

2023 TENNESSEE JUDICIAL CONFERENCE

THE ROLE OF THE JUDGE AS EVIDENCE GATEKEEPER, PART 2

FREQUENT EVIDENCE ERRORS

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This presentation is based on discussions with trial court judges as well as a review of Tennessee appellate cases with the goal of determining some of the most frequent evidence errors. Following this presentation, the judge should be able to:

1. Master the evidentiary framework that is set out by Rule 102's purpose and construction requirement and demonstrated by controlling Tennessee authority;
2. Analyze the numerous obligations that the Rules of Evidence place upon judges;
3. Apply the proper approach for ruling upon frequent and complicated evidence issues that arise before and during trial;
4. Conduct a fair, efficient, and, ideally, an error-free judicial proceeding that promotes respect for the court and the judiciary as a whole.

I. Construction of the Rules of Evidence: Rule 102

As is true of any statutory scheme, the application of the Rules of Evidence is governed by principles of statutory construction. These principles are set out in Rule 102 and emphasize the underlying purpose of the rules: "to secure the just, speedy, and inexpensive determination of proceedings." Tenn. R. Evid. 102.

II. Exercise of Discretion: Judicial Obligations When the Rules Require Exercise of Discretion

The Rules of Evidence provide judges with substantial discretion, which in turn places tremendous responsibility upon judges to assure the fair determination of proceedings. In many situations, the judges' obligations are specifically outlined, either in the Rules or in case interpretations, while in other circumstances the judge is required to exercise reasonable, deliberate discretion, an obligation that can be harder than it seems.

A. Appellate Review Standards When Rules Require Exercise of Discretion

Appellate courts frequently resolve evidence issues by asserting that evidence rulings rest in the sound discretion of the trial judge, who has a particularly keen vantage point for evaluating objections in the context of all of the evidence. But that generous grant does not allow a judge to rule haphazardly or indiscriminately. Similarly, appellate courts accord a deferential abuse-of-discretion standard of review on appeal in circumstances in which the trial judge is charged with exercising discretion. That standard also does not provide full, unchecked authority.

The Tennessee Supreme Court has consistently held that a judge abuses discretion by applying “an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.” *State v. Davis*, 466 S.W.3d 492 (Tenn. 2015) (citing numerous cases).

Thus, in those circumstances in which the Rules charge the judge with determining admissibility of evidence after an exercise of discretion, the judge must know and apply the law (legal standard), must correctly apply the facts (evidence), and must reach a logical conclusion based on the law and the facts. The reasoning must be sound, and not specious, reasoned and not haphazard. The “law” often includes both substantive and procedural components, requiring the judge to apply both correctly in order not to abuse discretion. A simple example is Rule 609, which sets out the types of criminal convictions that may be used to impeach a witness (the substantive legal component), outlines the standard for exercising discretion regarding admissibility, and addresses the procedural mechanism that the judge must follow in making the admissibility determination. That procedure, as is often the case, has been explained more thoroughly through decisions of the appellate courts.

B. General Approach for Exercise of Discretion – Specific Procedure Not Outlined in Rule

1. Require counsel to specify the specific ground(s) for the objection as required in Rule 103. Tenn. R. Evid. 103 (objection must “state the specific ground” if not apparent).
 - ❖ When a Rule 403 objection is raised, require counsel (1) to specify the dangers that counsel claims the evidence presents. If it is unclear, ask offering counsel (2) to describe the probative value of the evidence.
2. Identify and outline the evidence rule that is at issue (by looking at the Rule).
3. State the appropriate standard for your decision, if appropriate.
4. Rule with a brief explanation that will inform appellate review.

Example:

- The defense counsel has objected to the evidence based on Rule 403 and has argued that the evidence, if admitted, will be unfairly prejudicial. (Steps 1 and 2)
- Plaintiff’s counsel argues that the evidence will establish X.
- Rule 403 provides that I may exclude otherwise relevant evidence when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.
- In the circumstances of this case, I find _____.

C. Specific Approach for Exercising Discretion under Rule 403

In an evidentiary context, judges are most frequently taxed with exercising discretion when a Rule 403 objection is raised. When a Rule 403 objection is raised, counsel has conceded that the

evidence that counsel seeks to exclude is relevant. Tenn. R. Evid. 403. Thus, the judge assumes relevance but is charged under Rule 403 with (1) assessing the probative value of that relevant evidence (the degree to which the evidence makes a fact of consequence more or less probable than the fact of consequence would be without the evidence), (2) considering any of the potential dangers of admitting the evidence that counsel has raised (unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence); and then, (3) exercising discretion in determining whether the probative value of the evidence is “substantially outweighed” by the potential dangers raises, taking into account the requirements for the exercise of discretion. Rule 403, by its terms, is a “rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence.” *Roy v. Diamond*, 16 S.W.3d 783, 791 (Tenn.Ct.App.1999) (quoted in *State v. James*, 81 S.W.3d 751, 757 (Tenn. 2002)).

There is strong authority that, in exercising the discretion, the judge should evaluate “equivalent evidentiary alternatives” that have a similar degree of probative value but do not carry any of the potential dangers of the challenged evidence. See *Old Chief v. United States*, 519 U.S. 172 (1997) (cited in *State v. James*, 81 S.W.3d 751 (Tenn. 2002) (accepting the rationale but not the procedure employed by the Supreme Court since Federal Rule 404(b) and Tennessee Rule 404(b) differ substantially).

D. Examples of Specific Evidence Rules Requiring Exercise of Judicial Discretion

Checklists for Other Rules

- Rule 612 – Applies to circumstances in which witness uses a writing to refresh memory while testifying, opposing counsel requests copy, and offering counsel does not provide
 - In civil cases – Judge must “make any order that justice requires”
 - **But** in criminal cases when offering counsel is the prosecutor, “the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial”
- Rule 702 – Applies to expert opinions
- - Requires trial judge to determine if witness who will offer expert opinions is sufficiently qualified by skill, knowledge, education, experience, and training to rend the opinion
 - Requires trial judge to apply the “substantial assistance” standard to determine admissibility of expert opinions
- Rule 703 - Applies when the sufficiency or trustworthiness of the underlying facts and data upon which the expert opinion is challenged

- Requires trial judge to “disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness”¹

E. Examples of Evidence Rules That Require Balancing Applying Specific Standards

Several other rules also require the trial judge to weigh the probative value of evidence against dangers that may result from its admissibility but those rules utilize different standards than the balancing standard set out in Rule 403. Applying the wrong balancing standard is an abuse of discretion.

- Rule 404(b) – Applies when evidence of some other act, wrong, or conduct is probative of a material issue other than propensity (character established by inference of action in conformity with a character trait)²
 - Requires trial judge to “exclude the evidence if its probative value is outweighed by the danger of unfair prejudice” (not substantially outweighed)
- Rule 405(a) – Applies when reputation or opinion evidence of a character trait has been introduced (under either Rule 404(a) or 608(a) and opposing counsel seeks to cross-examine witness about specific instances of untruthfulness³
 - Requires trial judge to “determine that the probative value of a specific instance of conduct on the character witness's credibility outweighs its prejudicial effect on substantive issues” (probative value on specific issue of credibility must outweigh any prejudicial effect)
- Rule 412(d) – Applies when criminal accused seeks to offer evidence of a victim’s sexual behavior in designated cases⁴
 - Requires trial judge to admit the evidence if “the probative value of the evidence outweighs its unfair prejudice to the victim” to “extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined” (probative value must outweigh unfair prejudice)

¹ See Section 3 *infra* for exercise of discretion regarding admissibility of otherwise inadmissible underlying facts and data under Rule 703.

² See Section 3 *infra* for the specific procedure that the judge must follow before admitting evidence under Rule 404(b).

³ See Section 4 *infra* for the specific procedure that the judge must follow before admitting evidence under Rule 405(a).

⁴ See Section 4 *infra* for the specified procedure that the judge must follow before admitting evidence under Rule 412(d).

- Rule 608(b) – Applies when reputation or opinion evidence concerning a witness’ truthfulness/untruthfulness has been allowed and opposing counsel seeks to cross-examine about specific instances of truthfulness/untruthfulness⁵
 - In civil cases and in criminal cases when witness is not the accused, and when specific instance of conduct is within 10 years, the court determines that conduct has “probative value,” “a reasonable factual basis exists for the inquiry,” (presumably Rule 403 would also apply)
 - In a civil case and in criminal cases when the witness is not the accused, the specific instance of conduct did not occur within 10 years, and notice is given, inquiry is permissible “if the judge determines in the interest of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect” (requires findings additional to those required by Rule 403)
 - In criminal cases when the witness is the accused and notice is given, “upon request the court must determine that the conduct’s probative value on credibility outweighs its unfair prejudicial effect on the substantive issues” (balancing test favors exclusion because probative value must outweigh unfair prejudicial effect)
 - In any case when the specific instance of conduct occurred when the witness was a juvenile, the court determines that “the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination”
- Rule 609 (a),(b), (d)– Applies when particular criminal convictions are admitted to challenge a witness’ credibility⁶
 - In criminal cases, when the conviction is that of the accused “the court upon request must determine that the conviction’s probative value on credibility outweighs its unfair prejudicial effect on the substantive issues” (balancing test favors exclusion because probative value must outweigh unfair prejudicial effect)
 - In civil cases and criminal cases, when the conviction is of a witness who is not the accused and within ten years, the judge may admit the evidence (presumably Rule 403 would also apply because the provision allows but does not require admission)

⁵ See Section 4 *infra* for the specified procedure that the judge must follow before admitting evidence under Rule 608(b).

⁶ See next section for the specified procedure that the judge must follow before admitting evidence under Rule 609.

- In civil and criminal cases, when the conviction is time limited under the Rule,⁷ notice is given, and the court determines “in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect” (balancing test favors exclusion because probative value must outweigh unfair prejudicial effect)
- In civil and criminal cases, when the conviction is that of a juvenile, although generally inadmissible, the court determines that the “offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding”
- Rule 703 – Applies when the facts and data underlying an expert opinion are challenged as being insufficient or untrustworthy
 - When underlying facts and data are otherwise admissible, the applicable admissibility rules, including Rule 403, apply to the underlying facts and data⁸
 - When underlying facts and data are “reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence” for the opinion to be admissible”
 - ❖ When underlying facts and data are not otherwise admissible, the facts and data “shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect”⁹
 - ❖ When the underlying facts and data “indicate a lack of trustworthiness”, the “court shall disallow testimony in the form of an opinion”

F. Obligations When Rules Require Exercise of Discretion after Following Specified Procedure

⁷ Rule 609 requires that only convictions that have occurred within 10 years are admissible. Specifically, for the conviction to be admissible, no more than 10 years may have elapsed “between the date of release from confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release.” Tenn. R. Evid. 609(b).

⁸ See note 9 *infra*.

⁹ The Advisory Commission Comment to Rule 703 provides an even more emphatic explanation of this general rule of exclusion, noting that “[i]f the bases of expert testimony are not independently admissible, the trial judge should either prohibit the jury from hearing the foundation testimony or should deliver a cautionary instruction. Unfairly prejudicial facts or data should be dealt with under Rule 403.” This final comment must be read to apply only to otherwise admissible facts or data.

Several Rules of Evidence require that the judge exercise discretion *after* following a specified procedure. In these circumstances, the failure to follow the specified procedure is itself an abuse of discretion. Thus, in addition to the following the steps outlined above, the judge must adhere precisely to the procedure outlined by the Rules of Evidence in order to soundly exercise discretion.

Examples of Rules of Evidence that require a specified procedure are: Rule 404(b); Rule 405(a); Rule 412 (c) & (d); Rule 608(a); Rule 609(a)(3), (b), and (d); Rule 613(b); Rule 803(25); Rule 803(26); and a reasonable and deliberate exercise of judicial discretion before evidence is admitted in numerous circumstances, notwithstanding counsel's successful laying of an evidentiary foundation. Those circumstances and the specific obligations of the trial judge are set out below.

- Rule 404(b)

When a challenge is made to the admission of evidence of some crime, wrong, or act offered for some purpose other than propensity, the judge must:

- (1) upon request, hold a hearing outside the jury's presence;
- (2) determine that a material issue exists other than propensity ("conduct conforming with a character trait");
- (3) identify the material issue on the record (upon request);
- (4) find proof of the other crime, wrong, or act to be clear and convincing;
- (5) exclude the evidence if its probative value is outweighed by the danger of unfair prejudice; and
- (6) state the ruling and, if admitted, the reason for admitting the evidence.

See State v. McCaleb, 582 S.W.3d 179 (Tenn. 2019); *State v. James*, 81 S.W.3d 751 (Tenn. 2002).

- Rule 405 (a)

When counsel attempts to cross-examine a witness about specific instances of conduct probative of a character trait, after reputation or opinion evidence concerning that character trait has been admitted, *before allowing inquiry*, the judge must:

- (1) upon request, hold a hearing outside the jury's presence;
- (2) determine that a reasonable factual basis exists for the inquiry; and

(3) determine that the probative value of the specific instance of conduct on witness's credibility outweighs its prejudicial effect on substantive issues.

- Rule 412

When, in designated types of criminal cases, counsel attempts to introduce evidence of a victim's sexual behavior, the judge must:

(1) determine whether the evidence offered fits within the evidence specified in Rule 412(c);¹⁰

(2) determine whether a written motion accompanied by a written offer of proof has been filed in compliance with the requirements set out in Rule 412(d);¹¹

(3) hold a hearing in chambers or otherwise out of the public's presence, but on the record, at which

a) the victim may attend and testify;

b) other witnesses, including the accused may testify;¹²

(4) determine whether the probative value of the evidence outweighs its unfair prejudice to the victim;

(5) enter an order specifying the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined; and

(6) seal the evidence except as allowed by Rule 412(d)(2).¹³

¹⁰ Evidence must (a) be offered on the issue of credibility after the victim or prosecution has offered evidence as to the victim's sexual behavior and only as necessary to rebut the evidence presented; (b) concern sexual behavior with the accused offered on the issue of consent; (c) concern sexual behavior with a third-person being offered to rebut or explain scientific evidence; to prove or explain source of semen, injury, disease, or knowledge; or to prove consent when distinctive pattern of sexual behavior tends to prove consent or reasonably suggested consent; or (d) must be reputation or opinion evidence the admissibility of which is required by the state or federal Constitutions. Tenn. R. Evid. 412(b), (c).

¹¹ Rule 412(d) imposes both time and content requirements. The motion be in writing and must be "filed no later than ten days before the date on which the trial is scheduled to begin, except the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence relates has newly arisen in the case." The motion must be accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it, and must be served on all parties, including the prosecution attorney and the victim. The victim must be served through the prosecution's office.

¹² The Rule limits the use of testimony by the accused offered at the motions hearing. Tenn. R. Evid. 412(d)(3)(iii).

¹³ The Rule provides for the use of the evidence for limited purposes, including "facilitating appellate review, assisting the court or parties in their preparation of the case, and to impeach under subdivision (d)(3)(iii)." Tenn. R. Evid. 412 (d)(2).

- Rule 608

When a witness' character for truthfulness or untruthfulness has been introduced through reputation or opinion evidence, under Rule 608(a), and counsel wishes to cross-examine the witness about specific instances of conduct probative "solely of truthfulness or untruthfulness," the judge must:

- (1) upon request at a jury-out hearing
- (2) determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;
- (3) determine that the conduct occurred no more than ten years before the commencement of the action or that the special requirements of Rule 608(b)(2) have been met;¹⁴
- (4) apply the appropriate test to determine admissibility depending on whether the witness is the accused in a criminal prosecution, a witness in a civil or criminal case, or a juvenile witness;¹⁵
- (5) if the evidence pertains to the accused, rule before the accused testifies;

- Rule 609

When a party attempts to impeach a witness with a prior criminal conviction, the judge must:

- (1) assure that the conviction is an impeachable conviction as set out in Rule 609(a)¹⁶ and 609(b);¹⁷
- (2) assure that the proper procedure is invoked to examine the witness about the conviction, including:
 - (a) that the witness is asked about the conviction on cross-examination, using the statutory title for the crime;

¹⁴ See note 17 *infra*.

¹⁵ Tenn. R. Evid. 609 (a), (a)(3), & (d). .

¹⁶ Whether a conviction is an impeachable conviction depends upon either the legislatively-prescribed sentence for the crime, at the time of conviction, or the elements of the crime. Under Rule 609(a)(2), the conviction must either be for a "crime punishable by death or imprisonment in excess of one year" or for a crime that "involved dishonesty or false statement." Tenn. R. Evid. 609(a)(2).

¹⁷ Under Rule 609(b), the conviction is not admissible if more than 10 years "has elapsed between the date of release from confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release. Evidence of a conviction not qualifying under the preceding sentence is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Tenn. R. Evid. 609(b).

- (b) if the witness denies the conviction, the conviction is established by public record;
- (c) if the witness denies being the person named in the public record, “other evidence” may be used to establish identity;

(3) apply the proper balancing test, depending on who the witness is;¹⁸ and

(4) if the witness to be impeached is the accused, the judge must determine whether:

- (a) the State gave “reasonable written notice of the impeaching conviction before trial;”
- (b) upon request, the court applies the proper balancing test – that the conviction’s “probative value *on credibility outweighs* its unfair prejudicial effect on substantive issues,” and
- (c) rule before the accused testifies.

- Rule 703

When a party objects to the admission of “otherwise inadmissible” facts and data underlying an expert’s opinion, the judge must

- (1) not allow the proponent of the evidence to disclose the underlying facts and data “unless the court determines that their probative value in assisting the jury to evaluate the expert’s opinion substantially outweighs their prejudicial effect.”

G. Rules that Require or May Require Upon Request, a Pre-Admission Trustworthiness Determination

1. Upon Request

a. Records of Regularly Conducted Activity

Two hearsay exceptions specifically allow a judge to exclude evidence, even when the proponent has satisfied all of the elements of the requisite hearsay exceptions. These rules are the exception for regularly conducted activities, Tenn. R. Evid. 803(6), and for public records, Tenn. R. Evid 803(8). Arguably, both Rules require that the lack of trustworthiness claim be prompted by an objection rather than by a *sua sponte* obligation, although that interpretation is less clear under Rule 803(6), which provides, after listing the elements for the exception, “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” Tenn. R. Evid. 803(6). Tennessee has not adopted an amendment such as that adopted by the Federal Rules of Evidence, which clearly indicates that the person challenging the evidence must advance and establish the lack of trustworthiness. Fed. R. Evid. 803(6), 803 (8).

b. Public Records

¹⁸ The proper balancing test depends upon whether the witness being impeached is (1) a witness in a civil case or (2) the accused in a criminal case and also on the type of conviction. See Tenn. R. Evid 609(a).

Rule 803(8) has a similar trustworthiness “exception” to the hearsay exception, but its procedural requirements arguably are clearer. Rule 803(8) requires that public records, as defined in the Rule be admitted,”[u]nless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” Tenn. R. Evid 803(8).

2. Without Request

Two of Tennessee’s hearsay exceptions require the trial judge to make a pre-admissibility trustworthiness finding, regardless of an objection. In other words, establishing the hearsay exceptions requires that the proponent establish the trustworthiness of the evidence.

a. Child Witness’ Statements

Rule 803(25) permits the admission of certain statements of child witnesses in certain types of cases, provided the elements of the hearsay exception are established. If an out-of-court statement about abuse or neglect is made by a child victim and concerns physical, sexual, or psychological abuse or neglect, is offered in one of the designated types of civil cases,¹⁹ and the child is under thirteen years of age, the statement is admissible “[p]rovided that the circumstances indicate trustworthiness.” If the child is thirteen or older, in addition to these requirements, the child witness must be unavailable or must testify and be subject to cross-examination before the statement may be admitted.

b. Examples of Recent 803(25) Cases

[In re Kansas B., No. M2021-00827-COA-R3-JV, 2022 WL 6854397 \(Tenn. Ct. App. Oct. 12, 2022\).](#) In this case, the trial court precluded a child witness from testifying at a termination of parental rights trial, concluding that the risk of harm to the child from testifying outweighed any probative value her testimony might have. DCS argued that trial courts had this power under Rule 803(25), but the appellate court disagreed. Trial courts do not have discretion to preclude testimony from children that is otherwise admissible under Rule 803(25), but may do so under Rule 403, by engaging in the proper analysis.

[In re Analesia Q., No. E2021-00765-COA-R3-PT, 2022 WL 1468786 \(Tenn. Ct. App. May 10, 2022\).](#) The appellate court discusses how corroborating evidence may weigh in favor of a finding trustworthiness and also rejects an argument that statements made to a custodian who wishes to keep the child are categorically untrustworthy.

[In re Azhianne G., No. E2020-00530-COA-R3-CV, 2021 WL 1038208 \(Tenn. Ct. App. Mar. 18, 2021\).](#) This case engages in a rich discussion of the procedure of Rule 803(25) and what factors contribute to a finding of trustworthiness. Here those factors included that the statements were

¹⁹ These include cases “concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113” or statements “relating to custody, shared parenting, or visitation” in a civil case. Tenn. R. Evid. 803(25).

“spontaneous, credible, and very detailed” as well as consistent across the different witnesses to whom the child told the story.

In re Madison M., No. M2013-02561-COA-R3-JV, 2014 WL 4792793 (Tenn. Ct. App. Sept. 25, 2014). In this case, the stepfather argued that the child victim’s statements were untrustworthy because there was no eyewitness to the abuse. The court notes that this does not render the statements untrustworthy. The appellate reviews in detail the trial court’s inquiry and findings on the issue of trustworthiness, inferring that the judge’s approach was a model for how trial courts should approach the trustworthiness finding.

c. Prior Inconsistent Statements

Rule 803 (26) allows the introduction of certain prior inconsistent statements. The requirements vary significantly from the similarly named federal hearsay exemption for prior inconsistent statements under oath.

Tennessee, unfortunately, has connected the hearsay exception to the procedure that is used to impeach witnesses who have made prior inconsistent statements. The connection is unfortunate because evidence under the exception is offered for its truth, while impeachment evidence obviously is offered for the limited purpose of impacting the credibility of the witness. Nonetheless, Rule 803(26), inexplicably, requires that before a prior inconsistent statement can be admissible under its terms, the statement must be “otherwise admissible under Rule 613(b),” a rule that requires that extrinsic evidence of a prior inconsistent statement may not be offered “unless and until the witness is afforded an opportunity to explain or deny” the statement. Tenn. R. Evid. 613(b). In addition, the statement must be (1) prior to and (2) inconsistent with the trial testimony and must be (3) either audio or video recorded, written and signed, or given under oath. Further the declarant-witness must testify and be subject to cross-examination about the statement. Finally, the (1) judge must conduct a jury-out hearing; (2) to determine by a preponderance of the evidence (3) that the prior statement was made under circumstances indicating trustworthiness.

Whether a witness’ prior statement is inconsistent with the witness’ trial testimony is a Rule 104 question for the trial judge. The Tennessee courts have held that when a witness who has previously given a statement testifies at trial that he or she does not remember what happened, the absence of memory is inconsistent with the prior statement, thus satisfying that element of the 803(26) hearsay exception.²⁰ *State v. Davis*, 466 S.W.3d 49, 644-65 (2015).²¹

²⁰ In *Davis*, the court held that “for the purposes of Tennessee Rule of Evidence 803(26), a prior statement about events that a witness claims at trial to be unable to remember is ‘inconsistent’ with the witness’ trial testimony. Indeed, the Advisory Commission Comment specifically includes as an example a witness who asserts a lack of recollection at trial. That witness’ prior statement is, for the purposes of the Rule, inconsistent. This comports with common sense: A prior statement relating particular facts is certainly not *consistent* with a subsequent lack of recollection. Accordingly, we will not construe “inconsistent” so narrowly as to require accounts that differ in their recitation of the facts. . . . [A] trial court’s suspicion that the trial witness’ claim of memory loss is feigned or exaggerated does not defeat the inconsistent nature of the prior statement. As set forth above, trial courts lack the tools to determine conclusively whether a witness is being entirely honest about the extent of his or her recollection.”

d. Examples of Recent 803(26) Cases

[State v. Holmes, No. E2021-01489-CCA-R3-CD, 2022 WL 16736968 \(Tenn. Crim. App. Nov. 7, 2022\).](#) One of the State's witnesses testified at trial that she did not remember any of the events about which she had previously testified at the co-defendant's trial, which had been severed from the current defendant's trial. After a jury-out hearing, the trial court admitted the witness' testimony from the co-defendant's trial as substantive evidence. The appellate court found that the trial court erred in admitting the entirety of the witness' testimony from the other trial; the judge should have redacted the prior testimony to include only the five inconsistent statements about which the State asked the witness.

[State v. Hartshaw, No. E2019-02200-CCA-R3-CD, 2021 WL 5861278 \(Tenn. Crim. App. Dec. 10, 2021\).](#) Witness at trial testified that she did not remember making a statement to police. She had, in fact, made a recorded statement to police over the telephone. The trial court held a jury-out hearing, listened to the recording, and determined that the content of the recording was trustworthy and that the witness' live testimony that she did not remember was not. The opinion review excellent discussion of how the trial judge properly evaluated the determination of inconsistency and trustworthiness.

[State v. Boyd, No. E2019-02272-CCA-R3-CD, 2021 WL 5629865 \(Tenn. Crim. App. Dec. 1, 2021\).](#) In retrial, witness gave testimony that was inconsistent with her prior testimony in a federal proceeding against another defendant. Witness claimed not to remember what she testified to at federal trial. Trial court admitted transcript of her testimony from federal trial. Case demonstrates correct application of the procedures required by Rules 613 and 803(26).

[State v. Stevenson, No. W2019-01785-CCA-R3-CD, 2020 WL 7386288 \(Tenn. Crim. App. Dec. 16, 2020\).](#) This case pretty thoroughly covers the mechanics of Rule 803(26) and synthesizes the relevant caselaw up to that point.

[State v. Bates, No. E2014-01741-CCA-R3-CD, 2015 WL 9019818 \(Tenn. Crim. App. Dec. 15, 2015\).](#) This case lays out pretty well the mechanics of Rule 803(26) and goes step-by-step through the process, especially the relationship to the Rule 613 requirements.

[State v. Davis, 466 S.W.3d 49 \(Tenn. 2015\).](#) This is the only Supreme Court decision in which 803(26) is a major issue, and all the other cases cite this one. Witness at trial testified that he did not remember giving a prior statement to police. The State proceeded to play a recording of the witness' preliminary hearing testimony and introduced into evidence the written statement the witness gave to police following the incident. "We hold that, for the purposes of Tennessee Rule of Evidence 803(26), a prior statement about events that a witness claims at trial to be unable to remember is 'inconsistent' with the witness' trial testimony."

3. Unclear, but Arguably Without Request

Rule 703 excludes expert opinion, even if offered by an expert qualified by virtue of skill, knowledge, experience, education, and trainings, about a scientific, technical, or specialized field

of knowledge, if the underlying facts and data indicate a lack of trustworthiness. Tenn. R. Evid. 703. The language of the Rule itself makes it unclear whether a lack of trustworthiness must be asserted by counsel, but language in decisions interpreting Rules 702 and 703 may indicate that the trustworthiness finding is essential to the trial judge's exercise of the gatekeeper function related to the admission of expert opinion evidence.

III. Frequent Errors Not Involving Discretion:

A. Refreshing Recollection vs. Past Recollection Recorded

A premium is placed on live testimony from witnesses whose credibility is determined by considering their perception, language, memory, and sincerity. Substitutes for live testimony are subject to strict foundational requirements because the factfinder is not receiving the optimal opportunity to hear and gauge the witness' story and credibility.

The technique of refreshing recollection and the hearsay exception for recorded recollections are often confused or incorrectly linked. The former, as noted, is a process that may be used to refresh a testifying witness' memory on direct or cross-examination, though it most usually occurs during direct examination, while the latter is one of several hearsay exceptions that may apply regardless of the availability of the declarant.

1. Refreshing Recollection

a. Absence of Memory

The foundational requirement for the use of the refreshing recollection technique is, first and foremost, an absence of memory. The technique is not proper when a witness testifies to an answer that is different from the one counsel sought; nor is it proper when a witness responds "I don't know." Instead, the refreshing recollection technique is limited to times of "necessity," and may not be used to allow a witness to read from notes, depositions, or other documents. Advisory Comm'n Comments, Tenn. R. Evid. 612.

Rather, in order to use the refreshing recollection technique, counsel must establish that the witness does not *presently remember* the information sought. By inference, for a witness to have a lapse of memory, the witness must have, at one time, known and remembered the information. Thus, it is an absence of memory not an absence of knowledge that must be established to use the technique.

b. Refreshing Device and Refreshed Testimony

Once counsel has established a lapse or lack of memory, as opposed to a lack of knowledge, the second step in the process is for counsel to establish that there is a refreshing device. A refreshing device is anything that will trigger (refresh) the witness' memory. Thus, while refreshing devices are often documents, in actuality, anything – a picture, a scent, a noise – can be used to refresh a witness' recollection. Once counsel has established that a refreshing device exists, counsel is allowed to give the witness the refreshing device to review. Following review,

counsel is required to remove the refreshing device and to repeat the question. If the witness is able to answer, it is the refreshed testimony of the witness, not the device, that is the evidence in the case. *See id.* (noting that the technique requires showing and removing the writing and having the witness “testify from refreshed memory.”)

c. Cross-Examination and Introduction

Thus, a refreshing device does not have to be numbered for identification as an exhibit to the testimony. However, under Rule 612, if the refreshing device is a writing,²² the writing must be produced upon request to opposing counsel, who may review the device, cross-examine about it, and “introduce in evidence those portions which relate to the testimony of the witness.” Tenn. R. Evid. 612.²³ Additionally, if the court limits production of parts of the refreshing device, the device should be marked as an exhibit for identification purposes and preserved in the record for potential appellate review.

2. Recorded Recollection

Unlike the technique of refreshing recollection, the purpose of which is to prompt a witness to remember and testify, the purpose of the recorded recollection hearsay exception is to secure the admissibility of an out-of-court statement in order to prove the content of the statement.

a. Insufficient Recollection to Testify Fully and Accurately

²² State v. Price, 46 S.W.3d 785, 813-14 (Tenn. Crim. App. 2000).

Rule 612 applies to a “writing.” It does not prescribe who must author the writing or the source of the writing. Rule 612 applies to any writing used to refresh a witness's memory, irrespective of who prepared the writing, when it was prepared, or whether the witness had ever seen the writing until the moment of testimony. The writing used to refresh memory need not be admissible and the best evidence rule, Rule 1002, is inapplicable.

²³ **Rule 612: Writing used to refresh memory.**

If a witness uses a writing while testifying to refresh memory for the purpose of testifying, an adverse party is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires; in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

While the introduction of a recorded recollection under Rule 803(5) of the Tennessee Rules of Evidence²⁴ requires counsel to establish that the record “concerns a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately,” the witness’ insufficient recollection is but one of a series of foundational elements that must be established by the proponent before a recorded recollection may be admitted in evidence. Tenn. R. Evid. 803(5).

The Tennessee Supreme Court addressed the degree of insufficient recollection that is necessary to enable the admission of a recorded recollection in *State v. Davis*, 466 S.W.3d 49 (2015). Relying on decisions of the Sixth Circuit and the Pennsylvania Supreme Court, the court held that a “feigned memory loss will not defeat the admissibility of the prior recorded recollection.” *Id.* at 63 (citing cases).

First, there simply is no definitive objective test that a trial court can utilize to determine whether a witness is being truthful about his or her memory loss. Moreover, although a trial judge may have sufficient information to support a finding that a witness is exaggerating his or her difficulties in recalling events, Rule 803(5) does not require such a finding. Second, the purpose of Rule 803(5) is to permit the admission of hearsay that is deemed sufficiently trustworthy to assist the trier of fact in determining the facts of the case. *See* Cohen § 8.01[3][c] (recognizing that hearsay is frequently admitted because “the evidence is needed to provide the trier of fact with critical information”). Disallowing a contemporaneous statement made under conditions that indicate the statement’s trustworthiness because the author of the statement later may be exaggerating his or her memory loss, perhaps out of fear of reprisal, would defeat the purpose of the Rule and hamper the truth-finding function of the trial. Accordingly, we hold that a suspicion that a witness is exaggerating his or her memory loss at trial is not sufficient to abrogate the admissibility of a recorded recollection pursuant to Rule 803(5).

b. Memorandum or Record

A recorded recollection requires that a witness’ knowledge be contained in a “memorandum or record,” which, though not defined, have been interpreted broadly to include information preserved in writing, by recording, and in electronic format. *See Mitchell v. Archibald*, 971 S.W.2d 25, 28 (Tenn. Ct. App. 1998).

²⁴ **Rule 803: Hearsay Exceptions**

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

c. Proof and Timing of Making or Adopting Memorandum or Record

For the recorded recollection hearsay exception to apply, the memorandum or record must have been made or adopted by the witness,²⁵ and either the making or adoption must occur close enough in time to the event to enable the witness to have an accurate memory of the event. Thus, the basis for the freshness requirement is to assure that only statements that were accurate when made or adopted are allowed as recorded recollections. *State v. Robertson*, 130 S.W.3d 842, 857-58 (Tenn. Crim. App. 2003).

d. Accuracy of Memorandum or Record

In addition, counsel attempting to introduce a recorded recollection must establish that the memorandum or record was made or adopted by the witness at a time when “the matter was fresh in the witness's memory” and that the memorandum or record “reflect[s] that knowledge correctly.” *Id.*

e. Introduction of Recorded Recollection

Even after the foundation has been established for the introduction of a recorded recollection, the memorandum or record may be “read into evidence” but only offered as an exhibit by the opposing party. *Id.* This limitation is to assure that the factfinder does not give more weight to the recorded recollection than to a witness’ testimony from “present memory.” Advisory Comm’n Comments, Rule 803(5). See *State v. Hatcher*, 310 S.W.3d 788, 789 (Tenn. 2010) (noting that a recorded recollection cannot be offered as an exhibit); *State v. Robertson*, 130 S.W.3d 842 (Tenn. Crim. App. 2003) (finding harmless error, but relying, arguably inappropriately on cumulative nature of evidence as a bases for doing so).

3. Relationship Between Refreshing Recollection and Recorded Recollection

At common-law, the recorded recollection hearsay exception was known as the “past recorded recollection.” A misconception arose that the technique and the hearsay exception were sequential. Thus, the fallacy was that counsel must attempt to refresh recollection and upon being unable to do so could then offer the refreshing device as a past recollection recorded. This historical linkage is erroneous for a number of reasons. First, anything may be used to refresh recollection; the refreshing device is not required to be either a memorandum or record; nor is it required to contain matter that the witness made, adopted, or once knew. Second, a recorded recollection is read into evidence as a testimonial replacement when a witness cannot remember sufficiently to testify fully or accurately, while the witness’ refreshed testimony itself is the evidence following the use of the refreshing recollection technique.

²⁵ Tenn. R. Evid. Advisory Commission Comments (noting that the Rule changes the common-law by permitting a “witness to adopt a record made by another not acting under the witness's supervision. The safeguard is the requirement of adoption at the time when the witness could vouch for the document's correctness.”)