

2022 TENNESSEE JUDICIAL ACADEMY

**Relevance: The Evidence Cornerstone
Balancing Probative Value and Evidentiary Dangers
Judicial Discretion and the Scales of Justice**

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Objectives:

After this session, you will be able to:

1. Rule confidently and correctly on relevance objections;
2. Understand and distinguish between logical and legal relevancy; and
3. Exercise sound judicial discretion in balancing probative value of evidence against evidentiary dangers.

I. RELEVANCY

Relevancy is the cornerstone of all evidentiary rules and serves as the basic unifying and underlying principle. If evidence is not relevant, it is not admissible, even if the evidence meets the requirements of other evidentiary rules.

II. DEFINITIONS

In its simplest form, evidence that is relevant helps prove the existence or nonexistence of some fact that is pertinent to a legal dispute.

A. TENNESSEE DEFINITION

Tennessee Rules of Evidence 401 provides that relevant evidence “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The significance of the definition is in its breadth. In elaborating on the breadth of the definition, the Advisory Committee comments note that “the theoretical test for admissibility is a lenient one, as it should be, and practical difficulties can be resolved under Rule 403 or the exclusionary rules of legal relevancy that follow.”

Rule 401 establishes that all evidence must pass a threshold determination (albeit a very low one) of relevancy before it is admissible. The rules do not recognize levels of relevancy, such as limited or tangential relevance. Evidence is either relevant – having any tendency to have probative value – or it is not. Evidence may be relevant, however, on limited subjects.

1. Logical Relevance - Rule 401 establishes the rules of logical relevancy. Relevant

evidence is evidence that has any tendency to have a logical connection to a fact of consequence. A fact of consequence may be the ultimate fact, an intermediate fact, or an evidentiary fact so long as it is of some consequence to the action. If one objects that the evidence is irrelevant, the objector is asserting that the evidence has no logical connection to a material fact of consequence. In order to be logically relevant and admissible, evidence need only have minimal relevance. It need not be sufficient to convince the trier of fact standing alone.

2. Legal Relevance - Under the doctrine of legal relevance, a court has authority to exclude logically relevant evidence for a variety of reasons. These rules of legal relevance include the “scales of justice rule,” which is evidenced in Rule 403 of the Federal Rules of Evidence, as well as special rules set out in the federal rules and most state rules, including those limiting evidence concerning:

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| - Character. | Rules 404 and 405 |
| - Subsequent remedial measures. | Rule 407 |
| - Compromise and offers. | Rule 408 |
| - Payment of medical and similar expenses. | Rule 409 |
| - Expressions of sympathy or benevolence | Rule 409.1 |
| - Pleas, discussions, statements in plea negotiations. | Rule 410 |
| - Liability insurance. | Rule 411 (not federal) |
| - Prior sexual activity. | Rule 412 |

3. Nature of Relevant Evidence - Evidence may be either direct or circumstantial. Moreover, there is no distinction between the two and either may be sufficient to satisfy a sufficiency of the evidence standard. *Compare State v. Dorantes*, 331 S.W.3d 370 (Tenn. 2011) with *State v. Crawford*, 470 S.W.2d 610 (Tenn. 1971).

4. Materiality - Rule 401 does not use the term "material," but the concept of materiality is embodied in Rule 401's requirement that the fact that the evidence is offered to establish must be "of consequence to the action, " i.e., material. In the words of the Advisory Commission: “[t]o be relevant, evidence must tend to prove a material issue.” What is or is not "of consequence," depends on the substantive law governing the cause of action.

5. Preliminary Questions and Conditional Relevancy

When counsel objects to the relevancy of evidence, the judge determines preliminarily whether the evidence satisfies the relevancy requirement. If the judge finds the evidence is relevant, the judge will admit the evidence. In making this preliminary determination as to whether the evidence is admissible, the judge is applying the law. Although the judge may be required to make a factual determination to resolve the admissibility issue, the judge is not making a conclusive factual determination about the issues of the case.

At times, the relevancy of an item of evidence is itself dependent upon the existence of some other fact or the admission of some other piece of evidence. The rules of evidence and the

common law refer to these situations as so-called “conditional relevancy,” sometimes referred to as “relevance conditioned on fact.” Tenn. R. Evid. 104(b). In situations involving conditional relevancy, the probative value of the evidence depends not only upon satisfying the basic definition of relevance in Rule 401, but is also conditioned upon a fact that must be shown by other evidence. In other words, the relevance of one item of evidence depends upon the existence and introduction of another connected piece of evidence.

For example, if evidence of a holographic will depends upon whether the deceased signed the will, probative value is lacking unless there is evidence to authenticate the deceased’s signature. The issue is whether sufficient evidence of the conditional fact is offered and as such is an issue of fact that should be resolved by the jury, not the judge, in a jury case. *See* Tenn. R. Evid. 104(b). In such a situation, the judge admits the evidence conditioned upon assurances that the other evidence will be produced. The judge assumes a monitoring role, screenings the evidence to ensure that it is sufficient to support the jury’s finding. When the proponent of the evidence fails to introduce the connected piece of evidence – sometimes referred to as “connecting up”—the judge must take appropriate precautions to assure fairness, which may include striking the prior testimony, instructing the jury to disregard the prior evidence, granting a mistrial, and imposing sanctions.

6. Relevancy Analysis

IN ANALYZING RELEVANCY, ASK:
<p>For what purpose is the evidence offered? Is the purpose a legitimate one?</p>
<p>Does the evidence have any tendency to make a fact of consequence more or less probable than it would be without the evidence? (i.e., is it logically relevant?)</p>
<p>Does a specific rule of legal relevance apply to the evidence?</p>
<p>Is proof limited to certain types of evidence?</p>

6. Admissibility Analysis - Generally, relevant evidence is admissible except as provided by the Constitution (i.e., fundamental fairness, due process), statutes, and rules. Irrelevant evidence is not admissible.

III. SIGNIFICANCE OF BREADTH OF DEFINITION OF RELEVANCE

The definition of relevance is intentionally broad. Relevant evidence does not have to prove anything. It does not have to relate to a particular element of the claim or defense. It merely has to have a tendency to make a fact of consequence more or less probable. The standard of probability is said to “add the virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.” The “fact of consequence” phrase also was chosen to avoid confusion, which had resulted from the “loosely used and ambiguous word ‘material.’” By emphasizing that relevant evidence only need relate to a fact of consequence, it is clear that the fact may be an ultimate, intermediate, or mere evidentiary fact so

long as the fact is of consequence to the determination of the action. Most courts also hold that the fact need not be in dispute, thus giving lawyers the opportunity to prove background information for purposes of aiding the understanding of the case.

IV. EXCLUSION OF IRRELEVANT EVIDENCE

The common law and Rule 402 of the Tennessee Rules of Evidence excludes irrelevant evidence, while admitting relevant evidence, subject to other evidentiary considerations. Irrelevant evidence is excluded based on concerns for efficiency and fairness.

V. CHARACTER AND HABIT EVIDENCE

The rules regarding character evidence are "a conspicuous instance in which specific [relevance] rules have been developed in an effort to strike a proper balance between the probative value of the evidence and the countervailing practical policy considerations." McCormick has described the number of cases involving character evidence issues as "as numerous as the sands of the sea" and the judicial opinions interpreting them as basically unhelpful.

A. Differentiating Character and Reputation - Generally, character is described as "the aggregate of the moral qualities which belong to and distinguish an individual person," "moral predisposition," "aggregate of ethical qualities," "generalized description of a person's disposition in respect to a general trait." While character is what a person is and depends on attributes possessed, reputation is what a person is supposed to be and depends on attributes others believes person possesses. Under the evidence rules, character is an issue about which evidence can sometimes be offered, while reputation is a method or means of proving character.

B. Differentiating Character and Habit – Rule 406(b) defines habit as “a regular response to a repeated specific situation” and routine practice as a “regular course of conduct of an organization.” A good method for assessing whether conduct amounts to habit includes an assessment of the regularity of the conduct, the specificity of the conduct, and whether the conduct involves an involuntary or semi-automatic response.

To distinguish between character and habit evidence, McCormick suggests thinking of character evidence as having moral overtones, while habit evidence does not. As such, it is easy to understand why the rules generally differentiate the two and their admissibility with the nonjudgmental habit evidence being more reliable and therefore, generally admissible. When habit evidence is admissible, it may be established by opinion evidence or by specific instances of conduct sufficient in number to warrant a finding of habit.

C. Type of Proof – Depending on the purpose for which character evidence is offered, the type or method of the evidence offered to prove character may differ. There are three types of proof, with varying levels of acceptability. The most specific and time consuming, is proof of character by specific instances of past conduct. A second method of proving

character is via opinion from testimony by a witness who is familiar with the person's character and can state an opinion as to the character based on personal knowledge. A third method is proof of character by evidence of the person's community reputation based on testimony by a witness familiar with the person's community reputation.

D. Use of Character Evidence – General Principles - The complexity surrounding the use of character evidence can be simplified by asking four questions: (1) what is the purpose of the evidence, i.e., what is the evidence offered to prove? (2) whose character does the evidence concern? (3) who is offering the evidence? (4) what type of character evidence is being offered? and (5) at what stage of the trial is the evidence offered?

1. What is the purpose of the evidence? Character evidence may be offered as direct evidence or circumstantial evidence. In a limited number of cases, the substantive law makes character a direct issue in the case because it is probative of some essential element of the claim or defense. Some examples include negligent entrustment, defamation, and criminal cases in which the defense claims entrapment. Tenn. R. Evid. 405(b). In these cases, character may be proved by specific acts of conduct, opinion, and reputation evidence. To determine whether character is directly in issue, consider the requisite elements of the cause of action and defense and the contents of the pleadings.

More frequently, character evidence is being offered to prove that a witness acted in conformity with the character on some other occasion. This is circumstantial use of character evidence. The factfinder is asked to infer that conduct on the occasion in question was consistent with a trait demonstrated at some other time. In the limited situations in which character evidence is allowed to prove action in conformity with character, Tenn. R. Evid. 404(a), the evidence is limited to reputation or opinion evidence. Tenn. R. Evid. 405(a).

Often, the proponent of character evidence will argue that the evidence is not offered to establish an essential element of the case nor for the purpose of establishing action in conformity with character, but rather to establish some material issue of the case other than character. Tenn. R. Evid. 404(b). This is the most difficult application of the character evidence rule and requires the most care and caution.

2. Whose character does the evidence concern? The rules differentiate between evidence offered to establish some character trait of the accused or a victim, Tenn. R. Evid. 404(a)(1) & (2), and evidence offered to prove character of a witness. Tenn. R. Evid. 404(a)(3).

3. Who is offering the evidence? The rules also differentiate between evidence offered by the accused, Tenn. R. Evid. 404(a)(1) & (2), and evidence offered by the prosecution to rebut.

4. What type of character evidence is being offered? As noted above, the rules favor less time-consuming proof, allowing the use of reputation and opinion evidence when proving character for the limited purposes allowed under Rule 404(a)(1)-(3) and allowing specific instances of conduct, in the judge's discretion, only when character or a trait of character is an essential element of a charge, claim, or defense. Tenn. R. Evid. 405(b).

5. At what stage of the trial is the evidence offered? Because the prosecution is given much greater leeway in offering evidence to rebut evidence presented by the accused the stage at which the character evidence is offered is often a determinative factor. Tenn. R. Evid. 404(a).

E. Use of Character Evidence Under the Tennessee Rules – The Tennessee Rules of Evidence address character evidence in three separate rules. Direct evidence of character, offered to prove an essential element of a claim or defense, is addressed in Rule 405(b). Circumstantial use of character evidence offered to establish action in conformity with a character trait is addressed in Rules 404(a) and 405(a). Character offered to prove some purpose other than conformity is addressed in Rule 404(b).

Rule 404(a) establishes a general rule excluding propensity evidence, but sets out limited exceptions applying in criminal cases. The accused can offer evidence of a “pertinent character trait” regarding the accused or a victim. The prosecution may not initiate such proof, but may offer it to rebut that offered by the accused.¹ By offering evidence of a pertinent character trait, the accused places in issue the pertinent trait about which proof is offered. This does not place the accused's general character in issue, but does allow cross-examination as to that trait placed in issue.

Thus, under Rule 404(a), except in one limited circumstance, proof must be offered by the accused; it cannot be initiated by prosecutor, set up by cross-examination of the accused, or raised by direct or cross-examination of a witness. Only proof as to a pertinent character trait is admissible. The trial judge makes a preliminary determination whether the character trait about which evidence is offered is pertinent based upon the issues in the case. If character evidence about a pertinent trait of the accused or the victim is allowed, the prosecution may offer rebuttal evidence as to the trait raised.²

Rule 404(b) allows the introduction of evidence of other crimes, wrongs, or acts when they are offered to prove some “other purpose” but not “to prove the character of a person in order to show action in conformity therewith.” Evidence offered under Rule 404(b) is admissible if it is relevant for a non-propensity purpose *and* if the following “conditions” are satisfied: (1) the court must, upon request, hold a hearing outside the jury’s presence; (2) the court must determine that a material issue exists (other than conformity with a character trait); (3) the court must find proof of the act by clear and convincing evidence; and (4) the court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice. Upon request, the court must state on the record, the material issue that the evidence concerns and the reasons for admitting the evidence.

¹Rule 404(a)(2) also allows evidence of the peacefulness of a victim offered by the prosecution to rebut the claim that the victim was the first aggressor in a homicide case.

² Under Rule 404(a)(2) if the accused offers character evidence about the victim, the prosecution may introduce evidence of the same trait of character of the accused.

The Tennessee 404(b) version does not list specific issues that character evidence may be used to establish. But the Advisory Commission comments refer to and cite *State v. Parton*, 694 S.W.2d 299 (Tenn. 1985). There, the Tennessee Supreme Court set out the procedure, now outlined in Rule 404(b) and noted that in “exceptional case[s]” evidence of character may be used to establish issues such as identity, motive, intent, and rebuttal or accident or mistake. The federal counterpart to Rule 404(b) contains a non-exhaustive list that includes motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake and accident.

Some examples of how evidence may be used for these "other purposes" follow:

1. Motive - A claimed to have killed friend mistakenly believing friend to be intruder. Can prosecution prove that A learned earlier that day that friend had informed police of A's drug deals?

2. Intent - In a case in which intent to defraud is an essential element of the case, can the state prove that defendant claimed destruction of same property on thirteen prior fire loss claims?

3. Absence of mistake or accident - In an escape case in which an inmate claims to have fallen off a work truck, can state prove that inmate was previously charged with or convicted of escape?

4. Common scheme or plan - In a life insurance case in which the company claims that the deceased was murdered by the contingent beneficiary under the policy, can the company offer proof that contingent beneficiary attempted to poison deceased's spouse at the same time deceased was killed?

5. Complete story - Can state prove that they were arresting defendant for drunk driving at the time they observed a bulging bank bag in coat pocket?

6. Opportunity - Can state prove that defendant was known associate with drug dealers in order to prove opportunity to murder drug kingpin?

7. Identity - Can state introduce evidence that defendant stole a distinctive t-shirt in an earlier burglary to establish identity in murder case in which defendant was wearing shirt?

Before admitting evidence under Rule 404(b), the court must determine whether the purpose for which the evidence is offered is a material purpose in the case at bar. Judges should require the proponent of the evidence to articulate the purpose for which the evidence is offered and should be leery when counsel is unable to articulate a purpose that is relevant to the case. For example, in a case in which the defendant admits the offense, but claims the absence of an element or scienter, character evidence for purposes of proving identity, which is not at issue, should not be admitted.

VI. EXCLUSION OF RELEVANT EVIDENCE BECAUSE OF DANGERS- RULE 403 –

A. DANGERS AND CONCERNS

Trial judges are given great discretion in excluding evidence that is relevant, but that should nonetheless be excluded based on issues of fairness or efficiency. Under the federal rules and most state rules, this balancing of the probativeness of evidence against certain dangers that the admission of the evidence presents is set out in Rule 403, which provides that relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The danger sought to be avoided may be one or more of those listed.

B. CONTEXTUAL ANALYSIS

When a trial judge undertakes to balance the probativeness of evidence against dangers claimed by the opponent to the evidence, the trial judge must assess the evidence in the context of the case. The evidence may not be balanced in isolation. The probativeness and danger must be evaluated in light of the importance of the evidence, the other evidence in the case, the role that the evidence plays in the overall narrative of the case, and the availability of other alternative and equivalent evidence.

C. ADMISSIBILITY FAVORED

The trial judge is required to balance the probative value of and need for evidence against certain dangers likely to result from its admission. Because the evidence is relevant, its admissibility is favored. Therefore, the burden to establish the exclusion rests on the objecting party.

D. EFFICIENCY AND NEEDLESS CUMULATION

The rule contemplates that relevant evidence may be excluded for reasons related to judicial efficiency. When excluding evidence on the grounds of undue delay, waste of time, or needless presentation of cumulative evidence, the judge should articulate for the record what other evidence exists on the matter to substantiate the efficiency concerns. Judge must remain mindful that evidence should not be excluded under these grounds simply because the evidence is cumulative; exclusion is proper only when the evidence is “needlessly” cumulative.

E. FAIRNESS AND UNFAIR PREJUDICE

When an objection is raised based on the claim that the evidence unfairly prejudices a party, the court should require counsel to explain how the evidence will prejudice the party. The judge should neither assume nor articulate what prejudice is feared. Once counsel has articulated the feared prejudice, the judge should determine whether the evidence being offered might have an “undue tendency to suggest decision on an improper basis, commonly, though not necessarily,

an emotional one.” See generally Advisory Committee Comments, Fed. R. 403. Thus the unfair prejudice prong focuses on the desire to assure that the factfinder is not improperly motivated to reach a certain result. Some courts have phrased the test under Rule 403 in this manner: though relevant evidence may be excluded if “it appeals to the jury’s sympathies, arouses a sense of horror, provokes the instinct to punish, or otherwise may cause the jury to base its decision on something other than the established propositions of the case.”

G. EVIDENTIARY ALTERNATIVES

In reaching a decision on whether to exclude evidence on grounds of unfair prejudice, the trial court may also consider the availability of other means of proof as an appropriate factor. In *Old Chief v. United States*, 519 U.S. 172 (1997), the United States Supreme Court analyzed a trial court’s decision to allow proof of a prior conviction over the defense Rule 403 objection and in light of the defense’s offer to stipulate the conviction. The Court found that the trial judge abused his discretion in admitting the conviction.

As to a criminal defendant ‘unfair prejudice’ speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on an improper basis rather than on proof specific to the offense charged. Such improper grounds certainly include generalizing from a past bad act that a defendant is by propensity the probable perpetrator of the current crime. Thus, Rule 403 requires that the relative probative value of prior conviction evidence be balanced against its prejudicial risk of misuse. A judge should balance these factors not only for the item in question but also for any actually available substitutes. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.

Some scholars have urged a limited reading of the decision in *Old Chief*. They argue that the “key to the *Old Chief* holding is that the only *legitimate* use of evidence pertaining to the prior conviction [in the case] was to establish the accused’s status [which the defense had offered to stipulate.] Furthermore using the accused’s stipulation or narrative does not impede the flow of the prosecutor’s narrative nor does it frustrate the expectations of the jury.” Nonetheless, trial judges should carefully and deliberately analyze the availability and equivalence of alternative evidence when balancing probativeness and unfair prejudice.

H. EVIDENTIARY SURPRISE

At common law, Professor Wigmore included “unfair surprise” as a basis for excluding relevant evidence, but that rationale was not codified in the federal rules. In many cases, however, unfair surprise may be combined with or result in unfair prejudice. Additionally, modern procedural requirements and discovery rules have lessened the likelihood of claims that the evidence has unfairly surprised the party. When such situations do occur, the courts may grant continuances or delay to counter the negative effect of the unexpected evidence.

I. SUMMARY CHECKLIST FOR EXCLUDING RELEVANT EVIDENCE

- a. Describe probative value of the evidence
- b. Define dangers feared
- c. Balance probative value against dangers to see if dangers **SUBSTANTIALLY** outweigh probative value

J. BALANCING ANALYSIS

In balancing the probativeness against the potential dangers, ask:

- a. **What is the probative value of the evidence?**
- b. **What is the danger feared?**
unfair prejudice, confusion of issues, misleading jury, considerations of delay, waste of time, or needless presentation of cumulative evidence?
- c. **Does the admission of the evidence actually pose danger(s) feared?**
- d. **Is there alternative, equivalent evidence?**
- e. **In light of this, do the dangers substantially outweigh the probative value of the evidence?**

VII. APPLICATION

1. But she hired me!

Plaintiff mother sued obstetrician for medical malpractice arising from the birth of her first child. Before filing suit, but after the injuries to the first child were evidence, mother became pregnant and returned to obstetrician for medical care. At the medical malpractice trial, defendant obstetrician wishes to introduce evidence that mother hired obstetrician for the care and delivery of her second child. Plaintiff mother objects.

2. We're such a cute couple. He's a swell guy!

After child reported abuse, mother contacted authorities and boyfriend was arrested for sexual abuse of mother's child. After arrest but before trial, mother posts a picture of mother and boyfriend on her Facebook page with the following caption: "We're such a cute couple. He's swell." Boyfriend's defense lawyers wish to introduce picture along with caption at boyfriend's criminal trial for sexual abuse of child. Prosecution objects.

3. Prejudice arising from Party's Sexual Orientation?

In a criminal case in which the defense alleges entrapment, including persistent flirtation resulting in a sexual liaison between the prosecution's informant and the defendant, the prosecution wishes to introduce evidence of the defendant's sexual orientation, particularly

testimony that defendant had a long relationship with a member of the same sex. The defense objects.

4. Poor Taste!

Defendant, arrested for a minor drug offense, is photographed for mug shots. A detective looking for leads in a case notices a tattoo that depicts a murder crime scene in sufficient detail to suggest that it captured the scene of a recent murder with no suspects. Defendant is charged with the crime. The prosecutor wishes to introduce evidence from the tattoo artist's records indicating that the defendant got the tattoo shortly after the murder. Defense counsel objects.

5. You can't make this stuff up! (Well, you can, but you don't need to.)

Plaintiff sues the city for excessive force following a long police chase. Plaintiff is a gang member, who has tattoos, including his gang insignia above his lip. Plaintiff's counsel, in his blog, releases a before-and-after picture, which he used Photoshop to create in order to project what his client will look like during the trial. City wishes to introduce the photo to account for the police reaction and on the issue of damages. Plaintiff's counsel objects.