IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO THE TENNESSEE RULES OF PROCEDURE & EVIDENCE

Filed: September 24, 2008

ORDER

The Advisory Commission on the Rules of Practice & Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal and Juvenile Procedure and the Tennessee Rules of Evidence. In August 2008, the Advisory Commission completed its 2007-2008 term and presented its recommendations to the Court. After considering the amendments recommended by the Commission, the Court hereby publishes for public comment the proposed amendments set out in Appendix A to this order.

The Court hereby solicits written comments on the proposed amendments from the bench, the bar, and the public. The deadline for submitting written comments is Wednesday, November 26, 2008. Written comments should be addressed to:

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

For clarity, we note that the proposed amendments contained in Appendix A do not include the proposed amendments to the Rules of Civil Procedure governing the discovery of electronically stored information ("the 'e-discovery' amendments"). On June 20, 2008, the Court filed an order publishing the proposed "e-discovery" amendments and soliciting written comments concerning those proposals. The deadline for submitting written comments concerning the proposed "e-discovery" amendments is the same date (November 26, 2008) as the deadline for submitting written comments pertaining to the proposed amendments set out in Appendix A.

The Clerk shall provide a copy of this order, including Appendix A, to LexisNexis and to Thomson-West. In addition, this order, including Appendix A, shall be posted on the Tennessee Supreme Court's website.

PER CURIAM

APPENDIX A

PROPOSED AMENDMENTS
PUBLISHED FOR PUBLIC COMMENT

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 13

SCOPE OF REVIEW

2009 Advisory Commission Comment

See amended Rule 36(b) on the plain error doctrine.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 34

VOLUNTARY MEDIATION

(a) Within five days following receipt of the notice of appeal in all cases appealed to the Court of Appeals, the Clerk of the Appellate Courts shall notify the parties or their counsel that, consistent with the requirements of this rule, they may jointly request a suspension of the processing of the appeal for the purpose of engaging in voluntary mediation.

(b) Parties desiring to engage in voluntary mediation shall file a joint stipulation requesting suspension of the appeal with the Clerk of the Appellate Courts within fifteen days after the date of the notice provided for in Section (a). Upon the filing of a timely joint stipulation, the time for preparing the transcript or statement of the evidence, the record on appeal, and the briefs shall be suspended for no more than sixty days to enable the parties to mediate their dispute. The Clerk of the Appellate Courts shall notify the trial court clerk of the filing of the stipulation of suspension of the appeal. However, the provisions of this rule providing for the suspension of the processing of the appeal pending voluntary mediation shall not apply to (1) appeals required to be expedited by statute, rule, or order of a court, (2) appeals in which the constitutionality of a statute, or rule or the constitutionality of an application of a statute, ordinance or rule is an issue, or (3) appeals involving the imposition of criminal contempt sanctions.

(c) If the voluntary mediation is successful, the parties shall file a notice of voluntary dismissal of the appeal in accordance with Tenn. R. App. P. 15(a) within five days following the conclusion of the mediation. The Clerk of the Appellate Courts shall notify the trial court clerk of the filing of the notice of voluntary dismissal of the appeal. The notice of voluntary dismissal shall provide for the taxation of costs. If the voluntary mediation is not successful as to all issues, the

parties shall file a notice with the Clerk of the Appellate Courts within five days requesting the resumption of the appeal. If the voluntary mediation is successful as to some but not all issues, the parties shall file a notice with the Clerk of the Appellate Courts within five days identifying the remaining issues requesting a resumption of the appeal as to those issues only. The Clerk of the Appellate Courts shall notify the trial court clerk of the notice of resumption of the appeal. If no notice of voluntary dismissal has been filed with the Court of Appeals within sixty days after the filing of the joint stipulation, the appeal shall be returned to the active docket, and the applicable appellate deadlines shall be reactivated. If, within sixty days after the filing of the joint stipulation, the parties and the mediator jointly file a notice of an extension of up to an additional thirty days to complete the mediation process, the Clerk of the Appellate Courts shall return the case to the active docket after the expiration of the extended period if no notice of voluntary dismissal has been filed. The Clerk of the Appellate Courts shall notify the trial court clerk when the appeal has been returned to the active docket.

(d) The parties may voluntarily resolve their disputes in any appeal filed in the Court of Appeals without requesting the suspension of the processing of the appeal.

(e) Evaluation of Voluntary Appellate Mediation by the Parties

(1) In those appeals in which the parties invoke voluntary appellate mediation under this rule, each party shall complete an evaluation form supplied by the Clerk of the Appellate Courts and shall forward the evaluation to the Clerk's office in the grand division in which the case is filed within ten (10) days of the completion of mediation. The evaluation shall be maintained as confidential and shall not be entered into the case file.

(2) The completed evaluation form shall be placed in an evaluation envelope supplied with the evaluation form, and the evaluation envelope shall be sealed. The sealed

evaluation envelope shall then be placed in a cover envelope and mailed to the Clerk of the Appellate Courts in the grand division in which the case is filed. The case name and number shall be noted on the cover envelope ONLY.

(3) Upon receipt of the cover envelope, the Clerk of the Appellate Courts shall note the receipt of the evaluation envelope in the case file, open the cover envelope, remove the sealed evaluation envelope, and forward the unopened evaluation envelope to the Programs Manager of the Administrative Office of the Courts for processing.

(4) The Programs Manager of the Administrative Office of the Courts shall receive the evaluation envelopes, remove the evaluations, and compile the results of the evaluations; the Programs Manager shall provide information to the Supreme Court and/or Court of Appeals on the results of the evaluations on a periodic basis set by the Supreme Court and/or Court of Appeals.

2009 Advisory Commission Comment

Rule 34 introduces a new procedure to appellate practice. If the parties voluntarily decide to mediate their dispute, pursuant to the provisions of section (b) of this Rule, various deadlines are suspended. There is also an evaluation process for voluntary appellate mediation.

TENNESSEE RULES OF APPELLATE PROCEDURE

RULE 36

RELIEF; EFFECT OF ERROR

(b) Effect of Error.–A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process. When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.

2009 Advisory Commission Comment

A second sentence is added to Rule 36(b) incorporating the plain error doctrine. The initial sentence states the harmless error doctrine.

See Rule 13(b) on consideration of issues not presented for review.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 1

SCOPE OF RULES

[Add the following comment:]

2009 Advisory Commission Comment

A modified Rule 60 procedure to obtain relief from a general sessions court judgment is available by statute, T.C.A. §16-15-727.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 8

GENERAL RULES OF PLEADING

[Add the following language to the end of Rule 8.04:]

(5) Those against persons whose parental rights are sought to be terminated.

2009 Advisory Commission Comment

Even without denial of averments in an answer, allegations in a complaint must be proved in actions to terminate parental rights.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 12

DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED: BY PLEADING OR MOTION: MOTIONS FOR JUDGMENT ON THE PLEADINGS

12.08. Waiver of Defenses.–A party waives all defenses and objections which the party does not present either by motion as hereinbefore provided, or, if the party has made no motion, in the party's answer or reply, or any amendments thereto, (provided, however, the defenses enumerated in 12.02(2), (3), (4) and (5) shall not be raised by amendment), except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the defense of lack of capacity, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 in the light of any evidence that may have been received.

2009 Advisory Commission Comment

Rule 12.08 is amended to state the deadline for raising a defense of lack of capacity under Rule 9.01. This defense is found in Rule 12.02(8) by cross-reference to Rule 9.01. Lack of capacity can be raised as late as at the trial on the merits.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 23

CLASS ACTIONS

23.08. Disposition of Residual Funds.–Any order entering a judgment or approving a proposed compromise of a class action certified under this rule may provide for the disbursement of residual funds. Residual funds are funds that remain after the payment of all approved: class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement or order entering a judgment that does not create residual funds.

It shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds. A distribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation is permissible but not required.

Upon motion of any party to a settlement or judgment of a class action certified under this rule or upon the court's own initiative, orders may be entered after an approved settlement or judgment to address the disposition and disbursement of residual funds in a manner consistent with this rule.

2009 Advisory Commission Comment

The Tennessee Voluntary Fund for Indigent Civil Representation is established in Tenn. Code Ann. §16-3-821.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 34

PRODUCTION OF DOCUMENTS AND THINGS
AND ENTRY UPON LAND FOR INSPECTION
AND OTHER PURPOSES

34.03 Persons Not Parties.–As provided in Rule 45, a person not a party can be compelled to produce documents and tangible things or to permit an inspection.

2009 Advisory Commission Comment

New Rule 34.03 replaces the earlier version, which mentioned an independent action for production or entry. The subpoena duces tecum procedure in Rule 45 is more efficient.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 45

SUBPOENA

45.04. Subpoena for Taking Depositions–Place of Deposition

[Insert this new second sentence at paragraph (1):]

A subpoena for taking depositions may be served at any place within the state.

2009 Advisory Commission Comment

The amendment to Rule 45.04(1) restates settled law. A deposition subpoena, like a trial subpoena, may be served anywhere in Tennessee.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 51

INSTRUCTIONS TO JURY; OBJECTION

51.04. Written Form.–If any party requests that the instructions given under Rule 51.03(2) be reduced to writing, or if the judge sua sponte elects to reduce the instructions to writing, the judge shall give the jury one or more copies of the written instructions, in their entirety, for use in the jury room during deliberations. After the deliberations are concluded, the written charge shall be returned to the judge.

[Delete 2003 Comment to Rule 51.04.]

2009 Advisory Commission Comment

Revised Rule 51.04 gives any party the right to require the jury charge to be reduced to writing and given to the jury. The new language incorporates T.C.A. §20-9-501.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 52

FINDINGS BY THE COURT

52.01. Findings Required.–In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.

* * * *

2009 Advisory Commission Comment

The heading and first sentence of Rule 52.01 are amended. No longer must counsel request the judge to make findings of fact and conclusions of law in nonjury trials.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 55

DEFAULT

55.01 Entry.–

[Revise the two sentences after the colon to read as follows:]

The party entitled to default shall apply to the court. Except for cases where service was properly made by publication, all parties against whom a default judgment is sought shall be served with a written notice of the application at least five days before the hearing on the application, regardless of whether the party has made an appearance in the action. A party served by publication is entitled to such notice only if that party has made an appearance in the action.

2009 Advisory Commission Comment

The amendment to Rule 55.01 deletes the requirement of notice of application for default where service is properly made by publication, unless an appearance has been made.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 60

RELIEF FROM JUDGMENTS OR ORDERS

[Add the following comment:]

2009 Advisory Commission Comment

A modified Rule 60 procedure to obtain relief from a general sessions court judgment is available by statute, T.C.A. §16-15-727.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 65

INJUNCTIONS

65.03. Restraining Order.--

(1) When Authorized. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(a) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(b) the movant's attorney (or pro se movant) certifies in writing efforts made to give notice and the reasons why it should not be required.

2009 Advisory Commission Comment

Rule 65.03(1) is rewritten to require in most instances notice to the adverse party before the court issues a temporary restraining order.

See Rule 65.07 on domestic relations cases.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 5

INITIAL APPEARANCE BEFORE MAGISTRATE

(e) Indictment Before Preliminary Examination.–Any defendant arrested prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing on request, whether or not the grand jury is in session. If the defendant is indicted or charged by presentment while the preliminary hearing is being continued (whether at the defendant's or the prosecutor's request) or at any time before he or she has been afforded a preliminary hearing on a warrant, the defendant may dismiss the indictment or presentment on motion filed not more than thirty days from the arraignment on the indictment or presentment. The dismissal shall be without prejudice to a subsequent indictment or presentment.

2009 Advisory Commission Comment

The former rule prohibited the government from indicting a defendant while a preliminary hearing was pending. To preserve the right of a preliminary hearing in all instances the rule has been amended to include presentments. The remedy of the dismissal without prejudice is to afford the defendant the right to a preliminary hearing. Finally, to have a uniform time for filing a motion to dismiss, the rule requires that the motion be filed no more than thirty days from the arraignment.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 17

SUBPOENA

[Delete the third sentence of the Advisory Commission Comment.]

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 24

TRIAL JURORS

(e) Number of Peremptory Challenges.–

* * * *

(4) Additional Jurors.–For each additional juror selected pursuant to Rule 24(f), each side is entitled to one peremptory challenge for each defendant. Such additional peremptory challenges may be used against any regular or additional juror.

2009 Advisory Commission Comment

The reference to Rule 24(f) corrects an error.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 52

[RESERVED.]

2009 Advisory Commission Comment

Harmless error and plain error are covered in amended Tennessee Rule of Appellate Procedure 36(b).

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 32

DISPOSITIONAL HEARINGS; ORDERS

(f) Evidence Admissible; Standard of Proof.–In arriving at its dispositional decision, the court shall consider only evidence which has been formally admitted, and the juvenile court record of the child. All testimony shall be under oath and may be in narrative form. The rules of evidence shall apply except that reliable hearsay including, but not limited to, certified copies of convictions or documents such as psychiatric or psychological evaluations of the child or the child's parents or custodian or reports prepared by the Department of Children's Services, may be admitted provided that the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee. The parties shall have the right to examine any person who has prepared any report admitted into evidence. The standard of proof at the dispositional hearing is preponderance of the evidence.

2009 Advisory Commission Comment

The final sentence of revised Rule 32(f) provides for a preponderance of evidence standard of proof at dispositional hearings.

TENNESSEE RULES OF JUVENILE PROCEDURE

RULE 32A

PERMANENCY PLANNING

(a) GENERALLY. The permanency planning process requires the juvenile court to review and approve the development, implementation and modification of the permanency plan for each child in foster care. The court shall ensure the permanency plan remains in the best interest of the child throughout the permanency planning process. The court shall monitor compliance with the terms of the permanency plan by the parties and issue such orders as may be appropriate to enforce compliance. The court should modify the plan accordingly to ensure timely permanency for the child. The permanency planning process includes, but is not limited to, the ratification hearing, judicial review, foster care review board hearing and permanency hearing.

(b) REPRESENTATION. In dependent, neglect and abuse cases, the child shall be represented by a guardian ad litem at all stages of the permanency planning process until such time as the child is no longer in foster care. In the event the child returns to foster care, all efforts shall be made to appoint the same guardian ad litem to represent the child. In addition, the parent has a right to representation at all stages of the permanency planning process. If a parent is not represented by an attorney, the court shall advise the parent in open court of the right to an attorney and, if indigent, of the right to a court-appointed attorney. The court shall not proceed with the hearing unless the parent has waived the right to an attorney in accordance with Rule 30.

(c) ATTENDANCE; NOTICE; DILIGENT SEARCH FOR ABSENT PARENTS. At the beginning of each hearing, the court shall ascertain whether all necessary persons are before the court, including the child, parents (including putative fathers), representative of the foster care agency, CASA (Court Appointed Special Advocate), and foster parents, preadoptive parents or

relatives providing care of the child. If a necessary person is not present, the court shall determine whether notice of the hearing was provided. If a parent's identity or whereabouts are unknown, the court shall ascertain whether the agency has made reasonable efforts to identify and/or determine the whereabouts of the absent parent.

(d) EVIDENCE; STANDARD OF PROOF. The court shall consider only evidence which has been formally admitted, and the juvenile court record of the child. All testimony shall be under oath and may be in narrative form. The rules of evidence shall apply except that reliable hearsay including, but not limited to, documents such as psychiatric or psychological evaluations of the child or the child's parents or custodian or reports prepared by the Department of Children's Services, may be admitted provided that the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Tennessee. The parties shall have the right to examine any person who has prepared any report admitted into evidence. The standard of proof at the ratification hearing, judicial review and permanency hearing is preponderance of the evidence. This subsection does not apply to foster care review board hearings.

(e) ORDER. At the conclusion of each ratification hearing, judicial review, and permanency hearing the court shall enter an order in writing and signed by the judge. The order shall include the name of the persons attending the hearing and their relationship to the child; if a parent is not represented by counsel, that the parent has waived his or her right pursuant to Rule 30; and, if a necessary person is not present, whether notice of the hearing was provided. If a parent's identity or whereabouts are unknown, the order shall include findings of the reasonable efforts made by the agency to identify the parent or to ascertain the whereabouts of the absent parent. The order shall

include findings of fact that the permanency plan is in the best interest of the child and that the agency has or has not exercised reasonable efforts pursuant to T.C.A. §37-1-166. In addition, the order shall include all other findings required by federal and state law.

(f) RATIFICATION HEARING. (1) The court shall review the permanency plan for each child in foster care pursuant to T.C.A. §37-2-403. The court shall take such action as may be necessary to ensure the plan is in the child's best interest. The initial permanency plan must be ratified within sixty (60) days of a child's foster care placement. Permanency plans are subject to modification and shall be reevaluated and updated at least annually.

(2) The court shall explain on the record that the purpose of the ratification hearing is to review and approve the permanency plan. The court shall advise the parties that the consequences of failure to comply with the plan, visit or support the child will be termination of the parents' or guardians' parental rights, and that the parents or guardians may be represented by an attorney in any termination proceeding.

(3) If the permanency plan has been agreed upon by the parties, the court shall review and only ratify the plan if the court finds it to be in the best interest of the child. If the court finds the plan is not in the best interest of the child, the court shall hold an evidentiary hearing to develop and ratify a plan that is in the best interest of the child.

(4) If the parties are unable to agree on the permanency plan, the court shall hold an evidentiary hearing to develop and ratify a plan that is in the best interest of the child.

(5) In cases where the court ratifies the plan without modifications and the parent or guardian is not present at the ratification hearing and did not participate in the development of the permanency plan, the court shall determine the efforts made by the agency to notify the parent or guardian of the requirements of the plan. The court shall include findings of these efforts in the

order. In cases where the parent or guardian is not present for the hearing and the court modifies any provisions of the plan, the judge shall instruct the agency in the order to timely notify the parent or guardian of the plan's provisions.

(g) JUDICIAL REVIEW; FOSTER CARE REVIEW BOARD HEARINGS. (1) The court shall review the permanency plan, or delegate the review to the foster care review board, within ninety (90) days of the child's date of foster care and no less often than every six (6) months thereafter until such time as the child is no longer in foster care. Reviews may be scheduled as often as determined necessary. The agency shall submit a report on the progress of the permanency plan to the court or foster care review board. In addition, the progress report shall be provided to the parents whose rights have not been terminated or surrendered, the parent's attorney, guardian ad litem and/or attorney for the child and the child who is a party to the proceeding. The hearings shall be held in accordance with T.C.A. §§37-2-404 and 406.

(2) When the review of the permanency plan is conducted by the foster care review board, the board shall prepare and submit an advisory report of its findings and recommendations in accordance with T.C.A. §37-2-406(c)(1)(A). The court shall establish a procedure to receive the report from the foster care review board. At the next hearing by the court, the court shall review the board's advisory report. The court shall determine whether the recommendations are in the best interest of the child and, if in the child's best interest, incorporate the recommendations into the child's permanency plan.

(3) The court shall also establish a procedure to receive, docket and conduct a hearing on a direct referral of the foster care review board within the time limits provided by T.C.A. §37-2-406(c)(1)(B). The court shall ensure that the board is provided a copy of the order.

(h) PERMANENCY HEARING. (1) The court shall conduct a permanency hearing within

twelve (12) months of the child's date of foster care placement; or within thirty (30) days of a determination that reasonable efforts to reunify the family are not required pursuant to T.C.A. §37-1-166(g)(4). The hearing shall be conducted pursuant to T.C.A. §37-2-409.

(2) At this hearing the court shall make findings of fact whether reasonable efforts have been made to reunify the family or to finalize another permanent goal. These findings shall be included in the order.

(3) The court must determine the appropriate goal for the child to achieve permanency. Continuation of the goal of reunification should be allowed only in circumstances where the parent or guardian has substantially complied with the permanency plan. However, in determining whether the parent or guardian is in substantial compliance, the court must determine that the agency has provided reasonable efforts for the parent or guardian to comply with the responsibilities on the permanency plan. Additionally, the court shall determine whether the services for the child provided for in the plan are in the best interest of the child and if other services are required.

2009 Advisory Commission Comment

The purpose of this Rule 32A is to provide procedures for each hearing in the permanency planning process that occurs for children in foster care, specifically the ratification hearing, judicial review, foster care review board hearing, and permanency hearing. These procedures provide for safeguarding the rights of the parties, applicable evidentiary standards, and judicial oversight of the permanency process. The permanency planning process provides an opportunity to ensure timely permanency for children via continuing judicial oversight of the process. Permanency may be achieved through either of the five permanency goals: return to parent, exit custody with a fit and willing relative, adoption, permanent guardianship, or planned permanent living arrangement. The

role of the juvenile court judge as the gatekeeper of the foster care system requires judicial monitoring of every child's permanency plan. The result of proper judicial oversight is a beneficial permanency plan that comprehensively addresses the needs of the child and family while charting a timely course for the child to reach a permanent, safe, and healthy home.

Subsection (b) clarifies that the child must be represented by a guardian ad litem, and the parent has a right to representation by an attorney throughout the permanency planning process. The appointment of the guardian ad litem for the child should occur prior to the first hearing in the proceeding, including the preliminary hearing. A child may not waive his or her right to a guardian ad litem. In addition, the parent has the right to be represented by an attorney when the case is initiated. If the parent has previously waived his or her right to counsel pursuant to Rule 30, the court shall advise the parent at each of these hearings of the right to an attorney and, if indigent, of the right to a court-appointed attorney. If the parent continues to waive the right to representation, the court must continue to comply with Rule 30.

TENNESSEE RULES OF EVIDENCE

RULE 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally.–Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused.–In a criminal case, evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same or, if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of Alleged Victim.–In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of Witness.–Evidence of the character of a witness as provided in Rules 607, 608, and 609.

2009 Advisory Commission Comment

If the accused attacks the character of the alleged victim, amended Rule 404(a)(1) allows the prosecution to prove the accused's character for the same trait. This is an additional way the accused "opens the door" to character evidence.

TENNESSEE RULES OF EVIDENCE

RULE 703

BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

2009 Advisory Commission Comment

The third sentence is new. Normally a jury should not be allowed to hear the reliable but inadmissible bases underlying an expert's opinion.

TENNESSEE RULES OF EVIDENCE

RULE 803

HEARSAY EXCEPTIONS

The following are not excluded by the hearsay rule:

* * * *

(26) Prior Inconsistent Statements of a Testifying Witness.–A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:

(A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.

(B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.

(C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

2009 Advisory Commission Comment

Subsection (26) alters Tennessee law by permitting some prior inconsistent statements to be treated as substantive evidence. Many other jurisdictions have adopted this approach to address circumstances where witnesses suddenly claim a lack of memory in light of external threats of violence which cannot be directly attributed to a party, for example. This rule incorporates several safeguards to assure that the prior inconsistent statements are both reliable and authentic.

To be considered as substantive evidence the statement must first meet the traditional conditions of admissibility which include the procedural aspects of inconsistent statements as addressed in Rule 613. This reference also makes clear that only prior inconsistent statements, and not consistent statements, are within the ambit of this rule.

Assuming the inconsistent statement is otherwise admissible to impeach the testifying witness, the party may then seek to have the statement treated as substantive evidence by complying with the rule's other requirements. Other rules address authenticity of documents and recordings which clearly apply here. See e.g. Rule 1001. However, this rule contains additional express requirements regarding the form of the prior statement so that the jury is assured that the statement contains the actual "words" of the witness on a prior occasion. For example the prior statement must be an audio or video recorded statement. A "police report" or insurance investigator's "transcription" of the recorded statement would not qualify since it is not literally the witness's own words contained on audio or video media.

If not recorded, the prior statement can be in written form (created by the witness or by another) but then must be signed by the witness. The commission intends that the "signed" requirement must be equated with an actual signature as opposed to some email document which happens to have the witness's name on the address. Finally, the rule permits a prior statement to be treated as substantive evidence if given under oath.

The rule requires that the party seeking to have the statement treated as substantive evidence request a hearing out of the presence of the jury to satisfy the judge "by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness." This is to prevent fraud such as where a parent tape records a child after training the child to say "bad things" about the other parent in anticipation of a custody dispute. Rules 703 (Bases of Opinion Testimony by Experts) and 803(6) (Records of Regularly Conducted Activity) contain similar judicial gate-keeping requirements.

TENNESSEE RULES OF EVIDENCE

RULE 804

HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(b) Hearsay Exceptions.–The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * *

(2) Statement Under Belief of Impending Death.–In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.

2009 Advisory Commission Comment

The revised language makes admissible a dying declaration even though the declarant is not the victim of the homicide being prosecuted. The exception would apply, for example, where there were multiple victims but the prosecutions were severed. The revision also admits dying declarations in civil cases where relevant and material.