



exclusion, all involving criminal cases. (1) Defendant may offer evidence of a pertinent trait of his or her character; (2) Defendant may offer evidence of a pertinent trait of the alleged victim's character; (3 & 4) the State may rebut either (1) or (2), and when the Defendant offers evidence of a pertinent trait of the victim's character, the State may offer evidence of that same trait of the Defendant's character; (5) the State may offer evidence of the alleged victim's character trait for peacefulness in a homicide case to rebut evidence that the alleged victim was the first aggressor. Additionally, in all cases, evidence of a witness' character for untruthfulness or truthfulness or of a witness' criminal convictions may be admissible as set forth in TRE 608 and 609. When evidence of a person's character or character trait is allowed under any of these exceptions, character may be proved by reputation or opinion testimony. The judge may allow inquiry into relevant specific instances of conduct on cross-examination, but in Tennessee a strict pre-admission inquiry must be conducted.

(2) When a person's character or character trait is an essential element of the charge, claim or defense, character or character trait may be proved by reputation or opinion testimony or by testimony of relevant specific instances of conduct.

(3) Evidence of crimes, wrongs, or acts is not admissible to prove character in order to prove that a person acted in accordance with their character on a given occasion, but may be admissible for some other purpose, such as to prove absence of mistake or accident, common scheme or plan, motive, opportunity, intent, preparation, plan, knowledge, or identity. (Note that TRE 404(b) does not specifically list these as other purposes but case law includes ). Before this evidence is admissible, upon request, the court must conduct a rigorous pre-admission inquiry and must find that the (1) a material issue exists requiring proof of the other act; (2) that the other act is established by clear and convincing evidence; and (3) must exclude the evidence if the probative value is outweighed by the danger of unfair prejudice.

(4) Evidence is admissible to prove an **individual's habit or an organization's routine practice**. A habit is a regular response to a repeated specific situation. A routine practice is a regular course of conduct of an organization.

Relevant evidence may also be excluded under **TRE 403**, but under this rule, exclusion is within the trial judge's discretion; the judge has to balance the probative value of the evidence against certain claimed dangers (unfair prejudice, waste of time, confusion, expense, delay) and may exclude the evidence only if the dangers substantially outweigh the probative value

## For the Benchbook: Character Evidence

### Two Approaches for Ruling on Evidence Regarding Character

#### I. Rules-based approach

1. **404(a)** Character evidence offered to show propensity (action in conformity with trait of character) is generally not admissible. Exceptions in Rule 404(a) allow the accused to offer evidence concerning a “pertinent character trait of the accused or the victim” and allow the prosecution to rebut this evidence [**404(a)(1)&(2)**]; and allow prosecution to prove “same trait of character of accused “ if accused offers character trait of victim; and allow prosecution to offer evidence of “character trait of peacefulness of alleged victim in a homicide case to rebut evidence that the alleged victim was the first aggressor.”

When admissible, proof is limited to reputation and opinion evidence; on cross-examination inquiry may be allowed into relevant specific instances of conduct. **405(a)**

2. **405(b)** Character evidence offered to prove an essential element of a charge, claim or defense.  
When allowed, proof may be by reputation, opinion, or specific instances of conduct.
3. **404(b)** – Evidence of specific acts, wrongs, or crimes offered not to prove conformity but rather offered for “some other purpose.”
4. **406** - Evidence of habit of person or routine practice of organization
5. **404(a)(3)** – Evidence of the character of a witness for truthfulness or untruthfulness [**608(a)**], but when admissible, proof is limited to reputation or opinion evidence; on cross-examination inquiry may be allowed into specific instances of conduct [**608(b)**]; certain criminal convictions are admissible for the purpose of attacking character for truthfulness [**609**].

#### II. Question-based, Elimination Approach

1. What kind of case? If criminal, Rule 404, 405, and 608 may apply; if civil, use of Rule 404(a) is more doubtful, but Rules 404(b) and Rule 608 apply.
2. Who is offering the evidence? If criminal case, the prosecution’s ability to initiate proof of accused’s character is limited to two small exceptions in Rule 404(a) [see above] and Rule 404(b); accused has much greater leeway in initiating proof about self.
3. Whose character? Rule 404(a) discusses rules pertaining to character evidence about the accused or victim; Rule 608 [via Rule 404(a)(3) reference] applies to character evidence about a witness [remember, once an accused or victim testifies, he or she becomes a witness]
4. What kind of evidence is offered? If evidence is offered by accused or prosecution under Rule 404(a), proof must be by reputation or opinion evidence; if evidence is offered concerning a witness’ character for truthfulness/untruthfulness under 6-8(a), proof must be by reputation or opinion evidence. Judge has discretion to allow inquiry on cross-examination into specific instances of conduct. If character evidence is an essential element of claim or defense, specific instances of conduct are allowed. If

evidence of wrongs, crimes, or acts is being admitted under Rule 404(b), that evidence, by definition, concerns a specific instance of conduct.

## For the Benchbook: Hearsay Evidence

### Hearsay Checklist

1. Is the evidence a **statement**?  
Oral, written, non-verbal conduct intended as an assertion?
2. Is the statement an **out of court statement offered in court**?
3. Is the statement **offered to prove the truth of the matter asserted in the statement**?  
(Does the statement's probative value depend upon the statement being true?)
4. Checklist of reasons that statements may be offered other than to prove the truth of the matter
  - a. To prove the state of mind of the speaker (circumstantially indicating mental illness, anger, sadness, etc.)
  - b. To prove the effect on the listener (notice, awareness, etc.)
  - c. To prove that something was said (speaker was capable of speaking, etc.)
  - d. As proof of an independent act of legal significance, a/k/a verbal acts (words in and of themselves have legal consequences by virtue of fact uttered without regard to truth)
5. If the statement is offered for the truth of the matter asserted (and does not fall under the rule above in federal court), has the proponent established an **exception** to the hearsay rule, providing for admission?
  - a. **TRE 803 exceptions** – exceptions cover statements that are considered inherently trustworthy due to the circumstances of their making or that are considered important enough to reduce concerns of trustworthiness and fall within four broad categories:
    - i. **Truth-producing exceptions** – Examples include excited utterance; statements in aid of medical diagnosis **and** treatment under recorded recollection; statement of then-existing mental, emotional, or physical condition)
    - ii. **Records Exceptions** – Examples include records of regularly conducted activity and public records (**caveat:** public records not admissible by prosecution against defense in criminal case)
    - iii. **Reputation**
    - iv. **Judgments**
    - v. **TRE specifics**
      - a. **Prior Statements**
        - i. **Prior Statement of Identification** if declarant earlier perceived the person identified
        - ii. **Admissions** (better referred to as opposing party's statement) if offered against an opposing party **and**
          - i. Statement made by party in individual or representative capacity
          - ii. Statement adopted by party
          - iii. Statement made by person authorized by party to make statement
          - iv. Statement made by party's agent or employee on matter within scope of and during relationship
          - v. Statement made by the party's coconspirator during and in furtherance of conspiracy

- vi. **Other** - Tennessee has a child statements exception which applies in limited proceedings (TRE 803(25)) and a new exception for certain prior inconsistent statements (TRE 803(26)) when the declarant testifies and the prior inconsistent statements is (1) under oath, (2) written and signed, or (3) recorded. TRE 803(26) also has procedural requirements including a pre-admission determination that the statement was made under circumstances indicating trustworthiness and compliance with TRE 613(b) (disallowing admission of extrinsic evidence of the statement until and unless witness is given an opportunity to explain or deny the statement)
  - b. **TRE 804 exceptions** – examples include former testimony, declarations against interest, declarations in belief of impending death, and statements offered against a party that wrongfully caused another party’s unavailability (**note:** declarant must have intended to procure the unavailability of the witness)
6. If the exception falls under TRE 804, has the proponent established **unavailability** of the declarant? Unavailability is established by showing that the witness (1) is exempted from testifying, (2) refuses to testify, (3) cannot remember adequately to testify, (4) cannot be present due to death or infirmity, (5) cannot be compelled to attend by process or other reasonable means. **Unavailability** does not have to be established for an **804 exception** if statement’s proponent **wrongfully procured the unavailability of the declarant.**
  7. If the statement contains **hearsay within hearsay** has the proponent established an exception for each and every statement?
  8. If the statement is being offered in a criminal case by the prosecution is the statement **testimonial?** (Simple test: is it like what a witness does not the stand. USSC test: If the statement s made in the course of police interrogation, a primary purpose test is employed. A statement is nontestimonial when made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency and testimonial when the circumstances indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. If the statement is testimonial, is the declarant **unavailable** and did the defendant have a **prior opportunity to cross-examine?**
  9. If a hearsay statement is admitted as an exception, the **declarant** is now a witness subject to **impeachment.**
  10. If a hearsay statement is admitted for purposes other than the truth of the matter asserted, statement is not evidence of the facts asserted within the statement.

## **For the Benchbook: Confrontation**

### **Confrontation Checklist**

1. Is the statement offered by the state against defendant at trial?
2. Is the statement offered for the truth of the matter?
3. Is the statement testimonial?

In assessing testimonial, consider: whether statement was akin to that being given by a witness at trial; whether statement was made for purposes of allowing police to meet an ongoing emergency or was for the purpose of establishing or proving past events relevant to later prosecutions; Other factors include: formality, to whom the statement was made, similarity to affidavits,

4. Did the defendant have a prior opportunity to cross-examine the declarant?
5. Is the declarant now unavailable?  
Proponent has obligation to prove, not simply assert, unavailability
6. If the statement is testimonial and offered for the truth (and declarant is either not unavailable or defendant did not have a prior opportunity to cross-examine), the statement is not admissible unless defendant has waived the right to confrontation through forfeiture or some other means.
7. Even if the statement is not testimonial, it may still be inadmissible if it violates the hearsay rule or does not have sufficient indicia of reliability.

## For the Benchbook: Impeachment

### I. General Impeachment Principles

1. Witness impeachment is the process by which a witness' credibility is called into question. The factfinder ultimately determines whether a witness has been impeached.
2. Evidentiary issues related to impeachment are contained in case law and rules, but also are based on practice and tradition.
3. Both substantive and procedural limitations restrict impeachment evidence, most of which are prompted by concerns for **efficiency** and fairness, with an emphasis on efficiency.
4. Because of the emphasis on efficiency, whether and to what extent impeachment is allowed will be impacted two long-existing common-law rules.
  - a. If a witness admits the impeaching matter, impeachment is complete. No **extrinsic evidence** of the matter is admissible.
  - b. **Collateral – Non-collateral** – When a witness is being impeached with collateral matters (matters that would not be relevant in the case on any matter other than the witness' credibility), efficiency is compromised. Therefore, lawyers may not prove collateral matters with extrinsic evidence. The practical impact of this rule is that the lawyer is stuck with the witness' answer and should therefore phrase the cross-examination carefully.
5. A party does **not vouch** for its witnesses; thus, a party may impeach its own witness.

### II. Impeachment Checklist

On impeachment questions:

1. When confronting an evidence issue involving impeachment, first make sure that the impeachment is against a person who has testified or who is a hearsay declarant.
2. Next determine what impeachment method is being used.  
Generally, the impeachment methods include:
  - a. Bias, Motive, Interest – never collateral and (**TN 616**) may be proved on direct, cross, and by extrinsic evidence
  - b. Prior Inconsistent Statements –
    - i. Common law required that a witness be given an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of the prior inconsistent statement is admitted; this requirement persists but is more rigorously enforced in TN based on TRE 613(b)'s restriction that extrinsic evidence not be allowed **until and unless** the witness has had an opportunity to explain or deny;
    - ii. Some Prior Inconsistent Statements are admissible for their truth ( TRE 803(26)) - should differentiate and if for impeachment purposes, consider giving a limiting instruction



- c. Character for Untruthfulness –TRE 608 – must be proved by reputation or opinion testimony, but specific instances of conduct that are probative of untruthfulness may be inquired into on cross-examination in judge’s discretion; note that proof of character for truthfulness is not admissible until witness’ character for truthfulness has been attacked

TRE 608(b) requires, upon request, a jury-out determination that the alleged conduct has probative value; that a reasonable factual basis exists for inquiry; that the conduct occurred no more than ten years before the commencement of the action; and, if the conduct relates to the accused, that written notice was given and that the conduct’s probative value on credibility outweighs its unfair prejudicial effect on the substantive issues

- d. Criminal Convictions –TRE 609 – convictions for crime punishable by more than one year or crime, regardless of punishment, which include elements requiring proof or admission of dishonest act or false statement
  - i. Different balance test when conviction is admitted against accused in criminal case – probative value outweighs prejudicial impact on defendant
  - ii. Rule is subject to some exceptions – 10-year limitation unless special findings; exclusion of juvenile adjudications; exclusion of convictions that have been pardoned or annulled; a conviction on appeal is admissible as is fact of appeal
  - iii. TRE 609 requires pre-admission, jury-out determination
- e. Ability to perceive, remember, recollect – TRE 617 includes impeachment by impaired capacity at time of event or time of testimony
- f. Contradictory facts

3. Following impeachment, a witness is subject to being rehabilitated. Again, issues of efficiency and fairness will govern the extent of rehabilitation allowed.

4. Other Quirks About Impeachment:

- a. Impeachment should always be distinguished from refreshing recollection in which counsel’s purpose is not to discredit the witness but to assure that certain evidence is testified to; a witness’ memory may be refreshed by the use of leading questions and by reference to a refreshing device which is shown to the witness and then removed. The witness testifies from memory based upon having his or her memory refreshed. The purpose and the technique are vastly different from those used to impeach.

## For the Benchbook: Authentication

### I. General Authentication Principles

1. Authentication is the process by which the reliability of an item of tangible evidence including real evidence and documentary evidence, collectively referred to as exhibits, is established.
2. Authentication is generally a **TRE 104(a)** issue, meaning that the judge makes this determination before the item is allowed to be displayed (published) to the jury. For some items of evidence, authentication is a **TRE 104(b)** evidence in that the relevance of the evidence is conditional upon the establishment of some other fact. In these situations, the judge admits the item of evidence upon a finding that sufficient evidence of the fact exists, but the jury makes the ultimate determination as to whether the fact actually exists. (Example: handwriting)
3. The basic authentication requirement (a/k/a/ **“laying the foundation** for evidence) is very low – to authenticate an item of tangible evidence, the proponent only has to introduce evidence **“sufficient to support a finding that the item is what the proponent claims it is.”** This standard applies to all kinds of tangible evidence including documentary and electronic evidence.
4. The simplest way to authenticate tangible evidence is through the testimony of a witness with first-hand knowledge.
5. Many items of evidence are self-authenticating; TRE 902 sets out twelve types of self-authenticating documents which include sealed or signed public and foreign documents, certified public records, commercial documents, official publications, records of regularly conducted activities, and others
6. Items of tangible evidence that are fungible and not readily identifiable by sight are authenticated by chain of custody. A recent Tennessee decision held that the identity of tangible evidence requires only “reasonable assurances” that there has been no tampering, loss, or mistakes with the evidence. The proponent is not required to remove all possibilities of tampering.
7. Authentication is only the first of two prerequisites to the admission of tangible evidence. The evidence must be both authentic and admissible before it may be showed to the jury. Admissibility depends upon the application of the other rules of evidence – hearsay, original writing, opinion, privilege, and relevance rules.

## II. Checklist for Authenticating and Admitting Tangible Evidence

1. Is the item of evidence self-authenticating?
6. If the item is not self-authenticating, then consider:
  - a. what witness or witnesses with first-hand knowledge can testify that the item is what it is claimed to be
  - b. can the item be authenticated by reference to its appearance, contents, substance, internal patterns, or other distinctive characteristics?
  - c. can the item be authenticated by evidence describing the process or system that produced it and by verifying that the system or process produces a reliable result?
  - d. is there a statute that provides for authentication or identification of the item?
7. Once the item is authenticated, what obstacles do other rules pose to admissibility?
  - a. Documents and Writings
    - i. Original Writing Rule  
If the item is a writing (defined broadly by TRE 1001) and it is offered to prove its content, the original must be produced under the original writing rule (but duplicates are admissible to the same extent as the original unless genuine question of authenticity or unfair to admit duplicate).
    - ii. Hearsay Rule  
If a document or writing is offered to prove the truth of the matter asserted within it, the hearsay rule requires that the document or writing fit within a hearsay exception to be admitted.
    - iii. Opinion Rule  
If a document or writing contains opinions, TRE 701 and 702 may require exclusion of the opinion portion of the writings.
    - iv. Relevance
  - b. Physical Evidence
    - i. Relevance and Rule 403 issues
  - c. Electronic Evidence  
Authentication is often by process or system but admissibility issues must also be resolved.

## For the Benchbook: Opinion Testimony

### I. General Opinion Testimony Principles

1. Opinion may be lay or expert; lay opinion is limited to testimony that is based on the witness' first-hand knowledge and that is also (a) rationally based on perceptions; (2) helpful to a clear understanding; and (3) not based on scientific, technical, or other specialized knowledge. The third requirement is not clearly spelled out in TRE 701, as it is in FRE 701, but is effectually the rule. TRE701 also has a special provision allowing lay opinion on the value of one's property or services.
2. Witnesses who are not experts are allowed to give opinions on some issues that would appear to require some scientific, technical, or specialized knowledge when the witness' opinion is actually a composite expression of observations that are otherwise difficult to explain such as for example, speed, distance, weight, and physical condition. But limitations are imposed to exclude testimony that is merely a witness' unsubstantiated meaningless assertion.
3. To be admissible, opinions concerning scientific, technical, or specialized matters must (1) be offered by a qualified witness; (2) concern an appropriate subject matter; and (3) must substantially assist the trier of fact. TRE 702. Under TRE 702, the testimony must "substantially assist" the trier of fact, a one-word difference in federal and state standards that the Tennessee courts have relied upon to conclude that Tennessee's expert testimony standard is higher than the federal standard.
4. Qualified Witness. Opinions concerning scientific, technical, or specialized matters may be given only by a witness who is qualified by virtue of experience, education, training, or skill. TRE 702. The determination of whether a witness has sufficient qualification to give an opinion concerning scientific, technical or specialized matters is a threshold matter for the judge.
5. Subject Matter. To be admissible, opinions concerning scientific, technical, or specialized matters must be reliable. Reliability is determined by the (1) validity of the underlying theory or principle; (2) validity of the techniques applying the theory; and (3) proper application of the technique to the particular facts. Each is a distinct issue addressed as a preliminary matter by the judge.
6. Validity of underlying theory and techniques. The validity of the theory and techniques may be established through judicial notice; legislative recognition; stipulation; or presentation of evidence concerning the theory. When validity is determined via evidence (usually including expert testimony), a pretrial hearing known in federal courts as a *Daubert* hearing (and in state courts as a *McDaniel* hearing) is conducted at which the trial judge acts as "gatekeeper" to determine whether the opinion evidence will be admitted.
7. In determining the reliability and thus the admissibility of the opinion evidence, the trial judge as gatekeeper may consider a number of factors. In *Daubert*, the USSC enumerated four nonexclusive factors: (1) testability; (2) peer review and publication; (3) error rate and standards (because these two are combined, some say there are five factors); and (4) general acceptance.
8. Tennessee courts also look to whether the expert's research was conducted independent of litigation. The factors are only applied insofar as they are relevant to determining the validity of the particular theory or principle.

9. A trial judge's decision to exclude expert testimony is subject to an abuse of discretion, not a de novo standard on appeal.
10. An expert's opinion does not have to be based on first-hand knowledge. The opinion may be based on facts or data that the expert personally observed or those that are made known to the expert provided the facts and data are the kinds reasonably relied upon by experts in the field. TRE 703. The facts and data do not have to be admissible to be relied upon, but if they are not admissible, the proponent may not disclose the facts and data to the jury unless the probative value in helping the jury evaluate the opinion substantially outweighs the prejudicial effect.
11. An expert may testify without disclosing the underlying facts and data, but may be required to disclose the facts or data on cross-examination.
12. An expert may testify to the ultimate issue in a case but only if the opinions will substantially assist the trier of fact. TRE 704.
13. A court may appoint an expert on a party's motion or on the court's motion, but the expert must consent to act. When a court appoints an expert, the court sets out the duties and allows both parties to depose and cross-examine the expert. The parties may also call their own experts. The court determines whether the jury should be told that the expert is appointed. TRE 706.

## Checklist for Opinion Testimony

1. Is a party offering testimony in the form of an opinion?
  2. If so, is the opinion lay opinion: (TRE 701)
    - Does the witness have first-hand knowledge?
    - Is the opinion rationally based on the witness' perceptions?
    - Is the opinion helpful to an understanding of the witness' testimony or issues in the case?
    - Does the opinion not involve a scientific, technical, or otherwise specialized matter?
    - Does the opinion involve one of the special categories of composite expression?
  3. a. If expert testimony: (TRE 702)
    - Is the expert sufficiently qualified by virtue of skill, education, experience or training?
    - Is the subject matter of the testimony reliable as determined by the validity of the underlying principle, techniques, and the application to the facts?
    - Have appropriate factors been considered to assess the validity of the underlying principles and techniques?
    - Did the expert apply valid theories and techniques to the facts in the case?
  - b. In assessing the validity of the underlying principles and techniques, consider:
    - (1) whether scientific evidence has been tested and the methodology with which it has been tested;
    - (2) whether the evidence has been subjected to peer review or publication;
    - (3) whether a potential rate of error is known;
    - (4) whether the evidence is generally accepted in the scientific community;
    - (5) whether the expert's research in the field has been conducted independent of litigation. and perhaps:
    - (6) whether the expert unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
    - (7) whether the expert accounted for alternative explanations;
    - (8) whether the expert applied the same rigor as would have been applied in professional work; and whether the field of expertise is known to produce reliable results.
  - c. Will the opinion substantially assist the trier of fact?
4. Is an issue raised concerning the admissibility of the underlying facts or data on which the opinion is based? (TRE 703)

If so, exclude the underlying facts and data unless they are admissible or, if not admissible, "should exclude" unless the probative value in assisting the jury in evaluating the opinion substantially outweighs the prejudicial effect of the inadmissible facts and data; if admit, give cautionary instruction
5. Is an issue raised concerning the trustworthiness of the underlying facts or data on which the opinion is based? (TRE 703)

If so, the court "shall disallow testimony in the form of an opinion or inference. . . ."

6. Is an issue raised concerning an opinion on the ultimate issue? (TRE 704)  
Not automatically excluded.
7. Is an issue raised concerning nondisclosure of the underlying facts and data on which the opinion is based? (TRE 705)

If so, the court may require disclosure on cross-examination, but the expert is not required to disclose the underlying facts and data before stating an opinion or inference.

8. Is the court considering appointing an expert? (TRE 706)  
Precisely follow outlined procedure

## Other Issues

Impeaching Jury Verdict – Jurors may not testify to statements or occurrences during deliberations, effect of evidence, mental processes

Rule of Completeness – Applies to writing or recorded statements

Procedural Issues – Burden of Proof, Burden of Persuasion, Form of Question

Statute of Frauds – TCA 47-2-201; Statutory requirement of a writing to enforce certain contracts including those that are not to be performed within one year; exceptions include contracts for unique good; partial performance; and contracts that can be performed within one year

Parole Evidence Rule – TCA 47-2-202; part of UCC; Substantive common law rule in contract cases that prevents a party to a written contract from presenting extrinsic evidence that contradicts or adds to the written terms of the contract that appears to be whole.

Privileges – Tennessee rules refer to statutory privileges, which are numerous and include:

Accident Report	Disciplinary Board - Complainant
Attorney-Client	Legislative Committee - Witness
Accountant - Client	Medical Review Committee - Witness
Attorney-Private Detective	News reporter - Informant
Child Sexual Abuse Exception	Psychiatrist/Counselor/Social Worker/ Client
Client Penitent	Spousal Privilege (confidential communications only in TN and
Deaf Person – Interpreter	very limited in criminal cases)

Presumptions - Presumptions may act as inferences that permit but do not require jury to find presumed facts or may act to shift the burden of production of evidence to the other side. In Tennessee, presumptions are created by statute or case law; some example include presumption that registration is prima facie evidence of ownership and use for owner's benefit; presumption of negligence of bailee; presumption of death during lengthy period of absence; presumption against suicide; presumption of parentage; presumptions involving wills; presumption involving reasonableness of medical and repair bills; and many others