and Tennessee Constitutions, to administer justice without respect of persons, and to discharge impartially all the duties incumbent on a judge to the best of the judge's skill and ability. Tenn. Code Ann. § 17-1-104. Administration of the oath is governed by Tenn. Code Ann. §§ 17-1-104, 16-15-203, 8-18-107, and 8-18-109. Such an oath may be taken any time after the judge's election results are certified but before beginning the duties of the office. Tenn. Op. Atty. Gen. No 80-427. The oath taken by an officer whose duties are not limited to one (1) county, such as a judge of the supreme court or circuit court or a chancellor, must be filed with the certificate required by Tenn. Code Ann. § 8-18-107, in the office of the secretary of state. Tenn. Code Ann. § 8-18-108. Judges of general sessions, retired supreme court justices, and retired inferior court or general sessions judges, as well as other officers whose general duties are confined to a single county, shall file the oath and certificate in the office of the county clerk. Tenn. Code Ann. § 8-18-109.

4.03 JUDGES ADMINISTERING OATHS TO OTHER OFFICERS

When the statutes do not otherwise provide, judges, chancellors, retired judges, and retired chancellors are authorized to administer oaths of office. Tenn. Code Ann. §§ 8-18-107, 109. While many of the oaths for particular offices are specified by statute, a general oath to be used in the absence of a specific one is found at Tenn. Code Ann. § 8-18-111.

4.04 GRAND JURY

The judge shall administer the following oath to the foreperson and members of the grand jury:

> You, as members of the grand jury, do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, of all offenses given you in charge, or otherwise brought to your knowledge, committed or triable within this county; that you will keep secret the state's counsel, the other jurors', and your own; that you will present no person from hatred, malice, or ill will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but that you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God.

Tenn. R. Crim. P. 6(a)(4).

4.05 PAUPER'S OATH

According to statute, any state resident may commence any civil action without giving security for costs and without paying litigation costs by filing this oath of poverty: "I do solemnly swear, under penalty of perjury, that, owing to my poverty, I am not able to bear the expense of the action which I am about to commence, and that I am justly entitled to the relief sought, to the best of my belief." Tenn. Code Ann. § 20-12-127. The oath must be accompanied by an affidavit of indigency as prescribed by court rule. The oath does not relieve the person from responsibility for the payment of costs ultimately, but suspends collection until taxed by the court. *Id.*

4.06 INTERPRETERS

Tennessee Rule of Evidence 604 provides that interpreters are subject to the rules and statutes relating to both qualifications as an expert and the administration of an oath or affirmation to make a true interpretation. The interpreter oath can be found in Section 4(c) of Tennessee Supreme Court Rule 42.

4.07 JURORS

Jurors in Tennessee are sworn according to the common law form. as follows: "Do you and each of you solemnly swear (or affirm) that you will well and truly try the issues to be joined between _____and _____and a true verdict render thereto according to the law and evidence." In a felony case, no juror is sworn until all jurors are selected. The whole jury is then sworn together. Tenn. Code Ann. § 40-18-106.

4.08 WITNESSES

Before testifying, a witness must declare by oath or affirmation that the witness will testify truthfully. The oath or affirmation must be administered in a form "calculated to awaken the witness' conscience and impress the witness' mind with the duty" to testify truthfully. Tenn. R. Evid. 603.

Witnesses before the grand jury are administered the oath by either the clerk of the court or the foreperson of the grand jury. Tenn. R. Crim. P. 6(j)(4).

4.09 GUARDIANS, NEXT OF FRIENDS, AND PERSONAL REPRESENTATIVES

Three statutes provide for civil suits to be prosecuted or commenced by individuals appointed to represent others as guardian, guardian *ad litem*, next of friend, or personal representative. These representatives are not required to give bond or post security for costs. Instead they must subscribe to an oath that the representative has no property of the represented person or that the represented person has insufficient property to bear the expense of the action and that the representative believes that the represented person is entitled to the relief sought. Although the statutes vary somewhat as to whether an affidavit of indigency is mandatory, Tenn. Code Ann. §§ 20-12-129, -130, or discretionary, Tenn. Code Ann. § 20-12-128, the better procedure would suggest that an affidavit of indigency accompany the oath.

CHAPTER 5

JUROR SELECTION

Special thanks to Judge Steve Dozier and Judge J.B. Bennett for their edits and review of this chapter.

Contents **Section**

5.01 RIGHT TO JURY

The United States and Tennessee Constitutions provide for the right to a jury trial in most cases. U.S. Const. amend. VI; U.S. Const. amend VII; Tenn. Const. Art. I, § 6; Tenn. Const. Art. VI, § 14. While the right to a jury trial in a civil case is waived unless demanded, the right to a jury trial in a criminal case is mandatory unless waived. Tenn. R. Civ. P. 38; Tenn. R. Crim. P. 23.

5.02 NUMBER OF JURORS

Pursuant to Tenn. R. Civ. P. 47 and Tenn. R. Crim. P. 24, a "regular jury" in both civil and criminal cases consists of 12 persons. In civil cases, the parties may agree to a jury of fewer than 12 jurors or agree that a verdict of the majority of jurors will be considered the verdict of the jury. Tenn. R. Civ. P. 48. In a criminal case, fewer than 12 jurors may render a verdict under limited circumstances. *See State v. Bobo*, 814 S.W.2d 353, 359 (Tenn. 1991).

5.03 QUALIFICATIONS

A person is qualified and competent to serve as a juror if he or she: (1) is at least 18 years of age; (2) is a United States citizen; (3) is a Tennessee resident; (4) has been a resident of the

county for 12 months; and (5) has not been convicted of perjury, subornation of perjury, a felony or any other infamous offense. Tenn. Code Ann. §§ 22-1-101 -102. Unless all parties consent, the law also excludes from service those who are interested in a case or are connected with a party within six degrees. Tenn. Code Ann. § 22-1-104. A juror may be discharged from service for any other reasonable and proper cause in the court's judgment. A state of mind on the juror's part preventing that juror from being impartial shall constitute such cause. Tenn. Code Ann. § 22-1-105.

5.04 EXEMPTIONS / HARDSHIPS / POSTPONEMENTS

The policy of the State of Tennessee is that all qualified citizens are obliged to serve on a jury when summoned, unless excused. Tenn. Code Ann. § 22-1-101. A prospective juror may be excused due to a documented mental or physical condition rendering the person unfit for service. Tenn. Code Ann. § 22-1-103(a). A prospective juror may be excused due to extreme physical or financial hardship. Tenn. Code Ann. § 22-1-103(b). A prospective juror who is seventy-five (75) years of age or older may be excused upon a declaration that he or she is incapable of jury service due to mental or physical condition. Tenn. Code Ann. § 22-1-103(e).The foregoing excuses are temporary, lasting for no more than twenty-four (24) months, unless the Court determines the reason for the excuse is permanent. Tenn. Code Ann. § 22-1-103(d). A prospective juror may seek a postponement for no longer than twelve (12) months. Tenn. Code Ann. § 22-2-315(a). A second postponement for no longer than twelve (12) months requires a showing of an extraordinary event (e.g. death in the prospective juror's family, etc.) Tenn. Code Ann. § 22-2-315(c).

5.05 SELECTION OF JURY LIST, POOL, AND VENIRE / PANEL

A. Jury Commissioners

Jury commissioners have been replaced in each county by a jury coordinator, who shall be the circuit court clerk unless the judges appoint another person to serve in that position. Tenn. Code Ann. § 22-2-201.

B. Jury List and Jury Pool

The names of prospective jurors for the jury list, which cannot be retained for more than two years, shall be selected from "licensed driver records or lists, tax records, or other available and reliable sources" other than permanent voter registration records. Tenn. Code Ann. §§ 22-2-301, -302. These names shall be selected by random, automated means unless this technology is unavailable, in which case the county may manually select the names. *Id.* If the names are selected manually, the jury coordinator selects the number of names designated by the presiding judge. Tenn. Code Ann. § 22-2-302. The presiding judge may delegate this responsibility, and any other responsibilities related to the jury selection process, to another chancellor or judge who is authorized to conduct jury trials in the county at issue. Tenn. Code Ann. § 22-2-316.

The members of the jury pool are selected, either manually or through automated means, from the jury list. Tenn. Code Ann. §§ 22-2-304, -305. The presiding judge directs the jury

coordinator to select a particular number of jurors to be included in the jury pool, and all members receive a jury service summons. *Id.*; Tenn. Code Ann. § 22-2-307, -308.

C. Summons

The jury coordinator may, but is not required to, utilize the jury summons form drafted by the AOC. If the coordinator does not use the AOC's form, which is posted on the AOC's website, the summons prepared by the coordinator must include all of the information listed in Tenn. Code Ann. § 22-2-306. Although personal service must be conducted by the sheriff, either the sheriff or the jury coordinator may summon jurors by first class mail. Tenn. Code Ann. § 22-2-307.

D. Venire / Panel

The grand jury and the jury venire/panel are groups of jurors selected from the jury pool. A petit jury is selected from the jury venire/panel.

E. List of Persons Disqualified or Potentially Disqualified

> 2018 Tenn. Pub. Acts, Ch. 837 has amended T.C.A. Title 22, Chapter 2, by adding the following as a new section: (a) The jury coordinator shall prepare or cause to be prepared a list of all persons disqualified or potentially disqualified as a prospective juror from jury service due to being a non-United States citizen, convicted of a felony, deceased, not a resident of this state, or not a resident of the county. The list must be prepared and sent to the administrator of elections according to the jury summons cycle used by the court clerk. Nothing in this section prevents the list from being sent more frequently. The list may be provided by mail, facsimile transmission, or email. (b) The jury coordinator shall provide the administrator of elections with the following information about the disqualified juror: (1) The full name of the disqualified juror; (2) Current and prior addresses, if any; (3) Telephone number, if available; (4) Date of birth; and (5) The reason the prospective juror was disqualified. (c) After verifying that the person is a registered voter, the administrator of elections shall follow the procedures listed in § 2-2-106 or § 2-2-141. (d) ln addition to the list of names, if the jury coordinator has documentation showing the person's disqualification under subsection (a), the documentation may be forwarded to the administrator of elections.

Lawrence A. Pivnick, 2 Tenn. Cir. Ct. Prac. § 25:5

5.06 FAIR CROSS-SECTION

Criminal defendants "are not entitled to a jury of any particular composition," nor are they entitled to petit juries which "mirror the community and reflect the various distinctive groups in the population." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *State v. Hester*, 324

S.W.3d 1, 36-47 (Tenn. 2010) (discussing multiple jury selection issues, including a fair cross-section issue). However, they are constitutionally entitled to a petit jury which is "drawn from a source fairly representative of the community." *Id.*

It is not necessary for the defendant to be a member of the class (a particular gender or race, for instance) to have standing to object to the exclusion of that class. *Taylor*, 419 U.S. at 526. Instead, to establish a prima facie violation, the defendant merely must demonstrate the following:

> (1) that the group alleged to be excluded is a "distinctive group" in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979); *see also Berghuis v. Smith*, 130 S.Ct. 1382 (2010).

If the defendant satisfies this burden, the state then "bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." *Duren*, 439 U.S. at 368.

5.07 FAILURE TO APPEAR

Pursuant to Tenn. Code Ann. § 22-2-306, the juror summons must include, among other things, the processes by which a juror may request to be excused due to age or a hardship or otherwise request a postponement of jury service, and must also specify the penalty for a juror's failure to appear or respond to the summons in the manner specified by the court. If a summoned juror who has not been excused or discharged fails to appear or respond as directed, the court shall issue a show cause order. Tenn. Code Ann. § 22-2-309. If the court finds the juror's explanation to be inadequate, the court shall find the juror to be in civil contempt and assess a penalty of not more than $500 plus costs, but the court must suspend payment of the amount in excess of $50 with the condition that the juror complete his or her service. *Id.*

5.08 PROCEDURES

Although the examination of jurors and the number and nature of challenges are discussed in general terms below, trial courts should consult Tenn. R. Civ. P. 47 and Tenn. R. Crim. P. 24 regarding the detailed procedures that must be followed during the jury selection process. Failure to comply with the rules' requirements may result in a new trial. *See State v. Frausto, 463 S.W.3d 469, 483-486. (Tenn. 2015)(superseding State v. Coleman).*

5.09 RIGHT TO EXAMINE

Parties in civil and criminal cases have a right to examine prospective jurors, called "voir dire." Tenn. Code Ann. § 22-3-101; Tenn. R. Civ. P. 47; Tenn. R. Crim. P. 24. The court may also question jurors. Lawrence A. Pivnick, 2 Tenn. Cir. Ct. Prac. § 25:6. Tenn. R. Crim. P. 24; *State v. Doelman*, 620 S.W.2d 96, 100 (Tenn. Crim. App. 1981). At or near the beginning of voir dire, counsel are allowed to introduce themselves and to make brief, non-argumentative remarks about the general nature of the case. Tenn. R. Civ. P. 47.01. Voir dire is used to determine if potential jurors satisfy the statutory requirements to serve and can give the parties a fair and impartial trial. *See State v. Howell*, 868 S.W.2d 238, 247 (Tenn. 1993)

The court may allow individual voir dire during the examination process, and this method is frequently used to question prospective jurors regarding the extent of their knowledge of the facts of a high-publicity case as well as their views regarding the death penalty in a capital murder case. Tenn. R. Civ. P. 47; Tenn. R. Crim. P. 24; *State v. Reid*, 91 S.W.3d 247, 291-92 (Tenn. 2002) (appendix). However, the court is not required to permit individual voir dire. The method and scope of voir dire are within a court's discretion, and the court will not be reversed absent an abuse of that discretion. *See Reid*, 91 S.W.3d at 291.

Although Tenn. R. Crim. P. 24 requires the court to disclose personal information regarding prospective jurors upon the request of a party in a criminal case, courts have the discretion to impanel anonymous jurors under limited circumstances. *State v. Ivy*, 188 S.W.3d 132, 142-45 (Tenn. 2006).

5.10 CHALLENGES FOR CAUSE

After examination, the trial judge has wide discretion in both civil and criminal cases to excuse unqualified jurors. *See, Danmole v. Wright*, 933 S.W.2d 484, 487 (Tenn. Ct. App. 1996)(citing Vines v. State, 231 S.W.2d 332, 334(Tenn. 1950). If not excused by the trial judge, either party to an action may challenge for cause any potential juror who is unqualified, incompetent, or otherwise statutorily excluded from service. Tenn. Code Ann. §§ 22-1-101, -102, -104, -105; 22-3-102, -103. Either party may challenge for cause any juror who has completed jury service within the last twenty-four (24) months or who has an adverse interest in a similar suit involving like questions of facts or involving the same parties. Tenn. Code Ann. § 22-3-102, -103. A party is entitled to jurors who are competent, unbiased and impartial. *See Danmole* at 487. Jurors must be free from even a reasonable suspicion of bias or prejudice to be deemed impartial. *See, id*.

The party challenging a juror must ask the trial judge to excuse the juror for cause, specifying the reason for the challenge. *See, Dukes v. State*, 578 S.W.2d 659, 664 (Tenn. Crim. App. 1978). The party opposing such a challenge may be allowed upon request to try to rehabilitate the juror before the trial judge rules on the challenge. *See, State v. Thomas*, 158 S.W.3d 361, 379 (Tenn. 2005). The trial judge has wide discretion in ruling on a challenge for cause. *See, State v. Howell*, 868 S.W.2d, 238, 248 (Tenn. 1993). But a trial judge's error in this ruling is harmless if the jury was fair and impartial. Id.

In addition, Tenn. R. Crim. P. 24 provides that in a criminal case a juror may be challenged for cause if the "prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror." As the Tennessee Supreme Court has found, mere exposure to information regarding a case is not adequate to require the juror's removal:

> Implicit in Rule 24 is the recognition that jurors do not live in a vacuum. Because certain cases are by their very nature apt to generate publicity, it is not inconceivable that some jurors will have formed an impression or opinion concerning the case. In addressing this problem, the United States Supreme Court has observed:
>
> > It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.
>
> Accordingly, jurors may sit on a case, even if they have formed an opinion on the merits of the case, if they are able to set that opinion aside and render a verdict based upon the evidence presented in court.
>
> Accordingly, in interpreting Rule 24, this court has held that prospective jurors who have been exposed to information which will be developed at trial are acceptable, if the court believes their claims of impartiality. With respect to jurors who have been exposed to information which is inadmissible at trial because of its prejudicial effect, Rule 24 implicitly places the burden upon the trial court to assess the level of prejudice apart from the juror[s'] statements. In either case, the determination of impartiality remains a matter within the trial court's discretion. In other words, [a] trial court's findings of juror impartiality may be overturned only for manifest error.

State v. Mann, 959 S.W.2d 503, 531-32 (Tenn. 1997) (internal quotations and citations omitted).

5.11 PEREMPTORY CHALLENGES

A. Number

In a civil case, each party is allotted four peremptory challenges. Tenn. Code Ann. § 22-3-104(a). If there is more than one party on a "side" of a case, four additional challenges shall be granted to that side. Tenn. Code Ann. § 22-3-104(b). The total challenges per side shall not

exceed eight (8), even when two (2) or more cases are consolidated for trial, and the court shall use its discretion to distribute the number of challenges among the parties on each side of the case. Serving as both a plaintiff and defendant in the same case does not entitle a party to more than four (4) challenges. Tenn. Code Ann. § 22-3-104(c). A plaintiff asserting only a spousal loss of consortium claim is a separate party, entitled to four (4) peremptory challenges. *Tuggle v. Allright Parking Systems*, Inc., 922 S.W.2d 105 (Tenn. 1996). Parents bringing a wrongful death claim for their child are separate parties entitled to a total of eight (8) peremptory challenges. *O'Dneal v. Baptist Memorial*, 556 S.W.3d 759, 770(Tenn. Ct. App. 2018). If a jury is to be comprised of more than twelve (12) to hear the case, each party is entitled to one additional peremptory challenge for each additional juror, but no party may have more than the maximum number of eight (8) peremptory challenges. See, Tenn. R. Civ P. 47.02 and its companion Advisory Commission Comment.

In a criminal case, the number of peremptory challenges depends on the nature of the charged offense. In capital murder cases, each defendant is entitled to 15 challenges, and the state is entitled to 15 challenges per defendant. If the offense is punishable by imprisonment for more than one year, each defendant is entitled to eight challenges, and the state is entitled to eight challenges per defendant. Finally, for an offense which is punishable by imprisonment for less than one year and/or by fine, "each side is entitled to three peremptory challenges for each defendant." Tenn. R. Crim. P. 24. Pursuant to Tenn. R. Civ. P. 47 and Tenn. R. Crim. P. 24, the selection of alternate jurors involves peremptory challenges in addition to those noted above.

B. ***Batson v. Kentucky***

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court concluded that a defendant is not required to establish a long-standing pattern of a prosecutor's discriminatory use of peremptory challenges in order to establish an equal protection violation. Although the propriety of peremptory challenges must be evaluated on a case-by-case basis and the law continues to develop in this area, *Batson* and its progeny provide extensive guidance regarding the manner in which trial courts must evaluate allegations of the discriminatory striking of jurors.

A *Batson* objection can be raised by any party in a civil or criminal case, and the objecting party need not be a member of the suspect class to have standing. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991). The parties bear the following burdens when this issue is raised: (1) The objecting party must establish a *prima facie* case of purposeful discrimination; (2) The burden then shifts to the opposing party, which must offer a neutral explanation for the challenge(s); and (3) The court must determine whether, considering all of the circumstances, the objecting party has established purposeful discrimination. *See State v. Kiser*, 284 S.W.3d 227 (Tenn. 2009); *Zakour v. UT Medical Group, Inc.*, 215 S.W.3d 763 (Tenn. 2007); *State v. Hugueley*, 185 S.W.3d 356 (Tenn. 2006) (discussing the parties' burdens, the types of proof that are adequate to satisfy those burdens, and the comprehensive findings that must be made by the trial judge).

Appellate courts can rely upon transcripts to determine such things as whether peremptory challenges are exercised differently on similarly-situated prospective jurors of different races. *Miller-El v. Dretke*, 545 U.S. 231 (2005). The United States Supreme Court has stressed the importance of the role of the trial judge, who is in the best position to observe the

demeanor of the jurors and attorneys and to make factual findings on the record regarding credibility issues. *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008). However, while a prospective juror's demeanor is important, the Court's holdings in *Snyder* and *Batson* do not stand for the proposition that "a demeanor-based explanation must be rejected if the [trial] judge did not observe or cannot recall the juror's demeanor." *Thaler v. Haynes*, 130 S.Ct. 1171, 1174 (2010).

C. Court's Refusal to Excuse a Juror Counsel Seeks to Strike

Peremptory strikes are not constitutionally required, so a court's erroneous denial of a party's request to strike a particular juror does not alone entitle the party to relief, even if the juror is aware that he or she has been challenged. *Rivera v. Illinois*, 129 S.Ct. 1446 (2009). However, because the peremptory strike procedure is a creature of state law/procedure, states have the authority to devise their own remedies for violations thereof. *Id.*

5.12 ORIENTATION OF THE JURORS

Judges should welcome the opportunity to orient jurors as they commence their jury service. During orientation, the judge will often: (a) make a general statement of the importance of jury service; (b) summarize the jury selection process; (c) review the juror's oath and its purpose; (d) detail the steps of the trial, the purpose of conferences outside the jury's presence, and the importance of following instructions; and (e) describe the expected conduct of jurors during the trial and in the jury room.

In criminal cases, the judge also is required to admonish the jury regarding its conduct during the selection process. After swearing the jurors, the judge must instruct the jury:

> (1) not to communicate with other jurors or anyone else regarding any subject connected with the trial; (2) not to form or express any opinion about the case until it is finally submitted to the jury; (3) to report promptly to the court: (A) any incident involving an attempt by any person improperly to influence any jury member; or (B) a juror's violation of any of the court's admonitions; (4) not to read, hear, or view any news reports concerning the case; and (5) to decide the case solely on the evidence introduced in the trial.

Tenn. R. Crim. P. 24.

Additionally, jurors in criminal cases should be admonished about social media usage. See 7 Tenn. Prac. Pattern Jury Instr. – Crim. 1.09.

5.13 JUROR COMPENSATION

A. Courts

Jurors are entitled to receive a minimum of $10.00 per day unless they are sequestered, in which case they will receive a minimum of $30.00 per day. Counties have the authority to

increase the $10.00 daily rate and/or to compensate jurors for mileage. Tenn. Code Ann. §§ 22-4-101, -103.

B. Employers

An employer must excuse an "employee from employment for each day the employee's service as a juror . . . exceeds three (3) hours." Tenn. Code Ann. § 22-4-106(a). However, "no employer shall be required to compensate an employee for more time than was actually spent serving and traveling to and from jury duty." Tenn. Code Ann. § 22-4-106(b). For example, an employee who serves as a juror for four hours (including travel) is not required to return to work that day, but the employer is only required to compensate the juror for four hours as opposed to compensating the juror for eight hours if the juror typically works an eight-hour day. Moreover, the employer has the discretion to deduct the compensation the court paid the juror for the juror's service. *Id.* For additional information regarding exempt employers as well as the provisions governing employees who work the night shift, see Tenn. Code Ann. § 22-4-106.

5.14 EXCLUDING PUBLIC FROM COURTROOM DURING VOIR DIRE

Although there are exceptions, the general rule is that the accused has a right to a public trial, and this right extends to the voir dire process. Likewise, members of the public have a corresponding right to be present regardless of whether any participants in the proceeding assert that right. Finally, the court must consider alternatives to closing the proceedings even absent the parties' proffer of an alternative. *Presley v. Georgia*, 130 S.Ct. 721 (2010). See also Tenn. Sup. Ct. Rule 30.

Tennessee Rule of Evidence 615 and the Tennessee Constitution allow for a crime victim (or family representative) to be present at any proceeding the defendant is entitled to be present. *State v. Elkins*, 835 S.W.3d 706, 713 (Tenn. 2002); Tenn. Const. Art. I, sec. 35.

5.15 RIGHT TO EXPERTS AND SUBPOENAS IF CHALLENGING JURY SELECTION PROCEDURES

"[A] defendant who makes a *prima facie* showing of a statutory or constitutional violation with regard to the preparation of lists of prospective jurors or the selection of jury venires or petit juries has the right to subpoena appropriate witnesses and documents." *State v. Hester*, 324 S.W.3d 1, 52 (Tenn. 2010). While the appointment of an expert in statistics or demographics may be appropriate in some cases when a particularized need has been established, "[d]efendants do not have an inherent statutory or constitutional right" to such an expert. *Id.* at 48.

CHAPTER 6

WITNESSES

Special thanks to Judge Steve Dozier and Judge J.B. Bennett for their edits and review of this chapter.

Contents **Section**

6.01 SUBPOENAS

A. Civil Cases

In civil cases, the process for the issuance and service of a subpoena is set forth in Tennessee Rules of Civil Procedure Rule 45. The subpoena must be issued by the clerk and must contain the name of the court and the title of the action. It shall command the witness' attendance at a specified time and place. Tenn. R. Civ. P. 45.01. A subpoena may also be issued for documentary evidence, which may include electronically stored information. Tenn. R. Civ. P. 45.02. A subpoena should contain explicit language that states: (1) the witness must appear; and failure to do so may be contempt of court; and (2) the penalties the witness may face if found in contempt of court. Tenn. Code Ann. § 24-2-108.

A subpoena for taking a deposition may command the production of documents, electronically stored information or tangible things related to matters within the Scope of Tenn. R. Civ. P. 26.02. The subpoena is subject to the provisions of Tenn. R. Civ P. 30.02, 37.02, 45.02 and 45.07. A subpoena for production of documentary evidence must state in a prominent place in boldface text: "The failure to serve an objection to this subpoena within twenty-one (21) days after the day of service of the subpoena waives all objections to the subpoena, except the right to seek the reasonable cost for producing books, papers, documents, electronically stored information, to tangible things." Tenn. R. Civ. P. 45.04(1). A resident of this state may be required to give a deposition only in the county where the deponent resides, is employed, transacts in-person business or elsewhere as fixed by court order. Tenn. R. Civ. P. 45.04(2). The deposition subpoena may be served anywhere in the state. Tenn. R. Civ. P. 45.04(1).

A subpoena for trial or hearing testimony may be served anywhere in the state. Tenn. Civ. P. 45.05(1).

Some persons are exempt from subpoena to appear at trial but, instead, are subject to subpoena to give a deposition, by statute, Tenn. Code Ann. § 24-9-101. These persons are:

(1) An officer of the United States;
(2) An officer of this state;
(3) An officer of any court or municipality within the state;
(4) The clerk of any court of record other than that in which the suit is pending;
(5) A member of the general assembly while in session, or clerk or officer thereof;
(6) A practicing physician, physician assistant, advanced practice registered nurse, psychologist, senior psychological examiner, chiropractor, dentist or attorney;
(7) A jailer or keeper of a public prison in any county other than that in which the suit is pending;
(8) A custodian of medical records, if such custodian files a copy of the applicable records and an affidavit with the court and follows the procedures provided in title 68, chapter 11, part 4, for the production of hospital records pursuant to a subpoena duces tecum; and
(9) A licensed clinical social worker, as defined in § 63-23-105 and engaged solely in independent clinical practice, in proceedings in which the department of children's services is the petitioner or intervening petitioner.

Although these persons are exempt from subpoena to trial, a judge may compel the personal attendance of such a witness upon affidavit of a party or a party's attorney that the witness' testimony is important and that the "just and proper effect of the testimony cannot in a reasonable degree be obtained without an oral examination in court." Tenn. R. Civ. P. 45.05(2).

A non-party educator (a teacher with an active teaching license or a school counselor) is not required to be a witness in a trial, civil hearing, deposition, mediation, arbitration or "similar proceeding" involving a domestic dispute (domestic abuse, divorce, parentage or child custody) if attendance would require the educator to be absent from school duties, unless the court finds attendance is necessary to ensure fairness. Tenn. Code Ann. § 24-2-109.

The Uniform Interstate Depositions and Discovery Act was enacted in 2008. This act specifies a subpoena for deposition, issued by a court outside of Tennessee, may be submitted to a clerk in the county in which the discovery is sought to be conducted in this state. Tenn. Code Ann. § 24-9-203. The clerk then promptly issues a subpoena to be served upon the person from whom the discovery is sought. Tenn. Code Ann. § 24-9-203, -204. The subpoena may command production of documents, tangible things or electronically store information, subject to the Tennessee Rules of Civil Procedure. Tenn. Code Ann. § 24-9-205. The subpoena is subject to a protective order, if sought. Tenn. Code Ann. § 24-9-206.

A non-party witness has at least twenty-one (21) days after service to respond, unless he/she agrees otherwise or a court orders otherwise. Tenn. R. Civ. P. 45.07. A non-party witness shall serve, within twenty-one (21) days, any written objection, which obviates compliance with the subpoena absent a court order. Id. The burden is on the issuing party, not the non-party, to file a motion to compel compliance with the subpoena in the issuing court. Id. The failure timely to object waives all objections except the right to request reasonable costs for producing documentary evidence, tangible things or electronically stored information. Id.

A person responding to a subpoena to produce documents or electronically stored information must produce such items as they are kept ordinarily and in a format that is reasonably usable. Tenn. R. Civ. P. 45.08. Subject to court order upon good cause shown, a

responding person need not produce discovery that is not reasonably accessible because of undue burden or cost. Id. Privileged information not subject to discovery must be expressly claimed. Id. Privileged information that is inadvertently disclosed may be "clawed back" upon proper showing to the court. Id.

B. Criminal Cases

In criminal cases, the procedure for the issuance and service of subpoenas for witnesses is set forth in Tenn. Code Ann. §§ 40-17-107 through -110 and Tenn. R. Crim. P. 17. The clerk of the court is required to issue subpoenas for witnesses requested by the state and the defense and for witnesses whose names are endorsed by the district attorney general on the indictment. The subpoena must name the court and the title of the proceeding, and must direct the witness to attend court on a designated date. Tenn. Code Ann. § 40-17-107(a) & (b). As in civil actions, the subpoena may require the production of documentary evidence which may be quashed by the judge if the request is unreasonable or oppressive. As an alternative, the judge may require that the documentary evidence be brought to court for inspection by the court before it is offered as evidence at trial. Statements of witnesses, however, are not subject to subpoena in criminal cases, but must be produced pursuant to Tenn. R. Crim. P. 26.2 upon motion, following the direct examination testimony of the witness. Tenn. R. Crim. P. 17(h).

Tennessee has adopted the "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings." Its provisions are detailed in Tenn. Code Ann. §§ 40-17-201 through -212 and discussed below.

C. Reissuance

A witness who is subpoenaed to testify at a civil case is required to appear until discharged by the court or by the party who subpoenaed the witness. If a case is continued, the witness is not deemed to be discharged and must reappear without a subpoena unless discharged permanently by the court or the party. Tenn. Code Ann. § 24-2-101. Similarly, in a criminal case the subpoena extends to command a witness' appearance to subsequent terms of the court as the court requires until the case is finally completed. Tenn. Code Ann. § 40-17-110.

6.02 SERVICE OF SUBPOENAS

Subpoenas are served by delivering or offering to deliver a copy of the subpoena to the person to whom the subpoena is directed. Tenn. R. Civ. P. 45.03; Tenn. R. Crim. P. 17(f). In criminal cases, service may also be accomplished by leaving a copy with an adult occupant of the witness' usual residence. Tenn. R. Crim. P. 17(f).

Any person authorized by law to serve process may serve a subpoena. The obligation to serve subpoenas falls upon the sheriff, Tenn. Code Ann. § 8-8-201, but sheriffs may call upon persons to perform the service pursuant to the provision of the law. Tenn. Code Ann. § 8-8-220; Tenn. Code Ann. § 40-17-109.

An attorney licensed in the state or the attorney's agent, who is eighteen years of age or older, is also authorized to serve subpoenas if the attorney or any member of the firm is involved

in the case for which the subpoenas are issued. For this service to be valid, both the attorney and the agent must sign the subpoena and the persons serving the subpoena must file an affidavit of return with the issuing clerk naming the person served and detailing the date, place, and manner of service. Tenn. Code Ann. § 23-2-105.

Alternatively, a witness may acknowledge service in writing on the subpoena. Tenn. R. Civ. P. 45.03; Tenn. R. Crim. P. 17(f). A subpoena may be served at any place within the state. Tenn. R. Civ. P. 45.05; Tenn. R. Crim. P. 17(f).

6.03 BAIL FOR MATERIAL WITNESS

If it appears by affidavit that the testimony of a person is material in any criminal proceedings and if it is shown that the witness has refused or will refuse to respond to process, the court may require the witness to give bail. If the person fails to give bail, the court may commit the witness to the custody of the sheriff pending final disposition of the proceeding in which the testimony is needed, may order the release if the witness has been detained for an unreasonable length of time, and may modify at any time the bail requirement. Tenn. Code Ann. § 40-11-110. Bond may be forfeited. Tenn. Code Ann. §§ 40-11-110, -120, -139.

6.04 FAILURE TO APPEAR

A witness who willfully disobeys the requirements of a subpoena in a civil or criminal case may be punished for contempt. Tenn. Code Ann. § 29-9-102; Tenn. R. Civ. P. 45.06; Tenn. R. Crim. P. 17(g). Contempt is punishable by a fine, imprisonment, or both. Unless the law specifies otherwise, the courts of record are limited to a fine of $50 and imprisonment not to exceed ten days for each act of contempt. Tenn. Code Ann. § 29-9-103. *See* Chapter 14, Contempt.

The subpoenaed witness who fails to appear in civil cases is also subject to a penalty of $125 for the failure to appear. Tenn. Code Ann. § 24-2-102. In addition to the $125 penalty for failure to appear, a witness is also liable to the action of the party for the full damages sustained because of the absence of the witness' testimony. The penalty is to be recovered by scire facias in the name of the state. An alternate procedure, whereby a party who subpoenaed a witness that failed to appear may seek a conditional judgment of $25 and scire facias, is set out in Tenn. Code Ann. § 24-2-104.The witness may be relieved from the payment of the penalty if the witness can show sufficient cause for failure to attend. Tenn. Code Ann. § 24-2-106.

Every witness legally bound to appear shall appear and continue to attend until discharged by the court or party at whose instance the witness is summoned. In the event of a continuance, the party need not reissue the subpoena for the witness unless the witness were expressly discharged by the court or party at whose instance they were summoned. Tenn. Code Ann. § 24-2-101.

6.05 UNIFORM LAW (Criminal Cases)

Tennessee has adopted the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings. Tenn. Code Ann. §§ 40-17-201 - 210. It applies only to states of the United States and the District of Columbia and not to foreign countries. *Stubbs v. State*, 393 S.W.2d 150 (Tenn. 1965). It applies to witnesses whose testimony is desired in a grand jury proceeding, investigation, or a criminal proceeding.

A. Within the State

When a judge of a Tennessee court of record in a county where the witness is found receives a certificate from a court of record in a demanding state that has also adopted the uniform law, the Tennessee judge must set a time and place for a hearing and order the witness to appear. The certification from the demanding state must be under the seal of the court and must certify that there is a pending criminal action or grand jury investigation, that the person sought is a material witness, and that the witness' presence is required for a specified number of days. Tenn. Code Ann. § 40-17-203.

At the hearing, the court must issue the summons for the witness with a copy of the certificate attached if the judge determines that: (a) the witness is material and necessary; (b) the subpoena will not cause the witness undue hardship if required to testify in the other state; and (c) the laws of the other state and any state through which the witness will have to travel will protect the witness from arrest and service of process. The certificate is prima facie evidence of all the facts stated in the certificate. Tenn. Code Ann. § 40-17-204. If the judge issues the summons, it must direct the witness to appear and testify at the time and place specified. Tenn. Code Ann. § 40-17-204.

If the certificate from the demanding state recommended custody of the witness, the court may direct that the witness be brought immediately before the judge rather than notifying the witness of the hearing. The judge may also order the witness delivered to an officer of the demanding state rather than issue a summons for the witness' appearance. Tenn. Code Ann. § 40-17-205.

If after being paid or offered payment for mileage and attendance, as provided in Chapter 4 of Title 24, the witness fails, without good cause, to appear and testify, the witness is punished the same as an in-state witness who fails to obey a summons. Tenn. Code Ann. § 40-17-206.

B. Outside the State

A judge of a court of record in Tennessee in which a criminal action or grand jury proceeding is pending may likewise issue a certificate under seal stating that a person who is present in another state is required to appear and testify in this state and the number of days that the witness' appearance will be required. The certificate, which may include a recommendation that the witness be taken into immediate custody and delivered to this state rather than summoned, is only valid in states with laws which provide for commanding persons to attend and testify in criminal proceedings out of state. Tenn. Code Ann. § 40-17-207.

A witness summoned under the act is entitled to compensation as other witnesses in the state. The witness may not be required to remain in the state longer than specified in the certificate. Tenn. Code Ann. § 40-17-208. While traveling to or from a state as a result of a court order based on the provisions of the act, the witness is immune from arrest or service of process in connection with matters which arose prior to the witness' entrance into this state under the summons. Tenn. Code Ann. § 40-17-209.

6.06 COMPETENCY AND PRIVILEGES

The Tennessee Rules of Evidence establish a presumption that every person is competent to be a witness unless a rule or statute specifically provides otherwise. Tenn. R. Evid. 601. This presumption is qualified, however, by evidence rules which require that witnesses testify only as to matters within their personal knowledge, Tenn. R. Evid. 602, and that witnesses must declare by oath or affirmation that they will testify truthfully. Tenn. R. Evid. 603. The oath or affirmation must be administered so as to "awaken the witness' conscience and impress the witness' mind with the duty to [testify truthfully.]" Tenn. R. Evid. 603. Thus, the threshold question for the judge is whether the witness understands the obligations of the oath and will promise to abide by the obligations.

Judges should be aware that the effect of Rule 601 is to reverse the common-law presumption regarding children under the age of fourteen. While those children were presumed incompetent to testify at common law, *Ball v. State*, 219 S.W.2d 166 (Tenn. 1949), the presumption now is just the opposite. Unless evidence is offered to rebut the presumption, a child under fourteen years of age, and virtually all other witnesses, are presumed competent to testify. *State v. Campbell*, 904 S.W.2d 608 (Tenn. Crim. App. 1995). It is incumbent on the judge, however, to assure that the requirements of Rules 602 and 603 are met. Thus, the Tennessee Supreme Court has held that a judge should determine whether a child witness understands the nature and meaning of the oath, has sufficient intelligence to understand the subject matter of the testimony, and is capable of relating the facts accurately. *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993). If raised by opposing party, this determination should be made outside the presence of the jury.

Pursuant to Tenn. R Evid. 501, "[e]xcept 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."

There are a number of statutory privileges listed in the Advisory Commission Comment to Tenn. R. Evid. 501. The statutory language of each listed privilege is provided in that comment which judges may find useful concerning the applicability of each listed statutory privilege. Some of the other privileges are found in Title 24, Chapter 1, Part 2, Privileged Communications. *See*, Tenn. Code Ann. § 24-1-202, Transactions with mentally incompetent party, Tenn. Code Ann. § 24-1-203, Transactions with decedent or ward-Dead-man's statute, and

Tenn. Code Ann. § 24-1-204, Communications during crisis intervention. There is also a qualified privilege covering discovery of documents and tangible things prepared in anticipation of litigation or for trial by or for a party or that party's representative. This qualified privilege is commonly called the "work product doctrine." *See*, Tenn. R. Civ. P. 26.02(3) and common law interpreting this rule and qualified privilege. There is also a qualified privilege protecting against the discovery of the identity of, facts known by, or opinions held by a consulting expert in anticipation of litigation or preparation for trial who is not to be called as a trial witness (except as allowed by Tenn. R. Civ. P. 35.02). Tenn. R. Civ. P. 26.02(4)(B). As with all privileges, a party withholding information due to a privilege must make the claim expressly, describing the information withheld to a degree to enable other parties to assess the applicability of the privilege, without revealing the privileged information. Tenn. R. Civ. P. 26.02(5).

6.07 EXAMINATION

A. Scope of Witness Examination

The trial judge is vested with considerable discretion in regulating the manner of examination of witnesses. Tenn. R. Evid. 611. A witness is subject to cross-examination, however, on any matter relevant to any issue in the case, including credibility. Thus, Tennessee follows the wide open cross-examination rule and does not limit cross-examination to the scope of direct examination except in one specific circumstance. If a hostile witness, adverse party or witness identified with an adverse party is called by a party, cross-examination is limited to the subject matter of the direct examination, but may be accomplished by the use of leading questions. Tenn. R. Evid. 611(c)(2).

If the judge limits cross-examination, the judge must be certain to do so without abusing the exercise of reasonable discretion. On appeal, only a plain abuse of the judge's discretion will provide a basis for reversal. *State v. Gaylor*, 862 S.W.2d 546 (Tenn. Crim. App. 1992).

B. Leading Questions

The trial court likewise has discretion to permit the asking of leading questions. Tenn. R. Evid. 611(c). A judge should not allow leading questions on direct examination except as may be required to develop the witness' testimony. Leading questions are permitted and customary on cross-examination. If a party calls a witness which the court finds to be hostile, the court may allow leading questions. Tenn. R. Evid. 611(c).

C. Jury Questions

Under Tenn. R. Crim. P. 24.1(c) and Tenn. R. Civ. P. 43A.03, jurors may submit written questions to be asked of witnesses, if the court, in its discretion, chooses to allow such questions. However, allowing extensive examination of the witnesses by the jury in a criminal case has been found to be an abuse of discretion. *State v. Jeffries*, 644 S.W.2d 432 (Tenn. 1982). But see *State v. Pate* for discussion of potential appellate issues with this procedure. *State v. Pate*, No. E2016-02566-CCA-R3-CD, 2018 WL 4026500 (Tenn.Crim.App. June 29, 2018).

CHAPTER 7

ADMISSION OF RECORDS

Special thanks to Judge Valerie Smith and Judge Steve Sword for their edits and review of this chapter.

Contents **Section**

7.01 IN GENERAL

Both the Tennessee Rules of Evidence and various statutes provide the mechanisms for the introduction of records. Rule 101 of the Tennessee Rules of Evidence provides for the applicability of the rules in all trial courts except as otherwise provided by statute or Supreme Court rule. Tenn. R. Evid. 101.

7.02 LOST RECORDS

In the event a record or paper that had been filed in a court action becomes lost, a statute allows the evidence to be supplied by the best evidence available given the nature of the case. The statute is for the purpose of enabling one who has previously filed a record in the action to supply evidence of that record in the event it is lost, stolen, or destroyed, and if the record is believed to be necessary to a correct adjudication of the action. Tenn. Code Ann. § 24-8-109. Both the loss and contents of the record must be established by the best evidence available. *Strunk v. State*, 289 S.W. 532 (Tenn. 1926). In order to be accepted by the court with the same force and effect as the original evidence, the evidence must be sufficiently clear, cogent, and definite. *Goins v. University of Tenn. Mem. Research Ctr. & Hosp.*, 821 S.W.2d 942 (Tenn. App. 1991). Examples of acceptable replacement evidence include: affidavits of the district attorney general and the grand jury officer and documentation from the grand jury book to prove a lost indictment or presentment; the clerk's docket and judge's notes when a record book is lost; affidavit of the clerk or counselor to prove lost papers in a case.

In order to file a replacement record for a lost one, an application to do so must be filed with an order of the court granting the application and accepting the replacement evidence. Tenn. Code Ann. § 24-8-109.

Rules 1001 – 1003 of the Tennessee Rules of Evidence apply when the contents of a writing must be proved and the original is lost.

7.03 HOSPITAL RECORDS

Hospital records are defined at Tenn. Code Ann. § 68-11-302(5)(A)-(C). Under the Medical Records Act of 1974, hospital records remain the property of the hospital subject to a court order to produce the records. Tenn. Code Ann. § 68-11-304(a)(1). A person who requests a patient's records is responsible for the reasonable costs of copying and mailing the records. The statute contains presumed reasonable fees. Tenn. Code Ann. § 68-11-304(a)(2)(A)(i)-(iii). The production and introduction of hospital records as evidence is governed by the Hospital Records as Evidence Act found in Tenn. Code Ann. §§ 68-11-401 *et seq.*

7.04 RECORDS OF REGULARLY CONDUCTED ACTIVITIES

Records of regularly conducted activities or the absence of such records are admissible as an exception to the hearsay rule in Tennessee under Tenn. R. Evid. 803(6). An essential element to this exception is that the record was made because of a business duty to record or transmit the information. Otherwise, the requisite trustworthiness is not present. For purposes of this hearsay exception, a business includes every kind of business, institution, association, profession, occupation, and calling, whether or not the business is conducted for profit. For authentication by a certification of the records custodian, see section 7.10 below.

7.05 TELEPHONE RECORDS

Tenn. Code Ann. § 24-7-116 provides for the introduction of telephone records as evidence in judicial proceedings.

7.06 PUBLIC RECORDS OR REPORTS

Records, reports, statements, or data compilations in any form from public offices or agencies are generally admissible. If, however, the circumstances of preparation of the records indicate a lack of trustworthiness, the records are not admissible. Tenn. R. Evid. 803(8). Records and reports of law enforcement officers and personnel are specifically excluded from coverage. Tenn. R. Evid. 803(8).

A. Records of Judgments

Both the rules of evidence and a statute address the admissibility of court records. Tenn. Code Ann. § 24-6-101 provides for the admission of certified copies of final judgments or decrees of courts of record. The evidence rules likewise admit court records, either as public records or as judgments of previous convictions. Tenn. R. Evid. 803.

B. Statutes and Regulations

Judges must take judicial notice of the common law, the federal and state constitutions and statutes, and federal and state supreme court rules. The court may take judicial notice, upon request, of ordinances of local governments, other adopted rules of court, published regulations of federal and state agencies, and the laws, treaties, and conventions of foreign countries. The party requesting that optional judicial notice of law be taken must give reasonable notice of the request to the adverse party. Tenn. R. Evid. 202.

A statute allows an appellate court to take judicial notice of foreign law. Tenn. Code Ann. § 24-6-207.

C. Accident Reports

Accident reports prepared by drivers or law enforcement officers under the provisions of state law are not admissible as evidence in any trial. Tenn. Code Ann. § 55-10-114(b). If requested by a court or party, the Department of Safety must issue a certificate showing that a specified accident report has or has not been made to be in compliance with law. Tenn. Code Ann. § 55-10-114(b). *See also* T.P.I.- Civ. 2.12, Inadmissibility of Police Report.

7.07 REPORTS FOR CHEMICAL TESTS FOR INTOXICATION

Admissibility of reports regarding chemical tests for intoxication are governed by statute. Tenn. Code Ann. §§ 55-10-405 – 412.

7.08 FAMILY RECORDS

Births, deaths, marriages, divorces, baptisms, and other vital statistics may be proven by records of public offices if the report was made pursuant to a legal requirement. They may also be established through statements in marriage, baptism or similar certificates or through records in Bibles, engravings in rings, genealogies, inscriptions on portraits, tombstones, urns, or similar evidence. Tenn. R. Evid. 803(9), (12), (13).

7.09 CHILD FORENSIC INTERVIEWS

A video recording of an interview of a child by a forensic interviewer containing a statement made by the child under thirteen (13) years of age describing any act of sexual contact is admissible and may be considered for its bearing on any matter to which it is relevant in evidence at the trial of the person for any offense arising from the sexual contact if the requirements of Tenn. Code Ann. § 24-7-123(b) are met. See Tenn. Code Ann. § 24-7-123.

7.10 AUTHENTICATION

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. See Tenn. R. Evid. 902.

There are multiple mechanisms for establishing authentication. See Tenn. R. Evid. 901-902. Some records do not require extrinsic proof of authenticity. See Tenn. R. Evid. 902(1)-(11). Note, if the party seeking introduction of records of regularly conducted activity under Tenn. Rule of Evid. 803(6) is relying on certification by a records custodian, the admitting party must provide written notice of that intention to all adverse parties pursuant to Tenn. Rule of Evid. 902(11).

7.11 TEXTS AND OTHER ELECTRONIC INFORMATION

Text messages and other electronic information must be properly authenticated under Tenn. R. Evid. 901 Upon a determination of admissibility, a review under Tenn. R. Evid. 401 and 403 is often warranted. Text messages from a nonparty must also be reviewed as hearsay under Tenn. R. Evid. 803. State v. Austin, M2018-00591-CCA-R3-CD; 2020 WL 6277557 (Tenn. Crim. App. Oct. 27, 2020).

Electronic records are often produced by a process of extraction. Tenn. R. Evid. 901(b)(9) covers authentication of such records.

CHAPTER 8

STATUTORY PRESUMPTIONS

Special thanks to Judge Frank G. Clement, Jr. for his edits and review of this chapter.

Contents **Section**

8.01 CONVEYANCES

Instruments of conveyance that are executed in official capacity by public officers (or by any person occupying a position of trust or acting in a fiduciary relation) are admissible and are prima facie evidence of the facts recited in the instrument. Tenn. Code Ann. § 24-5-101.

8.02 MEDICAL, HOSPITAL, AND DOCTOR BILLS

In a personal injury action in which medical, hospital, or doctor bills were incurred or paid because of the injury, proof that the bills were paid or incurred because of the injury and that they were reasonable and necessary shall be prima facie presumed if the bills are itemized in the complaint (or civil warrant) and a copy of the bills is attached as an exhibit to the complaint (or civil warrant). Tenn. Code Ann. § 24-5-113 (a)(1)-(2). The presumption is only applicable when the total amount of the bills does not exceed $4000. Tenn. Code Ann. § 24-5-113 (a)(3).

In addition to the above procedure, a rebuttable presumption that the bills are reasonable shall attach if an itemization or copies of the bills appended is served on the other parties at least ninety days prior to the trial date. To rebut the presumption, a party must serve a statement of the intention to rebut at least forty-five days before trial. Tenn. Code Ann. § 24-5-113(b).

8.03 NEGLIGENCE OF BAILEE

In any action by a bailor against a bailee for loss or damage to personal property, proof by the bailor that the property was delivered to the bailee in good condition and not returned according to the contract, or returned in damaged condition shall constitute prima facie evidence that the bailee was negligent. This presumption does not apply if the loss or damage was due to the inherent nature of the bailed property. Tenn. Code Ann. § 24-5-111.

8.04 SETTLEMENTS OF PERSONAL REPRESENTATIVES AND GUARDIANS

The settlements of personal representatives and guardians, made in the county court in pursuance of law, are to be taken as prima facie correct. Tenn. Code Ann. § 24-5-102.

8.05 SWORN ACCOUNTS

An affidavit of the plaintiff or the plaintiff's agent to the correctness of an account accompanied with the certificate of a state commissioner, a notary public, or a general sessions judge (with a certificate from the county clerk that the judge is acting judge in the county) is conclusive evidence against the party sued unless that party denies the account under oath. T.C.A. § 24-5-107.

8.06 REPAIR BILLS

In civil actions seeking damages for injury to or improper repair of property, proof that bills were incurred and paid to repair either real or personal property creates a rebuttable presumption of the amount paid and of the need for the repairs. This presumption shall not extend to any payments which exceed the sum total of one thousand dollars. Proof of such payments shall be itemized in the civil warrant or complaint by attaching a list showing payments, amounts, person paid, goods or services for which payment was made and a copy of any invoice, bill or receipt. Failure to attach the invoice, bill, or receipt may be excused, in the court's discretion, if none was rendered, it was lost and cannot be found after diligent search or it has been inadvertently destroyed. Any such payments may be introduced into evidence at trial as though there had been competent testimony as to their reasonableness in amount and necessity, but it shall not constitute proof of any wrongdoing by the defendant. Tenn. Code Ann. § 24-5-114.

CHAPTER 9

INTERPRETERS AND COURT ACCESSIBILITY ISSUES

Special thanks to AOC General Counsel John Coke and AOC Language Access Program Manager Ryan Mouser for their edits and review of this chapter.

Contents **Section**

9.01 GENERALLY

Interpreters may be required for persons involved in court proceedings who are deaf or hard of hearing, or who have limited English proficiency. An interpreter must qualify as an expert and take an oath, and is subject to impeachment. Tenn. R. Evid. 604; *State v. Millsaps*, 30 S.W. 3d 364, 370-71 (Tenn. Crim. App. 2000).

9.02 INTERPRETERS FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY

"Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency ("LEP"). It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier." Tenn. Sup. Ct. R. 41. Appointing an interpreter is a matter of judicial discretion. Tenn. Sup. Ct. R. 42, § 3(a).

Pursuant to Tennessee Supreme Court Rule 42 ("Rule 42"), a court is required to appoint a certified interpreter if one is reasonably available. If a court is unable to locate a certified interpreter after making a "diligent, good faith" effort to do so, the court may appoint a registered interpreter. A non-credentialed interpreter may be appointed only if neither a certified nor a registered interpreter is reasonably available and "the court has evaluated the totality of the circumstances including the gravity of the judicial proceeding and the potential penalty or consequence involved." Section 3 of Rule 42 provides additional guidance regarding the findings required prior to the appointment of a non-credentialed interpreter. *See also State v. Banks*, 271 S.W.3d 90 (Tenn. 2008) (commenting upon the circumstances in which the use of a non-credentialed interpreter may constitute reversible error).

To locate Tennessee's certified and registered interpreters, consult the court interpreter roster on the AOC's website. To get to this page, go to www.tncourts.gov and select "Programs", "Court Interpreters", and then "Find a Court Interpreter." The court should always attempt to appoint a neutral, unbiased interpreter who has no interest in the outcome of the case. *State v. Van Tran*, 864 S.W.2d 465, 476 (Tenn. 1993).

The AOC will compensate interpreters for their interpretation services during general sessions court, a municipal court exercising general sessions jurisdiction, juvenile, probate, circuit, chancery, criminal, or appellate court hearings whether the parties are indigent or not. In cases where the defendants are entitled to court appointed counsel due to indigency, the AOC will compensate the interpreters for assisting defense counsel with out-of-court communication as well as for interpreting for the defendant and other participants who require an interpreter during the court proceeding. Tenn. Sup. Ct. R. 42 § 7(h)(1). Courts can find a sample appointment order, and billing instructions on the interpreter page of the AOC's website.

Section 7 of Supreme Court Rule 42 establishes which proceedings are covered, the interpreter compensation rates, eligible expenses, and AOC claim procedures.

The Tennessee Supreme Court Rules do not specify whether the prosecutor, defense counsel, or court is required to secure the services of an interpreter. Interpreter services should be scheduled as determined by local rules or at the direction of the court. Tenn. Sup. Ct. R. 42 § 4(a).

Due to the level of concentration required to accurately interpret, interpreters require frequent breaks. Courts should consider appointing multiple interpreters for lengthy proceedings exceeding more than 2 hours or for proceedings with multiple defendants. Tenn. Sup. Ct. R. 42 § 3(g). Courts should require each interpreter to submit to the interpreter oath prior to the proceedings. Tenn. Sup. Ct. R. 42 § 4(c).

For additional information or assistance regarding the credentialing or appointment of foreign language interpreters, or billing and compensation questions, contact the Language Access Program Manager at the AOC. For assistance with billing or compensation issues, contact the Fiscal Services division at the AOC.

9.03 INTERPRETERS FOR THE DEAF AND HARD OF HEARING

A Court is statutorily required to appoint a qualified interpreter in "any case arising out of law or equity" when a "party" (defined as plaintiff, defendant, or witness) is deaf and hard of hearing. Tenn. Code. Ann. § 24-1-211. The interpreter is directed to interpret "the proceedings" including "the testimony or statements." *Id.* at (b)(1). The interpreter is also required to "assist in preparation with counsel" when the party is a plaintiff or defendant. *Id.* This statute provides that the fee for the services of such an interpreter shall be paid by the county. *Id.* at (g). For assistance locating a qualified interpreter, please see the AOC's website (www.tncourts.gov/administration/human-resources/ada-policy) and click the link titled "Interpreters for the deaf and hard of hearing" for an updated list of Tennessee agencies who provide qualified interpreters.

9.04 ACCESSIBILITY FOR PERSONS WITH DISABILITIES

The Judicial Branch Americans with Disabilities Act (ADA) Policy (2.07) prohibits discrimination against any individual on the basis of physical or mental disability in accessing or participating in judicial programs. The policy applies to all courts, without limitation, including municipal courts, general sessions courts, juvenile courts, circuit courts, chancery courts, criminal courts, and the respective appellate courts. Generally, it is the policy of the Judicial Branch of the State of Tennessee to prohibit discrimination against any qualified individual on the basis of physical or

mental disability in accessing or participating in its judicial programs. The Judicial Branch shall conduct its services, programs or activities, when viewed in their entirety, in a manner that is readily accessible to and usable by qualified individuals with disabilities. A copy of the policy can be found on the AOC website (https://www.tncourts.gov/administration/human-resources/ada-policy).

The policy was established during the resolution of litigation that was filed against the State of Tennessee and twenty-five (25) counties in the District Court for the Middle District of Tennessee alleging discrimination against persons with disabilities for failing to conduct the judicial program in accessible courthouses in violation of Title II of the ADA. While county courthouses are county owned buildings, the judicial programs that occur in these buildings are both county programs (general sessions, juvenile, etc.) and state programs (circuit, chancery, etc.). The policy establishes a procedure (request for modification) by which persons with disabilities can request and receive appropriate modifications in order to ensure access to the court system.

Under the policy, each county is required to have at least one Local Judicial Program ADA Coordinator to serve as a contact person for persons with disabilities who need access to the judicial system. Specifically, the local coordinator is tasked with reviewing and processing the requests for modification. There is also a statewide Judicial Program ADA Coordinator, employed by the AOC, who can provide assistance to local coordinators and judges when reviewing modification requests. The statewide coordinator can also assist generally in answering questions about the policy and the ADA.

Additional information concerning the ADA policy, Local Judicial Program ADA Coordinators, Request for Modification forms, sample signage and other important ADA information and resources can be found at the ADA page at the AOC website, https://www.tncourts.gov/administration/human-resources/ada-policy.

CHAPTER 10

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Special thanks to Judge Russell Parkes for his edits and review of this chapter.

Contents **Section**

10.01 IN GENERAL: CIVIL CASES

In nonjury civil cases, the court shall "find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment." Tenn. R. Civ. P. 52.01. Under a previous version of rule 52.01, findings of fact and conclusions of law were only required to be written upon request by a party. Clearly, the current rule requires the court to make such written findings.

Written findings of fact and conclusions of law are not necessary for motions filed under Rules 12 or 56 of the Tennessee Rules of Civil Procedure, or any other motion, save for motions for involuntary dismissal pursuant to Rule 41.02 or temporary injunctions issued pursuant to Rule 65.04. It is sufficient if the findings of fact and conclusions of law appear in an opinion or memorandum of the court. The findings and conclusions of a master, to the extent the court adopts them, are considered the findings of the court. Tenn. R. Civ. P. 52.01.

10.02 PREPARATION, CONTENT, SUFFICIENCY AND FILING

Judicial opinions are the core work product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. *Bright v Westmoreland Co.*, 380 F.3d 729, 732 (3d Cir. 2004). See also *Smith v UHS of Lakeside, Inc.*, 439 S.W.3d 316 (Tenn. 2014). The preparation of findings of fact and conclusions of law is a function for the trial judge. It is generally improper for the judge to require or permit counsel for the successful party to prepare the findings. *Murray Ohio Mfg. Co. v. Vines*, 498 S.W.2d 897 (Tenn. 1973). While appellate courts have approved, but not recommended, the practice of trial courts receiving and using party-prepared findings of fact and conclusions of law two (2) conditions must be satisfied. First, the findings and conclusions must accurately reflect the decision of the trial court. Second, the record must not create doubt that the decision represents the trial court's own deliberations and decisions. A judicial decision must consist of more than simply announcing a decision to grant part or all of the requested relief. The question of whether an order represents the trial court's independent judgment cannot be waived. *Vaughn v DMC– Memphis, LLC*, No. W2019-

00886-COA-R3-CV, WL 274761 (Tenn. Ct. App. Jan. 27, 2021). The simple adoption of one (1) of two (2) competing orders will generally not hold up to attack or appellate court scrutiny. Appellate courts have routinely rejected the trial courts verbatim adoption of one (1) party's proposed findings of fact and conclusions of law even if the trial court states in its final order that the order was the result of the trial courts independent deliberation and decision. See *Mitchell v Mitchell*, No. E2017-00100-COA-R3-CV, 2019 WL 81594 (Tenn. Ct. App. Jan. 3, 2019).

Trial judges may request proposed findings and conclusions from the parties. *Delevan-Delta Corp. v. Roberts*, 611 S.W.2d 51 (Tenn. 1981). If the judge contemplates adopting any of the findings prepared by counsel, the judge should carefully examine the findings and determine that they are accurate and adequate. *Id.*

10.03 AMENDMENTS

Upon motion made by a party within thirty days after the entry of judgment, the judge may amend or make additional findings and amend the judgment accordingly. Tenn. R. Civ. P. 52.02. The motion for amended or additional findings may be made with the motion for new trial.

10.04 FAILURE TO MAKE FINDINGS AND CONCLUSIONS

Prior to the adoption of the Tennessee Rules of Civil Procedure, a judgment would be reversed and the case remanded if the trial judge failed to make findings of fact and conclusions of law after having been requested to do so. Upon adoption of the Tennessee Rules of Civil Procedure, the rules required findings of fact and conclusions of law to be written only when requested by a party. In 2009 Tennessee Rule of Civil Procedure 52.01 was amended to mandate that the trial court "find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment". Hence, post 2009, it is no longer necessary that counsel specifically request the trial court make specific findings of fact and conclusions of law. Courts have stated that the requirement that a trial judge make specific findings of fact and conclusions of law is "critical to facilitate appellate review and promote the just and speedy resolution of appeals". *In Re: K. H.*, No. W2008-01144-COA-R3-PT, 2009 WL 1362314, at 8 (Tenn. Ct. App. May 15, 2009). Courts have further consistently held that while there is no "bright line test by which to access the sufficiency of factual findings, … the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue". *Lovlace v Copley*, 418 S.W.3d 1, 35 (Tenn. 2013).

Generally when a trial court fails to explain the factual basis for its decision in accordance with Rule 52.01 of the Tennessee Rules of Civil Procedure the appropriate remedy is to "vacate the trial court's judgment and remand the cause to the trial court for written findings of fact and conclusions of law". *Manning v Manning*, 474 S.W.3d 252, 260 (Tenn. Ct. App. 2015). Appellate courts have repeatedly instructed trial courts to provide which evidence the trial court relied on when making its decision and to further explain how it came to its conclusion. Even a "lengthy summary of the testimony adduced at the hearing and a few credibility observations without further indicating which testimony or other evidence the trial court relied upon in making its decision is not sufficient to satisfy the requirements of making specific findings of fact and conclusions of law". *Rosebrough v Caldwell*, No. W2018-01168-COA-R3-CV, 2019 WL 6898218, (Tenn. Ct. App. Dec. 18, 2019).

10.05 APPEAL

The question of the sufficiency of the evidence to support the court's findings may be raised on appeal whether the party raising the question has objected to the findings in the trial court or moved to amend or for judgment. Tenn. R. Civ. P. 52.02.

10.06 IN GENERAL: CRIMINAL CASES

There are various types of criminal motions in criminal cases wherein a trial judge is called upon to make certain credibility determinations. Additionally, there are many instances when a trial judge shall make and state in the record findings of fact and conclusions of law to explain its ruling on an issue. Tennessee Rule of Criminal Procedure 33(c)(3) specifically requires that when ruling on a motion for a new trial, the court – on motion made by a party – shall make and state on the record findings of fact and conclusions of law to explain its ruling on any issue not determined by the jury.

When presented with a petition for post-conviction relief Tenn. Code Ann., Section 40-30-111(b) specifically provides, "Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each ground. The appellate courts have reviewed the trial judge's duty to enter findings of fact and conclusions of law as to each ground as mandatory. *Brown v State*, Tenn. Crim. App. 462, 445 S.W.2d 669, 671 (Tenn. Crim. App.1969). There may be a litany of pre-trial motions presented to the criminal trial court. Trial judges are asked to resolve conflicts in the evidence as the trier of fact. Such motions would include, but not be limited to, motions to suppress traffic-related stops, motions to suppress statements, motions to determine competency to stand trial, and motions to reduce or increase bonds. A trial judge's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise. *State v Odom*, 928 S.W.2d 18 (Tenn. 1996). Trial judges are strongly encouraged to make specific findings of fact and conclusions of law on all pre-trial motions, especially those in which there is conflicting witness testimony.

Upon ruling on a motion for new trial and upon the request of either party, the court must "make and state into the record findings of fact and conclusions of law to explain its ruling on any issue not determined by the jury." Tenn. R. Crim. P. 33(c).

CHAPTER 11

COURT COSTS AND FINES

Special thanks to AOC Application Support Manager and Court Clerk Liaison Amanda Hughes for her edits and review of this chapter.

Contents **Section**

11.01 CIVIL CASES

Costs are the expenses incurred in litigation as provided for by statute. The Constitution does not restrict the legislature's power to tax litigation as the legislature deems appropriate.

Tennessee law provides that the successful party in all civil actions is entitled to full costs unless otherwise directed by law or by a court of record. Tenn. Code Ann. § 20-12-101. In cases of nonsuit, dismissal, abatement due to the death of the plaintiff, or discontinuance, the defendant is the successful party and is entitled to recover costs. Tenn. Code Ann. § 20-12-110. Statutory provisions regarding court costs in civil cases are found in Tenn. Code Ann. §§ 20-12-101 – 144.

11.02 CRIMINAL CASES

Costs in criminal cases include all costs incident to the arrest and safekeeping of the defendant, before and after conviction, due and incident to the prosecution and conviction, and incident to the carrying out of the judgment or sentence of the court. Tenn. Code Ann. § 40-25-104. Statutory provisions regarding costs and fees in criminal cases are found in Tenn. Code Ann. §§ 40-25-101 – 144. See also Tenn. Code Ann. § 40-24-105 regarding the allocation formula for moneys paid into court in matters adjudicated on or after January 1, 2022, making restitution first priority.

11.03 MENTAL HEALTH PROCEEDINGS

Pursuant to legislative authority, the Supreme Court has adopted provisions for the payment of costs of the indigent in mental health proceedings arising under Tennessee Code Annotated Title 33, Chapters 3-8. Tenn. Sup. Ct. R. 15.

11.04 FINES IN CRIMINAL CASES

Defendants who are fined may be ordered to pay the fine immediately, at a later date, in periodic payments or as a condition of probation. Tenn. Code Ann. § 40-24-101. Judges may, for

good cause, release a defendant from a fine or forfeiture. Tenn. Code Ann. § 40-24-102. Statutory provisions regarding fines in criminal cases are found in Tenn. Code Ann. §§ 40-24-101 – 109.

CHAPTER 12

COURTROOM MISCONDUCT

Special thanks to Judge Steven Stafford for his edits and review of this chapter.

Contents **Section**

12.01 IN GENERAL

Dignity, order, and decorum are the hallmark of all court proceedings. "It is ultimately the authority and responsibility of the trial judge which must be exercised to maintain the atmosphere appropriate for a fair, rational and civilized determination of the issues and governance of the conduct of all persons in the courtroom, including the attorneys." ABA Standards on the Judge's Role in Dealing with Trial Disruptions. State law recognizes the authority of Tennessee judges to enforce order in their presence and to control judicial officers. Tenn. Code Ann. § 16-1-102.

12.02 LITIGANTS

When a litigant is disruptive during court proceedings, the judge has the authority to take reasonable measures under the circumstances to assure that the decorum and dignity of the courtroom is observed. If corrective action is taken, judges should describe the action and the reasons that prompted the action on the record.

Not all, but many courtroom disruptions occur in criminal cases. First, it must be understood that those accused of crime are entitled to appear in court “free from all bonds and shackles.” *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1972), *cert. denied sub nom, Kennedy v. Gray*, 416 U.S. 959 (1974). Such physical restraint is said to be an affront to the very dignity and decorum of the judicial proceedings that the judge is bound to uphold. But, at times, the conduct of the accused leaves the court with no choice but to take some action to protect the courtroom from inappropriate disruptions.

In the criminal context, the United States Supreme Court has said that “[t]he flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. . . . [T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.” *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970). Thus, the Court concluded, that a trial judge could handle such a situation in at least "three constitutionally permissible ways: bind and gag the defendant thereby keeping the defendant present in the courtroom; cite the defendant for contempt; or exclude the defendant from the courtroom until the defendant promises to act appropriately." *Illinois v. Allen*, 397 U.S. 337 (1970). Removal of a disruptive defendant from the courtroom does not violate the defendant’s right

to confrontation; the defendant has waived the right by his or her behavior. *Illinois v. Allen*, 397 U.S. 337 (1970) (note that the Court emphasized that the judge had repeatedly warned the defendant before the exclusion and that the circumstances indicated that threat of a contempt finding would have been ineffective); *see also State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000); *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000).

The American Bar Association Project on Standards Relating to Criminal Justice, Standards Relating to Trial By Jury, Section 4.1(c) provides that restraints should not be used against witnesses or defendants unless the trial judge has found such restraint reasonably necessary to maintain order. If a restraint is ordered, the standards suggest that the judge should place the reasons for the restraint in the record. In the event the defendant in a criminal case is restrained, the judge should instruct the jurors that such restraint is not to be considered in assessing the proof or determining guilt.

The Tennessee courts have applied the principles set forth in *Illinois v. Allen* to uphold physical restraint of a defendant only as a last resort. In *Willocks v. State*, 546 S.W.2d 819 (Tenn. Crim. App. 1976), the court noted that there is a presumption against the necessity of in-court restraint with the burden of showing the necessity of physical measures resting on the state. "[B]ecause every criminal defendant is entitled . . . to a fair and impartial trial . . . a defendant should never be shackled during . . . trial before a jury except in extraordinary circumstances. . . [and] upon a *clear showing* of necessity." *Willocks v. State*, 546 S.W.2d 819, 822 (Tenn. Crim. App. 1976). Shackling is to be used as a last resort only when less drastic security measures will not suffice. Likewise, the *Willocks* opinion and others following it have emphasized the requirement that judges who do impose physical restraints on criminal defendants caution the jury against allowing the fact of restraint affect their judgment. *State v. Thompson*, 832 S.W.2d 577 (Tenn. Crim. App. 1991).

The use of a stun belt on a disruptive defendant has also been upheld in *Mobley v. State*, 397 S.W.3d 70 (Tenn. 2013), based on a similar analysis. The opinion states that, should a stun belt inadvertently become visible to the jury, the trial court should give cautionary instructions that it should in no way affect the jury's determinations.

12.03 COUNSEL

Judges also have the authority to act to prevent disruption by counsel in the courtroom. Counsel's misconduct may take the form of improper remarks made in open court or by a failure to obey a judge's instruction. Some examples of misconduct by counsel include:

> singling out a juror and appealing personally to that juror, *Scarbrough v. City of Lewisburg*, 504 S.W.2d 377 (Tenn. App. 1973); *Pendleton v. Evetts*, 611 S.W.2d 607 (Tenn. App. 1981);
>
> implying to the jury that a civil defendant is insured, *Lovin v. Stanley*, 493 S.W.2d 725 (Tenn. App. 1973);
>
> unwarranted and improper reference to a party's or counsel's character not based on evidence, *Hager v. Hager*, 66 S.W.2d 250 (Tenn. App. 1933);

improperly arguing to appeal to passion, prejudice and sentiment, *Nashville, C. & St. L. Ry. v. Mangrum*, 15 Tenn. App. 518 (1932);

reacting to opposing counsel's misconduct with misconduct, *Nashville Ry. & Light Co. v. Owen*, 11 Tenn. App. 19 (1929);

commenting on failure of accused to testify in violation of the right to be free from self-incrimination, *Turner v. State*, 394 S.W.2d 635 (Tenn. 1965);

deliberately misquoting previous testimony, *Finks v. Gillum*, 273 S.W.2d 722 (Tenn. App. 1954);

arguing theories of law to the jury as authoritative instruction, *Zang v. Leonard*, 643 S.W.2d 657 (Tenn. App. 1982).

Often when counsel has engaged in misconduct requiring court action, the misconduct also constitutes a violation of the Rules of Professional Conduct, Tennessee Supreme Court Rule 8. A judge who has knowledge (defined as actual knowledge or knowledge inferred from the circumstances) that a lawyer has committed such a violation "that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer" is required to inform the appropriate authority which may include the Board of Professional Responsibility. Code of Judicial Conduct, Canon 3(D)(2).

Not all misconduct by counsel, however, rises to the level of contempt. Instead, "unethical conduct *may* amount to criminal contempt, but only if the conduct also embarrasses, hinders, or obstructs a court in its administration of justice or derogates the court's authority or dignity, thereby bringing the administration of law into disrepute." *State v. Beeler*, 387 S.W.3d 511, 522 (Tenn. 2012) (quotation marks omitted).

12.04 SPECTATORS

The courtroom must remain an open and public place in which the courts conduct their business in the presence of the public. Not only does the public have a right to be in the courtroom, their presence serves to assure the integrity of the proceedings. Exclusion of all spectators in advance of a trial may violate a defendant's right to a fair trial. *In re Oliver*, 333 U.S. 257 (1948). Delinquent and unruly cases are open to the public. However, in the discretion of the juvenile court, the general public may be excluded from delinquent and unruly proceedings. Dependent and neglect cases shall not be open to the public. Tenn. R. Juv. Prac. & Proc. 114. The general public may also be excluded in most mental health proceedings. *See* Tenn. Code Ann. § 33-3-706.

Despite the public nature of the courtroom, a spectator's right to attend a court proceeding is not absolute. Judges may impose reasonable limitations upon the unrestricted occupation of a courtroom by the members of the public. Thus, the judge may impose reasonable time, place, and manner restrictions in order to accomplish order and fairness. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980).

When spectators engage in misconduct in the courtroom, they may be cited for contempt or removed from the courtroom. As in the case of misbehaving counsel, the judge may summarily cite

and punish the misbehaving spectator for contempt if the contemptuous behavior occurred in the judge's presence. Tenn. R. Crim. P. 42.

12.05 COURT OFFICERS

Officers of the court likewise may not engage in courtroom misconduct. They should conduct themselves with dignity and treat the parties, counsel, spectators, and the jury with equal dignity and respect. Court officers should prevent anyone from attempting to influence the jury; should assure that nothing interferes with their eligibility as jurors; and should not engage in any misconduct that might tend to prejudice the jury in favor of or against any party.

CHAPTER 13

MEDIA COVERAGE IN THE COURTROOM

Special thanks to AOC Communications Director Barbara Peck for her edits and review of this chapter.

Contents **Section**

13.01 IN GENERAL

Tennessee Supreme Court Rule 30 provides the authority for media coverage in the courtroom. It is important to note that Rule 30 particularly addresses camera (video and still) and audio coverage of the courtroom. Provided a courtroom proceeding is not closed to the public for some other reason, general media coverage is always permitted. An evidentiary hearing shall be held before placing restrictions on coverage outside the general provisions provided for in the rule.

13.02 DEFINITIONS

- **Coverage** - any recording or broadcasting of a court proceeding by the media using television, radio, photographic, or recording equipment
- **Media** - *legitimate* news gathering and reporting agencies and their representatives whose function is to inform the public, or persons engaged in the preparation of educational films or recordings
- **Proceeding** - any trial, hearing, motion, argument on appeal, or other matter held in open court that the public is entitled to attend … proceeding includes any activity in the building in which the judicial proceeding is being held or any official duty performed in any location as part of the judicial proceeding
- **Presiding Judge** - means the judge, justice, master, referee or other judicial officer who is scheduled to preside, or is presiding, over the proceedings
- **Minor** - means any person under eighteen (18) years of age

13.03 PRESUMPTION

Media coverage shall be allowed and is subject at all times to authority of the presiding judge.

13.04 REASONS FOR LIMITING COVERAGE

- Control the conduct of the proceedings before the court
- Maintain decorum and prevent distractions
- Guarantee the safety of any party, witness, or juror
- Ensure the fair and impartial administration of justice in the pending case

13.05 REQUESTS FROM MEDIA

- In writing, to presiding judge, although judge may choose to designate someone else – court clerk, law clerk, assistant, etc.
- Two business days notice (often waived)

13.06 NOTICE TO PARTIES

- Clerk notifies attorneys of record in writing
- Individual notice can be waived if:
  - request is for entire docket
  - notice posted in "conspicuous place ... outside courtroom"
  - Any party may request a continuance
  - Need solid reasons to grant continuance

13.07 PROHIBITIONS

- Any coverage of a minor in any role, unless charged as an adult
- Jury Selection
- Jurors during proceedings
- Closed proceedings
- **Juvenile Proceedings**
  - Court will notify the parties and their counsel of media request
    - Prior to start of the proceedings:
    - Court advises accused, parties, witnesses of personal right to object
    - If consent is given, it must be in writing
  - Objections by a witness:
    - Will suspend media coverage as to that person only
    - Objections by the accused in a criminal case or any party to a civil action will prohibit media coverage of the entire proceeding

13.08 CONFERENCES OF COUNSEL

- Nothing recorded - includes close-up video (bench conferences & attorneys & clients)
- co-counsel

13.09 DISCRETION OF JUDGE

- Presiding judge has discretion to:
  - refuse, limit, terminate, or temporarily suspend media coverage of entire case or portions of a case
- Reasons:
  - (i) control the conduct of the proceedings before the court; (ii) maintain decorum and prevent distractions; (iii) guarantee the safety of any party, witness, or juror; and (iv) ensure the fair administration of justice in the pending cause

13.10 EVIDENTIARY HEARINGS

- Presiding judge shall hold an evidentiary hearing before:
  - denying, limiting, suspending, or terminating media coverage, if such a hearing will not delay or disrupt the judicial proceeding
- Hearing not possible? Affidavits may be used
- Burden of proof on party seeking limits on media coverage
- If there is no opposition to media coverage, judge may consider matters properly the subject of judicial notice.
- Media requesting coverage shall be allowed to present proof, at hearing or by affidavit.
- Any finding that coverage should be limited must be supported by substantial evidence that at least one of the four interests is involved.

13.11 EQUIPMENT & PERSONNEL

- **Cameras permitted**
  - *One, but no more than two television cameras* with one operator each
  - Two still photographers - not more than two cameras each
  - One audio system for radio broadcast purposes
- **Pooling Arrangements**
  - When more than one request for media coverage:
    - Media shall select representative to be liaison responsible for arranging pooling
    - Identity of representative shall be filed with clerk of the court
    - Sole responsibility of the media and cannot call upon judge to mediate disputes
    - If no advance media agreement, judge **shall** exclude all contesting media personnel from a proceeding
    - Please note, when a pooling arrangement is in place, reporters and staff from other media outlets have to come to the courthouse to "pick up the feed." A line is run from the camera in the courtroom to a space outside the courtroom where other media agencies "connect" to the feed. The space outside the courtroom can be a

conference room, other courtroom, or hallway, but it needs to be fairly close to the courtroom where proceedings are being held. It should have ample space for multiple people, plus equipment (often the size of a backpack, plus audio and video lines).

- **Personal Recorders**
  - Media personnel may use hand-held cassette tape recorders without notice if the recorder are no more sensitive than the human ear
  - For recordings used as personal notes, not for any purpose, or broadcast
- **Print media**
  - Basically anyone not using "camera or electronic equipment"
  - Applies to very few today as all reporters are multimedia reporters
- **Sound & Light**
  - Only equipment that does not produce distracting sound or light allowed to cover proceedings
  - Signal lights or devices to show when equipment is operating shall not be visible. No moving lights, flash attachments, or sudden light changes.
  - Audio pickup for all purposes shall be accomplished from existing audio systems present in the court facility or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judge.
    - Please note, the media is often frustrated by the audio quality in the courtroom and will attempt to place additional microphones on the judge's bench, witness bench and other locations. This is not permitted. There is a strong preference to use only the built-in audio system and the camera's built-in microphone. If there is no audio system (microphone and speaker) in the courtroom and there are no other options available, any microphones added by the media have to be placed to ensure they do not inadvertently capture bench conferences or attorney-client conversations.
  - Court proceedings shall not be interrupted because of a equipment problem
- **Location of Equipment & Media**
  - Judge designates location for "reasonable coverage"
  - No movement
  - Personnel shall "attire and deport themselves" as to not detract from proceedings
- **Use of Media Material**
  - Shall not be used:
    - in the proceeding out of which it arose
    - any proceedings subsequent and collateral thereto
    - or upon any retrial or appeal of such proceeding

13.12 ELECTRONIC DEVICES

When Rule 30 was adopted in 1995 and updated in 1999, the technological tools available today did not exist or were not widely used. Because of this, the rule does not address cell phones, smartphones, laptops, digital notebooks, combination video/still cameras, texting or social media. It is up to the judge presiding over the courtroom to determine if and how these devices can be used in the

courtroom. It is important for the judge to make her/his wishes known prior to the start of the proceedings.
Some things to consider:

- Are smartphones allowed in the courtroom? If so, smartphones cameras are considered cameras and users cannot use the camera in the phone during a court proceeding without filing a Rule 30 request. It is suggested that signage be placed in the courtroom to inform spectators that photos, video, and audio recordings are not permitted without permission of the court. The judge may wish to periodically remind court spectators of the protocols. In an effort to avoid issues with smartphone cameras, some courts ban smartphones all together. This approach should be balanced with the modern day burden on parents, employees, caregivers, etc of being "incommunicado" for an extended period of time. In addition, please note there are all types of video and recording devices that look inconspicuous, including pens, pins, etc.
- Are laptops or digital tablets allowed? If so, can a reporter continue typing during the proceedings?

13.13 LIVESTREAMING

Livestreaming means the proceeding is being shown live on a website or social media channel. "Broadcasting" a court proceeding is permitted under Rule 30. Whether livestreaming is allowed in a particular case is under the discretion of the presiding judge. The main concern with a livestream is that the coverage cannot be "taken back" after it is shown live (versus material that is recorded and can just not be used later). Questions to consider include: 1) is there are concern that confidential information may be accidentally stated in court?; 2) what is the camera placement in relation to the jury and what is the likelihood the jury may inadvertently be shown?;and 3) is there a concern that key witnesses who have yet to testify may view and be influenced by the livestreamed proceeding?

CHAPTER 14

CONTEMPT POWERS

Special thanks to Judge Steven Stafford for his review and edits of this chapter.

Contents **Section**

14.01 SCOPE OF POWER GENERALLY; TERMINOLOGY

Contempt of court is any act that tends to hinder or delay the administration of justice. *Winfree v. State*, 135 S.W.2d 454 (Tenn. 1940). Courts must possess the authority to punish those who disregard the dignity and authority of the court. Thus, the contempt power is exercised to maintain order and decorum in court proceedings, to punish for disrespect shown the court or the court's orders, to enforce the court's writs and orders, and to punish acts that obstruct the administration of justice.

The basis for contempt power in Tennessee is statutory. Tenn. Code Ann. §§ 29-9-101 – 108; 40-24-105 (contempt for willfully refusing to pay a fine). The statutory provision regarding general sessions judges' contempt power is found at Tenn. Code Ann. § 16-15-713.

The judge has discretion in determining the existence of and dealing with contempt. The judge's determination is final unless the judge abuses his or her discretion. While the power to punish for contempt should be used in appropriate cases, it should not be used unless the case clearly calls for its exercise. Such power should be exercised only when necessary to prevent direct obstruction of, or interference with, the administration of justice. *Robinson v. Air Draulics Engineering Co.*, 377 S.W.2d 908 (Tenn. 1964).

A tribunal cannot punish for an act that is actually a contempt of another court. *Raht v. Southern Ry. Co.*, 387 S.W.2d 781 (Tenn. 1965). A state court cannot punish for an act that constitutes contempt of a federal court. However, in counties where a court has several parts, a judge or chancellor of one part can punish for a contempt of another division or branch of the court. *Mayhew v. Mayhew*, 376 S.W.2d 324 (Tenn. App. 1963).

Contempts are classified as criminal or civil; direct or indirect. Whether a fine or imprisonment is imposed is not the distinguishing test of classification. The test stems from the nature of the contemptuous act itself. *O'Brien v. State ex rel. Bibb*, 170 S.W.2d 931 (Tenn. App. 1942).

A. Criminal Contempt

A criminal contempt occurs when an act of misconduct is directed against the dignity and authority of the court. It is an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect. *Garrett v. Forest Lawn Memorial Gardens, Inc.*, 588 S.W.2d 309 (Tenn. App. 1979). Generally, the primary purpose for exercising the power of contempt in a criminal contempt situation is to preserve the court's authority and punish for the disobedience of the court's orders. A criminal contempt can arise in the course of any proceeding.

B. Civil Contempt

A civil contempt occurs when one refuses or fails to comply with an order of the court. The purpose of punishment is to provide a remedy for the injured party and to coerce compliance with the court order. If the court order is obeyed, the contempt will be fully discharged. *Shiflet v. State*, 400 S.W.2d 542 (Tenn. 1966).

C. Direct Contempt

A direct contempt is based on conduct committed in the presence of the court or so near the court's presence to obstruct or interrupt proceedings. *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978). While the judge has the power to punish direct contempt summarily, summary punishment should be reserved for exceptional circumstances where instant action is required. *Harris v. United States*, 382 U.S. 162 (1965). The better procedure, even in a direct contempt situation, is to proceed with notice and a hearing.

D. Indirect Contempt

An indirect contempt is based on conduct not committed in or near the judge's presence. The most frequent use of the term is with reference to the failure or refusal of a party to obey a lawful court order, injunction, or decree. *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978). Actions constituting an indirect contempt can only be punished after notice and a hearing.

14.02 PREREQUISITES TO THE PROCEEDING

A direct criminal contempt may be punished summarily if the judge certifies that he or she saw or heard the conduct constituting the contempt and that it was committed in the presence of the court. The order of contempt must recite the facts and be signed by the judge and entered of record. Tenn. R. Crim. P. 42; *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978).

All other contempts, including indirect criminal contempts, must be initiated by the filing of a petition with the court or by the filing of notice. In an indirect criminal contempt, the notice must state the time and place of the hearing and must allow a reasonable time for the preparation of the defense. The notice must also state the essential facts constituting the criminal contempt charged and describe it as such. In a criminal contempt case, the notice may be given orally in court by the judge in the defendant's presence, on application of the district attorney general or an attorney appointed for that purpose, or by an order to show cause or an order of arrest. A defendant is entitled to admission to bail on a charge of criminal contempt. Tenn. R. Crim. P. 42. If the criminal contempt

involves criticism of the judge, the judge is disqualified from hearing the matter. *State v. Green*, 783 S.W.2d 548 (Tenn. 1990).

Civil contempts are generally initiated by the filing of a petition requesting the issuance of a show cause order. The court issues a show cause order for the defendant to appear and demonstrate why a contempt finding should not be made. The court may grant an attachment of the defendant's body pending the hearing. If a show cause order is issued, it must be served on the defendant along with notice of the hearing.

The notice must fairly and completely apprise the defendant of the events and conducts constituting the alleged contempt. *Storey v. Storey*, 835 S.W.2d 593 (Tenn. App. 1992).

14.03 DEFENDANT'S RIGHTS

A. Counsel

As a general rule, a defendant has a right to counsel in a contempt proceeding if incarceration is a potential punishment. With regard to child support enforcement, if a finding of civil contempt may result in the incarceration of the contemnor, the United States Supreme Court has held that where the custodial parent is unrepresented by counsel, it is not necessary to provide an indigent noncustodial parent with an attorney. However, the State must have alternative procedures assuring fundamental fairness in the determination of the critical incarceration related question. *Turner v. Rogers, et al.*, 131 S.Ct. 2507 (2011).

B. Jury

In most contempt cases the judge or chancellor is the sole determinant of the facts and law. *Pass v. State*, 184 S.W.2d 1 (Tenn. 1945). But if there is a measure of damages to be assessed as under Tennessee Code Annotated § 29-9-105, early case law suggested that a jury could be impaneled for the purpose of setting the amount of damages. *Robins v. Frazier*, 52 Tenn. 100 (1871).

Although the defendant does not generally have a right to a trial by jury in a contempt proceeding, *Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000), a defendant charged with a failure to pay child support under Tennessee Code Annotated § 36-5-104 which is defined as a criminal offense does have a right to a jury trial. *Brown v. Latham*, 914 S.W.2d 887 (Tenn. 1996). Additionally, the right to a jury trial exists to the same extent as for other crimes. *Bloom v. Illinois*, 391 U.S. 194 (1968).

C. Bail

If a defendant is arrested under an attachment to answer a contempt citation, the alleged offender is entitled to make bond insuring appearance unless the act of contempt is the failure to perform the requirements of a court order. Tenn. Code Ann. § 29-9-106. The judge is required to set bail, but if the judge fails to do so, the bail will be $250. Tenn. Code Ann. § 29-9-106.

D. Self-Incrimination

In criminal proceedings, the defendant can invoke the protection against self-incrimination. *Gompers v. Bucks Stove*, 221 U.S. 418, 444 (1911). *Gompers* expressly states that it is not deciding whether the self-incrimination right is available in a civil contempt: "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself."

E. Conflict-Free Prosecution

Under circumstances in which the prosecutor in the contempt action is a lawyer in a collateral suit, a conflict of interest may exist. *Young v. U.S. ex rel. Vuitton*, 481 U.S. 787 (1987) (contempt finding reversed due to conflict); *Wilson v. Wilson*, 984 S.W.2d 898 (Tenn. 1998) (no due process violation when prosecutor was also lawyer in civil case).

F. Double Jeopardy

Double jeopardy bars a criminal contempt conviction and a criminal conviction for the same act unless the two offenses do not have the same elements. *United States v. Dixon*, 509 U.S. 688 (1993); *see also Cable v. Clemmons*, 36 S.W.3d 39 (Tenn. 2001).

Thus, under double jeopardy principles, no appeal lies from an acquittal on criminal contempt charges. The same is not true of civil contempt—a party may appeal from an order finding that a party has not committed civil contempt. *See Overnite Transp. Co. v. Teamsters Loc. Union No. 480*, 172 S.W.3d 507, 510 (Tenn. 2005).

G. Confrontation

Except under a summary proceeding for direct criminal contempt, a defendant arguably has the right to confront the witnesses against the defendant.

H. Evidentiary Rulings

In a contempt proceeding, the court should not burden the defendant's ability to prove a defense by unnecessary strictness and technical rulings on the admissibility of evidence. *Bowdon v. Bowdon*, 278 S.W.2d 670 (Tenn. 1955).

14.04 BURDEN OF PROOF

In criminal contempts, the defendant is presumed to be innocent and must be proved to be guilty beyond a reasonable doubt. *Nashville Corp. v. United Steelworkers*, 215 S.W.2d 818 (Tenn. 1948). Civil contempts must be proven by preponderance of the evidence. *See Parsons v. Parsons*, No. W2016-01238-COA-R3-CV, 2017 WL 1192111, at *4 (Tenn. Ct. App. Mar. 30, 2017) ("The trial court's ruling is patently incorrect in that it applied an incorrect legal standard, i.e. clear and convincing evidence as opposed to preponderance of the evidence. The quantum of proof needed to find a person guilty of civil contempt is a preponderance of the evidence. .*Konvalinka v. Chattanooga–Hamilton Cty. Hosp. Auth.*, 249 S.W.3d 346, 356 (Tenn. 2008); *Doe v. Bd. of Prof'l*

Responsibility of Supreme Court of Tennessee, 104 S.W.3d 465, 474 (Tenn. 2003); see also *Luplow v. Luplow*, 450 S.W.3d 105, 119 (Tenn. Ct. App. 2014); *McLarty v. Walker*, 307 S.W. 3d 254, 259 (Tenn. Ct. App. 2009).").

14.05 DEFENSES

Often the contemnor will argue that the actions were as a result of the advice of counsel. In *Robinson v. Air Draulics Engineering Co.*, 377 S.W.2d 908 (Tenn. 1964), the supreme court suggested that reliance on advice of counsel should be considered in mitigation when defendant established reliance in good faith on counsel's advice.

An inability to perform the order of the court, if not the result of the defendant's voluntary acts, is a defense. *Mayer v. Mayer*, 532 S.W.2d 54 (Tenn. Ct. App. 1975).

The fact that the court's order was erroneous is not a defense to a contempt action. Even an erroneous order must be obeyed at the risk of contempt. *Nuclear Fuel v. Local Union*, 719 S.W.2d 550 (Tenn. Crim. App. 1986).

14.06 APPEAL

Appeals arising out of contempts in civil cases are to the Court of Appeals; appeals of contempts arising from a criminal matter are to the Court of Criminal Appeals. *B.H. Stief Jewelry Co. v. Walker*, 256 S.W.2d 392 (Tenn. App. 1952); Tenn. Code Ann. §§ 16-4-108 & -5-108.

CHAPTER 15

SELF-REPRESENTED LITIGANTS & SOVEREIGN CITIZENS

Special thanks to Senior Judge Don R. Ash for offering his expertise in drafting this chapter.

Contents **Section**

15.01 GENERAL

The explosion of individuals representing themselves is simply not going away but will more than likely expand. Based upon numerous court rulings and adopting various code of conduct applications to the self-represented litigant, Courts should be proactive in seeking and adopting both policies and procedures to provide a fair environment for all participants in the legal system whether represented by counsel or not. There is no doubt this is difficult for the judge and outside of their comfort zone, but preparation is the key to make sure "justice for all" takes place in Tennessee Courts. Best practices for handling these types of cases have three basic principles. They include the following:

1) While not compromising the neutrality of courtroom proceedings, the judge should ensure the facts of the case are adequately presented.
2) Providing the SRL checklist and procedures to help facilitate a full and fair hearing.
3) At the same time, the judge should also recognize the neutrality of the Court is not compromised merely because there is communication between the judge and litigants in the courtroom, when such communication is intended to provide self-represented litigants with the opportunity to be fairly heard; and
4) Answering questions and simplifying procedures needed to obtain the necessary facts to decide the case may aid in fairness, neutrality, and an unbiased process of law to all litigants.

To protect the interests of the self-represented litigant but also to preserve the formality of the Court, the Judge need to adopt the position of an educator. Explaining the process before the hearing begins not only help the parties but insures a fair process. It is recommended the Court review its procedures and explore opportunities to teach litigants how the hearing should proceed. Handouts, videos, and other tools can be useful to achieve a fair and just hearing for all parties involved.

15.02 GOVERNING STANDARDS

In June 2011, the United States Supreme Court ruled in Turner v. Rogers, 131 S. Ct. 2507, self-represented litigants are entitled to "substantial procedural safeguards" to reduce the risk of erroneous deprivation of liberty. In cases with self-represented litigants, courts can engage in questioning, have broad discretion in how to handle these types of cases, and should develop appropriate techniques.

Rule 2.2 0f the American Bar Association Model Code of Judicial Conduct states in comment 4 "It is not a violation of this rule for a judge to make reasonable accommodations to ensure Pro se litigants the opportunity to have their matter fairly heard".

In June 2013, the Tennessee Supreme Court amended Canon 3(A)(4) to read as follows: "A judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of the self-represented litigant to be fairly heard."

Unreasonable accommodations include creating defenses for the SRL, become an advocate for the unrepresented party, causing undue prejudice to the other side, and even taking on the role of cross-examiner.

Judicial efforts to enable SRLs to present their cases should be limited to assistance to the party in accomplishing the party's own strategy, not in suggesting a different or better strategy… Albrecht, Rebecca A.

15.03 OVERVIEW

We need to assume the self-represented litigant is not familiar with courtroom procedures. If the Judge has a lengthy docket, he or she might want to put cases who have attorneys go first so the SRL can mimic what they have seen. It is important to create an atmosphere in which the SRL can more efficiently present their case.

- Legal Representation – It is a good idea to remind the self-represented litigant they have a right to hire counsel, while acknowledging their right to represent themselves. Comments like "A person who represents himself has a fool for a client" or always suggesting a mental exam for everyone who wants to represent themselves are inappropriate.
    - In Tennessee, judges are required to review a series of questions regarding self-representation with the criminal defendant who represents him or herself. These series of questions need to be answered under oath and a written wavier need to be signed by the criminally accused litigant. This author suggests a similar procedure for civil cases Is a good practice as well as explaining

possible exposure. In criminal cases, it is also suggested always appointing "elbow counsel" even if rejected by the criminally accused SRL. It is important to be respectful when asking these questions about knowledge of the law and procedures.

- Language – Courts should use plain terms since many SRL have never appeared in Court (For example use "self-represented litigant" instead of "pro se"). Avoid complex legal terms if possible and remember to always use a qualified interpreter if needed.
- Application of the law – A judge should remind the parties he or she will apply the law without regard to the litigant's status nor will the Court punish the SRL due to the fact they have chosen to represent themselves.
- Continuances- Freely grant continuances to the SRL to adequately prepare and address issues in his or her case, like responses to a motion for summary judgment.

15.04 PRE-HEARING PREPARATION

Many Self-represented litigants simply do not understand the trial process. As mentioned before, the time spent by the Court, Court's staff or some other learning tool can be invaluable for the SRL but also provide great assistance to the Court to make sure the process goes as smoothly as possible. Some of these opportunities are listed below:

- Simple handouts explaining the court process, introducing exhibits, as well as what law is applicable, are helpful (under the best circumstance this information is provided prior to trial). It is possible for the Clerk's office to provide these handouts when the case is filed.
- Many courts have developed videotape examples of procedures. Our own Tennessee Supreme Court has developed a series of videos which can be found on the A.O.C. website as well as appropriate forms to be used (https://justiceforalltn.com/i-need-help/forms). One of my favorite videos explaining court procedure is from Minnesota and can found on YouTube at https://youtu.be/imrPhyP8Fb4. Many Courts are close to Universities, Junior Colleges, or technical Schools. These assets can help a court prepare the appropriate materials.
- Many local bar associations have developed "Legal Advice Clinics". In these situations, litigants are made aware of the clinic and can go there to have pleadings reviewed, discuss court procedures, as well as applicable law.
- Some communities have a "Lawyer of the Day Program" where a local lawyer volunteers to be at the Courthouse to answer questions regarding court proceedings.
- Legal Aid organizations have several brochures which can be quite helpful to the SRL.

15.05 EXPLAIN TRIAL PROCEDURES (AT THE BEGINNING OF A HEARING)

1) Introduce parties and explain procedural context of hearing
2) Make Sure parties understand what is to be decided at the current hearing – affirm understanding with parties
3) Outline the procedure you will be following – hopefully you have already provided this information either by using a video or handout
4) Indicate the time available for the hearing – advise the parties if go over time limit, the Court may have to move their case and start hearing another proceeding only to return to their case at the conclusion of the new case.
5) Explain, if needed, the governing law – hopefully this was provided pre-trial either by handout or video
6) Use simple language and invite questions
7) Clarify the Court's questions and interruptions have not other purpose other than to getting to the facts.

15.06 COURT HEARING (MANAGING EVIDENCE)

1) Considering hearing evidence in small blocks (Maybe hear from both parties first)
2) Permit narrative testimony
3) Allow parties to adopt pleadings as sworn testimony
4) Ask questions to get to evidence
5) Ask questions to establish the foundation of evidence (When and who took the photograph)
6) Probe for detail
7) Give verbal and non-verbal clues to encourage giving of testimony
8) Maybe shift back from side to side during questioning to get all the facts about a particular issue or fact
9) Maintain control of the courtroom, including use of body language, and help litigants to stay focused on matters relevant to the case (no insults etc.)
10) Help litigants stay focused on matters relevant to judge's ultimate decision
11) Clarify relevance of testimony when it is uncertain
12) IN ASSESING EVIDENCE, REMEMEBER JUDGES CAN DEEM EVIDENCE OBJECTED TO, CAN ADMIT UN-OBJECTED TO EVIDENCE FOR ALL PURPOSES, AND GIVE EVIDENCE THE WIEGHT THE COURT SEES FIT!!!!
13) Consider telling litigants when they have failed to establish an important element, and then provide an opportunity to fill the gap.
14) Provide a final opportunity for litigants to add to the testimony.
15) If you are unable to do what litigant asks because of neutrality concerns, explain the reasons.

15.07 POST HEARING

It is important to explain the Court's decision to the parties, especially when dealing with self-represented litigants. In managing the decision, the Court should consider the following:

1) Consider discussing potential decisions to find the most practical for the parties – give a general outline and ask for concerns.
2) If possible, announce the decision from the Bench, taking the opportunity to encourage litigants to explain any problems they might have complying with the ruling.
3) Explain the decision and consider acknowledging the positions and strengths of both sides (try to say something positive about both sides).
4) Confirm the litigants understand your ruling, what is expected of them, and the requirement the parties comply with your ruling.
5) If possible, advise the litigant of what happens next and what is expected from them.
6) Try to have order in written or printed form for the litigants. Advise them of the appeal time restraints.
7) Thank the parties for their participation.

15.08 SPECIAL CIRCUMSTANCES

1) One Represented Party
    - At the start, reassure the attorney procedures are designed to ensure both sides are fully heard
    - If necessary, control direct testimony to keep out inadmissible testimony or prevent its being given improper weight.
    - Require greater specificity and explanation in objections and explain rulings when helpful
    - If necessary, stop counsel from interrupting the SRL story (permit a standing objection).
    - Control cross examination to prevent mistreatment of non-represented party.
    - If attorney unhappy explain the scope of judicial discretion. Allow attorney to be heard and object on the record.
    - If too complex, consider other forms of assistance – appoint counsel for non-criminal case
2) Atypical Self- Represented litigants

    a) Mentally or emotionally challenged litigants
        - Be explicit what the court can and cannot do plus be respectful to the litigant's emotions
        - The more anxious the litigant, case structure becomes critical – break into small steps, explain each step, and repeat where necessary

- Ensure they SRL understands what happens and his obligations, ask them to restate your ruling, and suggest getting help from family and friends

b) Angry litigants

- Methods to maintain a respectful environment (Appeal to sense of fairness, express sympathy with intensity of the emotion, advise the litigant we cannot proceed with this level of emotion, and the judge could offer a brief "cooling off "period.
- More stringent methods: Adjournment, Sanctions including contempt and dismissal – always take a break before issuing sanctions.

15.09 NON-JURY TRIAL CHECKLIST

1) General:
   a. Make sure your complaint or answer complies with the Tennessee Rules of Civil Procedure (unless filing in General Sessions Court
      i. Sample forms can be found at https://tncourts.gov/
      ii. See "Justice for All – A Tennessee Supreme Court Initiative" (A website with several videos to assist the SRL)
      iii. Specifically see video on "Getting Ready for a General Sessions Case" (Very similar to all non-jury cases)

      https://justiceforalltn.com/videos/getting-ready-general-sessions-civil-court-case
   b. A Court cannot help you present your case or give legal advice to either side. It can only explain court procedures and the basis for its rulings in the case.
   c. Follow the Court's Orders regarding disclosure of witnesses and exhibits.
   d. Parties, not the Court, are responsible for subpoenaing witnesses and records (These forms are at the Clerk's Office in the Courthouse).
   e. There are limits on the type of evidence which can be presented (This will be covered later in this document).
   f. Parties may not communicate about the facts of the case with the Judge outside of court hearings. This is called *ex parte* communication and is strictly prohibited by the Tennessee Rules of Judicial Conduct. It is important to remember both sides have a right to tell their side of the story. Please be respectful and patient both in delivering your perspective and listening to your opponent's.
   g. The Court may notify you by Order of a pre-trial conference. At this proceeding, the parties will discuss exhibits, procedures, and other issues relevant to trial.
   h. Parties must file all communications to the Judge (complaints, answers, motions, affidavits, etc.) with the clerk's office and provide copies of these documents to the opposing parties.
2) Trial
   a. Parties bringing the action are responsible for presenting evidence to support their claims. A self-represented litigant must adhere to the essential requirements of

presenting a case; a judge will not assume anything in support of the case if it has not been properly presented.

b. Many times, parties will hire a court reporter or split the cost of a court reporter to transcribe the proceedings. This person will keep a record of every aspect of the trial. While somewhat rare in general sessions cases, it is the norm in Circuit and Chancery non-jury trials to have a court reporter present. This transcript is very important if either party wishes to appeal the trial court's ruling.

c. Courtroom Conduct – Except when examining or cross-examining witnesses, litigants should address their remarks and questions directly to the Judge. They should not direct comments to the opposing party or counsel for the opposing party.

d. For a good example of opening statements, introduction of documents, and closing statements please see the "Office of Administrative Hearings, Video Guide to Hearings" found at https://youtu.be/imrPhyP8Fb4

e. Exhibits – It is each party's responsibility to properly introduce exhibits (i.e. photographs, testimony, properly authenticated documents, etc.). Be sure to bring your exhibits to Court. You should provide copies for the opposing side, the Court, and one to place in the Court file for each proposed exhibit.

f. Presentation – The party who initially filed the complaint will make an opening statement (this is a roadmap of what he or she anticipates the evidence will show).

g. Next, the other side will make their opening statement. The party seeking relief will then proceed with presenting proof of their case. This can include the introduction of testimony of witnesses and the production of various exhibits (Remember to review the Tennessee Rules of Evidence, especially Rules 802, 803, and 804).

h. Rebuttal testimony can also be submitted after the initial presentation. When all of the proof has been presented, each side will be allowed to make closing statements. The Court may rule from the Bench or issue a written order.

i. Win or lose, it is always best to be respectful to the Court, the other parties, and witnesses when in Court.

3) Post-Trial

a. After trial in Circuit or Chancery Courts, each side has the right to file certain post-trial motions. An example of these is a Motion to Alter or Amend (See Tennessee Rule of Civil Procedure 59.04). There are strict time requirements to filing this motion – please review.

b. Review the Tennessee Rules of Appellate Procedure to take advantage of your rights to appeal. There are strict time requirements for these proceedings. Please review these Rules carefully.

15.10 SUGGESTIONS FOR COMPLEX TRIALS (JURY TRIALS, ETC.)

When a case seems too complicated to deal with a self-represented litigant, develop a nonlawyer approach equivalent to how the problem would be resolved if there were lawyers on both sides. Here are ten suggestions:

1) Explain very early in the process general concepts of motions in limine and offers of proof. Also establish clear procedures for resolving issues outside the presence of the jury, including the making, and resolving of issues.
2) Have numerous pre-trial conferences to discuss procedures. Also provide both side a detailed roadmap on how a jury trial proceeds. Resolve evidence admissibility issues before the trial begins.
3) Advise the jury pool of the self-represented litigant and not to draw and inferences from his self-representation.
4) Make sure the SRL understands jury selection rights and procedures (hopefully in writing) – if possible, advise the SRL of another earlier jury trial he or she can come observe.
5) Early on advice jury in written instructions regarding the SRL (Check your case law).
6) Make sure SRL knows and understands rules applicable to opening and closing statements
7) When the Court does intervene, consider mentioning the prior reference to the likelihood of intervention and repeating the importance of lack of intervention.
8) Discuss with the SRL the challenges of cross-examination, including his own.
9) Give SRL plenty of notice about requested jury instructions plus provide both parties instructions early in the process.
10) After verdict, make sure the SRL knows correct procedures for appeal.

15.11 DEMEANOR

1) The judge should maintain decorum in courtroom, cognizant of the effect it will have on everyone present, including the self-represented litigant. Be courteous
2) Patience doesn't mean making a pact with the devil of denial, ignoring or emotions and aspirations. It means being wholeheartedly engaged in the process which is unfolding, rather than ripping open a budding flower or demanding a caterpillar hurry upr and get the chrysalis stage over with" – Sharon Salzberg
3) Stress – this issue applies to both the Court, the self-represented litigant, and others in the proceeding. The judge may attempt to ease the anxiety in the courtroom, so all participants are more likely to participate fully in the proceedings. Calling a recess so parties can calm down is always a good strategy.
4) Do not use disdainful comments, tone, or manner towards the SRL
5) Do not make negative comments about self-representation
6) Use titles for the SRL like those for counsel
7) Avoid overly familiar contact or reference to attorneys
8) Consider treating the SRL like you would an inexperienced young attorney in your court for the first time.

15.12 SOVEREIGN CITIZENS

(A) Who are they?

1) Some of these individuals truly believe they are a "sovereign" aka self-governing and not bound by the jurisdiction of your court or the government of the United States. Some red flags to look for to anticipate a "sovereign citizen" will have a case in your courtroom include:
   a) Their use of language (will refer to their vehicle as a "conveyance"). They do not drive but instead "travel" so the state's driving laws are not applicable.
   b) They believe the 14th Amendment to the U.S. Constitution caused Americans to be federal citizens instead of sovereign ones. They also believe the U.C.C. is the effective law of the land.
   c) The sovereign may sign their pleading "under duress" with a U.C.C. section or write "without recourse" or "all rights reserved". Many times, their signature will be in all capital letters and have strange punctuations like "FIRST NAME MIDDLE NAME; LAST NAME."
   d) Often the pleading will refer to maritime law.
   e) Sovereigns often use a specific color of ink -usually red – when signing a document. The signature may also include a thumbprint, sometimes with a drop of blood.
   f) They see the U.S. government as a corporation plus you are an agent of the corporation. Thus, according to the U.C.C., they are not under your jurisdiction.
   g) If your flag has gold fringes, it is an admiralty flag, and you are not sitting as an admiralty court.
   h) The sovereign will make their own drivers license and car tags.

(B) Sovereign Tactics

   a) The goal is normally to disrupt the proceedings plus refuse to follow the Court's procedures to such an extent the case will be dismissed.
   b) Many times, they will refer to themselves as the "agent" of the party summoned to Court.
   c) They will request a copy of your oath of office – copies are normally kept at the A.O.C.
   d) "Paper Terrorism" – the goal is to flood your clerk's office with pleadings. They are designated to frustrate and confuse the Court. These documents, which can be found on the Internet, are written in nonsensical language which is all but incomprehensible to non-Sovereigns.
   e) Sovereigns have also been known to file bogus liens on judges' properties which are not discovered until the sale of the home! (Felony in Tennessee)

f) In Court, after questioning your authority, the sovereign usually will claim not to understand your question or simply not answer. Obviously, this can be frustrating to a Judge who is comfortable with the normal flow of his or her proceedings.

(C) Develop an Action Plan with techniques which work best for your Court

a) Remember to remain calm even though frustrated.
   i. Those who anger us control us.
   ii. Always treat people as an end in themselves, never to an end. – Immanuel Kant
   iii. A Judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others. Canon 3
b) Develop a difficult litigant toolbox (Ask Clerk's office to notify you of cases assigned to you which might involve a sovereign).
c) Demonstrate to sovereign you are listening and understand – treat him or her with respect even though the sovereign may not be treating you with respect.
d) Time is your friend – take advantage of this authority.
   i. If you find you are getting upset or frustrated …… Take a recess.
   ii. Patience will achieve more than force – Edmund Burke
   iii. The greatest remedy for anger is delay. – Seneca
e) Understand what the Sovereign wants
   i. Attention. Attention. Attention
   ii. Call their case last
   iii. Realize you are not going to be able to change the sovereign, his ideas, or to get him to willingly comply with your requests.
   iv. Many sovereigns want to upset you and disrupt court.
   v. The sovereign wants to entertain his/her entourage.
   vi. The sovereign or supporters may be recording the proceeding. Do not get in a fight over it.
f) Security
   i. Appropriate security is something you and your staff should discuss long before your first encounter with the sovereign
   ii. Consider if the person is a Sovereign (capital S) or a "sovereign light"
   iii. Do not let the sovereign about extra security – use some plain clothesman
   iv. If surprised by the appearance of a sovereign, take a recess to obtain the appropriate security.
g) Follow your procedures even if the Sovereign does not answer questions properly or follows your procedures.
   i. When ruling on a Sovereign's motion respond only – granted or denied or sustained or overruled.
   ii. Make your final decision quietly, patiently, without explanation or ruling (your call) and then get off the Bench.

(D) Warnings

a) Some of these individuals may be violent
b) They may attempt to disrupt your courtroom. Only use contempt powers after numerous warnings and recesses. Do not escalate the potential conflict. The Judge is in a position of authority. Challenging the sovereign is not a good practice.

(E) Practice Tips

- Be patient
- Let them talk
- Avoid long discussions
- Be respectful
- Take a recess
- Follow your rules and procedure (anticipate the Sovereign will not conform – press on)

15.13 DISCLAIMER

Many of the opinions in this chapter are the opinions of the author and other individuals who have experience with these issues. Use your own judgment on which of these suggestions you would like to adopt. I would also suggest taking the four-day course on Self Represented Litigants provided by the National Judicial College. Information on this course can be found at: https://judges.org/courses/srls-2022/ .

15.14 RESOURCES

1. "Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role," by Russell Engler, Notre Dame Journal of Law, Ethics and Public Policy, Volume 22, Pages 367-398 (June 2008)
2. "Ensuring Access to Justice in Tough Economic Times," by Frank Broccolina and Richard Zorza, Judicature, Volume 92, No. III (November-December 2008)
3. "Judicial Techniques for Cases Involving Self-Represented Litigants," by Rebecca Albrecht, John M. Greacen, Bonnie Rose Hough, and Richard Zorza, The Judges Journal, (Winter 2003 American Bar Association, Volume 42, No. 1)
4. "Litigants without Lawyers: Courts and Lawyers Meeting the Challenge of Self-Representation" (American Bar Associations Coalition for Justice Roadmap Series, 2002)
5. "Guidelines for Tennessee Court Clerks Who Assist Self-Represented Persons" (Tennessee State Court Clerks Association), https://tncourts.gov/sites/default/files/docs/clerk_guidelines_7_28_10.pdf
6. "Report to the Tennessee Supreme Court of the Task Force to Study Self-Represented Litigant Issues in Tennessee" (December 4, 2007, Carl A. Pierce, Chairperson)
7. "In a Downturn, More Act as Their Own Lawyers," by Jonathan D. Glater, The New York Times (April 10, 2009)

8. "The Toughest Nut: Handling Cases Pitting Unrepresented Litigants Against Represented Ones," by Russell Engler, National Council of Juvenile and Family Court Judges, Volume 62, No. 1 (Winter 2011)
9. "Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants," by Cynthia Gray (American Judicature Society, 2005)
10. "The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications," by Richard Zorza, Georgetown Journal of Legal Ethics, Volume 17, pages 423-454 (2004)
11. "Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials," by John Sheldon and Peter Murray, Judicature, Volume 86, No. 5 (March-April 2003)
12. "A New Day for Judges and the Self-Represented: Toward Best Practices in Complex Self-Represented Cases," by Richard Zorza, The Judges' Journal, Vol. 51, No. 1 (Winter 2012), by The American Bar Association
13. "Self-Represented Litigants in Civil Matters: Suggested Best Practices and Relevant Court Rules," Illinois Supreme Court Commission on Access to Justice, Administrative Office of the Illinois Courts (October 2014)
14. "Meeting the Challenges of Self-Represented Litigants," Bench Book for General Sessions Judges of the State of Tennessee, *An initiative of the Tennessee Supreme Court Access to Justice Commission* (May 2013)
15. "Handling Cases Involving Self-Represented Litigants," (A National Bench Guide for Judges), by Self-Represented Litigation Network (2008)
16. Justice for All, https://justiceforall.com
17. Self-Help Center, Administrative Office of the Courts, https://tncourts.gov

APPENDIX

1. Self-Represented Litigant Non-Jury Trial Checklist, Don R. Ash (April 2022).
2. Suggested Script for the Judge, Don R. Ash (2022).
3. Miscellaneous Checklists: Burden of Proof, Communications, and Fact Finder, Don R. Ash (2022).

Self-Represented Litigant Non-Jury Trial Checklist

Pre- Trial

1) Make sure your complaint or answer complies with the Tennessee Rules of Civil Procedure (unless filing in General Sessions Court
    - Sample forms can be found at https://tncourts.gov/
2) See "Justice for All – A Tennessee Supreme Court Initiative" (A website with several videos to assist the SRL)
    - Specifically see video on "Getting Ready for a General Sessions Case" (Very similar to all non-jury cases) https://justiceforalltn.com/videos/getting-ready-general-sessions-civil-court-case
3) A Court can not help you present your case or give legal advice to either side. It can only explain court procedures and the basis for its rulings in the case.
4) Follow the Court's Orders regarding disclosure of witnesses and exhibits.
5) Parties, not the Court, are responsible for subpoenaing witnesses and records (These forms are at the Clerk's Office in the Courthouse).
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7) Parties may not communicate about the facts of the case with the Judge outside of court hearings. This is called *ex parte* communication and is strictly prohibited by the Tennessee Rules of Judicial Conduct. It is important to remember both sides have a right to tell their side of the story. Please be respectful and patient both in delivering your perspective and listening to your opponent's.
8) The Court may notify you by Order of a pre-trial conference. At this proceeding, the parties will discuss exhibits, procedures, and other issues relevant to trial.
9) Parties must file all communications to the Judge (complaints, answers, motions, affidavits, etc.) with the clerk's office and provide copies of these documents to the opposing parties.

Trial

1) Parties bringing the action are responsible for presenting evidence to support their claims. A self-represented litigant must adhere to the essential requirements of presenting a case; a judge will not assume anything in support of the case if it has not been properly presented.
2) Many times, parties will hire a court reporter or split the cost of a court reporter to transcribe the proceedings. This person will keep a record of every aspect of the trial. While somewhat rare in general sessions cases, it is the norm in Circuit and Chancery non-jury trials to have a court reporter present. This transcript is very important if either party wishes to appeal the trial court's ruling.
3) Courtroom Conduct – Except when examining or cross-examining witnesses, litigants should address their remarks and questions directly to the Judge. They should not direct comments to the opposing party or counsel for the opposing party.
4) For a good example of opening statements, introduction of documents, and closing statements please see the "Office of Administrative Hearings, Video Guide to Hearings" found at https://youtu.be/imrPhyP8Fb4

5) Exhibits – It is each party's responsibility to properly introduce exhibits (i.e. photographs, testimony, properly authenticated documents, etc.). Be sure to bring your exhibits to Court. You should provide copies for the opposing side, the Court, and one to place in the Court file for each proposed exhibit.
6) Presentation – The party who initially filed the complaint will make an opening statement (this is a roadmap of what he or she anticipates the evidence will show).
    a. Next, the other side will make their opening statement. The party seeking relief will then proceed with presenting proof of their case. This can include the introduction of testimony of witnesses and the production of various exhibits (Remember to review the Tennessee Rules of Evidence, especially Rules 802, 803, and 804).
    b. Rebuttal testimony can also be submitted after the initial presentation. When all of the proof has been presented, each side will be allowed to make closing statements. The Court may rule from the Bench or issue a written order.
7) Win or lose, it is always best to be respectful to the Court, the other parties, and witnesses when in Court.

Post-Trial

1) After trial in Circuit or Chancery Courts, each side has the right to file certain post-trial motions. An example of these is a Motion to Alter or Amend (See Tennessee Rule of Civil Procedure 59.04). There are strict time requirements to filing this motion – please review.
2) Review the Tennessee Rules of Appellate Procedure to take advantage of your rights to appeal. There are strict time requirements for these proceedings. Please review these Rules carefully.

Suggested Script for the Judge

INTRODUCTION

"Good morning.

Today, _____ Court of _____ County is handling a Civil docket; that means we hear non-criminal cases. This includes automobile accidents, debt collection, and/or landlord/tenant cases. We also hear home improvement, property, employment and auto repair contract cases.

What I will do first is read the list of cases I will hear today. I need complete silence in the court. That means no talking or making noises. Turn off your cell phones. When I call your name, please hold up your hand and answer 'here.' We need to know if you are here and if you have an attorney. I may also ask questions about your case. This lets me know how long it will take to hear each case.

After I go over the case list, you will have time to go outside the courtroom and talk to people on the other side of your case. This is a last chance to settle the case yourselves. If you still can't agree, you will get a trial.

You must give each other any papers, pictures, or proof you plan to use in court (that you plan to hand to the judge as an exhibit). Give the other side copies if you have them. If you don't have copies, let the other side read your papers or see your pictures. The other side must then return our papers or pictures to you. This will save time when we start your case. This is lawyers must do and we expect the same if you represent yourself. Everyone must be polite in court. No cursing, yelling, or being rude to anyone. The bailiff can help with this if there is a problem.

Lawyers are here only to help their client. They don't speak for the court."

Burden of Production and Proof Checklist

- ✓ Parties bringing the action are responsible for presenting evidence to support their claims. A self-represented litigant must adhere to the essential requirements of presenting a case; a judge will not assume anything in support of the case if it has not been properly presented.
- ✓ The parties, not the court, are responsible for subpoenaing witnesses and records.
- ✓ There are limits on the kinds of evidence that may be admitted.
- ✓ The elements of a plaintiff's claim must be proven by evidence admitted by the court, according to the required legal standard.
- ✓ In the judge's discretion, the elements of claims and defenses, as well as the burden of proof may be explained in the same manner that they would be explained to a jury.

Communication with the Judge Checklist

- ✓ Parties may not communicate about the case with the judge outside formal court proceedings.
- ✓ The judge, as a general rule, is prohibited from communicating with a party unless all parties are aware of the communication and have an opportunity to respond or be present.
- ✓ Parties must file all communications to the judge (complaints, motions, affidavits) with the circuit clerk's office along with a notice that copies of those materials have also been given to the opposing party.

Judge as Fact Finder Checklist

- ✓ In most proceedings the case will be heard without a jury. In these proceedings, the judge is the fact finder and the facts are determined by the judge from the evidence presented. For example, if Party A presents a witness who testifies the light is green, it is the judge's responsibility to determine the color of the light. That determination becomes a fact of the case.

CHAPTER 16

INITIATING PROSECUTION

Special thanks to Judge Stacy Street for his review of this chapter.

Contents **Section**

16.01 METHODS AND FORMS

Under the United States and Tennessee Constitutions, anyone accused of a criminal offense has a right to be tried only upon indictment, presentment, or impeachment. Tenn. Code Ann. § 40-3-101; U.S. Const. amend. V.; Tenn. Const. art. I, §14. Tenn. R. Crim. P. 7 provides that the form and content of indictments, presentments, and informations shall be "as provided by law."

16.02 GRAND JURY

For general information regarding grand jury issues, see Tenn. R. Crim. P. 6 and Tenn. Code Ann. §§ 8-7-501 to -503, 22-2-301 to -315, 40-12-101 to -218, and 40-13-101 to -221. "[P]rosecutorial abuse of the grand jury process occurs when the dominant purpose of a grand jury proceeding is to investigate a defendant for an offense for which he or she has already been indicted," but there is a presumption of regularity and the defendant has the burden of proving otherwise. If the court concludes that abuse has occurred, the appropriate remedy depends upon the status of the proceedings at the time of the court's determination. *State v. Mangrum*, 403 S.W.3d 152, 165-66 (Tenn. 2013).

16.03 INDICTMENT AND AMENDMENT OF INDICTMENT

An indictment is a written accusation presented by the grand jury charging a person with an indictable offense. Indictable offenses include all felonies and misdemeanors. Tenn. Code Ann. §§ 40-13-101, -102. Acquiring a valid indictment requires compliance with numerous provisions regarding procedure, form and content. Tenn. Code Ann. §§ 40-3-104; 40-13-103 to -221; 40-17-106; Tenn. R. Crim. P. 7.

For certain offenses, statutes set forth what is necessary to constitute a sufficient indictment. That includes, but is not necessarily limited to, the following offenses: (1) Fraud; (2) Perjury; (3) Libel; (4) Conspiracy; (5) Gaming; (6) Dealing in futures; (7) Liquor violations; (8) Violating graves; (9) Embezzlement or breach of trust; and (10) Possession of counterfeit money. Tenn. Code Ann. §§ 40-13-212 to -221.

No judge, attorney, clerk, grand juror or any other officer of the court may reveal the fact that a defendant has been indicted until the defendant's appearance has been secured. Violation of this provision is a misdemeanor. Tenn. Code Ann. § 40-13-112.

An indictment may always be amended with the defendant's consent. It may also be amended without the defendant's consent before jeopardy has attached if no additional or different offenses are charged and no substantial rights of the defendant are prejudiced. Tenn. R. Crim. P. 7.

16.04 INFORMATION

An information is a written statement by a district attorney general charging a person with the commission of a criminal offense. Tenn. Code Ann. § 40-3-103(b). An accused may, with the consent of the court and the accused's attorney, waive the right to be tried upon presentment or indictment and consent to prosecution by information. Tenn. Code Ann. §§ 40-3-101, -103. Prior to accepting this waiver, the court should consult Tenn. Code Ann. § 40-3-103 regarding additional requirements.

16.05 PRESENTMENT

Any criminal violation may be prosecuted by presentment, and may be made upon the information of any one member of the grand jury. Tenn. Code Ann. § 40-3-102. Tennessee laws pertaining to indictments pertain equally to presentments if the context permits. Tenn. Code Ann. § 40-13-101(b).

16.06 FRAUD AND ECONOMIC CRIMES PROSECUTION ACT

The intent of the legislature in passing the Fraud and Economic Crimes Prosecution Act was, among other things, to provide a method for obtaining restitution in bad check cases prior to the institution of formal charges. Tenn. Code Ann. § 40-3-202. For additional information regarding this Act and its procedures, see Tenn. Code Ann. §§ 40-3-201 to -210.

CHAPTER 17

BAIL

Special thanks to Judge Steve Sword for his edits and review of this chapter.

Contents **Section**

17.01 RIGHT TO BAIL

An accused has the right to bail prior to trial for all offenses except for capital offenses "where the proof is evident or the presumption great." Tenn. Const. art. I, §15; Tenn. Code Ann. § 40-11-102. Upon conviction, bail pending appeal is permitted in limited circumstances. Tenn. Code. Ann. §§ 40-11-113, 40-26-102 to -104; Tenn. R. Crim. P. 32(d); Tenn. R. App. P. 8.

17.02 MAKING BAIL

The various types of bail and the relevant statutory provisions are as follows:

A. Release on Recognizance or Unsecured Appearance Bond

- Tenn. Code Ann. § 40-11-115

B. Release on Non-Financial Conditions

- Tenn. Code Ann.§ 40-11-116(b)

C. Secured Bail Bond

- Tenn. Code Ann. §§ 40-11-117, -118

D. Guaranteed Arrest or Bail Bond Certificate

- Tenn. Code Ann. §§ 40-11-145, -146

E. Bail Bond Secured by Real Estate or Sureties

- Tenn. Code Ann. §§ 40-11-122, -123

F. Release During Trial

- Tenn. Code Ann. § 40-11-141

17.03 SETTING AND TAKING BAIL

A defendant arrested and/or held for a bailable offense is entitled to bail by the committing magistrate or by any judge of the circuit or criminal courts. In limited circumstances, a clerk of the circuit or criminal court may also set the amount of bail. There are statutory limits on the amount a clerk may set, and the clerk must give notice that the defendant has a right to petition the court for a reduction in the amount of bail set by the clerk. Tenn. Code Ann.§ 40-11-105. For the provisions regarding which officials may take bail, see Tenn. Code Ann.§§ 40-11-106 to 40-11-109.

A. Factors for consideration

Excessive bail shall not be required. Tenn. Const., art. I, §16. In determining whether release on recognizance or on an unsecured bond will reasonably assure the defendant's appearance, and in setting an amount of bail where appropriate, the magistrate should consider the factors set out in Tenn. Code Ann. §§ 40-11-115 and 40-11-118. If a defendant does not qualify for release upon recognizance, the magistrate shall impose the least onerous conditions reasonably likely to assure the defendant’s appearance in court. Tenn. Code Ann. § 40-11-116.

B. Review of determination

Defense counsel may file a written motion for a change in bail or other conditions of release if dissatisfied with the court's determination. The motion must be served upon opposing counsel within a reasonable time. In granting or denying the motion, the court must set forth the reasons for its action in writing. Tenn. Code Ann.§ 40-11-143.

When a defendant is charged with a bailable offense while released on bail, the judge must set bail on each new offense in an amount not less than twice that which is customarily set for the offense charged. Tenn. Code Ann. § 40-11-148.

17.04 FORFEITURE OF BAIL

If the defendant does not appear according to the terms of release, a conditional judgment may be entered against defendant and defendant’s sureties or the court may grant an extension. Tenn. Code Ann. § 40-11-201. In the court’s discretion, the sureties may be exonerated upon surrender of the defendant and the payment of the costs. Tenn. Code Ann.§ 40-11-203.

17.05 DOMESTIC VIOLENCE AND ALCOHOL-RELATED OFFENSES

If a defendant is charged with DUI, vehicular assault, vehicular homicide by intoxication, or aggravated vehicular homicide, see Tenn. Code Ann. §§ 40-11-118 and 40-11-148. If a defendant is charged with stalking, aggravated stalking, especially aggravated stalking, or certain offenses involving domestic violence, or if the defendant is in violation of an order of protection, see Tenn. Code Ann. §§ 40-11-150 and 40-11-152.

17.06 DEFENDANT NOT LAWFULLY PRESENT IN THE UNITED STATES

If a defendant who is not lawfully present in the U.S. is arrested for causing a traffic accident resulting in death or serious bodily injury to another and if the defendant was driving without a valid driver license and evidence of financial responsibility, see Tenn. Code Ann. §§ 40-11-105(c) and 40-11-118(e).

17.07 RELEASE OF BONDSMAN/SURETY FOLLOWING INITIAL DISPOSITION

A bondsman or surety must be released if the charges are disposed of by "acquittal, agreement with the state, whether diversion or otherwise, or retirement." Tenn. Code Ann. § 40-11-138(b)(1). In contrast, the bond remains in effect until the defendant is sentenced if the defendant is convicted or enters a guilty plea. Tenn. Code Ann. § 40-11-138(b)(2)(A). Between the time of the conviction/plea and the time of sentencing, however, the bond cannot be forfeited or included in a bondsman's capacity or solvency. Tenn. Code Ann.§ 40-11-138(b)(2)(B).

17.08 BAIL FOR MATERIAL WITNESS

If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that the witness has refused or will refuse to respond to process, the court may require the witness to give bail. See Tenn. Code Ann.§ 40-11-110.

17.09 ADMISSION TO BAIL PENDING APPEAL

A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of the direct appeal. See Tenn. R. Crim. P. 32(d)(1). A judge shall revoke bail immediately following a conviction for one of the following offenses:

-First degree murder;
-Any Class A Felony;
-Any RICO violation;
-Aggravated kidnapping;
-Aggravated robbery;
-Rape;
-Aggravated sexual battery;
-Especially aggravated burglary;
-Aggravated child abuse, neglect, or endangerment;
-Adulteration foods, liquids, or pharmaceuticals;

-A felony drug offense involving a Schedule I Controlled Substance;

-A felony drug offense involving cocaine or methamphetamine in an amount 0.5 grams or more;

-A felony drug offense involving a certain quantity, see Tenn. Code Ann. §39-17-417(i); and

-Aggravated or especially aggravated sexual exploitation of a minor.

See Tenn. Code Ann. §40-11-113(b). A judge may revoke bail upon conviction for any other felony offense. See Tenn. Code Ann. § 40-11-113(c).

17.10 REVOCATION OF BAIL BEFORE TRIAL

A defendant released before trial shall continue on release during trial or release pending trial unless the court determines that other terms and conditions or termination of release are necessary to assure the defendant's presence during trial, or to assure that the defendant's conduct will not obstruct the orderly and expeditious progress of the trial.

If after the defendant is released on bond prior to trial, the defendant violates a condition of release, is charged with an offense committed during the defendant's release, or engages in conduct which results in the obstruction of the orderly and expeditious progress of the trial or other proceedings, then the court may revoke and terminate the defendant's bond and order the defendant held without bail pending trial or without release during trial. See Tenn. Code Ann. § 40-11-141.

Pretrial bail revocation hearing must comply with due process including at a minimum the right to notice and the opportunity to be heard. The burden of proof is upon the State to show by a preponderance of the evidence that the defendant has violated the terms of Tenn. Code Ann. § 40-11-141. Revocation will be appropriate in cases where the court finds that the imposition of additional bail conditions or an increased amount of bail would not be sufficient to assure the defendant's appearance at trial or protect the public's safety. See State v. Burgins, 464 S.W.3d 298 (Tenn. 2015).

CHAPTER 18

SEARCH WARRANTS

Special thanks to Judge Christopher Craft and Judge Roy Morgan for their edits and review of this chapter.

Contents **Section**

See the "Warrantless Searches" chapter of this benchbook for additional information regarding searches.

18.01 IN GENERAL

The Fourth Amendment to the United States Constitution provides that "[the] right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Tennessee Constitution speaks in broader terms than the federal constitution, protecting "possessions" from unreasonable searches and seizures to limit searches of real and personal property. Tenn. Const. Art. I, § 7.

The Fourth Amendment only limits governmental activity. Therefore, evidence secured by private persons, even by illegal means, creates no constitutional violation. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). A private party acting for a reason independent of a governmental purpose does not implicate the Fourth Amendment. *State v. Burroughs*, 926 S.W.2d 243, 246 (Tenn. 1996).

The two clauses of the Fourth Amendment are referred to as the warrant clause and the reasonableness clause. Under both the federal constitution and our state constitution, a search without a warrant is presumptively unreasonable. Any evidence obtained pursuant to such a search is subject to suppression unless the state demonstrates that the search was conducted under one of the narrowly defined exceptions to the warrant requirement. *State v. Garcia*, 123 S.W.3d 335, 343 (Tenn. 2003) (citing *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997) and *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)); see also *Katz v. United States*, 389 U.S. 347, 357 (1967).

Tennessee has approved of and adopted exceptions to the requirement of obtaining a valid search

warrant, including search incident to arrest, plain view, stop and frisk, hot pursuit, search under exigent circumstances, and consent. *State v. Cox*, 171 S.W.3d 174, 179 (Tenn. 2005). If a search falls under one of the exceptions to the warrant requirement, the relevant inquiry in determining the reasonableness of a warrantless search is not whether it would have been reasonable to get a warrant, but rather whether the search that occurred was reasonable under all of the circumstances. The consequence of an illegal search or seizure in most situations is the suppression or exclusion of the evidence obtained. *Mapp v. Ohio*, 367 U.S. 643 (1961).

18.02 ISSUANCE

By statute, judicial commissioners, county mayors, presiding officers of any municipal or city court, and judges of the supreme, appellate, chancery, circuit, general sessions, and juvenile courts have the authority to issue search warrants. Tenn. Code Ann. § 40-1-106. Search warrants must be issued by a neutral and detached magistrate and not by one having a direct, personal, or pecuniary interest. *In re Dender*, 571 S.W.2d 491 (Tenn. 1978). Persons whose compensation is contingent upon issuance or non-issuance are prohibited from issuing a search warrant. Tenn. Code Ann. § 40-5-106.

A search warrant can only be issued by the judges of the supreme, appellate, chancery, circuit, general sessions and juvenile courts throughout the state, judicial commissioners and county mayors in those officers' respective counties, and the presiding officer of any municipal or city court within the limit of their respective corporations wherein the property sought is located. Tenn. R. Crim. P. 41(a) and Tenn. Code Ann. § 40-1-106. The statute was amended effective 7/1/19 to allow Circuit, Chancery and Criminal Courts to have statewide jurisdiction to issue search warrants for persons or property, not limited by county or district boundaries. A warrant may be issued upon request of the district attorney general, assistant district attorney general, criminal investigator or any other law-enforcement officer. Tenn. R. Crim. P. 41(a).

18.03 GROUNDS

The grounds for issuance of a search warrant are that probable cause exists to believe that the items or person(s) sought are in a particular place at a particular time. A search warrant may be issued to search for and seize any of the following: (1) evidence of a crime; (2) contraband, the fruits of a crime, or items otherwise criminally possessed; (3) property designed or intended for use, or that has been used in a crime; (4) a person whose arrest is supported by probable cause; or (5) a person who is unlawfully restrained. Tenn. R. Crim. P. 41(b). A search warrant may also be issued for property that was stolen or embezzled, property that was used as a means of committing a felony, and property in the possession of any person who has the intent to use it as a means of committing a public offense (or in another's possession for the purpose of concealing it). Tenn. Code Ann. § 40-6-102.

18.04 PARTICULARS OF ISSUANCE

***NOTE*: See 18.09 relative to requesting a warrant by electronic means, the particulars of**

which are set out in Tenn. R. Crim. P. 41(c)(2).

A warrant may issue only on an affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuance. Tenn. R. Crim. P. 41(c)(1). The magistrate, before issuing the warrant, must examine the complainant and any witness produced under oath, take their affidavits in writing, and require those swearing to the information to sign the affidavit, which must set forth facts tending to establish the grounds of the application or probable cause for believing that they exist. Tenn. Code Ann. § 40-6-104. The probable cause necessary for issuance of a search warrant must be based only upon the evidence appearing in the written and sworn affidavit, which must present facts upon which "a neutral and detached magistrate, reading the affidavit in a common sense and practical manner," can determine the existence of probable cause for the issuance of the search warrant. The affidavit must provide more information than just the affiant's conclusory allegations to ensure that the magistrate exercises independent judgment. In reviewing the existence of probable cause for issuance of a warrant, the magistrate may only consider the affidavit, and may not consider any other evidence known by the affiant or provided to or possessed by the issuing magistrate. *State v. Carter,* 160 S.W.3d 526, 533 (Tenn. 2005).

While an affidavit must be retained in order to ensure subsequent judicial review of the probable cause determination, there is no statute or rule in Tennessee which requires an affidavit upon which a search warrant is issued to be attached or otherwise kept with the warrant. *State v. Davis,* 185 S.W.3d 338, 345 (Tenn. 2006). It is, however, good practice, particularly if a previous affidavit's contents are also considered in the issuance of the warrant. An affidavit that is neither referred to nor incorporated in a search warrant is subject to being disregarded by the court reviewing the magistrate's probable cause determination. *State v. Smith*, 836 S.W.2d 137 (Tenn. Crim. App. 1992).

The affidavit must, within its four corners, establish probable cause to believe that items (or a person) subject to seizure are in a particular place at a particular time. The test for probable cause is whether the facts and circumstances within the affiant's knowledge and of which the affiant has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that items subject to seizure are presently to be found at a certain place. It is the probability, and not the certainty, of criminal activity that must be shown to establish probable cause. An affiant's mere belief or suspicion that evidence is located at a particular place is insufficient for the issuance of a search warrant. *Earls v. State*, 496 S.W.2d 464 (Tenn. 1973).

Probable cause may consist of first-hand probable cause, that which the affiant is aware of through the affiant's personal senses, and hearsay probable cause, that which the affiant is made aware of by another. Both types of probable cause are acceptable, but warrants based on hearsay probable cause may be required to establish the basis for believing the hearsay declarant as well as the basis of the declarant's information.

If the affidavit is based on the officer's own observations, only the officer's basis of knowledge need be set out. However, if the affidavit is based on hearsay statements of an informant, facts regarding the informant's credibility and reliability, as well as the informant's basis of knowledge, must be set out in the affidavit. To ensure that the magistrate exercises independent judgment, the affidavit must contain more than mere conclusory allegations by the affiant. While independent police corroboration can make

up deficiencies in either prong, each prong represents an independently important consideration that must be separately considered and satisfied in some way. *State v. Henning*, 975 S.W.2d 290, 295 (Tenn. 1998).

Although a criminal informant's information is inherently suspect, information provided by an ordinary citizen is presumed to be reliable, and the affidavit need not establish that the source is credible or that the information is reliable. In order for the informant to be considered a citizen informant, the affidavit should contain more than conclusory allegations that the informant was a "concerned citizen source," "acted on civic duty," or "asked for no payment for their information." Generally, a more particularized showing of the law-abiding nature of the person supplying the information is needed. The reliability of the informant, as well as the information furnished, must be judged from all the circumstances and from the entirety of the affidavit. *See State v. Echols*, 382 S.W.3d 266, 279 (Tenn. 2012) (reliability of information is not presumed in the absence of information regarding whether the informant is a citizen informant); *State v. Williams*, 193 S.W.3d 502, 506-09 (Tenn. 2006) (estranged girlfriend potentially motivated by revenge was neither a criminal informant nor a citizen informant, and her information was not presumptively reliable); *State v. Smotherman*, 201 S.W.3d 657, 663-64 (Tenn. 2006) ("reference in the affidavit to the confidential informant as an 'agent,' alone, is insufficient to establish that the informant was a law enforcement officer whose information is considered reliable"). Although the age of the informant is certainly relevant, the mere fact that the citizen is a juvenile does not preclude a finding of reliability. *State v. Yeomans*, 10 S.W.3d 293, 296 (Tenn. Crim. App. 1999).

Prior to *State v. Tuttle*, 515 S.W.3d 282 (Tenn. 2017), if the source for the affidavit was a criminal informant, reliability of that informant had to be determined by a two-prong *Aguilar-Spinelli* test as adopted by our Tennessee Supreme Court in *State v. Jacumin*, 778 S.W.2d 430,439 (Tenn. 1989), which required that the affidavit establish (1) the basis of the informant's knowledge, and either (2)(a) a basis establishing the informant's credibility or (2)(b) a basis establishing that the informant's information was reliable. The United States Supreme Court abandoned that standard as too troublesome for the trial courts in 1983, adopting a "totality of the circumstances" approach in *Illinois v. Gates*, 462 U.S. 213 (1983). Our Tennessee Supreme Court continued to adhere to *Aguillar-Spinelli* until 2017, however, due to our Tennessee Constitution, until it decided *State v. Tuttle*, 515 S.W.3d 282 (Tenn. 2017), adopting the *Gates* "totality of the circumstances" test as well. Therefore, the series of Tennessee cases decided between 1983 and 2017 as to the validity of search warrants in Tennessee must be examined with care, as they were decided under a stricter standard than the one now recognized. Citing *Illinois v. Gates*, our Supreme Court in *Tuttle* 515 S.W.3d at 303 described the two different standards and held that the *Aguilar-Spinelli* test

> when applied rigidly, "poorly serve[d]" the government's most basic function of providing for the security of individual citizens and property because an "anonymous tip seldom could survive a rigorous application" of the two-pronged test, even though "such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise 'perfect crimes.' "*Id*. at 237-38. "While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not." *Id.* at 238.

The Gates Court emphasized, however, "that an informant's 'veracity,' 'reliability' and 'basis of knowledge'" remain "highly relevant in determining the value of his report" under the totality-of-the-circumstances analysis but "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." *Gates*, 462 U.S. at 230.

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. Id. at 238-39 (internal quotation marks and citations omitted). The *Gates* Court was "convinced that this flexible, easily applied standard" would "better achieve the accommodation of public and private interests" required by the Fourth Amendment. Id. at 239.

Nevertheless, the *Gates* Court cautioned that, "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur," the *Gates* Court reiterated that courts should conscientiously review affidavits and strike as insufficient "'bare bones' affidavits" containing conclusions rather than facts. *Gates*, 462 U.S. at 239. The *Gates* Court emphasized "the value of corroboration of details of an informant's tip by independent police work" to the totality-of-the-circumstances analysis, id. at 241, and did not discount the value of corroboration of innocent conduct, explaining, "[i]t is enough, for purposes of assessing probable cause, that 'corroboration through other sources of information reduced the chances of a reckless or prevaricating tale,' thus providing 'a substantial basis for crediting the hearsay.'" *Id.* at 244-45 (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)).

To establish probable cause, an affidavit must set forth facts from which a reasonable conclusion may be drawn that the evidence will be found in the place for which the warrant authorizes a search. *See State v. Saine*, 297 S.W.3d 199 (Tenn. 2009) (although the affidavit did not contain direct information connecting the objects of the search with the suspect's residence, the magistrate could reasonably infer that the drugs were located in the residence based upon the affidavit's assertion that the officers observed the defendant leave his residence, sell drugs to a confidential informant, and return to his residence). In addition, the affidavit must contain information which will allow a magistrate to determine whether the facts are too stale to establish probable cause at the time issuance of the warrant is sought. *State v. Vann*, 976 S.W.2d 93, 105 (Tenn. 1998). While the lapse of time between the commission of a crime and the issuance of a search warrant may affect the likelihood that incriminating evidence will be found, probable cause is a case-by-case determination. In making this determination, the issuing magistrate should consider whether the criminal activity under investigation was an isolated event or a protracted

pattern of conduct, the nature of the property sought, the normal inferences as to where a criminal would hide the evidence, and the perpetrator's opportunity to dispose of incriminating evidence. *State v. Reid*, 164 S.W.3d 286, 327 (Tenn. 2005). There is, however, no requirement that a particular date be specified. *State v. McCormick*, 584 S.W.2d 821 (Tenn. Crim. App. 1979). Service of the warrant within five days, as provided in Tennessee Code Annotated section 40-6-107, creates a rebuttable presumption that a warrant retains the probable cause validity attributed to it at the time of issuance. *State v. Evans*, 815 S.W.2d 503 (Tenn. 1991). The challenger of the warrant may defeat the presumption by showing that probable cause no longer existed and that something objective occurred that reasonably put the police on notice of that fact. *Id*.

If the magistrate is satisfied that probable cause exists, the magistrate is required to issue a signed search warrant directed to any law enforcement officer and commanding the officer to search the person or place named for the property or person specified. The magistrate is required to make two copies of the warrant, endorse the officer's name, the hour, and the date on the warrant, and retain a copy of the warrant. The failure of the magistrate to copy or endorse the warrant, or the failure of the officer to leave a copy of the warrant with the person upon whom the search warrant is served (if possible), renders the search and seizure illegal. Tenn. R. Crim. P. 41(c) & (d); *State v. Bobadilla*, 181 S.W.3d 641 (Tenn. 2005); *State v. Coffee*, 54 S.W.3d 231 (Tenn. 2001).

An affidavit which is sufficient upon its face may be impeached in two circumstances: (1) when a false statement was made with intent to deceive the court, regardless of whether the statement was material to the establishment of probable cause, or (2) when a false statement is recklessly made and is essential to establish probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978). Recklessness may be established by showing that a statement was false when made and that the affiant did not have reasonable grounds for believing it at the time it was made. *State v. Little*, 560 S.W.2d 403 (Tenn. 1978). An innocent or mere negligent misrepresentation is not sufficient to invalidate a warrant or nullify a search. *Woods v. State*, 552 S.W.2d 782 (Tenn. Crim. App. 1977).

18.05 SCOPE

The scope of a search warrant is described in the Fourth Amendment. It provides that "[w]arrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. amend. IV. The Tennessee Constitution is even more specific: "General warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted." Tenn. Const. art. I, § 7.

The Fourth Amendment requires a search warrant to contain a description of the place to be searched with such particularity that the searching officer may with reasonable effort ascertain and identify the intended place. The Tennessee Constitution prohibits general warrants, and Tennessee Code Annotated section 40-6-103 requires search warrants to describe particularly the property and the place to be searched. This requirement is met if the description "particularly points to a definitely ascertainable place so as to exclude all others, and enables the officer to locate the place to be searched with reasonable certainty, without leaving it to his discretion." *State v. McCary*, 119 S.W.3d 226, 247 (Tenn.

Crim. App. 2003). A search warrant confers no right to search premises other than those described in the warrant. If the warrant is for the search of a unit in a multi-unit dwelling, it must describe the subunit intended to be searched with sufficient definiteness to exclude the search of an unintended subunit, unless the police are understandably misled into believing that a house was a single dwelling unit. *State v. Stinnett*, 629 S.W.2d 1 (Tenn. 1982).

18.06 EXECUTION AND RETURN

A. Execution

A search warrant must be executed and returned to the issuing magistrate within five days after the issuance date or it is void. Tenn. Code Ann. § 40-6-107. The five-day period in which a search warrant must be executed is to be computed using calendar days rather than hours. Thus, a search warrant is valid if executed by midnight of the fifth day after its issuance, with the calculation of days to exclude the day of issuance. *State v. Stanley*, 67 S.W.3d 1, 3 (Tenn. Crim. App. 2001). The five day period to return the warrant is not mandatory, but only directory. Therefore a late return does not void the warrant as long as it was executed (served) within the five days. *Anderson v. State*, 512 S.W.2d 665, 668 (Tenn. Crim. App. 1974). The search warrant may only be executed by the officer or officers to whom it was directed. The officers may enlist other persons to help in the search, but the officer to whom the warrant was directed for execution must be present when the warrant is executed (served). Tenn. R. Crim. P. 41(e). The officer is then free to leave while the search is completed by other persons. The warrant may be executed in the daytime or at night. Tenn. Code Ann. § 40-6-107.

In the past, “no knock” warrants were allowed in Tennessee if the affidavit set out facts that would indicate that if the officers knocked or announced their presence before entering with a search warrant, it would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This was proper pursuant to *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997). However, our legislature has enacted Tenn. Code Ann. § 40-6-105, effective 7/1/21, which mandates that “A magistrate shall not issue a "no knock" search warrant, which expressly authorizes a peace officer to dispense with the requirement to knock and announce the peace officer's presence prior to execution of the warrant.” Therefore “no knock” warrants are now forbidden, and any magistrate issuing one may incur civil liability. If non-law enforcement personnel are injured or killed due to the lack of announcement.

B. Detention During Execution

The United States Supreme Court has recognized law enforcement officers’ authority to detain the occupants of the premises while the officers are executing a search warrant. *Michigan v. Summers*, 101 S.Ct. 2587 (1981). However, this authority does not extend to individuals who are beyond the

immediate vicinity of the premises. *Bailey v. United States*, 133 S.Ct. 1031 (2013). While some distances clearly are outside the immediate vicinity, courts can consider "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and any other relevant factors" in closer cases. *Id.* at 1042. If an individual is outside the immediate vicinity of the premises and therefore his detention cannot be justified under the *Summers* rule, law enforcement officers still have the authority to detain the individual if the officers have probable cause to justify an arrest or reasonable suspicion to justify a brief seizure. *Id.* at 1042-43.

C. Return

The officer taking property under the warrant must give the person from whose premises the property was taken a copy of the warrant and a receipt for the property taken. In the alternative, the officer must leave the copy and receipt at the place from which the property was taken. Tenn. R. Crim. P. 41(e)(4).

The "magistrate shall transmit the executed original warrant with the officer's return and inventory to the clerk of the court having jurisdiction of the alleged offense in respect to which the search warrant was issued." Tenn. R. Crim. P. 41(f)(2). To ensure that these items will be accessible in the future, the clerk may wish to file them in a permanent warrant book.

18.07 CONTEST

A. Motion to Suppress

A person aggrieved by an unlawful or invalid search or seizure must move the court prior to trial to suppress any evidence obtained as a result thereof. *State v. Blair*, 145 S.W.3d 633, 641 (Tenn. Crim. App. 2004); Tenn. R. Crim. P. 12(b)(2)(C). Prior to trial means sometime earlier than the first day of the trial. *State v. Roberts*, 755 S.W.2d 833 (Tenn. Crim. App. 1988). A defendant waives any right to contest the admissibility of evidence if a written motion to suppress the evidence is not filed and heard before the trial. *State v. Eldridge*, 749 S.W.2d 756 (Tenn. Crim. App. 1988). In the trial court's discretion, and for good cause shown, a motion to suppress may be raised at trial. *State v. Wilson*, 611 S.W.2d 843 (Tenn. Crim. App. 1980).

The rule excluding illegally-obtained evidence also excludes evidence seized as the result of an unlawful search. *Wong Sun v. United States*, 371 U.S. 471 (1963). This fruit of the poisonous tree doctrine has exceptions. As a general rule, if the search warrant was based on an affidavit predicated on facts obtained as result of an unreasonable search or seizure, anything seized under the warrant must be suppressed. However, if enough untainted, independent facts were alleged, those facts could independently support probable cause such that the warrant would not be invalidated. *State v. Vanderford*, 980 S.W.2d 390, 399-400 (Tenn. Crim. App. 1997). Likewise, if the derivative evidence is so far removed from the illegally seized evidence by time or circumstance, *i.e.*, the taint of the original

illegality has been purged or dissipated, the derivative evidence would not need to be excluded. Moreover, if the derivative evidence would have been discovered via an independent source even without the use of the illegal evidence, the derivative evidence would not be excluded. *Wong Sun v. United States*, 371 U.S. 471 (1963). Finally, if the prosecution establishes that certain proper and predictable investigatory procedures would have been utilized in the case at bar and that those procedures would have inevitably led to the discovery of the derivative evidence, the evidence need not be suppressed. *Nix v. Williams*, 467 U.S. 431 (1984).

B. Return of the Property

If property is unlawfully seized, the party may move for the return of the property pursuant to Tenn. R. Crim. P. 41(g).

18.08 DISPOSITION OF PROPERTY

The general rule is that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated. *State v. Casey*, 868 S.W.2d 737 (Tenn. Crim. App. 1993). Contraband cannot be returned to an accused from whom it was unlawfully taken, since possession of the property would constitute an offense. Tenn. R. Crim. P. 41(g).

18.09 ELECTRONIC COMMUNICATION WHEN SEEKING WARRANT

A magistrate may issue a warrant based on information communicated by telephone or other reliable electronic means. The proposed warrant, the signed affidavit, and accompanying documents may be transmitted by electronic facsimile transmission (fax) or by electronic transfer with electronic signatures to the magistrate, who may act upon the transmitted documents as if they were originals. If the warrant is being sought by electronic means rather than face-to-face, the warrant affidavit shall be sworn to or affirmed by administration of the oath by audio-visual means by the magistrate, and the examination of the affiant by the magistrate shall also be by audio-visual means; provided, the warrant affidavit shall be in writing and received by the magistrate prior to the administration of the oath and examination of the affiant. The affidavit with electronic signature received by the magistrate and the warrant approved by the magistrate, signed with electronic signature, shall be deemed originals. The magistrate shall facilitate the filing of the original warrant with the clerk of the court and shall take reasonable steps to prevent tampering with the warrant. The issuing magistrate shall retain a copy of the warrant as part of his or her official records. The issuing magistrate shall issue a copy of the warrant, with electronic signatures, to the affiant. This does not alter the requirement that the affidavit be submitted to the magistrate in writing regardless of the means of transmission. Tenn. R. Crim. P. 41(c)(2).

CHAPTER 19

WARRANTLESS SEARCHES

Special thanks to Judge Christopher Craft and Judge Roy Morgan for their review of this chapter.

Contents **Section**

19.01 IN GENERAL

The guarantee of the Fourth Amendment of the United States Constitution must be liberally construed in favor of the citizen. *Hughes v. State*, 141 S.W.2d 477 (Tenn. 1940). Since the Fourth Amendment requires warrants, a warrantless search and seizure is presumed to be illegal. Thus, the state bears the burden of establishing an applicable exception to the search warrant requirement and demonstrating the reasonableness of the search or seizure. The relevant inquiry in determining the reasonableness of a warrantless search is not whether it would have been reasonable to get a warrant, but rather whether the search that occurred was reasonable.

Exceptions to the search warrant requirement generally include a search that is incident to a lawful arrest, a search with consent, a search that is in plain view, most vehicle searches, a search that is of an open field or abandoned property, or a search made under exigent circumstances. If a warrantless search is valid, the scope of the search is no narrower - and no broader - than the scope of a search authorized by a warrant supported by probable cause. *State v. Hawkins*, 706 S.W.2d 93 (Tenn. Crim. App. 1985).

19.02 STOP AND FRISK (PERSONS AND VEHICLES)

Long recognized is the right of police to make minimal intrusions into a person's privacy. Since the intrusion is less significant, the courts have reasoned that a lesser degree of suspicion will be

reasonable in justifying the intrusion. Thus, police may encounter a person on the street and ask questions with no suspicion of criminal behavior at all. The person, of course, retains the right to walk away and ignore the questions.

If the officer has an articulable suspicion about an individual in light of the officer's experiences (but not sufficient suspicion to allow an arrest or search), and that suspicion leads the officer objectively to believe that criminal activity is afoot and that the individual might be armed and dangerous, the officer may make a limited stop of the person. The limited stop is not an arrest because it is not as significant an intrusion of the privacy rights of the individual as an arrest. Thus it does not require probable cause. This intrusion is referred to as a stop.

During the stop, the officer may make inquiry of the person. The officer may also perform a protective frisk of a suspect where the officer has reasonable suspicion that the suspect is armed. *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *State v. Bridges*, 963 S.W.2d 487, 492 (Tenn. 1997). Reasonable suspicion is suspicion supported by specific and articulable facts. *Id.* These facts may be derived from information obtained from other law enforcement personnel or citizens, known patterns of criminal behavior, or the officer's experience. *State v. Winn*, 974 S.W.2d 700, 703 (Tenn. Crim. App. 1998). Courts have upheld frisks as reasonable when the suspected crime typically involves a weapon. Furthermore, even if the suspected crime does not involve a weapon, "other circumstances" may justify a *Terry* frisk. *Id.* at 703-04. Such circumstances include a characteristic bulge in the suspect's clothing; observation of an object in the pocket which might be a weapon; an otherwise inexplicable sudden movement toward a pocket or other place where a weapon could be concealed; an otherwise inexplicable failure to remove a hand from a pocket; backing away by the suspect under circumstances suggesting he or she was moving back to obtain time and space to draw a weapon; awareness that the suspect had previously been engaged in serious criminal conduct; awareness that the suspect had previously been armed; or discovery of a weapon in the suspect's possession.

When an officer stops a vehicle on the highway as a result of probable cause or articulable reasonable suspicion, the officer may order the driver out of the car. *Ohio v. Robinette*, 519 U.S. 33 (1966); *see also State v. Donaldson*, 380 S.W.3d 86 (Tenn. 2012) (recognizing the permissibility of ordering a driver out of a car during the issuance of a citation and noting that determining where a *de minimis* intrusion ends and an undue delay begins is a fact-specific inquiry); *State v. Brown*, 294 S.W.3d 553 (Tenn. 2009) (explaining the permissible scope of the temporary detention); *State v. Berrios*, 235 S.W.3d 99 (Tenn. 2007) (explaining the circumstances in which it is appropriate to frisk the driver and place him in a patrol car). The same rule applies to passengers in the vehicle. *Maryland v. Wilson*, 519 U.S. 408 (1997); *see also Brendlin v. California*, 127 S.Ct. 2400 (2007) (traffic stop results in seizure of driver and passengers, all of whom have standing to challenge the constitutionality of the stop). As with a *Terry* stop of a person on the street, an officer who has conducted a *Terry* stop of a vehicle may search the driver and/or passengers upon reasonable suspicion that they may be armed and dangerous. *Arizona v. Johnson*, 129 S.Ct. 781 (2009). These rules are based upon concern for the arresting officer's safety as well as the diminished expectation of privacy a person has while traveling in an automobile.

An anonymous tip that a person is carrying a gun, without more, is not sufficient to justify a police officer's stop and frisk of that person. *Florida v. J.L.*, 529 U.S. 266 (2000); *see also State v. Williamson*, 368 S.W.3d 468 (Tenn. 2012) (applying *Florida v. J.L.* and finding a lack of reasonable suspicion). However, when an individual in a high crime area flees upon seeing a caravan of police, the officers are permitted to pursue the individual. *Illinois v. Wardlow*, 528 U.S. 119 (2000). Presence in a high crime area alone is not sufficient to support a reasonable suspicion of criminal activity, but the

characteristics of the location are relevant in determining whether the circumstances are suspicious enough to merit further investigation.

For additional guidance regarding when a person pursued by a law enforcement official has been seized and/or what circumstances are adequate to constitute reasonable suspicion justifying such a seizure, see *State v. Nicholson*, 188 S.W.3d 649 (Tenn. 2006). *See also Navarette v. California*, 134 S.Ct. 1683 (2014) (caller's use of the 911 system is an indicator of veracity); *State v. Moats*, 403 S.W.3d 170 (Tenn. 2013) (distinguishing between a full-scale arrest, brief investigatory detention, and brief police-citizen encounter, discussing the community caretaking function, and noting that the activation of blue lights does not always constitute a seizure); *State v. Brotherton*, 323 S.W.3d 866 (Tenn. 2010) (reiterating that *Terry* requires an "articulable and reasonable suspicion" of a violation of the law to justify a stop and further investigation as opposed to requiring proof that there was an actual violation of the law); *State v. Hanning*, 296 S.W.3d 44 (Tenn. 2009) (finding that, under the facts of this case, an anonymous tip reporting reckless driving was adequate to justify an investigatory stop); *State v. Day*, 263 S.W.3d 891 (Tenn. 2008) (without addressing the community caretaking exception, which was not before the court, finding that an officer does not have adequate reasonable suspicion to stop a car when another driver merely gets the officer's attention and points to the car at issue).

19.03 INCIDENT TO ARREST

An officer has the authority to conduct a warrantless search incident to a lawful arrest substantially contemporaneous with that arrest, but the search is limited to the area within the arrestee's immediate control, which includes "the area from within which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969). The permissible search includes the opening of containers. *United States v. Robinson*, 414 U.S. 218 (1973). Moreover, officers may conduct a "protective sweep" in the immediate vicinity of the arrest if the arrest is made in a home. *Maryland v. Buie*, 494 U.S. 325 (1990). The arrest typically must precede the search, but a search preceding an arrest has been upheld in a circumstance in which the officer had probable cause to arrest prior to the search. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

The authority to conduct a search incident to a lawful arrest applies to vehicle searches as well. *New York v. Belton*, 453 U.S. 454 (1981). However, this authority is not without limits, as the United States Supreme Court concluded in a case in which the arrestee had been handcuffed and placed in the patrol car, and therefore no longer had access to the interior of his vehicle:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 129 S.Ct. 1710, 1723-24 (2009).

The United States Supreme Court also has held that an officer cannot conduct a full vehicle search when the driver of an automobile is given a traffic citation but is not arrested, even if the state statute under which the driver is cited authorizes arrest for the offense. *Knowles v. Iowa*, 525 U.S. 113 (1998). In contrast, if state law requires the issuance of a citation for a particular offense but the officer

conducts an arrest instead of issuing the citation, thereby violating state law, the Fourth Amendment does not preclude the warrantless arrest (if based upon probable cause) or a search incident to that arrest. *Virginia v. Moore*, 128 S.Ct. 1598 (2008). State law is irrelevant to the Fourth Amendment analysis, so the issue is not whether state law requires the issuance of a citation or authorizes an actual arrest. Instead, the controlling factor is whether, irrespective of state law requirements, the officer arrests the person or merely issues a citation. An arrest involves greater potential danger for the officer than the issuance of a citation, so an officer who is making an arrest has authority to search the offender incident to that arrest while an officer issuing a citation does not have that authority. *Moore*, 128 S.Ct. 1607-08. It is unclear whether an analysis under Tennessee's Constitution would yield a different result. *See State v. Richards*, 286 S.W.3d 873 (Tenn. 2009) (stating that the offense must be one for which a full custodial arrest is permitted, but failing to rely upon Tennessee's Constitution or to acknowledge the holding in *Virginia v. Moore*).

Finally, the United States Supreme Court has held that the authority to conduct a search incident to an arrest does not extend to cell phones. *Riley v. California*, 134 S.Ct. 2473 (2014). Likewise, Tenn. Code Ann. § 40-6-110 precludes law enforcement officers from searching cell phones unless the officer obtains a search warrant, the owner/possessor consents to the search, the owner/possessor has abandoned the phone, or the exigent circumstances exception applies.

19.04 CONSENT

A search by consent is based upon an individual's waiver of constitutional protections. Anyone can consent to a warrantless search, or even to an unreasonable search. The consent must be "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1998). Moreover, consent to search which is preceded by an illegal seizure must be "sufficiently attenuated from the intrusive act." *State v. Berrios*, 235 S.W.3d 99 (Tenn. 2007). Whether or not there was consent is determined by the "totality of circumstances test" set out in *State v. Cox*, 171 S.W.3d 174, 184-186 (Tenn. 2005). It is not necessary that the officer inform the person of the right to refuse consent. *United States v. Drayton*, 536 U.S. 194, 206 (2002). The government has the burden of proving that consent was voluntarily, intelligently, and knowingly given. The voluntariness of consent to search is necessarily undermined when police utilize trickery, fraud, or misrepresentation. *State v. McMahon*, 650 S.W.2d 383 (Tenn. Crim. App. 1983). While an officer is not required to advise an accused of the right to refuse to consent, the failure to do so is one factor that should be considered in determining whether the totality of the circumstances support a finding of a knowing, intelligent, and voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S. Ct. 2041 (1973). Mere acquiescence or consent in the face of an announced or apparent intention to search with or without a warrant or permission does not constitute a waiver. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

In addition to determining the validity of the consent given, the court must determine if the person who allegedly gave consent was authorized to do so. In some situations, persons have mutual authority to consent to a search of certain premises. For example, persons having equal rights to use or occupy premises may each consent to a search of the premises, and the consent will be binding on all co-occupants. *McGee v. State*, 451 S.W.2d 709 (Tenn. Crim. App. 1969). Thus, a spouse can consent to a search of the marital home. It is not a question of ownership, but one of who has common authority over the premises. The common authority does not rest upon the law of property, but "rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own

right and that others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). The state may satisfy its burden of proof in this regard either by demonstrating that the third party in fact possessed common authority as defined above or, alternatively, by demonstrating that the facts available to the searching police officers would have warranted a man of reasonable caution in the belief that the consenting party had authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990). Generally, while parents may consent to a search of their children's rooms, a child cannot authorize a search of the family residence. *Hembree v. State*, 546 S.W.2d 235 (Tenn. Crim. App. 1976).

While persons having common authority over the premises have the authority to consent to a search, consent of one occupant is not adequate if another present occupant objects to the search. *Georgia v. Randolph*, 126 S.Ct. 1515 (2006). Law enforcement officers are not bound by the objection of an absent occupant, however, and this is true even if the occupant's absence was caused by the authorities as long as the occupant's detention or arrest was lawful. *Fernandez v. California*, 134 S.Ct. 1126 (2014).

19.05 PLAIN VIEW

When an officer seizes an item lying in the open, no legitimate privacy interest has been affected. Thus, the search of an area open to the public or the seizure of an item found lawfully in plain view does not require a search warrant. In order to be justified under the plain view doctrine, however, the officer must be in a place where the officer has a legitimate right to be. *State v. Goad*, 549 S.W.2d 377 (Tenn. 1977). For example, the officer might be in a public place, alongside a car that has been stopped for a traffic violation, or inside a home pursuant to consent or to the execution of an arrest warrant. If the original intrusion is justified, objects observed in "plain view" are admissible so long as it is immediately apparent to the officer that the items are subject to seizure. *State v. Hawkins*, 969 S.W.2d 936, 938 (Tenn. Crim. App. 1997).

Once an official is rightfully on private premises, the officer may look into a car window without intruding upon the defendant's expectation of privacy. The fact that the officer looks deliberately and not inadvertently does not transform a mere observation into a search in the constitutional sense. It is not a search within the meaning of the Fourth Amendment merely to look and observe that which is open to view. *State v. Byerley*, 635 S.W.2d 511 (Tenn. 1982). The United States Supreme Court dispensed with the inadvertent discovery requirement under the United States Constitution in *Horton v. California*, 496 U.S. 128, 137-38 (1990). The Tennessee Supreme Court reached the same conclusion under the Tennessee Constitution in *State v. Cothran*, 115 S.W.3d 513, 525 (Tenn. 2003). However, if an officer suspects, has a feeling, or knows of the possibility of finding the items at the location and avoids getting a search warrant because the suspicion does not rise to probable cause, the plain view doctrine may not support the warrantless search. *Arizona v. Hicks*, 480 U.S. 321 (1987).

The officer may also use senses other than sight. Thus, an officer who is lawfully patting down a suspect and feels something that is known to the officer not to be a weapon, but is believed to be contraband, may seize that evidence without a warrant, pursuant to the officer's plain touch. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). This "plain feel" doctrine was adopted in Tennessee in *State v. Bridges*, 963 S.W.2d 487, 493-94 (Tenn. 1997).

Although simple observation of an article is not proscribed under the Fourth Amendment, it does not follow that the seizure of the same article does not invoke Fourth Amendment scrutiny. It is possible that while the visual observation of an article does not violate any reasonable expectation of privacy, the seizure of the same article may intrude upon such reasonable privacy expectations. In essence, the observation of the article may provide probable cause, but seizure without a warrant may be permissible only if exigent circumstances exist. *State v. Byerley*, 635 S.W.2d 511 (Tenn. 1982).

19.06 VEHICLES

Vehicles are frequently subject to search without a warrant. The first question a court must address, of course, is whether the behavior at issue constitutes a "search" for purposes of the Fourth Amendment. For example, installing a GPS device on a target's vehicle and using that device to monitor the movement of the vehicle constitutes a search. *U.S. v. Jones*, 132 S.Ct. 945 (2012).

Assuming the action/behavior at issue constitutes a search, such a search may be conducted without a warrant under certain circumstances. For example, a search may be based on consent. *See State v. Brown*, 294 S.W.3d 553 (Tenn. 2009) (addressing the permissible scope of the consent to search a vehicle, including the propriety of peeling tape from a package to assist in determining the nature of its contents). It may also be incident to a valid, custodial arrest. *New York v. Belton*, 453 U.S. 454 (1981); *State v. Blair*, 632 S.W.2d 567 (Tenn. Crim. App. 1982). The officer with the right to arrest has the corresponding right to search at that time the interior of the automobile and all containers therein, both to protect the officer and preserve evidence. This authority is not without limits, though, and courts should consult *Arizona v. Gant*, 129 S.Ct. 1710, 1723-24 (2009), if the search was conducted when the automobile's occupant(s) no longer had access to the interior of the vehicle.

In addition to these warrantless automobile searches, an officer with probable cause to believe that an automobile contains items subject to seizure may search the automobile without a warrant. *United States v. Ross*, 456 U.S. 798 (1982); *see also Florida v. Harris*, 133 S.Ct. 1050 (2013) (identifying relevant considerations for determining whether a drug-detection dog's "alert" on a vehicle during a traffic stop constitutes probable cause to search the vehicle). This rule was originally based on the nature of the automobile, particularly its mobility and its heightened regulation by the state. Thus, for a time, Tennessee courts held that the exception did not apply once the vehicle had completed its journey and was no longer mobile. *Fuqua v. Armour*, 543 S.W.2d 64 (Tenn. 1976). This proposition has been explicitly rejected by the United States Supreme Court on two occasions. *See Maryland v. Dyson*, 527 U.S. 465 (1999); *Pennsylvania v. Labron*, 518 U.S. 928 (1996). Thus, unless the Tennessee courts deemed *Fuqua* to rely upon independent state constitutional or statutory grounds, its holding is no longer good law.

Reliance on the mobility justification has diminished in the face of the United States Supreme Court's reasonable expectation of privacy analyses. The Court now emphasizes the reduced privacy interest in an automobile as a reason to allow an automobile search even when the car has been stopped or is not capable of being moved from the scene. *California v. Carney*, 471 U.S. 386 (1985). Thus, if an officer has probable cause to search an automobile, the officer can search the passenger's belongings in the car if the belongings are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295 (1999). The Court's reasoning is that the passenger, like the driver, has a reduced expectation of privacy in an automobile.

When an officer has probable cause to search an automobile under the vehicle exception, the officer may search all places where the item for which there is probable cause could be concealed. *United States v. Ross*, 456 U.S. 798 (1982). The Supreme Court has emphasized that when probable cause to search an automobile exists, the scope of the warrantless search is as broad as a search conducted with a warrant would be.

An officer may also conduct a warrantless automobile search as a result of a standard departmental inventory policy, and may open unlocked containers when necessary to prepare a complete and meaningful inventory. *State v. Roberge*, 642 S.W.2d 716 (Tenn. 1982). This inventory search is justified based on three purposes**:** protection of the owner's property while in police custody; protection of police against claims of lost property; and protection of police from potential danger. If the driver, even though arrested, is able to make his or her own arrangements for the custody of the vehicle, or if the vehicle can be parked and locked without obstructing traffic or endangering the public, arguably the police should permit that action rather than impounding the car against the will of the driver. But the United States Supreme Court has upheld an inventory search conducted pursuant to an established, routine departmental police even when it was not necessary to impound the vehicle. *Florida v. Wells*, 495 U.S. 1 (1990). In Tennessee, conversely, the courts seem to require the state to present sufficient evidence to show the reasonableness of the impoundment. *Drinkard v. State*, 584 S.W.2d 650 (Tenn. 1979). When it is clear that the procedure used is a valid inventory and not merely a pretext for a search, it will be upheld regardless of whether there was some suspicion that contraband or other evidence might be found. *State v. Glenn*, 649 S.W.2d 584 (Tenn. 1983). In *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999), the Tennessee Supreme Court held that if a friend volunteers to drive the car home after the defendant is arrested, the car cannot be towed and subjected to an inventory search. The court's opinion in *Crutcher* includes a helpful analysis of the increasing application of constitutional restrictions implicated by a casual investigatory stop, a search incident to arrest, and an inventory search after arrest. *Id.* at 300-01.

19.07 ABANDONED PROPERTY, OPEN FIELDS, CURTILAGE, AND COMMON AREAS

The seizure of an abandoned article does not violate the constitutional guaranty against unlawful seizure. *Graves v. State*, 489 S.W.2d 74 (Tenn. Crim. App. 1972). Likewise, the search of an open field does not constitute a search. Under the so-called "open fields doctrine," a search of open fields without a search warrant is not constitutionally unreasonable. *Hester v. United States*, 265 U.S. 57 (1924). An open field is an area outside the curtilage of a residence and thus, an area in which there is a reduced expectation of privacy. *See State v. Jennette*, 706 S.W.2d 614 (Tenn. 1986). The curtilage is considered the area used in conjunction with the domestic life and economy of the residence.

With regard to curtilage, the United States Supreme Court has recognized the right of a law enforcement officer to approach a home, knock on the door, and speak with the person who answers the door. *Kentucky v. King*, 131 S.Ct. 1849 (2011). However, it does not follow that that same officer has the authority to use a drug-sniffing dog to investigate the contents of the person's home via its curtilage (in this case the porch), as this behavior constitutes a search under the Fourth Amendment. *Florida v. Jardines*, 133 S.Ct. 1409 (2013).

With regard to abandoned property, the Tennessee Supreme Court has held that a person's expectation of privacy is lost if the person disclaims any interest in the object at issue. *State v. Ross*, 49 S.W.3d 833, 840-42 (Tenn. 2001) (person who disclaimed interest in a motel unit had no reasonable

expectation of privacy). Moreover, common, unlocked/unsecured areas of an apartment building do not qualify for a reasonable expectation of privacy. *State v. Talley*, 307 S.W.3d 723, 732, n.4 (Tenn. 2010). With regard to locked/secured common areas in a condominium or apartment complex, the Tennessee Supreme Court declined to adopt a bright-line rule and held that "the totality of the circumstances test is best-suited for determining the reasonableness of an expectation of privacy." *Id.* at 734. Under the facts in *Talley*, the Court concluded that the defendant did not have a reasonable expectation of privacy in the locked, commonly shared interior hallway of the 21-unit condominium building in which he lived.

19.08 EXIGENT CIRCUMSTANCES

The United States Supreme Court has recognized an exception to the warrant requirement in circumstances in which "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment," and the Court has identified the following types of exigencies which may justify the warrantless search of a home: (1) Emergency aid - "[O]fficers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury"; (2) Hot pursuit - "[O]fficers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect"; and (3) Evidence destruction – Officers may enter a home without a warrant "to prevent the imminent destruction of evidence." *Kentucky v. King*, 131 S.Ct. 1849, 1856-57 (2011) (citations omitted); s*ee also Ryburn v. Huff*, 132 S.Ct. 987 (2012) (discussing the propriety of entering a residence if there is an objectively reasonable basis for fearing that violence is imminent); *Michigan v. Fisher*, 130 S.Ct. 546 (2009) (reiterating that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception"). The rule "applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment," and the police do not "impermissibly create an exigency" by knocking loudly on a door and announcing that they are the police. *King*, 131 S.Ct. at 1862-63.

With regard to blood tests for persons suspected of driving while under the influence of an intoxicant, there may be circumstances in which the potential for "evidence destruction" due to the natural dissipation of alcohol could justify the taking of blood in the absence of a warrant. *Schmerber v. California*, 86 S.Ct. 1826 (1966). However, the Court declined to adopt a *per se* rule exempting law enforcement officials from securing a warrant in these circumstances. Instead, the totality of the circumstances must be considered on a case-by-case basis. *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

For a thorough discussion regarding situations in which a warrantless search supported by probable cause is permissible based upon exigent circumstances, see *State v. Meeks*, 262 S.W.3d 710 (Tenn. 2008), in which the Tennessee Supreme Court found that officers were justified in entering a motel room in which persons were actively operating a methamphetamine laboratory.

19.09 ADMINISTRATIVE SEARCHES AND INSPECTIONS

A well-established exception to the constitutional search warrant requirement allows warrantless searches of pervasively regulated businesses and closely regulated industries. The reasonableness of warrantless searches by administrative agencies depends upon the specific enforcement needs and privacy guarantees of each statute. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). The expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the

sanctity accorded an individual's home, and this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. *State v. McClure*, 74 S.W.3d 362, 370 (Tenn. Crim. App. 2001).

19.10 SEARCH BY GOVERNMENT EMPLOYER

The Fourth Amendment applies when the government acts in its capacity as an employer. For a discussion regarding the relevant considerations when determining the propriety of a government employer's search of an employee's employer-issued electronic equipment, see *Ontario v. Quon*, 130 S.Ct. 2619 (2010).

19.11 ROADBLOCKS/CHECKPOINTS

Stopping vehicles at roadblocks/checkpoints is permitted in limited circumstances. *See State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006) (*citing State v. Downey*, 945 S.W.2d 102 (Tenn. 1997), and *State v. Hicks*, 55 S.W.3d 515 (Tenn. 2001)). However, Tenn. Code Ann. § 38-8-125 bars law enforcement officers from having any involvement in a voluntary motor vehicle checkpoint/stop conducted by a private company or research group that is collecting human samples for research or statistical purposes.

19.12 DNA TESTING OF ARRESTED OR CONVICTED FELONS

The Tennessee Supreme Court upheld the constitutionality of Tennessee Code Annotated section 40-35-321's requirement that persons convicted of certain offenses provide biological specimens for the purpose of DNA analysis. *State v. Scarborough*, 201 S.W.3d 607 (Tenn. 2006). The legislature subsequently broadened that statute to require persons arrested for certain violent felonies on or after January 1, 2008 to provide biological specimens as well. Although *Scarborough* analyzed the pre-2008 version of the statute and therefore did not address the constitutionality of requiring arrestees to provide biological samples, the United States Supreme Court subsequently concluded that if an individual is arrested and detained for a serious offense based upon probable cause, "taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Maryland v. King*, 133 S.Ct. 1958, 1980 (2013).

19.13 SEARCH OF PAROLEE'S PERSON, RESIDENCE AND VEHICLE

Although declining to address the propriety of a warrantless search of a probationer, the Tennessee Supreme Court has held that "the Tennessee Constitution permits a parolee to be searched without any reasonable or individualized suspicion where the parolee has agreed to warrantless searches by law enforcement officers." *State v. Turner*, 297 S.W.3d 155, 162-66 (Tenn. 2009). However, "the totality of the circumstances surrounding a warrantless, suspicionless search of a parolee must be examined to determine whether the search is constitutionally unreasonable." *Id.* at 167.

19.14 SEARCHES BY PUBLIC SCHOOL EMPLOYEES

By virtue of the Fourteenth Amendment, public school officials are subject to the Fourth Amendment's prohibition on unreasonable searches and seizures. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). The officials are not required to obtain a warrant prior to searching a student, but when determining the appropriateness of the search courts should consider the following balance reached by the United States Supreme Court:

> We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. Under ordinary circumstances, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Id. at 340-41 (quotation marks and citations omitted); *see also Safford Unified School Dist. #1 v. Redding*, 129 S.Ct. 2633 (2009) (addressing the constitutionality of the "strip search" of a student).

Although the United States Supreme Court's opinion in *T.L.O.* limited its application to a situation in which a school official is acting independently of law enforcement, the Tennessee Supreme Court has concluded as follows with regard to situations in which a law enforcement officer is involved with the search:

> After balancing the competing interests between [the student's] legitimate expectations of privacy and the State's need for effectively investigating breaches of public order, we hold that the reasonable suspicion standard is the appropriate standard to apply to searches conducted by a law enforcement officer assigned to a school on a regular basis and assigned duties at the school beyond those of a ordinary law enforcement officer such that he or she may be considered a school official as well as a law enforcement officer, whether labeled an 'SRO' or not. However, if a law enforcement officer not associated with the school system searches a student in a school setting, that officer should be held to the probable cause standard.

R.D.S. v. State, 245 S.W.3d 356, 369 (Tenn. 2008). The Court also set out multiple factors for courts to consider when determining the applicable standard. *Id.* at 369-70.

19.15 SEARCHES BY PRISONS/JAILS DURING INTAKE PROCESS

Although the Court could reach a different conclusion if an arrestee was not going to be assigned to the general jail population and/or would not have substantial contact with other detainees, the United States Supreme Court deferred to correctional officials regarding necessary intake procedures under the facts of this case and rejected the argument that "persons arrested for a minor offense could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process" absent "reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband." *Florence v. Bd. of Chosen Freeholders*, 132 S.Ct. 1510 (2012). However, Tennessee's judges should consult Tenn. Code Ann. § 40-7-119, which defines "strip search" and identifies circumstances in which strip searches of arrestees are not permitted.

19.16 ELECTRONIC DEVICES AND DRONES

Absent a search warrant or a statutory exception to the search warrant requirement, law enforcement officials are precluded from obtaining location information from an electronic device. Tenn. Code Ann. § 39-13-610. Likewise, with limited exceptions, law enforcement officials cannot use drones to gather evidence or information in the absence of a search warrant. Tenn. Code Ann. § 39-13-609.

The United States Supreme Court has held that the authority to conduct a search incident to an arrest does not extend to cell phones. *Riley v. California*, 134 S.Ct. 2473 (2014). Likewise, Tenn. Code Ann. § 40-6-110 precludes law enforcement officers from searching cell phones unless the officer obtains a search warrant, the owner/possessor consents to the search, the owner/possessor has abandoned the phone, or the exigent circumstances exception applies.

CHAPTER 20

PRELIMINARY HEARING

Special thanks to Judge Jeff Wicks for his edits and review of this chapter.

Contents **Section**

20.01 GENERALLY

A defendant who is arrested or served with a criminal summons prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing. Tenn. R. Crim. P. 5(f)(1). Unless the hearing is waived by the defendant, the magistrate shall schedule the preliminary hearing to be held within 14 days from the date of the initial appearance before the magistrate if the defendant is in custody and 30 days if the defendant has been released from custody. Tenn. R. Crim. P. 5 (c) and (d). If the defendant consents, these time limits may be extended one or more times "upon a showing of good cause" but if the defendant does not consent, the time limits may be extended "only on a showing that extraordinary circumstances exist and justice requires the delay." Tenn. R. Crim. P. 5(e). A defendant waives the right to a preliminary hearing by failing to appear for a scheduled hearing unless the defendant subsequently "presents before the general sessions court" and, within 14 days of the scheduled hearing, the "court finds by clear and convincing evidence that the defendant's absence was beyond the defendant's control." Tenn. R. Crim. P. 5(f)(2).

The defendant has the right to cross-examine witnesses and introduce evidence at the preliminary hearing. Tenn. R. Crim. P. 5.1(a)(2). With very limited exceptions, a magistrate's finding that there is probable cause to believe that the defendant committed the offense at issue shall not be based upon inadmissible hearsay. Tenn. R. Crim. P. 5.1(a)(1). If the proof establishes that an offense has been committed and there is probable cause to believe that the defendant committed the offense, the magistrate shall bind the defendant over to the grand jury. Tenn. R. Crim. P. 5.1(b). If the proof does not so establish, the magistrate shall discharge the defendant. However, the state is not precluded from instituting a subsequent prosecution for the offense. Tenn. R. Crim. P. 5.1(c).

The preliminary hearing "shall be preserved by electronic recording or its equivalent." In the event the defendant is subsequently prosecuted by indictment or presentment, "recording shall be made available to the defendant or defense counsel." If the recording of the preliminary hearing is unavailable or inaudible, "the trial court shall order a new preliminary hearing upon motion of the defendant filed not more than 60 days following arraignment. The indictment shall not be dismissed while the new preliminary hearing is pending." Tenn. R. Crim. P. 5.1(a)(3).

If an indictment or presentment is returned against a defendant who has not waived the right to a preliminary hearing, the indictment or presentment shall be dismissed if the defendant files a motion within 30 days from the arraignment. This dismissal shall be without prejudice, and the court shall remand the case to the general sessions court for a preliminary hearing. Tenn. R. Crim. P. 5(f)(4).

20.02 RIGHTS OF DEFENDANT

The preliminary hearing is a critical stage of the proceedings. Therefore, the defendant is entitled to the assistance of counsel. *State v. Blye*, 130 S.W.3d 776, 780 (Tenn. 2004).

As a general rule, the parties are not entitled to discovery pursuant to Tenn. R. Crim. P. 16. *State v. Willoughby*, 594 S.W.2d 388, 390 (Tenn. 1980). However, the Tennessee Court of Criminal Appeals has held that the State must provide the defendant with a copy of the affidavit underlying a search warrant. *State v. Boyd*, No. W2003-02444-CCA-R9-CD, Madison County (Tenn. Crim. App. March 17, 2004).

CHAPTER 21

ARRAIGNMENT

Special thanks to Judge Justin Angel for his review of this chapter.

Contents **Section**

21.01 ARRAIGNMENT NECESSITY

The defendant must be arraigned in open court before being tried for any offense with the following exceptions:

(a) if the defendant appears through counsel who presents the defendant's written waiver of the right to be present;
(b) if the defendant is a corporation, limited liability company, or limited liability partnership, which is represented by counsel;
(c) if the maximum penalty for the offense is a $50 fine;
(d) if the defendant, initially present, has been removed for disruptive behavior or is voluntarily absent; and
(e) if the arraignment is conducted by electronic audio-visual conference.

Tenn. R. Crim. P. 10, 43(b), (d). Failure to raise the lack of arraignment prior to trial constitutes a waiver.

21.02 ARRAIGNMENT PROCEDURE

The Tennessee Rules of Criminal Procedure provide for a formal arraignment procedure. The procedure requires that the judge:

(a) ensure that the defendant has a copy of the charging instrument;
(b) read the indictment, presentment, or information to the defendant or state the substance thereof;
(c) require the defendant to enter a plea (If a defendant refuses to plead, the judge must enter a plea of not guilty for the defendant); and
(d) make an entry of record of the arraignment.

The judge may arraign jointly charged defendants together or separately. Tenn. R. Crim. P. 10, 11.

21.03 DISCOVERY AT ARRAIGNMENT

At the arraignment or as soon after as practical, the state may give notice to the defendant of its intent to use certain evidence at trial so that the defendant can raise pre-trial objections to the evidence through a motion to suppress. The defendant may request such notice if the defendant is entitled to discovery of the evidence under Rule 16. Tenn. R. Crim. P. 12(d).

CHAPTER 22

APPOINTMENT OF COUNSEL

Special thanks to Judge Justin Angel and AOC Assistant General Counsel Lacy Wilber for their review and edits of this chapter.

Contents **Section**

22.01 RIGHT TO COUNSEL

Criminal defendants have a right to counsel and must be appointed counsel if they are indigent. U.S. Const. amend. VI; Tenn. Const. art I, § 9; Tenn. Code Ann. § 40-14-202; Tenn. Sup. Ct. R. 13 (herein "Rule 13"); Tenn. R. Crim. P. 44. "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel" regardless of whether a public prosecutor is involved in, or even aware of, the initial proceeding. *Rothgery v. Gillespie County*, 128 S.Ct. 2578 (2008) (distinguishing between the issues of attachment (whether formal judicial proceedings have begun) and critical stage (whether counsel, if not waived, must be present at a post-attachment proceeding)). Tennessee Supreme Court Rule 13 provides additional guidance regarding the types of criminal and civil proceedings in which a party is entitled to the appointment of counsel.

22.02 ESTABLISHING INDIGENCY

An indigent person is one "who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney." Tenn. Code Ann. § 40-14-201(1). When determining if someone is indigent, the court should consider the factors set forth in Tenn. Code Ann. § 40-14-202(c) as well as the Uniform Affidavit of Indigency provided in Rule 13. When appointing counsel for an indigent defendant, "the court shall appoint the district public defender's office, the state post-conviction defender's office, or other attorneys employed by the state for indigent defense . . . if qualified pursuant to this rule and no conflict of interest exists, unless in the sound discretion of the trial judge appointment of other counsel is necessary." Rule 13, §1(e)(4). If the circumstances warrant, a court may declare a defendant partially indigent and require partial payment of attorney fees. Tenn. Code Ann. § 40-14-202(e).

22.03 WAIVER/FORFEITURE OF RIGHT TO COUNSEL

A. Waiver Generally

In *Faretta v. California*, 95 S.Ct. 2525 (1975), the United States Supreme Court recognized the constitutional right to self-representation and found error when a state forced an accused to be represented by a public defender over the accused's objections. The right to self-representation becomes absolute if the accused timely asserts the right, makes a clear and unequivocal request, and knowingly and intelligently waives the right to counsel. *State v. Herrod*, 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988), *app. denied* (Tenn. July 25, 1988); *see also Lovin v. State*, 286 S.W.3d 275 (Tenn. 2009) (discussing the right to self-representation at trial, during a post-conviction proceeding, and on appeal of both types of proceedings). To be valid, a waiver of the right to counsel must be in writing. Tenn. R. Crim. P. 44(b)(2). Moreover, a court should accept a competent and intelligent waiver only after advising the accused in open court of the right to counsel at every stage of the proceedings, conducting an extensive inquiry regarding the pitfalls of self-representation, and inquiring into the background, experience, and conduct of the accused. *Smith v. State*, 987 S.W.2d 871 (Tenn. Crim. App. 1998); Tenn. R. Crim. P. 44(b)(1). The Tennessee Court of Criminal Appeals recommends that trial courts question defendants according to the guidelines contained in 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986). Those guidelines are as follows:

> When a defendant states that he wishes to represent himself, you should … ask questions similar to the following:
>
> (a) Have you ever studied law?
>
> (b) Have you ever represented yourself or any other defendant in a criminal action?
>
> (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)
>
> (d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least $ ___ and could sentence you to as much as ___ years in prison and fine you as much as $ ____? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)
>
> (e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?
>
> (f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.
>
> (g) Are you familiar with the [Tennessee] Rules of Evidence?

(h) You realize, do you not, that the [Tennessee] Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

(i) Are you familiar with the [Tennessee] Rules of Criminal Procedure?

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried in [this] court?

(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.

(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, [and in your opinion the waiver of counsel is knowing and voluntary,] you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

Standby counsel, to which these guidelines refer, is referred to as “advisory counsel” in Tennessee. Appointment of advisory counsel is within the trial court’s discretion. Hybrid representation, in which the defendant and counsel are both permitted to participate in the proceedings, should only be permitted in exceptional circumstances. *State v. Small*, 988 S.W.2d 671 (Tenn. 1999).

B. Waiver vs. Forfeiture

There are limited circumstances in which a court can require a defendant to represent himself absent a request by, and even over the objections of, the defendant. For a thorough discussion

regarding the differences between affirmative waiver, implicit waiver, and forfeiture of the right to counsel, as well as the court's obligations as to each, see *State v. Holmes*, 302 S.W.3d 831 (Tenn. 2010). With regard to an alleged physical attack upon an attorney by a client, the Supreme Court provided trial courts with guidance as to the necessary procedural steps:

> For the benefit of trial courts in future cases where a criminal defendant is alleged to have physically attacked his lawyer, we suggest that the following procedure be followed. Counsel should be allowed to withdraw if requested. Then, unless the attack occurred in full view of the court, the trial court should conduct promptly an evidentiary hearing, with the defendant present and permitted to testify, and make findings of fact on the basis of the proof presented. The trial court should determine, on the basis of the facts found, whether the defendant engaged in "extremely serious misconduct" sufficient to justify the extraordinary sanction of an immediate forfeiture (or implicit waiver) of counsel. In making this determination, the trial court should consider (a) the stage of the proceedings; (b) whether the lawyer attacked is initial counsel or is a successor to other lawyers allowed to withdraw due to problems with the defendant; (c) whether the defendant had previously been warned about the potential loss of counsel as a result of misbehavior; (d) whether the defendant engaged in the misconduct deliberately and with the aim of disrupting, delaying, or otherwise manipulating the proceedings; (e) the degree of violence involved and the seriousness of any injury inflicted; and (f) whether measures short of forfeiture will be adequate to protect counsel. If the trial court concludes that the defendant did not commit "extremely serious misconduct" so as to justify a forfeiture, the trial court should (1) appoint new counsel (assuming prior counsel withdrew); (2) inform the defendant of the potential consequences of future misbehavior and the risks of proceeding *pro se*; and (3) order such measures as are necessary to protect new counsel from future misbehavior by the defendant.

Id. at 848.

22.04 APPOINTMENT OF COUNSEL – SELF-REPRESENTATION WHEN COMPETENCY IS AT ISSUE

Questioning the defendant regarding the guidelines listed above in Section 21.03 may not be adequate, particularly if the State is seeking the death penalty and/or the defendant's competency has been an issue during the proceedings. In those circumstances, it may be necessary for the court to examine the defendant further and/or appoint counsel to represent the defendant during the competency hearing. Assuming the court concludes that the defendant is entitled to represent himself at trial, the court has the authority to appoint advisory counsel over the defendant's objection. For additional guidance regarding these issues and other competency issues, including issues involving the involuntary medication of a defendant, trial courts should consult the Court of Criminal Appeals' opinion in *State v. Richard Taylor*, No. M2005-01941-CCA-R3-DD (Tenn. Crim. App., filed March 7, 2008). Moreover, in cases in which competency is at issue, the trial judge should be aware that the United States Constitution "permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States*, 362 U.S. 402 (1960)] but who still

suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Indiana v. Edwards*, 128 S.Ct. 2379 (2008).

22.05 QUALIFICATION AND COMPENSATION OF APPOINTED ATTORNEYS

Tennessee Supreme Court Rule 13 governs the qualifications and compensation of appointed attorneys. Please refer to that rule for guidance regarding those issues.

22.06 REQUESTS FOR EXPERTS, INVESTIGATORS, EXPENSES- SUP. CT. RULE 13

Rule. 13 also provides a procedure appointed attorneys may utilize to request pre-approval for funding for miscellaneous expenses or for expert, investigative, and court reporter services.

A. Miscellaneous Expenses

Rule 13, § 4 addresses expenses incurred in representation of an indigent defendant. Rule 13, § 4(a) lists specific expenses that do not require prior approval by the court and the AOC. The AOC will reimburse the attorney for these expenses when the attorney submits his/her fee claim. Any expense not listed in Rule 13, § 4(a) falls under section 4(b), miscellaneous expenses. Rule 13, § 4(b) requires prior approval by the court and the AOC before the miscellaneous expense is incurred. Miscellaneous expenses include court reporters' preparation of transcripts from proceedings in General Sessions, interviews, or for a reporter's attendance at a misdemeanor trial in Criminal or Circuit court. Miscellaneous expenses also include medical records, service of process, cost of preliminary hearing audio disks – any expense not specifically listed in Rule 13, § 4(a). The court must approve a specific dollar amount in the order. Once the judge approves the miscellaneous expense, the attorney will send the motion and order to the AOC for prior approval. Once the AOC gives prior approval, the attorney may incur the expense.

B. Expert and Investigator Services

Rule 13, § 5 sets forth requirements for how an attorney may obtain an expert or investigator for cases in Circuit or Criminal court. The court must approve a specific dollar amount that the court determines is reasonable. Rule 13 sets the maximum hourly rate for investigator services at $50 per hour. Rule 13 also provides hourly rates for specific experts. Judges should consult Rule 13, § 5(d)(1) for a listing of maximum hourly rates for those specific experts.

Rule 13, § 5(c) requires the attorney to provide "particularized need" for the investigator or expert. To show particularized need, the motion and order must set forth the specific facts of the case that show that an expert or investigator is needed. Attorneys frequently fail to show particularized need. If the court approves a request for an expert or investigator, the AOC will review the motion and order for compliance with Rule 13. If the AOC does not approve the request for prior approval, Rule 13 sets out the procedure to be followed for review of the request by the Chief Justice.

CHAPTER 23

PLEA AGREEMENTS

Special thanks to Judge Lisa Rice for her review and edits of this chapter.

Contents **Section**

23.01 PLEA AGREEMENTS

Most defendants ultimately dispose of their cases by negotiation and plea agreements. The process of plea negotiations, thus, is essential to the efficient administration of criminal justice. The nature of the process was described by the United States Supreme Court:

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. . . . [A]ll of these considerations presuppose fairness in securing agreement between an accused and a prosecutor.

Santobello v. New York, 404 U.S. 257 (1971). Promises made by the prosecution to the defendant in plea negotiations must be kept. If they are not, the defendant is entitled to relief. *Santobello v. New York*, 404 U.S. 257 (1971). If the defendant dishonors the agreement before the plea agreement is accepted by the court, the prosecution's promises are not enforceable. *Metheny v. State*, 589 S.W.2d 943 (Tenn. Crim. App. 1979).

A prosecutor does not violate due process by threatening a defendant with other justified prosecutions if the defendant does not agree to plead guilty. The plea bargaining process is one of

give and take, and the defendant may freely choose to accept or reject a plea offer. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Blankenship v. State*, 858 S.W.2d 897 (Tenn. 1993).

In Tennessee, plea agreements are governed by Rule 11 of the Rules of Criminal Procedure. The prosecutor and defendant's counsel (defendant, if *pro se*) may confer in order to reach an agreement. In exchange for a defendant's entry of a guilty or *nolo contendere* plea to the charged or some lesser offense, the prosecutor may move for a dismissal of other charges, recommend (or agree not to oppose) a defendant's request for a particular sentence, or agree that a specific sentence is appropriate. If an agreement is reached, the parties must inform the judge at arraignment or at such later time as the judge directs. Tenn. R. Crim. P. 11(c).

The Tennessee Supreme Court has consistently held that a "plea-bargained sentence is legal so long as it does not exceed the maximum punishment authorized for the plea offense." *Hoover v. State*, 215 S.W.3d 776, 781 (Tenn. 2006) (*citing State v. Mahler*, 735 S.W.2d 226 (Tenn. 1987), and *Hicks v. State*, 945 S.W.2d 706 (Tenn. 1997)); *see also Davis v. State*, 313 S.W.3d 751 (Tenn. 2010) (reiterating the scope of habeas corpus relief in the context of a plea bargain, and distinguishing between "illegal" sentences and sentences which contain "errors").

23.02 COURT'S ROLE IN PLEA AGREEMENTS

The judge shall not participate in any plea discussions. Tenn. R. Crim. P. 11(c)(1). Upon being informed that the parties have reached a plea agreement, the judge must require the disclosure of the agreement on the record in open court, unless good cause requires an *in camera* proceeding. Tenn. R. Crim. P. 11(c)(2)(A). If the agreement is to dismiss certain charges or to agree to a particular sentence, the judge may accept or reject the agreement or defer decision until the presentence report is considered. Tenn. R. Crim. P. 11(c)(3).

If the judge accepts the agreement, the judge must advise the defendant that the plea agreement has been accepted and will be incorporated into the court's judgment. Tenn. R. Crim. P. 11(c)(4). If the judge rejects the agreement, the judge must, on the record and in open court (or, for good cause, *in camera*), advise the defendant that the court is not bound by the agreement, inform the parties that the court rejects the agreement, allow the defendant the opportunity to withdraw the plea, and advise the defendant that persisting in the plea may lead to a disposition less favorable toward the defendant than provided in the agreement. Tenn. R. Crim. P. 11(c)(5)

If the parties announce an agreement to recommend (or not oppose) a particular sentence pursuant to Rule 11(c)(1)(B), the judge must advise the defendant, before the plea is entered, that if the recommendation is not accepted, the defendant has no right to withdraw the plea. Tenn. R. Crim. P. 11(c)(3)(B).

23.03 EVIDENTIARY VALUE OF PLEA AGREEMENTS IN SUBSEQUENT CIVIL OR CRIMINAL PROCEEDINGS

See Tenn. R. Evid. 410 for information regarding the admissibility of a plea, plea discussions or plea-related statements. Tenn. R. Crim. P. 11(d).

23.04 *NOLO CONTENDERE* PLEAS

The defendant cannot enter a plea of *nolo contendere* absent the court's consent. In determining whether to consent to the plea, the court must consider the interests of the parties and the public. Tenn. R. Crim. P. 11(a)(2). The procedure for handling pleas of *nolo contendere* is identical to that of guilty pleas.

23.05 GUILTY PLEAS

Before a judge can accept a guilty plea, which has the same effect as a guilty verdict, it is essential that the judge ascertain whether the plea is voluntarily made, whether defendant is aware of the rights a plea surrenders, whether the plea is made intelligently with knowledge of the consequences, and whether a factual basis for the plea exists. *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)); *see also* Tenn. R. Crim. P. 11(b)(3) (factual basis required for guilty plea but not for *nolo contendere* plea). The defendant must be competent, must understand the nature of the proceedings, and must be capable of intelligently entering the plea. *Brady v. United States,* 397 U.S. 742 (1970).

A guilty plea waives the nonjurisdictional defects in the indictment. *State v. Pettus*, 986 S.W.2d 540 (Tenn. 1999). It also admits every essential element of the charge. *State v. Carter*, 988 S.W.2d 145 (Tenn. 1999).

A defendant who wishes to enter a conditional plea of guilty or *nolo contendere* must comply with the requirements of Tenn. R. Crim. P. 37(b). Tenn. R. Crim. P. 11(a)(3).

23.06 PLEA PROCEDURE

A defendant who pleads guilty or *nolo contendere* waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront the accusers. A judge must not accept a guilty or *nolo contendere* plea without first addressing the defendant personally in open court and determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead results from prior discussions between the district attorney general and the defendant or his attorney. Tenn. R. Crim. P. 11(b)(2).

Before a plea of guilty or *nolo contendere* can be entered, a trial judge must ensure the defendant's understanding of the information listed in Tenn. R. Crim. P. 11(b). *See Howell v. State*, 185 S.W.3d 319 (Tenn. 2006). A verbatim transcript of the plea proceedings must reflect the trial court's compliance with Tenn. R. Crim. P. 11(b) and (c). Tenn. R. Crim. P. 11(e). Moreover, the plea must be reduced to writing and signed by the defendant. *Id*.

A judge who accepts a guilty or *nolo contendere* plea must make it clear to the defendant that the resulting conviction may be used in a subsequent proceeding to enhance punishment. *State v. McClintock*, 732 S.W.2d 268 (Tenn. 1987); *see also Howell v. State*, 185 S.W.3d 319 (Tenn. 2006). When the defendant is entering a plea to an offense for which a sentence of lifetime community supervision is mandatory, the trial court is required to advise the defendant of this consequence.

Ward v. State, 315 S.W.3d 461, 476 (Tenn. 2010). However, this requirement does not apply retroactively. *Bush v. State*, 428 S.W.3d 1 (Tenn. 2014).

Although the court is not required to advise a defendant that he is subject to the sexual offender registry requirement, the Supreme Court encourages trial courts to advise defendants of this consequence prior to accepting a plea. *Ward*, 315 S.W.3d at 472.

For a thorough summary concerning the trial court's obligations with regard to pleas of guilty or *nolo contendere*, see *Lane v. State*, 316 S.W.3d 555 (Tenn. 2010). Although literal compliance with the applicable authorities is not required, substantial compliance is required. Moreover, the Supreme Court encouraged trial courts to conclude the colloquy by asking the defendant "How do you plead?" and awaiting the defendant's response. Failure to do so is not fatal in all cases, though, and the Court will evaluate the issues on a case-by-case basis. *Id.*

23.07 VICTIMS' RIGHTS DURING PLEA PROCEEDINGS

A victim's right to confer with the prosecutor does not authorize the victim to direct the prosecution of the case, and the prosecutor's failure to confer with the victim (or the victim's family) will not affect the validity of the case's disposition. *State v. Layman*, 214 S.W.3d 442, 453 (Tenn. 2007). Moreover, victims and their attorneys do not have the right to "appear before the court and offer legal arguments in opposition to those of the prosecutor." *Id.* at 454 (*citing* T.C.A. § 40-38-114(c)). Finally, because hearings regarding plea agreements and *nolle prosequis* are not "critical stages of the criminal justice process" as defined by the relevant authorities, victims do not have a right to be heard during those proceedings. *Id.* at 453-54.

23.08 EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA PROCESS

A. Standard

When considering whether defense counsel was ineffective during the plea process, courts should consider the following:

> When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, . . . he or she must prove that counsel performed deficiently and "there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial." The primary consideration is whether the deficiency in performance "affected the outcome of the plea process." The petitioner is not, however, required to demonstrate that he would have fared better at trial than by a plea of guilt.

Grindstaff v. State, 297 S.W.3d 208, 216-17 (Tenn. 2009) (citations omitted).

B. Risk of Deportation

Defense "counsel must inform her client whether his plea carries a risk of deportation." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010). However, the Court recognized that immigration law can be very complex and that counsel's duty regarding this issue will vary from case-to-case, noting:

> When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.

Id. at 1483 (footnote omitted).

The Court also concluded that counsel's failure to properly advise a defendant regarding this issue does not automatically entitle him to post-conviction relief on a claim of ineffective assistance of counsel. Petitioner must still demonstrate that he suffered prejudice as a result of counsel's omission. *Id.* at 1487; *see also Garcia v. State*, 425 S.W.3d 248, 256-61 (Tenn. 2013). Finally, the Court subsequently held that *Padilla* does not apply retroactively to cases whose direct appeals concluded (conviction(s) became final) prior to the issuance of the Court's opinion. *Chaidez v. United States*, 133 S.Ct. 1103 (2013).

Following the Court's ruling in *Padill*a, Tenn. R. Crim. P. 11 was amended to add subsection (b)(1)(J), which addresses the manner in which the immigration/naturalization issue should be addressed by a court when a defendant is pleading guilty or *nolo contendere*. The Tennessee Supreme Court has declined to address the issue of whether the trial court's failure to comply with this rule-based requirement constitutes a constitutional error. *Garcia*, 425 S.W.3d at 264-65.

C. Available Sentencing Options

Counsel's performance is considered deficient if counsel incorrectly informs his client that the client is eligible for an alternative sentence. *See Grindstaff v. State*, 297 S.W.3d 208, 221 (Tenn. 2009). However, it does not necessarily follow that the client is entitled to relief. The prejudice prong of *Strickland* must be evaluated on a case-by-case basis. *Id.* at 221-23.

D. Lifetime Community Supervision

"[A] lawyer's failure to advise his or her client about the mandatory lifetime community supervision sentence, where the client is considering a plea to one or more of the relevant offenses, is deficient performance" for purposes of the first prong of the ineffective counsel analysis. However, the defendant is not entitled to relief absent a showing of prejudice. *Calvert v. State*, 342 S.W.3d 477 (Tenn. 2011).

E. Communication of Plea Offers

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused . . . [and] [w]hen defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012). With regard to the prejudice prong, the Court held as follows:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants

> must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Id. at 1409.

F. Rejecting Plea Offer as a Result of Ineffective Assistance of Counsel

For guidance regarding the prejudice prong of *Strickland v. Washington*, 104 S.Ct. 2042 (1984) and *Hill v. Lockhart*, 106 S.Ct. 366 (1985) as well as the available remedies when the inadequate assistance of counsel results in the rejection of a plea offer that was more favorable than the ultimate disposition of the case, see *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). An attorney's violation of ethical norms is not *per se* ineffective. *Burt v. Titlow*, 134 S.Ct. 10, 18 (citing *Mickens v. Taylor*, 535 U.S. 162 (2002)).

G. Waiver of Appeal

An attorney's failure to file a written waiver of appeal pursuant to Tenn. R. Crim. P. 37(d) does not always constitute deficient performance for post-conviction purposes. *See Arroyo v. State*, 434 S.W.3d 555 (Tenn. 2014).

23.09 WITHDRAWAL OF PLEA

Tenn. R. Crim. P. 32(f) provides for the withdrawal of a guilty plea under certain circumstances. A court may permit the withdrawal prior to sentencing "for any fair and just reason." Tenn. R. Crim. P. 32(f)(1). When considering the request, trial courts should consider the following non-exclusive factors:

> 1. The length of time between the entry of the guilty plea and the filing of the motion to withdraw it;
> 2. Why the grounds for withdrawal were not presented to the court at an earlier point in the proceedings;
>
> 3. Whether the defendant has asserted and maintained his innocence;
>
> 4. The circumstances underlying the entry of the plea of guilty, the nature and background of the defendant, and whether the defendant has admitted guilt; and
>
> 5. Once the defendant has established a fair and just reason, whether the prosecution will be prejudiced should the plea be withdrawn.

State v. Phelps, 329 S.W.3d 436, 447 (Tenn. 2010). Although a trial court should not allow a defendant to "pervert this process into a tactical tool for purposes of delay or other improper purpose," "where a trial court applies the correct non-exclusive multi-factor analysis and determines that the balance of factors weighs in the defendant's favor, the trial court should allow the defendant

to withdraw his plea, even if the defendant's reasons could be characterized as a 'change of heart.'" *Id.* at 448.

If the sentence has been imposed but the judgment has not become final, the court may permit the defendant to withdraw the plea to correct manifest injustice. Tenn. R. Crim. P. 32(f)(2).

23.10 WAIVER OF APPEAL FOLLOWING PLEA

If a defendant has a right to appeal pursuant to Tenn. R. Crim. P. 37(b)(2) and chooses to waive that right, the defendant's attorney must file a written waiver that complies with the requirements of Tenn. R. Crim. P. 37(d). However, failure to comply with this requirement does not always constitute deficient performance for post-conviction purposes. *See Arroyo v. State*, 434 S.W.3d 555 (Tenn. 2014).

23.11 PLEA CHECKLIST

A verbatim record of the plea proceedings is required pursuant to Tenn. R. Crim. P. 11(e), and the colloquy should include the substantive and procedural elements listed below. Substantial compliance is required. *See Lane v. State*, 316 S.W.3d 555, 564-65 (Tenn. 2010).

1. Judge addresses defendant in open court on the record and under oath.

2. Judge verifies defendant's identity.

3. If defendant is represented by counsel, judge must ascertain that defendant has discussed the plea and its ramifications with counsel.

4. Judge ascertains whether defendant's decision to plead guilty or *nolo contendere* is a result of prior discussions between the district attorney general and defendant or defendant's counsel.

5. If defendant is not represented by counsel, judge advises defendant of the right to counsel at every stage of the proceedings and that counsel will be appointed for defendant if defendant cannot afford counsel. Judge secures signed waiver of counsel if defendant proceeds *pro se*.

6. Judge ascertains that defendant is entering the plea voluntarily, knowingly and intelligently, and not as a result of force, threats, or promises (other than plea agreement promises). Judges often will inquire as to defendant's educational background, opportunity to review the case and the proposed plea with counsel, competency issues, potential effects of drug or alcohol use or mental health issues, and defendant's reasons for entering the plea.

7. Judge advises defendant of the nature of the charge(s) as well as the maximum and minimum penalties.

8. Judge advises defendant that if defendant pleads guilty or *nolo contendere*, defendant will waive certain constitutional rights including:

    Right to plead not guilty (also advise of right to persist in a not-guilty plea)
    Right to jury trial
    Right to have guilt proved by state
    Right to confront and cross-examine adverse witnesses
    Right not to be compelled to incriminate self

9. Judge advises defendant that if defendant pleads guilty or *nolo contendere*, there will be no further trial of any kind except as to sentence.

10. Judge advises defendant that the judge may ask defendant questions about the offense and that if defendant answers those questions under oath, on the record, and in the presence of counsel, the answers may later be used against defendant in a prosecution for perjury or aggravated perjury.

11. Judge advises defendant that prior convictions or other factors may be used by the judge or jury in determining defendant's punishment, and that the conviction resulting from the current plea may be used to enhance punishment for subsequent convictions.

12. When defendant is entering a plea to an offense for which a sentence of lifetime community supervision is mandatory or which would subject him to the sex offender registry (or other registry) requirement, judge advises defendant of these consequences.

13. Judge advises defendant that if he pleads guilty or *nolo contendere* it may have an effect upon defendant's immigration or naturalization status. If defendant is represented by counsel, the judge shall determine that defendant has been advised by counsel of the immigration consequences of the plea.

14. If the plea agreement is one in which the prosecutor recommended, or agreed not to oppose defendant's request for, a particular sentence, with the understanding that the recommendation/request is not binding on the judge, the judge advises defendant that defendant has no right to withdraw the plea if the judge does not accept the recommendation/request.

15. Judge asks defendant "How do you plead?" and awaits his response.

16. After accepting a guilty plea, but before entering judgment, the judge must determine that a factual basis for the plea exists. There is no such requirement for a *nolo contendere* plea.

17. If the judge accepts the plea agreement, the judge advises defendant that the judge will embody in the judgment and sentence the disposition provided in the agreement.

18. Defendant must sign the plea, which must be reduced to writing.

Tenn. R. Crim. P. 11; *Howell v. State*, 185 S.W.3d 319 (Tenn. 2006); *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1997).

IMPORTANT: If the defendant is entering a conditional plea pursuant to Tenn. R. Crim. P. 11(a)(3), the judge should verify compliance with Tenn. R. Crim. P. 37(b).

23.12 PLEA UNDER JUDICIAL DIVERSION

Pursuant to Tenn. Code Ann. § 40-35-313(a)(B)(i)(a)-(e), a Defendant is eligible for judicial diversion when he or she is found guilty or enters a plea of guilty or a nolo contendere plea to most Class C, D or E felonies; is not seeking deferral for an offense committed by an elected official; is not seeking deferral for a sexual offense; has not been convicted of a felony or a Class A misdemeanor previously and served a sentence of confinement; has not been granted judicial diversion or pretrial diversion previously.

When a plea of guilty is entered under judicial diversion by agreement of the District Attorney General and the Defendant, and accepted by the Court, imposition of the sentence is deferred until the completion of the probationary period established by the terms of the plea agreement or the Court. Deferral of the sentence shall be for a period of time not less than the period of the maximum sentence for the misdemeanor with which the person is charged, or not more than the period of the maximum sentence of the felony for which the person is charged. Tenn. Code Ann. § 40-35-313(a)(1)(A).

A separate Order of Deferral form must be completed for each count in the indictment for which a conditional plea is entered under judicial diversion. Tenn. Sup. Ct. R. 17A. Pursuant to the provisions of T.C.A. § 40-35-313(a)(3)(A), a certificate from the Tennessee Bureau of Investigation stating that the defendant does not have a prior Class A misdemeanor or felony conviction MUST be attached by the District Attorney before the plea can be accepted by the Court. Once the forms are properly completed and the plea is accepted, the Court defers both the imposition of the sentence and the adjudication of guilt pending completion of the period of deferral.

CHAPTER 24

COMPETENCY TO STAND TRIAL

Special thanks to Judge Cheryl Blackburn for her review and edits of this chapter.

Contents **Section**

24.01 RAISING ISSUE

"When a defendant charged with a criminal offense is believed to be incompetent to stand trial . . . the criminal, circuit, or general sessions court judge may, upon such judges (sic) own motion or upon petition by the district attorney general or by the attorney for the defendant and after hearing, order the defendant to be evaluated on an outpatient basis." Tenn. Code Ann. § 33-7-301(a)(1). Tenn. Code Ann. § 33-7-301 provides additional information regarding what organization(s) must conduct the evaluation, who compensates the evaluator(s), under what circumstances an inpatient evaluation is warranted, at what point a representative of the prosecution is entitled to evaluate the defendant, and what action the court should take if it concludes that the defendant is not competent to stand trial.

24.02 STANDARD

"The Fourteenth Amendment to the United States Constitution and Article I, section 8 of the Tennessee Constitution prohibit the trial of a person who is mentally incompetent. To be competent to stand trial, a defendant in a criminal case must have 'the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.'" *State v. Reid*, 164 S.W.3d 286, 306 (Tenn. 2005), *cert. denied* (Oct. 3, 2005) (citations omitted). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." *Drope v. Missouri*, 95 S.Ct. 896, 908 (1975).

The defendant has the burden of proving his or her incompetency to stand trial by a preponderance of the evidence. *Reid*, 164 S.W.3d at 307-08; *see also State v. Reid*, 213 S.W.3d 792 (Tenn. 2006), *reh'g denied* (Jan. 17, 2007) (addressing multiple competency hearing issues in the text of the opinion as well as in the appendix). Following an initial finding of incompetency, however, the burden shifts and the State must prove competency by a preponderance of the evidence. *State v. Richard Taylor*, No. M2005-01941-CCA-R3-DD (Tenn. Crim. App., filed March 7, 2008). The defendant is not entitled to a jury trial on the competency issue. *Van Tran v. State*, 6 S.W.3d 257, 270 (Tenn. 1999) (*citing State v. Johnson*, 673 S.W.2d 877, 880 (Tenn. Crim. App. 1984)).

For guidance regarding competency as it relates to the waiver of the right to counsel, see Chapter 22 (Appointment of Counsel) of this benchbook.

24.03 EFFECT OF DETERMINATION

If a court declares a defendant incompetent to stand trial, the court must delay the trial until the defendant becomes competent. The court should consult Tenn. Code Ann. § 33-7-301(b) to determine if judicial hospitalization is warranted. If the court orders such hospitalization, the court must then follow the procedures set out in Tenn. Code Ann. §§ 33-7-301(c) and (d).

If the defendant has been found incompetent and is determined not likely to become competent in the foreseeable future and is also not committable to an institution due to mental illness, the Court must make a determination regarding the continued detention or release of the defendant. A defendant may not be held indefinitely as this is a violation of the Due Process Clause. *Jackson v. Indiana*, 92 S. Ct. 1845 (1972).

24.04 DISCOVERY/ADMISSIBILITY OF DEFENDANT'S STATEMENTS

Pending the adoption of an applicable discovery rule, the Tennessee Supreme Court created "temporary procedures governing the discovery and disclosure of evidence in pretrial competency proceedings in criminal cases." *State v. Harrison*, 270 S.W.3d 21, 36 (Tenn. 2008). In 2010, Tenn. R. Crim. P. 12.2 and the accompanying Advisory Commission Comment were amended to include discovery procedures as well as limitations on the use of statements (and fruits of the statements) made by the defendant during the competency evaluation. Tenn. R. Crim. P. 12.2(f) and (g).

CHAPTER 25

DOUBLE JEOPARDY

Special thanks to Judge Jim Goodwin for his review and edits of this chapter.

Contents **Section**

25.01 SOURCE OF LAW

The United States Constitution provides that "[n]o person shall, for the same offense, be twice put in jeopardy of life or limb." U. S. Const. amend. V. The state constitution, Tenn. Const. art. 1, § 10, has a similar prohibition. Additionally, the federal injunction against double jeopardy applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969); Tenn. R. Crim. P. 11, 12.

25.02 SCOPE / BLOCKBURGER TEST

The double jeopardy clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *Schiro v. Farley, 510 U.S. 222, 229 (1994); North Carolina v. Pearce, 395 U.S. 711 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989); State v. Rimmer, 623 S.W.3d 235, 253 (Tenn. 2021).* The accused is not just protected from unreasonable convictions but from the strain and harassment of multiple trials. *Abney v. United States, 431 U.S. 651 (1977).*

In *State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012), the Court abandoned the four-factor test the Court created in *State v. Denton*, 938 S.W.2d 373 (Tenn. 1996), and adopted the same elements test set out in *Blockburger v. United States*, 52 S.Ct. 180 (1932) for the purpose of determining whether multiple convictions under separate statutes are prohibited by the Double Jeopardy Clause. Multiple punishments are not precluded if the legislature authorized those punishments. Therefore, if the legislative intent is clear, no additional analysis is necessary.

The double jeopardy protection at issue in *Watkins* was the protection against multiple punishments for the same offense in a single prosecution. The test that should be utilized by a court when analyzing this issue depends upon whether the single-prosecution/multiple-punishment claim is a

"unit-of-prosecution" or "multiple description" claim.[1] A unit-of-prosecution claim is at issue if the defendant is convicted for multiple violations of the same statute and asserts that those convictions are for the "same offense." When analyzing that issue, a court must determine the legislature's intent with regard to what constitutes a single unit of conduct. A multiple description claim is at issue if the defendant is convicted of violating two separate statutes and asserts that those convictions are for the "same offense."

In *Watkins*, the defendant was convicted of reckless homicide and aggravated child abuse following the death of a child who was in his care, so a "multiple description" claim was at issue. Therefore, the threshold inquiry was whether the alleged violations arose from the "same act or transaction." Courts should refer to the charging instrument and applicable statutory provisions when making this determination. Courts also should consider whether discrete acts or multiple victims are at issue. If the court concludes that the convictions do not arise from the same act or transaction, there is not a double jeopardy violation and no further analysis is necessary. If the court concludes that the threshold has been met, the court must next determine whether the crimes at issue constitute the "same offense." If each statute includes an element which is not included in the other, the crimes are not the same offense and multiple convictions are permissible. Courts must analyze the elements of the offense as opposed to the facts of the case. Since only one statute is at issue in a "unit-of-prosecution" claim, this second step will never be utilized when evaluating such a claim. This step is only necessary for a "multiple description" claim.

Utilizing the *Blockburger* test, the Court ultimately concluded that aggravated child abuse and reckless homicide are not the "same offense" such that multiple convictions would violate the double jeopardy prohibition. In an opinion released contemporaneously with *Watkins*, the Court utilized the *Blockburger* test and concluded that Class D felony evading arrest and Class E reckless endangerment do not constitute the same offense (or lesser-included offenses) and, therefore, multiple convictions are permissible. *State v. Cross*, 362 S.W.3d 512 (Tenn. 2012). The Court also noted that if the charging instrument refers to the public at large or the general public as opposed to identifying individual victims, there are not "multiple" victims for the purpose of analyzing the "same act or transaction" prong of the *Blockburger* test. *Id.* at 519-20.

25.03 WHEN DOES JEOPARDY ATTACH?

Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution. *Breed v. Jones*, 421 U.S. 519 (1975). Jeopardy attaches in a jury trial when the jury is empaneled and sworn and in a nonjury case when the first witness is sworn. *Crist v. Bretz*, 437 U.S. 28 (1978); *Serfass v. United States*, 420 U.S. 377 (1975). This is a bright-line rule. *Martinez v. Illinois*, 134 S.Ct. 2070 (2014) (rejecting the argument that jeopardy did not attach because the prosecution declined to participate in the trial and the defendant, therefore, was not genuinely at risk of conviction).

1Charging a single offense in multiple counts of an indictment is referred to as multiplicity. *See State v. Smith*, 436 S.W.3d 751 (Tenn. 2014).

25.04 FORMER JEOPARDY

A defendant may raise the issue of former jeopardy prior to trial, but it is not mandatory. Tenn. R. Crim. P. 12. In order to establish that jeopardy requires the dismissal of a pending case, the record must show a previous acquittal or conviction for the same offense. *Bell v. State*, 423 S.W.2d 482 (Tenn. 1968).

IMPORTANT NOTE: A particular former jeopardy problem arises when sequential jury instructions are given in first degree murder cases where there are indictment counts on a single murder charging both premeditated first degree murder and felony murder. In this situation the Tennessee Supreme Court has stated the better practice thusly:

> While it was not error for the trial court to deliver sequential jury instructions, *see Harris v. State*, 947 S.W.2d 156, 175 (Tenn. Crim. App. 1996), we have previously urged trial courts to allow juries to consider all theories of first-degree murder. *See State v. Cribbs*, 967 S.W.2d 773, 787-88 (Tenn. 1988[)]; *Carter v. State*, 959 S.W.2d 620, 624-25 n. 6 (Tenn. 1997). We are compelled to emphasize this point again; a trial court should instruct a jury to render a verdict as to each count of a multiple count indictment which requires specific jury findings on different theories of first-degree murder. If the jury does return a verdict of guilt on more than one theory of first-degree murder, the court may merge the offenses and impose a single judgment of conviction. *See State v. Addison*, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997). The benefits of instructing the jury in this manner are important. *First, the double jeopardy problem of retrying a defendant after a subsequent appellate opinion reverses a conviction as unsupported by evidence is precluded.* (Emphasis added). Second, the State will have a basis to protect other convictions to which it may be entitled. Third, in light of our decision in *State v. Middlebrooks*, 840 S.W.2d 317 (1992), a jury verdict on each charged offense will allow the State to use the felony murder aggravator as an aggravating circumstance in sentencing. *See State v. Hall*, 958 S.W.2d 679, 692-92 (Tenn. 1997).

State v. Howard, 30 S.W.3d 271, 274-75 n.4 (Tenn. 2000).

25.05 MISTRIAL

If a defendant requests a dismissal on jeopardy grounds because a previous trial on the same offense resulted in a mistrial, it must first be determined if jeopardy attached in the previous trial. If a mistrial was required by manifest necessity, jeopardy does not bar a retrial. *Illinois. v. Somerville*, 410 U.S. 458 (1973); Tenn. Code Ann. § 40-18-109. A defendant who successfully moves for a mistrial on the basis of prosecutorial or judicial conduct must establish that the offending conduct was intended to provoke the mistrial motion in order to raise the mistrial as a bar to retrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982). The state must establish manifest necessity in these circumstances to lift the double jeopardy bar. *State v. Smith*, 871 S.W.2d 667 (Tenn. 1994).

Similarly, the constitutional protection against double jeopardy does not prevent a retrial of a defendant after a mistrial caused by a genuinely deadlocked jury. *See Renico v. Lett*, 130 S.Ct. 1855 (2010). The trial judge has inherent authority to terminate prosecution where it appears that, at future trials, substantially the same evidence will be presented with a high probability of additional mistrials. *State v. Witt*, 572 S.W.2d 913 (Tenn. 1978).

25.06 ACQUITTAL

The state cannot appeal from a verdict of acquittal without violating the double jeopardy clause. *United States v. Ball*, 163 U.S. 662 (1896). The form of acquittal is not important. *See Martinez v. Illinois*, 134 S.Ct. 2070 (2014). Thus, the granting of a motion for a judgment of acquittal bars appeal as does a jury verdict of acquittal. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). This is true even if the court's granting of the motion for a judgment of acquittal is based upon the court's erroneous understanding of the facts or the law. *Evans v. Michigan*, 133 S.Ct. 1069 (2013).

25.07 DIFFERENT SOVEREIGNS

Different sovereigns may institute separate actions against the same defendant without offending double jeopardy. This dual sovereignty exception to the double jeopardy rule provides that two sovereigns may prosecute the accused for substantially the same offense, because different interests are involved. *Bartkus v. Illinois*, 359 U.S. 121 (1959).

A municipality and a state, however, may not try someone for the same offense. *Waller v. Florida*, 397 U.S. 387 (1970). This applies even if the city proceedings are denominated civil, provided they involve the prospect of some kind of punishment, i.e. fine or imprisonment. *Metropolitan Government of Nashville and Davidson Co. v. Miles*, 524 S.W.2d 656 (Tenn. 1975). The *Waller* holding did not overturn the old dual sovereignty exception to double jeopardy, but merely held that a state and a municipality within the state are not separate sovereigns. The Tennessee statute also sets forth the rule of *Waller*. Tenn. Code Ann. § 40-3-105.

25.08 COLLATERAL ESTOPPEL / ISSUE PRECLUSION

Inherent in the prohibition against double jeopardy is the doctrine of collateral estoppels, which provides that if the same ultimate facts are to be decided in each case, double jeopardy forbids more than one trial. For example, if an offense involves one act committed against multiple victims, an acquittal on the charge relating to one victim would prohibit the state from charging the offense with regard to a different victim. *Ashe v. Swenson*, 397 U.S. 436 (1970)(robbery of multiple victims); s*ee also Yeager v. United States*, 129 S.Ct. 2360 (2009) (holding that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the preclusive force of the acquittals under the Double Jeopardy Clause); *Bobby v. Bies*, 129 S.Ct. 2145 (2009) (finding that double jeopardy / issue preclusion considerations did not bar a full hearing on the issue of mental retardation when mental retardation was raised as a mitigating circumstance at trial but the issue of the defendant's mental capacity was not fully litigated as an independent issue); *State v. Thompson*, 285

S.W.3d 840 (Tenn. 2009) (finding that collateral estoppel precluded prosecution for felony murder when the defendant was acquitted of the underlying predicate offense in a previous trial). Collateral estoppel applies even if the first jury did not consider all relevant evidence, including circumstances in which some evidence was improperly excluded. *Harris v. Washington*, 404 U.S. 55 (1971).

"Affirmative" or "offensive" collateral estoppel, in which the prosecution asserts collateral estoppel against a defendant in a criminal case, is not permitted in Tennessee. *State v. Scarbrough*, 181 S.W.3d 650 (Tenn. 2005). However, the prosecution is not precluded from introducing "evidence of the prior conviction if the trial court determines that its probative value is not substantially outweighed by the risk of unfair prejudice to the defendant." *Id.* at 660-61. The conviction at issue in *Scarbrough* was a prior conviction for a felony which served as the underlying felony for a pending felony murder charge.

25.09 RE-SENTENCING

No absolute bar prohibits giving a more severe sentence upon reconviction at a new trial, but reasons for the more severe sentence must be given. The more severe sentence must be based on the accused's conduct after the original sentence or on factors that could not have been known or discovered at the time of the original sentence. *North Carolina v. Pearce*, 395 U.S. 711 (1969).

25.10 WAIVER

If the accused seeks and is granted a new trial, a plea of double jeopardy is generally not applicable.

CHAPTER 26

STATEMENTS / CONFESSIONS

Special thanks to Judge Deanna Johnson and Judge Scott Green for their review and edits of this chapter.

Contents **Section**

26.01 TERMINOLOGY

In the context of an attempt to suppress a statement, courts and litigants often refer to the person's statement as a "confession". However, the constitutional considerations at issue apply equally to a statement, whether inculpatory or exculpatory, that does not rise to the level of a confession. *Miranda v. Arizona*, 86 S.Ct. 1602, 1612 (1966). As the United States Supreme Court has observed, "If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution." *Id.* at 1629. Therefore, when the term "confession" is utilized in this Chapter, the proposition at issue applies equally to any statement.

Moreover, although many state and federal court opinions refer to the person being questioned as the "suspect," it is now well settled that "any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda*." *Stansbury v. California*, 114 S.Ct. 1526, 1530 (1994). Therefore, although the terms "suspect" and "accused" will be utilized in this Chapter, the Fifth Amendment's protections apply equally to all persons who are subjected to custodial interrogation regardless of whether those persons are considered suspects.

Even if a defendant gives a confession voluntarily and his constitutional rights are not violated, he cannot be convicted solely on his confession. *State v. Bishop*, 431 S.W. 3d 22 (Tenn. 2014). There must be corroboration of the confession. *Id*. Tennessee follows a modified version of the "trustworthiness" standard which seeks to detect false confessions by focusing on whether a confession is true or false. "Extrajudicial statements are more suspect than admissions made at trial because they face 'neither the compulsion of the oath nor the test of cross-examination.'" *Id.* at 48 (citing *Opper v. United States*, 75 S. Ct. 158 (1954)). Therefore, "any statement made by the defendant in court can serve as corroboration for an extrajudicial confession." *Id. See also, State v. Frausto*, 463 S.W. 3d 469, 480 (Tenn. 2015) (because the defendant testified in open court and under oath that his earlier written statement was accurate and voluntary, he could be convicted on his own statements despite the lack of physical evidence of sexual abuse of the victim).

26.02 ***MIRANDA V. ARIZONA***

A. Generally

The Fifth Amendment provides in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. This provision is applicable to the states via the Fourteenth Amendment. *Malloy v. Hogan*, 84 S.Ct. 1489 (1964). Similarly, Tennessee's Constitution provides in relevant part that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." Tenn. Const. art I, § 9. "Encompassed within these constitutional provisions is the right to counsel, which is applicable whenever a suspect requests that counsel be present during police-initiated custodial interrogation." *State v. Saylor*, 117 S.W.3d 239, 244 (Tenn. 2003), *cert. denied*, 124 S.Ct. 1483 (2004) (footnote and citations omitted).

There is a distinction between the *Miranda* Fifth Amendment right to counsel, which is designed to protect against coercion, and the Sixth Amendment right to counsel, which guarantees to a criminal defendant the right to legal assistance in any critical confrontation with state officials, irrespective of coercion. *State v. Willis*, 496 S.W. 3d 653, 702 (Tenn. 2016). The Fifth Amendment right to counsel under *Miranda* attaches any time a suspect is subject to custodial interrogation, even if formal charges have not been filed. *Id*. The right to counsel is intertwined with the ability to deal with the inherently compelling pressures of custodial interrogation. *Id*. Accordingly, once the *Miranda* warnings are given, if the suspect states he wants an attorney, the interrogation must cease. *Id*. The Sixth Amendment right to counsel attaches after the initiation of formal charges. *Id.*

A person's constitutional rights must be communicated to him prior to an interrogation by a government official or agent if the accused is in custody or otherwise deprived of freedom in any significant way. Specifically, the accused must be informed that he has the right to remain silent, anything he says can be used against him in a court of law, he has the right to the presence of an attorney, and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. The warnings need not be given verbatim, but they must fairly communicate the accused's constitutional rights. *Florida v. Powell*, 130 S.Ct. 1195, 1203-06 (2010); *California v. Prysock*, 101 S.Ct. 2806, 2809-10 (1981). *See also, State v. Davidson*, 509 S.W. 3d 156, 191-93 (Tenn. 2016) (holding *Miranda* does not require law enforcement to specifically advise that a defendant is entitled to consult with an attorney "before and during" an interview). As noted by the Tennessee Supreme Court, law enforcement officials also are required to repeat the previously conveyed *Miranda* warnings under certain circumstances:

> A valid waiver of *Miranda* rights remains valid unless the circumstances change so seriously that the suspect's answers to interrogation are no longer voluntary or unless the suspect is no longer making a knowing and intelligent waiver of his rights. Courts must examine the totality of the circumstances to determine whether renewed warnings are required.
>
> Factors to be considered when assessing the totality of the circumstances include: 1) the amount of time that has passed since the waiver; 2) any change in the identity of the interrogator, the location of the interview, or the subject matter of the questioning; 3) any official reminder of the prior advisement; 4) the suspect's sophistication or past

> experience with law enforcement; and 5) any indicia that the suspect subjectively understands and waives his rights. Because of the infinite variety of circumstances a case may present, the list of factors is by no means exhaustive. The weight to be accorded different factors will vary depending on the particular facts of the case.

State v. Downey, 259 S.W.3d 723, 734 (Tenn. 2008) (quoting *State v. Rogers*, 188 S.W.3d 593, 606 (Tenn. 2006)).

B. Custody

Because *Miranda* warnings are only required in the context of a custodial interrogation, it is necessary for a reviewing court to determine if the person was in fact in custody at the time of the interrogation. The Tennessee Supreme Court recommends that courts consider the following when determining whether a person is in custody for purposes of *Miranda*:

> Having determined that the focus or progress of the investigation is not relevant to determine whether a person is in custody, we deem it necessary to briefly delineate some of the factors that are pertinent to the inquiry. Again, we emphasize that the test is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest.
>
> Some factors relevant to that objective assessment include the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will. The listed factors are by no means exclusive. The totality of the circumstances surrounding each interrogation must be closely examined when evaluating whether an individual is in custody for purposes of *Miranda*. It is a very fact specific inquiry. Application of the appropriate, relevant factors to the facts is a task for which the trial court is especially suited.

State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996) (citations omitted). *See also, State v. Moran*, 621 S.W.3d 249, 257 (Tenn. 2020) (reiterating the factors stated in *Anderson*); *State v. Lowe*, 552 S.W. 3d 842, 867 (Tenn. 2018) (same) .

In *Moran*, the Court held that the defendant bears the initial burden of proving custody for the purposes of *Miranda* before the burden shifts to the State to prove the voluntariness of the statement. *Moran*, 621 S.W. 3d at 258.

In *State v. Lowe*, 552 S.W. 3d 842 (Tenn. 2018), the detective went to the defendant's workplace and asked to speak with her. The detective then asked the defendant to go with him to the police station and she agreed to do so. The detective drove the defendant in his car and the defendant sat in the front seat and

was not restrained. The defendant had her purse and her cell phone with her. When she first arrived at the police station, the defendant sat on a bench in the building unattended and unrestrained for thirty minutes. The detective's questioning was focused solely on determining how a dead infant came to be placed in a laundry basket in the defendant's bedroom. The detective was nice, polite, and did not badger or belittle the defendant. The Court held that the defendant was not in custody during this interview. *Lowe*, 552 S.W. 3d at 869.

When determining whether someone is in custody for purposes of *Miranda*, the person's age is also relevant to the custody determination "[s]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer . . .." *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2406 (2011).

In *State v. Bush*, 942 S.W.2d 489 (Tenn. 1997), the Tennessee Supreme Court concluded that the defendant was not in custody for *Miranda* purposes when he gave a statement to the police. Although he was transported to the police station in a police car, his father rode with him and neither man was restrained. Moreover, the defendant initiated contact with the police, offered to make a statement, was not given any reason to believe that he was not free to leave, and did most of the talking while the police asked very few questions. *Bush*, 942 S.W.2d at 499-500. In reaching its conclusion, the court noted that the "undisclosed knowledge or suspicions of law enforcement officials are irrelevant to the question of whether a reasonable person in the position of [the interviewee] would have considered himself deprived of freedom of movement to a degree associated with a formal arrest." *Id.* at 500.

In contrast, the court concluded in *State v. Dailey*, 273 S.W.3d 94 (Tenn. 2009), that the defendant was in custody despite the fact that he drove himself to the police station, that he was not subjected to prolonged questioning, and that the officers' tone of voice and demeanor were conversational. In support of its conclusion, the court noted, among other things, that the officers lied to the defendant regarding the reason they wanted to speak with him, the defendant was interviewed in a small interrogation room in a secured area of the building, the door of the room was closed, a police officer was sitting between the defendant and the door, the questioning was "accusatory and demanding, aimed at convincing the [d]efendant that the police already had sufficient evidence to convict him," and one of the officers was armed. *Dailey*, 273 S.W.3d at 103-04; *see also R.D.S. v. State*, 245 S.W.3d 356 (Tenn. 2008) (analyzing a custody issue in a school setting); *State v.* Payne, 149 S.W. 3d 20 (Tenn. 2004) (defendant was in custody for purposes of Miranda when police interview resumed after break even though defendant drove himself to police station and was told during first minute of interview that he did not have to be there; tone of interview changed after break from conversational to demanding and accusatory, officers changed positions in interview room, with one officer standing near and somewhat over the defendant and the other officer moving the chair closer to the defendant and partially blocking his access to the door, and officers at no time after first minute of interrogation advised the defendant that he was free to not answer questions or to end interview); *State v. Munn*, 56 S.W.3d 486, 498-99 (Tenn. 2001) (person was not in custody despite the fact that the officers were "extremely inquisitive and often times accusatory"); *State v. Walton*, 41 S.W.3d 75, 83 (Tenn. 2001) (person who was handcuffed and confined to the back seat of a patrol car with two officers present was in custody for purposes of *Miranda* despite a claim that the handcuffs were only for security purposes); *State v. Mann*, 959 S.W.2d 503, 528-29 (Tenn. 1997), *reh'g denied* (Tenn. Feb. 17, 1998), *cert. denied*, 118 S.Ct. 2376 (1998) (Appendix) (not in custody for *Miranda* purposes despite being in a conference room at the police station).

Also, in *State v. Hawkins*, 519 S.W. 3d 1 (Tenn. 2017), law enforcement officers called the defendant on more than one occasion and asked him to go to police headquarters to talk to police about the

victim's disappearance. The defendant was reluctant to do so and later outright refused to do so. Thus, the police went to the defendant's house, cornered his vehicle with theirs, and told him to go with them to the police station to talk. The defendant offered to talk there at his house but the police insisted he go to the station with them. The defendant was placed in the back seat of a marked police car and transported to police headquarters. At headquarters, the defendant was placed in an interview room, which was locked from the outside, and remained there for several hours. The defendant gave a statement during which he announced that he was ready to go home. The officers said they still had more questions and, therefore, the defendant remained in the interview room several more hours. Later, the defendant gave another statement and implicated himself in a murder. By the time he gave this statement, the defendant had been in continuous police custody for more than twenty-four hours and had been questioned by police multiple times. The Court concluded that "the time, place, and purpose of the encounter, the presence of multiple officers, the nature of the questioning, which focused on the victim's homicide, and the remaining totality of the circumstances certainly would have 'communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Hawkins*, 519 S. W. 3d at 36 (citing *Michigan v. Chesternut*, 108 S. Ct. 1975 (1988)).

With regard to on-the-scene questioning, the general rule is that this type of questioning does not implicate *Miranda*, so *Miranda* warnings are not required. *Miranda*, 86 S.Ct. at 1629. There are exceptions to that rule, however. Therefore, courts should consider the factors listed in *Anderson* in these types of cases as well.

The considerations differ somewhat regarding whether an inmate/prisoner is in custody for purposes of *Miranda* because such a person would necessarily feel that he was not free to leave the jail/prison. For those individuals, courts should consider the following factors: "(1) the language used to summon the inmate, (2) the physical surroundings of the interrogation, (3) the extent to which he is confronted with evidence of his guilt, and (4) the additional pressure exerted to detain the inmate." *State v. Goss*, 995 S.W.2d 617, 628 (Tenn. Crim. App. 1998), *app. denied* (Tenn. April 26, 1999); *see also Howes v. Fields*, 132 S.Ct. 1181 (2012) (rejecting the argument that a prisoner is *per se* in custody for purposes of *Miranda* if he is "taken aside and questioned about events that occurred outside the prison walls" and setting out the various factors courts must consider when determining whether the prisoner was "in custody").

C. Interrogation

The *Miranda* safeguards apply to "questioning initiated by law enforcement officers" as well as to the "functional equivalent" of questioning, which includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Arizona v. Mauro*, 107 S.Ct. 1931, 1935 (1987) (quoting *Rhode Island v. Innis*, 100 S.Ct. 1682 (1980) and *Miranda v. Arizona*, 86 S.Ct. 1602 (1966)). "[T]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island v. Innis*, 100 S.Ct. 1682, 1690 (1980).

Whether the law enforcement officers' conversation about the offense at issue within earshot of a suspect constitutes interrogation for *Miranda* purposes must be evaluated on a case-by-case basis, and courts should consider whether law enforcement officials utilized "psychological ploys, such as casting blame on the victim or society, minimizing the culpability of the offender, or minimizing the moral seriousness of a crime." *State v. Northern*, 262 S.W.3d 741, 753 (Tenn. 2008) (finding that the

conversation constituted interrogation); *see also Innis*, 100 S.Ct. at 1688-91 (finding that the conversation did not constitute interrogation).

Although there are situations in which questioning by someone other than a law enforcement officer could constitute "interrogation" for purposes of *Miranda*, the United States Supreme Court held in *Arizona v. Mauro* that, under the facts of that particular case, the suspect's conversation with his wife at his wife's insistence did not constitute interrogation despite the fact that an officer was present during the conversation and recorded it in anticipation that the suspect might make an incriminating statement. *Mauro*, 107 S.Ct. at 1936-37. Likewise, the court has concluded that "[v]olunteered statements of any kind are not barred by the Fifth Amendment." *Miranda*, 86 S.Ct. at 1630 ("There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make"); *see also State v. Hurley*, 876 S.W.2d 57 (Tenn. 1993), *cert. denied*, 115 S.Ct. 328 (1994) (finding that an inmate who made self-serving statements to a detective he had summoned to his cell had volunteered his statement and was not entitled to *Miranda* warnings). Moreover, "police officers are permitted to ask follow-up questions to a defendant's voluntary statement without first having to give *Miranda* warnings, unless the officer has reason to believe that the follow-up questions are 'reasonably likely to elicit an incriminating response.'" *Walton*, 41 S.W.3d at 85.

D. Questioning By Undercover Law Enforcement Official Or Government Agent

Assuming that a statement is otherwise voluntary and that the person's Sixth Amendment right to counsel has not attached to the offense at issue, a statement made by a person in custody as a result of questioning by an undercover police officer or anyone else who, unbeknownst to the suspect, is serving as an agent of the government (family member, friend, or fellow inmate, for example) is admissible even in the absence of *Miranda* warnings. *See Illinois v. Perkins*, 110 S.Ct. 2394 (1990) (holding that "*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement"); *State v. Branam*, 855 S.W.2d 563, 568-69 (Tenn. 1993) (finding no constitutional violation when the police "wired" a family member before she spoke to the suspect, but recognizing that "under some circumstances, deceptive interrogation practices by law enforcement officers may be so unfair that they offend notions of due process"). Although such a person is in "custody" and is being "interrogated" for purposes of *Miranda*, the United States Supreme Court offered the following explanation for the inapplicability of the *Miranda* warnings when the person is unaware that the interrogator is a government employee or agent:

> The warning mandated by *Miranda* was meant to preserve the privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere." That atmosphere is said to generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated."
>
> Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. Coercion is determined from the perspective of the

> suspect. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking.

Perkins, 110 S.Ct. at 2397 (citations omitted).

In *State v. Clark*, 452 S.W. 3d 268 (Tenn. 2014), the defendant's wife secretly recorded her conversations with him. During these conversations, the defendant confessed to as many as eleven acts of sexual molestation of his daughters. The Court noted that, while it had previously adopted a two-factor test for determining when a private person qualifies as a state agent for purposes of the constitutional right against unreasonable searches and seizures, the Court had declined to apply that test in the Fifth Amendment context. In *Clark*, the Court focused on whether the defendant's will was overcome by his wife and whether the defendant's statement was voluntary. The Court found the statement was voluntary. The Court noted that the defendant's wife did not yell at, threaten, or confine the defendant. The Court held that the wife's interrogation of the defendant did not implicate his right against self-incrimination which affords no protection to a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

The Court considered the *Clark* case along with *State v. Sanders*, 452 S.W. 3d 300 (Tenn. 2014) in which the parent of a victim of sexual abuse wore a concealed police microphone, promised the defendant he would not be prosecuted if he confessed, and obtained a confession from the defendant. The defendant argued his confession should have been suppressed because it was involuntary and inconsistent with due process. The Court found that, in cases that involve suspects making confessions to friends, relatives, and other associates, the law need not be concerned with whether that confidant could properly be labeled as a private citizen or an agent of the State. The Court held that the defendant had simply misplaced his trust in a confidant to whom he voluntarily confessed.

In *State v. Dotson*, 450 S.W. 3d 1 (Tenn. 2014), the defendant invoked his right to remain silent but then asked to speak with his mother. Law enforcement transported the defendant's mother from protective custody to the police department to speak with the defendant. Law enforcement did not tell the defendant's mother what to say, nor did they tell her to obtain information from the defendant or to even question him. The defendant confessed his crimes to his mother. The Court held that his confession was not obtained in violation of constitutional law because his mother was not an agent of the state.

In *State v. Willis*, 496 S.W. 3d 653 (Tenn. 2016), the defendant sought to suppress numerous conversations he had with his ex-wife, with whom he continued to enjoy a cordial relationship after their divorce. The defendant initiated contact with his ex-wife when he asked to meet with her. The ex-wife met with the defendant at the jail. The defendant asked his ex-wife to return to the jail the next day and to bring with her a note pad and pen as well as a tape-recorder, which she did. The defendant controlled the tape-recorder, turning it on and off at his will. Later, the ex-wife informed law enforcement that she planned to attend the defendant's federal court hearing. A detective asked the ex-wife to record her telephone conversations with the defendant and the ex-wife agreed to do so. The detective gave the ex-wife equipment with which to record her conversations with the defendant. Also, during numerous telephone conversations between the ex-wife and the defendant while he was in jail, the defendant made incriminating statements despite the clear recorded warning that the calls were monitored and recorded. The Court found that neither the fact that the defendant was in custody nor the fact that his ex-wife was cooperating with the police mattered to the analysis under the self-incrimination clause because there are no constitutional protections for those who voluntarily offer information to a confidant. The Court then looked to whether the defendant's will was overborne so as to render his statements involuntary. The Court

answered this question in the negative because the defendant initiated the contact and there was no other proof to establish involuntariness.

E. Invocation

A suspect must unequivocally and unambiguously invoke his right to counsel or to remain silent, and this same standard applies in both the pre-waiver and post-waiver contexts. *Berghuis v. Thompkins*, 130 S.Ct. 2250 (2010); *Davis v. United States*, 114 S.Ct. 2350 (1994); *State v. Climer*, 400 S.W.3d 537 (Tenn. 2013); *State v. Dotson*, 450 S.W. 3d 1, 53 (Tenn. 2014). As the Tennessee Supreme Court has noted,

> an unequivocal invocation requires a suspect to "articulate his desire to have counsel present sufficiently clearly that a reasonable officer in the circumstances would understand the statement to be a request for an attorney." Questions that merely probe the parameters of *Miranda* rights are properly characterized as "equivocal statements made by a person who is still in the decision making process."

Climer, 400 S.W.3d at 563 (citations omitted); *see also Salinas v. Texas*, 133 S.Ct. 2174 (2013) (If *Miranda* warnings are neither required nor given during a noncustodial interview and the defendant fails to invoke his privilege against self-incrimination at the time of the questioning, his silence can be used by the prosecution in its case-in-chief.)

Although the invocation issue must be evaluated on a case-by-case basis, the Tennessee Supreme Court concluded that a suspect's statement to a transporting officer that he "intended to turn himself in after he got an attorney" did not constitute an unequivocal request for an attorney. *Downey*, 259 S.W.3d at 732. Similarly, in *Climer* the court concluded that a suspect failed to unequivocally invoke his right to counsel when he asked, "You mean I can have an uh an appointed lawyer right now?" and also said, "I'm scared to without an attorney here" and "I can't afford a lawyer." *Climer*, 400 at 562-63. The court gave numerous examples of statements various courts have found to be equivocal or ambiguous. *Id.* at 563-64.

In *State v. Dotson*, 450 S.W. 3d 1, 53 (Tenn. 2014), the Court held that the defendant's request to speak to officers other than those conducting the interview did not amount to an invocation, ambiguous or unambiguous, of his right to remain silent.

F. Waiver

If a suspect fails to invoke his right to remain silent and/or his right to counsel, his statement is still inadmissible unless the state establishes by a preponderance of the evidence that he voluntarily and knowingly waived his rights. *Climer*, 400 S.W.3d at 564-66. The waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and must also be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 106 S.Ct. 1135 (1986); *State v. Davidson*, 509 S.W. 3d 156 (Tenn. 2016); *State v. Freeland*, 451 S.W. 3d 791 (Tenn. 2014). Whether the waiver constitutes "a knowing and intelligent relinquishment or abandonment of a known right or privilege [is] a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Edwards*, 101 S.Ct. 1880, 1884

(1981); *see also McNeil v. Wisconsin*, 111 S.Ct. 2204, 2208 (1991); *North Carolina v. Butler*, 99 S.Ct. 1755 (1979).

"[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 86 S.Ct. at 1628; *Climer*, 400 S.W.3d at 565-66 (state failed to establish that the suspect understood his *Miranda* rights). When a defendant is advised of his *Miranda* rights and knowingly signs a written waiver of those rights, it will be presumed that the waiver is valid, absent evidence to the contrary. *See, State v. Freeland*, 451 S.W. 3d 791, 815 (Tenn. 2014) (where the defendant was advised of his rights before he gave each of his four statements and signed rights waiver forms, he knowingly and voluntarily waived his *Miranda* rights. However, even absent a written waiver or other express waiver, the *Miranda* requirements are met if the circumstances establish that the person received adequate warnings, understood those warnings, and had an opportunity to invoke his rights before making any statements. *Berghuis*, 130 S.Ct. at 2263; *see also State v. Chalmers*, 28 S.W.3d 913, 920 (Tenn. 2000), *cert. denied*, 121 S.Ct. 1367 (2001) (Appendix) ("'law does not require a written waiver' as long as the record demonstrates the defendant was advised of his rights and did, in fact, waive them"); *Mann*, 959 S.W.2d at 529-30 (written waiver is not required). "In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." *Berghuis*, 130 S.Ct. at 2264.

While the accused's mental condition is relevant to the issue of voluntariness, "coercive police activity is a necessary predicate" to a conclusion that the accused's *Miranda* waiver or statement was not made voluntarily. *Colorado v. Connelly*, 107 S.Ct. 515, 520-24 (1986) ("[W]hile mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry"); *see also Bush*, 942 S.W.2d at 500-01 ("assuming that the defendant's decision to execute the waiver could have been influenced by mental illness" lower courts properly upheld the waiver's validity "in the absence of police overreaching"); *but see State v. Blackstock*, 19 S.W.3d 200 (Tenn. 2000) (concluding that defendant's mental condition prevented him from voluntarily, knowingly and intelligently waiving his Fifth Amendment rights). With regard to intoxication, the Tennessee Supreme Court has stated:

> The law in this state is well-established that the ingestion of drugs and alcohol does not in and of itself render any subsequent confession involuntary. It is only when an accused's faculties are so impaired that the confession cannot be considered the product of a free mind and rational intellect that it should be suppressed. The test to be applied in these cases is whether, at the time of the statement, the accused was capable of making a narrative of past events or of stating his own participation in the crime.

State v. Morris, 24 S.W.3d 788 (Tenn. 2000), *cert. denied*, 121 S.Ct. 786 (2001) (citations and quotation marks omitted) (rejecting defendant's claim that cocaine use rendered his statement involuntary and unknowing); *see also State v. Dailey*, 273 S.W.3d 94, 110-11 (Tenn. 2009) (listing the accused's sobriety (as it relates to his ability to understand his *Miranda* rights) as one factor in determining voluntariness for purposes of a question-first interrogation).

The state is not required to present expert proof that a *Miranda* waiver was knowingly and intelligently executed merely because the defendant presented expert testimony to the contrary. *State v. Bush*, 942 S.W.2d 489, 500 (Tenn. 1997). The state bears the burden of proving by a preponderance of the

evidence that the defendant waived his rights under *Miranda*. *State v. Freeland*, 451 S.W. 3d 791 (Tenn. 2014).

G. Post-Invocation Obligations

1. Right to Counsel

As a general rule, after *Miranda* warnings are given the interrogation must cease until an attorney is present if the suspect invokes his right to counsel, and the interrogation must cease completely if the suspect invokes his right to remain silent. *Miranda*, 86 S.Ct. at 1627-28; *Saylor*, 117 S.W.3d at 244; *see also Minnick v. Mississippi*, 111 S.Ct. 486, 489-91 (1990) (interpreting "until counsel has been made available to him" to mean that counsel must be present, not merely that the suspect has consulted with counsel outside the interrogation room). While a voluntary *Miranda* waiver is adequate during the initial interrogation, it is not adequate during questioning (in the absence of an attorney) which follows a suspect's invocation of the right to counsel unless the suspect "initiates further communication, exchanges, or conversations with the police." *Maryland v. Shatzer*, 130 S.Ct. 1213, 1219-20 (2010); *Minnick*, 111 S.Ct. at 492; *Edwards v. Arizona*, 101 S.Ct. 1880, 1885 (1981).

However, because a blanket prohibition against initiating communication with a suspect who has invoked his right to counsel would "be eternal" regardless of whether a subsequent interrogation pertained to a different crime or was conducted by a different government authority, the United States Supreme Court has limited the presumption of involuntariness of a post-invocation waiver by adopting a 14-day break-in-custody rule. *Shatzer*, 130 S.Ct. at 1223. Therefore, a suspect whose post-invocation interrogation falls outside of this 14-day period is no longer entitled to the presumption that a *Miranda* waiver which precedes it is involuntary; however, the suspect can still argue that the waiver was involuntary. *Id.* at 1223, n. 7. For purposes of this rule, returning an inmate to the general prison population constitutes a break in custody. *Id.* at 1224-25.

2. Right to Remain Silent

If the person who is being interrogated invokes his right to remain silent at any point prior to or during the interrogation, the questioning must cease. *Miranda*, 86 S.Ct. at 1627. The admissibility of a statement which follows the invocation depends upon whether the interviewer "scrupulously honored" the accused's request. *Michigan v. Mosley*, 96 S.Ct. 321, 326 (1975). A failure to do so renders the statement inadmissible during the state's case-in-chief regardless of whether the failure was intentional or inadvertent. *State v. Crump*, 834 S.W.2d 265, 271 (Tenn. 1992).

Courts should consider the totality of the circumstances when determining whether law enforcement scrupulously honored a request to remain silent. *State v. Huskey*, 177 S.W.3d 868, 877-80 (Tenn. Crim. App. 2005), *app. denied* (Tenn. Oct. 31, 2005). This includes, but is not limited to, the following factors: (1) whether the questioning ceased immediately upon the invocation of the right to remain silent; (2) whether the interrogator attempted to persuade the person to reconsider the invocation, including any efforts to curry favor; (3) whether a significant period of time passed between the invocation and the resumption of questioning; (4) whether the location, interrogator, and/or subject matter of the interrogation changed; and (5) whether the interrogator informed the person of his *Miranda* rights and gave him an opportunity to invoke or waive those rights prior to the post-invocation interview(s). *Mosley*, 96 S.Ct. at 327; *Huskey*, 177 S.W.3d at 880 (officers attempted to curry favor by allowing the interviewee to shower and to telephone family members). "[R]einterrogation of a suspect concerning the same subject

matter does not constitute a *per se* violation of *Miranda* . . . [but] it is an important factor to consider." *Huskey*, 177 S.W.3d at 880.

26.03 SIXTH AMENDMENT

A. Generally

The Sixth Amendment to the United States Constitution provides in relevant part that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." *U.S. Const. amend VI.* This provision is applicable to the states via the Fourteenth Amendment. *State v. Rollins*, 188 S.W.3d 553, 565, n.8 (Tenn. 2006). Similarly, the Tennessee Constitution provides that "in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . .." *Tenn. Const. art I, § 9*; *see also Rollins*, 188 S.W.3d at 565, n.10 (reiterating that the Tennessee Supreme Court has construed the state constitution consistently with the federal constitution with regard to the right to counsel). While the emphasis under the Fifth Amendment is protection against coercion, the emphasis under the Sixth Amendment is "the right to legal assistance in any critical confrontation with state officials, irrespective of coercion." *State v. Berry*, 592 S.W.2d 553, 557 (Tenn. 1980); *State v. Willis*, 496 S.W. 3d 653 (Tenn. 2016).

Although the "core of this right has historically been, and remains today, the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial," the United States Supreme Court has held that "the right extends to having counsel present at various pretrial critical interactions between the defendant and the State, including the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge." *Kansas v. Ventris*, 129 S.Ct. 1841, 1844-45 (2009), *reh'g denied*, 129 S.Ct. 2853 (2009) (citations and internal quotation marks omitted). Thus, following the initiation of judicial proceedings, the government is precluded from deliberately eliciting incriminating statements from an accused in the absence of counsel or the waiver of counsel. *See Brewer v. Williams*, 97 S.Ct. 1232 (1977); *Massiah v. United States*, 84 S.Ct. 1199 (1964).

With regard to the Sixth Amendment, the Tennessee Supreme Court has summarized the pertinent rights and procedures as follows:

> A presumption exists that the accused requests the services of counsel at every *critical stage* of the prosecution. The purpose of the Sixth Amendment counsel guarantee -- and hence the purpose of invoking it -- is to protec[t] the unaided layman at critical confrontations with his expert adversary, the government, *after* the adverse position of government and defendant have solidified with respect to a particular alleged crime.
>
> After the initiation of formal charges against an accused, the Sixth Amendment right to counsel attaches, guaranteeing the accused the right to rely on counsel as a medium between himself and the State in any critical confrontation with state officials. In Tennessee, the adversarial judicial process is initiated at the time of the filing of the formal charge, such as the indictment or arrest warrant. Once formal criminal proceedings have begun, statements deliberately elicited from a defendant without an express waiver of the right to counsel are inadmissible in the prosecution's case-in-chief. The waiver of an accused's right to counsel after receiving *Miranda* warnings, or their

> equivalent, will generally suffice to establish a knowing and intelligent Sixth Amendment waiver of right to counsel, thus permitting the introduction of post-arrest statements.

Downey, 259 S.W.3d at 733 (citations and quotation marks omitted) (emphasis in original); *see also Montejo v. Louisiana*, 129 S.Ct. 2079, 2085 (2009), *reh'g denied*, 130 S.Ct. 23 (2009). (reiterating that interrogation by the state is a critical stage); *Rollins*, 188 S.W.3d at 566 (noting that the adversarial process is "initiated when formal charges are filed, i.e., an arrest warrant issues, a preliminary hearing is held (if no arrest warrant is issued), or an indictment or presentment is returned" and rejecting defendant's argument that police are barred from approaching him for questioning once the right to counsel attaches).

In *Michigan v. Jackson*, the United States Supreme Court held that, for Sixth Amendment purposes, "if police initiated interrogation after a defendant's assertion, at an arraignment or other similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 106 S.Ct. 1404, 1411 (1986). However, the court subsequently overruled *Michigan v. Jackson*, noting that a person cannot invoke his *Miranda* rights anticipatorily in a proceeding or context other than custodial interrogation, and concluding that the *Miranda-Edwards-Minnick* line of cases adequately protects defendants' rights under both the Fifth and Sixth Amendments. *Montejo*, 129 S.Ct. at 2089-91. Thus, a defendant may waive his Sixth Amendment right even if he is represented by counsel, but only if it is a voluntary, knowing and intelligent waiver, which typically occurs via a *Miranda* waiver. *Id.* at 2085.

In *State v. Willis*, 496 S.W. 3d 653, 707 (Tenn. 2016), the defendant was on release in a federal case for which he had appointed counsel. The defendant was suspected in a state homicide case and, therefore, he was arrested for violating the conditions of his federal release. The defendant made numerous incriminating statements to his ex-wife. Noting that the Sixth Amendment is "offense specific," the Court held that "statements obtained regarding an offense for which adverse judicial proceedings have not begun are admissible, even if they were deliberately elicited during an investigation of a separate offense for which there was a right to counsel" because "[a]ssertion of the right to counsel for an indicted offense does not serve to invoke the right for all future prosecutions."

B. Deliberate Elicitation

1. Generally

Direct questioning is not required for law enforcement's actions to constitute a Sixth Amendment violation. Even in the absence of such questioning, the government violates this provision by "intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel." *United States v. Henry*, 100 S.Ct. 2183, 2189 (1980). For instance, the "Christian burial speech" made by officers in the presence of the accused was "tantamount to interrogation." *See Brewer*, 97 S.Ct. at 1239-40.

2. Questioning by Undercover Law Enforcement Official or Government Agent

Absent a valid waiver after the Sixth Amendment right to counsel attaches, neither the government nor its agent (such as a fellow inmate, co-defendant, friend or relative) may question the defendant without the presence of counsel regardless of whether the defendant is incarcerated or otherwise in custody at the time of the questioning, and regardless of whether the defendant is aware that the person is a government employee or agent. *Maine v. Moulton*, 106 S.Ct. 477 (1985); *Henry*, 100 S.Ct. at 2186-89; *Massiah*, 84 S.Ct. at 1201-03; *State v. Willis*, 496 S.W. 3d 653 (Tenn. 2016). If the defendant is unaware that the person

to whom he is speaking is acting on behalf of the government, the defendant clearly has not knowingly and voluntarily waived his Sixth Amendment right by engaging in a conversation with that person. *Henry*, 100 S.Ct. at 2188. However, the United States Supreme Court has also clarified the scope of the Sixth Amendment's protection as follows:

> The primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since "the *Sixth Amendment* is not violated whenever – by luck or happenstance – the State obtains incriminating statements from the accused after the right to counsel has attached," a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Kuhlmann v. Wilson, 106 S.Ct. 2616, 2630 (1986) (citations omitted).

Tennessee courts use traditional principles of agency to determine government agent status. *State v. Willis*, 496 S.W. 3d 653, 709-711 (Tenn. 2016). "An agency relationship arises when the principal manifests assent or intention to have an agent act on its behalf and subject to its control, and the agent consents to do so." *Id*. "The defendant bears the burden of proving agency, based on all the circumstances." *Id*. In *Willis*, law enforcement recruited the defendant's ex-wife to assist them in the investigation prior to the defendant being indicted. However, after the defendant was indicted for two murders, law enforcement actually discouraged the ex-wife from staying in contact with the defendant and told her to stop taking his calls. The ex-wife continued to stay in contact with the defendant and he continued to make incriminating statements to her. The Court held that the incriminating statements the defendant made to his ex-wife after he was indicted – which was when his Sixth Amendment right attached – were admissible because the ex-wife was not an agent of the state as law enforcement had discouraged her from communicating with the defendant.

C. Critical Stage

For Sixth Amendment purposes, a pre-trial "critical stage" includes (in addition to interrogations) "preliminary hearings, post-indictment lineups, and any post-indictment proceedings on motions for court-ordered mental evaluations of the defendant." *State v. Blye*, 130 S.W.3d 776, 780 (Tenn. 2004), *cert. denied*, 125 S.Ct. 289 (2004) (citations omitted). In contrast, the Sixth Amendment right to counsel does not include a right to have counsel present when the state presents a photographic lineup to a witness, during a court-ordered mental examination of the defendant, or during "systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like." *Id.* at 781. Likewise, "a post-presentment, *ex parte* search warrant proceeding to obtain a blood sample from the defendant is not a critical stage of the prosecution." *Id.* at 782.

D. Offense Specific

It is important to recognize that "[t]he Sixth Amendment right . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced . . .." *Sepulveda v. State*, 90 S.W.3d 633, 638 (Tenn. 2002) (quoting *McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991)); *see also Texas v. Cobb*, 121 S.Ct. 1335, 1339 (2001) (Sixth Amendment right to counsel is offense

specific, and does not extend to "other offenses 'closely related factually' to the charged offense"). With regard to offenses for which the Sixth Amendment right has not attached, government officials must simply comply with *Miranda* and its progeny regarding the notification, waiver, and/or invocation of a person's Fifth Amendment rights, and they must do so only in the context of a custodial interrogation.

26.04 VOLUNTARINESS OF STATEMENT

A. Voluntariness

In addition to determining whether a defendant waived his *Miranda* rights, courts must also determine whether the defendant's subsequent statement or confession was voluntarily given. S*tate v. Freeland*, 451 S.W. 3d 791, 815 (Tenn. 2014). As noted above, the state is required to prove the voluntariness of a *Miranda* waiver and a subsequent statement by a preponderance of the evidence. *Bush*, 942 S.W.2d at 500 (citing *Colorado v. Connelly*, 107 S.Ct. 515 (1986)); *State v. Freeland*, 451 S.W. 3d 791, 814 (Tenn. 2014). Assuming a statement was made voluntarily, its truth or falsity is a question of fact for the jury, not a question of admissibility. *State v. Housler*, 193 S.W.3d 476, 488-91 (Tenn. 2006), *cert. denied*, 127 S.Ct. 499 (2006).

"[C]oercive police activity is a necessary predicate to the finding that a statement is not 'voluntary'" pursuant to the United States Constitution. *Connelly*, 107 S.Ct. at 522. Moreover, "[w]hen *Miranda* warnings are given and a waiver obtained, the state has 'a virtual ticket of admissibility' for any resulting custodial statement of the defendant. Indeed, 'maintaining that a statement is involuntary even though given after warnings and a voluntary waiver of rights requires unusual stamina' and usually is a losing argument in court." *Northern*, 262 S.W.3d at 749 (citations omitted). With regard to the voluntariness requirement pursuant to Tennessee's Constitution, the Tennessee Supreme Court has stated:

> The test of voluntariness for confessions under article I, § 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. In Tennessee, for a confession to be considered voluntary, it must not be the product of any sort of threats or violence . . . any direct or implied promises, however slight, nor by the exertion of any improper influence. The essential question therefore is whether the behavior of the State's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined.

Downey, 259 S.W.3d at 733-34 (citations and quotation marks omitted).

When determining whether a suspect's statement was voluntary in nature, courts should consider the following:

> The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep or medical

> attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

State v. Huddleston, 924 S.W.2d 666, 671 (Tenn. 1996) (quoting *People v. Cipriano*, 431 Mich. 315, 429 N.W.2d 781, 790 (Mich. 1988)); S*tate v. Freeland*, 451 S.W. 3d 791, 815 (Tenn. 2014) (officers' challenges to the veracity of the defendant's answers in light of contradictory evidence discovered during the investigation were not threats and defendant failed to show his sleepiness and hunger were caused by the officers; defendant failed to show that the promise that he could take a polygraph test was a ruse to coerce him into giving a statement); *State v. Reyes*, 505 S.W. 3d 890, 901 (Tenn. 2016) (where the defendant answered all of the detective's questions in English and never spoke a word of Spanish during the interrogation and waived his *Miranda* rights in English, his waiver was knowingly and voluntarily given) .

In *State v. Davidson*, 509 S.W. 3d 156 (Tenn. 2016), Davidson was suspected of committing multiple murders. Over thirty law enforcement officers, including sixteen SWAT members, arrived at an abandoned house to arrest Davidson. The Court found the show of force was not disproportionate to the seriousness of the crimes Davidson was suspected of committing. The Court noted that only two officers transported Davidson to the police station and only two officers were present during Davidson's interrogation. Therefore, the Court found that Davidson's statement was voluntary.

Although this issue must be evaluated on a case-by-case basis, denying an accused's request to make a phone call, requiring him to reduce his oral confession to writing despite his request that he be permitted to do so "later", and assuring him that his statement could not hurt him do not necessarily render a statement involuntary. *Downey*, 259 S.W.3d at 734-36; *see also Walton*, 41 S.W.3d at 95 (reiterating that custody alone is not sufficient to vitiate the voluntariness of a confession); *State v. Smith*, 933 S.W.2d 450 (Tenn. 1996) (informing the suspect that there will be certain consequences if he refuses to cooperate and making accurate assertions about the suspect's predicament do not constitute coercion).

Evidence about the manner in which a confession was obtained can be highly relevant to its probative value. *State v. McCaleb*, 582 S. W. 3d 179 (Tenn. 2019) (citing *Crane v. Kentucky*, 106 S. Ct. (1986)). *See also*, State v. Echols, 382 S. W. 3d 266 (Tenn. 2012) (to aid the jury in resolving the question of the veracity of a defendant's statement to the police, the jury may hear evidence of the circumstances under which the confession was procured; thus, the trial court erred in not allowing the defendant to cross-examine the interrogating officer about redacted portions of the recorded interrogation).

In *State v. McCaleb*, after the officer repeatedly told the defendant that the polygraph test indicated his denials were false, the defendant made incriminating statements. The trial court found that the defendant's statements were voluntary in the constitutional sense but prohibited the state from using the defendant's statements against him pursuant to Rule 403 of the Tennessee Rules of Evidence. The Supreme Court affirmed, finding that it was appropriate for the trial court to consider, under Rule 403, both the defendant's constitutional right to attack the credibility of his "confession" by informing the jury of the circumstances under which he "confessed" as well as the potential effects on the trial of that attack. *Id*. at 196.

B. Question-First Interrogations

Whether a statement can be considered knowing and voluntary if it follows an incriminating admission during an unwarned custodial interrogation (commonly known as a "question-first

interrogation") is evaluated on a case-by-case basis and involves multiple fact-specific considerations. *See Missouri v. Seibert*, 124 S.Ct. 2601 (2004); *Dailey*, 273 S.W.3d at 110 (discussing the relevant factors under both the Tennessee and United States constitutions and ultimately concluding that the post-*Miranda* statement was not admissible); *Northern*, 262 S.W.3d at 763-66 (discussing the relevant factors under both the Tennessee and United States constitutions and ultimately concluding that the post-*Miranda* statement was admissible).

26.05 USE OF STATEMENTS OBTAINED IN VIOLATION OF CONSTITUTION(S) AS WELL AS EVIDENCE OBTAINED AS A RESULT OF THOSE STATEMENTS

A. Statements

A truly coerced or involuntary statement may not be introduced at trial during the state's case-in-chief, to impeach a defendant who testifies, or for any other purpose. *New Jersey v. Portash*, 99 S.Ct. 1292 (1979); *Mincey v. Arizona*, 98 S.Ct. 2408 (1978). In contrast, a statement which is elicited in technical violation of the Fifth Amendment or Sixth Amendment is inadmissible during the state's case-in-chief but is admissible to impeach a defendant who testifies as long as the statement was made voluntarily and is otherwise admissible. *Ventris*, 129 S.Ct. 1844-47; *Harris v. New York*, 91 S.Ct. 643 (1971); *Dailey*, 273 S.W.3d at 102, n.4. The admissibility of a statement which follows an illegally obtained statement is evaluated on a case-by-case basis, and the Tennessee Supreme Court has set forth numerous factors which must be considered by a reviewing court. *Dailey*, 273 S.W.3d at 110-12.

B. Non-Testimonial Evidence

"[A] defendant may seek suppression of non-testimonial evidence discovered through his or her unwarned statements only when the statements are the product of an actual violation of the privilege against self-incrimination, *i.e.*, such as when actual coercion in obtaining the statement is involved or when the invocation of the right to remain silent or to have counsel present is not 'scrupulously honored.'" *Walton*, 41 S.W.3d at 92. Suppression of the "fruit of the poisonous tree" is not an available remedy for a *Miranda* violation if the statement was made voluntarily. *Climer*, 400 S.W.3d at 566-67.

26.06 PROBABLE CAUSE DETERMINATION FOLLOWING WARRANTLESS ARREST

A. Fourth Amendment

1. Violation Determination

In *Gerstein v. Pugh*, 95 S.Ct. 854 (1975), the United States Supreme Court held that the Fourth Amendment requires "a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Gerstein*, 95 S.Ct. at 869. An adversary hearing is not required, and the probable cause determination is not a critical stage at which the accused is entitled to appointed counsel. *Id.* at 866-67.

The court subsequently concluded that making the probable cause determination "within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *County of Riverside v. McLaughlin*, 111 S.Ct. 1661, 1670 (1991). However, if the accused can establish that the determination was delayed unreasonably, a court could find a constitutional violation even if the determination was made within the 48-hour period. *Id.* The court noted that practical realities often will cause reasonable delays, but stated that "[e]xamples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.*; *see also State v. Bishop*, 431 S.W.3d 22, 38-39 n.9 (Tenn. 2014) (utilizing a 48-hour hold procedure to gather additional evidence is unconstitutional). If the period between a warrantless arrest and the probable cause determination exceeds 48 hours, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.; see also Baker v. McCollan*, 99 S.Ct. 2689, 2694 (1979) (issuance of a valid arrest warrant satisfies the probable cause requirement).

2. Effect of Violation

If a person is arrested without a warrant and the court concludes that the Fourth Amendment has been violated because a probable cause determination was not made in a timely fashion, a confession/statement made following the violation "should be excluded unless the prosecution establishes that the confession 'was sufficiently an act of free will to purge the primary taint of the unlawful invasion.'" *State v. Carter*, 16 S.W.3d 762, 766 (Tenn. 2000) (quoting *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996)). The state has the burden of establishing the statement's admissibility by a preponderance of the evidence, and courts should consider: "(1) the presence or absence of *Miranda* warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and finally, of particular significance, (4) the purpose and flagrancy of the official misconduct." *Id.*

With regard to the second factor, the Tennessee Supreme Court acknowledged that "if the statement was given prior to the time the detention ripened into a constitutional violation, it is not the product of the illegality and should not be suppressed," but also recognized that the passage of time following a violation exacerbates the problem because the custody would necessarily become more oppressive over time. *State v. Huddleston*, 924 S.W.2d 666, 675 (Tenn. 1996). With regard to the third factor, being released on bail after arrest but prior to the statement could purge the taint, as could the suspect's consultation with a friend, relative, attorney or priest prior to making a statement. *Id.* Finally, with regard to the fourth factor, detaining the suspect for the purpose of gathering additional evidence to justify the arrest weighs in favor of suppression of the statement. However, the "harsh conditions" under which a suspect is held do "not bear on whether the officers had ulterior reasons for the unlawful detention . . . and [the authorities'] treatment of [the suspect] while he was detained is irrelevant" under the fourth factor. *Carter*, 16 S.W.3d at 768. However, the authorities' treatment of the accused, including the conditions of confinement, is relevant to the admissibility of a statement obtained following an unnecessary delay pursuant to Rule 5(a) of the Tennessee Rules of Criminal Procedure.

B. Tenn. R. Crim. P. 5(a)

Tennessee Rule of Criminal Procedure 5(a) provides in relevant part that "[a]ny person arrested – except upon a capias pursuant to an indictment or presentment – shall be taken without unnecessary delay before the nearest appropriate magistrate . . .." Failing to comply with the probable cause requirement within 72 hours constitutes an "unnecessary delay" but does not require the automatic suppression of a

statement that was obtained during the period of unnecessary delay. *Huddleston*, 924 S.W.2d at 670; *see also State v. Davis*, 141 S.W.3d 600, 625-26 (Tenn. 2004), *cert. denied*, 125 S.Ct. 1306 (2005) (delay of 12-13 hours does not constitute an "unnecessary delay"). Instead, a court should exclude the statement only if the court, upon examining the totality of the circumstances, concludes that the statement was not voluntarily given. *Huddleston*, 924 S.W.2d at 670-71. The "focus on unnecessary delay should not be solely on the length of the delay, but rather on the circumstances of the delay and their effect on the accused." *Carter*, 16 S.W.3d at 769 (quoting *Huddleston*, 924 S.W.2d at 671).

26.07 STATEMENTS MADE DURING MENTAL HEALTH EVALUATION

"[W]here a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence." *Kansas v. Cheever*, 134 S.Ct. 596, 603 (2013) (rejecting the argument that rebuttal evidence is not permitted when the issue is voluntary intoxication as opposed to a "mental disease or defect"); *see also Buchanan v. Kentucky*, 483 U.S. 402 (1987); Tenn. R. Crim. P. 12.2(f) and (g) (discovery and admissibility provisions relative to competency examinations).

CHAPTER 27

CONFRONTATION

Special thanks to Judge John Campbell for his review and edits of this chapter.

Contents **Section**

27.01 IN GENERAL

In all criminal prosecutions, the accused has the right to confront the witnesses, and the standards of the federal guarantee apply to the states. U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400 (1965). Although the Tennessee Constitution specifies that the accused shall have the right to "confront the witnesses face to face," the courts have interpreted the state constitution as offering no more rights than the United States Constitution. *See* Tenn. Const. art. I, § 9; *State v. Lewis*, 235 S.W.3d 136, 144-45 (Tenn. 2007) (declining to interpret Tennessee's constitutional protections more broadly than the Sixth Amendment's protections). See also *State v Dotson*, 450 S.W.3d 1, 63 (Tenn. 2014), *State v. McCoy,*459 S.W.3d 1, 13-14 (Tenn. 2014).

The United States Supreme Court has interpreted the Confrontation Clause as a trial right. It includes both the right to cross-examination and the right to have the witness testify under oath in the presence of the defendant and the fact-finder. *California v. Green*, 399 U.S. 149 (1970) (right includes: examination under oath, opportunity to cross-examine, and jury observation of the witness' demeanor and credibility).

27.02 *CRAWFORD V. WASHINGTON*

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court overruled *Ohio v. Roberts* regarding the admissibility of testimony or other evidence that impacts the defendant's Sixth Amendment right of confrontation. Prior to *Crawford*, an unavailable witness' statement was admissible if it bore "adequate 'indicia of reliability,'" which essentially meant that the statement fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). In *Crawford*, the defendant's wife did not testify at trial due to the marital privilege, but the state introduced a statement she made during a police interrogation following

the incident at issue. Finding this to be error, the Supreme Court overruled *Ohio v. Roberts* and concluded that an unavailable witness' out-of-court statement is inadmissible under the Confrontation Clause if the statement is testimonial and the defendant did not previously have an opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 38-69; *see also Hardy v. Cross*, 132 S.Ct. 490 (2011) (discussing the lengths to which the state must go to establish a "good-faith effort" to locate an allegedly unavailable witness, and noting that the Court has never required the state to issue a subpoena if the state is attempting to prove that a witness who goes into hiding is unavailable); *State v. Cannon*, 254 S.W.3d 287, 306 (Tenn. 2008) (noting that "unavailability must be supported by proof, not by unsupported statements of counsel").

The Court declined to define "testimonial" for purposes of the Confrontation Clause but found that some types of statements would be considered "testimonial" under any definition, noting that "whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. at 68. The Court also summarized the focus of the Confrontation Clause:

> It applies to witnesses against the accused -- in other words, those who bear testimony. Testimony, in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52 (citations and quotation marks omitted); *see also State v. Franklin*, 308 S.W.3d 799 (Tenn. 2010) (reiterating the relevant factors for determining whether a statement is testimonial in nature); *Cannon*, 254 S.W.3d at 301-03 (summarizing the applicable standards under *Crawford* and its progeny, and noting that *Crawford* cited business records and statements in furtherance of a conspiracy as examples of nontestimonial statements). *See also State v. Middlebrook*, E2019-01503-CCA-R3-CD at 15-16 (1/05/2021).

If the witness who made the out-of-court testimonial statement is present at the trial and is available for cross-examination, allowing the jury to consider the out-of-court statement does not violate the defendant's right of confrontation. *Crawford*, 541 U.S. at 59, n.9; s*ee also State v. Banks*, 271 S.W.3d 90, 118-19 (Tenn. 2008) (finding that because the victim was available at trial and was cross-examined by defense counsel, the trial court did not violate the defendant's right of confrontation by admitting into evidence the victim's pretrial statement to a police officer in which the victim identified the defendant as the shooter). If a statement is considered nontestimonial, the Confrontation Clause is not implicated, and the tests set out in *Ohio v. Roberts* and *Crawford v. Washington* should not be utilized.

Instead, the trial court should determine admissibility by analyzing the issue under the Tennessee Rules of Evidence. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007); *Lewis*, 235 S.W.3d at 144-45.

27.03 ADMISSIBILITY TEST - *CRAWFORD V. WASHINGTON*

Courts might find the following test helpful when analyzing a *Crawford* issue:

1. Does the out-of-court statement ("statement") constitute hearsay? If the answer is "Yes" proceed to question 2. If the answer is "No" stop here because the defendant's confrontation rights are not implicated.

2. Does the statement satisfy a hearsay exception? If the answer is "Yes" proceed to question 3. If the answer is "No" the statement is not admissible.

3. Is the statement testimonial in nature (see the relevant factors listed below)? If the answer is "Yes" proceed to question 4. If the answer is "No" stop here because the defendant's confrontation rights are not implicated (the court still must determine if the statement is otherwise admissible).

4. Did the witness appear at trial such that he/she is available for cross-examination? If the answer is "Yes" confrontation considerations do not preclude the introduction of the statement (the court still must determine if the statement is otherwise admissible). If the answer is "No" proceed to question 5.

5. Did the court make a finding that the witness is "unavailable"? If the answer is "Yes" proceed to question 6. If the answer is "No" the statement is not admissible.

6. Did the defendant (or his/her counsel) previously have an opportunity to cross-examine the unavailable witness regarding his/her statement? If the answer is "Yes" the statement is admissible under the Confrontation Clauses of the United States and Tennessee constitutions (the court still must determine if the statement is otherwise admissible). If the answer is "No" the statement is not admissible.

When determining whether evidence is testimonial or nontestimonial, courts should consider the intent of a reasonable person in the position of the questioner and declarant, including considering the following nonexclusive list of factors:

> (1) whether the declarant was a victim or an observer; (2) whether contact was initiated by the declarant or by law-enforcement officials; (3) the degree of formality attending the circumstances in which the statement was made; (4) whether the statement was given in response to questioning, whether the questioning was structured, and the scope of such questioning; (5) whether the statement was recorded (either in writing or by electronic means); (6) the declarant's purpose in making the statements; (7) the officer's purpose in speaking with the declarant; and (8) whether an objective declarant under the circumstances would believe that the statements would be used at a trial.

State v. Parker, 350 S.W.3d 883, 898-99 (Tenn. 2011) (citations omitted).

27.04 POLICE INTERROGATIONS AND ONGOING EMERGENCIES

In *Davis v. Washington*, 547 U.S. 813 (2006), the Court explained that a "police interrogation" is not always conducted by a police officer, that the statements made during the interrogation can be considered either testimonial or nontestimonial depending on the circumstances, and that the statements can evolve from nontestimonial to testimonial as the circumstances change, holding:

> 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 prosecution.

Davis, 547 U.S. at 822.

For purposes of this opinion, the Court found that the acts of a 911 operator constituted the acts of the police. *Id.* at 823, n.2. The victim's statements in response to a 911 operator's questions regarding an ongoing incident were considered nontestimonial while, in the companion case, the victim's statements in response to a police officer's questions regarding an incident which had concluded were considered testimonial. The Court noted that statements made by a victim/witness to a 911 operator are not always considered nontestimonial. For instance, statements made to a 911 operator after the emergency has concluded may be considered testimonial. Finally, the Court concluded that the location of the "interrogation" (at the alleged crime scene or at the police station, for example) is not dispositive. *Id.* at 826-33.

The Court subsequently revisited the "primary purpose"/"ongoing emergency" issue in *Michigan v. Bryant*, 131 S.Ct. 1143 (2011), in the context of a "nondomestic dispute" in which the mortally-wounded victim identified the shooter and location of the shooting when talking to the police in a public place. Finding that the victim's statements were not testimonial hearsay and noting that the "existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public," the Court considered numerous factors including, but not limited to, the informality of the situation, the type of weapon used by the perpetrator, the type of dispute at issue, the severity of the victim's injuries, and the context of the officers' questions and the victim's answers. *Michigan*, 131 S.Ct. at 1156-1167. The Court further noted:

> The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the "primary purpose of the interrogation" because of the effect it has on the parties' purpose, not because of its actual existence.

Id. at 1157, n.8.

27.05 AFFIDAVITS/EXPERTS

An affidavit establishing that a substance seized by the police was cocaine is testimonial and the analysts (affiants) were witnesses for Sixth Amendment purposes, so such an affidavit is inadmissible unless the analysts are available at trial for cross-examination or the analysts are unavailable to testify and the defendant had a prior opportunity to cross-examine them. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2427 (2009) (also noting that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records"); *see also Lewis*, 235 S.W.3d at 150-51 (allowing an expert to testify regarding the results of a DNA test when that expert evaluated data gathered by a colleague and the colleague failed to appear at trial for cross-examination). Likewise, a forensic laboratory report that reflects the defendant's blood alcohol level is not admissible through the testimony of an analyst who had no involvement in the testing of the blood sample or the recording of the test results. *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).

As is often done in cases involving the comparison of DNA found at a crime scene with DNA located in a database, an expert witness may express an opinion based upon facts that have been made known to the witness but about which the witness is not competent to testify, and this testimony does not violate the Confrontation Clause. *See Williams v. Illinois*, 132 S.Ct. 2221 (2012).

In regards to autopsy reports, does the report of the medical examiner provide testimonial evidence such that it triggers a right to confrontation? The Court in *Crawford* did not answer the question of whether an autopsy report was testimonial. The pathologist performing an autopsy is attempting to determine what was the cause and manner of death. Due to the nature of this inquiry, the pathologist never can provide testimony about who may have caused the death of the individual. Based on the unique character of medical examiner testimony and considering the plurality in *Williams*, the Tennessee Supreme Court determined that the report of the medical examiner was not testimonial and could be admitted without violating the confrontation clause. *State v. Hutchison*, 482 S.W.3d 893, 915 (Tenn. 2016).

27.06 STATEMENTS MADE TO MEDICAL PERSONNEL

Consistent with *Crawford*, whether statements made by a victim to a sexual assault nurse examiner or other medical personnel are considered testimonial or nontestimonial depends upon the circumstances, with the focus being on the primary purpose of the statements. If a statement is given for the primary purpose of medical diagnosis and treatment, the statement is nontestimonial and its admissibility is governed by the rules of evidence as opposed to confrontation considerations. In contrast, if the primary purpose of the statement is to establish or prove past events which may be relevant to a criminal prosecution, the statement is testimonial. As with statements made to law enforcement personnel, statements made to medical personnel can evolve from testimonial to nontestimonial, and trial courts should redact any portions which violate a defendant's right of confrontation. *Cannon*, 254 S.W.3d at 303-06. *See also State v. Rimmer*, W2018-00496-CCA-R3-CD, at 7 (1/24/2019).

27.07 STATEMENTS BETWEEN PRIVATE PARTIES

Although acknowledging that the United States Supreme Court has not resolved this issue, the

Tennessee Supreme Court noted that there is some support for the proposition that statements between private parties are categorically nontestimonial. *See Parker*, 350 S.W.3d at 898. *See State v. McDonald*, No. M2013–02666–CCA–R3–CD, 2014 WL 6609404 *6-10 (Tenn. Crim. App. 11/21/2014)

27.08 DYING DECLARATIONS

Assuming a dying declaration is otherwise admissible under the Tennessee Rules of Evidence, admitting it at trial does not violate the defendant's right of confrontation regardless of whether the statement is considered testimonial or nontestimonial. *Lewis*, 235 S.W.3d at 148; *but see Michigan v. Bryant*, 131 S.Ct. 1143, 1151, n.1 (2011) (noting that the Court has not yet decided whether the Sixth Amendment incorporates an exception for testimonial dying declarations). *See State v. Bailey*, No. E2015–01127–CCA–R3–CD, 2017 WL 3868804 *7 (Tenn. Crim. App. 09/05/2017).

27.09 WRITTEN RECORD OF LICENSE PLATE NUMBER

In *State v. Franklin*, 308 S.W.3d 799 (Tenn. 2010), the victim of a robbery asked a bystander to write down the license plate number of a van in which the victim believed the alleged perpetrator was fleeing the scene. The police subsequently used this number to identify the defendant as the owner of the van, and the defendant objected to the admission of the number into evidence because the bystander who recorded the number was not testifying at the trial. Recognizing that there is a "growing consensus that statements establishing the identity of the perpetrator are nontestimonial when made in informal settings during the immediate aftermath of a crime," the Tennessee Supreme Court concluded that under the specific facts of this case the number was nontestimonial hearsay, the defendant's confrontation rights were not implicated, and the number was admissible pursuant to the excited utterance exception to the hearsay rule.

27.10 WAIVER, FORFEITURE, RETROACTIVITY, HARMLESS ERROR

A. Waiver

The right of confrontation may be waived, including by failure to object to the evidence at issue. States may adopt procedural rules governing the exercise of such objections. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009); *see also Cannon*, 254 S.W.3d at 303, n.9 (choosing to address the *Crawford* issue on its merits, but noting that the defendant "risked waiving this issue by not objecting at trial").

B. Forfeiture

If the absence of the witness is caused by the defendant, the defendant forfeits his right to confrontation. *Davis v. Washington*, 547 U.S. at 832-34; *Crawford v. Washington*, 541 U.S. at 62. However, the defendant's conduct must have been designed to prevent the witness from testifying, and would include such things as bribing, intimidating, or killing the witness. The mere fact that the defendant killed the witness is not adequate unless the defendant did so in an effort to prevent the witness from testifying. *Giles v. California*, 128 S.Ct. 2678 (2008); *see also State v. Brooks*, 249 S.W.3d 323 (Tenn. 2008); *State v. Hawkins*, 519 S.W.3d 1 at 44 (Tenn. 2017); *Bohanna v. State*, W2019-01200-

CCA-R3-PC, 2021 WL 1698524 at 24-26 (Tenn. Crim. App. 1/27/2021).

C. Retroactivity

Courts should apply *Crawford* to future trials and retroactively to cases pending on direct review, but not to cases on collateral review via a habeas corpus petition in federal court. Although states are not required to apply *Crawford* retroactively to cases at the state post-conviction stage, states are not precluded from doing so. *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008); *Whorton v. Bockting*, 549 U.S. at 416-21.

D. Harmless Error

"The erroneous admission of testimony in violation of an accused's right of confrontation is not structural error mandating reversal. Such a violation is subject to harmless error review." *Cannon*, 254 S.W.3d at 306-07.

27.11 PROCEEDINGS AT ISSUE

The "criminal prosecutions" in which the United States and Tennessee constitutional provisions apply regarding a defendant's right to confront witnesses do not appear to include sentencing hearings or probation revocation hearings. *See State v. Stephenson*, 195 S.W.3d 574, 590-91 (Tenn. 2006) (addressing the merits of the defendant's complaint, but noting that the federal appellate courts have held that the Sixth Amendment right of confrontation does not apply at sentencing); *State v. Walker*, 307 S.W.3d 260 (Tenn. Crim. App. 2009), *perm. app. denied* (Tenn. Jan. 25, 2010) (declining to extend *Crawford* to probation revocation hearings). *See State v. Bonds*, 502 S.W.3d 118, 150 (Tenn. Crim. App. 2016).

CHAPTER 28

IDENTIFICATION PROCEDURES

Special thanks to Judge John Campbell for his review and edits of this chapter.

Contents **Section**

28.01 GENERALLY

Out-of-court identification procedures include, by are not necessarily limited to, lineups, showups, and photographic arrays. An accused may be compelled to participate in a lineup. *State v. Briley*, 619 S.W.2d 149, 152 (Tenn. Crim. App. 1981). Following the initiation of adversarial proceedings, however, lineups are considered a critical stage at which the accused is entitled to the assistance of counsel. *State v. Blye*, 130 S.W.3d 776, 780 (Tenn. 2004); *State v. York*, 605 S.W.2d 837, 839-40 (Tenn. Crim. App. 1980). In contrast, the accused does not have a right to have counsel present when a witness views a pretrial photographic display. *Id.* at 781.

Showups, in which only one individual is shown to a witness or victim as a means of identification, are widely condemned. *State v. Cribbs*, 967 S.W.2d 773, 794 (Tenn. 1998). The Tennessee Court of Criminal Appeals has noted, however, that the identification made during a showup may be admissible under certain limited circumstances:

> An identification procedure violates due process if it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." A showup is a type of identification procedure that is inherently suggestive. Identifying a suspect of a crime in a showup procedure has been condemned repeatedly unless (1) imperative circumstances necessitate the showup, or (2) the showup occurs as part of an on-the-scene investigatory procedure shortly after the crime is committed.
>
> Although a showup may be suggestive, the identification may satisfy due process as reliable and admissible under the totality of the circumstances. This court must consider five factors in determining if an identification is reliable and thus admissible: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

State v. Edmondson, No. M2005-01665-CCA-R3-CD (Tenn. Crim. App., filed July 18, 2006) (citations omitted).

If a court determines that a pretrial identification procedure was so impermissibly suggestive that it violated an accused's due process rights, both out-of-court and in-court identifications are automatically excluded. *State v. Philpott*, 882 S.W.2d 394, 400 (Tenn. Crim. App. 1994). If the identification procedure does not involve state action, due process rights are not implicated and it is

not necessary for the court to determine if the identification procedure was unduly suggestive. *See Perry vs. New Hampshire*, 132 S.Ct. 716 (2012) (holding that the "Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement"); *State v. Reid*, 91 S.W.3d 247, 271-73 (Tenn. 2002) (witnesses implicated the defendant after seeing television coverage of his arrest). *State v. Martin*, 505 S.W.3d 492, 500-502 (Tenn. 2016) (witness saw defendant on "Who's in Jail" app before seeing photo array).

28.02 Expert Testimony

When a defendant wishes to present expert testimony regarding the reliability of eyewitness identification, the trial court should evaluate its admissibility under the rule established in *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997). *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007). To the extent it held otherwise, the Tennessee Supreme Court's opinion in *State v. Coley*, 32 S.W.3d 831 (Tenn. 2000), has been overruled. *Id. See State v. Epps*, No. M2014–01955–CCA–R3–CD, 2015 WL 5968339 *9 (Tenn. Crim. App. October 15, 2015).

CHAPTER 29

SELF-INCRIMINATION

Special thanks to Judge Jill Ayers for her review and edits of this chapter.

Contents **Section**

***See Chapter 26 of this benchbook on Statements/Confessions for additional information regarding the Fifth Amendment and* Miranda v Arizona.**

29.01 GENERAL RULE

The United States and Tennessee Constitutions provide similarly that "no person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; Tenn. Const. art. 1, § 9. The Fifth Amendment standards apply to states through the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964). Some characteristics of the privilege against self-incrimination are:

(a) it can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. *Kastigar v. United States*, 406 U.S. 441 (1972).

(b) it extends not only to answers which would support a conviction, but also those which would furnish a link in the chain of evidence needed to prosecute. *Malloy v. Hogan*, 378 U.S. 1 (1964).

(c) it protects a person's private papers since they are considered communications. *Bellis v. United States*, 417 U.S. 85 (1974).

(d) it is personal and applies only to natural persons; it cannot be invoked by a corporation, *Curcio v. United States*, 354 U.S. 118 (1957), an unincorporated association, *United States v. White*, 322 U.S. 694 (1944) or a partnership, *Bellis v. United States*, 417 U.S. 85 (1974).

(e) it grants the right to remain silent, not to give false answers. *United States v. Knox*, 396 U.S. 77 (1969).

29.02 SUSTAINING THE PRIVILEGE

To claim the privilege, the information sought need only tend to incriminate the individual. The privilege will be sustained if it is evident from the implications of the question that a responsive answer to the question or an explanation of why it cannot be answered might tend to incriminate the individual. For a judge to reject the privilege, it must be perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer or answers cannot possibly have a tendency to incriminate. *Hoffman v. United States*, 341 U.S. 479 (1951). In order to invoke the privilege, the hazards of incrimination must be substantial, real and apparent as distinguished from trifling or imaginary. *Marchetti v. United States,* 390 U.S. 39 (1968).

The Fifth Amendment applies only to compelled disclosures. *State v. Blackstock*, 19 S.W.3d 200 (Tenn. 2000). Thus, seizure of papers from a third party, *Fisher v. United States*, 425 U.S. 391 (1976), and voluntary disclosures to third parties or within a third party's presence do not fall within the amendment's protection. *Hoffa v. United States*, 385 U.S. 293 (1966); *State v. McCary*, 119 S.W.3d 226 (Tenn. Crim. App. 2003).

The privilege applies only to disclosures that are testimonial in nature. The following have been held to be nontestimonial in nature: (a) field sobriety test, *Trail v. State*, 526 S.W.2d 127 (Tenn. Crim. App. 1974); (b) blood sample, *Schmerber v. California*, 384 U.S. 757 (1966); (c) handwriting sample, *Gilbert v. California*, 388 U.S. 263 (1967); *State v. Harris*, 839 S.W.2d 54 (Tenn. 1992); (d) voice sample, *United States v. Wade*, 388 U.S. 218 (1967); (e) modeling clothing, *Holt v. United States*, 218 U.S. 245 (1910); (f) fingerprints, *Schmerber v. California*, 384 U.S. 757 (1966); *State v. Cole*, 155 S.W.3d 885 (Tenn. 2005); (g) hair sample, *State v. Jackson*, 889 S.W.2d 219 (Tenn. Crim. App. 1993); (h) clothing scent, *State v. Barger*, 612 S.W.2d 485 (Tenn. Crim. App. 1980); and (i) breathalyzer/implied consent, *State v. Frasier*, 914 S.W.2d 467 (Tenn. 1996).

29.03 WAIVER AND IMMUNITY

The privilege is waived if the defendant takes the stand and testifies to related matters during direct examination. The defendant cannot set forth to the jury all the facts that favor the defendant, without being required to submit to cross-examination on those facts. *Brown v. United States*, 356 U.S. 148 (1958).

While the privilege protects against compelling testimony to use against a person, it does not protect against all compelled testimony. Thus, a witness under a sufficient grant of immunity may be compelled to testify. Use immunity - prohibiting the use of testimony or evidence derived from the testimony - is all that is required. *Kastigar v. United States*, 406 U.S. 441 (1972).

If a defendant shows that he or she testified under a grant of immunity previously, the burden is on the prosecution to prove a source independent of the immunized testimony in order to proceed with charges against the immunized defendant. *Kastigar v. United States*, 406 U.S. 441 (1972); *State v. Desirey*, 909 S.W.2d 20 (Tenn. Crim. App. 1995).

29.04 RAMIFICATIONS OF INVOCATION OF THE PRIVILEGE

No economic sanction, including the loss of job or disbarment, can be imposed against one who invokes the privilege. *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New York*, 385 U.S.

493 (1967). This applies equally to private and public employees. *Uniformed Sanitation Men Ass'n. Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968). Moreover, the failure of an accused to testify creates no presumption, and neither the prosecutor nor the court may comment on the failure to testify. *Griffin v. California*, 380 U.S. 609 (1965).

29.05 IMPROPER COMMENT ON INVOCATION OF THE PRIVILEGE

If a defendant does invoke the privilege, the prosecution may not comment about defendant's silence as evidence of guilt. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). This prohibition includes indirect reference on the failure to testify. *Felts v. State*, 354 S.W.3d 266 (Tenn.2011). A two-part test is used to determine if a prosecutor's remarks are improper: (1) whether the prosecutor's manifest intent was to comment on defendant's right not to testify; or (2) whether the prosecutor's remark was of such a character that the jury would necessarily have taken it to be a comment on defendant's decision not to testify. De novo review is the proper standard of review. *State v. Jackson*, 444 S.W.3d 554 (Tenn. 2014).

CHAPTER 30

DELIBERATIONS AND VERDICT

Special thanks to Judge Jennifer Mitchell for her review and edits of this chapter.

Contents **Section**

30.01 DELIBERATIONS – INSTRUCTIONS AND EXHIBITS

In addition to reading the instructions to the jury, the judge must provide the jury with a written copy of the instructions when it retires to deliberate. Tenn. R. Crim. P. 30(c). Moreover, "[u]nless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received in evidence." Tenn. R. Crim. P. 30.1. According to the Advisory Commission Comments, an exhibit might not be sent to the jury room if it could "endanger the health and safety of the jurors" or "be subjected to improper use by the jury," or if "a party may be unduly prejudiced by submission of the exhibit to the jury."

30.02 DEADLOCKED JURY

In *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975), the Tennessee Supreme Court abandoned the use of a "dynamite charge" when a jury is deadlocked. Instead, the trial court should include T.P.I. Crim. – 43.02 (Jury: Deliberation – Deadlocked Jury Charge) in its main charge before the jury retires for deliberation. *Kersey*, 525 S.W.2d at 145. If the jury subsequently reports that it is deadlocked, the court should "admonish the jury, at the very outset, not to disclose their division or whether they have entertained a prevailing view. *Id.* at 141. "Until the jury shall have reached a verdict, no one—not even the trial judge—has any right, reason or power to question the specifics of its deliberative efforts." *Id.* at 141. The only permissive inquiry is as to progress and the jury may be asked whether it believes it might reach a verdict after further deliberations." *Id.* If the court determines that "further deliberations might be productive," the court may repeat the instruction set out in T.P.I. 43.02. *Id.* Under certain circumstances, a trial court may also utilize a *Kersey* instruction during the penalty phase of a capital murder trial. *See State v. Torres*, 82 S.W.3d 236, 253-58 (Tenn. 2002); *see also* Tenn. Code Ann. § 39-13-204(h).

In limited circumstances, it may be necessary for the court to declare a mistrial due to a deadlocked jury. *See Renico v. Lett*, 130 S.Ct. 1855 (2010). If the jury reports that it cannot unanimously agree on a verdict, the court should instruct the jury using the procedures set out in Tenn. R. Crim P. 31(d)(2) as to lesser-included offenses.

When taking all the circumstances into consideration and the trial court determines that a mistrial needs to be declared it must find that "manifest necessity" requires it. This decision is left to the sound discretion of the judge, but should be done with the "greatest caution, under urgent circumstances, and for very plain and obvious causes." *Renico v. Lett*, at 1863. It is not necessary that the trial court make any specific findings as to the manifest necessity. "And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse". *Id* at 1863.

30.03 VERDICT

The jury's verdict must be unanimous, and it must be returned in open court. Tenn. R. Crim. P. 31(a), (b). After the verdict is returned but before it is recorded, "the court shall – on a party's request or on the court's own initiative – poll the jurors individually" to verify that the verdict is unanimous. Tenn. R. Crim. P. 31(e). If the verdict is not unanimous, the court may either discharge the jury or direct it to retire for further deliberations. *Id*.

A verdict of guilt by the trier of fact resolves all conflicts in the evidence in favor of the prosecution's theory. *State v. Rice*, 184 S.W.3d 646, 661 (Tenn. 2006) (*citing State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)).

Immediately after the trial, the trial court can discharge its duty as the Thirteenth Juror. This duty is to evaluate the credibility of witnesses and assess the weight of the evidence, based upon the trial proceedings. *State v. Brown*, 53 S.W.3d 264, 274. This duty may also be discharged during the Motion for New Trial. Tenn. R. Crim. P. 33(d).[1] The Supreme Court has deemed this duty as a necessary prerequisite to a valid judgment however the Court has opined that this duty does not have to be explicitly stated on the record. Compliance with the rule is presumed when the trial court simply overrules a motion for a new trial without comment; however, "where the record contains statements by the trial judge expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or statements indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror, an appellate court may reverse the trial court's judgment." *State v. Carter*, 896 S.W.2d 119, 122 (Tenn.1995).

A defendant who has been convicted of a crime does not have a constitutional right to a bail. Pursuant to applicable law, a trial court has discretion to grant bail. *State v. Burgins*, 464 S.W.3d 298 (2015). See also Tenn. R. Crim. P. 32(d)(1)(2).

30.04 INTERFERENCE WITH DELIBERATIONS

Interference with a jury's deliberations is a serious matter and, in some instances, constitutes a crime. For instance, a person who "privately communicates with a juror with intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law" is guilty of a Class A misdemeanor. Tenn. Code Ann. § 39-16-509. Likewise, it is a Class E felony if a

[1] Previously marked as Tenn. R. Crim. P. 33(f)

person, by means of coercion, "[i]nfluences or attempts to influence a juror in the exercise of the juror's official power or in the performance of the juror's official duty" or "[i]nfluences or attempts to influence a juror not to vote or to vote in a particular manner." Tenn. Code Ann. § 39-16-508. Finally, bribing a juror is a Class C felony. Tenn. Code Ann. § 39-16-108.

Once a party challenging a verdict presents admissible evidence that the jury was exposed to extraneous prejudicial information or was subjected to an improper outside influence there is a presumption of prejudice that the other party must rebut, and the court should consider the following factors when determining whether the party satisfied its burden:

> (1) the nature and content of the information or influence, including whether the content was cumulative of other evidence adduced at trial; (2) the number of jurors exposed to the information or influence; (3) the manner and timing of the exposure to the juror(s); and (4) the weight of the evidence adduced at trial. No single factor is dispositive. Instead, trial courts should consider all of the factors in light of the ultimate inquiry – whether there exists a reasonable possibility that the extraneous prejudicial information or improper outside influence altered the verdict.

State v. Adams, 405 S.W.3d 641, 654 (Tenn. 2013) (citation omitted).

The permissible scope of the inquiry is very narrow, and trial courts should consult *State v. Adams* prior to conducting a hearing regarding this issue. For example, while Tenn. R. Evid. 606 permits a juror to testify concerning "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," a juror is not permitted to testify concerning the impact/influence/effect of the extraneous information on the jury's deliberations. Instead, trial courts should:

> limit the questions asked the jurors to whether the communication was made and what it contained, and then, having determined that the communication took place and what exactly was said, to determine – without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion – whether there is a reasonable possibility that the communication altered their verdict.

Adams, 405 S.W.3d at 652 (citations omitted).

30.05 RECALL OF DISCHARGED JURY

"[O]nce a jury has returned a complete verdict, or the jurors have separated and passed from the control of the court, the jury cannot be reassembled to act on the case for any purpose." *State v. Nash*, 294 S.W.3d 541, 550-53 (Tenn. 2009); *see also State v. Green*, 995 S.W.2d 591, 614 (Tenn. Crim. App. 1998).

CHAPTER 31

POST-CONVICTION RELIEF

Special thanks to Judge Barry Tidwell for his review and edits of this chapter.

Contents **Section**

For information regarding the effective assistance of counsel during the plea process, see the plea agreement chapter of this benchbook.

31.01 POST-CONVICTION PROCEDURE ACT

The Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101 *et seq.*, and Rule 28 of the Tennessee Supreme Court Rules ("Rule 28") set out the procedure for post-conviction actions in Tennessee.

31.02 GROUNDS FOR RELIEF

A court must grant relief "when petitioner's conviction or sentence is void or voidable because of the violation of any right guaranteed by the state or federal constitution, including a right not recognized as existing at the time of the trial or sentencing if either constitution requires retrospective application of that right." Tenn. Sup. Ct. R. 28, § 9(B); *see also* Tenn. Code Ann. § 40-30-103. A court shall also grant relief if the petitioner was unconstitutionally denied the right to appeal the original conviction. Tenn. Code Ann. § 40-30-113.

In the absence of a criminal conviction, a petitioner is not entitled to relief pursuant to the Post-Conviction Procedure Act. For example, a finding of criminal contempt pursuant to Tenn. Code Ann. § 29-9-102 does not constitute a criminal conviction for post-conviction purposes. *Baker v. State*, 417 S.W.3d 428 (Tenn. 2013). Likewise, if an offender enters a guilty plea, successfully completes judicial diversion, and has his or her record expunged, a judgment of conviction is never entered and, therefore, there is no conviction for post-conviction purposes. *Rodriguez v. State* 437 S.W.3d 450 (Tenn. 2014). A judgment of conviction is one that is signed by the Trial Court, entered

by the Clerk, and includes the plea, the verdict or findings, and the adjudication and sentence. Tenn. R. Crim. P. 32(e)(2).

31.03 COMMENCEMENT

A post-conviction action is commenced by the filing of a petition. This petition is "an application to the court, filed by or on behalf of a person convicted of and sentenced for the commission of a criminal offense, that seeks to have the conviction or sentence set aside or an appeal granted" on state or federal constitutional grounds. Tenn. Sup. Ct. R. 28, § 2(A).

The petition must be filed within one year of the date of the final action of the highest state appellate court to which an appeal was taken. If no appeal was taken, the petition must be filed within one year of the date the judgment became final. Tenn. Code Ann. § 40-30-102(a). In very limited circumstances, due process considerations require the tolling of the statute of limitations. *See Whitehead v. State*, 402 S.W.3d 615 (Tenn. 2013); *Smith v. State*, 357 S.W.3d 322, 355-61 (Tenn. 2011). However, as a general rule, the one-year period can be extended in only three circumstances: (1) If the claim is based upon an appellate decision establishing a constitutional right not recognized as existing at the time of trial and retrospective application of that right is required, then the limitations period is one year from the date of the ruling of the highest court establishing that right; (2) If the claim is based upon new scientific evidence establishing a claim of actual innocence, no limitations period is set; and (3) If the claim is based upon a sentence that was enhanced as a result of a conviction that was later determined to be invalid, the limitations period is one year from the finality of the decision invalidating the prior conviction. Tenn. Code Ann. § 40-30-102(b)(1)(2)(3).

The petition must be filed in the court of conviction or sentence, if a court of record; if the conviction or sentence did not occur in a court of record, the petition must be filed in a court of record in the county where the conviction or sentence occurred. Tenn. Code Ann. § 40-30-104(a). Although a trial court has the authority to treat a habeas corpus petition as a petition for post-conviction relief, Tenn. Code Ann. § 16-1-116 does not authorize a trial court to transfer the petition to another county for disposition. *Carter v. Bell*, 279 S.W.3d 560 (Tenn. 2009).

31.04 PLEADINGS

A. Petitions, Answers, Preliminary Orders

A petitioner may file only one post-conviction petition per judgment. Tenn. Code Ann. § 40-30-102(c). If a prior petition was resolved on the merits, the trial court must summarily dismiss any subsequent petition(s). If a petitioner wishes to attack multiple judgments entered in separate trials, he or she must file a separate petition for each trial. Tenn. Code Ann. § 40-30-104(c). Under very narrow circumstances, a petitioner may request the reopening of a petition which has already been considered. Tenn. Code Ann. § 40-30-102(c).

A post-conviction petition must be verified pursuant to Tenn. Code Ann. § 40-30-104, and should include the information specified in Section 5(E) of Rule 28 as well as Tenn. Code Ann. § 40-30-104. The petition should substantially conform to the form printed in Appendix A to Rule 28. If the court determines that the initial petition is inadequate, the court may require the petitioner to file an amended petition or, under certain circumstances, may appoint counsel and require counsel to file an amended petition on the petitioner's behalf. Tenn. Code Ann.§§ 40-30-106, -107. There is no

constitutional right to representation by counsel in post-conviction proceedings and, thus, no right to effective assistance of counsel in post-conviction proceedings. *House v. State*, 911 S.W.2d 705, 712 (Tenn. 1995). However, there is a statutory right to counsel. *See* Tenn. Code Ann. § 40-30-107(b)(1).

Following the filing of an amended petition, if one was required, the court can either dismiss the petition or order further proceedings. *Id.*; Tenn. Sup. Ct. R. 28, § 6(B). If the court orders further proceedings, the order should appoint counsel (assuming the petitioner is indigent and the court did not previously appoint counsel), set a deadline for the filing of an amended petition (if counsel did not previously file an amended petition), and direct the state to disclose the information subject to discovery. *But see Blackmon v. State*, No. M2004-03070-CCA-R3-PC (Tenn. Crim. App., filed Jan. 11, 2007), *app. denied* (Tenn. May 14, 2007) (denying relief when petitioner refused appointed counsel and subsequently argued that the absence of counsel denied him a full and fair hearing). The preliminary order must also direct the state to answer the petition and, if appropriate, require the state to provide the clerk with transcripts, exhibits, and other records from the trial or hearing at issue. Tenn. Sup. Ct. R. 28, § 6(B)(3).

In its answer, the state must admit or deny every allegation set forth in the petition. To raise a statute of limitations, waiver, previous determination, jurisdiction, or multiple filing defense, the state must file a motion to dismiss. This motion may also include an allegation that the facts alleged fail to demonstrate that petitioner is entitled to relief. Tenn. Sup. Ct. R. 28, § 5(G).

Following the filing of the state's answer, the court is again required to review the pleadings to determine whether a colorable claim has been stated. If a colorable claim has not been stated, the court is required to dismiss the petition by written order setting out findings of fact and conclusions of law. If a colorable claim has been stated, the court is required to enter a written order setting an evidentiary hearing. The court must file the order either dismissing the claim or setting an evidentiary hearing within 30 days of the filing of the state's answer. Tenn. Code Ann. § 40-30-109; Tenn. Sup. Ct. R. 28, § 6(B)(6).

B. Motion to Reopen

Once a petition for post-conviction relief has been ruled on, a Motion to Reopen may be filed to address any new claims of constitutional error. Tenn. Sup. Ct. R. 28, § 2(C). A motion to reopen is appropriate when the claim is based upon: (1) a newly recognized constitutional right that has been given retroactive effect; (2) new scientific evidence establishing actual innocence; or (3) a sentence enhanced by an invalid conviction. In addition, petitioner must show that "the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced." Tenn. Code Ann. § 40-30-117(a). Although it is more likely to arise in a motion to reopen, "a freestanding claim of actual innocence based on new scientific evidence is cognizable in an initial petition for post-conviction relief under the Tennessee Post-Conviction Procedures Act." *Dellinger v. State*, 279 S.W.3d 282 (Tenn. 2009).

The motion to reopen, which should substantially conform to the form set out in Appendix D to Rule 28, must set out the factual basis underlying each claim and must be supported by affidavit(s) containing only admissible evidence. The court must determine whether the facts, if true, satisfy the requirements listed above for reopening a case. If they do, the procedure mirrors that followed upon the filing of an original petition. If they do not, the court must dismiss the motion. Tenn. Code Ann. § 40-30-117(b).

An intellectually disabled (previously referred to as "mentally retarded") or incompetent defendant cannot be executed. Tenn. Code Ann. § 39-13-203; *Coleman v. State*, 341 S.W.3d 221 (2011) (discussing intellectual disability issues at length). However, the Tennessee Supreme Court's opinion in *Coleman* did not establish a new constitutional right upon which a motion to reopen a post-conviction petition can be based pursuant to Tenn. Code Ann. § 40-30-117(a)(1), nor does actual innocence as contemplated by Tenn. Code Ann. § 40-30-117(a)(2) include an allegation that an offender is not eligible for the death penalty due to an intellectual disability. *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012).

31.05 HEARINGS AND DISPOSITIONS

At the hearing on the petition or motion, the petitioner is required to appear and give testimony unless an affidavit or deposition is permitted. The petitioner bears the burden of proving the allegations of fact by clear and convincing evidence. The rules of evidence apply at the proceeding, which must be recorded. Tenn. Code Ann. § 40-30-110.

Petitioners who have been sentenced to death "shall be given priority over all other matters in docketing by the courts having trial and appellate jurisdiction of the cases." Tenn. Code Ann. § 40-30-121. If indigent, these petitioners will be represented by the Office of the Post-Conviction Defender. Tenn. Code Ann. § 40-30-206(a).

If the court finds that a petitioner's rights were violated such as to render the judgment void or voidable, the court is required to set aside the judgment or order a delayed appeal, whichever is appropriate. Tenn. Code Ann. §§ 40-30-111, -113. Unless the order simply grants a delayed appeal, it must be in writing and must contain findings of fact and conclusions of law with regard to each claim presented. The court must rule within 60 days of the conclusion of the proof. This deadline cannot be extended unless the court finds "unforeseeable circumstances [that] render a continuance a manifest necessity." Tenn. Code Ann. § 40-30-111.

If the petitioner alleges the unconstitutional deprivation of an appeal in addition to asserting other grounds for relief, the court must bifurcate the proceedings and address the appeal issue while holding the other issues in abeyance. The court shall consider the remaining claims only "after the outcome of the delayed appeal if allowed, or after the appeal of the claim, if denied." Tenn. Sup. Ct. R. 28, § 8(D)(3).

31.06 APPEALS

If the court denies relief, the petitioner has a right to appeal to the Tennessee Court of Criminal Appeals, and that appeal is governed by the Tennessee Rules of Appellate Procedure. Tenn. Code Ann. § 40-30-116. If the case is a capital case, the appellate court must render its decision within nine months of oral argument or submission and must dispose of any rehearing petitions within 30 days of filing. *Id*.

If the motion is denied, the petitioner shall have thirty (30) days to file an application in the court of criminal appeals seeking permission to appeal. The application shall be accompanied by copies of all the documents filed by both parties in the trial court and the order denying the motion.

The state shall have thirty (30) days to respond. The court of criminal appeals shall not grant the application unless it appears that the trial court abused its discretion in denying the motion. If it determines that the trial court did so abuse its discretion, the court of criminal appeals shall remand the matter to the trial court for further proceedings. Tenn. Sup. Ct. R. 28 § 10(B)

31.07 STAYS OF EXECUTION

Upon the filing of a petition for post-conviction relief, the Court in which the conviction occurred shall stay an execution for the duration of any appeals or until the post-conviction action is otherwise final. The court cannot stay the execution date before the filing of a petition unless it finds that petitioner is unable to file a petition before the execution date and that the inability is due to "extraordinary circumstances beyond the petitioner's control." Tenn. Code Ann. § 40-30-120(a). If the petition filed is not the first petition, the court may not stay the execution unless the judge finds that a motion to reopen has been granted, there is a significant possibility that the death sentence will be invalidated, and there is a significant possibility that the death sentence will be carried out before consideration of the petition is concluded. Tenn. Code Ann. § 40-30-120(b) & (c).

Motions for review of execution stay requests may be acted upon by a single appellate judge or by a three-judge panel. The motion for review must be filed within five days of the trial court's ruling on the stay request. Tenn. Sup. Ct. R. 28, § 10(C). The appellate judge(s) may allow a response but must rule within five days of the motion's filing. *Id.*; Tenn. Code Ann. § 40-30-120(f).

31.08 POST-CONVICTION DNA ANALYSIS ACT OF 2001

Pursuant to the Post-Conviction DNA Analysis Act of 2001, petitioners may request "the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence." Tenn. Code Ann. § 40-30-303. For additional information regarding the applicable procedures as well as the circumstances in which such analysis is required, trial courts should consult Tenn. Code Ann. §§ 40-30-301 et seq., *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308 (2009) (addressing constitutional claims regarding the right, or lack thereof, to DNA testing), and *Powers v. State*, 343 S.W.3d 36 (Tenn. 2012) (discussing the history and application of the DNA Analysis Act of 2001).

31.09 COMPETENCY ISSUES DURING POST-CONVICTION PROCEEDINGS

A post-conviction petition may be filed by a "next friend" on behalf of an inmate under limited circumstances adequately demonstrating present mental incompetency. *See Holton v. State*, 201 S.W.3d 626 (Tenn. 2006). For guidance regarding the procedure for determining competency when a petitioner seeks to withdraw a previously-filed post-conviction petition or to toll the statute of limitations, or when a "next friend" attempts to have the person declared incompetent, see *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478 (Tenn. 2013). *See also Reid v. State*, 197 S.W.3d 694 (Tenn. 2006), *reh'g denied* (July 20, 2006); Tenn. Sup. Ct. R. 28, § 11.

31.10 RIGHT TO COUNSEL

As previously noted, a trial court has the authority to appoint counsel to a post-conviction petitioner under certain circumstances. However, petitioners also have a right to self-representation at the post-conviction stage if certain requirements are met. *See Lovin v. State*, 286 S.W.3d 275 (Tenn. 2009) (discussing the right to self-representation at trial, during a post-conviction proceeding, and on appeal of both types of proceedings).

31.11 SCOPE OF CROSS-EXAMINATION OF TESTIFYING PETITIONER

Section 8(C)(1)(d) of Tennessee Supreme Court Rule 28, as opposed to Tennessee Rule of Evidence 611(b), governs the scope of the cross-examination of a testifying petitioner during a post-conviction hearing. *Keough v. State*, 356 S.W.3d 366, 371 (Tenn. 2011). Although noting other states' positions regarding whether the constitutional right against self-incrimination applies to post-conviction proceedings, the Court declined to address that issue in *Keough* because the question presented could be resolved on non-constitutional grounds. *Id.* at 371-72.

31.12 POST-CONVICTION FINGERPRINT ANALYSIS ACT OF 2021

In 2021, the Tennessee General Assembly enacted the Post Conviction Fingerprint Analysis Act. The Act permits an appropriate party to file a petition at any time "requesting the performance of fingerprint analysis of any evidence that is in the possession or control of the prosecution, law enforcement, a laboratory, or court, and that is related to the investigation or prosecution that resulted in a judgment of conviction and that may contain fingerprint evidence. Tenn. Code Ann. § 40-30-403.

If, after notice to the prosecution and an opportunity to respond the court finds that:

(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through fingerprint analysis;
(2) The evidence is still in existence and in such a condition that fingerprint analysis may be conducted;
(3) The evidence was never previously subjected to fingerprint analysis, was not subjected to the analysis that is being requested which could resolve an issue not resolved by previous analysis, or was previously subjected to analysis and the person making the motion under this part requests analysis that uses a new method or technology that is substantially more probative than the prior analysis; and
(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice

the court shall order fingerprint analysis. Tenn. Code Ann. § 40-30-404.

If, after notice to the prosecution and an opportunity to respond the court finds that:

(1) A reasonable probability exists that analysis of the evidence will produce fingerprint results that would have rendered the petitioner's verdict or sentence more favorable if the results had been available at the proceeding leading to the judgment of conviction;

(2) The evidence is still in existence and in such a condition that fingerprint analysis may be conducted;
(3) The evidence was not previously subjected to fingerprint analysis, was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis, or was previously subjected to analysis and the person making the motion under this part requests analysis that uses a new method or technology that is substantially more probative than the prior analysis; and
(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice,

the court may order fingerprint analysis. Tenn. Code Ann. § 40-30-405. Only Section 405 gives the Court discretion to order an analysis. A favorable finding under Section 404 requires mandatory fingerprint analysis. The Court should look to the pleadings to determine under which of these sections the petitioner is seeking relief.

The court is required to order both parties to produce any reports from any previous independent fingerprint analysis. *Id.* § 40-30-408. Section 408 contemplates a situation where one party (or both) had already obtained an independent analysis before filing a petition under Section 403. *Smith v. State*, M2021-01339-CCA-R3-PD, 2022WL854438 (Tenn. Crim. App. March 23, 2022). If the petition is not summarily dismissed, the court shall order that all evidence in the possession of the prosecution, law enforcement, laboratory, or the court that could be subjected to fingerprint analysis must be preserved during the pendency of the proceeding. *Id.* § 40-30-409. Further, should the court select the laboratory used by the original investigating agency if the laboratory is capable of performing the required analysis. If the laboratory used by the original investigating agency is not capable of performing the required analysis, the court shall select a laboratory that the court deems appropriate. *Id.* § 40-30-410.

Because the Fingerprint Act mirrors that of the Post-Conviction DNA Analysis Act (hereinafter "DNA Act"), any court looking for guidance as to interpretation of the Fingerprint Act should look to case law interpreting the DNA Act. *Smith v. State,* M2021-01339-CCA-R3-PD, 2022WL854438 (Tenn. Crim. App. March 23, 2022).

CHAPTER 32

HABEAS CORPUS AND ERROR CORAM NOBIS

Special thanks to Judge Barry Tidwell for his review and edits of this chapter.

Contents **Section**

32.01 HABEAS CORPUS

Article I, Section 15 of the Tennessee Constitution guarantees the right to seek *habeas* corpus relief. *See Faulkner v. State, 226 S.W.3d 358, 361 (Tenn. 2007).* Habeas corpus proceedings are also governed by Tenn. Code Ann. §§ 29-21-101 through 29-21-130. A court may grant the writ *sua sponte* if the court "has evidence, from a judicial proceeding, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of liberty." Tenn. Code Ann. § 29-21-104. However, this type of proceeding typically is initiated by the filing of a petition that has been verified by affidavit. Tenn. Code Ann. § 29-21-107. Such an application "should be made to the court or judge most convenient in point of distance to the applicant, unless a sufficient reason be given in the petition for not applying to such court or judge." Tenn. Code Ann. § 29-21-105. Although a trial court has the authority to treat a habeas corpus petition as a petition for post-conviction relief, Tenn. Code Ann.§ 16-1-116 does not authorize a trial court to transfer the petition to another county for disposition. *Carter v. Bell*, 279 S.W.3d 560 (Tenn. 2009).

The circumstances in which relief may be granted are quite limited, and the Tennessee Supreme Court has summarized them as follows:

> The grounds upon which habeas corpus relief is available are narrow. A petitioner is entitled to habeas corpus relief only if the petition establishes that the challenged judgment is void, rather than merely voidable. A judgment is void "only when it appears on the face of the judgment or the record of the proceedings upon which the judgment is rendered that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." A void or illegal sentence is one whose imposition directly contravenes a statute. A voidable conviction or sentence is valid on its face and requires evidence beyond the face of the record or judgment to demonstrate its invalidity. A trial court may dismiss a habeas corpus petition without a hearing if the petition fails to establish that the challenged judgment is void.

Hogan v. Mills, 168 S.W.3d 753, 755 (Tenn. 2005) (citations omitted); *see also Cantrell v. Easterling*, 346 S.W.3d 445 (Tenn. 2011) (distinguishing between clerical mistakes, appealable errors, and fatal errors and discussing the procedures and relief available under each circumstance, but also noting that, subsequent to petitioner's plea, the legislature amended the habeas corpus statute to limit the circumstances in which a petitioner is entitled to relief); *Davis v. State*, 313 S.W.3d 751 (Tenn. 2010) (reiterating the scope of habeas corpus relief in the context of a plea

bargain, and distinguishing between "illegal" sentences and sentences which contain "errors"); *Edwards v. State*, 269 S.W.3d 915, 924 (Tenn. 2008) (finding that "habeas corpus relief is not available to correct errors or irregularities in offender classification"); *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008) (granting narrow relief when the trial court's judgment form contained an erroneous finding of infamy); *Summers v. State*, 212 S.W.3d 251 (Tenn. 2007) (providing additional guidance regarding when the appointment of counsel is necessary and when summary dismissal is appropriate).

In 2009, the legislature narrowed the circumstances in which habeas corpus relief is available to a petitioner who entered a guilty plea with a negotiated sentence. Pursuant to this legislation, such a petitioner is not entitled to relief under the following circumstances: (1) petitioner received concurrent sentencing where there was a statutory requirement for consecutive sentencing; (2) petitioner's sentence included a release eligibility percentage where petitioner was not entitled to any early release; or (3) petitioner's sentence included a lower release eligibility percentage than he was entitled to under statutory requirements. Tenn. Code Ann. § 29-21-101(b).

If the habeas court determines from a petitioner's filings that no cognizable claim has been stated and that the petitioner is not entitled to relief, the petition for *habeas corpus* may be summarily dismissed. *See Hickman v. State, 153 S.W.3d 16, 20 (Tenn. 2004).* Additionally, a court may summarily dismiss a petition for *habeas corpus* relief without the appointment of a lawyer or without an evidentiary hearing if there is nothing on the face of the judgment to indicate the convictions are void. *Passarella v. State*, 891 S.W.2D 619, 627 (Tenn. Crim. App. 1994), *superseded by statute as stated in State v. Steven S. Newman, No. 02C01-9709-CC00266, 1998 WL 104492*, at 1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998).

32.02 ERROR CORAM NOBIS

A defendant typically files a petition for writ of error coram nobis in an attempt to secure a new trial based upon newly-discovered evidence. *See* Tenn. Code Ann. § 40-26-105; *State v. Vasques*, 221 S.W.3d 514, 524-29 (Tenn. 2007). This relief is most often sought following a trial, but a writ is also a "viable remedy to attack the knowing and voluntary nature of guilty pleas which serve as the basis for convictions." *Wlodarz v. State*, 361 S.W.3d 490, 506 (Tenn. 2012). The availability of *error cram nobis* relief is governed solely by statute. *Frazier v.* State, 495 S.W.3d 246, 248 (Tenn. 2016). Additionally, the statute that sets forth the remedy of *error coram nobis in criminal matters does not apply to guilty pleas. Id. at 247.*

As a general rule, a "petition for writ of error coram nobis is untimely unless filed within one year of the time a judgment becomes final in the trial court." *State v. Mixon*, 983 S.W.2d 661, 671 (Tenn. 1999) (footnote omitted); Tenn. Code Ann. § 27-7-103. Under limited circumstances, however, due process considerations may require the tolling of the statute of limitations. *See Workman v. State*, 41 S.W.3d 100, 101-04 (Tenn. 2001); *see also Harris v. State*, 301 S.W.3d 141 (Tenn. 2010) (finding the delay to be unreasonable as a matter of law under the facts of this case). If the petition is filed during the pendency of the defendant's appeal, trial and appellate courts should follow the procedure set out in *State v. Mixon*. *See Mixon*, 983 S.W.2d at 671-72.

The Court of Criminal Appeals has summarized the relevant error coram nobis policies and procedures as follows:

> The writ of error coram nobis is an "extraordinary procedural remedy," filling only a "slight gap into which few cases fall." The "purpose of this remedy is to bring to the attention of the court some fact unknown to the court which if known would have resulted in a different judgment." The decision to grant or deny a petition for writ of error coram nobis rests within the sound discretion of the trial court.
>
> A petition for writ of error coram nobis must relate: (1) the grounds and the nature of the newly-discovered evidence; (2) why the admissibility of the newly-discovered evidence may have resulted in a different judgment had the evidence been admitted at the previous trial; (3) that the petitioner was without fault in failing to present the newly-discovered evidence at the appropriate time; and (4) the relief sought by the petitioner.
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> * * *
>
> The grounds for seeking a petition for writ of error coram nobis are not limited to specific categories, as are the grounds for reopening a post-conviction petition. Coram nobis claims may be based upon any "newly discovered evidence relating to matters litigated at the trial" so long as the petitioner also establishes that the petitioner was "without fault" in failing to present the evidence at the proper time. Coram nobis claims therefore are singularly fact-intensive. Unlike motions to reopen, coram nobis claims are not easily resolved on the face of the petition and often require a hearing. The coram nobis statute also does not contain provisions for summary disposition or expedited appeals. Although coram nobis claims also are governed by a one-year statute of limitations, the State bears the burden of raising the bar of the statute of limitations as an affirmative defense.

Carney v. State, No. M2005-01904-CCA-R3-CO (Tenn. Crim. App., filed July 31, 2006) (citations omitted); *see also Wilson v. State*, 367 S.W.3d 229 (Tenn. 2012) (concluding that a prosecutor's handwritten note regarding witness credibility was work product which was neither discoverable nor admissible and, therefore, was not newly discovered evidence).

Further, the Tennessee Supreme Court has found that an *error coram nobis* proceeding is not the appropriate procedural vehicle for obtaining relief on the ground that the defendant suffered a constitutional due process violation under *Brady v. Maryland, 373 U.S. 83 (1963). Nunley v. State of Tennessee, 552 S.W.3d 800, 819 (Tenn. 2018).*

******It would be well worth the time for any Judge who has a pending petition for* writ of error coram nobis to read both *Frazier v. State, 495 S.W.3d 246 (Tenn. 2016) and Nunley v. State, 552 S.W.3d 800 (Tenn. 2018).*

CHAPTER 33

EXTRADITION AND DETAINER

Special thanks to Judge Barry Steelman for his review and edits of this chapter.

Contents **Section**

33.01 OVERVIEW

Tennessee has adopted the Uniform Criminal Extradition Act and the Interstate Compact on Detainers to encourage or facilitate interstate transfers of persons accused or convicted of a crime.

The Uniform Criminal Extradition Act authorizes one state, the demanding state, to request the cooperation of another state, the asylum state, in apprehending, if necessary, and transferring a fugitive or other person found in the asylum state who is accused or convicted of a crime in the demanding state.

The Interstate Compact on Detainers authorizes a prisoner who is subject to a detainer based on an untried charge in another state or the other state itself to initiate a temporary transfer of the prisoner from the state of confinement, the sending state, to the other state, the receiving state, for trial of the untried charge and any other charge arising out of the same transaction. It also limits the time for commencing trial.

33.02 UNIFORM CRIMINAL EXTRADITION ACT

A. Purpose, applicability, and construction

The Uniform Criminal Extradition Act, codified in Tennessee at Tenn. Code Ann. §§ 40-9-101-30, with a federal statute, 18 U.S.C. § 3182, implements the Extradition Clause of the United States Constitution, U.S. Const. art. IV, § 2, cl. 2, which requires interstate renditions of fugitives from justice and contemplates a summary executive proceeding in the asylum state.

The act applies to fugitives who commit a crime in the demanding state and then flee to Tennessee. It also applies to persons found in Tennessee who commit an act in Tennessee or another state that "intentionally result[s] in crime" in the demanding state. Tenn. Code Ann. § 40-9-113.

The act defines state as any state or territory of the United States. Tenn. Code Ann. § 40-9-102(3). Adopters of the act do not include the United States.

Extradition statutes are to be liberally construed in favor of the demanding state.

B. Rules of evidence

In extradition proceedings, courts are not bound by the rules of evidence that apply in criminal trials. *McLaughlin v. State*, 512 S.W.2d 657, 661 (Tenn. Crim. App. 1974).

C. Institution of extradition proceedings with or without warrant of apprehension

A demanding state institutes extradition proceedings in Tennessee in one of two ways:

(1) upon the oath of a credible person before a Tennessee judge or magistrate that the fugitive or other person found in Tennessee ("the fugitive") has committed a crime in the demanding state or
(2) upon a complaint made in Tennessee and based on the affidavit of a credible person in the demanding state that a crime has been committed in the demanding state, the fugitive has been charged with the crime, and, if the fugitive was present in the demanding state at the time of the commission of the crime, the fugitive has fled from the demanding state and is believed to be in Tennessee.

Tenn. Code Ann. § 40-9-103; Tenn. Code Ann. § 40-9-113. Upon either such oath or complaint and affidavit, the judge or magistrate issues a warrant, with a certified copy of the charge or complaint and affidavit attached, directing the sheriff of the county where the charge or complaint is filed to apprehend the fugitive, wherever the fugitive may be found in Tennessee, and bring the fugitive before the issuing judge or magistrate or any other judge, court, or magistrate conveniently accessible to the place of arrest to answer the charge or complaint and affidavit. Tenn. Code Ann. § 40-9-103.

An officer or private citizen may arrest a fugitive without a warrant upon reasonable information that the fugitive has been charged in another state with a crime punishable by death or imprisonment for more than one year. Tenn. Code Ann. § 40-9-104. In the event of the fugitive's arrest without a warrant, the fugitive must appear before a judge or magistrate "with all practicable speed and complaint must be made against the person under oath setting forth the ground for the arrest as in 40-9-103." Tenn. Code Ann. § 40-9-104.

D. Waiver of extradition, appearance, and warrant of commitment or admission to bail

Upon arrest, a fugitive may waive extradition. Absent waiver of extradition, the arrestee appears before a judge or magistrate, who:

(1) determines whether the arrestee is the person charged by the demanding state;
(2) determines whether the arrestee probably committed the crime; and
(3) if so, by warrant reciting the accusation, commits the arrestee to jail for a specified time to allow the arrestee's arrest on a governor's warrant or until discharge or, unless the charge is one punishable by death or life imprisonment, admits the arrestee to bail for the arrestee's appearance and surrender for arrest upon the governor's warrant.

Tenn. Code Ann. § 40-9-105; Tenn. Code Ann. § 40-9-106.

E. Forfeiture and recovery

In the event of the fugitive's non-appearance after admission to bail, the court declares a forfeiture. Tenn. Code Ann. § 40-9-107. Recovery is available as in criminal cases. Tenn. Code Ann.§ 40-9-107.

F. Effect of formal demand for governor's warrant of extradition

Upon notification of the fugitive's refusal to waive extradition, the demanding state makes a formal demand for extradition upon the governor. After issuance of the demand, the fugitive's guilt or innocence is beyond inquiry by the governor or in any proceeding, "except as it may be involved in identifying the person held as the person charged with the crime." Tenn. Code Ann. § 40-9-114.

G. Disposition on delay

After expiration of the first period of commitment without an arrest upon the governor's warrant, the judge may discharge, recommit, or again take bail from the fugitive. Tenn. Code Ann. § 40-9-108(a). After expiration of the second period of commitment without an arrest upon the governor's warrant, the judge may discharge the fugitive or set a new bond. Tenn. Code Ann. § 40-9-108(a).

Although no Tennessee extradition statute sets a time limit on a fugitive's detention in Tennessee, the federal implementing statute, 18 U.S.C. § 3182, which binds Tennessee, allows discharge if no agent of the demanding state appears within 30 days from the fugitive's arrest on the governor's warrant. *Yates v. Gilless*, 841 S.W.2d 332, 335 (Tenn. Crim. App. 1992). If a criminal prosecution against the fugitive has been instituted under the laws of Tennessee, however, the governor, at the governor's discretion, may surrender the fugitive to the demanding state or hold the fugitive for trial in Tennessee first. Tenn. Code Ann. § 40-9-115.

No judge or court may release or discharge a fugitive who has filed a protest or requested a hearing before the governor, pending the final disposition of the proceeding before the governor. Tenn. Code Ann. § 40-9-108(b).

H. Notice of demand, charge(s), and right to counsel

Upon the fugitive's arrest on the governor's warrant, the fugitive shall be notified of the demand from the demanding state, the underlying charge, and the right to counsel. Tenn. Code Ann. § 40-9-119. If the fugitive, friends, or counsel indicate a desire to test the legality of the arrest, the fugitive must appear "forthwith" before a judge of a court of record, who sets a reasonable time in which the fugitive may apply for a writ of *habeas corpus*. Tenn. Code Ann.§ 40-9-119.

I. *Habeas-corpus* proceeding

Habeas-corpus review is generally limited to determining readily verifiable historic facts:

(a) whether the extradition documents on their face are in order;

(b) whether the petitioner has been charged with a crime in the demanding state;
(c) whether the petitioner is the person named in the request for extradition; and
(d) whether the petitioner is a fugitive.

Michigan v. Doran, 439 U.S. 282, 289 (1978).

In extradition proceedings, a fugitive may not challenge the constitutionality of the actions of the demanding state or the asylum state, though, in its fact-finding capacity, a court may take into account "any truly egregious violations by the asylum state . . . ." *State* ex rel. *Sneed v. Long*, 871 S.W.2d 148, 151-52 (Tenn. 1994).

J. Other

The Uniform Criminal Extradition Act also sets forth the procedure by which the governor of Tennessee can request from other states the extradition of fugitives from Tennessee. Tenn. Code Ann. §§ 40-9-121-30.

33.03 INTERSTATE COMPACT ON DETAINERS

A. Purpose, applicability, and construction

The Interstate Agreement on Detainers, approved by Congress pursuant to the Compact Clause of the United States Constitution, U.S. Const. art. 1, § 10, cl. 3, and codified in Tennessee as the Interstate Compact on Detainers at Tenn. Code Ann. §§ 40-31-101-108, encourages expeditious and orderly disposition of untried charges and determination of the propriety of detainers based thereon for the benefit of prisoners, whose treatment or rehabilitation such charges or detainers may affect. Tenn. Code Ann. § 40-31–101, art. I. Its protections are statutory, not constitutional or jurisdictional.

In addition to Tennessee, parties to the interstate agreement include the United States, the District of Columbia, and Puerto Rico.

The interstate agreement applies to prisoners, not pre-trial detainees, who are serving a sentence of imprisonment in one party-state and are subject to a detainer based on an untried indictment, information, or complaint, not a detainer based on revocation charges, in another party-state. Tenn. Code Ann. § 40-31-101, art. III(a), art. IV(a).

A detainer is a request from a criminal justice agency to an inmate's institution that the institution hold the inmate for the agency or notify the agency when the inmate's release is imminent. A writ of *habeas corpus ad prosequendum* constitutes a detainer within the meaning of the interstate agreement in only one circumstance: when the federal government first lodges a detainer against a prisoner with state prison officials, thereby activating the agreement, and then obtains custody by means of the writ. *United States v. Mauro*, 436 U.S. 340, 349, 361-62 (1978).

The interstate agreement is a federal law subject to federal construction. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). It is to be liberally construed in favor of prisoners. Tenn. Code Ann. § 40-31-101, art. IX.

B. Article III

Article III of the compact governs prisoner requests for final disposition of untried charges. Under Article III, a prisoner who is serving a sentence in one state may demand trial of any untried charge in another state by reason of which the prisoner is subject to a detainer by filing written notice of the place of imprisonment and a request for final disposition. Such a request is deemed to be a waiver of extradition.

From delivery of the prisoner's written notice to the appropriate court and prosecutor, the state has 180 days to obtain temporary custody of the prisoner and commence the trial. Tenn. Code Ann. § 40-31-101, art. III(a).

C. Article IV

Article IV of the compact governs state requests for temporary transfer of prisoners. Under Article IV, a state may request temporary transfer of a prisoner who is serving a sentence in another state and is subject to a detainer based on untried charges.

Although Article IV does not mention extradition rights, the United States Supreme Court has interpreted subsection (d) to mean that prisoners transferred to another state pursuant to Article IV(a) retain their rights to the writ of *habeas corpus*, counsel, and a pre-transfer hearing under the Uniform Criminal Extradition Act but may not challenge temporary transfer on the ground that the governor of the sending state did not approve such transfer. *Heard v. Lee*, No. E2018-00700-CCA-R3-HC, 2019 WL 364453, *2-3 (Tenn. Crim. App. 01/29/2019).

From the prisoner's arrival in the receiving state, the receiving state has 120 days to commence the trial. Tenn. Code Ann. § 40-31-101, art. IV(c).

D. Excusable and inexcusable delay

Under Articles III and IV, "for good cause shown in open court, the prisoner or the prisoner's counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance." Tenn. Code Ann. § 40-31-101, art. III(a), art. IV(c). The state has the burden of establishing good cause for delay.

"Neither a crowded docket nor the State's negligence constitutes 'good cause' for delay." *State v. Barefoot*, No. M2014–01028–CCA–R3–CD, 2015 WL 351978, *5 (Tenn. Crim. App. 01/28/2015), *perm. app. denied* (Tenn. 05/14/2015) (citations omitted).

A delay that the prisoner occasions or to which the prisoner agrees tolls the running of the limitation on the commencement of trial.

Absent tolling of the running of the limitation on the commencement of trial, which the court having jurisdiction of the matter determines, Tenn. Code Ann. § 40-31-101, art. VI(a), failure to commence the trial within the specified time entitles the prisoner to dismissal of the charge(s) with prejudice, Tenn. Code Ann. § 40-31-101, art. III(d), art. IV(e).

CHAPTER 34

DEATH PENALTY

Special thanks to Judge Jennifer Smith and Judge Chris Craft for their review and edits of this chapter.

Contents **Section**

34.01 ELIGIBILITY

A defendant convicted of first degree murder may be sentenced to life imprisonment, life imprisonment without the possibility of parole (only for offenses committed on or after July 1, 1993), or death. Tenn. Code Ann. § 39-13-204. A defendant convicted of 'grave torture,' recently enacted by our legislature effective 7/1/22, may also receive a sentence of either life without parole or death. A defendant is not eligible for the death penalty or life without the possibility of parole unless one of the statutory aggravating circumstances listed in Tenn. Code Ann. § 39-13-204(i) applies. A capital case begins upon the filing of the state's notice of intent to seek the death penalty. The state must file a notice of this intention not less than 30 days prior to trial, and the notice must specify the aggravating circumstance(s) upon which the state intends to rely. Tenn. R. Crim. P. 12.3(b).

Capital case attorneys are available to assist trial judges who preside over death penalty cases. These attorneys are very familiar with the intricacies involved in the pre-trial, trial, and post-trial phases of a capital case. A judge who is appointed to a capital case may ask the AOC which capital case attorney is assigned to the judge's district. The judge may also wish to obtain and review the Capital Case Bench Book, prepared by the Tennessee Capital Case Attorneys and published by the Administrative Office of the Courts.

34.02 MISCELLANEOUS ISSUES

The issues that may arise during a capital trial are too numerous to discuss at length in this brief summary. However, some of the issues a court may encounter during a capital case are outlined below.

Pretrial:

1. An indigent defendant is entitled to the appointment of two attorneys, who are qualified under Tenn. Sup. Ct. R. 13, Sec. 3. The appointment order shall specify which attorney is "lead counsel" and which attorney is "co-counsel". Tenn. Sup. Ct. R. 13, Sec. 3(b)(1). The defendant may be entitled to funds for experts, investigators, or other support services. Tenn. Sup. Ct. R. 13, Sec. 5.

2. The state is not required to plead aggravating circumstances in the indictment. *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008) (Appendix).

3. The defendant is not entitled to a bill of particulars regarding the factual basis for each aggravating circumstance. *State v. Bush*, 942 S.W.2d 489, 520 (Tenn. 1997) (Appendix).

4. Defendants often request a change of venire or change of venue due to the publicity surrounding capital cases, and both are permissible. Tenn. Code Ann. § 20-4-201; Tenn. R. Crim. P. 21.

5. A defendant does not have a constitutional right to plea bargain. *State v. Odom*, 336 S.W.3d 541, 569 (Tenn. 2011).

Jury Selection:

6. Juror questionnaires are often used but are not required. *See State v. Suttles*, 30 S.W.3d 252, 269-70 (Tenn. 2000) (Appendix). If a questionnaire is utilized, *see State v. Sexton*, 368 S.W.3d 371 (Tenn. 2012), regarding the hazards of excusing a juror based exclusively on the juror's responses to questions that appear on the questionnaire.

7. During jury selection, each party is entitled to 15 peremptory challenges. Tenn. R. Crim. P. 24(e)(1).

8. A potential juror must be excused from service if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Pike*, 978 S.W.2d 904, 924 (Tenn. 1998) (Appendix). Individual questioning of potential jurors is often permitted but is not required. *See State v. Cribbs*, 967 S.W.2d 773, 796 (Tenn. 1998) (Appendix); *State v. Cauthern*, 967 S.W.2d 726, 749 (Tenn. 1998) (Appendix).

9. A defendant's request for funding to hire a jury selection expert is assessed under the same "particularized need" standard as applied to other experts. A conclusory statement that a jury selection expert is necessary in every capital case is insufficient to establish a particularized need. *State v. Dellinger*, 79 S.W.3d 458, 468-69 (Tenn. 2002); *State v. Smith*, 993 S.W.2d 6, 28 (Tenn. 1999) (Appendix). A trial court's decision to award funds for employment of an expert rests within the sound discretion of the trial court. Tenn. Code Ann. § 40-14-207(b).

Trial-Guilt Phase:

10. A capital trial is bifurcated. The trier of fact determines guilt during the first phase. If the trier of fact convicts the defendant of first degree murder or grave torture during the first phase, it must determine the penalty during the second phase. Tenn. Code Ann. § 39-13-204. Under certain circumstances it is permissible for the trial court to replace a regular juror with an alternate juror for the penalty phase of the trial even if the alternate juror did not participate in the guilt-phase deliberations. *State v. Hester*, 324 S.W.3d 1, 62-67 (Tenn. 2010). The parties are precluded from mentioning the aggravating circumstance(s) during the first phase of the trial.

11. Jurors must be sequestered during a trial in which the state is seeking the death penalty. Tenn. Code Ann. § 40-18-116; State v. Bondurant, 4 S.W.3d 662, 672 (Tenn. 1999).
12. In limited circumstances, the defendant may be granted a bench trial on the issues of guilt and/or penalty. Tenn. Code Ann. § 39-13-205.

13. The defendant is not entitled to separate juries for the guilt and penalty phases of the trial. State v. Dellinger, 79 S.W.3d 458, 478-79 (Tenn. 2002) (Appendix).

14. When a defendant waives his right to testify through the procedure set out in *Momon v. State*, 18 S.W.3d 152 (Tenn. 1999), counsel is not required to inform the defendant through this colloquy in open court that the defendant may "testify to collateral mitigating factors in a death penalty sentencing hearing without waiving his privilege against self incrimination." *State v. Rimmer*, 250 S.W.3d 12, 28 (Tenn. 2008).

15. For a thorough discussion regarding the application of Tenn. R. Evid. 615 (Exclusion of Witnesses) to a death penalty case, *see State v. Jordan*, 325 S.W.3d 1, 37-53 (Tenn. 2010).

Trial-Penalty Phase:

16. Many issues have arisen over the years regarding the application of various aggravating circumstances and/or what types of evidence are admissible to prove those circumstances. Moreover, the weighing process (aggravators vs. mitigators), available penalties, and applicability of certain aggravators vary greatly depending upon the date of the offense. Prior to trial, the trial court and/or the capital case attorney assisting the court should thoroughly research these issues.

17. Anything favorable to the defendant, regardless of whether it is statutory or non-statutory, presented by the defense or the prosecution, or presented during the guilt or penalty phase of the trial, may be considered mitigation evidence by the jury when it is deciding which penalty to impose. Tenn. Code Ann. § 39-13-204(j); *State v. Cauthern*, 967 S.W.2d 726, 738-39 (Tenn. 1998).

18. Victim impact testimony is typically permitted during the penalty phase of the trial. If the court allows such testimony, it must also instruct the jury regarding the manner in which to consider the testimony. T.C.A. § 39-13-204(c); *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008) (Appendix); *State v. Nesbit*, 978 S.W.2d 872, 887-94 (Tenn. 1998). T.C.A. § 39-13-204 permits "a member or members, or a representative or representatives of the victim's family to testify" during the penalty phase of the trial. The Supreme Court concluded that a "blood or marital relationship is not a prerequisite" and that a fiancée should not be excluded from testifying solely on the basis of her status. The Court declined to decide under what circumstances a victim's "friend" would be permitted to testify. *State v. Jordan*, 325 S.W.3d 1, 56-57 (Tenn. 2010). If victim impact testimony is presented at the sentencing hearing, the bracketed victim impact jury instruction on the second page of TPI-CRIM. 7.04(a) must be charged to the jury, after the court considers the accompanying footnotes to that particular part of the instruction.

19. In *State v. Reid*, 981 S.W.2d 166 (Tenn. 1998), the Tennessee Supreme Court held that trial courts have the authority to order defendants to file written pre-trial notice of their intent to present expert testimony regarding their mental condition as mitigation evidence at the

sentencing phase of their capital trial. The provisions of Tenn. R. Crim. P. 12.2, while applying to the notice required for introduction of expert testimony of mental condition at the guilt phase, do not specifically require the defendant in a capital case to give notice of his or her intent to introduce expert mental condition testimony at the sentencing phase of the trial. *Id*. at 170. The Court likewise found Tenn. R. Crim. P. 16 inapplicable to mitigation proof presented at the sentencing phase of a capital trial. Therefore, once notice is given that the State is asking for death, or at the latest four months prior to trial, the trial judge should be proactive, and enter an order mandating that the defense give notice of its intent to introduce expert mental condition testimony at the sentencing phase of the trial to the State. The State can then have its expert examine the defendant, and its expert will turn its reports and findings over to the defense *without allowing the State to see them, or allowing the State's expert to discuss the case with the State.* At trial, if the defendant is convicted, the defense will then have to decide if it still intends to put on its expert mental proof of mitigation. If it does decide to put on this proof, it must then turn the reports of its defense experts and the State's experts over to the State prior to the beginning of the sentencing phase of the trial, and the State can then discuss the case with its experts and prep for testimony. If the defense decides not to put on expert mental proof, it does not have to give the State any of the reports, and the State still can have no access to its mental health experts or their reports. If the trial judge does not enter a *Reid* order at all, or enters it shortly before trial, the trial will have to be reset because the State will not have time to have the defendant examined, resulting in delay and extra expense, particularly if jury questionnaires have already been administered and hotel accommodations have already been arranged for the jury

20. The court must instruct the jury as to all ***applicable*** ***statutory*** aggravating circumstances. *State v. Blanton*, 975 S.W.2d 269, 281 (Tenn. 1998). The court will also instruct the jury on all statutory and non-statutory mitigating circumstances, and must provide a catch-all instruction regarding mitigation proof. Finally, the court must instruct the jury on the manner in which to weigh the aggravating and mitigating circumstances. T.C.A. § 39-13-204(e). These instructions can be found in the pattern jury instruction book.

21. A defendant who committed his offense prior to July 1, 1993, is not eligible for a sentence of life without the possibility of parole. *State v. Austin*, 87 S.W.3d 447, 481-82 (Tenn. 2002) (Appendix). Likewise, if an offender committed the offense prior to July 1, 1993, the trial court is not required to instruct the jury that the offender will not be eligible for parole until the offender has served at least 25 full calendar years. *State v. Odom*, 336 S.W.3d 541, 567, n.11 (Tenn. 2011). If an offender committed the offense on or after 7/1/95, the trial court must instruct the jury that the offender will not be eligible for release until the offender has served at least 51 full calendar years. Tenn. Code Ann. §39-13-204(e)(2) and Attorney General Opinion 97-098.

22. Constitutional challenges to the death penalty repeatedly have been rejected by the appellate courts. *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008); *State v. Reid*, 91 S.W.3d 247, 312-14 (Tenn. 2002) (Appendix); *State v. Austin*, 87 S.W.3d 447, 486-88 (Tenn. 2002) (Appendix).

23. If the jury indicates that it is unable to reach a verdict during the penalty phase of the trial, the court should consult T.C.A. § 39-13-204(h). See also *State v. Torres*, 82 S.W.3d 236, 253-58 (Tenn. 2002). If the jury fails to agree on a sentence of death, the court should instruct them utilizing T.P.I. – Crim. 7.04(d) on deciding between life and life without parole.

24. States are not permitted to execute a juvenile convicted of any offense or an adult convicted of rape, regardless of whether the rape victim was an adult or a child. *See Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008). Moreover, an intellectually disabled (previously referred to as "mentally retarded") or incompetent defendant cannot be executed. T.C.A. § 39-13-203; *Hall v. Florida*, 134 S.Ct. 1986 (2014); *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007); *Atkins v. Virginia*, 122 S.Ct. 2242 (2002); *Coleman v. State*, 341 S.W.3d 221 (2011) (discussing intellectual disability issues at length); *State v. Irick*, 320 S.W.3d 284, 294-95 (Tenn. 2010) (stating that "[a]ny portions of *Van Tran* or *Coe* that can be read as inconsistent with *Panetti* are hereby renounced as obsolete" and explaining the relevant standards/tests); *Bobby v. Bies*, 129 S.Ct. 2145 (2009) (finding that double jeopardy/issue preclusion considerations did not bar a full hearing on the issue of mental retardation when mental retardation was raised as a mitigating circumstance at trial but the issue of the defendant's mental capacity was not fully litigated as an independent issue); *State v. Strode*, 232 S.W.3d 1 (Tenn. 2007); *Van Tran v. State*, 66 S.W.3d 790, 805 (Tenn. 2001); *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000). However, the Tennessee Supreme Court's opinion in *Coleman* did not establish a new constitutional right upon which a motion to reopen a post-conviction petition can be based pursuant to T.C.A. § 40-30-117(a)(1), nor does actual innocence as contemplated by T.C.A. § 40-30-117(a)(2) include an allegation that an offender is not eligible for the death penalty due to an intellectual disability. *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012).

25. A competent defendant has the right to preclude his attorney from presenting mitigation evidence and making a closing argument during the penalty phase of a capital trial, but the trial court must follow the procedures set forth by the appellate courts regarding the waiver as well as the defendant's competency to execute such a waiver. *See State v. Johnson*, 401 S.W.3d 1 (Tenn. 2013); *State v. Kiser*, 284 S.W.3d 227 (Tenn. 2009); *State v. Smith*, 993 S.W.2d 6, 13-16 (Tenn. 1999); *Zagorski v. State*, 983 S.W.2d 654, 660 (Tenn. 1998). It is not necessary for the court to follow the *Zagorski* procedures if the defendant is proceeding *pro se*. *State v. Richard Taylor*, No. M2005-01941-CCA-R3-DD (Tenn. Crim. App., filed March 7, 2008).

26. The trial court should instruct the jury regarding residual doubt under certain circumstances. *State v. Kiser*, 284 S.W.3d 227 (Tenn. 2009).

27. See Tenn. Code Ann. § 40-23-114 for the applicable methods of execution. Because the protocols for carrying out each method of execution are left to the Tennessee Department of Correction, Tenn. Code Ann. § 40-23-114(c), challenges to the execution protocol must proceed administratively through the TDOC grievance process. Declaratory judgment actions challenging an execution protocol are resolved by a three-judge chancery panel. Tenn. Code Ann. §§ 20-18-101 through -104.

34.03 RULE 12 REPORTS

Rule 12 of the Tennessee Supreme Court Rules ("Rule 12") requires the trial court to submit a report for every conviction for first degree murder regardless of punishment and regardless of whether the conviction resulted from a trial or a plea. See Chapter 35 of this benchbook for additional information regarding the Rule 12 Reports.

34.04 APPEAL AND POST-CONVICTION

Appellate review of capital cases is governed by Tenn. Code Ann. § 39-13-206. *See also State v. Godsey*, 60 S.W.3d 759, 781-93 (Tenn. 2001).

See Bobby v. Van Hook, 130 S.Ct. 13 (2009) regarding the standards for determining (during a post-conviction proceeding) whether the defendant's attorneys provided ineffective assistance at the trial. This case includes a discussion regarding the relevance of "guides" such as the ABA Standards. For additional discussion regarding ineffective assistance of counsel claims in capital cases, see *Wong v. Belmontes*, 130 S.Ct. 383 (2009) and *Sears v. Upton*, 130 S.Ct. 3259 (2010).

CHAPTER 35

SUPREME CT. RULE 12: FIRST DEGREE MURDER REPORTS

Contents **Section**

35.01 REPORT OF TRIAL JUDGE IN FIRST DEGREE MURDER CASES

Tennessee Supreme Court Rule 12 addresses the report of the trial judge in first degree murder cases. The report required by Tenn. Sup. Ct. R. 12 must be completed in its entirety in all cases, in which the defendant is convicted of first-degree murder. This includes cases in which the defendant pleads guilty to first-degree murder and cases remanded by the appellate court for retrial and/or resentencing.

35.02 WHEN REPORT IS TO BE FILED

A. Cases resulting in a trial

Prior to the hearing on the motion for new trial, the defendant's counsel shall complete Section B of the report ("Date concerning the defendant") and the district attorney general shall complete Section C ("Data Concerning the Victim, Co-Defendants and Accomplices") and submit the completed sections to the trial judge at or before the hearing.

The trial judge shall complete the remaining parts and submit to counsel for comments by the defense attorney and district attorney general. Any comments must be delivered to the trial judge no later than ten days after the ruling on the motion for new trial.

B. Cases resulting in a plea

Defendant's counsel shall complete Section B of the report ("Date concerning the defendant") and the district attorney general shall complete Section C ("Data Concerning the Victim, Co-Defendants and Accomplices") and submit the completed sections to the trial judge within thirty days after the plea is entered.

The trial judge shall complete the remaining parts and submit to counsel for comments by the defense attorney and district attorney general. Any comments must be delivered to the trial judge no later than ten days after receiving the report from the trial judge.

C. Submission of the reports

The first degree murder report and any necessary or required documents shall be transmitted to the Clerk of the Supreme Court via the First Degree Murder Cases Data Repository (electronic

database) within fifteen (15) days after the trial court rules on the motion for new trial or within sixty (60) days after the guilty plea is entered.

The trial judge shall compile or cause to be compiled all information for entry into the electronic database, and shall certify the accuracy of the report. Once certified, the report will be transmitted electronically, along with any required documents that are uploaded to the electronic database, to the Clerk of the Supreme Court.

Submission of the first degree murder reports through the electronic database is **mandatory**, absent exigent circumstances. Reports filed in hard-copy will be returned to the trial judge for entry into the electronic database.

35.03 ACCESS TO THE ELECTRONIC DATABASE

The trial judge should request access to the database by navigating to www.amp.tncourts.gov. On the login page, select "Sign up". After entry of the requested information, the AOC will be notified of the pending request for approval of the account. Once approved, you may login to view reports, enter and file new reports, or approve, certify, and file reports entered by the judicial assistant.

The trial judge's assistant may also request access to the database by signing up for an account in the same manner. Upon approval, the assistant's account will be linked with the trial judge's account. If the assistant enters the information for the report and submits it to the judge for approval, the report will then appear in the judge's case list. The judge must login to the judge's account and certify the report for filing and electronic submittal to the Clerk of the Supreme Court.

Additional information on using the system may be found under the "Help" tab, after logging into the system. Slides on entry of a report, FAQ's and other documents are there to assist in the entry and filing of the reports.

CHAPTER 36

PLEADINGS

Special thanks to Judge Thomas J. Wright for his review and edits of this chapter.

Contents **Section**

36.01 CLAIMS FOR RELIEF, ANSWERS, AND REPLIES

In a civil action, claims for relief include the original claim, which is made in a complaint or petition, as well as a counterclaim, a cross-claim, and a third-party claim.[1] Tenn. R. Civ. P. 8.01. An answer is allowed for each complaint and cross-claim; a reply to a counter-claim is allowed; and a third-party answer is allowed to be filed as to a third-party complaint. No other pleadings are allowed unless the court orders a reply to the answer of a third-party. Tenn. R. Civ. P. 7.01.

Each claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment. Each answer or reply must state in short and plain terms the defense or defenses asserted and must admit or deny each of the averments alleged in the complaint, counterclaim, cross-claim, or third-party claim. Tenn. R. Civ. P. 8.01 & 8.02. Affirmative defenses must be specifically pled in short and plain terms. Tenn. R. Civ. P. 8.03. A list of affirmative defenses that must be pled is found in Tenn. R. Civ. P. 8.03. Failure to plead an affirmative defense in an answer or by motion prior to trial precludes reliance on such defense. *George v. Alexander*, 931 S.W.2d 517 (Tenn. 1996); *Dickson v. Kriger*, 374 S.W.3d 405 (Tenn. App. 2012); Tenn. R. Civ. P. 12.08.

Rule 10 of the Tennessee Rules of Civil Procedure prescribes the form pleadings shall take and requires each averment to be made in separate numbered paragraphs, and each paragraph to be limited to statements of a single set of circumstances. Each claim and each defense are to be stated in separate counts or defenses. Tenn. R. Civ. P. 10.02. Previous statements in a pleading may be adopted by reference in a different part of the same pleading. Tenn. R. Civ. P. 10.04.

Pleadings relying upon statutes must either specifically refer to the statute or state all the facts necessary to constitute the breach of the statute so that the other party is apprised that a statutory violation is alleged. Tenn. R. Civ. P. 8.05(1). The same requirement applies to reliance on any ordinance or regulation. *Id*.

Certain matters must be specially pled. Tenn. R. Civ. P. 9.01 – 9.07. This most commonly comes up in cases alleging fraud or mistake. The rule requires the alleged circumstances constituting

[1] For additional discussion of counterclaims, cross-claims, third-party claims and other "multiple parties" issues *see*, sections 40.01-40.11 hereafter.

fraud or mistake to be stated "with particularity." Tenn. R. Civ. P. 9.02; *see*, *Kincaid v. South Trust Bank*, 221 S.W. 3d 32 (Tenn. App. 2006), perm. app. denied (2007).

If a pleading relies upon any written instrument, other than a policy of insurance, the pertinent parts of the writing must be attached to the pleading as an exhibit unless the writing is either a matter of public record or in the possession of the adverse party, or if the attachment would be unnecessary or impracticable as stated in the pleading. Tenn. R. Civ. P. 10.03.

36.02 FILING WITH THE CLERK, SERVICE OF PROCESS, SERVICE OF PLEADINGS

The initial pleading, containing the original claim for relief, commences a civil action when filed with the clerk of the court. Rule 3, Tenn. R. Civ. P. The clerk then issues a summons which must be served upon the opposing party in compliance with Rule 4, Tenn. R. Civ. P.

Each subsequent pleading must be filed with the clerk and served upon each party in compliance with Rule 5, Tenn. R. Civ. P.

36.03 TIME FOR FILING RESPONSIVE PLEADINGS

Generally, a party has 30 days to file an answer or reply. Rule 12.01, Tenn. R. Civ. P. But the filing of a motion to dismiss prior to a responsive pleading alters the time period for filing the responsive pleading. *See*, Rule 12.01, Tenn. R. Civ. P.

For computing the prescribed time period *see* Rule 6, Tenn. R. Civ. P.

36.04 SIGNING OF PLEADINGS

Rule 11 of the Tennessee Rules of Civil Procedure provides that all pleadings, motions, and papers filed with the court must be signed by at least one attorney of record or by a party appearing *pro se*. The paper must also bear the signer's address, telephone number, email address, and bar number. Unsigned papers must be stricken unless promptly corrected. Tenn. R. Civ. P. 11.01.

The signing of a pleading, motion or other court document is tantamount to making certain certifications, listed in Tenn. R. Civ. P. 11.02, concerning the contents of the signed document. If the signed document does not comply with the requirements of Tenn. R. Civ. P. 11.02, the opposing party may file a motion for sanctions pursuant to Tenn. R. Civ. P. 11.03(1)(a) or the court may sua sponte order the responsible person to show cause why they have not violated Rule 11.02. Tenn. R. Civ. P. 11.03(1)(b).

If the court determines that a violation of this rule has occurred, after notice and a reasonable opportunity to respond, the court may impose an appropriate sanction upon the violating attorney, law firm, or *pro se* party. Tenn. R. Civ. P. 11.03(2).

In determining whether a Rule 11 violation has occurred, the applicable standard for the court's application is whether an attorney's conduct is objectively reasonable under all the circumstances. The reasonableness must be assessed in light of the circumstances existing at the time the action was taken. *Krug v. Krug*, 838 S.W.2d 197 (Tenn. 1992). Sanctions are imposed for the purpose of deterring repetition of the violation or comparable violations. The sanctions may include

nonmonetary directives and monetary penalties including payment to the movant of costs and fees or payment into the court except in limited situations. Tenn. R. Civ. P. 11.03(2). An order imposing sanctions must describe the conduct found to be in violation of the rule and must explain the basis for the imposed sanction. Tenn. R. Civ. P. 11.03(3).

36.05 AMENDED and SUPPLEMENTAL PLEADINGS

"Tennessee law and policy have always favored permitting litigants to amend their pleadings to enable disputes to be resolved on their merits rather than on legal technicalities." *Hardcastle v. Harris*, 170 S.W.3d 67, 80 (Tenn. App. 2004), perm. app. denied (2005).

Initial amendments to pleadings which are filed before a responsive pleading is filed, or within fifteen days of service if no responsive pleading is allowed, are a matter of right. Amendments thereafter may be made only by written consent or with the court's permission. The rule anticipates, however, that courts will act liberally in the granting of permission to amend. *Henderson v. Bush Bros. & Co.*, 868 S.W.2d 236 (Tenn. 1993).

In the event a motion to amend is denied, the trial court must give a reasoned explanation for the denial. *Cumulus Broadcasting v. Shim,* 226 S.W.3d 366, 374 (Tenn. 2007).

The proper way for a party to seek to amend is for the party to attach a copy of the proposed amendment to the motion so that a copy of the proposed amendment becomes a part of the record, which an appellate court can review if asked to do so. *Taylor v. Nashville Banner Publishing Co.*, 573 S.W.2d 476 (Tenn. Ct. App. 1978), *cert. denied*, 441 U.S. 923 (1979).

The trial court has discretion in whether to allow an amendment. Your discretion is substantially lessened by the liberal language of Rule 15.01. *Stephens v. Home Depot*, 529 S.W.3d 63, 77 (Tenn. App. 2016). In exercising your discretion, you should consider:

1. Whether undue delay in filing the amendment has occurred *see, Zukowski v. Hamilton County Department of Education*, 640 S.W.3d 505 (Tenn. App.), perm. app. denied (2021);
2. Whether the opposing party has sufficient notice;
3. Whether the amending party is acting in bad faith;
4. Whether the moving party failed to cure deficiencies in previous amendments;
5. Whether the opposing party will suffer undue prejudice;
6. The futility of the amendment.

Gardiner v. Word, 731 S.W.2d 889 (Tenn. 1987); *Merriman v. Smith*, 599 S.W.2d 548 (Tenn. App. 1979). The most important factor to consider is the potential prejudicial effect the amendment would have on the opposing party. *Hardcastle v. Harris*, 170 S.W.3d 67, 81 (Tenn. App. 2004, perm. app. denied (2005).

Supplemental pleadings, setting forth additional allegations, involving transactions, occurrences, or events which have happened since the date of the original pleading are also freely allowed. Tenn. R. Civ. P. 15.04. The rule provides that supplemental pleadings may be allowed even if the party failed to plead the claim or defense in the original pleading.

Amendments may be granted at any time, including during trial, Rule 15.02, Tenn. R. Civ. P., and even after trial to conform to the evidence received. *Id*.

Generally, amended claims or defenses will relate back to the date of the original pleading. Rule 15.03, Tenn. R. Civ. P.

36.06 MOTION PRACTICE RELATING TO PLEADINGS

Motions to dismiss for various flaws in the complaint are governed by Rule 12.02, Tenn. R. Civ. P.

Motion for judgment on the pleadings. Rule 12.03, Tenn. R. Civ. P.

Motion for more definite statement. Rule 12.05, Tenn. R. Civ. P.

Motion to strike any "insufficient defense or any redundant, immaterial, impertinent or scandalous matter." Rule 12.06, Tenn. R. Civ. P.

Motion to amend. Rule 15.01, Tenn. R. Civ. P.

36.07 USE OF STATEMENTS IN PLEADINGS AS EVIDENCE

Generally, the statements made in pleadings are not evidence, *Greer v. City of Memphis*, 356 S.W.3d 917 (Tenn. App. 2010); however, they may be considered admissions of a party on whose behalf the pleading was filed. *Pankow v. Mitchell*, 737 S.W.2d 293 (Tenn. App.), perm app. denied (1987).

Rule 803 (1.2) provides that statements admissible in evidence as admissions of a party-opponent are not conclusive.

CHAPTER 37

DISCOVERY

Special thanks to Chancellor Steven Maroney for his review and edits of this chapter.

Contents **Section**

37.01 GENERALLY

The Tennessee Rules of Civil Procedure outline the discovery methods for civil actions in Tennessee in Rules 26 through 37. The methods include depositions, interrogatories, requests for productions of documents, permission to enter upon land or property for inspections, requests for physical and mental examinations, and requests for admissions.

37.02 COURT INVOLVEMENT

To a large extent, discovery is controlled and managed by the parties. However, when discovery matters are disputed by the parties, the parties often seek guidance from the court in settling the issue(s).

A. Protective orders

For good cause, a judge may enter an order to protect a party or person from discovery sought for the purpose of annoyance, embarrassment, oppression or undue burden or expense. Tenn. R. Civ. P. 26.03. The protective order issued by the court may require one or more of the remedies listed in Tenn. R. Civ. P. 26.03.

B. Orders to compel

A party may file a motion seeking an order to compel discovery. The motion may be made if a party or other person fails to answer questions at a deposition or in an interrogatory, if the answers are evasive or incomplete, or if the party fails to provide other requested discovery. Grounds for objection to written discovery must be stated with specificity and must clearly indicate whether and what responsive information is being withheld. The court may enter an order requiring the party or other person to provide a response to the discovery request. In addition to granting the motion, if appropriate, the court may require that the reasonable expenses incurred by the moving party be paid by the party whose actions necessitated the motion. Tenn. R. Civ. P. 37.01.

C. Sanctions

Sanctions that may be imposed for the failure to comply with an order compelling discovery may be found in Tenn. R. Civ. P. 37.02.

Where a party fails to admit the genuineness of a document or to the truth of a matter, and such document or matter is proven through the presentation of evidentiary proof, the court may order sanctions found in Tenn. R. Civ. P. 37.03. Exceptions to the imposition of this sanction are also found in Tenn. R. Civ. P. 37.03.

Tenn. R. Civ. P. 37.04 sets out the sanctions that may be imposed if a party or its designee fails to attend a properly noticed deposition or to answer questions or requests properly posed under the rules in writing. In such circumstances, the judge must require the payment of reasonable expenses incurred, including attorney fees because of the failure to attend the deposition or answer submitted discovery. Tenn. R. Civ. P. 37.04.

Finally, the general rule requiring the good faith participation of a party or party's attorney in the establishment of a discovery plan is found at Tenn. R. Civ. P. 37.05. Failure to participate in good faith makes the party or party's attorney subject to the sanctions listed in Tenn. R. Civ. P. 37.05.

37.03 ELECTRONIC DISCOVERY

The Supreme Court adopted amendments, effective July 1, 2009, to the Rules of Civil Procedure concerning discovery to add provisions that address the discovery of electronic material. These new rules do not require mandatory, automatic discovery, as in the federal courts. However, the courts have the authority to control the discovery process with regard to electronic materials, taking into consideration the burdens and costs to the parties.

CHAPTER 38

PRETRIAL MOTIONS

Special thanks to Judge William B. Acree for his review and edits of this chapter.

Contents **Section**

38.01 DISPOSITIVE MOTIONS

In civil actions, certain defenses may be raised by motion before pleading. Defenses or objections which are raised in motions or in pleadings are not waived if joined with other defenses or motions which are raised in motions or pleadings. A list of such defenses can be found at Tenn. R. Civ. P. 12.02. Other such specific special matters can be found in Tenn. R. Civ. P. 9.

If any of the motions specified in rule 12.02 are raised, the judge, upon application of a party, must hear and determine the motion before trial, unless the court specifically defers the ruling until the trial. Tenn. R. Civ. P. 12.04. The same applies for a motion for judgment on the pleadings discussed below. *Id.* Tenn. Code Ann. § 20-12-119(c) now provides that a party who prevails on a 12.02 (6) motion be awarded reasonable and necessary costs and attorney's fees, subject to some limitations.

Rule 12 also recognizes a motion for judgment on the pleadings, which permits the court to dismiss the action if the pleadings fail to support a cause of action or defense. Tenn. R. Civ. P. 12.03. If outside materials are used to support a motion for judgment on the pleadings, the motion is treated as a motion for summary judgment. *Id.*

38.02 OTHER MOTIONS

- **Motion to strike** - The court may remove an "insufficient defense or any redundant, immaterial, impertinent or scandalous matter" from the pleadings. Tenn. R. Civ. P. 12.06.

- **Motion for more definite statement** - The court may require more specificity in pleadings when a pleading is found to be "so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading." Tenn. R. Civ. P. 12.05.

38.03 RESOLUTION OF MOTIONS

The court may resolve motions by in court hearings, telephonic, zoom or similar hearings, or on brief.

CHAPTER 39

INJUNCTIONS

Special thanks to Judge Joseph Woodruff for his review and edits of this chapter.

Contents **Section**

39.01 IN GENERAL

Injunctive relief can be obtained by (1) restraining order, (2) temporary injunction or (3) permanent injunction in a final judgment. While a restraining order may only restrict the commission of an act, an injunction may restrict or mandate the commission of an act. Every injunctive order must be specific in terms and describe in reasonable detail, and not by reference to the pleadings, the act that is restrained or enjoined. Tenn. R. Civil P. 65.01, 65.02.

39.02 RESTRAINING ORDERS

A restraining order may be granted either at the beginning of an action or while it is pending. Notice is not required in certain circumstances set out in Tenn. R. Civ. P. 65.03(1)(A)-(B). First, it must be clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and that the applicant will suffer immediate and irreparable injury, loss, or damage before notice and a hearing can be accomplished. In addition, the person applying for the injunction must certify his efforts to give notice to the opposing party and state specific reasons why notice should not be required. Tenn. R. Civ. P. 65.03(1). Other requirements concerning the content of restraining orders and the process by which restraining orders are issued can be found at Tenn. R. Civ. P. 65.03.

A restraining order becomes effective when it is served upon the party restrained or when the party is informed of the order, whichever is sooner. All temporary restraining orders granted without notice expire at a date the court orders, which shall not exceed fifteen days from issuance. The court may extend the order for fifteen additional days or the party restrained may consent to the continuation of the order. In the event of an extension, the judge must enter the reasons for the extension on the record. Tenn. R. Civ. P. 65.03(5).

39.03 TEMPORARY INJUNCTIONS

Temporary injunctions may only be granted with notice. The prerequisites for issuance are a clear showing by verified complaint, affidavit or other evidence that the applicant's rights are being or will be violated by an adverse party, and that the applicant will suffer immediate and irreparable injury, loss, or damage pending a final judgment, or that acts of the adverse party will render any final judgment ineffectual. Tenn. R. Civ. P. 65.04(1) & (2). Other requirements concerning the content of temporary injunction orders and the process by which such orders are issued can be found at Tenn. R. Civ. P. 65.04.

A temporary restraining order becomes effective and binding when the order is entered and remains in effect until it is modified, dissolved, or until a permanent injunction is entered. If an application for a preliminary injunction is pending, the court may consolidate the hearing with the trial of the action on the merits. Tenn. R. Civ. P. 65.04(5), (7).

39.04 INJUNCTION BONDS

No temporary restraining order or injunction may be granted without the giving of an injunction bond in an amount that the court deems proper "for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined." Tenn. R. Civ. P. 65.05(1). Requirements and restrictions concerning injunction bonds can be found at Tenn. R. Civ. P. 65.05.

39.05 ENFORCEMENT OF RESTRAINING ORDERS AND INJUNCTIONS

Upon a showing of proof by evidence or affidavit that a violation or threatened violation of a restraining order or injunction has occurred, a judge may compel compliance with the order and/or punish disobedience as contempt. Tenn. R. Civil P. 65.06.

39.06 EXCEPTIONS TO REQUIREMENTS

Judges who issue restraining orders or injunctions in domestic relations cases may include the terms and conditions and expiration dates as seem just and proper notwithstanding the provisions of Rule 65. Tenn. R. Civ. P. 65.07.

39.07 ISSUANCE OF AN INJUNCTION

The issuance of injunctions is governed by the provisions outlined above unless the provisions of Rule 65 conflict with a statute. Tenn. R. Civil P. 65.07. Tennessee Code Annotated contains numerous statutes that supersede the rule in specific circumstances. *See* Tenn. Code Ann. Title 29, Chapter 23 as an example of statutes superseding the Rules of Civil Procedure on injunctive relief.

Injunctive relief is extraordinary and should be granted with great caution and only after full and ample evidence that injunctive relief is necessary. Injunctive relief is not a matter of right, but a matter committed to the sound discretion of the judge. The expected harm must be a reasonable probability of irreparable harm. If a full and adequate remedy at law exists, the harm is not irreparable and injunctive relief should not be granted. *Hall v. Britton*, 292 S.W.2d 524 (Tenn. Ct. App. 1953).

39.08 ORDERS OF PROTECTION

Certain restraining orders and temporary injunctions are called orders of protection and governed by Tenn. Code Ann. § 36-3-601 et seq. Orders of protection may be issued to victims of stalking, sexual assault, and domestic abuse. An order of protection may be issued for stalking or sexual abuse without regard to the relationship (or lack thereof) between the victim and perpetrator. For domestic abuse, an order of protection may be issued against a current or former spouse, persons who live or have lived together, persons who have or have had a romantic relationship, persons related by blood or adoption, and persons related or formerly related by marriage.

The clerk of court maintains approved forms for petitioners seeking an order of protection, but no specific form is required. A hearing must be set on the petition, at which time an order of protection should issue if the petitioner has proven stalking, sexual assault, or domestic abuse by a preponderance of the evidence. If, however, the face of the petition shows an immediate and present danger of abuse, the court should immediately issue an ex parte order of protection.

An ex parte order of protection is similar to a Rule 65.03 restraining order, and the court must hold a hearing on the petition within 15 days of service on the respondent. At the hearing, depending on whether the petitioner meets the burden of proof, the court shall either dissolve the ex parte order or extend it for a definite period of time not to exceed 1 year. If no ex parte order was issued, then following the hearing the court may enter an order of protection for a definite time not to exceed 1 year or dismiss the petition.

An order of protection entered for a definite time following a hearing is similar to a Rule 65.04 temporary injunction. Orders of protection may be modified for changed circumstances, renewed in terms up to 1 year, or extended due to violations by the respondent. Unlike Rule 65 restraining orders and temporary injunctions, the petitioner is not required to post bond; and the petitioner is usually not required to pay court costs.

Relief available to the petitioner is set out in Tenn. Code Ann. § 36-3-606 and includes, but is not limited to: (1) prohibiting the respondent from committing stalking, sexual abuse, or domestic abuse; (2) prohibiting the respondent from coming about and/or communicating with the petitioner(s); (3) granting or restoring the petitioner exclusive possession of a residence; (4) setting temporary custodial or visitation rights with regard to minor children; (5) directing the respondent to pay temporary financial support under certain circumstances; (6) transferring to petitioner control over his or her cell phone; (7) ordering the respondent to attend an appropriate counseling program; and (8) dispossessing the respondent of firearms. Similar to Rule 65 injunctive relief, an ex parte order generally restricts commission of an act, whereas an order of protection issued with notice may restrict or mandate commission of an act.

Effective July 1, 2021, a victim of certain felony offenses may be awarded a lifetime order of protection. This is similar to a permanent injunction incorporated into a final judgment in the non-domestic setting.

39.09 DIVORCE & CHILD CUSTODY PROCEEDINGS

Immediately upon the filing of an action for divorce, legal separation, or child custody, the court must enter a statutory temporary restraining order, sometimes called a "STRO." If the proceeding is one for child custody but not for divorce or legal separation, the STRO should strictly comply with the language in Tenn. Code Ann. § 36-6-116(a), which alerts the parties they are restrained from: (1) terminating or modifying insurance policies; (2) harassing or disparaging the other; (3) hiding or destroying evidence; and (4) relocating children without consent or a court order. In a proceeding for divorce or legal separation, the STRO should strictly comply with the language in Tenn. Code Ann. § 36-4-106(d), which includes the restrictions above and further prohibits the parties from transferring, concealing, or in any way disposing of marital property without consent or a court order.

A court may also enter a wide variety of other temporary injunctive orders during pendency of divorce and child custody proceedings, including but not limited to: (1) orders awarding exclusive possession of marital property, including a residence; (2) orders to comply with psychological or physical evaluation, including drug or alcohol screenings; (3) orders providing for the care, custody, and control of minor children; (4) orders directing payment of child and/or spousal support; (5) orders for payment of litigation expenses, including attorney fees; (6) orders of protection; (7) orders to complete an educational parenting seminar; and (8) orders to stay the litigation due to a competing action filed in another judicial district of Tennessee or another state.

The same or similar types of injunctive relief are also available in proceedings to modify or enforce existing orders of divorce, child custody or support, and alimony. For example, in the exercise of its contempt authority, a court may order a noncustodial parent to deliver a minor child to the custodial parent or produce the child in court.

39.10 SPECIAL PURPOSE INJUNCTIONS

Statutory schemes for the protection of juveniles, and adults vulnerable due to age or disability, contain important injunctive provisions to prevent or remedy abuse, neglect, and exploitation. *See, e.g.*, Tenn. Code Ann. §§ 71-6-104, -124.

Courts have broad injunctive authority to control property which is the subject of litigation. The court may direct such property to be deposited with the clerk of court; restrain the injury, removal, or destruction of property; or appoint a receiver to safeguard, collect, manage, and/or dispose of property. Once a final judgment has been entered, the court has certain authority to stay enforcement proceedings pending appeal.

Among other things, courts may enter restraining orders or temporary injunctions for the abatement of nuisances; to prevent, correct, or remedy occupational or public health conditions or practices reasonably expected to cause death or serious physical harm; to prohibit the unlicensed

practice of certain professions; to halt unlawful business practices; and to prevent the unauthorized publication or dissemination of a person’s name or likeness.

CHAPTER 40

MULTIPLE PARTIES

Contents **Section**

40.01 COUNTERCLAIMS

There are two types of counterclaims: compulsory and permissive. Compulsory counterclaims are defined and explained in Tenn. R. Civ. P. 13.01. Permissive counterclaims are defined and explained in Tenn. R. Civ. P. 13.02. The court may allow supplemental pleadings to assert omitted counterclaims or counterclaims that matured after the service of the responsive pleading. Tenn. R. Civ. P. 13.05 and 13.06. The court may order any party necessary for complete relief to be brought in as a defendant if jurisdiction can be obtained. Tenn. R. Civ. P. 13.08. A court may also order a separate trial on a counterclaim. Tenn. R. Civ. P. 13.09.

40.02 CROSS-CLAIMS

A party may bring a cross-claim against a co-party that either arises out of the same transaction or occurrence that is the subject matter of the original action or counterclaim or that relates to property that is the subject matter of the original action or counterclaim. The cross-claim must assert that the party against whom the claim is asserted may be liable to the cross-claimant for all or part of the claim asserted in the action against the cross-claimant. Tenn. R. Civ. P. 13.07. As in the case of counterclaims, the court may order any party necessary for complete relief to be brought in as a defendant if jurisdiction can be obtained and separate trials may be ordered on an original claim and cross-claim. Tenn. R. Civ. P. 13.08, 13.09.

40.03 THIRD-PARTY PRACTICE

After the action is commenced, a defendant can bring in anyone who may be liable to the defendant for all or part of the plaintiff's claim against the defendant. This third-party defendant can likewise bring in anyone who may be liable to the third-party defendant in the action. Any party can move to strike the third-party claim, for severance, or for a separate trial. A plaintiff may cause a

third party to be brought in the same way if a counterclaim is asserted against the plaintiff. Tenn. R. Civ. P. 14.

40.04 COMPULSORY JOINDER

A person subject to the court's jurisdiction must be joined as a party if (1) complete relief between the original parties is otherwise impossible or (2) the person has an interest in the action that cannot be otherwise protected or which will cause an original party a substantial risk of incurring inconsistent obligations from additional litigation. The court may make the party either a defendant or an involuntary plaintiff. Tenn. R. Civ. P. 19.01.

If a necessary person cannot be made a party, the court must consider whether the action should continue without the person. Factors to consider include: (1) how prejudicial such a judgment would be to the original parties or the absent person; (2) whether the prejudice could be lessened by court action; (3) whether judgment rendered in the person's absence would be adequate; and (4) whether dismissal of the action would leave the plaintiff an adequate remedy. Tenn. R. Civ. P. 19.02.

Any pleading for relief must include the names of any necessary parties who have not been joined and the reason they have not been joined. Tenn. R. Civ. P. 19.03. Rule 19 does not apply to class actions. Tenn. R. Civ. P. 19.04.

40.05 PERMISSIVE JOINDER

Parties who assert a right to joint or several relief, a right to relief arising out of the same transaction or occurrence, or a right to relief with common questions of law or fact may join in one action as plaintiffs. Tenn. R. Civ. P. 20.01. Parties against whom joint or several relief, relief arising out of the same transaction or occurrence, or relief with common questions of law or fact is asserted may join in one action as defendants. Tenn. R. Civ. P. 20.01. Judgment, however, may be given for one or more of the plaintiffs and against one or more the respective defendants. Tenn. R. Civ. P. 20.01.

The court may order separate trials or other appropriate relief to prevent a party embarrassment, delay, or expense caused by the presence of another party against whom the party asserts no claim and who asserts no claims against the party. Tenn. R. Civ. P. 20.02.

40.06 MISJOINDER

If parties are misjoined, the appropriate remedy is to drop or add parties by court order at any stage of the proceeding and upon the motion of either party or the court. Dismissal is not appropriate. Tenn. R. Civ. P. 21.

40.07 INTERPLEADER

A plaintiff or defendant may interplead, or join others with claims that might expose the plaintiff or defendant to multiple liability. The claims do not have to be consistent with each other. If liability is admitted by the party seeking interpleader, the amount admitted may be required to be deposited with the court or otherwise preserved. The court may then enjoin further action by the parties relating to the amount deposited. Tenn. R. Civ. P. 22.01 and 22.02.

40.08 CLASS ACTIONS

The sections of Rule 23 of the Tennessee Rule of Civil Procedure establish procedural authority concerning class action lawsuits. Rule 23.01 establishes the prerequisites for an action to be maintained as a class action. Tenn. R. Civ. P. 23.01. In addition to these prerequisites, the rules also require that one of three conditions be satisfied. Either (1) the prosecution of separate actions must create a risk of (a) inconsistent or varying adjudications or (b) adjudications which would dispose of or seriously impede non-class members interests; or (2) the opposing party must have refused to act on grounds applicable to the whole class; or (3) a class action must be the superior method for efficient adjudication since common questions of law or fact predominate over individual ones. Tenn. R. Civ. P. 23.02.

When an action is commenced as a class action, the judge is required to determine whether it will be allowed to proceed as a class action as soon as practicable after the commencement. Tenn. R. Civ. P. 23.03 (1). The decision is left to the sound discretion of the trial judge and can be modified on appeal only if the judge's discretion was abused. *Meighan v. United States Sprint Communication Co.*, 924 S.W.2d 632 (Tenn. 1996). If the action proceeds as a class action, the judge must direct that the members of the class receive the best notice practicable under the circumstances including individual notice or publication, where appropriate. The notice shall advise the members that they may opt out of the class; that if they do not opt out of the class, any judgment rendered will include their claims; and that any member who does not opt out may enter an appearance. Tenn. R. Civ. P. 23.03 (2) & (3).

The judge may order that an action be maintained as a class action with respect to particular issues or that classes be divided into subclasses with each subclass treated as a separate class. Tenn. R. Civ. P. 23.03(4). Any judgment entered in a class action must describe those who are found to be members of the class and must specify those to whom notice was directed who did not opt out as class members. Tenn. R. Civ. P. 23.03(3).

A class action cannot be involuntarily dismissed or compromised without court approval. All members of the class are entitled to notice of any proposed dismissal or compromise in the manner the court directs. Tenn. R. Civ. P. 23.05.

Class action complaints filed by shareholders to enforce a right of a corporation or of an unincorporated association must be verified and must allege that the plaintiff was a shareholder or member at the time of the transaction or that plaintiff's share(s) devolved by operation of law. Tenn. R. Civ. P. 23.06. The complaint must also describe the plaintiff's efforts to obtain the action desired from the directors or other appropriate authority. Tenn. R. Civ. P. 23.06.

Rule 23 applies only to procedure; it does not create substantive rights where there is no standing. *Bennett v. Stutts*, 521 S.W.2d 575 (Tenn.1975).

40.09 INTERVENTION

Anyone may intervene in a suit on timely application as a matter of right if the intervening party has an unconditional statutory right to intervene; the parties agree to intervention; or if the intervening party has an interest in the subject matter of the suit that cannot otherwise be adequately protected. Tenn. R. Civ. P. 24.01. Further, intervention is permitted if the intervening party has a conditional statutory right to intervene or if the intervening party's claim or defense has a question of law or fact in common with the action. Tenn. R. Civ. P. 24.02.

To intervene, an intervening party must serve on all parties a motion to intervene stating the grounds for intervention, accompanied by an appropriate pleading. If any case involves the validity of a state statute or administrative rule, the judge must require that notice be given to the State Attorney General, specifying the challenged statute or regulation. Tenn. R. Civ. P. 24.04.

40.10 CONSOLIDATED AND SEPARATE TRIALS

The court may order pending actions consolidated when they involve a common question of law or fact. In jury trials, the judge may order a separate trial on any one or more claims on which all parties have waived the right to a jury trial. In non-jury trials, the court may also order separate trials on any one or more claims. Tenn. R. Civ. P. 42.01, 42.02.

40.11 PEREMPTORY CHALLENGES IN MULTIPLE PARTY CASES

A party to a civil action may exercise four peremptory challenges. Likewise, a party that is both a plaintiff and a defendant may exercise four peremptory challenges. If there is more than one party on a side, four additional challenges are allowed with a maximum of eight challenges allowed on a side regardless of the number of parties. The judge is required to divide the aggregate number between the parties on the same side if necessary. Tenn. Code Ann. § 22-3-104.

CHAPTER 41

MASTERS

Special thanks to Chancellor Anne Martin for her review and edits of this chapter.

Contents **Section**

41.01 APPOINTMENT AND COMPENSATION

A judge may issue an order of reference to appoint a special master (or the clerk and master) in any pending action. Tenn. R. Civ. P. 53.01. There are many reasons a judge may want to appoint a special master, but most common is the need for someone with highly specialized skills, and trial judges have broad discretion to make use of masters. *Pennington v. Boundry, Inc.*, No. M2006-02650-COA-R3-CV, 2008 WL 1923110, at *8 (Tenn. Ct. App. May 1, 2008); *see also Sanders v. Breath of Life Christian Church, Inc.*, No. W2010-01801-COA-R3-CV, 2012 WL 114279, at *13-14 (Tenn. Ct. App. Jan. 13, 2012). Additionally, cases that require difficult calculations or include duties that may be more clerical than judicial in nature are also appropriate for a special master. *Gibson's Suits in Chancery* § 17.04 (8th Ed. 2004). Some examples, a portion of which are listed in *Gibson's Suits in Chancery* include determinations regarding:

1. Real property ownership and interests associated with partition actions;
2. Sale of minor's property;
3. Assets and liabilities of decedents and whether to sell assets to satisfy liabilities;
4. The relative rights and priorities of various creditors, or claimants, of the same fund;
5. The state of accounts between persons or entities with mutual interests (e.g., business dissolutions, creditor claims);
6. Complex discovery disputes;
7. The investment of money belonging to persons with disabilities;
8. The ascertainment of heirs, or legatees, or distributees, whose estates are in Court, when their whereabouts are unknown;
9. The ascertainment of the value of any property, real or personal;[1] and
10. The sale of property in divorce cases.[2]

Id. at § 17.02.

Gibson's Suits in Chancery also discusses what matters should not be referred to a master, as follows:

[1] *See, e.g., Turman v. Turman*, No. W2014-01297-COA-R3-CV, 2015 WL 1744278 (Tenn. Ct. App. Apr. 14, 2015).
[2] *See, e.g., Kuhlo v. Kuhlo*, No. M2015-02155-COA-R3-CV, 2016 WL 3537198 (Tenn. Ct. App. June 23, 2016).

> The line of division between matters proper to be referred to the Master and matters not proper to be referred is not well defined. Generally, it may be stated that the main issues of the controversy and the principles on which these issues are to be adjudicated must be determined by the [judge],[3] while collateral, subordinate, and incidental issues, and the ascertainment of facts ancillary to the determination of the main issues, or to the execution of the decrees, may be referred to the Master. It is not proper to refer a question of law to the Master, but a mixed question of law and fact may be referred.

Id. at § 17.03. The decision to refer a matter to a special master is reviewed under an abuse of discretion standard. *Sanders*, 2012 WL 114279, at *14 (citing *Owens v. Owens*, 241 S.W.3d 478 (Tenn. Ct. App. 2007)).

The master or special master's compensation is addressed in Tenn. R. Civ. P. 53.01.

41.02 POWERS

The order of reference specifies or limits the powers of the master and should conform to the matters in controversy based upon the pleadings or funds held by the court. *See Gibson's Suits in Chancery* § 17.07. Those powers can include the marshalling of documents, books, records and the like, or the review of business records or other financial documents.. The master is required to exercise the power to regulate all proceedings in every hearing the master conducts and is required to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require evidence to be produced, rule on its admissibility, swear and examine witnesses, and issue sanctions for contempt against defaulting witnesses. If a party requests, a record must be made of the evidence offered and excluded. Tenn. R. Civ. P. 53.02 & 53.03(2).

41.03 PROCEEDINGS

Generally, a master will be appointed either based upon a motion of a party or upon the court's determination of necessity. *Gibson's Suits in Chancery* § 17.06. Judges will generally realize the need for a master's special skills upon review of the initial pleadings or, more likely, after hearing preliminary motions or based upon a status conference. *Id.*

When a judge enters an order of reference, the master must set a time and place within twenty days of the date of the order for the parties to meet, unless the order requires otherwise. Tenn. R. Civ. P. 53.03(1). "The order of reference should clearly indicate the matter to be reported on, and if any rules or directions are necessary for the guidance of the Master, they should be specified." *Gibson's Suits in Chancery* § 17.07. Masters must conduct proceedings with all reasonable diligence. Tenn. R. Civ. P. 53.03(1). A party may, with notice, seek an order from the court directing the master to expedite the proceedings. The master may proceed in a party's absence or, in the master's discretion, may reschedule the proceedings. *Id.*

[3] Although Tennessee cases have stated that "the main issues of a controversy and the principles on which these issues are to be adjudicated must be *determined* by the trial court," *Turman*, 2015 WL 1744278, at *3 (emphasis added), this does not mean that all issues in a controversy may not be referred to a master. So long as the trial court ultimately "determines" the main issues of a controversy, a referral of all issues will be upheld. *See Hardin v. Hensley-Hardin*, No. E2014-01506-COA-R3-CV, 2015 WL 9271557, at *7 (Tenn. Ct. App. Dec. 18, 2015).

41.04 REPORT

The master must file a report with the clerk on the matters referred, at the time and in the manner specified by the court. Tenn. R. Civ. P. 53.04(1). The court may require that the master make findings of fact and conclusions of law. *Id*. Unless the order directs otherwise, the master must file with the order a transcript of the proceedings and the exhibits. *Id*. The clerk must notify the parties of the filing. *Id*. Expectations in this regard should be included in the order of appointment.

> A report is ordinarily either a formal statement by the Master which finds certain facts, or a formal statement of how he has discharged some duty imposed upon him by the Court. It is, therefore, essential to a complete report that the Master shall fully and definitely respond to every matter referred, to the end that the report may supply the Court with all the facts called for or inquired about. In all respects it should show that the Master has fully and properly discharged every duty imposed on him by the order of reference.

Gibson's Suits in Chancery § 17.18. The report should be "positive, definite, and correct; not inferential, hypothetical, or in the alternative as to any matter." *Id.*

41.05 ACTION OF THE COURT

The report should provide a process or timetable by which parties may lodge objections. "Objections to a Master's report are proper only in those cases where he has reached a wrong conclusion upon the matters referred to him, or failed to give notice, or heard improper proof, improperly refused to reopen the account, or to grant a continuance, or otherwise denied a party his just rights." *Gibson's Suits in Chancery* § 17.22.

If the action is nonjury, the judge must act upon the master's report by adopting, modifying, or rejecting the report in whole or in part. The judge may also receive additional evidence or may refer the matter again with additional instructions. Tenn. R. Civ. P. 53.04(2). The parties, in such a case, have ten days from the date they are served with notice of the master's filing to file any objections to the report. *Id*.

If the action is to be tried with a jury, the master may or may not be directed to report the evidence. If the master is directed to report the evidence, the master's findings are admissible as evidence of the matters found and may be read to the jury. Tenn. R. Civ. P. 53.04 (3). The submission is subject to the court's rulings on any objections as to points of law. The parties may also submit other proof and may cross-examine the master as to the findings. *Id*.

The parties may stipulate the findings as final, in which case only questions of law can be disputed. Tenn. R. Civil P. 53.04(4). If the trial judge approves the master's findings, the findings will not be disturbed on appeal unless (1) the matter was not properly referred; (2) the findings were based upon an error of law or a mixed question of fact and law; or (3) the findings were not supported by any material evidence. *Moore v. Moore*, 602 S.W.2d 252 (Tenn. App.1980).

CHAPTER 42

SUMMARY JUDGMENT

Special thanks to Judge Mike Pemberton for his review and edits of this chapter.

Contents **Section**

42.01 IN GENERAL

A motion for summary judgment is designed to provide a quick, inexpensive means of concluding cases on which no dispute exists as to material facts. *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993). It is not intended as a substitute for trial, but is to be rendered by the trial judge when it is shown that no genuine issue as to any material fact exists so that the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, the trial judge must view all of the affidavits in the light most favorable to the opponent of the motion and draw all legitimate inferences in that party's favor. Thus, judgment is appropriate only when both facts and conclusions drawn from the facts permit reasonable persons to reach but one result. *Id.*

With the opinion in *Rye v. Women's Care Ctr. Of Memphis, MPLLC,* 477 S.W.3d 235 (Tenn. 2015) the Tennessee Supreme Court overruled *Hannan v. Alltel Publishing Co.,* 270 S.W.3d 1 (Tenn. 2008). While *Hannan* and its progeny required the movant to either affirmatively negate an essential element of the nonmoving party's claim or demonstrate that the nonmoving party cannot prove an essential element of the claim at trial, *Rye* only requires the movant to either affirmatively negate an essential element of the nonmoving party's claim, or demonstrate that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense. It is this second "prong" of *Rye* that has materially altered how a trial court is to determine a Tenn. R. Civ. P. 56 summary judgment motion. This second prong is often referred to as requiring the non-moving party to "put up or shut up." Under *Hannan's* second prong, the movant had the burden of demonstrating that the nonmoving party had insufficient proof of an essential element of the non-movant's claim; whereas *Rye* forces the non-movant to come forward and affirmatively demonstrate the presence of proof as to each element of his/her claim. Thus, once a properly supported Rule 56 motion is filed, *Rye operates to* shift the burden of production to the nonmoving party.

Prior to the 2015 *Rye* decision, in 2011 the Tennessee General Assembly enacted Tenn. Code Ann. § 20-16-101 (2014) in which the General Assembly purported to legislatively reverse *Hannan.* Because the operative facts/events of *Rye* pre-dated the passage of § 20-16-101, the *Rye* court was not required to address whether the § 20-6-101 violated the mandate of *Tenn. Const. art. II, § 2* which states that "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others," except as otherwise permitted in the constitution. Most practitioners cite to both *Rye* and its progeny and to Section 20-6-101 when referencing the applicable standard the court is to apply to their motion. While there may be little to no difference in

the *Rye* standard and the standard set out in § 20-6-101, given the open separation of powers issue, the better practice is to simply apply the holding of *Rye* and its progeny when considering a motion for summary judgment. As noted above, § 20-6-101 was enacted in 2011 and *Rye* was decided in 2015. Clearly, the *Rye* standard applies to all cases filed after October 26, 2015. Whether the standard of § 20-6-101 or that of *Hannan* applies to cases filed before that date remains an open question for the reasons set out above.

42.02 PROCEDURE FOR FILING

Any party seeking to recover on a complaint, counterclaim, or cross-claim may file a motion for complete or partial summary judgment, with or without supporting affidavits, any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment filed by the adverse party. Tenn. R. Civ. P. 56.01. A party against whom a complaint, counterclaim, or cross-claim has been filed may move for summary judgment at any time. Tenn. R. Civ. P. 56.02. All summary judgment motions must be filed at least thirty days before the hearing date. Tenn. R. Civ. P. 56.04. The response to the motion, including affidavits, must be filed no later than five days before the hearing. Tenn. R. Civ. 56.04. Local Rules of Court may apply alternate time periods concerning filing of responses and scheduling of hearings.

42.03 CONTENTS OF MOTION AND SUPPORTING AFFIDAVITS

The Tennessee Rules of Civil Procedure have specified what must be filed with a motion for summary judgment. Each motion must be:

> accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.

Tenn. R. Civ. P. 56.03. A responding party must file with the pleadings opposing the motion, a response to each fact asserted by the moving party. The response must either agree that the fact is undisputed, agree that the fact is undisputed only for summary judgment purposes, or demonstrate that the fact is in dispute. Each disputed fact, likewise, must be supported by specific citation to the record. Tenn. R. Civ. P. 56.03.

Supporting and opposing affidavits must be made on personal knowledge and must include only those facts that would be admissible in evidence. The affidavit must show affirmatively that the affiant is competent to testify on the matter stated in the affidavit. If the affidavit refers to a document, a sworn or certified copy of the document must be attached. Expert opinion affidavits are governed by the evidence rules pertaining to expert testimony. Tenn. R. Civ. P. 56.06. The opposing party may not simply rely on allegations or denials of information contained in the moving part's pleadings, but must set forth specific facts showing that there is a genuine dispute concerning material fact(s). *Id.*

If a party opposing a summary judgment motion is unable to procure an affidavit in opposition, the party may, by affidavit, request, and the court may grant, a continuance to allow affidavits or depositions to be obtained. Tenn. R. Civ. P. 56.07.

If a party submits or opposes a motion by filing an affidavit presented in bad faith or for the purpose of delay, the court shall order the party employing such affidavits to pay the other party the amount of reasonable expenses that the filing of the affidavits caused, including attorney fees. The offending party may also be found guilty of contempt. Tenn. R. Civ. P. 56.08.

42.04 PROCEEDINGS ON THE MOTION

The court may grant summary judgment on the entire case or on some of the issues in the case. If the court grants partial summary judgment, the court shall ascertain what material facts are actually in controversy, shall issue an order specifying the facts that appear to be without controversy, and shall direct further proceedings as are required. Tenn. R. Civ. P. 56.05.

42.05 REVIEW

No presumption of correctness applies to decisions granting summary judgment since they involve only questions of law. *Hembree v. State*, 925 S.W.2d 513 (Tenn. 1996).

CHAPTER 43

EXECUTION

Special thanks to Judge William T. Ailor for his review and edits of this chapter.

Contents **Section**

43.01 ISSUANCE AND RETURN

All money judgments of any court of the state may are enforced by execution. Tenn. Code Ann. § 26-1-103. To aid execution, the judgment creditor may take discovery pursuant to Rules 26-37, excluding Rule 35, of the Tennessee Rules of Civil Procedure. Tenn. R. Civ. P. 69.03. If judicial process or execution cannot operate to carry into effect the judgment, the court may enforce its judgment by an attachment for contempt. Tenn. Code Ann. § 26-1-102.

If the judgment debtor is a corporation, the court may authorize a *fieri facias* to be levied against the things to which the corporation may have a legal right in addition to an execution on the goods, lands, and tenements. The court may appoint a receiver to collect the proceeds. Tenn. Code Ann. § 26-1-105. Court executions are tested the day of issuance. Tenn. Code Ann. § 26-1-109.

The court clerk may issue executions in favor of the successful party without demand. Tenn. Code Ann. § 26-1-201. From courts of record, the issuance may be any time after thirty days following judgment. Tenn. Code Ann. § 26-1-203. In all other cases, the court shall issue to the plaintiff, plaintiff's agent, or plaintiff's counsel execution on demand. Tenn. Code Ann. § 26-1-207. An accelerated execution may be issued upon a showing that the defendant is about to fraudulently dispose of, conceal, or remove the defendant's property. Tenn. Code Ann. § 26-1-206. No alias or pluries execution can be issued until the original is accounted for satisfactorily by affidavit. Tenn. Code Ann. § 26-1-108.

Requirements for endorsement and docketing of an execution by the court clerk are found in Tenn. Code Ann. §§ 26-1-301 – 304. Executions must be returned within thirty days after their issuance. Tenn. Code Ann. § 26-1-401. The officer who receives the execution must give a receipt, if requested, and make sufficient return along with the money collected on or before the return day. Tenn. Code Ann. § 26-1-402.

Proceedings to enforce judgments, including execution, may be stayed for various reasons and through specified methods delineated in Tenn. R. Civ. P. 62. The sections of this rule have no

effect on the provisions concerning immediate issuance of execution, found at Tenn. Code Ann. § 26-1-206.

43.02 EXEMPTIONS

The debtor can claim certain property as exempt from execution pursuant to provisions of the Tennessee Code Annotated. The exemptions that may be claimed, and are also applicable as exemption claims in bankruptcy proceedings pursuant to Tenn. Code Ann. § 26-2-112, are found in Tenn. Code Ann. §§ 26-2-101 *et seq.*

On the application of the judgment creditor, the court may inquire into the accuracy of any exemption claimed by the debtor. If the court finds that a knowingly false claim of exemption was made, the court may enter an order denying the debtor the right to claim any further exemption as to that creditor. Tenn. Code Ann. § 26-2-115.

A stipulation in a note waiving the right of exemption is void as against public policy. *Sherwin Williams Co. v. Morris*, 156 S.W.2d 350 (Tenn. App. 1941).

43.03 LEVY OF EXECUTION

The former requirement that personalty must be levied upon before realty is repealed. Tenn. R. Civ. P. 69.02. Specific requirements concerning the levy of execution are found in Tenn. Code Ann. §§ 26-3-101 *et seq.* Provisions concerning a levy, lien of levy or sale of execution on personalty are found in Tenn. R. Civ. P. 69.06. Different types of execution on realty, including lien lis pendens, judgment lien, levy, sale and termination statement are located in Tenn. R. Civ. P. 69.07 and Tenn. Code Ann. §§ 25-5-101 *et seq.*

43.04 TIME FOR JUDGMENT - EXTENSION

If a judgment remains unsatisfied, a judgment creditor may, within ten years from entry of a judgment, move the court for an extension of the judgment for an additional ten years. The same procedure can be repeated within any ten year period until the judgment is satisfied. Tenn. R. Civ. P. 69.04.

43.05 UNSATISFIED EXECUTIONS

If an officer cannot satisfy the debt upon execution before the return date, the officer must return the execution and an alias or pluries execution will issue. Tenn. Code Ann. § 26-3-114. Such alias or pluries execution shall show endorsements indicating the amounts paid upon any former execution, and specifying the amount for which the sureties are bound, if less than the unsatisfied balance. *Id.*

43.06 SALE

Provisions which set out the specific process and procedures for conducting a land sale, including requirements for redemption of such realty, are found in Tenn. Code Ann.§ 26-5-101 *et seq.* When corporate stock is sold, the executing officer executes an assignment to the purchaser and the return on the execution is notice to all the world of the sale. The corporate officer, when shown such assignment, must make the transfer on company books. Tenn. Code Ann. § 26-5-106. Special provision is made for the sale of liquors. Tenn. Code Ann. § 26-5-107.

43.07 FOREIGN JUDGMENTS

Tennessee has enacted the Uniform Enforcement of Foreign Judgments Act. Tenn. Code Ann.§§ 26-6-101 *et seq.* A copy of a foreign judgment authenticated in accordance with the law may be filed in the office of any chancery or circuit court. It has the same effect and is subject to the same rules that apply to other judgments in the state. Tenn. Code Ann.§ 26-6-104. This procedure does not prohibit a judgment creditor from bringing an action to enforce the creditor's judgment instead of proceeding under the foreign judgments act. Additionally, the statute provides that the judgment is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a court of record of this state.

The Tennessee Supreme Court held in *David New v. Lavinia Dumitrache,* 604 S.W.3d 1 (Tenn. 2020) that the writ of error is no longer a viable method of appeal in this State and the chancery court correctly dismissed the plaintiff's request to enroll the Texas decree because he provided an incomplete copy of the decree.

43.08 CRIMINAL CASES

All personalty exemptions apply to criminal as well as civil cases. Tenn. Code Ann. § 26-2-113.

CHAPTER 44

GARNISHMENT

Special thanks to Judge William T. Ailor for his review of this chapter.

Contents **Section**

44.01 IN GENERAL

One of the remedies that may be implemented at the commencement of and during the course of an action for the purpose of securing satisfaction of a judgment is garnishment. Tenn. R. Civ. P. 64. Tennessee has adopted the Personal Property Owner's Rights and Garnishment Act of 1978 which is codified in Tennessee Code Annotated Section 26-2-101 *et seq.* Garnishment refers to any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of any debt. Tenn. Code Ann. § 26-2-102.

44.02 PROPERTY AFFECTED

All property, debts, and effects of and in the possession or under the control of the garnishee at the time notice is served (or under the garnishee's control if acquired subsequent to the service of notice but before judgment) are subject to garnishment to satisfy the garnishee's debt. Tenn. Code Ann. § 26-2-202. The words "property, debts, and effects" include real estate and things to which the person may have a legal right whether due or not, judgments before a court, and money or stocks in an incorporated company. Tenn. Code Ann. § 26-2-201.

Garnishment of salaries, wages, or other compensation due from the state or from any county or municipality to any employee is permissible. A special procedure for these garnishments is set forth in Tenn. Code Ann. § 26-2-221. Certain earnings, however, are exempt from garnishment. *See* Tenn. Code Ann. §§ 26-2-104 to -111 (concerning exemptions). For example, pensions, some retirement funds, certain insurance benefits, and some child support payments are exempt from garnishment. *Id.*

44.03 ATTACHMENT PROCEDURE

To attach by garnishment, written notice is left for the defendant's debtor or the person holding the defendant's property (garnishee) that appearance is required before the court at a certain time and place to respond to questions about the defendant's property. The garnishee may answer in person or in writing. Tenn. Code Ann. §29-7-103. The form for the summons and notice are set out

in Tenn. Code Ann. § 26-2-203. The garnishee is required to retain possession of all of defendant's property. Tenn. Code Ann. § 26-2-203; Tenn. Code Ann. § 29-7-104. The garnishee may be required to answer under oath questions pertaining to the defendant's property. The garnishee's answer is not conclusive. Tenn. Code Ann. § 26-2-205.

If the court determines that the garnishee holds property of the defendant's the court may enter judgment and execution for the property. Tenn. Code Ann. § 26-2-206. If the examination makes it appear that others hold defendant's property, the plaintiff may request that they be given notice and that similar proceedings commence. Tenn. Code Ann. § 26-2-207. If the garnishee fails to appear, a conditional judgment is rendered against the garnishee. If the garnishee, upon notice, fails to appear and show cause why judgment should not be rendered, the judge must make the conditional judgment a final judgment holding the garnishee liable for the plaintiff's entire debt and costs. Tenn. Code Ann. § 26-2-209.

44.04 EXECUTION PROCEDURE

Anyone may be summoned in writing as a garnishee to appear in the court which issued the execution or to which the execution is returnable. The time set for appearance must be within ten days of issuance. If the court has issued the execution, the court shall set the time at which the garnishee shall appear. The summons to the garnishee must notify the garnishee to determine whether the defendant's property is in his or her possession and to furnish a copy of the summons to the defendant either by mailing it to the last address appearing in the garnishee's records or by actual delivery. Tenn. Code Ann. § 26-2-203.

44.05 FEDERAL RESTRICTIONS

In its capacity to regulate interstate commerce, Congress has enacted several restrictions on state garnishment laws. The federal statutes are not an attempt to create or establish garnishment proceedings, but are meant only to preempt state laws that are less restrictive, thus guaranteeing every debtor a minimum of protection regardless of residence.

The major restrictions and the comparable Tennessee statutes are as follows:

FEDERAL	TENNESSEE
The exemption of personal earnings is 25% of disposable earnings OR the excess over the Federal minimum wage multiplied by thirty, 15 U. S. C. A. 1673.	Tenn. Code Ann. § 26-2-106

44.06 RIGHTS OF GARNISHEE

TENNESSEE

A garnishee has rights established by Tennessee statutory law. These rights are set out in Tenn. Code Ann. §§ 29-7-101 – 119.

FEDERAL

A garnishee has rights established by federal statutory law. These rights are set out in 15 U.S.C.A. 1673 and 15 U.S.C.A. 1674.

CHAPTER 45

STAY OF PROCEEDINGS TO ENFORCE JUDGMENT

Special thanks to Judge Kristi Davis for her review and edits of this chapter.

Contents **Section**

45.01 INITIAL STAY AND ADDITIONAL STAY

Executions on judgments cannot be issued until the expiration of thirty days following the entry of the judgment. Actions involving removal of public officers, custody of minor children, injunctions and receiverships are not subject to the initial stay. Tenn. R. Civ. P. 62.01.

The execution on a judgment is also stayed for thirty days after the entry of an order made upon a timely motion for judgment in accordance with a directed verdict motion, motion to amend or make additional findings of fact, motion to alter or amend the judgment, or a motion for a new trial. Tenn. R. Civ. P. 62.02.

45.02 STAY AND BOND PENDING APPEAL

If an appeal is taken of any action, other than alimony or child support actions and those specified in Rule 62.01, the appellant may, upon the giving of an appropriate bond, obtain a stay of execution on the judgment pending the appeal. Such bond is within the court's discretion and upon such terms as the court deems appropriate to secure the other party to the action. Tenn. R. Civ. P. 62.03, 62.04. The bond must be sufficiently secured. Tenn. R. Civ. P. 62.05. Bond requirements for money judgments are found in Tenn. R. Civ. P. 62.05(1). For judgments requiring possession, delivery, sale, or assignment of real or personal property, the bond requirements are set out in Tenn. R. Civ. P. 62.05(2).

The judge may also exercise discretion to allow the stay of an execution on a bond amount that is less than that specified in Rule 62.05 for good cause shown, upon a consideration of the appropriate factors including financial condition of the appealing party. A party proceeding as an indigent person may proceed without giving any security under the terms of Rule 18 of the Tennessee Rules of Appellate Procedure. Those provisions allow individuals who have proceeded as an indigent person at trial to continue to do so on appeal unless the trial judge finds and rules in writing that the person is not entitled to so proceed. A party who did not proceed as an indigent person at trial, but wishes to do so on appeal, must first request permission to do so from the trial judge. If the trial judge denies permission, the party may request permission in the appellate court. Tenn. R. Civ. P. 62.05(2).

Tenn. R. Civ. P. 62.06 addresses the granting of a stay where the appellant is a state, county or municipal governmental entity. Tenn. R. Civ. P. 62.07 specifies that the rules concerning the granting of a stay to enforce judgment are not to serve as a limit to the power of a trial court judge.

Similarly, Tenn. R. Civ. P. 62.08 specifies that such rules are not to serve as a limit to the power of an appellate court judge. Finally, Tenn. R. Civ. P. 62.09 addresses the application of the stay provisions/rules where multiple claims and/or multiple parties are concerned.

CHAPTER 46

ENFORCEMENT OF SPOUSAL AND CHILD SUPPORT

Special thanks to Judge Joe Thompson for his review and edits of this chapter.

Contents **Section**

46.01 IN GENERAL

A judge granting an absolute divorce or decreeing a perpetual or temporary separation may order spousal and child support. Tenn. Code Ann. §§ 36-5-121 and 36-5-101, respectively. An order for support is a judgment enforceable as any other judgment. Tenn. Code Ann § 36-5-101(f)(1). If the amount due is not paid by the due date, the unpaid amount becomes a judgment for that amount. Prior to April 17, 2017, interest accrues on any judgment for unpaid child support at the rate of twelve percent (12%) per year.

On or after April 17, 2017, interest no longer accrues on unpaid child support unless the court makes a written finding that interest shall continue to accrue. In making such a finding, the court shall set the interest at no more than four percent (4%) per year.

On or after July 1, 2018, interest in non-Title IV-D cases shall accrue at the rate of six percent (6%) per year, although the court in its discretion may reduce or eliminate interest payments. On or after July 1, 2018, interest shall not accrue in Title IV-D cases unless the court makes a written finding that interest shall accrue. In such cases, the court may set the rate at no more than six percent (6%) per year.

Accumulated interest is considered child support. Tenn. Code Ann § 36-5-101(f)(1).

An excellent resource for all issues regarding spousal support is the Alimony Bench Book published periodically by the Family Law Section of the Tennessee Bar Association.

46.02 IN-STATE ENFORCEMENT

All orders for child support issued or modified after July 1, 1994, must include an order

for an immediate assignment of wages. Tenn. Code Ann. § 36-5-501. This mandate is subject to three exceptions: (1) the judge makes a finding in a case modifying support that a wage assignment would not be in the best interests of the child and finds that the support has been timely; (2) the parties consent in writing and the court approves; or (3) the support order is being enforced by the state and the Department of Human Services agrees to the exception. Tenn. Code Ann. § 36-5- 501(a)(2). If a wage assignment is not originally ordered, it may be requested by affidavit and activated by the clerk if the support is not paid on the due date. No court order expressly authorizing an income assignment shall be required. Tenn. Code Ann. § 36-5-501(b)(1)(D).

In proceedings under the Uniform Interstate Family Support Act, Tenn. Code Ann. § 36-5-2001 *et seq.*, discussed below, an income assignment issued by another state may be sent to an employer in this state without first registering the order in this state or filing a similar petition in this state. The employer is required to treat the order as one received from this state if the order appears regular on its face. Tenn. Code Ann. § 36-5-2501.

If the obligor wishes to contest the order, s/he must request a hearing within twenty (20) days after receiving notice and a copy of the registered order, if the order is from another state. Tenn. Code Ann. § 36-5-2605(b)(2). If the order is from a foreign country, the contest must be filed within thirty (30) days, unless the obligee resides outside of the United States, in which case the contest must be filed within sixty (60) days. Tenn. Code Ann. § 36-5-2707(b). The obligor must give notice of contest to the support enforcement agency that is assisting the obligee, to each employer that has directly received an income-withholding order relating to the obligor, and to the person designated in the order to receive the payments. Tenn. Code Ann. § 36-5-2506.

Alternatively, if a person who owes a child support obligation (obligor) is more than thirty (30) days in arrears, the clerk may issue, upon written request (by the custodial parent or guardian of the child/ren), a summons for the person, or, in the court's discretion, an attachment setting a bond of not less than $250 but not more than the amount of the arrearage. The court may also require the giving of bond to secure other support obligations, which may be forfeited upon failure to appear. Tenn. Code Ann. § 36-5-101(f)(2). The court may then conduct proceedings to determine whether the person is in willful contempt of the court's support order. The court may also award reasonable attorney fees and costs for the benefit of the party who was forced to bring the action to enforce the court's order in actions for either civil or criminal contempt. Tenn. Code Ann. § 36-5-103(c).

Support orders may also be enforced by interception of federal income tax refunds and by administrative order of wage assignment issued pursuant to a court order. Tenn. Code Ann. § 36-5-103(d)-(e). An obligee may also seek the revocation of certain state licenses for failure to comply with a child support order. Tenn. Code Ann. § 36-5-101(f)(5); *see also* Tenn. Code Ann. § 36-5-701 *et seq.*

By operation of law, a lien arises against both in-state real and personal property owned by an obligor who owes child or spousal support in any case that is being enforced by the Department of Human Services. Tenn. Code Ann. § 36-5-901. Special provisions regarding the

operation of support liens are set forth in Tennessee Code Annotated sections 36-5-901 *et seq.* The available methods of enforcement include seizing payments due to the obligor, attaching and seizing the obligor's assets held in financial institutions, attaching retirement funds, and forcing the sale of property. Tenn. Code Ann. § 36-5-904. The Department also can issue an administrative order of seizure directed to any person or entity with assets of the obligor. Tenn. Code Ann. § 36-5-905.

46.03 INTERSTATE ENFORCEMENT

The law requires the Department of Human Services to use the same enforcement procedures in response to a request from another state to enforce support duties as it uses for intrastate cases. Tenn. Code Ann. § 36-5-1201. This includes searching various available state databases to determine whether information is available about the obligor.

46.04 JURISDICTION - UNIFORM INTERSTATE FAMILY SUPPORT ACT

Tennessee also has adopted the Uniform Interstate Family Support Act. Tenn. Code Ann. §§ 36-5- 2001 *et seq*. A court in Tennessee may exercise personal jurisdiction over a nonresident individual or that individual's guardian or conservator in a proceeding to establish, modify, or enforce a support order or to determine parentage if: (1) the individual is served with notice in the state; (2) the individual consents to jurisdiction either by general appearance, consent, or by filing a responsive document; (3) the individual resided with the child in this state; (4) the individual resided in the state and provided prenatal expenses or support for the child; (5) the child resides in the state as a result of the acts or directives of the individual; (6) the individual engaged in sexual intercourse in the state and the child may have been conceived by that act of intercourse; (7) the individual asserted parentage in the putative father registry in this state; or (8) any other basis consistent with the Tennessee or United States constitutions for the exercise of personal jurisdiction. Tenn. Code Ann. § 36-5-2201.Tennessee is both an initiating and responding state for purposes of the Act. If a pleading has been filed in another state or foreign country, the court in Tennessee may exercise jurisdiction only if the petition filed in Tennessee is filed within the time required to respond in the other state or foreign country and challenges jurisdiction; the contesting party challenges jurisdiction in the other state; and Tennessee is the home state of the child. Similarly, if a petition is pending in this state and the contesting party files a petition in another state or foreign country within the time required to respond in Tennessee, challenging jurisdiction, and that state or foreign country is the home state, Tennessee courts shall not exercise jurisdiction. Tenn. Code Ann. § 36-5-2204.

A Tennessee court issuing a lawful support order maintains continuing, exclusive jurisdiction over the child support order if the obligor, the obligee, or the child resides in the state, or until all parties file a written consent to allow another state to assume jurisdiction. Tenn. Code Ann. § 36-5-2205. Continuing, exclusive jurisdiction over a spousal support order remains as long as the support obligation exists.

When different courts have issued multiple orders in support cases, the Act provides rules for determining which order should be recognized. Tenn. Code Ann. § 36-5-2207.

46.05 COMMENCEMENT

An individual or a support enforcement agency may file a proceeding under the Act either in a state with personal jurisdiction over the obligor or in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or comparable proceeding directly in a tribunal or another state or foreign country that has or can obtain personal jurisdiction over the respondent. Tenn. Code Ann. § 36-5-2301(b). If a petition is filed in an initiating tribunal, the tribunal is required to forward the petition and accompanying documents to the responding tribunal or to the appropriate support enforcement agency in the responding state or foreign country, or if the agency is unknown, to the state information agency with a request to forward to the appropriate tribunal and acknowledge receipt. Tenn. Code Ann. § 36-5-2304(a). If requested by the responding tribunal, a tribunal of this state shall issue a certificate or other document and make findings required by the law of the responding state. If the responding tribunal is in a foreign country, upon request, the tribunal of this state shall specify the amount of support sought, convert that amount into the equivalent amount in the foreign currency under the applicable official or market exchange rate as publicly reported, and provide any other documents necessary to satisfy the requirements of the responding foreign tribunal. Tenn. Code Ann. § 36-5-2304(b).

If an obligee wishes to gain enforcement of a support order in a responding tribunal, the obligee may (1) have any income assignment order sent directly to the obligor's employer for compliance, (2) provide the order to the support enforcement agency in the state for registration, or (3) submit the order for registration and enforcement along with a sworn statement to the tribunal in the responding state or foreign country. Tenn. Code Ann. §§ 36-5-2502, -2507, -2602.

46.06 FORM AND PROCEDURE

The petition to establish or modify a support order must, unless otherwise ordered, contain the name, residential address, and social security number of the obligor and the petitioner, and the name, sex, residential address, social security number, and date of birth for each child for whom support is sought. Tenn. Code Ann. § 36-5-2311(a). A copy of any support order in effect must accompany the petition. The petition must specify the relief sought. Tenn. Code Ann. § 36-5-2311(b). Costs and attorney fees may be assessed against an obligor if the petitioner prevails. Tenn. Code Ann. § 36-5-2313(b). If the court determines that the hearing was requested for the purposes of delay (which is presumed if a support order is confirmed or enforced without change), the court is required to order the payment of costs and fees. Tenn. Code Ann. § 36-5-2313(c).

The Act sets out special rules of evidence and procedure. For example, the physical presence of the obligor is not a prerequisite to the establishment, enforcement, or modification of a support order by a responding tribunal. Tenn. Code Ann. § 36-5-2316. An affidavit, a document substantially complying with the federally mandated forms, or a document incorporated by reference in any of them, which would not be excluded by the hearsay rule if given in person, is admissible if given under oath by a party or witness residing in another state. Tenn. Code Ann. § 36-5-2316(b). Likewise, a copy of the child support payment records

certified as "true" by the custodian is admissible to establish whether payments were made in the responding tribunal. Tenn. Code Ann. § 36-5-2316(b). Special rules also apply to electronically transmitted documentary evidence and electronic and audio-visual depositions. Tenn. Code Ann. § 36-5-2316(e) – (f).

If in a proceeding under the Act, a witness refuses to testify on the basis of the Fifth Amendment, the fact finder may draw an adverse inference from the refusal. Neither the spousal privilege nor the parent-child or husband-wife immunity defense applies in proceedings under the Act. Tenn. Code Ann. 36-5-2316 (g) – (i).

The Act provides a separate procedure for inter-county enforcement of support orders. Primarily, this portion of the statute allows for transfers without re-filing, jurisdiction of the court to which the filing is transferred, and admission of the certified court orders from the transferring court without the need for the record keeper's testimony. A party objecting to a transfer must file an objection in the transferor court within fifteen (15) days of the mailing date of the notice from the requesting party. Tenn. Code Ann. §§ 36-5-3001 *et seq*.

46.07 OTHER REMEDIES

Remedies under the Uniform Interstate Family Support Act are in addition to and not instead of other remedies. Tenn. Code Ann. § 36- 5-2103.

46.08 CRIMINAL REMEDIES

The failure to support is also a criminal offense in Tennessee. Tenn. Code Ann. § 36-5-104. The governor may demand the surrender of one found in another state who is charged criminally in this state with having failed to support. Tenn. Code Ann. § 36-5-2801(b)(1). Our governor's responsibility is the same upon receipt of a demand from another.

CHAPTER 47

POST-TRIAL MOTIONS AND APPEALS

Special thanks to Chancellor Melissa Thomas Blevins-Willis for her review and edits of this chapter.

Contents **Section**

47.01 POST-TRIAL MOTIONS

The Tennessee Rules of Civil Procedure provide for post-trial motions in both Rules 59 and Rule 60. Rule 59 provides for motions for judgment in accordance with a directed verdict motion, motions for additional or altered findings of fact, motions for new trial, and motions to alter or amend the judgment. These are the only motions that extend the time for taking an appeal in Tennessee. Tenn. R. Civ. P. 59.01. They must be filed and served within thirty days after judgment has been entered. Tenn. R. Civ. P. 59.02. A judgment is deemed entered when the signed order has been stamp filed with the clerk pursuant to Tenn. R. Civ. P. 58.

If a motion for new trial is based upon affidavits, the affidavits must be filed and served with the motion unless otherwise authorized by the court. Tenn. R. Civ. P. 59.03. The opposing party has ten days to reply unless the court grants or the parties stipulate to an extension for a maximum for twenty days.

A court may alter or amend a judgment or grant a new trial on its own motion, or after giving the parties notice and an opportunity to be heard on a timely filed motion for new trial, the court may grant such motion on grounds not stated in the motion. In either case, the grounds for such action shall be stated specifically in the order. Tenn. R. Civ. P. 59.05.

If the motion is granted on the grounds that the verdict was contrary to the weight of the evidence, either party may request that the new trial be conducted by a different judge or chancellor. Tenn. R. Civ. P. 59.06.

Tenn. R. Civ. P. 60.01 and 60.02 are applicable to General Sessions Courts pursuant to Tenn. Code Ann. § 16-15-727.

Rule 60 also provides for post-trial motions when relief is required for orders or judgments due to clerical mistakes, inadvertence, excusable neglect, fraud misrepresentation, void judgment, or other enumerated reasons. The rule requires that the motion be made within a reasonable time, but if the motion is based upon mistake, inadvertence, excusable neglect, fraud, misrepresentation, or misconduct of the adverse party, such motion must be made within one year of the judgment. Tenn. R. Civ. P. 60.02. The "reasonable time" filing requirement may require further inquiry by the Court consistent with applicable case law if the motion is based on a void judgment.

Rule 60 motions do not affect the finality of the judgment or suspend its operation. The court may, however, enter an order doing so if the circumstances require it.

47.02 APPEALS

Civil and Criminal appeals are governed by the Tennessee Rules of Appellate Procedure. An appeal as of right lies from every final judgment entered by a trial court pursuant to Tenn. R. App. P. 3.

An appeal is perfected by the filing of a notice of appeal with the clerk of the appellate court within thirty days after the entry of judgment. Tenn. R. App. P. 3(e) - 4. The trial court is required to approve the transcript or statement of the evidence and authenticate the exhibits as soon as practicable after they are filed, but in no event later than thirty days following the period of time allowed for the appellee to object to the compiled record. Tenn. R. App. P. 24(f).

CHAPTER 48

ORDERS OF PROTECTION

Special thanks to Judge Angelita Dalton for her review and edits of this chapter.

Contents **Section**

48.01 IN GENERAL

Tennessee law provides protection for an adult or minor who has been subjected to or threatened with abuse by a current or former spouse; someone with whom he/she has lived or is currently living; someone he/she has dated or is currently dating; someone with whom he/she has or had a sexual relationship; someone to whom he/she is related by blood or adoption; someone to whom he/she is related or was formerly related by marriage; or a child of a person who falls within any of these categories. Tenn. Code Ann. §§ 36-3-601 and 36-3-602. Abuse means "inflicting, or attempting to inflict, physical injury on an adult or minor by other than accidental means, placing an adult or minor in fear of physical harm, physical restraint, malicious damage to the personal property of the abused party, including inflicting, or attempting to inflict, physical injury on any animal owned, possessed, leased, kept, or held by an adult or minor, or placing an adult or minor in fear of physical harm to any animal owned, possessed, leased, kept, or held by the adult or minor." *Id*.

Protection is also provided for anyone who has been subjected to, threatened with, or placed in fear of sexual assault or stalking. Tenn. Code Ann. § 36-3-602.

48.02 PROCEDURE

The person seeking protection must file a sworn petition alleging abuse. The AOC, in consultation with the domestic violence coordinating council, has developed the forms for orders of protection. The clerk's office must make these forms, which may be printed from the website of the Administrative Office of the Courts, available to individuals who are seeking an order of protection. Tenn. Code Ann. § 36-3-604. However, petitioners are not limited to the use of these forms and may present to the court any legally sufficient petition in whatever form. *Id*.

The clerk's office is required to assist a person seeking protection who is proceeding *pro se* in filling in the name of the court on the petition, indicating where the petitioner's name shall be filled in, reading through the petition form, and rendering any other assistance necessary for the filing of

the petition. . Moreover, a petition filed by a *pro se* petitioner must be liberally construed in the petitioner's favor. *Id*.

48.03 EX PARTE ORDERS

Upon the filing of a petition, the court may, for good cause shown, issue an *ex parte* order of protection. A finding of immediate and present danger of abuse shall constitute good cause. Tenn. Code Ann. § 36-3-605. A copy of the petition and *ex parte* order as well as notice of the date set for the hearing must be served on the respondent at least five days prior to the hearing. The notice must advise the respondent of the right to be represented by counsel. If the respondent is not a resident of Tennessee, the *ex parte* order must be served pursuant to Tenn. Code Ann. §§ 20-2-215 and 20-2-216. *Id.*

In every case, unless the court finds that the action would create a threat of serious harm to the minor, when a petitioner is under 18 years of age, a copy of the petition, notice of hearing and any *ex parte* order of protection shall also be served on the parents of the minor child, or in the event that the parents are not living together and jointly caring for the child, upon the primary residential parent.

48.04 HEARINGS

If an *ex parte* order is issued, the respondent is entitled to a hearing, which must occur within 15 days of service of the *ex parte* order of protection. At the hearing, the court must either dissolve the *ex parte* order or, if the petitioner has proved the allegation of domestic abuse, stalking, or sexual assault by a preponderance of the evidence, extend the protective order for a definite period not to exceed one year. Tenn. Code Ann. § 36-3-605. Further hearings and extensions may occur. Any *ex parte* order of protection shall be in effect until the time of the hearing. *Id.*

If an *ex parte* order has not been entered prior to the hearing but the petitioner establishes the allegations of abuse, stalking, or sexual assault by a preponderance of the evidence at the hearing, the court may issue an order of protection for a definite period not to exceed one year. *Id*.

If an order of protection is extended after a respondent has been properly served and afforded the opportunity for a hearing and is found to be in violation of the order, the court may extend the order of protection up to five years. If an order of protection is extended after a respondent has been properly served and afforded the opportunity for a hearing, and is found to be in a second or subsequent violation of the order, the court may extend the order of protection up to 10 years. No new petition is required to be filed in order for a court to modify or extend an order. *Id*.

48.05 SERVICE

If the respondent has been properly served with a copy of the petition, notice of hearing, and *ex parte* order of protection, subsequent orders of protection shall be effective when entered. Tenn. Code Ann. § 36-3-609. Copies of orders of protection, modifications, and dismissals are required to be issued to the petitioner, the respondent, and local law enforcement agencies in the jurisdiction where petitioner resides. *Id.* Specific requirements for service on the respondent are contained in

Tenn. Code Ann. § 36-3-609. If a party lives outside the county in which the order was issued, the clerk may transmit the order to the sheriff in the appropriate county via facsimile or other electronic transmission. *Id*.

48.06 SCOPE AND ENFORCEMENT

The scope of a protective order is set out in Tenn. Code Ann. § 36-3-606. Enforcement of orders of protection is provided for in Tenn. Code Ann. § 36-3-610.

48.07 COSTS

No victim shall be required to bear the costs, including any court costs, filing fees, litigation taxes or any other costs associated with the filing, issuance, registration, service, dismissal or nonsuit, appeal or enforcement of an *ex parte* order of protection, order of protection, or a petition for either such order, whether issued inside or outside the state. If the court, after the hearing, issues or extends an order of protection, all court costs, filing fees, litigation taxes and attorney fees shall be assessed against the respondent. Tenn. Code Ann. § 36-3-617.

If the court does not issue or extend an order of protection and the court finds by clear and convincing evidence that the petitioner is not a domestic abuse victim, stalking victim, or sexual assault victim (such determination not being based on the fact that the petitioner requested that the petition be dismissed, failed to attend the hearing or incorrectly filled out the petition) and the court finds by clear and convincing evidence that the petitioner knew that the allegation of domestic abuse, stalking, or sexual assault was false at the time the petition was filed, the court may assess all court costs, filing fees, litigation taxes and attorney fees against the petitioner, because the petitioner was not found to be a victim. *Id*.

48.08 OUT-OF-STATE ORDERS

Any valid protective order related to abuse, domestic abuse, or domestic or family violence that is issued by a court of another state, tribe, or territory is entitled to full faith and credit by the courts of this state if the requirements of Tenn. Code Ann. § 36-3-622 regarding notice and opportunity to be heard have been met. In order to secure enforcement of a foreign order of protection, the petitioner may present a certified copy of the foreign order to the clerk of the court having jurisdiction over protective orders. No fees or costs shall be charged. Tenn. Code Ann. § 36-3-622.

48.09 FIREARMS

If an order of protection is granted in a manner that fully complies with 18 U.S.C. § 922(g)(8), the respondent will be required to terminate physical possession of all firearms within 48 hours of issuance of the order. It is a criminal offense for any such respondent to be in possession of a firearm while the order is in effect. Upon issuance of the order of protection, the court shall instruct the respondent to terminate physical possession of firearms, and complete and file an "Affidavit of Firearm Dispossession" developed by the domestic violence state coordinating council, in

consultation with the administrative office of the courts. The affidavit may be obtained from the website of the administrative office of the courts. Tenn. Code Ann. § 36-3-625.

CHAPTER 49

ALTERNATIVE DISPUTE RESOLUTION

Special thanks to Judge Robert Bateman for his review and edits of this chapter.

Contents **Section**

49.01 IN GENERAL

Alternative Dispute Resolution is defined as any procedure for settling a dispute by means other than litigation. *Black's Law Dictionary* (11th ed. 2019). By Order entered on October 3, 2018, Tennessee Supreme Court Rule 31 ("Rule 31") was divided into two rules: Rule 31 and Rule 31A ("Rule 31A"). Rule 31 addresses mediators who are overseen by the Alternative Dispute Resolution Commission ("ADRC"). Rule 31A addresses other forms of alternative dispute resolution including but not limited to case evaluations, judicial settlement conferences, mini-trials, non-binding arbitrations, or summary jury trials and requires neutrals to be attorneys. The Court and Board of Professional Responsibility oversee neutrals under Rule 31A. Rule 31 and Rule 31A provide that they do not affect or address the general practice of mediation or alternative dispute resolution in the private sector outside the scope of either Rule 31 or Rule 31A.

Under either Rule 31 or Rule 31A, on the motion of either party or by the court's own motion, parties in any civil action, with the exception of civil commitments, adoption proceedings, habeas corpus and extraordinary writs, or juvenile delinquency (or dependency and neglect cases under Rule 31) may be ordered to participate in a mediation under Rule 31 or a judicial settlement conference under Rule 31A. In addition, with consent of the parties, under Rule 31A, a court may order a case evaluation, non-binding arbitration, mini-trial, summary jury trial, or other appropriate alternative dispute proceedings.

Sections 4 of both Rule 31 and Rule 31A provide the procedure for selecting a Rule 31 Mediator ("mediator") or Rule 31A Neutral ("neutral").

49.02 COSTS

Pursuant to Section 8 of both Rule 31 and Rule 31A, the costs of any Rule 31 Mediation or Rule 31A ADR Proceeding ("ADR proceeding"), including the costs of the services of a mediator or neutral may, at the mediator's or neutral's request, be charged as court costs. The court has the authority to waive or reduce those costs. If an appeal of the case is filed, the parties shall advise the court in their

appellate briefs whether the mediator or neutral requested that the cost of the mediator's or neutral's services be included in the court costs.

49.03 QUALIFIED RULE 31 MEDIATORS AND RULE 31A NEUTRALS AND THEIR RESPONSIBILITIES

In order to participate as a mediator in a Rule 31 mediation or a neutral in a Rule 31A ADR proceeding, an individual must qualify under the provisions of the applicable rule. Among the requirements for continued listing as a Rule 31 Mediator, a mediator must be available to conduct three *pro bono* mediations per year, not to exceed 20 total hours. At the initiation of a mediation, the court may, upon a showing by one or more parties of an inability to pay, direct that the mediator serve without pay. No mediator will be required to conduct more than three *pro bono* proceedings or serve *pro bono* for more than 20 hours in any continuous 12-month period. In order to participate as a Rule 31A neutral, one must be a licensed attorney.

49.04 COMPENSATION

With the exception of the *pro bono* requirement and the fee waiver/reduction options noted above, mediators are entitled to reasonable compensation for their services. However, pursuant to Tennessee Supreme Court Rule 38 and Tennessee Code Annotated Title 36, Chapter 6, Part 4, there may be circumstances in which a mediator will provide services to indigent persons at reduced cost or no cost. Subject to the availability of funds, the mediator will be compensated for those services pursuant to Rule 38 and Tenn. Code Ann. § 36-6-413 (Divorcing Parent Education and Mediation Fund). Neutrals are entitled to be compensated at a reasonable rate for participation in court-ordered alternative dispute resolution proceedings.

49.05 RULE 31 MEDIATORS

No person shall act as a Rule 31 mediator without first being listed by the ADRC. To be listed, mediators must pay application fees set by the ADRC and comply with the qualification and training requirements set forth in Rule 31. A database of actively listed mediators is maintained on the AOC's website and can be accessed at the following address: https://www.tncourts.gov/programs/mediation/find-mediator.

49.06 RULE 31A NEUTRALS

Any lawyer in good standing can act as a neutral in non-binding arbitration, a mini-trial, or case evaluation.

CHAPTER 50

PARENTING PLANS

Special thanks to Judge Joe Thompson for his review and edits of this chapter.

Contents **Section**

50.01 IN GENERAL

Tennessee law requires the filing of a parenting plan in all divorce cases where there are minor children of the marriage. Tenn. Code Ann. §§ 36-6-401 *et seq*. The parenting plan, the purpose of which is to assign responsibility for parenting, replaces the longstanding notions of sole custody and visitation with the ideas of primary residential parent and alternate parent parenting time. The parenting responsibilities allocation agreed to by the parties will be accepted by the court if it is consistent with any limitations on parental decision making mandated by law; is voluntary and knowing; and is in the child's best interest. Tenn. Code Ann. § 36-6-407.

In certain limited circumstances, alternative dispute resolution methods may not be utilized in the parenting plan or as the mechanism for approval of the plan. These exceptions are set out fully in Tenn. Code Ann. § 36-6-409.

50.02 CONTENTS OF PARENTING PLAN

As provided by statute, a parenting plan shall (1) provide for the child's changing needs in a way that minimizes the need for modification of the plan; (2) establish the authority and responsibility of each parent; (3) minimize the child's exposure to harmful parental conflict; (4) provide for a process for dispute resolution before court action unless precluded by law; (5) allocate decision making authority regarding the child's education, health care, extracurricular activities, and religious upbringing; (6) provide that each parent may make day-to-day decisions regarding the child while the child is residing with the parent; (7) provide that when mutual decision making is designated but cannot be accomplished, each parent will make a good-faith effort to resolve the issue through appropriate dispute resolution processes; (8) require an annual report of income as defined by the child support guidelines; and (9) specify that a parent shall make appropriate transportation arrangements if the parent does not have a valid driver license. A permanent parenting plan must also include a residential schedule. Tenn. Code Ann. § 36-6-404.

50.03 TEMPORARY PARENTING PLANS

Courts must incorporate a temporary parenting plan in any temporary order of the court in actions for divorce, separation, annulment, or separate maintenance involving a minor child. The plan must include the provisions set forth above which are applicable at the time the temporary plan is prepared and must include a residential schedule. If the parties agree to a temporary parenting plan, a written plan is not required. If they cannot agree, on either's request, either party may request the court to order mediation to establish a temporary plan unless the law prohibits alternative dispute resolution. Tenn. Code Ann. § 36-6-403. If mediation is not appropriate, an expedited hearing may be requested to establish a temporary plan. In either mediation or in an expedited hearing, each party must submit a proposed temporary plan, a verified statement of income, and a verified statement that the plan is proposed in good faith and is in the child's best interest. If only one party submits a plan, that party may request adoption by default.

50.04 PERMANENT PARENTING PLANS

Any final or modified decree in divorce, separation, annulment, or separate maintenance proceedings involving a minor child must incorporate a permanent parenting plan that includes all of the contents set forth above. If the parties cannot agree on a permanent parenting plan, the court may order, or either party may request, resolution through alternative dispute resolution proceedings pursuant to Rule 31 of the Tennessee Supreme Court Rules. Tenn. Code Ann. § 36-6-404.

50.05 MODIFYING PARENTING PLANS

When a modification of a parenting plan is sought, a proposed parenting plan must be filed and served with the modification petition and with the response to the petition. If the modification applies only to the amount of child support, a proposed plan is not required, but the obligor parent must file a verified statement of income pursuant to the child support guidelines and other related provisions. Tenn. Code Ann.§ 36-6-405(a).

In a proceeding to modify a parenting plan, the existing residential schedule shall not be modified prior to a final hearing on the petition, unless (1) the parents agree to a modification or (2) the court finds the child/ren will be subject to a likelihood of substantial harm absent a temporary modification. Tenn. Code Ann. § 36-6-405(b).

If the parties agree to a modification of the parenting plan and either announce to the court and place on the record the terms of the agreement or submit an agreed parenting plan in writing, the court may, but is not required to, make inquiry into whether the agreed plan is in the best interests of the child/ren. Tenn. Code Ann.§ 36-6-405(d).

50.06 OTHER PROVISIONS

Every parent who seeks a divorce must attend a Parent Education Seminar, unless excused by the court. The seminar is intended to help parents focus on the potential effects that divorce and

separation may have on children, various parenting arrangements, communication techniques, and alternatives to the judicial process. No court shall deny granting a divorce for failure of one or both parties to attend the seminar. Tenn. Code Ann. § 36-6- 408.