A Quick Trip Through the Rules of Evidence

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I. Evidence Rulings at Trial and on Appeal

The trial judge is given the responsibility under the Rules of Evidence to determine preliminary questions including the admissibility of evidence. Once the judge admits the evidence, the jury weighs the evidence and in so doing assesses the credibility of the witnesses and ultimately whether the party bearing the burden of proof has met the burden.

The trial judge is the gatekeeper of all evidence, determining when objections are raised when evidence is admissible and when it is not. The trial judge sits in a key position from which he or she can hear the testimony, observe the witnesses, and assess their demeanor and credibility. The trial judge also has the opportunity to benefit from the argument of counsel concerning the admissibility of evidence. Because the trial judge has such a pivotal role, great deference is given to trial judge's decisions regarding the admissibility of evidence.

A trial judge's ruling on evidentiary matters may require a determination of facts and law. Because of the superior vantage point of the trial judge, appellate courts give deference to the trial court's findings of fact. Thus, the appellate court will presume that the trial judge's factual findings are correct. If the trial judge has failed to make specific findings, the appellate court will review the facts "to determine wherein the preponderance lies" without applying a presumption of correctness.

A trial judge's application of the law is reviewed de novo on appeal. However, many evidentiary rulings require the trial judge to exercise discretion. When a non-constitutional evidentiary ruling requires the exercise of discretion, an appellate court will not reverse "unless it is based on a misapplication of controlling legal principles or a clearly erroneous assessment of the evidence or unless it affirmatively appears that the trial court's decision was against logic or reasoning and caused an injustice or injury to the complaining party." Additionally, even when a trial judge abuses his or her discretion in an evidentiary ruling, relief will not be available on appeal unless the party complaining about the ruling preserved the issue, *see* Tenn. R. Evid. 103, *but see* Tenn. R. App. P. 36(b)(allowing recognition of plain error), and the error more affected a substantial right of the party and more probably than not affected the judgment or would result in prejudice to the judicial process.

In essence, these principles regarding the standard of review mean that a trial judge may err on an evidentiary ruling and still be affirmed. It is the job of the appellate court to apply an abuse of discretion review to non-constitutional evidentiary rulings, while presuming correct specific factual findings made by the trial judge, and adhering to the state's harmless error standard. In order to apply the harmless error standard, however, appellate judges and judicial clerks must understand and appreciate the principles set forth in the Tennessee Rules of Evidence. **For purposes of this program, we will endeavor to reach the right ruling under the Tennessee Rules of Evidence not just a ruling that is likely to withstand appellate review.**

II. Mastering Rules of Relevance and Balancing

A. Logical and Legal Relevance

Rule 401 establishes that all evidence must pass a threshold determination (albeit a very low one) of relevancy before it is admissible. There is no such thing as limited or tangential relevance. Evidence is either relevant, i.e., has any tendency to have probative value, or it is irrelevant. Evidence may be relevant, however, on limited subjects. 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. What is or is not "of consequence," depends on the substantive law governing the cause of action.

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.

Notwithstanding logical relevance, policy-driven rules authorize (and sometimes require) courts to exclude evidence for a variety of reasons. The primary rules of legal relevance pertain to evidence of character, habit, subsequent remedial measures, compromises and offers, payment of medical and similar expenses, pleas, liability insurance, and prior sexual activity.

In analyzing relevancy ask:

1. For what purpose is the evidence offered?
2. Is the purpose a legitimate one?
3. Is there a logical connection between the evidence and a fact of consequence?
4. Is the evidence legally relevant?
5. Does some specific rule apply to the evidence?
6. Although relevant, does some specific rule limit the proof to certain types of evidence?

B. Exclusion of Relevant Evidence

The admission of relevant evidence is limited by the Constitution and by other statutes and rules, the most prominent of which is Rule 403. Rule 403 is, in many ways, the “scales of justice” rule. It allows the trial court to exclude relevant evidence. When counsel argues that evidence should be excluded under Rule 403, counsel has conceded the relevance objection.

Rule 403 provides the trial judge with the discretion to exclude otherwise relevant evidence if the probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.” When an objection is raised under Rule 403, the trial judge is required to balance the probative value of and need for evidence against certain dangers likely to result from its admission. It is counsel’s job to help the court in analyzing the two weights on the scale – on the one side, the probative value of the evidence and on the other the potential dangers.

The harmfulness prong focuses on the desire to assure that the fact finder is not improperly motivated to reach a certain result. Some courts analyze prejudice in terms of influencing by improper means, appealing to jury's sympathies, arousing a sense of horror, passion, or prejudice, promoting a desire to punish, or otherwise moving a jury to base its decision on extraneous considerations. In reaching a decision on whether to exclude evidence because of the danger of unfair prejudice, the trial court may also consider the availability of other means of proof as an appropriate factor.

Rule 403 favors admission of relevant evidence. Therefore, the burden to establish the exclusion rests on the objecting party. In determining whether to admit evidence objected to on these grounds, the trial judge must consider the probable effectiveness of a limiting or cautionary instruction.

In making, resisting, or ruling on a Rule 403 objection, ask:

1. What is the probative value of the evidence? (tendency to prove, contribute to proof on issue)
2. What are the potential dangers that arise from admitting the evidence? (danger of unfair prejudice, confusion of issues, misleading jury, considerations of delay, waste of time, or needless presentation of cumulative evidence?)
3. Do the potential dangers substantially outweigh the probative effect of the evidence?

Relevance and Balancing In Context 

1. In the civil case, Jonas wants to testify that when he saw Roger at the hospital, Roger said: "Man, I am sorry for this. I didn't mean for anything like this to happen." Roger objects based on Rules 401, 403, and 409.1.

2. In the civil case, Jonas wants to testify and introduce documents to confirm that Roger withdrew $225,000 from Paula's account and changed the names on the vehicle titles the day after her death. Roger objects based on Rules 401 and 403.

3. In the criminal case, Jonas wants to testify that when he saw Roger at the hospital, Roger said: "Man, I am sorry for this. I didn't mean for anything like this to happen." Roger objects based on Rule 401, 403, and 409.1.

4. In the criminal case, Jonas wants to testify and introduce documents to confirm that Roger withdrew $225,000 from Paula's account and changed the names on the vehicle titles the day after her death. Roger objects based on Rules 401 and 403.

5. In the criminal case, the State wants to introduce witness' testimony regarding his observations of Roger as he collected trash and dumped the trash at the city dump after the fire and before going to the hospital. Roger objects based on Rules 401 and 403 (and potentially 407).

III. Assessing the Admissibility of Character Evidence

A. Character Evidence in General

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.

Generally, character is defined 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." It is distinguishable from reputation. Character is what a person is; it depends on attributes possessed. Reputation is what a person is supposed to be and depends on attributes others believe the person possesses. In legal terms, character is an issue about which evidence can sometimes be offered, while reputation is a method or form of proving character evidence.

B. Methods of Proving Character

Character may be proven in various ways, but the rules restrict which types of proof can be offered. The three forms of evidence are specific instances of past conduct probative of a relevant trait of character; opinion from a person with knowledge; and community reputation as testified to by a person who is familiar with the reputation.

C. Use of Character Evidence

In determining the use of character evidence, the appropriate inquiry centers on the purpose of the evidence, the nature of the person about whom the evidence is offered (including the type of case), and the method of proof offered. The purpose of introducing evidence of character may be to offer direct evidence of some essential element of the claim or defense. In other words, in some limited contexts, character is directly in issue in a case. In those circumstances, character is being offered as direct evidence of a fact in issue because under the substantive law it determines the rights and liabilities of the parties. 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. If character is directly at issue, the rules generally allow proof by specific instances of conduct, opinion, or reputation testimony.

Character may also be used in limited purposes to prove conformity or propensity. In essence, this is circumstantial use of character evidence. The fact finder is asked to infer that conduct on the occasion in question was consistent with a trait demonstrated at some other time. In the limited circumstances when character evidence is allowed to establish propensity, only reputation or opinion evidence is allowed on direct examination, with inquiry into specific instances of conduct being allowed on cross-examination in the court's discretion.

D. Exceptions to the Exclusion of Character Evidence in Criminal Cases

Rule 404(a) sets out exceptions to the general rule that character evidence cannot be introduced for the purpose of showing propensity. The exceptions apply only in criminal cases. The exceptions allow the defendant to offer proof of a pertinent trait of the defendant's character and the defendant to offer proof of a pertinent trait of the victim's character. If the defendant does so, the State is entitled to offer proof to rebut that offered by the defendant. Additionally, if the defendant offers proof of a pertinent trait of the victim's character, the State may offer proof of that same character trait of the defendant. In addition, a limited exception allows the State to offer evidence of the victim's character trait for peacefulness in a homicide case in which the defendant claims that the victim was the first aggressor. In all of these instances, proof is limited to reputation or opinion evidence, with inquiry on cross-examination allowed into specific instances in the judge's discretion.

E. Character of Witnesses

Because a witness' credibility is always at issue, Rule 608 allows the admission of reputation and opinion evidence to attack the character of a witness so long as the evidence refers only to the witness' character for truthfulness or untruthfulness. To offer opinion or reputation evidence of character, a foundation must first be established that the character witness is familiar with the reputation of the witness or has a foundation for an opinion of the witness' credibility. Once a witness has testified concerning either reputation or opinion evidence regarding the witness' truthfulness or untruthfulness, the witness may be cross-examined about specific acts bearing upon the person's credibility.

Rule 609 allows for the admission of certain criminal convictions for purposes of impeaching a witness' credibility.

F. Character Evidence vs. Habit Evidence

Proof of a person's habit is generally admissible. Under Rule 406, evidence of a habit of a person or the routine practice of an organization, whether corroborated or not, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 406 does not define habit or routine practice but leaves the determination up to the courts on a case by case basis. Generally, habit is thought to be a person's regular practice of meeting a particular kind of situation with a specific kind of conduct. A good checklist for assessing whether conduct amounts to habit is to inquire into 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, he explains, it is easy to understand why the rules generally differentiate between the two and their admissibility with the nonjudgmental habit evidence being more reliable and therefore, generally admissible.

When habit evidence is admissible, the evidence may "consist of testimony in the form of an opinion or evidence of specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine."

G. Evidence of Other Crimes, Wrongs, Acts to Prove Something Other than Propensity

Rule 404(b) allows proof of specific instances of conduct – other crimes, wrongs, or acts – for purposes of proving some legitimate issue in the case. Evidence under rule 404(b) is not offered to prove propensity. That is, it is not offered to prove that conduct on a given occasion conformed with conduct on other occasions; rather it is offered for some other legitimate purpose, such as to prove motive, intent, opportunity, common scheme, absence of accident, or absence of mistake. In Tennessee, the court must conduct a hearing and make specific findings before 404(b) evidence is allowed.

Rule 404(b) requires that the court must hold a hearing outside the jury's presence and must determine that a material issue exists other than conduct conforming with a character trait; must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
must find proof of the other crime, wrong, or act to be clear and convincing; and must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Applying Character and Habit Rules 

6. In the civil case, plaintiff wants to introduce evidence of Roger's drug and alcohol use. Defendant objects based on Rules 401, 403, and 404.

7. In the civil case, plaintiff wants to introduce evidence of Roger's involvement with another partner at the time of Paula's death. Defendant objects based on Rules 401, 403, and 404.

8. In the civil case, defendant wants to introduce evidence of Paula's drug and alcohol use. Plaintiff objects based on Rules 401, 403, and 404.

9. In the criminal case, the State wants to introduce evidence of Roger's drug and alcohol use. Defendant objects based on Rules 401, 403, and 404.

10. In the criminal case, the State wants to introduce evidence of Roger's involvement with another partner at the time of Paula's death. Defendant objects based on Rules 401, 403, and 404.

11. In the criminal case, defendant wants to introduce evidence of Paula's drug and alcohol use. The State objects based upon Rules 401, 403, and 404.

12. In the criminal case, defendant wants to introduce evidence of Paula's admission into a drug rehabilitation hospital six months before her death. The State objects based upon Rules 401, 403, and 404.

IV. Effectuating Impeachment

The evidentiary rules pertaining to impeachment are complicated because they are both substantive and procedural and not comprehensive. The rules are supplemented by case authority and common law. In addition to method-specific limitations, the rules (and case law) impose some general limitations on all impeachment evidence. One such limitation is the collateral fact-extrinsic evidence rule. The rule promotes efficient trials. It is based on the premise that because impeachment is a peripheral issue, impeachment matters should not be allowed to dominate the trial. Thus, if impeachment is on a collateral matter, extrinsic evidence is generally not allowed to prove the impeachment; rather counsel is limited to inquiry on cross-examination and is bound by the witness' answer. Thus, in order to determine whether extrinsic evidence is admissible, the court must determine whether the matter is collateral or not collateral. A fact is not collateral if it tends to prove or disprove a material proposition in the case. Evidence of bias, prejudice, or motive is never considered collateral.

Seven methods of impeachment were recognized at common law. Impeachment could be by bias, motive, or interest; mental impairment; contradiction; prior inconsistencies; character for untruthfulness; conduct probative of untruthfulness, including criminal convictions; and religious beliefs. Some of these impeachment methods are no longer recognized. Others are restricted by various substantive and procedural limitations imposed by the rules.

In Tennessee, the rules specifically address impeachment by character evidence related to truthfulness or untruthfulness (Rule 608); impeachment by criminal convictions (Rule 609); impeachment by bias (Rule 616); impeachment by impaired capacity (Rule 617); and impeachment by learned treatise (Rule 618). Rule 613 addresses some procedural aspects of using a witness' prior statement, but the substance of impeachment by prior inconsistent statement is governed by case law.

Lawyers often confuse proof of character with impeachment of a witness based on the witness' character for untruthfulness. The former is controlled by Rules 404 and 405, while the latter is controlled by Rule 608. When impeaching a witness, impeachment is limited to the character trait for truthfulness or untruthfulness and proof is limited to opinion or reputation testimony. However, in the court's discretion, following a fairly rigorous pre-admission determination, inquiry may be made into specific instances of conduct probative of truthfulness or untruthfulness.

Evaluating Witness Impeachment 

13. In the civil case, defendant cross-examines Jonas Harris regarding his disagreement with his mother over his life style arguing that this, rather than her relationship with Roger, is the real reason for Jonas and his mother's disagreement. The plaintiff objects claiming improper impeachment.

14. In the civil case, plaintiff cross-examines Roger about the unexplained death of his last girlfriend. The defense objects claiming improper impeachment.

15. In the criminal case, defendant's introduction of Paula's admission into a drug rehabilitation hospital. The Sate objects claiming improper impeachment.

16. In the criminal case, the State's introduction of Roger's 2001 felony aggravated assault conviction for stabbing his former wife. The defense objects claiming improper impeachment.

17. In the criminal case, the State's cross-examination of Roger concerning his marital status at the time he began his relationship with Paula. The defense objects claiming improper impeachment.

18. In the criminal case, defense cross-examination of Joan Murphy about the statement she gave to the police chief following Paula's death. The State objects claiming improper impeachment.

19. In the criminal case, the defense introduction of an Order of Protection entered against Paula six months prior to her death. The State objects claiming improper impeachment.

V. Admitting and Excluding Hearsay Evidence

Because the reliability of evidence is affected by the perception, memory, sincerity, and language of a witness, our rules of evidence have traditionally favored live witness testimony in the presence of the fact finder. The three traditional conditions require that a witness testify under oath, while present in court, and subject to cross-examination. The general exclusion of hearsay evidence preserves these three safeguards of evidence. Hearsay is thus excluded because of the desire to preserve four important tenets of evidence: perception, memory, language, and sincerity. The exclusion of hearsay is based upon the

belief that these factors will be best preserved if testimony is required to be under oath, in the presence of the fact-finder, and subject to cross-examination.

Although not fulfilling these three conditions, some evidence is nonetheless thought to be trustworthy by its nature and, therefore, worthy of consideration, or perhaps, simply necessary. As a result, the rules of evidence deem some statements that would otherwise fit within the hearsay definition to be "not hearsay." Other statements are deemed to satisfy exceptions to the hearsay rule subject, in some circumstances, to the unavailability of the declarant.

When evidence is admitted because it is not hearsay or because it fits with a hearsay exception, the evidence is admitted for its full evidentiary, substantive value. But satisfying the hearsay rule does not render the evidence per se admissible. The evidence may still be admissible or not admissible, depending on compliance with other applicable rules of evidence.

A. Statements Not Offered for the Truth of the Matter Asserted

Out of court statements that are not offered for the truth of the matter asserted do not violate the hearsay rule. Examples of statements not offered to prove the truth are statements offered to prove that something was said, as opposed to *what* was said, and statements offered to prove the effect the statement had on the listener, rather than to prove the truth of what was said. Some other frequent examples of statements that are non-hearsay, because they are not offered to prove the truth of the matter, are statements offered to prove the speaker's state of mind, statements having independent legal significance that act as verbal or operative facts, and statements offered to prove another party's course of action.

B. Statements Excluded from the Hearsay Rule

The Federal Rules of Evidence declare certain statements that arguably would otherwise fit within the definition of hearsay to be excluded from the hearsay rule. The Tennessee Rules do not contain any similar category but treat many of these exclusions as exceptions.

C. Hearsay Exceptions

Despite the general rule favoring in-court testimony, certain hearsay is considered trustworthy by its very nature and is, therefore, deemed admissible despite the absence of the witness. There are two broad categories of hearsay exceptions. In the first, the availability of the declarant is immaterial. Arguably, this evidence is inherently reliable, thus removing any need for a necessity inquiry. In the second category of hearsay exceptions, the declarant must be unavailable, evidencing an indication it is the necessity of the evidence that has resulted in its being deemed an exception.

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Two special rules round out the hearsay rules found in the Rules of Evidence. First, Rule 805 provides that when hearsay occurs within hearsay, each statement must satisfy the elements of a hearsay exception or exclusion to be admissible. Second Rule 806 allows the credibility of a declarant to be

attacked when a hearsay statement or some non-hearsay admissions are admitted. Evidence attacking a declarant's credibility is the same "as evidence which would be admissible for those purposes if declarant had testified as a witness."

D. Confrontation

In criminal cases, the accused has a constitutional right to be confronted with the witnesses against the accused. This right has been redefined by the United States Supreme Court in *Crawford v. Washington* as a procedural right, requiring that the accused have the opportunity to cross-examine the declarant before any testimonial statement is offered against the accused. Thus, in criminal cases, when the State seeks to introduce an out of court statement (either written or oral) for the truth of the matter asserted within the statement, both a hearsay analysis and a confrontation analysis must preceded the admission.

The confrontation clause applies only to statements offered by the prosecution that are testimonial. Although no explicit, all-encompassing definition of testimonial statement exists, one simple test is to determine whether the statement being offered is an attempt to substitute what a witness would ordinarily be expected to testify to on the witness stand. With regard to statements made pursuant to questioning by law enforcement, the United States Supreme Court has established a primary purpose test. A statement is testimonial 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, the state may only admit the statement without the declarant if the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant.

Applying Hearsay Rules 

20. In the civil case, Jonas wishes to testify that he learned that no one had been to visit his mother (after conferring with the nursing staff and looking at the guest log). The defense objects on hearsay grounds.

21. In the civil case, Jonas wishes to testify to his conversation with Paula. The defense objects on hearsay grounds.

22. In the civil case, Roger wishes to testify why he left the hospital (based on nursing staff assurances that Paula was going to be fine.) The plaintiff objects on hearsay grounds.

23. In the criminal case, the State wishes to introduce Paula's statement to Jonas. The defense objects on hearsay and confrontation grounds.

24. In the criminal case, the State wishes to introduce the preliminary hearing testimony of the EMT, who has been deployed to Afghanistan. The defense objects on hearsay and confrontation grounds.

25. In the criminal case, the State wishes to introduce the EMT's report which includes Paula's statement and vitals. The defense objects on hearsay and confrontation grounds.

26. In the criminal case, the defense wishes to introduce records from Paula's admission to a drug rehabilitation hospital. The state objects on hearsay grounds.

27. In the criminal case, the defense wishes to introduce chemical reports showing the amount and types of drugs and the amount of alcohol in Paula's blood when she arrived at the hospital from the scene of the fire. The State objects on hearsay grounds.

28. In the criminal case, the defense wishes to introduce Paula's email to her friend threatening suicide. The State objects on hearsay grounds.

VI. Opinion

A. Types of Opinion Evidence

1. Lay Opinion

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 Tennessee Rule of Evidence 701, as it is in Federal Rule of Evidence 701, but is effectually the rule. Tennessee Rule of Evidence 701 also has a special provision allowing lay opinion on the value of one's property or services.

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.

2. Expert Opinion

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 assist the trier of fact. Under Rule 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.

a. Qualified Witness

Opinions concerning scientific, technical, or specialized matters may be may be given only by a witness who is qualified by virtue of experience, education, training, or skill. 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.

b. Subject Matter of Testimony

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.

c. Validity of Underlying Theory or Techniques

The validity of the theory and techniques may be etablished 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.

d. Trial Judge's Gatekeeper Function

In determining the reliability and thus the admissibility of the opinion evidence, the trial judge as gatekeeper may consider a number of factors. In *McDaniel v. CSX Transportation, Inc.*, the Tennessee Supreme Court embraced the *Daubert* factors outlined by the United States Supreme Court enumerating 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. The factors are flexible and list other factors that may be considered as well. 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.

e. Basis of Opinion and Admissibility of Underlying Facts and Data

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. 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. An expert may testify without disclosing the underlying facts and data, but may be required to disclose the facts or data on cross-examination. Moreover, an expert may testify to the ultimate issue in a case but only if the opinions will substantially assist the trier of fact.

f. Appellate Standard.

A trial judge's decision to exclude expert testimony is subject to an abuse of discretion, not a de novo standard on appeal.

Applying Opinion Rules 

29. In the criminal case, the State wishes to introduce the fire marshal's opinion as to the cause of the fire, which is based on statements from neighbors at the scene, observations at the scene, Roger's removal of debris, and tests done by a laboratory showing the presence of an accelerant. The State also wishes for the fire marshal to testify to the specifics of these conversations, observations, and test results. The defense objects based on Rules 702-704.

30. In the criminal case, the State wishes to introduce the neighbor's testimony that Roger looked "shocked" to see him when he arrived at the scene of the fire. The defense objects based on Rule 701.

31. In the criminal case, the State wishes to introduce the neighbor's testimony that Roger did not act upset or concerned about Paula. The defense objects based on Rule 701.

VII. Embracing Authentication Requirements in the Electronic Age

Reduced to its simplest formulation, all tangible and documentary evidence, including electronic evidence, must be both authenticated and admissible unless opposing counsel has stipulated either or both. The basic threshold standard for the authentication of any evidence is "evidence sufficient to support a finding that the matter in question is what its proponent claims." It is not necessary that the court find that the evidence is what the proponent claims, only that there is sufficient evidence from which the jury might ultimately do so. This is obviously a fairly low standard. The rules set forth the general standard, followed by illustrations and a list of several types of self-authenticated documents.

The proponent of any tangible or documentary evidence has an obligation to authenticate the evidence before requesting to admit or publish it to the fact finder; if the opponent objects to its admissibility, based on any of a collection of rules, then the proponent must address that admissibility objection as well. If both authentication and admissibility are established, then the court must determine how the evidence will best be presented to the trier of fact, bearing in mind that the court is obligated, under Rule 611(A) to "exercise reasonable control . . . so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

For all tangible evidence, counsel and the court must consider (1) relevance rules, (2) the authentication rules, (3) the hearsay rules, (4) the original writing rules, and (5) the scales of justice rule. The content of the electronic evidence may implicate other rules such as the opinion rules and the personal knowledge rule, but those content-based issues are beyond the scope of this discussion. Most scholars and courts agree that the issues related to the authentication and admissibility of electronic evidence simply depend on an application of the existing evidence rules. Although technical challenges may arise, the Rules are flexible enough in their approach to address this new kind of evidence.

Below is a five-point generic checklist for the admission of electronic evidence:

1. Is the electronic evidence relevant?
   Does it make a fact that is of consequence to the action more or less probably than it would be without the evidence?

2. Is the electronic evidence authentic?
   Can the proponent produce "evidence sufficient to support a finding that the electronic evidence is what the proponent claims?"

3. Is the electronic evidence hearsay?
   Is the electronic evidence offered to prove the truth of what it asserts?
   If so, does it satisfy a hearsay exception?

4. Is the electronic evidence an original or duplicate sufficient to satisfy the requirements of the original writing rule?
   Is the writing offered to prove the content?
   If so, is it either the original or a duplicate (counterpart produced by the same impression as the original, or from same matrix, etc.) unless genuine questions of authenticity or fairness exist?

5. Is the probative value of the electronic evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence?

Applying Authentication Rules 

32. In the criminal case, the State wishes to introduce text messages between Roger and his girlfriend the night of Paula's death, coming both from Roger's phone and her phone. The defense objects based on Rules 901 and 902.

33. In the criminal case, the defense wishes to introduce Paula's email to her friend threatening suicide. The State objects based on Rules 901 and 902.

VIII. The Misnamed Best Evidence Rule

The problem with the commonly-referred to best evidence rule is that its name is misleading. The correct name – the original writing rule—more aptly describes the rule which establishes a preference for the original when proving the content of a writing. The rule is made more difficult by the definition of "writing," which includes photographsand recordings and the definition of "original," which basically encompasses duplicates as well as originals. Reduced to its simplest formulation, the original writing rule expresses a preference for the original of a writing, photograph, or recording, but allows admission of a duplicate unless there is genuine question raised as to the authenticity of the duplicate.

The original writing rule applies only when the content of the writing is at issue. In those situations, oral testimony concerning the content is generally not admissible under the original writing rule. The rule contains specific provisions regarding lost or destroyed writings as well as those that cannot be obtained.

Applying Original Writing Rules 

34. In the criminal case, the State wishes to introduce a photograph of the text messages between Roger and his girlfriend the night of Paula's death, coming both from Roger's phone and her phone. The defense objects based on Rules 1001- 1003.

35. In the criminal case, the defense wishes to introduce a copy of Paula's email to her friend threatening suicide. The State objects based on Rules 1001- 1003.