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1. *Synopsis to CHAPTER 1 : ARTICLE I. TENNESSEE LAW OF EVIDENCE—GENERAL PROVISIONS*
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2. *§ 1.01 Rule 101. Scope*
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4. *§ 1.03 Rule 103. Rulings on Evidence*
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1 Tennessee Law of Evidence § 1.01

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§ 1.01 Rule 101. Scope

[1] Text of Rule

Rule 101 Scope

These rules shall govern evidence rulings in all trial courts of Tennessee except as otherwise provided by statute or rules of the Supreme Court of Tennessee.

Advisory Commission Comment:

These rules would apply in all trials, including those in general sessions courts and juvenile courts. *See* T. R. JUV. P. 28(c) (adjudicatory hearings). Sentencing proceedings are not covered, with respect to strict application of the hearsay exclusionary rule. *See* Tenn. Code Ann. §§ 40-35-209(b), 39-13-204(c) [Repealed], and T. R. JUV. P. 32(f). Administrative hearings are not covered. *See* Tenn. Code Ann. § 4-5-313(1).

[2] Evidence Rules Applicable in Trial Courts; Exceptions

[a] In General

In order to achieve uniformity and to provide evidentiary standards for all courts in Tennessee, Rule 101 makes the Tennessee Rules of Evidence applicable in all trial courts in Tennessee unless a statute or Tennessee Supreme Court rule grants an exception. Thus the rules of evidence govern some or all proceedings in such courts as Chancery Courts, Criminal Courts, Circuit Courts, General Sessions Courts, and Juvenile Courts. Rule 101 does not, however, extend the evidence rules to administrative[1] or legislative proceedings, which are not "trial courts." Other rules or statutes may make all or parts of the rules of evidence applicable in some such proceedings.

Since Rule 101 does not place limits on the types of cases subject to the rules of evidence, the rules apply to both civil and criminal cases of every type, unless some exception is provided as described below. However, under Rule 104(a) the rules of evidence, except for those dealing with privileges, do not apply to hearings to determine the admissibility of evidence.

[b] Legislative and Supreme Court Exceptions

Statutes. Rule 101 also states that exceptions can be created by statute and the Tennessee Supreme Court. Accordingly, the Tennessee legislature is specifically permitted to pass statutes that make some or all the evidence rules inapplicable to a certain court or in a specified situation. A number of such statutes exist.[2] The Tennessee Supreme Court, like the Tennessee legislature, is authorized by Rule 101 to

[1] *See also* Tenn. Code Ann. § 4-5-313(1) (2005) (rules of evidence, except for privileges, do not necessarily apply in contested cases under Administrative Procedure Act). Hearsay is admissible in an administrative hearing if it is the type of material commonly relied on by reasonably prudent people in conducting their affairs, is corroborated, and is not the only evidence of the act. Crosby v. Holt, 320 S.W.3d 805, 815 (Tenn. Ct. App. 2009). Taylor v. Clarksville Montgomery County Sch. Sys., 2010 Tenn. App. LEXIS 522.

promulgate rules making some or all the rules of evidence inapplicable in certain cases. A few such rules

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[2] *Sentencing in general. E.g.*, Tenn. Code Ann. § 40-35-209(b) (2010) (at sentencing hearing, rules of evidence apply, except reliable hearsay may be admitted; constitutionally excluded evidence not admissible). The party against whom reliable hearsay is admitted in a sentencing hearing has a statutory right "to rebut any hearsay evidence so admitted." *Id. See also* State v. Pierce, 138 S.W.3d 820, 2004 Tenn. LEXIS 634 (Tenn. 2004) (trial courts may not consider polygraph examination results or any portion of a risk assessment report that relies upon polygraph examination results when imposing sentences, because such evidence is inherently unreliable and, therefore, inadmissible under Tenn. Code Ann. § 40-35-209(b) and Tenn. R. Evid. 402); Thompson v. State, ___ S.W.3d ___, 2019 Tenn. Crim. App. LEXIS 166 (Tenn. Crim. App. Mar. 14, 2019) (prosecutor could use Florida police reports during her argument, since the majority of the facts described were contained in the presentence report, which was reliable hearsay); State v. Solomon, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 788 (Tenn. Crim. App. Oct. 23, 2018) (blood test results report was reliable hearsay and, therefore, appropriately admitted by trial court); State v. Mills, 2011 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. Aug. 15, 2011) (in sentencing hearing, reliable hearsay is admissible as long as a defendant is accorded a fair opportunity to rebut any hearsay evidence so admitted); State v. Taylor, 744 S.W.2d 919, 921 (Tenn. Crim. App. 1987) (trial court should not have considered, at sentencing hearing, hearsay reports of Tennessee Bureau of Investigation agents because defendant was not accorded opportunity to rebut them and there were inadequate indicia of reliability); State v. Mounger, 7 S.W.3d 70, 75 (Tenn. Crim. App. 1999) (rules of evidence apply at sentencing); State v. Stephenson, 195 S.W.3d 574, 589 (Tenn. 2006) (rules of evidence do not limit the admissibility of evidence, including hearsay, at a capital sentencing hearing). Absent an objection to hearsay evidence introduced at a sentencing hearing, any error will be viewed as waived and the hearsay evidence will be received as evidence. State v. Carney, 752 S.W.2d 513 (Tenn. Crim. App. 1988).

Victim's impact statement. Irrespective of its hearsay and double hearsay nature, a victim's impact statement, compiled by the Tennessee Department of Correction, is admissible in a sentencing hearing as evidence of the existence or nonexistence of an enhancement or mitigating factor. Tenn. Code Ann. § 40-38-207 (2010); Tenn. Code Ann. § 39-13-204(c) (2010) (in capital case sentencing hearing, evidence having "probative value" is admissible irrespective of the rules of evidence; constitutionally excluded evidence is inadmissible). On victim's impact statement, see State v. Austin, 87 S.W.3d 447, 463 (Tenn. 2002) (extensive discussion of admissibility of victim's impact statement in capital sentencing hearing).

Capital sentencing hearing. On evidence in capital cases, State v. Odom, 336 S.W.3d 541 (Tenn. 2011) (although the Tennessee Rules of Evidence may serve as a guide in determining the admissibility of evidence in capital sentencing hearings, trial judges are not required to adhere strictly to them); State v. Austin, 87 S.W.3d 447, 461 (Tenn. 2002) (hearsay admissible in capital sentencing hearing); State v. Bane, 57 S.W.3d 411, 421 (Tenn. 2001) (at capital sentencing hearing, statute should be construed to allow judges wider discretion than normally allowed under the rules of evidence); State v. Stout, 46 S.W.3d 689, 702–703 (Tenn. 2001) (rules of evidence do not limit admissibility of evidence at capital sentencing proceeding, but trial court is not required to dispense with the evidentiary principles derived from and contained within the rules of evidence); State v. Sims, 45 S.W.3d 1 (Tenn. 2001) (rules of evidence should not be applied to preclude introduction of otherwise relevant, reliable evidence at capital sentencing hearing, but fundamental fairness must be maintained to protect rights of defendant and victim's family); State v. Hartman, 42 S.W.3d 44, 60 (Tenn. 2001) (rules of evidence should not be strictly applied in capital sentencing hearings to preclude the admission of relevant evidence, but court need not admit inherently unreliable polygraph proof); State v. Carter, 114 S.W.3d 895, 902 (Tenn. 2003) (in capital sentencing hearing, trial court may admit any evidence relevant to circumstances of the murder and appropriate aggravating and mitigating circumstances, but does not have to completely disregard the rules of evidence; trial court at capital sentencing hearing maintains its traditional role in controlling the introduction of evidence and may continue to use the rules of evidence to guide its decisions); State v. Cole, 155 S.W.3d 885, 913 (Tenn. 2005) (rules of evidence do not limit the admissibility of evidence in capital sentencing proceeding).

Tennessee law also allows witnesses to testify about the impact of the murder. Tenn. Code Ann. § 39-13-204(c)(2010). The trial court should exclude this proof if it threatens to render the trial fundamentally unfair or poses a danger of unfair prejudice. State v. Jordan, 325 S.W.3d 1, 56 (Tenn. 2010) (victim's financee permitted to tesify).

The Sixth Amendment's confrontation clause does not apply in Tennessee probation revocation cases. State v. Walker, 307 S.W.3d 260, 264 (Tenn. Crim. App. 2009) (due process clause applies to assess admissibility of evidence in probation revocation hearing).

Probation revocation. Reliable hearsay is admissible in a probation revocation hearing if the defendant has a fair opportunity to rebut the evidence. State v. Phelps, 2017 Tenn. Crim. App. LEXIS 435 (Tenn. Crim. App. 2017); State v. Mills, 2011 Tenn. Crim. App. LEXIS 624 (Tenn. Crim. App. 2011) (strict rules of evidence do not apply to probation revocation hearing); State v. Lewis, 917 S.W.2d 251, 257 (Tenn. Crim. App. 1995) (unauthenticated hospital records admitted at probation revocation hearing on

exist.[3] Case law also occasionally limits application of the rules of evidence.[4]

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issue of amount of restitution; defendant had been provided access to these records); *State v. Wall, 909 S.W.2d 8, 10 (Tenn. Crim. App. 1994)* (reliable hearsay admissible in probation revocation hearing if opposing party is accorded a fair opportunity to counter it; probation violation report is reliable hearsay). The *Sixth Amendment's confrontation clause* does not apply in Tennessee probation revocation cases. *State v. Walker, 307 S.W.3d 260, 264 (Tenn. Crim. App. 2009)*. The confrontation rights of a defendant, though relaxed at a probation revocation hearing, preclude the admission of hearsay evidence unless: (1) the trial court makes a finding that there is "good cause" to justify the denial of the defendant's right to confront and cross-examine adverse witnesses, and (2) there is a showing that information contained in the evidence is reliable. *State v. Wade, 863 S.W.2d 406, 1993 Tenn. LEXIS 358 (Tenn. Oct. 4, 1993)*; *State v. Giles, 2014 Tenn. Crim. App. LEXIS 259 (Tenn. Crim. App. 2014)*; *State v. Watson, 2004 Tenn. Crim. App. LEXIS 617 (Tenn. Crim. App. 2004)*. The court's revocation decision will not be set aside where the exclusion of the erroneously admitted evidence would not have changed the outcome of the case. In such a case, the error is deemed harmless under *Tenn. R. Crim. P. 36(b)*. *State v. Clay, ___ S.W.3d ___, 2018 Tenn. Crim. App. LEXIS 291 (Tenn. Crim. App. Apr. 17, 2018)*. *See* infra [3] Harmless Error—Substantial Rights.

Tenn. Code Ann. § 40-35-311(c) (2010) provides that a lab report regarding a defendant's drug test result may be admitted in probation revocation proceedings, without the testimony of the administering laboratory technician, if accompanied by an affidavit detailing the identity and qualifications of the certifying technician, a description of the methodology used, and a certification of the accuracy of the test and reliability of the results. If the state plans to use the report and affidavit in lieu of live testimony, the defendant is entitled to a copy of the report and affidavit five days prior to the hearing. Where a lab report lacked a statement of qualifications from a certifying technician, it should not have been admitted into evidence during a probation revocation hearing, because it did not meet the statutory requirements of *Tenn. Code Ann. § 40-35-311(c)*. *State v. Carroll, 2013 Tenn. Crim. App. LEXIS 1037 (Tenn. Crim. App. 2013)*. *Tenn. Code Ann. § 40-35-311(c)(2)* mandates that, upon seasonable objection and for good cause shown, the trial judge shall require that the laboratory technician appear and testify at the probation revocation hearing.

Parole revocation. The statute governing parole revocation hearings contains similar provisions permitting the admission of drug test results without live testimony of the technician, if accompanied by appropriate affidavit. *Tenn. Code Ann. § 40-28-122* (2006). Additionally, at parole revocation hearings, evidence, such as letters and affidavits, that are not admissible at a criminal trial, may be considered by the parole board. *Sanders v. Tennessee Bd. of Parole, 944 S.W.2d 395 (Tenn. Ct. App. 1996)*. While the constitutional right to confront and cross-examine adverse witnesses as to the essential elements of a crime in a criminal proceeding is absolute, the issue in a probation revocation proceeding is not the guilt or innocence of the defendant, and the right to confront and cross-examine adverse witnesses is not absolute and may be relaxed under some circumstances. The full panoply of rights due a defendant in criminal prosecutions do not apply to parole revocations. Thus, hearsay evidence is admissible at a parole revocation hearing, depriving the parolee of the right to cross-examination, when minimum confrontation requirements of due process in probation hearings are met. These include (1) a specific finding by the trial court of "good cause" that would justify the denial of the defendant's right to confront and cross-examine an adverse witness; and (2) a showing that the information contained in the report is reliable. *Moss v. Tennessee Bd. of Paroles, 2000 Tenn. App. LEXIS 650 (Tenn. Ct. App. 2000)*.

Claims Commission. *Tenn. Code Ann. § 29-13-108(e)(1)* (Supp. 2010) (certain affidavits and documents submitted to Tennessee Claims Commission by the Division of Claims Administration are admissible in both administrative and judicial proceedings, irrespective of the Tennessee Rules of Evidence).

Other Statutory Provisions. Use of victim's photograph while alive, see *Tenn. Code Ann. § 40-38-103(c)* (an appropriate photograph of the victim while alive is admissible in criminal prosecution for homicide); use of prior statements of witnesses at criminal trial and on appeal, see Tenn. Code Ann. § 40-17-12 (providing for *in camera* inspection of statement and excisement of portions that do not relate to the subject matter of the testimony, but in the event of conviction and appeal, the entire statement shall be made available to the reviewing courts); inadmissibility of voice stress analysis and related testimony, see *Tenn. Code Ann. § 40-17-101*; use of prior conviction in sex offenses where victim is less than 13 years of age, see *Tenn. Code Ann. § 40-17-124(a)(4)* (defendant's prior conviction is admissible, subject to *Rule 403 of the Tennessee Rules of Evidence*).

[3] *E.g.*, Tenn. Sup. Ct. R. 31, Section 7 (scope of confidential and inadmissible evidence in mediation proceedings); Tenn. Sup. Ct. R. 31A, Section 7 (scope of confidential and inadmissible evidence in a Rule 31A ADR Proceeding); ***Tenn. Sup. Ct. R. 7***, Sec. 13.03 (licensing of attorneys; hearings before the Board of Law Examiners are not bound by the rules of evidence applicable in a court); Tenn. R. Civ. P. 32 (admissibility of depositions); 43 (rules of evidence generally apply but affidavits admissible on motions); TENN. R. CRIM. 5.1 (limits hearsay admitted at preliminary examination); 11(d) (certain plea discussions

In *State v. Mallard*,[5] the Tennessee Supreme Court made it clear that under the separation of powers doctrine the Tennessee Supreme Court alone "has the inherent power to promulgate rules governing the practice and procedure of the courts of this state."[6] Accordingly, a Tennessee statute that conflicts with an evidence rule is not necessarily valid. The Court conceded that the Tennessee General Assembly has broad power "to establish rules of evidence in furtherance of its ability to enact substantive law."[7] But the *Mallard* Court stressed that the judiciary's acceptance of legislative enactments affecting evidence rules is consensual rather than obligatory. It is the product of the judiciary's recognition that a "workable model of government" requires cooperation of "interdependent" branches of government. State courts "have, from time to time, consented to the application of procedural or evidentiary rules promulgated by the legislature."[8]

The *Mallard* Court held that the legislature steps into forbidden territory when it enacts rules "that strike at the very heart of a court's exercise of judicial power."[9] Although the Court refused to precisely define the limits of the legislature's lawful authority to pass statutes that affect evidence issues, it did note that:

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inadmissible); 12.2 (limits proof on issue of insanity if required notice not given); 15(f) (limits use of deposition in criminal case); 16(d)(2) (court's exclusion of evidence as penalty for discovery violation); 26.2(d) (court's exclusion of testimony as penalty for failure to produce witness's statement); 30 (jury instructions); 41(g) (motion to suppress unlawfully seized property), (h) (right to object to admissibility of evidence; nonwaiver); 51 (exceptions unnecessary); 15(f) (use of deposition as evidence); *Tenn. R. Juv. P. 308(e)* (reliable hearsay admissible in preliminary hearing in dependent and neglected cases); 208(b)(2) (at probable cause hearing prior to likely transfer of juvenile to adult court, same rules of evidence apply as at General Sessions preliminary hearing); 307(d) (applying Tennessee law of evidence to juvenile adjudicatory hearings; 306 (taking children's testimony); 303 (waiver of right to attorney in dependent and neglect proceedings; privilege against self-incrimination); 308(e) (application of modified rules of evidence at dispositional hearing); 403(j) (statements of child made during foster care review board hearing inadmissible in delinquent or unruly proceeding prior to a dispositional hearing);

Welch v. Bd. of Prof'l Responsibility for the Supreme Court of Tenn., 193 S.W.3d 457, 464 (Tenn. 2006) (rules of evidence apply to attorney disciplinary proceedings before a hearing committee of the Tennessee Board of Professional Responsibility). *See also*, *Mabry v. Bd. of Prof'l Responsibility, 458 S.W.3d 900 (Tenn. 2014)* (Tenn. Sup. Ct. R. 9, § 23.3 provides that the Tennessee Rules of Evidence apply in attorney disciplinary proceedings "except as otherwise provided" in the Supreme Court Rules).

Inherent power of court. When issues arise for which no procedure is otherwise specifically prescribed, trial courts in Tennessee have inherent power to adopt appropriate rules of procedure to address the issues. Rules adopted pursuant to this inherent power must be consistent with constitutional principles, statutory laws, and generally applicable rules of procedure. *State v. Reid, 981 S.W.2d 166 (Tenn. 1998)*.

[4] *See, e.g.*, *State v. Harrison, 270 S.W.3d 21 (Tenn. 2008)* (adopting a temporary procedure, based on analogous provisions of *Tenn. R. Crim. P. 16(b)(1)(B)* and *Tenn. R. Crim. P. 12.2(c)(2)*, to be followed for disclosure and use of evidence relating to competency to stand trial); *Coe v. State, 17 S.W.3d 193, 212 (Tenn. 2000)* (rules of evidence do not apply in hearing to determine competency to be executed); *Van Tran v. State, 6 S.W.3d 257 (Tenn. 1999)* (same); *State v. Woods, 806 S.W.2d 205, 212 (Tenn. Crim. App. 1990)* (hearsay evidence can be used to establish probable cause to search or arrest).

[5] *40 S.W.3d 473 (Tenn. 2001)*.

[6] *Id. at 481*.

[7] *Id.*

[8] *Id.*

[9] *Id. at 483*. *See also* *Pinkard v. HCA Health Servs. of Tenn., 545 S.W.3d 443 (Tenn. Ct. App. 2017)* (applying *Mallard* to uphold the constitutionality of the evidentiary privilege created by *Tenn. Code Ann. § 68-11-272(c)(1)* of the Healthcare Quality Improvement Act ("HCQIA"); although appellant argued that the privilege, which bars admission of evidence relating to Quality Improvement Committee proceedings, usurped the judiciary's authority by conflicting with the Tenn. Rules of Evidence, the court held that the privilege promotes Tennessee public policy by encouraging candor within a hospital's quality improvement process and is "reasonable and workable within the framework of evidentiary rules already recognized by the judiciary").

> [A]ny legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand.[10]

Mallard involved a conflict between Tennessee Evidence Rule 404(b) and a Tennessee statute[11] stating that a court "shall" consider an enumerated list of factors to determine whether a particular object constitutes illegal "drug paraphernalia." Finding that the mandatory "shall" language would preempt Evidence Rule 404(b) if read literally, the *Mallard* Court refused to presume that the legislature intended to infringe upon judicial power and violate the Tennessee separation of powers doctrine. Accordingly, the Supreme Court held that the legislature, despite the statute's use of the word "shall," meant only to suggest factors for Tennessee trial courts to consider in assessing whether an object is drug paraphernalia. This interpretation avoided a constitutional conflict between an evidence rule and a statute. More importantly, it conveyed the clear message that the legislature's power to enact laws affecting the admission of evidence is limited, and that the Tennessee Supreme Court will determine the parameters of those boundaries.[11.1]

[c] Other Exceptions

Constitution. Although Rule 101 lists no exceptions other than those created by statute or the Tennessee Supreme Court, other exceptions do exist. The Tennessee Rules of Evidence must yield to the United States Constitution. For example, although the rules of evidence may permit a prosecutor to comment on the criminal defendant's silence at the trial, the United States Supreme Court has held that such comments may violate the accused's *Fifth Amendment* right to remain silent.[12]

Detainers. The Interstate Compact on Detainers,[13] which provides procedures for enabling one state to obtain custody of a prisoner in another state, has been interpreted liberally in favor of the admission of evidence. According to the Tennessee Court of Criminal Appeals, "[r]ules of evidence in these proceedings are not rigidly applied and the evidence shall be construed liberally in favor of the demanding state.[14]

Davenport v. Adair, 2005 Tenn. App. LEXIS 821 (Tenn. Ct. App. Dec. 27, 2005) (any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand).

[10] *Id.*

[11] TENN. CODE ANN. § 39-17-424 (2010).

[11.1] *State v. Lowe, 552 S.W.3d 842 (Tenn. 2018)*, is one example where the legislature overstepped that boundary. In *Lowe*, the court held that *Tenn. Code Ann. § 40-6-108* of the Exclusionary Rule Reform Act (ERRA) was unconstitutional, because in enacting the statute the General Assembly was trying to legislate "a good-faith exception to the exclusionary rule, *a judicially created remedy* … . [B]y directly contradicting existing procedural rules and then-existing Court precedent related to any good-faith exception through the enactment of the ERRA, the General Assembly overstepped its constitutional boundaries."

[12] *See Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)*; *United States v. Robinson, 485 U.S. 25 (1988)* (where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, the privilege against compulsory self-incrimination is violated; but where the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, there is no violation of the privilege); *State v. Cazes, 875 S.W.2d 253, 267 (Tenn. 1994)* (applying Robinson to reject a Griffin claim); *State v. Dotson, 450 S.W.3d 1, 2014 Tenn. LEXIS 694 (Tenn. Sept. 30, 2014)* (where prosecution attempted neither to create an inference of guilt from the defendant's request for counsel nor to use the defendant's request for counsel to impeach his trial testimony, testimony did not violate constitutional rules).

[13] TENN. CODE ANN. § 40-31-101 (2006).

[14] *State v. Whitt, 753 S.W.2d 369, 370 (Tenn. Crim. App. 1988)*. *State ex rel. Sneed v. Long, 871 S.W.2d 148 (Tenn. 1994)* (the issuance of a rendition warrant creates a prima facie case that the extradition is valid, and the person seeking to resist extradition bears the burden of proving beyond a reasonable doubt that he is not the person sought to be extradited).

[d] Ethical Rules

Although evidence that violates the Tennessee Rules of Evidence may be excluded by a court, evidence obtained in violation of the ethical rules for the conduct of lawyers typically will not. In *TBC Corporation v. Wall,*[15] the defendant, through counsel, entered into an agreement to pay a witness on a contingency basis, possibly in violation of Disciplinary Rule 7-109(C) of the Code of Professional Responsibility.[16] The Tennessee Court of Appeals held that this violation of the ethical rules did not render the witness's testimony inadmissible since Tennessee law does not provide for the exclusion of evidence obtained in violation of the Code of Professional Responsibility. The contingent payment arrangement would be used to impeach the witness rather than to exclude his testimony.

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[15] *955 S.W.2d 838 (Tenn. Ct. App. 1997)*.

[16] Subsequent to this case, Tennessee replaced the Code of Professional Responsibility with the Tennessee Rules of Professional Conduct. D.R. 7-109(c) was replaced by Rule 3.4(h).

§ 1.02 Rule 102. Purpose and Construction

[1] Text of Rule

Rule 102 Purpose and Construction

These rules shall be construed to secure the just, speedy, and inexpensive determination of proceedings.

Advisory Commission Comment:

This language comes from *T. R. Civ. P. 1*.

[2] General Purposes of Evidence Rules

Rule 102 states three general purposes behind the Tennessee Rules of Evidence. Taken almost verbatim from the Tennessee Rules of Civil Procedure,[17] and differing markedly from Rule 102 of the Federal Rules of Evidence,[18] this rule indicates that the Tennessee evidence rules should be construed to serve three goals: the just, speedy, and inexpensive determination of issues.

Although general policy statements often go unnoticed and unused, Rule 102 should not be ignored. The Tennessee Rules of Evidence are an integrated whole,[18.1] and Rule 102's broad mandate to achieve a 'just' determination of the issues becomes meaningful only when read in conjunction with other Rules of evidence and applied to the particular facts in any given case.[18.2] The words of the rules themselves should be given

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[17] ***Tenn. R. Civ. P. 1***. It is also similar to the Tennessee Rules of Criminal Procedure. Tenn. R. Crim. P. 2 (just determination, simplicity in procedure, fairness in administration, elimination of unjustifiable expense and delay).

[18] Federal Rule 102 is more expansive than Tennessee Rule 102. Federal Rule 102 states that the rules of evidence:

> [S]hall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

[18.1] State v. McCaleb, 582 S.W.3d 179, 187 (Tenn. 2019) (the general goal of the Tennessee Rules of Evidence is "fairness and reliability", which is "best served by not reading any rule in isolation").

[18.2] *See* State v. McCaleb, 582 S.W.3d 179 (Tenn. 2019) (under Rule 403 the trial court's evaluation of undue prejudice may extend beyond merely the impact of a prosecution witness's testimony on direct examination, or the impact of an exhibit admitted through that witness; thus, a trial court may consider not only the impact of the evidence itself but the impact of potential cross-examination resulting from admission of the evidence, which allows a trial court to effectuate Tenn. R. Evid. 102, 106 and the accused's constitutional right to inform the jury about the circumstances surrounding his admissions and attach their credibility). The evidence at issue in *McCaleb* were defendant's post-polygraph statements, which the State sought to introduce. After identifying Rule 102 as the starting point in the admissibility inquiry, the Court evaluated the statements under Rules 106, 401, 402 and 403. The Court held that in evaluating the undue prejudice that would result if the evidence were admitted, the trial court was entitled to consider the effect admission of the defendant's statements would have on his constitutional right to contest their credibility by taking the stand, including the jury's potential misuse of any polygraph information that would inevitably be elicited during cross examination. It is important to recognize that these concerns implicate not just Rule 403's fairness analysis and the balancing of "undue prejudice" against probative value, but also Rule 102's broad policy requiring courts to interpret the Rules of

great weight in their construction and application. The equivalent though differently worded Federal Rule 102 has been interpreted as authorizing flexibility.[19] It remains to be seen whether Tennessee Rule 102 will be read as broadly as its federal counterpart.

Rule 102 provides some guidance for courts and lawyers to use in arguments and decisions about the application of each rule of evidence. Often the resolution of an evidence question will hinge on which interpretation of an evidence rule best serves the policies of Rule 102.[19.1] Unfortunately, the vague terms used in Rule 102 provide little specific guidance to courts and may provide ammunition for lawyers on either side of an issue.

For example, Rule 102 states that the evidence rules should be construed to secure a speedy and just determination of proceedings. Although courts have the option of granting a continuance in appropriate cases to secure the attendance of a witness,[20] counsel opposing the continuance could use Rule 102 to argue that the continuance would frustrate the rule's preference for speedy resolution of proceedings. Of course, counsel seeking the continuance would also rely on Rule 102's statement that the rules should be construed to effectuate a just resolution of proceedings.

[3] Curative Admissibility

The existence of sometimes conflicting policy goals in Rule 102 suggests trial courts should be given much discretion in resolving issues involving such conflicts. On appeal, great deference should be given to the trial judge's decisions on these matters as long as the judge seriously analyzed the factors enumerated in Rule 102. This principle is effectuated by the doctrine of *curative admissibility*, which allows otherwise inadmissible evidence to be used when fairness so requires. In *State v. Land*,[21] the Tennessee Court of Criminal Appeals held that a criminal accused, who misled the jury by a response that did not take into consideration already-excluded evidence, had opened the door to the admission of that same evidence. The concept of fundamental fairness justifies this departure from ordinary evidence rules.

Another illustration is *State v. Robinson,*[22] where a defendant's cross-examination of a police officer specifically asked the names of people who had identified the defendant's photo. The officer named two people, then the

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Evidence with 'just' results. The Court implicitly recognizes this overlapping relevance of Rule 403 and 102, stating that its interpretation of Rule 403 "*allows a trial court to recognize and effectuate Rules 102* and 106 as well as the accused's constitutional rights to explain the circumstances surrounding his incriminating statements (emphasis added)." *Id.* Although *McCaleb* turns on the court's interpretation of Rule 403 and an analysis of the defendant's fundamental rights, these interpretations are clearly guided by Rule 102's policy directing courts to achieve 'just' resolution under the Rules as a whole.

[19] 1 WEINSTEIN'S FEDERAL EVIDENCE 102-7 (McLaughlin 2d ed. 2000). *See also* CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, 1 FEDERAL EVIDENCE 4 (3d ed. 2007) ("no set of rules can be tailor-made to deal specifically with all the problems that arise").

[19.1] *See e.g.*, State v. McCaleb, 582 S.W.3d 179 (Tenn. 2019) (court's interpretation of Tenn. R. Evid. 403 aligned with Tenn. R. Evid. 102, thereby allowing a trial court "to recognize and effectuate" Rule 102).

[20] *See* Tenn. R. Evid. 611(a) (court controls presentation of evidence and conduct of trial to control abuse by counsel).

[21] State v. Land, 34 S.W.3d 516 (Tenn. Crim. App. 2000). *See also* State v. Conway, 77 S.W.3d 213 (Tenn. Crim. App. 2001) (under doctrine of curative admissibility, officer was permitted to testify that in less than 5 of his 108 DUI arrests did the defendant admit to being drunk; during earlier cross-examination of officer, defense counsel had attacked the officer for not asking the defendant how many drinks the defendant had consumed; officer permitted to clarify his reason for not asking that question); *see below* § 6.11[6][b].

[22] 146 S.W.3d 469, 493 (Tenn. 2004). *See also* State v. Childress, 2006 Tenn. Crim. App. LEXIS 995 (Tenn. Crim. App. 2006) (while it may be that both Crawford v. Washington and Tenn. R. Evid. 803(1.1) bar hearsay statements of identification if the declarant does not testify at trial, neither Crawford nor R. 803(1.1) is dispositive when the defendant himself both elicits and opens the door to the testimony that he currently assigns as error. Under these circumstances, the defendant is not entitled to relief. Indeed, a litigant will not be permitted to take advantage of errors which he himself committed or invited, or induced the trial court to commit, or which were the natural consequence of his own neglect of misconduct).

defendant objected that this was error because Rule 803(1.1) bars hearsay identification evidence if the declarant does not testify. The Tennessee Supreme Court held that the defendant opened the door to the testimony and could not take advantage of his own errors.

Another example is a medical malpractice case where defense counsel cross-examined a medical expert witness by asking about the long-term impact on the patient of the doctor's surgical error.[23] The witness responded with information about improbable risks. The Tennessee Court of Appeals upheld the testimony on the theory that a party cannot complain about testimony elicited by his or her own cross-examination of an opposing party or witness. The court noted that a party may not take advantage of errors which it invited or induced. There are many other examples.[24]

[4] Policies in Other Evidence Rules

[a] In General

Although Rule 102 provides the basic policies to be used in construing the Tennessee Rules of Evidence, it is not the only rule that must be considered.

[b] Rule 611: Abuse by Counsel

Rule 611(a), discussed elsewhere in this book,[25] states, "The court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel." The concept of avoiding abuse by counsel supplements Rule 102's policies of a just, speedy, and inexpensive legal system. For example, Rule 611 permits a court to limit cross-examination that has become hostile and has evolved to the point of inappropriate harassment of a witness.

[c] Rule 403: Confusion of Issues, Misleading Jury, Cumulative Evidence, Waste of Time, and Undue Delay

Rule 403, also discussed elsewhere in this book,[26] provides that relevant evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or cumulative evidence. In applying the Tennessee Rules

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[23] *Palanki v. Vanderbilt University, 215 S.W.3d 380, 392 (Tenn. Ct. App. 2006)*.

[24] *See, e.g.*, *State v. Osborne, 251 S.W.3d 1, 22 (Tenn. Crim. App. 2007)* (rule of curative admissibility used to permit proof, during redirect examination, of defendant's prior sexual acts against child sex abuse victim when defendant, on cross examination of victim, suggested victim acquired knowledge of sexual matters through the sexual misconduct of the victim's grandfather; defendant's cross examination of victim opened the door to proof that the victim acquired such knowledge from the defendant's own prior sexual misbehavior rather than from the grandfather's). The doctrine of curative admissibility permits the State, on redirect, to question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by, the previous cross-examination. The doctrine allows the State to present otherwise inadmissible evidence in order to explain or counteract a negative inference created when a defendant has injected an issue into the case. The doctrine is designed to guarantee fairness in that it prevents a party from using the Rules of Evidence to gain exclusion of certain evidence and then extracting selected pieces of this evidence for his own advantage, without the government being able to place them in their proper context. *State v. Butler, 2016 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 2016)*. *See also, State v. Clark, 2019 Tenn. Crim. App. LEXIS 60 (Crim. App. Jan. 31, 2019)* (where a defendant has injected an issue into the case, curative admissibility doctrine allows the State to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects; the evidence admitted must be relevant to the same subject matter as the evidence introduced by the party against whom it is offered); *State v. Vance, 2018 Tenn. Crim. App. LEXIS 827 (Crim. App. Nov. 7, 2018)* (applying curative admissibility doctrine), app. granted as to applicability of curative admissibility doctrine, *State v. Vance, 2019 Tenn. LEXIS 31 (Feb. 20, 2019)*.

[25] *See below § 6.11[3]*.

[26] *See below § 4.03[2]*.

of Evidence, courts will use Rule 403's policies in assessing the admissibility of specific pieces of evidence. This approach, involving the assessment of the admissibility of a particular piece of evidence by examining its role in the trial, can be slightly different than an application of Rule 102. Rule 102 assists the court in interpreting a particular evidence rule. Rule 403, on the other hand, does not aid the court in construing an evidence rule; rather it provides guidance in determining whether a piece of evidence otherwise admissible under the rules of evidence should be excluded for other policy reasons.

[d] Rule 103(c): Protect Jury from Inadmissible Evidence

A related rule also indirectly attempts to facilitate a just resolution by ensuring that a jury does not learn about inadmissible evidence. Rule 103(c) dictates that jury trials "shall be conducted to the extent practicable so as to prevent inadmissible evidence from being suggested to the jury by any means." This admirable provision should minimize the likelihood that jury verdicts are based on facts other than those properly presented—and countered—during the trial.

[e] Policy of Particular Evidence Rule Being Used

Counsel should also use the policy underlying the evidence rule at issue. For example, if the issue is the applicability of a particular hearsay exception, counsel should consider arguments that the policy behind the exception would be served or not served if the rule were applied in a certain way.

[f] Practice Suggestion

An attorney seeking the exclusion of evidence can use several of the above rules. For example, the lawyer may argue that a particular evidence rule should be interpreted to exclude the evidence because of Rule 102's policy of fostering just proceedings. The attorney can also argue, pursuant to Rule 611, that the evidence should be barred to avoid abuse by counsel. Finally, he or she can assert that the evidence should be disallowed under Rule 403, perhaps because the probative value of the evidence is slight but the danger of unfair prejudice is great.

End of Document

§ 1.03 Rule 103. Rulings on Evidence

[1] Text of Rule

RULE 103 Rulings on Evidence

(a) Effect of erroneous ruling.Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context. Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of offer and ruling.The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling. It shall permit the making of an offer in question and answer form. If an issue arises concerning the privileged nature of a communication, the trial court may require the communication be reduced to writing for in camera review. If ruled not privileged, the communication can be divulged in open court and will become part of the record for appellate review. If ruled privileged, the trial court shall seal the writing reviewed in camera and attach it to the record for appellate review.

(c) Hearing of jury. In jury cases, proceedings shall be conducted to the extent practicable so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Advisory Commission Comment:

Part (a) restates current law. Errors must be substantial rather than harmless. The effect of a trial error, including an erroneous ruling on evidence, is set out in *T.R.A.P. 36(b)*. Objections must be timely and specific. Offers of proof must indicate to the reviewing court what was excluded. Note that in Part (b) the trial court must permit a formal question-and-answer offer, the kind favored by appellate courts.

Part (d) recognizes that some errors are so plain and harmful that a trial judge can be reversed despite absence of objection. *See* *T.R.A.P. 36(b)*, *T. R. Crim. P. 52(b)*, and *State v. Ogle, 666 S.W.2d 58 (Tenn. 1984)* (reversing for *Bruton* error not raised in trial court or Court of Criminal Appeals). Whether or not an appellate court should recognize the error and grant relief depends upon the facts and circumstances of the particular case. *State v. Ogle, 666 S.W.2d 58 (Tenn.*

1984); ***State v. Toth, 2016 Tenn. Crim. App. LEXIS 176 (Tenn. Crim. App. 2016)*** **(discussing plan error review under *T.R. Crim. P. 52(b)* arising from prosecutorial misconduct).**

1991 Advisory Commission Comment:

Subsection (a)(2) is amended to add a specificity requirement as to the evidentiary rule supporting an offer of proof, thereby making this requirement for offers consistent with that for objections in subsection (a)(1).

2001 Advisory Commission Comment:

The final sentence of Rule 103(a) eliminates the need to repeat objections or offers of proof.

2005 Advisory Commission Comment:

The second paragraph in Rule 103(b) provides a procedure for appellate review where parties disagree whether a communication is privileged. Rulings at trial are subject to interlocutory appeals pursuant to Appellate Rules 9 and 10.

[2] Rulings on Evidence: In General

Rule 103 provides a series of rules regulating appellate review of evidence decisions, counsel's obligations in objecting to evidence, and some of the trial court's procedures in resolving disputed evidence questions. Rule 104 complements this rule by outlining the procedures used in the court's preliminary screening of challenged evidence.

Rule 103 reinforces several existing concepts of Tennessee evidence law. By providing that appellate reversal requires a trial court ruling affecting a party's "substantial rights," Rule 103(a) makes it clear that minor evidentiary errors will not threaten the validity of a judgment. Thus, Rule 103 sensibly seeks to avoid appellate reversals based on technical and inconsequential errors.

Rule 103 also establishes the predominant role of counsel in aspects of the trial process. This provision places the burden on counsel to raise objections and create a valid record for appeal. Lawyers, not judges, have the responsibility for initiating evidentiary restrictions and facilitating facets of appellate review.

Finally, Rule 103 also leaves much to the discretion of the trial judge. Many details of trial practice are only generally described in Rule 103. For example, Rule 103(a) hinges appellate reversal on an error affecting "substantial rights," but does not define that term. It also requires a "timely objection," but does not describe the form or exact timing of the objection. And Rule 103(a)(2) requires an offer of proof, yet does not detail many of the possible methods of tendering the offer.

It is difficult to overestimate the importance of the dictates of Rule 103, which is similar in many ways to Rule 103 of the Federal Rules of Evidence.[27] Because of the simplicity of the requirements of Rule 103, it cannot be characterized as a "trap" for counsel. Nevertheless, as the subsequent sections illustrate, Tennessee appellate decisions are replete with cases in which trial counsel's failure to follow the requirements now in Rule 103 precluded the appellate court from considering counsel's argument on appeal.

[3] Harmless Error—Substantial Rights

[a] In General

A trial, like a human being, is likely to be imperfect. If perfection were required for every trial, appellate reversals would be so frequent that the legal system could become paralyzed and the concept of speedy justice would become a mirage. The legal system accommodates trial imperfection by the concept of

[27] The only significant difference between the Tennessee and federal rules is the last sentence of Rule 103(b). The federal rule states that the trial court "may direct" the making of an offer of proof in question and answer form. FED. *R. Evid. 103(b)*. The Tennessee rule says the trial court "shall permit" the question and answer form. *Tenn. R. Evid. 103(b)*.

harmless error. Appellate courts will ordinarily not reverse a trial court for an error that the appellate court characterizes as harmless.[27.1]

[b] Substantial Right Affected

Rule 103(a), which primarily tracks existing rules of Tennessee appellate[28] procedure, states that error, and reversal, may not be based on a ruling on an evidence question unless a substantial right of a party is affected. In essence, this means that Tennessee appellate courts will not reverse trial courts on evidentiary rulings unless the appellate court believes that the erroneous ruling affected a "substantial right" of a party.

The rules of evidence do not define the pivotal term "substantial right." Federal cases based on the identical language suggest that the error must have had an effect on the jury verdict. In *United States v. Lane*,[29] the United States Supreme Court noted that an error affects substantial rights when it causes "actual prejudice because it 'had substantial and injurious' effect or influence in determining the jury's verdict."[30]

There is little discussion, no agreement, and virtually no precision in judicial efforts to describe how convinced the appellate court must be that the error affected the jury's decision. A number of approaches are used in federal and Tennessee courts.[31] Some ask whether it was "highly probable,"[32] "more probable than not,"[33] or there was a "reasonable likelihood" that a substantial right was affected.[34] The "reasonable likelihood" standard is especially sensible because of the difficulty in weighing the actual impact of a piece of evidence.

[27.1] The harmless error doctrine espouses the rule that "[a] final judgment … shall not be set aside, unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." *Tenn. R. App. P. 36(b)*. Generally, in modern jurisprudence application of the harmless error doctrine is the rule rather than the exception. *State v. Williams, 977 S.W.2d 101 (Tenn. 1998)*; *State v. Howze, 2015 Tenn. Crim. App. LEXIS 1008 (Tenn. Crim. App. 2015)*. The harmless error doctrine is an embodiment of the fundamental premise that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." ***State v. Momon, 18 S.W.3d 152, 165 (Tenn. 1999)*** (quoting *State v. Howell, 868 S.W.2d 238, 253 (Tenn. 1993)*). *See also State v. Howze, 2015 Tenn. Crim. App. LEXIS 1008 (Tenn. Crim. App. 2015)* (discussing *Tenn. R. App. P. 36(b)* and harmless error arising from jury instructions).

[28] *See Tenn. R. App. P. 36(b)* (final judgment not set aside unless error "involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process").

[29] *474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986)* (discussing Federal *Rule of Criminal Procedure 52(a)*).

[30] *Id. at 449* (plurality opinion) (*quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*). *See also United States v. Velarde, 214 F.3d 1204, 1211 (10th Cir. 2000)* (an error that affects a substantial right is one that had a substantial influence on the outcome or that leaves one in grave doubt whether it had such an effect).

[31] *See, e.g.*, *United States v. Marrowbone, 211 F.3d 452, 455 (8th Cir. 2000)* (harmless error if error did not influence or only had slight influence on verdict; reversal only if jury may have been substantially swayed by improperly admitted evidence); *United States v. Torres-Galindo, 206 F.3d 136, 141 (1st Cir. 2000)* (whether improperly admitted evidence likely affected outcome of trial).

[32] *See, e.g., United States v. Saada, 212 F.3d 210, 221 (3d Cir. 2000)* (criminal case; was "highly probable" that erroneous admission of evidence did not contribute to the judgment).

[33] *See, e.g.*, *United States v. Davis, 577 F.3d 660 (6th Cir. 2009)* (evidentiary error is harmless unless it is more probable than not that the error materially affected the verdict); *State v. Leming, 3 S.W.3d 7 (Tenn. Crim. App. 1998)* (erroneous admission of hearsay more probably than not affected the verdict); *State v. Ruff, 978 S.W.2d 95, 98 (Tenn. 1998)* (harmless error since erroneous admission of testimony more probably than not did not affect the judgment or result in prejudice to the judicial process).

[34] *See, e.g., Johnson v. William C. Ellis & Sons Iron Works, 609 F.2d 820, 823 (5th Cir. 1980)* (civil case; was "reasonable likelihood" that exclusion of safety codes affected substantial right of a party).

In criminal cases involving most federal constitutional errors, a higher standard is imposed. The error must be "harmless beyond a reasonable doubt."[35] This means that it appeared beyond a reasonable doubt that the error did not contribute to the verdict in the case.[36] Whether an error is harmless in a particular case depends upon a host of factors, including the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.[36.1]

These approaches, of course, require the appellate court to consider all the proof in the case in order to determine the impact of a disputed piece of evidence. The importance of the evidence at issue is a significant factor.[37] If it is cumulative evidence, the result will be different than if it were the only evidence on point.[38] Other important factors include whether the case was close,[39] whether curative instructions were given,[40] whether counsel relied on it in opening or closing argument, and the outcome of the case.[41]

The rules of evidence do not indicate who has the burden of proving that a substantial right has been affected. Case law, however, suggests that the party complaining about the error in admitting or excluding evidence has the burden of proving that the error affected that party's substantial rights.[42] On the other

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[35] *Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)*; *Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)*. *See, e.g.*, *United States v. Leon-Delfis, 203 F.3d 103 (1st Cir. 2000)* (statement admitted in violation of right to counsel reversed unless error was harmless beyond a reasonable doubt); *Johnson v. Cain, 215 F.3d 489 (5th Cir. 2000)* (involuntary statement); *United States v. Torres-Galindo, 206 F.3d 136 (1st Cir. 2000)* (*Bruton* violation); *State v. Alvarado, 961 S.W.2d 136 (Tenn. Crim. App. 1996)* (*Miranda* violation).

[36] *See, e.g.*, *Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)*. *State v. Jones, 2013 Tenn. Crim. App. LEXIS 809 (Tenn. Crim. App. 2013)* (a conviction need not be reversed due to an error of constitutional dimensions as long as the State demonstrates beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained). There are some constitutional errors that are deemed so fundamental that automatic reversal is required. *See id. at 1*; *Arizona v. Fulminante, 499 U.S. 279, 309, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)* (illustrations include a court-ordered guilty verdict, denial of counsel, use of race to exclude jurors, and a biased judge).

[36.1] *Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)*; *State v. Echols, 382 S.W.3d 266, 2012 Tenn. LEXIS 738 (Tenn. 2012)*.

[37] *See, e.g., United States v. Arrington, 215 F.3d 855 (8th Cir. 2000)* (erroneous testimony was "essentially useless").

[38] *See, e.g.*, *United States v. Velarde, 214 F.3d 1204 (10th Cir. 2000)* (improper admission of expert testimony not harmless error since there was relatively littleother evidence of child sexual abuse); *United States v. Frazier, 213 F.3d 409 (7th Cir. 2000)* (erroneous admission of hearsay is harmless error because of strength of other evidence); *State v. Heflin, 15 S.W.3d 519 (Tenn. Crim. App. 1999)* (harmless error since similar testimony properly admitted through another witness).

[39] *See, e.g.*, *United States v. Bowman, 215 F.3d 951 (9th Cir. 2000)* (error harmless because of strength of government's case); *Ruff v. State, 978 S.W.2d 95 (Tenn. 1998)* (erroneous admission of hearsay not reversible error because of strength of government's case); *State v. Hodge, 989 S.W.2d 717 (Tenn. Crim. App. 1998)*; *State v. Deloit, 964 S.W.2d 909 (Tenn. Crim. App. 1997)*.

[40] *See, e.g.*, *United States v. Ihsan Elashyi, 554 F.3d 480* (5th Cir. 2008) (prejudicial effect of evidence may be rendered harmless by curative instruction); *State v. Gray, 960 S.W.2d 598 (Tenn. Crim. App. 1997)*; *State v. Speck, 944 S.W.2d 598 (Tenn. 1997)*.

[41] *See, e.g.*, *United States v. Webb, 214 F.3d 962 (8th Cir. 2000)* (harmless error since defendant was acquitted on the count about which the witness erroneously testified); *State v. Patterson, 966 S.W.2d 435 (Tenn. Crim. App. 1997)* (acquittal on one count was factor in finding harmless error in erroneous admission of guns).

[42] *See United States v. Killough, 848 F.2d 1523, 1527 (11th Cir. 1988)*.

hand, in criminal cases, the constitutional errors beneficial to the state put the burden on the state to prove that the defendant's substantial rights were unaffected.[43]

In *O'Neal v. McAninch*,[43.1] the Supreme Court distinguished habeas corpus from civil proceedings, stating that, "[U]nlike in civil cases … , the errors being considered by a habeas court occurred in a criminal proceeding, and therefore, although habeas is a civil proceeding, someone's custody, rather than mere civil liability, is at stake. And … when reviewing errors from a criminal proceeding, this Court has consistently held that, if the harmlessness of the error is in grave doubt, relief must be granted." The court rejected the State's argument that the burden of proof applicable to civil proceedings should apply to habeas corpus proceedings, instead holding that when a federal habeas court finds a constitutional trial error and is in grave doubt about whether the error had a substantial and injurious effect or influence in determining the jury's verdict, the error is not harmless, and the petitioner must win.[43.2] The court specifically chose to avoid the use of "burden" or similar terminology in its discussion of the issue, instead placing the responsibility on the presiding judge:

> Regardless of whether counsel are helpful, it is still the responsibility of the court reviewing a trial court judgment, once the reviewing court concludes that there was error, to determine whether the error affected the judgment; the reviewing court must do so without benefit of such aids as presumptions or allocated burdens of proof that expedite factfinding at the trial.[43.3]

[c] Duty to Minimize Harm

Pursuant to *Rule 36(a) of the Tennessee Rules of Appellate Procedure*, relief on appeal can be denied to a party who failed to "take whatever action was reasonably available to prevent or nullify the harmful effect of an error."[44] This rule obligates counsel who loses an objection to the admission of evidence to take steps to minimize the harm of admitting the evidence.

State v. Jones,[45] for example, involved testimony suggesting that the defendant had a prior criminal record. Although the court record was not clear on whether the defense objected to the testimony, the Court of

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[43] *Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)*.

[43.1] *513 U.S. 432, 115 S. Ct. 992, 130 L. Ed. 2d 947 (1995)*.

[43.2] *Id.* (the court defined a case of grave doubt to mean that, "in the judge's mind, the matter is so evenly balanced that he is in virtual equipoise as to the harmlessness of the error.")

[43.3] *Id.* The court summarized the review process as follows: "As an initial matter, we note that we deliberately phrase the issue in this case in terms of a judge's grave doubt, instead of in terms of "burden of proof." The case before us does not involve a judge who shifts a "burden" to help control the presentation of evidence at a trial, but rather involves a judge who applies a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect. In such a case, we think it conceptually clearer for the judge to ask directly, "Do I, the judge, think that the error substantially influenced the jury's decision?" than for the judge to try to put the same question in terms of proof burdens (e. g., "Do I believe the party has borne its burden of showing …?").

[44] *Tenn. R. App. P. 36(a)*.

[45] *733 S.W.2d 517 (Tenn. Crim. App. 1987)*. It is arguable that, contrary to *State v. Jones*, counsel has no obligation under Rule 103 to take steps other than to make a timely and specific objection.

The duty to minimize harm also was discussed in *State v. Tizard, 897 S.W.2d 732 (Tenn. Crim. App. 1994)*, a sexual assault case where the victim's mother was permitted to testify about the victim's nightmares and unusual aggressive behavior after the alleged assault. Although the opinion is not entirely clear about the procedural facts, the defense objected to some of this testimony and the court instructed the jury to disregard what the victim had told his mother. The Court of Criminal Appeals held that the defense counsel had not taken reasonable action to prevent or nullify the harmful effect of any error in admitting the evidence, citing Appellate Rule 36(a).

Criminal Appeals held that the defendant violated Rule 36(a) of the appellate rules by not requesting curative instructions to minimize the impact of the testimony about a prior conviction. Of course this creates a "Catch 22" dilemma for defense counsel. Had the defendant so requested the curative instruction, the court would have held that the error was harmless because the instructions cured any adverse consequences.

[d] Waiver by Opening the Door

On occasion, a party wants to have its evidence cake and eat it too. This party may "open the door" to the admission of otherwise inadmissible evidence, then object when that evidence is rendered. Tennessee law has long recognized that a party "will not be permitted to take advantage of errors which he himself committed, or invited, or induced the trial court to commit, or which were the natural consequences of his own neglect or misconduct."[46]

This principle is illustrated by *State v. Robinson*[47] where defense counsel asked a government witness about out-of-court identifications, then objected on appeal that the answer was inadmissible hearsay which violated the defendant's confrontation rights. The Tennessee Supreme Court rejected relief for this self-inflicted wound.

[4] Timely and Specific Objection; Waiver

[a] In General

In an adversary system, lawyers for the parties are responsible for presenting the evidence supporting their clients' positions. Since the judge in an adversary system performs the role of neutral referee rather than partial advocate, ordinarily the judge will not exclude evidence unless there is a complaint about the proof. The usual form of a complaint is a timely objection or a motion to strike.

Rule 103(a)(1) mandates that counsel use objections or motions to strike in certain circumstances. This rule specifically provides that reversible error will not be predicated upon an evidence ruling unless, among other things, a "timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context."

[b] Timely Objection or Motion to Strike; Waiver

Policy Bases. Rule 103(a)(1) normally provides that there must be a timely objection or motion to strike as a prerequisite to successful appellate review of an evidence ruling admitting evidence. This rule serves several purposes. First, an objection permits the trial judge to make a ruling on the admissibility of the evidence before the jury has heard it. This process gives both sides an opportunity to argue their positions on the evidence and it permits the judge to make an informed decision on the issue. Second, it prevents sandbagging, where a lawyer would have a legitimate objection to evidence but withholds a trial objection in order to have grounds to appeal in case the jury verdict is unfavorable. Third, it allows the proponent of the evidence to rephrase the question or somehow restructure the proof to accommodate the objections of the other side. Fourth, it preserves the issue for appellate review or a successful motion for a new trial.

Tennessee courts take seriously the requirement that counsel make a timely objection to proffered evidence.[48] The Tennessee Supreme Court explained:

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[46] *Norris v. Richards, 246 S.W.2d 81, 85 (1952)*. *See also*, *State v. Sexton, 368 S.W.3d 371 (Tenn. 2012)* (the "open the door" principle applies only when the complaining party elicits testimony he later assigns as error).

[47] *146 S.W.3d 469 (Tenn. 2004)*.

[48] *See, e.g., State v. Copenny, 888 S.W.2d 450 (Tenn. Crim. App. 1993)* (failure to object to errors in Rule 404(b)'s procedures precludes successfully raising issue on appeal); *Hohenberg Bros. Co. v. Missouri P. R. Co., 586 S.W.2d 117 (Tenn. Ct. App. 1979)* (Court of Appeals unable to consider objections never made in trial court); *State v. Bennett, 549 S.W.2d 949, 950 (Tenn.*

> A trial court … generally has no duty to exclude evidence or to provide a limiting instruction to the jury in the absence of a timely objection … When a party does not object to the admissibility of evidence, though, the evidence becomes admissible notwithstanding any other Rule of Evidence to the contrary, and the jury may consider that evidence for its "natural probative effects as if it were in law admissible."[49]

Although many cases characterize the failure to make a timely objection as a waiver,[50] there are a number of exceptions to this rule. Tennessee authorities hold that fundamental constitutional questions may be raised at any time even though there was no contemporaneous objection at trial.[51]

New Trial. When a party fails to object to evidence at trial but the case is then reversed, the failure to object to the evidence at the first trial does not constitute a waiver of the objection at a second trial. The new trial "vacates" the earlier one and is an entirely new proceeding.[51.1]

Objection Unnecessary. The Tennessee Supreme Court extended this exception by noting that a party may consent, by failing to object, to the admission of otherwise excludable evidence, "so long as the proceedings are not rendered so fundamentally unfair as to violate due process of law."[52] In addition, Tennessee rules state that an objection is not necessary if the party had no real opportunity to object.[53] Federal authorities have excused a failure to object, where the objection would have been futile,[54] and

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1977) (since defendant failed to object to hearsay testimony at trial, testimony could be considered as evidence and given appropriate weight by jury); *Wright v. United Servs. Auto. Ass'n, 789 S.W.2d 911, 914 (Tenn. Ct. App. 1990)* (failure to make timely, specific objection in trial court bars party from challenging on appeal the erroneous admission of evidence at trial); *In re Estate of Armstrong, 859 S.W.2d 323 (Tenn. App. 1993)* (failure to object to introduction of photographs at trial precludes raising issue of admissibility on appeal); *Riley v. Dreyzehner, 398 S.W.3d 182 (Tenn. Ct. App. 2012)* (must make timely objection to hearsay evidence at administrative hearing to preserve issue for judicial review).

[49] *State v. Smith, 24 S.W.3d 274, 279–280 (Tenn. 2000)* (*quoting State v. Harrington, 627 S.W.2d 345, 348 (Tenn. 1981)*, *cert. denied*, ***457 U.S. 1110 (1982))***; *State v. Robertson, 130 S.W.3d 842 (Tenn. Crim. App. 2003)* (failure to object to evidence allows jury to consider the evidence for its natural probative effect as if it were admissible in law).

[50] *See, e.g.*, ***State v. Coker, 746 S.W.2d 167 (Tenn. 1987)*** (failure to make trial objection to portion of tape recording constitutes waiver, foreclosing consideration of issue on appeal); *State v. Pearman, 2017 Tenn. Crim. App. LEXIS 372 (Tenn. Crim. App. 2017)* (although the defense made numerous hearsay objections throughout trial and engaged in extensive argument regarding the admission of a variety of the victim's hearsay statements, review of the trial transcript showed that defendant arguably waived any issues regarding the admission of certain statements by failing to make a contemporaneous objection to this testimony at trial); *State v. Rhoden, 739 S.W.2d 6 (Tenn. Crim. App. 1987)* (by failing to make contemporaneous objection, defendant waived issue of admissibility of testimony about other rapes and issue of jury voir dire questions about victim's consent); *State v. Roberson, 988 S.W.2d 690 (Tenn. Crim. App. 1998)* (failure to object to testimony waived appeal on that issue); *State v. Gray, 960 S.W.2d 598 (Tenn. Crim. App. 1997)* (criminal defendant's failure to object to content of photographs waives issue on appeal); *Tire Shredders, Inc. v. ERM-North Central, 15 S.W.3d 849 (Tenn. Ct. App. 1999)* (failure to object to expert testimony is waiver of right to appeal admissibility of such testimony); *Davidson v. Holtzman, 47 S.W.3d 445, 456 (Tenn. Ct. App. 2000)* (failure to make contemporaneous objection constitutes waiver of issue of admissibility of the evidence); *State v. Smith, 24 S.W.3d 274, 281 (Tenn. 2000)* (parties may waive objection to admission of hearsay evidence by failing to object).

[51] *Cf. State v. Simerly, 612 S.W.2d 196 (Tenn. Crim. App. 1980)* (fundamental constitutional questions can be raised at any time, but court was unwilling to apply this rule to all constitutional violations; court refused to consider four issues because there was no contemporaneous objection at trial).

[51.1] *Iloube v. Cain, 397 S.W.3d 597, 603 (Tenn. Ct. App. 2012)*.

[52] *State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000)*.

[53] *See Tenn. R. Crim. P. 51* (absence of objection does not prejudice party having no opportunity to object). *See also State v. Hicks, 618 S.W.2d 510, 516 (Tenn. Crim. App. 1981)* (objections not made because of "general atmosphere of the courtroom"). *Cf. State v. Jeffries, 644 S.W.2d 432 (Tenn. Crim. App. 1982)* (difficult or embarrassing for attorney to object to question asked by juror).

Tennessee law is also read as providing that, in the automatic review of capital cases, the reviewing court will consider any error, irrespective of the presence or absence of an objection.[55]

Prior Criminal Conviction. A related exception occurs when an objection is made to the admissibility of a prior conviction under Rule 609. If the trial judge rules that the conviction is admissible, the defendant does not waive an appeal on this issue if he or she brings out the disputed conviction during direct examination.[56]

Deposition. Depositions also present a unique set of rules. A party need not ordinarily object to evidentiary issues during a deposition in order to object later when the deposition is used at trial.[57] However, if the ground of the objection might have been "obviated or removed" by a timely objection, an objection must be made.[58]

[c] Motion to Strike

Although on most occasions an objection rather than a motion to strike is used, Rule 103(a)(1) sometimes dictates the latter procedure. A motion to strike, which is essentially a delayed objection, is used frequently when evidence has been conditionally admitted, and the condition is not later fulfilled. This motion should be made by counsel opposing the evidence. A motion to strike is also appropriate any time inadmissible evidence has been heard by the trier of fact. It may be accompanied by a request for a jury instruction to ignore the evidence.

A good illustration is *State v. Dean*,[59] where the criminal accused objected to the admission of certain blood tests on the theory that there had been inadequate proof of chain of custody of the blood that was evaluated. The objection was made after the final prosecution witness testified but before the state rested its case. Rejecting the prosecution's argument that the objection was too late, the Court of Criminal Appeals held that the objection was really a motion to strike and was timely, preserving the issue for appeal. The opinion noted that a motion to strike could be made at any time prior to the closing of the evidentiary record and the final resting of the case by all parties.[60]

[d] Form of Objection

The rules of evidence do not dictate the form of objections. While written objections have many advantages, discussed below, they are rarely required and virtually never seen on most issues in some lower courts. Oral objections are most common. No magic litany is required to form an objection. Counsel must simply communicate that he or she objects to the introduction of certain evidence because of

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[54] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 496, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (since objection unavailable at time of trial, failure to object is not waiver).

[55] State v. Duncan, 698 S.W.2d 63, 68 (Tenn. 1985) ("In short, there is no waiver of error directed to the admissibility of evidence when the defendant is under sentence of death").

[56] State v. Roberts, 943 S.W.2d 403, 409 (Tenn. Crim. App. 1996). *But see* United States v. Gaitan-Acevedo, 148 F.3d 577 (6th Cir. 1998), *cert denied*, ***525 U.S. 912 (1998)*** (defendant who introduced impeaching conviction during own direct examination waives appeal on adverse *in limine* ruling admitting the conviction).

[57] Tenn. R. Civ. P. 32.02, 32.04(3).

[58] Tenn. R. Civ. P. 32.04(3).

[59] 76 S.W.3d 352 (Tenn. Crim. App. 2001).

[60] *Id.* (*citing* State v. Pilkey, 776 S.W. 2d 943, 952 (Tenn. 1989)).

specified reasons. A formal "exception" is no longer necessary.[61] Counsel must, however, avoid conduct that might be construed as withdrawal of an objection. A withdrawn objection is the same as no objection.

[e] Person Making Objection

Sometimes one of multiple plaintiffs or defendants will object unsuccessfully to evidence. Will this objection preserve the issue for the other co-parties who did not object? Since the purposes behind requiring an objection are served by one party's objection, the better reasoned cases hold that one party's objection preserves appellate review for other co-parties.[62] However, the Tennessee Court of Appeals has noted that a plaintiff may not rely on the motion of the defendant to preserve an issue for appeal.[62.1]

[f] Motion *in Limine*

One method of making an objection is a motion *in limine* which should, but need not, be in writing and filed before trial. This motion asks the court to rule in advance of the trial on the admissibility of certain evidence. It may also request an order that adversary counsel make no reference to certain items or facts until their admissibility has been determined.

A motion *in limine* has several advantages. It facilitates an orderly process by eliminating disruptions in a party's proof. It also helps prevent the jury from being wrongfully influenced by hearing opening arguments or questions or answers that contain subject matter subsequently ruled inadmissible. Moreover, if the court does rule before trial on the motion *in limine*, counsel can better plan the order and content of proof because he or she will know whether the challenged evidence is admissible at the trial. Despite these advantages, a line of Tennessee cases holds that the court does not have to render a decision on such motions before trial.[63] The trial court is given broad discretion in the timing of its decisions, with few exceptions.[64]

[g] Timing of Objection

Rule 103(a)(1) requires a "timely objection or motion to strike." The Tennessee Supreme Court has noted that to allow evidentiary questions to be raised at any time would undercut the function of the trial process by making it a tactical matter of defense to allow a bit of constitutionally inadmissible evidence into the record, in the hope for an acquittal but secure in the knowledge that a new trial could result if the defendant is convicted.[65] If a motion *in limine* is not used, and sometimes when it is used, a timely objection should be made as early as possible before evidence is brought to the jury's attention. For example, in those cases where counsel knows or suspects what the witness will say, objection should be made before a witness takes the stand.

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[61] *Tenn. R. Civ. P. 46*; *Tenn. R. Crim. P. 51*.

[62] *See, e.g., United States v. Hawkins, 905 F.2d 1489 (11th Cir. 1990)* (normal appellate review available to both defendants on any issue objected to by any one defendant).

[62.1] *Mayo v. Shine, 392 S.W.3d 61, 70 n.3 (Tenn. Ct. App. 2012)* (plaintiff may not rely on defendant's objection to expert testimony; plaintiff must expressly join the defendant's objection or motion on the record to have it be considered the plaintiff's objection).

[63] *See, e.g., State v. McGhee, 746 S.W.2d 460 (Tenn. 1988)* (dictum; trial court has discretion whether to rule on motion *in limine* prior to trial); *State v. Martin, 642 S.W.2d 720 (Tenn. 1982)* (trial court has discretion whether to rule on motion *in limine* before trial).

[64] For exceptions, see *Tenn. R. Evid. 608* (court must rule on admissibility of prior bad acts to impeach criminal defendant before the defendant testifies); 609 (same for prior criminal convictions of criminal accused used to impeach accused).

[65] *State v. Biggs, 218 S.W.3d 643, 667 (Tenn. Crim. App. 2006)*.

No Specific Deadline. Tennessee courts have been inconsistent in describing when an objection must be made in order to avoid a waiver. While some courts have suggested that the objection must be tendered when the evidence is offered,[66] other cases permit more flexibility. In *Lee v. Lee,*[67] for example, the court stated:

> The Defendant, if prejudiced by the admission of illegal testimony without objection when offered, may insist upon its exclusion from the jury at any time before their retirement from the bar, unless objection has been explicitly waived.

In *State v. Pilkey,*[68] the Tennessee Supreme Court reaffirmed *Lee*. The *Pilkey* case involved an objection because of a failure to administer an oath to a child witness. The Supreme Court in *Pilkey* cited Rule 103(a)(1) and held that counsel must make either a contemporaneous objection or a timely motion to strike. The latter can be made after the evidence has been introduced.[69] According to an earlier case quoted in *Pilkey*, the motion to strike may be made "any time before the jury retires to consider its verdict" provided there has been no waiver.[70] *Pilkey* and *Lee* stand for the proposition that, despite counsel's failure to make a contemporaneous objection, a Tennessee trial court should permit a motion to strike to be made later in the proceedings if the integrity of the trial would not be compromised by the delay.[71]

Renewing Objection. If a motion *in limine* is made and denied, counsel may believe that sufficient efforts have been taken to preserve the issue for appeal. Rule 103(a) now makes this a reasonable conclusion by providing that once a court makes a "definitive ruling on the record admitting or excluding evidence, either at *or before trial*" (emphasis added), a party need not renew the objection to preserve the issue for appeal. Federal *Rule of Evidence 103(a)* is the same as the revised Tennessee Rule 103(a).[72]

In *State v. McGhee*,[73] however, the Tennessee Supreme Court refused to hold that a motion *in limine* itself is adequate in all cases to constitute a timely objection to evidence covered in the motion. Defendant filed a

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[66] *See, e.g., State v. Glebock, 616 S.W.2d 897, 902–903 (Tenn. Crim. App. 1981)* (objection entered after witness was excused is too late to avoid waiver); *Bowman v. State, 598 S.W.2d 809 (Tenn. Crim. App. 1980)* ("law does not permit litigant to remain silent during the testimony of an incompetent witness then later interpose an objection when the witness's testimony is determined to be unfavorable"); *Grandstaff v. Hawks, 36 S.W.3d 482, 489 (Tenn. Ct. App. 2000)* (evidentiary objection is timely if made in motion *in limine* or at time objectionable evidence is about to be introduced); *State v. Halake, 102 S.W.3d 661 (Tenn. Crim. App. 2001)* (objection is timely if made at time evidence is about to be introduced; police officer testified about observations at crime scene, then was asked about blood spatter evidence; objection when question was asked was timely and preserved an appeal of officer's testimony about blood spatter evidence).

[67] *719 S.W.2d 295, 296–297 (Tenn. App. 1986)*.

[68] *776 S.W.2d 943 (Tenn. 1989)*.

[69] *Id. at 953*.

[70] *Id. at 952*, *quoting Moon v. State, 146 Tenn. 319, 368, 242 S.W.2d 39, 53 (1922)*.

[71] *See also*, *State v. Dean, 76 S.W.3d 352 (Tenn. Crim. App. 2001)* (concluding that the issue was not waived simply because the motion to strike was made the morning after the evidence had been introduced). For an illustration of a situation where a late objection should not be permitted, *see* (*Armstrong v. Bowman, 21 Tenn. App. 673, 115 S.W.2d 229 (1938)* (hearsay objection, after other side has closed case and witnesses scattered, is too late because error could have been corrected had there been a timely objection).

[72] FED. *R. Evid. 103(a)*.

[73] *746 S.W.2d 460 (Tenn. 1988)*. *See also State v. Alder, 71 S.W.3d 299 (Tenn. Crim. App. 2001)* (when record not fully developed at earlier motion *in limine*, counsel should again object to the admissibility of evidence during trial when the evidence is presented in order to develop the record and permit the trial court to place in the record its reasons for overruling the objection).

motion *in limine* objecting to the use of a prior robbery conviction as impeachment. The Tennessee Supreme Court held that the motion itself did not preserve the issue for appellate review since the motion was brief and, according to the court, failed to delineate or sufficiently present the issue of the prior conviction. The *McGhee* trial court held a jury-out hearing on the motion and clearly ruled that the prior robbery conviction was admissible. The Tennessee Supreme Court held that this ruling, not the motion *in limine*, preserved the issue for appellate review and no further objection was necessary.

While *McGhee* states that a motion *in limine* is not always sufficient to preserve the evidentiary issue for appellate review, an earlier case, *Goines v. State*,[74] reaffirmed in a subsequent decision,[75] suggested that sometimes the motion is adequate for this purpose. In *Goines*, the defendant made a pretrial motion to suppress evidence. The trial court clearly overruled the objection and the evidence was introduced. The Tennessee Supreme Court held that the defendant had preserved the issue for appellate review even though no objection was made at trial when the evidence was introduced. The *McGhee*[76] decision approved the *Goines* ruling:

> We adhere to the decision in that [*Goines*'] case where the record on a pretrial suppression motion or on a motion *in limine* clearly presents an evidentiary question and where the trial judge has clearly and definitively ruled. In many instances, however, including the present case, issues are only tentatively suggested or the record only partially and incompletely developed in connection with a motion *in limine*. Counsel necessarily take some calculated risks in not renewing objections in such cases.[77]

Although the amendment to Rule 103(a) subsequent to *McGhee* clarifies the law, counsel who file a pretrial motion would be well advised to take the conservative approach suggested by the Supreme Court in *McGhee* and object at trial to the introduction of evidence that has already been subject to an adverse ruling by the trial court. If counsel is unclear whether another objection is necessary to preserve the issue, he or she should so advise the trial court. Some judges accept a "continuing objection" as sufficient to preserve an issue for appeal and eliminate the need for time-consuming repeated objections. Although one objection is usually sufficient, in rare circumstances counsel must renew an objection in order to preserve the issue of the admissibility of a piece of evidence.[77.1] In *State v. Groseclose*,[78] the prosecution, over defense objections, introduced a grenade detonator, promising to connect up its relevance through a later witness. Although the later witness never testified and the detonator was never shown to be relevant, the

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[74] *572 S.W.2d 644 (Tenn. 1978)*.

[75] *State v. Brobeck, 751 S.W.2d 828, 833 (Tenn. 1988)* (defendant's motion *in limine* clearly presented an evidentiary question and trial judge clearly ruled in written memorandum; further objection would have been an "idle ceremony and a useless gesture").

[76] *746 S.W.2d 460, 462 (Tenn. 1988)*. *Accord* *Wright v. United Servs. Auto. Ass'n, 789 S.W.2d 911, 914 (Tenn. Ct. App. 1990)*:

> A litigant who files an unsuccessful motion *in limine* need not also make another objection when the evidence is introduced in order to preserve an evidentiary issue for appellate review as long as the trial court has "clearly and definitively" disposed of the motion *in limine*. [*citing McGhee*]

[77] *746 S.W.2d at 462*. *See also* *Grandstaff v. Hawks, 36 S.W.3d 482 (Tenn. Ct. App. 2000)* (motion *in limine* need not be renewed if court "clearly and definitively" acted on the motion; decided before amendment to Rule 103(a)).

[77.1] Where counsel fails to take whatever action was reasonably available to prevent or nullify the harmful effect of an error, relief will not be granted on appeal. *See* *Tenn. R. App. P. 36(a)*; *State v. Rochelle, 2013 Tenn. Crim. App. LEXIS 67 (Tenn. Crim. App. 2013)* (where defense counsel elicited testimony on cross examination about defendant's anger issues, and only objected after he was finished with cross-examination and during the State's preparation to redirect, the court held that counsel's delay in making the motion to strike allowed further testimony of the defendant's temper to be put in the record, and denied relief on appeal); *Pulley v. State, 506 S.W.2d 164, 168 (Tenn. Crim. App. 1973)* (defendant cannot be heard to complain about incompetent evidence he elicits by cross-examination).

[78] ***State v. Groseclose, 615 S.W.2d 142, 146–147 (Tenn. 1981)***.

Tennessee Supreme Court held that the defendant waived the issue by not renewing the objection when the later witness did not testify.

In a few situations, court rules dictate the timing of objections.[79]

[h] Specific Ground for Objection Unless Ground Obvious

Rule 103(a)(1) both requires an objection and describes the content of the objection. The rule requires counsel to state the specific ground for the objection unless the specific ground is apparent from the context. This procedure enables all parties and the judge to understand the reasons for the objection and enables them to deal efficiently with the objecting party's concerns.[80] It also encourages counsel to prepare for trial and enables meaningful appellate review of a trial court's evidentiary rulings.[81]

Rule 103(a)(1) does not state how detailed the objection must be, but a general objection is insufficient.[82] For example, Rule 103(a)(1) would not permit counsel to say, "Your honor, I object. The evidence is incompetent and inadmissible,[83] or "This evidence is unfair." Counsel must state the specific objection. For example, counsel could object because "the testimony is hearsay." An even better practice is for the lawyer to state both the reason for the objection and the evidence rule supporting the objection. For example, counsel could object because "the lay witness is giving an expert opinion in violation of Rule 701." Often it is wise to cite a case or statutory authority in support of an objection.

Counsel should also specify the particular testimony being challenged unless it is clear from the situation.[84] For example, an objection to a hypothetical question should state what fact is being attacked.[85] An objection to the admissibility of part of a document should indicate what part is challenged.[86]

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[79] *E.g.*, Tenn. R. Crim. P. 12(b)(2) (motion to suppress evidence must be filed prior to trial).

[80] Although a general objection is ordinarily insufficient under Rule 103(a)(1), it does have some positive features in certain situations. According to one treatise, a general objection can interrupt damaging testimony, convey a sense of outrage, disrupt adversary counsel's presentation, give the objecting party time to generate a better argument, actually succeed in having evidence excluded, and even preserve an issue for appeal if there is no ground at all for admitting the evidence. CHRISTOPHER B. MUELLER & LAIRD KIRKPATRICK, 1 FEDERAL EVIDENCE 36–37 (3d ed. 2007).

[81] State v. Biggs, 218 S.W.3d 643, 667 (Tenn. Crim. App. 2006) (*quoting* State v. Courtney, 1995 Tenn. Crim. App. LEXIS 325 (April 11, 1995)).

[82] State v. Long, 2016 Tenn. Crim. App. LEXIS 630 (Tenn. Crim. App. 2016) (objection held insufficient, and issue therefore waived, where defendant made several general objections to playing a video, but never raised a specific objection regarding the witnesses' qualification as a forensic interviewer, and the specific basis for defendant's objections was not apparent from the context of his general objections); State v. Whited, 2011 Tenn. Crim. App. LEXIS 953 (Tenn. Crim. App. 2011) (where defendant stipulated to expert's qualifications but objected to the expert's testimony—apparently on the ground of relevancy, asking whether it was necessary "to go in to this big in depth synopsis on this"—and never specifically objected to the expert's characterization of the amount of force required to puncture the victim's heart, the court held that defendant failed to make a contemporaneous objection to testimony and that his general objection to the breadth of the expert's testimony was insufficient to preserve the issue for appeal). A few decisions have sustained a general objection. *Cf.* Wade v. Whitsitt, 9 Tenn. App. 436 (1928). *See also* United States v. Cummiskey, 728 F.2d 200, 205 (3d Cir. 1984), *cert. denied*, ***471 U.S. 1005 (1985)***.

[83] *See* ***McKarsie v. Citizens' Building & Loan Ass'n, 53 S.W. 1007 (Tenn. Chan. App. 1899)*** (objection that evidence is "incompetent and inadmissible" is too general). *But see* McCadden v. Lowenstein, 92 Tenn. 614, 22 S.W. 426 (1893) (general objection sufficient if evidence not competent for any purpose); Jones v. State, 184 Tenn. 128, 196 S.W.2d 491 (1946) (same).

[84] *See, e.g.,* Knoxville, C.G. & L.R. Co. v. Beeler, 90 Tenn. 548, 18 S.W. 391 (1891) (motion to "strike all oral evidence in regard to the deed" was too general; only some such testimony was incompetent); Baxter v. State, 83 Tenn. 657 (1885).

[85] Mason & Dixon Lines, Inc. v. Gregory, 206 Tenn. 525, 334 S.W.2d 939 (Tenn. 1960).

[86] Monday v. Millsaps, 37 Tenn. App. 371, 264 S.W.2d 6 (1953).

Since under Rule 103(a)(1) a timely and specific objection is required, failure to make the necessary specific objection may cause an appellate court to find that the issue is not preserved for review.[87]

[i] Correct Theory Used

Counsel making an objection to evidence must be careful to articulate the correct theory. Tennessee appellate courts often refuse to consider a new theory that was not presented to the trial court.[88] This result, though harsh, ensures that trial courts have an opportunity to correct their mistakes and that the adversary process presents trial courts with countervailing arguments on relevant issues. According to the Tennessee Court of Criminal Appeals:

> First, as a general rule, a party will not be permitted to assert an issue for the first time in the appellate court. Second, an appellate court will limit its decision to the ground asserted when the trial court made its ruling. Third, an appellate court will not permit a party to take advantage of its adversary when it is too late to remedy the basis of the objection.[89]

[j] Specific Ground Not Required

According to Rule 103(a)(1), a specific objection is not required if the specific ground was apparent from the context. In such cases a general objection will suffice. This could occur in several situations. The parties may already have argued the same issue in a motion *in limine* or in one or more previous objections, perhaps involving the same witness. For example, if there had been a series of hearsay objections to the testimony of a single witness, the next question that repeats the subject of a past objection might be

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[87] *State v. Greene, 929 S.W.2d 376, 380 (Tenn. Crim. App. 1995)* (defendant made general objection to testimony about blood alcohol level; issue not preserved for appellate review because specific ground for objection not stated). *State v. Coleman, ___S.W.3d___, 2019 Tenn. Crim. App. LEXIS 277 (Tenn. Crim. App. Apr. 30, 2019)* (evidentiary issue was waived, and defendant was not entitled to relief, because defendant's failure to make an offer of proof as to what the proposed testimony of a witness would have been precluded effective and meaningful appellate review of the trial court's exclusion of the testimony; defendant also changed theories regarding the admissibility of the evidence on appeal); *State v. Phelps, 2006 Tenn. Crim. App. LEXIS 172 (Tenn. Crim. App. 2006)* (where defendant allowed the State to ask numerous questions, without objection, about whether the defendant thought three witnesses had been untruthful, and defendant then attempted to make an overall objection to the questions when asked about the veracity of a fourth witness, the failure to make contemporaneous, specific objections constituted waiver).

[88] *See, e.g.*, *Tire Shredders, Inc. v. ERM-North Central, 15 S.W.3d 849 (Tenn. Ct. App. 1999)* (failure to object on basis that witness was not qualified as an expert and that witness based his opinions on untrustworthy data precluded appellate review of those issues, despite objections to the testimony on other grounds); *Lee v. Lee, 719 S.W.2d 295 (Tenn. Ct. App. 1986)* (at trial, counsel based objections to evidence on several theories, but did not argue ground asserted on appeal; Court of Appeals refused to consider the new ground); *Jack M. Bass & Co. v. Parker, 208 Tenn. 38, 343 S.W.2d 879 (Tenn. 1961)* (appellate court will not consider objections to evidence not made at trial); *Tate v. Alder, 71 S.W.3d 299 (Tenn. Crim. App. 2001)* (appellant is bound by the evidentiary theory advanced during objection at trial and may not change theories on appeal); ***State v. Coulter, 67 S.W.3d 3, 55 (Tenn. Ct. Crim. App. 2001)*** (party may not assert a new or different theory to support an objection to evidence in the motion for a new trial or in the appellate court; the party is bound by the ground asserted when making an objection; counsel first argued on appeal that Rule 403 should exclude certain evidence, an argument not made in the trial court); *State v. Korsakov, 34 S.W.3d 534, 545 (Tenn. Crim. App. 2000)* (may not base objection at trial on relevance and on another basis on appeal); *State v. Dellinger, 79 S.W.3d 458, 484 (Tenn. Crim. App. 2001)* (may not object at trial on one ground and then argue on appeal another ground for excluding evidence); *State v. Biggs, 218 S.W.3d 643, 667 (Tenn. Crim. App. 2006)* (defendant objected to evidence on hearsay grounds but did not object under Rule 403 as unfairly prejudicial or as inadmissible character evidence and did not argue that certain statements should be admitted as excited utterances; issues waived on appeal); ***State v. Schiefelbein, 230 S.W.3d 88, 129 (Tenn. Crim. App. 2007)*** (trial objection was that the testimony was inadmissible lay opinion evidence; on appeal could not argue that the testimony was inadmissible hearsay, expert opinion, invades the function of the jury, and is unknown as an evidentiary proposition). *Cf.* *Anderson v. United States, 417 U.S. 211, 217 n.5, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974)* (appellate court ordinarily need not consider grounds of objection not presented to trial court).

[89] *State v. Adkisson, 899 S.W.2d 626, 635 (Tenn. Crim. App. 1994)*.

handled by, "Your honor, I object." Because of the history of objections to the testimony of this witness, the specific ground would be apparent from the context of the case. The ground may also be "apparent from the context" if the questions themselves clearly raise the issue or the issue is otherwise obvious. An example is a lay witness who begins to make a complicated medical diagnosis of another person's illness.

[5] Offer of Proof

[a] In General

When an objection is made, sustained, and evidence is excluded, both trial and appellate courts often have a difficult time reviewing the decision unless the excluded evidence is somehow included in the record. For example, a trial judge in a lengthy trial who has excluded a piece of evidence may be unable to reassess the decision unless somehow the content of the evidence is disclosed. Likewise, an appellate court may be unable to assess whether a "substantial right" was affected by an error unless the court knows the substance of the excluded evidence and can view it in the context of the entire trial. An offer of proof provides the necessary information. Tennessee appellate courts routinely refuse to consider allegations of erroneous exclusion of evidence if there was no offer of proof.[90] The absence of an offer of proof is viewed with special concern when the excluded testimony consists of oral testimony.[90.1] Because of the importance of an offer of proof, ordinarily trial courts must allow it.[90.2] Refusal to do so may be trial court error.[90.3]

Rule 103(a)(2) mandates that appeals of rulings excluding evidence must contain an offer of proof, which makes known the substance of the evidence unless the substance was apparent from the context of the

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[90] *See, e.g.,* State v. Galmore, 994 S.W.2d 120, 125 (Tenn. 1999); State v. Lankford, 298 S.W.3d 176 (Tenn. Crim. App. 2008) (although not required, when preserving a claim of an erroneous ruling on admissibility for review, an offer of proof may be the only way to demonstrate prejudice); ***Rutherford v. Rutherford, 971 S.W.2d 955, 956 (Tenn. Ct. App. 1998)*** (complaint about trial court's refusal to consider father's pre-divorce fitness as parent will not be considered on appeal since complainant neither stated for the record a summary of what the evidence would entail nor made an offer of proof); State v. Hall, 958 S.W.2d 679, 691 n.10 (Tenn. 1997) (generally, if offer of proof is not made, the issue is deemed waived and appellate review is precluded); Davis v. Hall, 920 S.W.2d 213 (Tenn. Ct. App. 1995) (witness did not testify and no offer of proof made; in absence of offer of proof and inclusion of the testimony in the record, the appellate court cannot consider the alleged error in excluding the testimony). *See, e.g.,* State v. Coleman, 2019 Tenn. Crim. App. LEXIS 277 (Crim. App. Apr. 30, 2019) (error may not be predicated upon a ruling excluding evidence unless a substantial right of the party is affected and the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context, as required by Tenn. R. Evid. 103(a)(2); an offer of proof is a means by which to ensure effective and meaningful appellate review and thus, generally, if an offer of proof is not made, the issue is deemed waived and appellate review is precluded); Starkey v. Wells Fargo Bank, N.A., 2019 Tenn. App. LEXIS 190 (Ct. App. Apr. 23, 2019) (to raise an issue on appeal regarding the admissibility of evidence the party raising the issue must have made a contemporaneous objection pursuant to Tenn. R. Evid. 103(a); in the absence of such an objection, the court generally considers the issue waived); Russell v. State, 2018 Tenn. Crim. App. LEXIS 857 (Crim. App. Nov. 20, 2018) (failure to render offer of proof fatal on appeal); In re Estate of Darken, 2016 Tenn. App. LEXIS 969 (Tenn. Ct. App. 2016) (offers of proof create the record necessary for the appellate court to review a trial court's decision to exclude evidence; without an offer of proof, the court cannot conclude that the decision to limit cross-examination resulted in prejudice); Atkinson v. State, 337 S.W.3d 199, 209 (Tenn. Ct. App. 2010) (appellate court refused to consider possible exclusion of expert testimony because trial counsel did not make offer of proof about the intended testimony); Bean v. Wilson County School System, 488 S.W.3d 782, 790 (Tenn. Ct. App. 2015) (same).

[90.1] State v. Goad, 707 S.W.2d 846 (Tenn. 1986) (when excluded evidence consists of oral testimony, it is essential that a proper offer of proof be made in order that the appellate court can determine whether or not exclusion was reversible); Atkinson v. State, 337 S.W.3d 199, 209 (Tenn. Ct. App. 2010).

[90.2] Taylor v. State, 443 S.W.3d 80, 84 (Tenn. 2014); Alley v. State, 882 S.W.2d 810, 815 (Tenn. Crim. App. 1994).

[90.3] Taylor v. State, 443 S.W.3d 80, 84 (Tenn. 2014). State v. Lowe, 2016 Tenn. Crim. App. LEXIS 497 (Tenn. Crim. App. 2016) (trial court commits error by refusing a request to make an offer of proof, unless it is obvious from the record that the proffered evidence could, under no circumstances, be relevant to the issues).

questions.[90.4] Since the same party who lost the initial decision (and wanted the evidence admitted) is also the party who must convince the trial or appellate court to reverse the initial evidence ruling, he or she has a strong incentive to ensure that the offer of proof is correctly made.

Tennessee trial courts have been reversed on appeal for refusing to permit an offer of proof.[91] The question of whether reversal is appropriate is resolved on a case-by-case basis. Key factors are the nature, relevance, and admissibility of the evidence.[92] Where it is obvious from the record that under no circumstances could the evidence be relevant, the trial court's refusal to allow an offer of proof is not reversible. On the other hand, according to *Alley v. State*:

> [I]f the obvious incompetence or irrelevance is not readily apparent from the record, it is error to exclude any reasonable offer which demonstrates the relevance and general import of the excluded evidence.[93]

[b] Content of Offer of Proof

Rule 103(a)(2) provides that an offer of proof must contain two elements.
Substance of Evidence. First, it must convey the "substance of the evidence." This means that the offer must indicate "what was excluded."[94]

[90.4] *See* State v. Coleman, 2019 Tenn. Crim. App. LEXIS 277 (Crim. App. Apr. 30, 2019) (where defendant failed to make offer of proof and substance of the evidence was not apparent from the record, defendant failed to satisfy Tenn. R. Evid. 103(a)(2) and was not entitled to relief on appeal); In re Jaxon W., ___S.W.3d___, 2019 Tenn. App. LEXIS 87 (Tenn. Ct. App. Feb. 15, 2019) (testimony of a licensed clinical psychologist who had been treating the child was properly allowed where the father had not objected to the testimony or sought to limit it in any way); Russell v. State, 2018 Tenn. Crim. App. LEXIS 857 (Crim. App. Nov. 20, 2018) (meaningful appellate review precluded where defendant did not make an offer of proof consisting of testimony, an affidavit, or other evidence to show how the proposed testimony was necessary to substantially assist the trier of fact, and no issues requiring specialized knowledge were apparent from the record); Bewick v. Bewick, 2017 Tenn. App. LEXIS 97 (Tenn. Ct. App. 2017) (although a failure to make an offer of proof is not fatal on its own, where the record contained no motion in limine and the record transmitted to the appellate court contained no details of the disputed property interest at issue, the record failed to enable appellate review and the issue was deemed waived); Jackson v. Futrell, 2000 Tenn. App. LEXIS 164 (Tenn. Ct. App. 2000) (an offer of proof is not required when the substance of the evidence is apparent from the context, or when the trial court's refusal to allow further evidence affects the fairness of the proceedings).

[91] *See* Bray v. State, 2 Tenn. Crim. App. 18, 450 S.W.2d 786 (1969). *Cf.* Alley v. State, 882 S.W.2d 810 (Tenn. Crim. App. 1994).

[92] *See* State v. Martin, 642 S.W.2d 720, 724 (Tenn. 1982) (trial court erred in not permitting an offer of proof regarding the defendant's proposed testimony but the error was harmless, because the defendant was convicted of five crimes that were clearly admissible in addition to the two crimes that the defendant claimed were not admissible, and these five were the basis of the choice not to testify); State v. Lowe, 2016 Tenn. Crim. App. LEXIS 497 (Tenn. Crim. App. 2016) (trial court's refusal to permit offer of proof at suppression hearing did not require reversal where evidence in the record was adequate to give the trial court a basis for ruling on admissibility and the evidence was also sufficient to allow appellate review); State v. Torres, 82 S.W.3d 236 (Tenn. 2002) (where excluded videotapes were included in the appellate record and provided an adequate basis for appellate review, and the parties verbally summarized the nature of the evidence so that the trial court could make a ruling, the two primary prongs of an offer of proof were met and the court's error did not entitle defendant to relief); Alley v. State, 882 S.W.2d 810 (Tenn. Ct. App. 1994).

[93] Id. at 816.

[94] Tenn. R. Evid. 103 Advisory Commission Comment. This requirement may be satisfied by presenting the testimony, by stipulating as to the content of the excluded evidence, or by presenting an oral or written summary of the excluded evidence. *See* In re Estate of Darken, 2016 Tenn. App. LEXIS 969 (Tenn. Ct. App. 2016); Singh v. Larry Fowler Trucking, Inc., 390 S.W.3d 280 (Tenn. Ct. App. 2012).

Tennessee courts are sometimes quite demanding in requiring an adequate offer of proof. In *State v. Goad*,[95] the trial court excluded evidence from a defense psychiatrist. After objecting to the ruling, counsel made an offer of proof that was quite vague in describing what the witness would say if permitted to testify about the effect of the defendant's military experience. Because the case involved mitigation in a capital case, the Tennessee Supreme Court reversed, but indicated that the inadequate offer of proof would ordinarily bar an appellate reversal. The court suggested that an inadequate offer of proof could be cured by an affidavit attached to the motion for new trial.

Specific Evidentiary Basis. The second requirement is that the offer of proof must contain the "specific evidentiary basis supporting admission."[96] This may require counsel to disclose the purpose of the evidence, why it is relevant, and what legal theory (or evidence rule) supports its admission.[97] It may be especially helpful to indicate when the excluded proof is the only evidence on point. Similar to the consequence of violating Rule 103(a)(1)'s requirement that objections state the specific ground for the objection, counsel making the wrong argument during an offer of proof may find that appellate courts refuse to consider other arguments on appeal.[98]

[c] Offer of Proof Not Required

According to Rule 103(a)(2), an offer of proof is not needed when the substance of the evidence and the reasons for admission "were apparent from the context within which questions were asked." This could occur when the witness's previous responses, the wording of the question, and other evidence in the case reveal the substance of the excluded testimony.[99]

An offer of proof is also unnecessary in the instance where evidence is admitted, and then the court reverses itself and excludes the evidence. In this instance, the record will contain a complete account of the excluded proof. Also, an offer of proof is not required where the defendant objects to a court's decision to

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[95] *707 S.W.2d 846 (Tenn. 1986)*.

[96] *Tenn. R. Evid. 103(a)(2)*. *See also, Jackson v. Futrell, 2000 Tenn. App. LEXIS 164 (Tenn. Ct. App. 2000)* (an offer of proof must contain the substance of the evidence and the specific evidentiary basis supporting the admission of the evidence; these requirements may be satisfied by presenting the actual testimony, by stipulating the content of the excluded evidence, or by presenting an oral or written summary of the excluded evidence).

[97] For offers of proof regarding communications alleged to be privileged, see below *§ 1.03 [5][f]*.

[98] *See, e.g.*, *United States v. Gaines, 170 F.3d 72 (1st Cir. 1999)* (during offer of proof, defendant argued a statement should have been admitted as a state of mind hearsay exception; appellate court refused to consider new arguments that the statement was not hearsay or was admissible as an excited utterance).

[99] *See, e.g.*, *State v. Hall, 958 S.W.2d 679, 691 n. 10 (Tenn. 1997)* (though no offer of proof was made at trial, the Tennessee Supreme Court considered the propriety of exclusion of expert testimony at trial because the substance of the testimony was presented at a later sentencing hearing); *Singh v. Larry Fowler Trucking, Inc., 390 S.W.3d 280 (Tenn. Ct. App. 2012)* (no offer of proof is necessary to challenge the exclusion of portions of deposition testimony when the appellate record contains the entire deposition, the motion in limine, and the trial court's order, enabling the appellate court to determine the trial court's reasoning and the validity of its decision in excluding the evidence; substance of evidence and specific evidentiary basis supporting admission or exclusion are apparent from the context). A party who fails to make an offer of proof where the substance of the evidence is not clearly reflected in the record, however, risks losing meaningful appellate review. See, for example, *State v. Coleman, 2019 Tenn. Crim. App. LEXIS 277 (Crim. App. Apr. 30, 2019)* (meaningful appellate review precluded where defendant failed to make an offer of proof regarding what the witness's testimony would have been had the trial court allowed him to testify, and where the record did not reflect what the witness's answer would have been to defense counsel's questioning); *Russell v. State,2018 Tenn. Crim. App. LEXIS 857 (Crim. App. Nov. 20, 2018)* (petitioner was not entitled to relief on appeal resulting from excluded evidence, since he had the burden of establishing the admissibility of excluded evidence but did not make an offer of proof consisting of testimony, an affidavit, or other evidence to show how the proposed testimony was necessary to substantially assist the trier of fact, and no issues requiring specialized knowledge were apparent from the record).

permit prior convictions to be used to impeach him or her.[100] In *State v. Galmore*,[101] the Tennessee Supreme Court held that a criminal accused need not make an offer of proof to preserve for appellate review a trial court's ruling on the admissibility of a prior conviction for purposes of impeachment. The Court explained that requiring the defendant to, in advance of his or her testimony, describe its likely content has potential constitutional problems. Moreover, *Galmore* recognized that a proffer of proof in this situation would be unmanageable since the proffer could differ from the actual trial testimony and would give the accused a tactical disadvantage in having to disclose future testimony.

[d] Methods of Making Offer of Proof

Stipulation. There are a number of ways of making an offer of proof. Rule 103 does not provide guidance in selecting the best approach. One time-saving method is for the parties to stipulate the content of the excluded evidence. If the excluded testimony is oral, counsel may summarize for the court either orally or in writing the content of the excluded evidence. For example, in a Tennessee case an offer of proof consisted of counsel's description of what the client would have said had she been permitted to testify about an experiment she conducted.[102] The court indicated, however, that "this narrative approach is by no means the best or the encouraged method" of making an offer of proof.[103] The witness can also provide a written statement or affidavit of what the testimony would be.

Actual Evidence. A better way, strongly endorsed by the Tennessee Supreme Court, is for counsel to present the actual testimony at issue.[104] Rule 103(b) facilitates this method by providing that the court shall permit the making of an offer of proof in question and answer form. The word "shall" in the Tennessee rule, differing from the federal rule which uses "may,"[105] means that the Tennessee trial court must permit an offer of proof in question and answer form if counsel chooses to use that method.

Reasonable Limits Set by Court. Under Rules 102 and 611(a), however, surely the trial court has the discretion to impose reasonable limits on the process in those unusual cases in which counsel abuses the right to make an offer of proof. Although the rules of evidence do not deal with the issue, the trial judge should remain in the courtroom during an offer of proof in a jury trial.[106] On rare occasions, circumstances may indicate that counsel for the side which won the ruling excluding the evidence (and hence has no responsibility during the offer of proof) should be permitted to comment on the offer of proof or even participate in the process.[107]

Procedures. If the excluded evidence is a document or an exhibit, the item should be marked for identification and filed with the court at the time of the offer of proof.[108] This will ensure that the appellate court has access to the actual evidence at issue.

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[100] *See below* § 6.09[10].

[101] *994 S.W.2d 120 (Tenn. 1999)*. *See also State v. Taylor, 993 S.W.2d 33 (Tenn. 1999)*.

[102] *Harwell v. Walton, 820 S.W.2d 116 (Tenn. Ct. App. 1991)*.

[103] *Id. at 118*.

[104] *See, e.g., Farmers-Peoples Bank v. Clemmer, 519 S.W.2d 801, 804 (Tenn. 1975)* (offer of proof can be by counsel's summary, but better way is to present the proof itself); *Johns v. State, 2004 Tenn. Crim. App. LEXIS 361 (Tenn. Crim. App. 2004)*.

[105] FED. *R. Evid. 103(b)*.

[106] *See United States v. Smith, 831 F.2d 657 (6th Cir. 1987)*.

[107] *See Gilchrist v. Bolger, 733 F.2d 1551 (11th Cir. 1984)* (other side permitted to comment on offer of proof).

On rare occasions where multiple parties are on the same side of the case, one of the parties may make an offer of proof while the others remain silent. If the offer of proof adequately informs the appellate court of the content of the excluded evidence, the offer of proof should be viewed as that of all co-parties unless there is a good reason not to do so because of the unique facts of the case. The purpose of an offer of proof would be served fully by this efficient procedure.

[e] Jury's Presence

Since by definition an offer of proof is used when evidence is excluded, the jury should be absent during the offer of proof to protect it from exposure to the inadmissible evidence. Rule 103(c) specifically provides that proceedings should be conducted in such a manner as to screen inadmissible evidence from the jury.

A jury-out offer of proof has other benefits as well. It gives parties and the judge an opportunity candidly to discuss this and other evidence and the parties' theories, without fear that the jury will be influenced by the discussion.

[f] Communications Claimed to be Privileged

Under Tennessee law, various types of communications are, by statute, common law, constitution, or Tennessee Supreme Court rule, deemed privileged and thus are generally inadmissible in court proceedings.[109] However, if one party seeks to elicit testimony that another party deems to be inadmissible as privileged, difficulties can arise. Often, the court must know the substance of the allegedly privileged communication in order to properly rule on a motion *in limine* or objection to its introduction, yet revealing the substance of the allegedly privileged information defeats the purpose of the protections provided by law.

To remedy this situation, Rule 103(b) provides a specific mechanism that gives the trial court the opportunity to make a confidential determination regarding whether the evidence in question is privileged. The trial court may require an offer of proof of the testimony in question. An offer of proof typically involves memorializing proffered testimony that the trial court has ruled inadmissible in the hope that an appellate court, upon reviewing the proffered evidence, will determine that it was erroneously excluded. This portion of Rule 103(b) envisions a different situation. Before ruling on the admissibility of evidence that a party claims to be a privileged communication, the trial court may require that "the communication be reduced to writing for in camera review."[110]

Circumstances in which this could arise include a discovery dispute and a motion for protective order, a motion *in limine*, or objection at a hearing or trial. The writing in question to be submitted to the court might be an existing writing, such as a letter from an attorney to a client. Alternatively, it could be either a summary of a written or oral communication, or even anticipated testimony in question and answer form, such as questions and answers about a clergy person's conversation with a member of the congregation. Regardless of the format of the writing presented to the court, it should contain detailed information about the circumstances under which the communication occurred, including the specific relationship of the parties to the communication at the time it was made.

The court will then review the proffered writing in camera, and will make a ruling on whether it is indeed privileged. If the court rules that it is not privileged, "the communication can be divulged in open court and will become part of the record for appellate review."[111] Even if the communication is found to be privileged,

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[108] *See* State v. Goad, 707 S.W.2d 846, 852 (Tenn. 1986) (dictum); State v. Hixson, 2013 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. 2013) (where defendant appealed the exclusion of testimony relating to the arrest warrant, but the record did not include a copy of the warrant, the appellate court could not conduct a meaningful review of the issue).

[109] See *Tenn. R. Evid. 501* and *below §§ 5.01 et seq*.

[110] *Tenn. R. Evid. 103(b)*.

[111] *Tenn. R. Evid. 103(b)*.

it becomes part of the record for appeal, but under seal in order to facilitate appellate review.[112] An interlocutory appeal, pursuant to *Rule 9* or *10 of the Tennessee Rules of Appellate Procedure*, is clearly anticipated by the rule.[113]

[6] Contents of Record

[a] In General

To facilitate appellate review of evidentiary rulings, Rule 103 requires the record to reflect several facts. First, according to Rule 103(a)(1), the record must show that a timely objection or motion to strike was made.

[b] Side-bar, Bench, or In-Chambers Conferences

Although a record is routinely made of proceedings in the courtroom, too often no record is made of side-bar, bench, and in-chambers conferences. Since the absence of a record makes appellate review difficult and sometimes impossible, Tennessee courts strongly discourage these off-the-record events. A Tennessee case decided prior to the Tennessee Rules of Evidence criticized a lawyer for using a "side-bar conference" that was not on the record to make an objection to evidence.[114] Another case stated:

> The holding of off-the-record bench conferences impairs the ability of this Court [of Criminal Appeals] to afford the parties a full and complete review of the issues. Such conferences create a void in the record and prevent this Court from determining why the trial court may have ruled in a certain manner. For this reason trial judges should not conduct off-the-record bench conferences.[115]

If such conferences are used, counsel must make sure that the court reporter records the conference so that a record is available for appellate review. It may be reversible error for the court to refuse counsel's request that the in-chambers proceedings be recorded and included in the record.[116]

Sometimes off-the-record conferences are made for the most commendable motives, yet can haunt the attorneys during the appellate process. In *Rutherford v. Rutherford*,[117] a post-divorce custody dispute, the trial judge interviewed the parties' child in chambers with neither the parties, the attorneys, nor the court reporter present. Although the appellate court found that it was proper, under circumstances such as this, to interview children away from the courtroom setting, the court further held that such examination must occur in the presence of the attorneys and the court reporter. Failure to do so was held to be reversible error.[118]

[c] Record of Specific Ground for Objection

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[112] *Id.*

[113] *Tenn. R. Evid. 103(b)*, 2005 Advisory Commission Comment.

[114] *State v. Jones, 733 S.W.2d 517, 522 (Tenn. Crim. App. 1987)*.

[115] *State v. Hammons, 737 S.W.2d 549, 551 (Tenn. Crim. App. 1987)* (counsel should avoid off-the-record bench conferences; if counsel voluntarily participates in such conferences, there is a risk an appellate court will find counsel failed to take action to prevent or nullify the effect of an error, in violation of *Tenn. R. App. P. 36(a)*).

[116] *See Warren v. Warren, 731 S.W.2d 908 (Tenn. Ct. App. 1985)* (divorce court judge's refusal to permit court reporter at in-chambers conference with lawyers is reversible error).

[117] *971 S.W.2d 957 (Tenn. Ct. App. 1998)*.

[118] *Id*.

The record must also reflect the specific ground for the objection unless the ground is apparent from the context, Rule 103(a)(1). Rule 103 also permits the court to include in the record several matters. Rule 103(b) authorizes, but does not require, the court to make a statement showing the character of the evidence, the form in which it was offered, the objection made, and the ruling on the evidence.

[d] Record of Judge's Ruling

Because appellate review is virtually impossible without a record of an adverse ruling on an objection, counsel should ensure that the court does make a ruling and that the ruling is on the record. Sometimes in the confusion of a trial, judges forget or otherwise fail to make a decision on an objection regarding a disputed piece of evidence, and the evidence is presented to the jury. On appellate review, the absence of a formal ruling admitting the evidence may prove fatal to appellate relief.[119] On the other hand, Tennessee law does not require the trial court to place on the record its reasons for overruling a hearsay objection.[120]

[e] Record Should Contain Exhibits, Documents, Etc.

Appellate review is also frustrated if the official record fails to contain the evidence which is the object of appellate scrutiny. In *State v. Cooper*,[121] for example, the defendant complained because he had been denied access to audio tapes of a conversation between the defendant and informants. The trial court ruled that the defendant was not entitled to the tapes because they contained no exculpatory material. Since the appellate record—inexplicably—did not contain the tapes, the Court of Criminal Appeals conclusively presumed that the trial court's finding was correct. To avoid this result, defense counsel should have made sure that the tapes were included in the record and transmitted to the Court of Criminal Appeals.

[7] Out of Hearing of Jury

The Tennessee Rules of Evidence are sensitive to the problem posed when a jury hears inadmissible evidence. Although a judge may give jury instructions in an effort to remedy such errors, experienced lawyers and social science researchers know that these instructions are of doubtful efficacy.[122] Both Rules 103 and 104 approach this problem in a preventive way by requiring or suggesting that the jury be protected from exposure to inadmissible evidence.

In general terms, Rule 103(c) mandates that "to the extent practicable" judges should conduct trials "so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." Rule 104(c) complements Rule 103 by providing that hearings on the admissibility of evidence shall be conducted outside the hearing of the jury when the interests of justice require,[122.1] when the accused is a witness and so requests, and when the admissibility of a

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[119] *See, e.g.*, *United States v. Wagoner, 713 F.2d 1371, 1374 (8th Cir. 1983)* (failure to get ruling on motion to exclude evidence); *Cf. United States v. Keltner, 147 F.3d 662, 673 (8th Cir. 1998)* (defense counsel's failure to obtain a ruling on a discovery motion prevents appellate review of the issue).

[120] *State v. Samuel, 243 S.W.3d 592, 600 (Tenn. Crim. App. 2007)*.

[121] *736 S.W.2d 125 (Tenn. Crim. App. 1987)*.

[122] *See below § 1.05[3]*.

[122.1] The discretionary nature of Rule 104(c) means that the trial court's determination as to whether "justice so requires" is entitled to deference on appeal. *See State v. Mullen, 151 S.W.3d 518, 2004 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. 2004)* (the trial court had broad discretion in determining whether to have a hearing outside of the jury's presence under *Tenn. R. Evid. 104(c)*, and the trial court's failure to conduct such a hearing was not improper).

confession is to be decided. Sometimes statements made during the jury-out hearing can be used for impeachment purposes later in the trial.[123]

Counsel objecting to evidence should make every effort to enforce these rules. A motion *in limine* is often desirable. Another approach is for counsel to initiate a bench conference, stating that he or she plans to object to certain evidence and requesting a jury-out hearing to resolve the issue. Although such hearings should be out of the presence of the jury, they should not be held in the absence of the criminal accused, unless presence has been waived.[124]

[8] Plain Error

Although Rule 103(a) states clearly that errors in evidentiary rulings will not cause a reversal unless there has been a timely and specific objection, Rule 103(d) somewhat reduces the harshness of this principle. Rule 103(d) provides that appellate courts can take notice of *plain errors* affecting substantial rights,[125] even though no timely and specific objection was made. This seldom used rule, already part of Tennessee appellate procedure,[126] permits counsel on appeal to raise issues not addressed at trial and authorizes appellate courts to deal with errors unnoticed by counsel. The admirable policy underlying this principle is that the client should be protected against egregious errors of counsel.

The vagueness of the terms “plain error” and “substantial rights” obviously provides trial and appellate courts with much discretion.[126.1]

The plain error rule is generally applied on a case-by-case basis.[127] The court looks at the facts of the case and the role the disputed evidence played in the outcome. More particularly, the Tennessee Supreme Court has

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[123] *See, e.g.,* State v. McDougle, 681 S.W.2d 578 (Tenn. Crim. App. 1984) (court reporter can testify about testimony during jury-out hearing).

[124] *See* State v. Suttles, 767 S.W.2d 403, 407 (Tenn. 1989) (defendant has the right to be present when judge determines competency of child witness).

[125] The use of the term “substantial rights” in two places in Rule 103 is potentially confusing. Rule 103(a) states that there will be no reversal on appeal unless a “substantial right” is affected and, in most cases, a timely objection is made. If evidence is excluded, an offer of proof must also be made. Rule 103(d) provides that appellate courts can notice plain errors affecting “substantial rights” even if no objection is made. Since under Rule 103(d) an objection is not needed if a “substantial right” involving plain error is involved, it is not clear what “substantial right” will lead to a reversal if a timely objection is made under Rule 103(a).

[126] *See* TENN. R. APP. P. 36(b). *See also,* Manning v. State, 500 S.W.2d 913, 914 (Tenn. 1973) (in exceptional circumstances, appellate courts can, on own motion, take notice of errors where there was no exception at trial, if errors are obvious or otherwise seriously affect fairness, integrity, or public reputation of judicial proceedings); Studdard v. State, 182 S.W.3d 283, 287 (Tenn. 2005) (under former Tenn. R. Crim. P. 52(b) and (now TENN. R. APP. P. 36(b)), plain error is found when the following are all present: the record must clearly establish what occurred at the trial court, a clear and unequivocal rule of law must have been breached, a substantial right of the accused must have been adversely affected, the accused did not waive the issue for tactical reasons, and consideration of the error is necessary to do substantial justice).

[126.1] *See, e.g.*, State v. Grant, 2018 Tenn. Crim. App. LEXIS 294 (Tenn. Crim. App. Jan. 4, 2018) (defendant found guilty of second-degree murder, reckless endangerment, and aggravated assault was not entitled to plain error relief for the admission of a photograph of the 12-year-old victim taken on the morning of the shooting; although the defendant argued that the photograph should have been excluded because the child’s height, weight or how he looked at the age of 12 was not probative of whether she was guilty of the crimes charged, and the photograph was only introduced to elicit sympathy, the Court of Criminal Appeals held that the trial court had discretion under under Tenn. R. Evid. 401 and 403 to admit the photograph since it (1) was relevant and the probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury; (2) accurately depicted the child's age at the time of the crimes; (3) assisted the jury in evaluating the child's actions on the night of the shooting; and (4) helped the jury determine whether the child's mother, the murder victim, used lawful force against defendant in order to protect the child).

identified five factors[127.1] that must be present before an appellate court should find plain error in the absence of an objection in a criminal case:

1. The record must clearly establish what occurred in the trial court.
2. A clear and unequivocal rule of law must have been breached.[127.2]
3. A substantial right of the accused must have been adversely affected.
4. The accused did not waive the issue for tactical reasons.[128]
5. Consideration of the error is necessary to do substantial justice.[129]

The error must have been "of such a great magnitude that it probably changed the outcome of the trial."[130] The plain error doctrine is applied more in criminal than civil cases, perhaps because of the gravity of the criminal punishment at stake.

By way of illustration, in *United States v. Jean-Baptiste*[131] the defendant was charged with making false statements in a passport application. At trial the government carelessly used the wrong serial number in proving a prior bogus passport application. Trial counsel did not object to this error. On appeal, the Second Circuit held the mistake was "plain error" and reversed despite defense counsel's failure to object during trial. The court defined "plain" as being "clear" or "obvious," and "affecting substantial rights" as meaning, in most cases,

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[127] State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000).

[127.1] State v. Adkisson, 899 S.W.2d 626, 641–42 (Tenn. Crim. App. 1994). For recent cases applying these factors, *see, e.g.,* State v. Sharp, 2019 Tenn. Crim. App. LEXIS 130 (Crim. App. Feb. 26, 2019) (appellate court may only consider an issue as plain error when all five of the factors are met; no plain error found); State v. White, 2019 Tenn. Crim. App. LEXIS 90 (Crim. App. Feb. 11, 2019) (the defendant bears the burden of persuasion to show that he is entitled to plain error relief, and when it is clear from the record that at least one of the five factors cannot be established, the appellate court need not consider the remaining factors; no error found).

[127.2] *See, e.g.,* State v. White, 2019 Tenn. Crim. App. LEXIS 90 (Crim. App. Feb. 11, 2019) (trial court did not breach a "clear and unequivocal rule of law" by failing to instruct the jury on witness credibility during or after witness's testimony).

[128] *See* ***State v. Wyrick, 62 S.W.3d 751 (Tenn. Crim. App. 2001)*** (the Court of Criminal Appeals will not review an issue for plain error when the defendant has affirmatively waived an issue rather than simply failed to object to it).

[129] State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (*quoting* State v. Adkisson, 899 S.W.2d 626, 641–642 (Tenn. Crim. App. 1994)).

[130] 24 S.W.3d at 283. *See also* State v. Martin, 505 S.W.3d 492 (Tenn. 2016); State v. Sharp, 2019 Tenn. Crim. App. LEXIS 130 (Crim. App. Feb. 26, 2019) (language quoted); State v. White, 2019 Tenn. Crim. App. LEXIS 90 (Crim. App. Feb. 11, 2019) (plain error relief is "limited to errors that had an unfair prejudicial impact which undermined the fundamental fairness of the trial"); State v. Sims, 2012 Tenn. Crim. App. LEXIS 218 (Tenn. Crim. App. 2012); State v. Hatcher, 310 S.W.3d 788, 808 (Tenn. 2010).

[131] 166 F.3d 102 (2d Cir. 1999).

"prejudicial."[131.1] The court also cited authority that the error must be "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it."[132]

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[131.1] Tennessee appellate courts have also defined "substantial right" to mean one that is "of fundamental proportions in the indictment process, a right to the proof of every element of the offense, and is constitutional in nature." *State v. Flamini, 2009 Tenn. Crim. App. LEXIS 380 (Tenn. Crim. App. 2009)* (quoting *State v. Adkisson, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994))*.

[132] *Id. at 107*. Defendant may, by his own conduct, waive a waive a substantial right, and in such case the court's interference with that right does not constitute plain error. See, for example, *State v. Myers, 2019 Tenn. Crim. App. LEXIS 285 (Crim. App. Apr. 30, 2019)* (because the defendant's repeated misconduct was the basis for the trial court's decision to exclude him from the sentencing hearing, no plain error occurred; notwithstanding a defendant's federal and state constitutional rights to be present at all critical stages of a criminal proceeding, he may waive his right to be present when he persists in disruptive conduct despite a warning from the court that he will be excluded if he continues to disrupt the proceedings).

§ 1.04 Rule 104. Preliminary Questions

[1] Text of Rule

Rule 104 Preliminary Questions

(a) Questions of admissibility generally.Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact.When the relevance of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition. In the court's discretion evidence may be admitted subject to subsequent introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or when an accused is a witness and so requests.

(d) Testimony of accused. The accused does not by testifying upon a preliminary matter become subject to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Advisory Commission Comment:

Part (a) governs the fact questions to be resolved by trial courts in deciding whether a sufficient foundation has been laid. For example, the court must decide that the declarant believed death was imminent in order to admit a dying declaration. This preliminary determination can be based on hearsay, because the judge should be able to separate reliable from unreliable proof.

Part (b) allows the court to admit evidence over a relevancy objection on condition that the offering party prove other facts making the evidence relevant. If subsequent proof fails to establish relevancy, the conditionally admitted evidence should be stricken with an appropriate jury instruction; extreme prejudice could result in a mistrial.

Whether preliminary questions are determined outside the jury's presence is discretionary under Part (c), except where a confession is offered or where the accused in a criminal case is a witness and requests a jury-out hearing through counsel.

[2] Judge-Jury Responsibilities: In General

Rule 104 restates the traditional responsibilities of the judge and the jury. In general terms, Rule 104(a) provides that the judge, not the jury, determines the admissibility of evidence,[133] the competence of a witness,[134] and the existence of a privilege. As described below,[135] however, the jury ultimately resolves certain relevance issues involved in the admissibility of evidence.

Rule 104(a) also makes it clear that the rule does not limit a party's right to introduce evidence that will assist the jury in determining the weight or credibility to be given other evidence.[135.1] For example, if a judge rules that a certain statement is admissible as an excited utterance, the statement will be presented to the jury but opposing counsel can try to minimize the weight given to that statement by introducing evidence to prove the declarant was mistaken, drunk, or biased when the statement was made.

[3] Conditional Relevance

Rule 104(b) prescribes the process for resolving the admissibility of evidence that may be conditionally relevant—relevant only upon the resolution of some factual question. This rule states that the judge can admit the conditionally relevant evidence if there has been introduced evidence "sufficient to support a finding of the fulfillment of the condition."[136] The judge determines whether the minimal amount of admissible evidence on this point has been introduced. Rule 901[137] provides examples of minimally acceptable proof that a matter is what its proponent claims it to be. Rule 1008,[138] part of the so-called "best evidence rule," states that the trier of fact determines certain issues concerning whether some evidence existed, was the original, or accurately reflected the contents of other evidence.

According to the United States Supreme Court's reading of the identical federal Rule 104(b):

> In determining whether the government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact … by a preponderance of the evidence … . We

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[133] *See* Hager v. Hager, 13 Tenn. App. 23 (1930); Branch Banking & Tr. Co. v. Hill, 2019 Tenn. App. LEXIS 106 (Ct. App. Feb. 28, 2019) (as to evidentiary questions, the admissibility or exclusion of evidence rests within the sound discretion of the trial court, which should be reversed only for abuse of that discretion); Conley v. Life Care Ctrs. of Am., Inc., 236 S.W.3d 713 (Tenn. Ct. App. 2007) (preliminary questions concerning the admissibility of evidence shall be determined by the court pursuant to Tenn. R. Evid. 104(a); relief on appeal will only be afforded if there was an abuse of discretion which was prejudicial); State v. Norment, 2000 Tenn. Crim. App. LEXIS 837 (Tenn. Crim. App. 2000) (as with other evidence, the admissibility of photographs generally lies within the sound discretion of the trial court).

[134] *See* Currier v. Bank of Louisville, 45 Tenn. 460 (1868). State v. Brown, 2019 Tenn. Crim. App. LEXIS 220 (Crim. App. Apr. 8, 2019) (questions relating to the admissibility, relevancy, and competency of expert testimony are matters left to the trial court's discretion); State v. Pendergrast, 1992 Tenn. Crim. App. LEXIS 766 (Tenn. Crim. App. 1992) (whether opinion evidence requires special knowledge, skill, experience, or training, is largely a matter within the trial judge's discretion; the trial judge properly excluded officer's testimony concerning the cause of certain marks on the defendant's arms).

[135] *See below* § 1.04[3].

[135.1] State v. Parrish, 1995 Tenn. Crim. App. LEXIS 915 (Tenn. Crim. App. 1995) (whether specialized knowledge will "substantially assist" the jury is a question for the trial judge under Rule 104(a); trial judge's decision to allow officer's testimony explaining how a prostitution organization was organized and operated, because the information would assist the jury, was within the court's discretion).

[136] An old Tennessee case suggested that conditionally relevant evidence should be admitted only in exceptional cases, because jurors would still use the evidence even if later excluded. Russell v. Farrell, 102 Tenn. 248, 52 S.W. 146 (1899). Rule 104 does not appear to adopt this cautious approach.

[137] *See below* § 9.01[2].

[138] *See below* § 10.08[2].

emphasize that in assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury.[139]

If sufficient proof is offered, the evidence may be heard by the jury, assuming the other rules of evidence are satisfied. The jury can be instructed to ignore the evidence if the condition for admissibility is not satisfied. If the minimal proof is not tendered, the court should strike the testimony. In egregious cases, a mistrial or appellate reversal[140] may be appropriate.

Rule 104(b) gives the court direction in structuring the order of proof in conditional relevance cases. The judge is permitted to admit the evidence subject to the subsequent introduction of evidence sufficient to support a finding that the condition is fulfilled. This process, often referred to as "connecting up," is necessary because of the linear nature of trial proof. Witness *D* testifies after witness *C* and before witness *E*. If the testimony of witness *C* is relevant only if one also believes witness *D* (and witness *D*'s testimony is irrelevant without witness *C*'s), the court can conditionally admit the evidence of witness *C* subject to it being "connected up" by witness *D*.

A good illustration is *In re Related Asbestos Cases*,[141] in which plaintiffs sought to introduce documents of defendant *A* to prove defendant *B* had notice of the hazards of asbestos. The court, applying the doctrine of conditional relevance, held that it would admit the documents against defendant *B* only after introduction of evidence sufficient to support a finding that defendant *B* had actual knowledge of the contents of defendant *A*'s documents.

[4] Hearings on Admissibility of Evidence

[a] In General

Although Rule 104 is quite vague in describing the procedures to be used in resolving evidentiary questions, it does by inference suggest that a hearing is appropriate. At this hearing the rules of evidence, except for privileges, do not apply, Rule 104(a). For example, in deciding whether certain testimony is excluded as hearsay, the court may hold a hearing and take the testimony of witnesses. During this hearing virtually all of the rules of evidence, including the hearsay rule, do not apply.[141.1] The disputed item can also be considered. For example, a challenged hearsay statement may be considered by the court in assessing whether the excited utterance hearsay exception applies. However, in order to avoid compromising the confidentiality and other concerns underlying privileges, the witnesses at this hearing cannot violate a privilege.

[b] Out of Jury's Hearing

To prevent the jury from being contaminated (and often bored) by the evidence at the hearing to determine the admissibility of evidence, Rule 104(c) mandates that the hearing be outside the "hearing" of the jury in certain cases. The use of the word "hearing" rather than "presence" clearly indicates that side-bar proceedings are permissible.

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[139] *Huddleston v. United States, 485 U.S. 681, 690–69, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)*.

[140] *See, e.g., United States v. Cote, 744 F.2d 913 (2d Cir. 1984)* (government introduced evidence of other crimes but failed to connect them to accused; convictions reversed). *Cf.* ***Delk v. State, 590 S.W.2d 435 (Tenn. 1979)*** (could be reversal if prosecution fails to connect up).

[141] *543 F. Supp. 1142 (N.D. Cal. 1982)*.

[141.1] *State v. Bonds, 502 S.W.3d 118, 2016 Tenn. Crim. App. LEXIS 266 (Tenn. Crim. App. Apr. 7, 2016)* (investigator's hearsay testimony as to the identifications made by witnesses was permissible at suppression hearing, because the rules of evidence did not apply to the proceeding).

Rule 104(c) requires an out-of-hearing procedure in three cases. First, when the issue is the admissibility of a confession, Rule 104(c) and constitutional principles,[142] mandate that the proceeding be held outside the presence of the jury. This should prevent the obvious miscarriage of justice that would occur if the jury were to hear a confession later ruled inadmissible.

Second, hearings on the admissibility of other evidence must be held outside the presence of the jury if requested by the criminal accused who is a witness, Rule 104(c). Presumably, the hearing must concern the witness-accused's testimony.

Third, according to Rule 104(c), a jury-out hearing should be held "in the interests of justice," a vague term undefined in the Tennessee Rules of Evidence. Trial courts will be given great latitude in assessing whether this standard mandates a jury-out hearing under particular circumstances.[143] Several factors should be considered: prejudice to a party, the likelihood the evidence will be disallowed, whether the evidence relates to weight as well as to admissibility, and whether exclusion could cause the jury to draw on adverse inference.[144]

Counsel seeking a jury-out hearing should formally request one. The request should be made on the record to preserve the issue for appellate review.

[c] Waiver of Fifth Amendment

In order to preserve the criminal accused's *Fifth Amendment* right to remain silent, Rule 104(d) states that the accused can testify about a preliminary matter without being subjected to cross-examination on other issues. Thus, at a hearing to determine the admissibility of an allegedly coerced confession, the accused could testify about the circumstances of the confession without being cross-examined about the criminal offense underlying the charges. However, it must be noted that at this hearing to assess whether a confession was involuntary, the accused can be cross-examined about matters that relate to the issue of consent to the confession.[145] And a number of cases hold that the accused's testimony at this hearing may be used to impeach, should he or she testify at trial.[146]

[d] Standard of Proof

Rule 104 does not indicate what standard of proof must be satisfied in order to assess the presence or absence of facts necessary for an evidentiary rule to apply. In *State v. Stamper*,[147] the Tennessee Supreme Court held that "the appropriate standard of proof for preliminary facts required for the admission of evidence is proof by a preponderance of the evidence.[148] Although this decision dealt specifically with the evidence necessary to establish a coconspirator's admission, the standard was expressed in general terms and may reflect the test in Tennessee.

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[142] *See* *Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)*; *State v. Norment, 2000 Tenn. Crim. App. LEXIS 837 (Tenn. Crim. App. 2000)* (a jury-out hearing to determine the admissibility of proffered evidence is only mandated in certain limited circumstance).

[143] *See, e.g., United States v. Odom, 736 F.2d 104 (4th Cir. 1984)* (trial court has great latitude in determining whether there should be jury-out hearing on issue of competency of witness to testify).

[144] *See, generally* STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, 1 FEDERAL RULES OF EVIDENCE MANUAL 104-10 TO 104-11 (9th ed. 2006).

[145] *See, e.g.*, *United States v. Roberts, 14 F.3d 502 (10th Cir. 1993)*.

[146] *See, e.g.*, *United States v. Beltran-Gutierrez, 19 F.3d 1287 (9th Cir. 1994)*.

[147] *863 S.W.2d 404 (Tenn. 1993)*.

[148] *Id. at 406*.

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§ 1.05 Rule 105. Limited Admissibility

[1] Text of Rule

Rule 105 Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

Advisory Commission Comment:

This is the common law rule.

[2] Jury Instruction Limiting Use of Evidence

[a] In General

While jury instructions are a critical part of the trial process, the rules of evidence deal with them only briefly. Rule 105, consistent with both Federal *Rule of Evidence 105* and traditional Tennessee law,[149] addresses jury instructions in cases where evidence is admissible as to one of several parties or for one but not other purposes. Rule 105 does not reach such issues as jury instructions to ignore erroneously admitted evidence.

This rule requires the court, upon request, to give a jury instruction restricting the evidence to its proper scope.[150] In other words, the jury would be told to use item X only against defendant A and not against defendant B, or to use evidence of a prior bad act only on the issue of identity and not on the issue of character for violence. Another example is an instruction that a prior murder conviction should be used to prove only that a defendant in a felony escape case had a prior felony.[151]

Because Rule 105 makes limiting instructions mandatory when requested by counsel and when the evidence has limited admissibility, the instructions must be given even if the judge believes the instructions are unnecessary or that the evidence is of little value.[152] Since Rule 105 is triggered by the request of counsel, lawyers who want this instruction should make a formal and specific request on the record to

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[149] *See, e.g.,* *Southern Ry. v. Hooper, 16 Tenn. App. 112, 65 S.W.2d 847 (1932)* (evidence may be admissible on one issue but not another; jury instructions can tell jurors which issue certain evidence is admissible to prove).

[150] *See, e.g.*, *State v. Ward, 2019 Tenn. Crim. App. LEXIS 202 (Crim. App. Apr. 1, 2019)* (pursunt to *Tenn. R. Evid. 105*, a trial court must, upon request, instruct the jury that the prior consistent statement cannot be used for the truth of the matters contained therein); ***Duran v. American Hundai Motor Am., Inc., 271 S.W.3d 178, 199 (Tenn. Ct. App. 2008)*** (limiting instruction commonly given to explain the "proper use of the evidence").

[151] *State v. Wingard, 891 S.W.2d 628 (Tenn. Crim. App. 1994)*.

[152] *Cf.* *State v. Dutton, 896 S.W.2d 114, 116 (Tenn. 1995)* ("it is the duty of trial courts to give limiting instructions when evidence is being admitted for only a limited purpose").

preserve the issue for appellate review. It may also be worthwhile for counsel to suggest, on the record, the language to be used in the instruction. Failure to make a request can be viewed as a waiver of the right to a limiting instruction[153] and it may bar appellate reversal if no such instruction is given.[154] Of course the plain error rule of Rule 103 could still permit appellate review in exceptional cases where no limiting instruction was requested.[155]

[b] Timing of Jury Instructions

Rule 105 does not dictate when the limiting jury instruction is to be given.[156] Ordinarily, jury instructions limiting the use of evidence should be given immediately before or after the jury hears the proof to which the instruction relates. In theory this enables the jury to put this evidence to proper use when it hears the rest of the proof in the case. The jury charge at the end of the trial can also repeat the limiting instruction.[157] On rare occasions, the failure to give a limiting instruction at the time the evidence is offered has been found to be reversible error.[158]

[3] Doubtful Efficacy of Limiting Jury Instructions

Although Rule 105 seems to assume that limiting jury instructions are heeded by jurors, common sense suggests that jurors may find it hard to implement the judge's admonitions. Social science research confirms the view that juries do not follow these instructions.[159] Even a few judicial opinions hold that the limiting

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[153] *Cf.* United States v. Mark, 943 F.2d 444 (4th Cir. 1991) (no request for limiting jury instruction on extrinsic act evidence); State v. Ward, 2019 Tenn. Crim. App. LEXIS 202 (Crim. App. Apr. 1, 2019) (a trial court generally has no duty to exclude evidence or to provide a limiting instruction to the jury in the absence of a timely objection; moreover, a party may consent to the admissibility of evidence which is otherwise prohibited by the Rules of Evidence, so long as the proceedings are not rendered so fundamentally unfair as to violate due process of law); State v. Sherrod, 2017 Tenn. Crim. App. LEXIS 361 (Tenn. Crim. App. 2017) (a trial court generally has no duty to exclude evidence or to provide a limiting instruction to the jury in the absence of a timely objection; because an instruction was not requested, the issue was waived). State v. Little, 402 S.W.3d 202, 210 (Tenn. 2013).

[154] *See, e.g.*, United States v. Smith, 459 F.3d 1276 (11th Cir. 2006) (no request for limiting instruction; court did not commit error in not giving limiting instruction). State v. Little, 402 S.W.3d 202 (Tenn. 2013) (defendant bears the blame for the failure to seek a limiting instruction regarding evidence of prior crimes).

[155] *See, e.g.*, United States v. Sisto, 534 F.2d 616 (5th Cir. 1976) (failure to give instruction limiting use of prior inconsistent statement was plain error even though counsel did not request one).

[156] *See, e.g.*, United States v. Garcia, 848 F.2d 1324 (2d Cir. 1988) (court can give limiting instruction at time evidence is admitted or during full jury instructions at end of trial).

[157] *See, e.g.*, United States v. Misle Bus & Equip. Co., 967 F.2d 1227, 1992-1 Trade Cas. (CCH) P69879 (8th Cir. 1992) (best to give limiting instruction both when the evidence is offered and at end of trial, but latter alone is adequate); United States v. Beasley, 495 F.3d 142 (4th Cir. 2007) (limiting instruction at end of trial was sufficient).

[158] *See* Jones v. United States, 385 F.2d 296 (D.C. App. 1967) (plain error to fail to give immediate limiting instruction concerning use of prior inconsistent statement). *See also,* State v. Reece, 637 S.W.2d 858, 1982 Tenn. LEXIS 339 (Tenn.1982) (the failure to give the limiting instruction may amount to fundamental error constituting grounds for reversal, even in the absence of a special request, but only in exceptional cases in which the impeaching testimony is extremely damaging, the need for the limiting instruction is apparent, and the failure to give it results in substantial prejudice to the rights of the accused); State v. Lalone, 2017 Tenn. Crim. App. LEXIS 438 (Tenn. Crim. App. 2017) (the failure to give a limiting instruction may amount to fundamental error constituting grounds for reversal when the State's case is weak and the prior inconsistent statements are extremely damaging); State v. Cody, 2000 Tenn. Crim. App. LEXIS 127 (Tenn. Crim. App. 2000) (when the only direct evidence tying a defendant to a murder is a prior inconsistent statement and when the other evidence is insufficient to convict, the prior unsworn statement is obviously extremely damaging, the need for a limiting instruction is clearly apparent, and the failure to give the instruction results in substantial prejudice to the rights of the defendant, requiring reversal).

instructions cannot "unring the bell."[160] Accordingly, counsel should make every effort to make such instructions unnecessary. Evidence should be carefully evaluated before trial, *in limine* motions should be filed, and zealous arguments should be made to exclude inadmissible evidence. Reliance on jury instructions to cure errors or ensure that evidence is properly used may be dangerous at best and disastrous at worst.

[4] Importance of Requesting Limiting Instructions

Although jury instructions authorized by Rule 105 may have little effect on jurors, Tennessee appellate courts take them seriously. In some cases the failure to give a limiting instruction may cause an appellate reversal.[161] Conversely, errors in admitting evidence are often viewed as harmless error if curative jury instructions are given.[162] Some errors, however, are so egregious that curative instructions are inadequate.[163]

Appellate Review. A harmless error analysis is used by an appellate court when a trial court has erroneously refused to give a limiting instruction. Assessing the impact of a nonexistent jury instruction, however, is difficult if not impossible. The chances for appellate reversal increase if this error is considered in conjunction with other errors in the trial.[164]

Penalizing Counsel. Some decisions have penalized attorneys who did not ask for a limiting instruction. Rule 36(a) of the Tennessee Rules of Appellate Procedure requires counsel to take reasonable action to prevent or nullify the harmful effect of an error. *State v. Jones*[165] held that counsel who failed to request curative instructions violated Rule 36(a) by not taking sufficient steps to minimize the effect of an error in admitting evidence.

This possibility should make lawyers especially careful to request these instructions when appropriate. Some experienced lawyers, however, make a tactical decision to refrain from requesting cautionary jury instructions. Consistent with the conclusions of many social science researchers, they believe that the instructions make the situations worse by reminding the jury of the evidence in question and stressing its importance in the case. Although this judgment may be correct, it does pose the risk of hindering opportunities for appellate review and should be made only after careful consideration of all factors.

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[159] *See, e.g.,* J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 86–87, 95–99 (1990) (empirical research clearly demonstrates that limiting instructions are not effective in preventing a jury from improperly using information; extensive citations to studies).

[160] *See, e.g.*, Blankenship v. State, 219 Tenn. 355, 410 S.W.2d 159 (1966). *Cf.* Harrison v. State, 217 Tenn. 31, 394 S.W.2d 713 (1965) (prior convictions); Bruton v. United States, 391 U.S. 123, 129, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (jury instructions inadequate to have jury ignore co-defendant's statement inculpating accused); *see also* Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987).

[161] *Cf.* State v. Wingard, 891 S.W.2d 628 (Tenn. Crim. App. 1994) (reversal for failure to give limiting instruction in combination with other trial errors).

[162] *See, e.g.*, State v. Torrey, 880 S.W.2d 710 (Tenn. Crim. App. 1993) (prompt jury instruction directing jury to ignore improper evidence about prior criminal record generally cures any error unless the evidence is so prejudicial that it is more probable than not that it affected the judgment); State v. Tyler, 598 S.W.2d 798, 802 (Tenn. Crim. App. 1980) (accused's silence during police interrogation); Armstrong v. State, 555 S.W.2d 870 (Tenn. Crim. App. 1977), *cert. denied*, ***435 U.S. 904 (1977)*** (prosecutor's misconduct); Williams v. State, 218 Tenn. 359, 403 S.W.2d 319 (1966) (prosecutor's remarks).

[163] *See, e.g.*, Blankenship v. State, 219 Tenn. 355, 410 S.W.2d 159 (1966) (police officer testified that defendant had entered, then withdrawn, guilty plea; evidence so prejudicial, curative instructions ineffective); Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (jury instruction inadequate to limit use of confession of nontestifying co-defendant implicating defendant).

[164] *See* State v. Wingard, 891 S.W.2d 628 (Tenn. Crim. App. 1994).

[165] 733 S.W.2d 517 (Tenn. Crim. App. 1987). *See above* § 1.03[3]. *Cf.* State v. Little, 402 S.W.3d 202, 210 (Tenn. 2013).

Inherent Authority. Even if counsel does not request a limiting instruction under Rule 105, however, the trial judge has the inherent authority to so instruct the jury.[166] The better practice, it is submitted, is for the court to inform counsel of its intention to give such instructions and to hear the arguments of counsel on the issue. The court can also take the initiative and ask counsel if he or she wants a limiting instruction. Generally, if both lawyers oppose the limiting instruction, the court should not give it. Trial judges, ordinarily, should not override a lawyer's tactical decision on this issue. Of course all such discussions should be on the record to facilitate appellate review.

Minimizing Prejudice. A limiting instruction may have an effect on the admissibility of evidence. Evidence otherwise excluded under Rule 403 as unfairly prejudicial is sometimes admitted if a limiting instruction is given pursuant to Rule 105. Tennessee courts have held that in some cases the limiting instruction ameliorates sufficient prejudice to render the evidence admissible.[167]

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[166] *See, e.g.*, United States v. Lester, 491 F.2d 680 (6th Cir. 1974) (reversal because trial judge should have given limiting instructions even though counsel did not so request); ***Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 199 (Tenn. Ct. App. 2008)*** (judges may give a limiting instruction "on their own motion" even without a request from counsel).

[167] *See, e.g.*, Blankenship v. State, 219 Tenn. 355, 410 S.W.2d 159 (1966).

§ 1.06 Rule 106. Writings or Recorded Statements—Completeness

[1] Text of Rule

Rule 106 Writings or Recorded Statements—Completeness

> **When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.**

Advisory Commission Comment:

The rule restates settled law.

[2] Rule of Completeness

[a] In General

When a party introduces all or part of a writing or recorded statement, sometimes the jury would profit from learning at that time about another statement or part of a statement. Rule 106, often referred to as the *rule of completeness*, reflects a concern for fairness and is designed to let the jury assess related information at the same time rather than piecemeal.[168] This should help the jury avoid being misled by hearing only partial information about a writing or recorded statement.[169] Moreover, it will assist the jury in assessing the weight to be given to the written or recorded statement by permitting the jury to consider at the same time other relevant writings and recordings. A Tennessee decision saw this as a concern with "the inadequacy of repair work when the admission of the disputed proof is delayed to a point later in the trial."[170] The rule may also be welcomed by witnesses who will not have to testify twice in order to present a single document as evidence.

Rule 106, consistent with the identical Federal Rule 106 and existing Tennessee law,[171] accomplishes this by permitting a court to admit into evidence at that time any other part of that statement or any other written or recorded statement which ought in fairness to be considered contemporaneously with it. For example, if

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[168] ***State v. Vaughan, 144 S.W.3d 391, 406 (Tenn Crim. App. 2003)***.

[169] *See, e.g.*, Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171, 109 S. Ct. 439, 451, 102 L.Ed.2d 445 (1988) (the rule of completeness is designed "to secure for the tribunal a complete understanding of the total tenor and effect of the utterance," citing 7 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 653 (J. Chadbourn rev. 1978)). *See also* United States v. Howard, 216 Fed. Appx. 463, 2007 U.S. App. LEXIS 1816 (6th Cir. 2007) (Rule 106 allows a party who is prejudiced by an opponent's introduction of part of a document, or a correspondence, or a conversation, to enter so much of the remainder as necessary to explain or rebut a misleading impression caused by the incomplete character of that evidence); State v. Hartman, 42 S.W.3d 44, 61 (Tenn. 2001) (Rule 106 is designed to ensure that the trier of fact can assess related information without being misled by hearing only portions of evidence).

[170] ***State v. Vaughan, 144 S.W.3d 391, 407 (Tenn Crim. App. 2003)***.

[171] *See* Tenn. R. Civ. P. 32.01(4) (when part of a deposition is offered in evidence, an adverse party can require introduction at that time of other relevant portions that ought in fairness to be considered contemporaneously with it).

during the direct or cross-examination of a witness the plaintiff introduces the first paragraph of a letter, the defense, at that time, is authorized by Rule 106 to have other parts of the same letter or another letter introduced if the other information in fairness ought to be considered with the first paragraph.

In *State v. Belser*,[172] for example, the prosecution used portions of two statements by the defendant to cross-examine him, pointing out discrepancies between the earlier statements and the in-court testimony. The defendant then sought unsuccessfully to introduce the entire statements, plus a third given shortly before the other two. The Court of Criminal Appeals held that the entire first statement should have been introduced under the rule of completeness because it put the other two statements in context. Moreover, the trial judge should have permitted parts of the third statement to be introduced because it could have affected how the jury assessed the credibility of the police detective who probably fabricated facts in the statement.

Another illustration arises when one side uses a document or recorded statement as a prior inconsistent statement to impeach a witness. The other side may want to use Rule 106 to introduce, at that time, another written or recorded statement as a prior consistent statement to rehabilitate that witness.[173]

A third illustrative decision used Rule 106 to require an accountant's work papers to be introduced to explain items on financial statements.[174] The work papers assisted the jury in understanding certain numbers on the financial statements.

Another case read Rule 106 as applying to scientific articles needed to counter testimony that the existing scientific evidence "as a whole" showed the product was dangerous.[175]

A case holding Rule 106 inapplicable involved a murder defendant who cross-examined a police investigator about the thoroughness of her investigation and twice referred to specific lines in her report. The Tennessee Court of Appeals held that the prosecution could not introduce the entire report under Rule 106 because it contained too much hearsay, would violate the *Confrontation Clause*, and was not needed since nothing was taken out of context and there was no likelihood the jury would be misled if the report were not introduced into evidence.[176]

Where multiple statements are at issue, the court will consider the circumstances under which they arose in order to determine whether they were part of a single, continuous statement requiring admission under Rule 106. The rule of completeness does not, however, render self-serving hearsay evidence admissible.[176.1]

[b] Fairness

Rule 106 applies a rule of completeness when *fairness* so requires. The obvious vagueness of this standard leaves much to the discretion of the trial judge.[176.2] Several factors are relevant. The most

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[172] *945 S.W.2d 776 (Tenn. Crim. App. 1996)*.

[173] *See, e.g.*, *United States v. Pierre, 781 F.2d 329 (2d Cir. 1986)*.

[174] *Phoenix Associates III v. Stone, 60 F.3d 95 (2d Cir. 1995)*.

[175] *Marsee v. United States Tobacco Co., 866 F.2d 319 (10th Cir. 1989)*.

[176] ***State v. Vaughan, 144 S.W.3d 391 (Tenn. Crim. App. 2003)***.

[176.1] *United States v. Gallagher, 57 Fed. Appx. 622, 2003 U.S. App. LEXIS 1327 (6th Cir. 2003)* (self-serving exculpatory statements were not required for completeness and were properly excluded as inadmissible hearsay); *State v. Henry, 2015 Tenn. Crim. App. LEXIS 34 (Tenn. Crim. App. 2015)* (a recorded statement made by defendant at the crime scene, and a second unrecorded, self-serving statement made by defendant at the hospital and merely referred to in a police report, constituted separate complete statements, not one continuous statement subject to Rule 106; accordingly, no abuse of discretion arose from the trial court's decision to exclude the second statement).

important is whether the jury's accurate understanding of the evidence introduced by one side would be furthered if, at that time, the other side were permitted to introduce evidence under Rule 106. The court should consider the impact of the delayed introduction of that proof as well as the extent to which the use of Rule 106 would disrupt the orderly presentation of one side's proof. Convenience to witnesses and costs to the parties are also considerations. Appellate review of this rule results in a reversal only for an abuse of discretion.[177]

[3] Impact of Rule of Completeness

[a] In General

Rule 106 advances the truth process but must be read carefully because of several difficult issues.

[b] Effect on Admissibility of Evidence

It is unclear whether Rule 106 affects the admissibility of evidence. The federal courts disagree whether Rule 106 authorizes the admissibility of evidence not otherwise admissible. Some decisions hold that if one party introduces a writing or recorded statement covered by Rule 106, the other side is entitled to introduce evidence, whether or not otherwise admissible, that ought in fairness to be considered with the item introduced.[178]

Perhaps the majority federal view, however, is that Rule 106 does not affect the admissibility of evidence, only the timing of evidence. To these courts, evidence otherwise excluded is not made admissible by Rule 106.[179] While the question is a difficult one, it is submitted that the minority position is preferred. If a piece of

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[176.2] The discretionary nature of the "fairness" standard under Rule 106 is further complicated by the requirements of other evidentiary rules, such as Rule 403. Evidence that might otherwise satisfy Rule 106 may be excluded under Rule 403 if its probative value is outweighed by its prejudicial effect. In *State v. McCaleb, 582 S.W.3d 179 (Tenn. 2019)*, the prosecution sought to introduce incriminating post-polygraph statements made by the defendant, without referencing the underlying polygraph or its results. The defendant objected to their introduction on the basis that allowing the jury to see only those portions of the interview that did not include the officer's references to the polygraph would violate the "rule of completeness" under Rule 106, as well as his constitutional right to contest the credibility of the statements by taking the stand. The trial court excluded the statements for undue prejudicial effect under Rule 403. On appeal, the Supreme Court affirmed. Although the Court recognized that it is not consistent with fundamental fairness under Rule 106 to allow the prosecution to introduce only the most incriminating portions of a defendant's statement without regard to the overall context or relevant exculpatory portions found in the same statement, it also recognized that admission of the entire post-polygraph statement to satisfy Rule 106 would have resulted in undue prejudice to the defendant under Rule 403. In order to contest the statements and explain their context in exercise of his constitutional right to take the stand, defendant would be required on cross examination to reference the underlying polygraph and its existence. Hearing about the polygraph created a danger that the jury would misuse the information in rendering its verdict, which could not be overcome with a limiting instruction. Accordingly, the Court held that the probative value of the statements was outweighed by the undue prejudice that would arise from their admission under Rule 403.

[177] *See, e.g.*, *United States v. Larranaga, 787 F.2d 489, 500 (10th Cir. 1986)* (no abuse of discretion to refuse to admit entire grand jury transcript of statement of witness); *State v. Keough, 18 S.W.3d 175 (Tenn. 2000)* (no abuse of discretion to refuse to admit written confession to explain prior oral confession).

[178] *See, e.g.*, *United States v. Bucci, 525 F.3d 116 (1st Cir. 2008)*; (otherwise inadmissible statement admissible under Rule 106); *United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986)* (unless otherwise inadmissible evidence is admitted, Rule 106 permits a party to mislead a jury and distort truth process); *United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986)*. *State v. Brewer, 2019 Tenn. Crim. App. LEXIS 157 (Crim. App. Mar. 11, 2019)* (noting that because *Tenn. R. Evid. 106* is a rule of timing rather than admissibility, it is not immediately clear whether the rule would permit the introduction of otherwise inadmissible hearsay).

[179] *See, e.g.*, *United States v. Lentz, 524 F.3d 501 (4th Cir. 2008)* (Rule 106 does not render admissible an item of evidence that is otherwise inadmissible hearsay); ***United States v. Sine, 493 F.3d 1021 (9th Cir. 2007)***; *United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982)*; *State v. Fair, 1999 Tenn. Crim. App. LEXIS 1146 (Tenn. Crim. App. 1999)* (although Rule 106 permits a

evidence is introduced and fairness dictates that the jury hear another piece of evidence at that time, the system of justice is best served if the other evidence is admitted. By introducing part of a document or recorded statement, the party can be viewed as waiving or forfeiting an objection to other items that, in fairness, should be considered by the jury.[180] Of course otherwise inadmissible evidence should be scrutinized especially carefully and Rule 403 should be invoked when appropriate.

A related issue relates to the impact of Rule 106 on admission of a prior consistent statement.[181] If evidence is introduced under Rule 106 because "in fairness" it is needed to put a document or recorded statement in context, the item may be admissible even though it would not qualify as a prior consistent statement, perhaps because it was made after a motive to lie arose.[182] A good illustration is *State v. Belser*,[183] where a murder defendant made several statements to police shortly after the shooting. During cross-examination, the prosecutor extensively questioned the defendant about these statements but did not introduce them into evidence. The Tennessee Court of Criminal Appeals held that the defendant should have been permitted to introduce them under Rule 106 as prior consistent statements. The Court did not discuss how the pretrial statement to police was made before the motive to lie arose or how it surpassed the hearsay rule if offered by a testifying defendant. Thus, admissibility under Rule 106 may permit admission of the proof even though another rule would bar admission.[184]

[c] Effect on Timing of Admission of Evidence

While it is not clear whether Rule 106 affects the admissibility of evidence, it is clear that it alters the timing of the admission of evidence. Certainly the adverse party could decide to introduce the remaining parts of the document or another relevant document later in the trial during its own proof, on rebuttal, or in cross-examination. Rule 106 simply gives the trial judge the discretion to let one party have evidence introduced during another party's proof.

[d] Limited Types of Evidence

Rule 106 is also a narrow rule. It applies only to writings, including depositions, and recorded statements. It does not reach oral statements,[185] photographs, movies or video recordings (unless they constitute recorded statements). Rule 611(a), however, may permit the same result for evidence not formally covered by Rule 106.

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party to introduce evidence during the adversary party's case if the evidence in fairness ought to be considered at that time, the rule does not open the door to admission of evidence on any topic; furthermore, the rule generally only applies to admit evidence that "qualifies or explains the subject matter of the portion offered by the opponent").

[180] This approach is illustrated by *State v. Robinson, 146 S.W.3d 469 (Tenn. 2004)*, where a defendant asked a witness about a prior identification, then on appeal objected that the response was inadmissible and a violation of the *Confrontation Clause*. The Tennessee Supreme Court refused relief because the defendant had opened the door to this inadmissible evidence. It should be noted that *Robinson* did not involve Rule 106. *See above § 1.02[3]* (curative admissibility).

[181] *See below § 8.05[5]*.

[182] *See United States v. Keltner, 147 F.3d 662, 672 (8th Cir. 1998)*.

[183] *945 S.W.2d 776 (Tenn Crim. App. 1996)*.

[184] *Cf. Trepel v. Roadway Express, Inc., 194 F.3d 708 (6th Cir. 1999)* (when defendant introduced part of plaintiff's deposition testimony taken out of context, under the rule of completeness plaintiff could force defendant to introduce additional parts of plaintiff's deposition, which came in as an admission of a party opponent since it would be introduced by the defendant).

[185] *See, e.g.*, *United States v. Garcia, 530 F.3d 348 (5th Cir. 2008)* (Rule 106 does not apply to defendant's oral statement); *State v. Henry, 2015 Tenn. Crim. App. LEXIS 34 (Tenn. Crim. App. 2015)* (Rule 106 pertains to recorded or written statements); *State v. Wilson, 164 S.W.3d 355, 365 (Tenn. Crim. App. 2003)* (Rule 106 applies to written or recorded statements; it does not apply to a criminal defendant's oral statement to a friend).

On its face, Rule 106 applies only if a written or recorded statement is *introduced* by a party; it does not appear to apply to statements that are mentioned during oral testimony but are not introduced as documentary evidence. This could occur if witness A testifies about X's earlier oral statement and, on cross-examination, the other side wants to introduce X's prior written statement under Rule 106 to shed light on the testimony about X's oral statement.[186] Technically, Rule 106 does not apply since the initial statement was oral, not written or recorded. Nevertheless, the trial judge likely has the discretion to permit the written statement to be introduced immediately rather than later during the other side's proof. Surely no party's rights would be violated as long as the written statement was admissible on its own.

Some creative federal courts, applying the identical federal provision, have held that Rule 106 also applies when the substance of a writing or recorded statement is presented to the jury but not actually admitted into evidence in written form.[187] This is illustrated in Tennessee by *State v. Belser,*[188] where the prosecution extensively cross-examined the defendant from his previous statements, which had not been admitted into evidence. Finding that the detailed cross-examination "effectively introduced" the defendant's statements, the Tennessee Court of Criminal Appeals held that Rule 106 applied and the rule of completeness required the admission of other pretrial statements as prior consistent statements. This sensible result furthers the goal of permitting the jury to learn about other evidence that in fairness ought to be presented at that time. Delaying introduction of the evidence until the other side's proof may confuse the jury and weaken efforts to cure the misimpression created by the partial evidence presented earlier.

In *State v. Brewer*,[188.1] the Tennessee Court of Criminal Appeals reasoned that the "fairness concerns underlying Rule 106" and the court's ruling in *Belser* should apply "equally to extensive questioning on direct examination regarding the contents of a written statement."[188.2] Accordingly, the court held that when the prosecutor asked its witness extensive questions regarding the substance of defendant's confession, the defendant should have been allowed to admit the remainder of his confession so that the jury could consider the entire statement in its proper context.[188.3]

[e] Content of Other Evidence

Although Rule 106 permits a party to introduce evidence during the adversary party's case if the evidence in fairness ought to be considered at that time, the rule does not open the door to the admission of evidence on any topic. There are few Tennessee authorities on point. One summarized the rule as requiring that the evidence admitted under Rule 106 at least (1) explain already-admitted proof, (2) place the admitted proof in context, (3) avoid misleading the trier of fact, or (4) ensure a fair and impartial understanding of the already-admitted proof.[189]

Another illustrative Tennessee case held that when the state introduced portions of statements two and three, the defendant should have been permitted to introduce statement one to put statements two and

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[186] *See* State v. Keough, 18 S.W.3d 175, 181–183 (Tenn. 2000).

[187] *See, e.g.,* United States v. Pendas-Martinez, 845 F.2d 938, 943–944 (11th Cir. 1988); United States v. Maccini, 721 F.2d 840 (1st Cir. 1983) (portions of grand jury testimony).

[188] 945 S.W.2d 776 (Tenn. Crim. App. 1996).

[188.1] State v. Brewer, 2019 Tenn. Crim. App. LEXIS 157 (Crim. App. Mar. 11, 2019).

[188.2] Id. at *48.

[188.3] *Id.*

[189] ***State v. Vaughan, 144 S.W. 3d 391, 407 (Tenn. Crim. App. 2003)***. *See also,* State v. Brewer, 2019 Tenn. Crim. App. LEXIS 157 (Crim. App. Mar. 11, 2019).

three in context.[190] The same decision held that another portion of a statement should have been admitted to permit the jury to assess how much weight to give other parts of the statement.

While federal courts have differed on the exact contours of the rule, they agree that Rule 106 applies to evidence that is both relevant to the issues and qualifies or explains the subject matter of the portion offered by the opponent.[191] Some other federal courts expand this to evidence that puts the admitted portion in context, avoids misleading the trier of fact, or ensures a fair and impartial understanding of the evidence.[192] Counsel attempting to invoke Rule 106 should be prepared to show what portions of the proof to be introduced under this rule are relevant to the above issues.

Rule 106, on the other hand, does not open the door to the admission of *any* otherwise admissible writing or recorded statement. The rule only authorizes the introduction of proof that assists the trier of fact in using already-admitted proof. For example, a plaintiff may introduce paragraph A of a two-paragraph letter to prove that a manufacturer had notice of a certain defect on a certain date. The defense may not, however, secure admission of paragraph B of the letter into evidence to prove a subsequent remedial measure. Under Rule 106, the second paragraph is likely inadmissible under Rule 106 because it does not help the jury with the already-introduced first paragraph. If paragraph B is to be introduced, it will have to be done when adversary counsel is permitted to introduce his or her own proof.

[4] Procedures

Rule 106 does not provide the procedures to be used in assessing whether and how the rule is to be used. A federal decision[193] has approved one possible way that makes sense. Side A introduces all or part of a document during its proof. Side B then, in a jury out proceeding, argues that other portions or items should be introduced at that time because the jurors are being misled or confused by the partial information they have received. The trial court then reviews the evidence that side B argues should be admitted, at that time, to prevent the distortion that would occur if the other evidence were admitted later in the trial. Some or all of this new evidence may be admitted pursuant to Rule 106. Of course the trial court may redact portions of the new evidence that do not qualify for admission under Rule 106. Ordinarily the new proof would be offered immediately after the proof that it complements.[194]

Appellate reversal for a violation of Rule 106 is rare. Counsel failing to make a timely request to have the new material introduced may find that the issue was waived.[195] Moreover, since Rule 106 most often affects the timing rather than the admissibility of evidence, the doctrine of harmless error will bar appellate reversal in most cases. The jury will eventually hear about the entire document and will be coached on its use during closing argument. Under these circumstances it will be difficult to find that substantial rights were affected.[196]

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[190] *State v. Belser, 945 S.W.2d 776 (Tenn. Crim. App. 1996)*. *See also, State v. Brewer, 2019 Tenn. Crim. App. LEXIS 157 (Crim. App. Mar. 11, 2019)*.

[191] *See, e.g., United States v. Wright, 826 F.2d 938, 946 (10th Cir. 1987)*; *United States v. Walker, 652 F.2d 708, 710 (7th Cir. 1981)* (*en banc*); *United States v. Marin, 669 F.2d 73 (2d Cir. 1982)*.

[192] *See United States v. Soures, 736 F.2d 87, 91 (3d Cir. 1984)*, *cert. denied*, ***469 U.S. 1161 (1985)***; *see also* United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010)(fair and impartial understanding of the evidence).

[193] *United States v. Sutton, 801 F.2d 1346, 1369 (D.C. Cir. 1986)*.

[194] *See United States v. Southland Corp., 760 F.2d 1366 (2d Cir. 1985)*.

[195] *Cf. United States v. Larranaga, 787 F.2d 489, 500 (10th Cir. 1986)*.

[196] *See Tenn. R. Evid. 103*.

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