

2023 TENNESSEE JUDICIAL CONFERENCE

THE ROLE OF THE JUDGE AS EVIDENCE GATEKEEPER, PART 3

EVIDENCE UPDATE

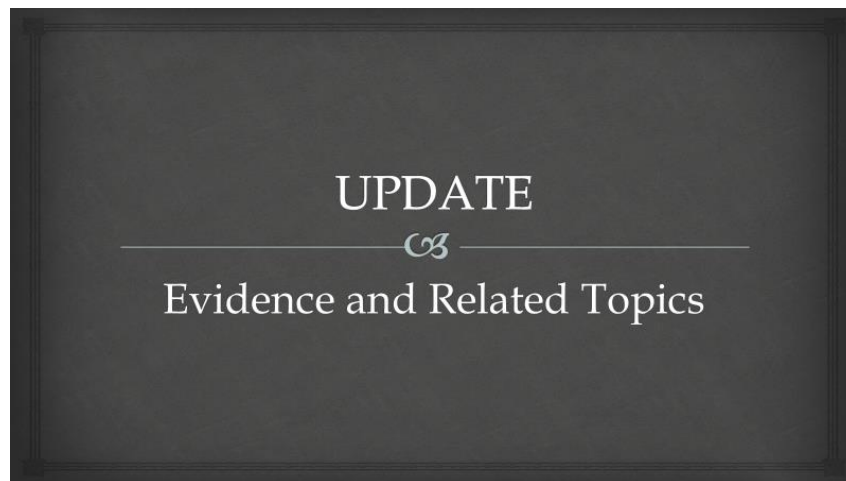
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These materials address recent and not-so-recent but significant cases concerning the role of the judge as evidence gatekeeper. Most of the cases are drawn from decisions by the Tennessee courts during the time period of 2018-2023, with additional cases being provided on the two highlighted topics of electronic evidence and the 803(25) and 803(26) hearsay exceptions.

The materials are appended with a listing of the cases indexed by court, with the United States Supreme Court decisions impacting evidence listed first, then the Tennessee cases, listed first by court, then alphabetically by topic, and chronologically within topic. As each summary is quite succinct and does not fully cover the issues addressed in the opinion, links to the opinions are included for a convenient full review.

After attending this session, judges will be able to:

1. Conduct a current and accurate analysis of evidentiary issues and
2. Rule confidently and correctly on those issues.



Arbitration

Badgerow v. Walters (US 2022)



A federal court must have an independent jurisdictional basis to assert jurisdiction. This assures that federal courts act only when authorized and do not cumvent the core requirement of the FAA requiring courts to enforce arbitration agreements like other contracts. The FAA sets out a “normal-and sensible – judicial division of labor. The application to enforce award goes to state, rather than federal, courts when claim is between non-diverse parties and involves. State courts play a “significant role in implementing the FAA,” demonstrating an appreciation of the “capacity of state courts to properly enforce arbitral awards.”

Deference to and Duty of State Courts

Shinn v. Ramirez (US 2022)



“Under §2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel.”

Evidence:

Attorney-Client Privilege

Dialysis Clinic v. Medley (Tenn. 2019)



The attorney-client privilege applies to communications between an entity’s legal counsel and a third-party nonemployee of the entity if the nonemployee is the functional equivalent of the entity’s employee and when the communications relate to the subject matter of legal counsel’s representation of the entity.

Evidence: Attorney-Client Privilege
Outpost Solar, LLC v. Henry, Henry, & Underwood
(Tenn. Ct. App. 2017)



Implied waiver of attorney-client privilege occurs when a “party’s affirmative act puts the protected information at issue by making it relevant to the case and when application of the privilege results in denying the opposing party access to information vital to the defense.”

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Evidence: Privilege -
Psychologist-Patient Privilege
***Bottorff v. Bottorff* (Tenn.App. 2020).**



The privilege is not absolute and may be waived by the patient. Though “designed to protect confidences that the patient has shared with a treating psychologist, [] if the patient ‘divulges the communications he seeks to protect, then he has waived’ the privilege. *See id.* Moreover, the psychologist-patient privilege “ ‘is not designed to specifically protect [a] psychotherapist’s own opinion, observations, diagnosis, or treatment alternatives, particularly when such information finds its way beyond [a] patient’s personal file.’ ”

Evidence: Confrontation
***New York v. Hemphill* (US 2022)**



Door-opening principle as applied here is not a procedural rule, but a substantive evidence rule, and as such cannot interfere with the 6th amendment right to confrontation. Additionally, the Rule of Completeness does not apply in these circumstances in which a third-party’s plea allocution was not part of any statement introduced by the Accused.

Evidence: Expert Testimony
Ellis v. Modi (Tenn. App. 2020)



Expert testimony was excluded under Rule 403 after the trial court acknowledged that the expert was qualified, had substantial knowledge in the field, and that the testimony would likely substantially assist the jury. The appellate court disagreed, finding the exclusion of the expert testimony to merit reversal.

Evidence: Hearsay: Record of Regularly Conducted Activity, 803(6)

Barnes v. Barnes Tenn. App. 2019



Letter from employer reflecting expected decrease in income was inadmissible hearsay. Argument that letter was being introduced for a non-hearsay purpose, to show notice, was invalid. Nor was the letter admissible under the record of a regularly conducted activity under Tennessee Rule of Evidence 803(6). Husband was not a “qualified witness” as required under the exception simply because he was a “witness with knowledge of the letter and the contents.” The court also held that the letter lacked trustworthiness because of the manner in which it was provided.

Evidence: Hearsay: Unavailability
State v. McGill (Tenn. Crim. 2023)



State urges the appellate court to follow “well-settled law” that statements of an unavailable witness are admissible simply due to the witness’ unavailability. The appellate court corrects the State’s erroneous claim, noting that unavailability under Rule 804(a) “is not an exception to the hearsay rule. Rather, Rule 804(a) describes the situations in which a witness will be considered unavailable for purposes of the hearsay exceptions provided in Rule 804(b)(1)-(4), (6).” Thus, hearsay evidence is admissible under this Rule only when both (1) the declarant is “unavailable”; and (2) the evidence “satisfies one of the exceptions to the hearsay rule for unavailable declarants provided in Rule 804(b).”

Evidence: Juror Competency - FRE 606
***Peña-Rodriguez v. Colorado* (U.S. 2017)**



When a juror makes a clear statement indicating reliance on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment does not allow the application of Rule 606's no-impeachment rule; trial judge must be permitted to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Evidence: Juror Competency - TRE 606
***Parker v. Epstein Enterprises* (Tenn. App. 2020).**



Defendant failed to meet burden of establishing juror misconduct by a preponderance of the evidence and a failure to comply with the requirement of TRE 606. No affidavits or testimony was submitted to demonstrate that extraneous prejudicial information found its way into the jury room.

Evidence: Missing Witness Rule
***In re Mattie L.* (Tenn. 2021)**



Plaintiff may not use missing witness inference to avoid proving an element of the claim. Missing witness rule carries no more legal force than commonsense inference it permits the trier of fact to apply in weighing the evidence. The inference is not substantive proof and does not a party of the burden of proving a prima facie case. The missing witness rule alone does not resolve any issue.

Thus, in a non-jury trial, a trial court should not apply missing witness rule in a mechanical or conclusory fashion to replace evidence. Instead, the court should carefully consider the commonsense inference that withheld testimony is likely unfavorable when the court weighs other available evidence.

**Evidence: Motion in Limine –
Opening the Door
State v. Vance (Tenn. 2020)**



The Supreme Court emphasizes the differences between the doctrines of curative admissibility and opening the door and reiterates that Tennessee has not adopted the curative admissibility doctrine.

The curative admissibility doctrine is triggered by the elicitation of inadmissible evidence. Only then may an opposing party claim the right to adduce its own otherwise inadmissible proof.

A party opens the door to evidence when that party “introduces evidence or takes some action that makes admissible evidence that would have previously been inadmissible.”

UNITED STATES SUPREME COURT

Arbitration

[*Badgerow v. Walters*, 596 U.S. ____ \(2022\)](#)

Confrontation

[*Hemphill v. New York*, 595 U.S. ____ \(2022\)](#)

Deference to and Duty of State Courts

[*Shinn v. Ramirez*, 596 U.S. ____ \(2022\)](#)

Juror Incompetence

[*Pena-Rodriguez v. Colorado*, 580 U.S. ____ \(2017\)](#)

TENNESSEE SUPREME COURT

Attorney-Client Privilege

[*Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 \(Tenn. 2019\)](#)

Hearsay: 803(26)

[*State v. Davis*, 466 S.W.3d 49 \(Tenn. 2015\)](#)

Missing Witness Rule

[*In re Mattie L.*, 618 S.W.3d 335 \(Tenn. 2021\)](#)

Motion in Limine; Opening the Door; Plain Error Review

[State v. Vance, 596 S.W.3d 229 \(Tenn. 2020\)](#)

Relevance: Special Rules; Other Act Evidence; Appellate Review

[State v. Moon, 644 S.W.3d 72 \(Tenn. 2022\)](#)

[State v. Miller, 638 S.W.3d 136 \(Tenn. 2021\)](#)

[State v. Reynolds, 635 S.W.3d 893 \(Tenn. 2021\)](#)

[State v. Rimmer, 623 S.W.3d 235 \(Tenn. 2021\).](#)

TENNESSEE COURT OF APPEALS

Expert Testimony

[Ellis v. Modi, No. M201901161COAR3CV, 2020 WL 2316649 \(Tenn. Ct. App. May 11, 2020\)](#)

Hearsay

[Barnes v. Barnes, 614 S.W.3d 90 \(Tenn. Ct. App. 2019\)](#)

Juror Misconduct

[Parker v. Epstein Enterprises, LLC, No. W201900311COAR3CV, 2020 WL 2731234 \(Tenn. Ct. App. May 26, 2020\)](#)

Privilege; Psychologist-Patient Privilege

[Bottorff v. Bottorff, No. M201900676COAR3CV, 2020 WL 2764414 \(Tenn. Ct. App. May 27, 2020\)](#)

Relevance: Special Relevance Rule: Other Act Evidence

[Ellis v. Modi, No. M201901161COAR3CV, 2020 WL 2316649 \(Tenn. Ct. App. May 11, 2020\)](#)

Relevance: Special Relevance Rule: Prejudice under Rule 403

[Ellis v. Modi, No. M201901161COAR3CV, 2020 WL 2316649 \(Tenn. Ct. App. May 11, 2020\)](#)

TENNESSEE COURT OF CRIMINAL APPEALS

Electronic evidence cases

[State v. Ison, No. E2018-02122-CCA-R3-CD, 2020 WL 3263384 \(Tenn. Crim. App. June 17, 2020\)](#)

[State v. Linzy, No. E2016-01052-CCA-R3-CD, 2017 WL 3575871 \(Tenn. Crim. App. Aug. 18, 2017\)](#)

[State v. Murray, No. M2021-00688-CCA-R3-CD, 2022 WL 17336522 \(Tenn. Crim. App. Nov. 30, 2022\)](#)

[State v. Spivey, No. M201800263CCAR3CD, 2020 WL 598347 \(Tenn. Crim. App. Feb. 7, 2020\)](#)

Hearsay: 803(25) cases

[In re Analesia Q., No. E2021-00765-COA-R3-PT, 2022 WL 1468786 \(Tenn. Ct. App. May 10, 2022\)](#)

[In re Azhianne G., No. E2020-00530-COA-R3-CV, 2021 WL 1038208 \(Tenn. Ct. App. Mar. 18, 2021\)](#)

[In re Kansas B., No. M2021-00827-COA-R3-JV, 2022 WL 6854397 \(Tenn. Ct. App. Oct. 12, 2022\)](#)

[In re Madison M., No. M2013-02561-COA-R3-JV, 2014 WL 4792793 \(Tenn. Ct. App. Sept. 25, 2014\)](#)

[In re Samuel D., 536 S.W.3d 447 \(Tenn. Ct. App. 2016\)](#)

Hearsay: 803(26) cases

[State v. Bates, No. E2014-01741-CCA-R3-CD, 2015 WL 9019818 \(Tenn. Crim. App. Dec. 15, 2015\)](#)

[State v. Boyd, No. E2019-02272-CCA-R3-CD, 2021 WL 5629865 \(Tenn. Crim. App. Dec. 1, 2021\)](#)

[State v. Gilbert, No. M2020-01241-CCA-R3-CD, 2021 WL 5755018 \(Tenn. Crim. App. Dec. 3, 2021\)](#)

[State v. Hartshaw, No. E2019-02200-CCA-R3-CD, 2021 WL 5861278 \(Tenn. Crim. App. Dec. 10, 2021\)](#)

[State v. Boyd, No. E2019-02272-CCA-R3-CD, 2021 WL 5629865 \(Tenn. Crim. App. Dec. 1, 2021\)](#)

[State v. Stevenson, No. W2019-01785-CCA-R3-CD, 2020 WL 7386288 \(Tenn. Crim. App. Dec. 16, 2020\)](#)

Hearsay: Unavailability

[State v. McGill, No. M2022-00501-CCA-R3-CD, 2023 WL 2033804 \(Tenn. Crim. App. Feb. 16, 2023\)](#)