

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 11

SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS;  
REPRESENTATIONS TO COURT; SANCTIONS

11.03. Sanctions.—

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(2) Nature of Sanctions; Limitations.—A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (a) and (b), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

**Advisory Commission Comment**

A spelling error is corrected in Rule 11.03(2); there is no substantive change.

# TENNESSEE RULES OF CIVIL PROCEDURE

## RULE 16

### SCHEDULING AND PLANNING, PRETRIAL, AND FINAL PRETRIAL CONFERENCES AND ORDERS

16.01. Scheduling and Planning Conferences and Orders.—In any action, the court may in its discretion, or upon motion of any party, conduct a conference with the attorneys for the parties and any unrepresented parties, in person or by telephone, mail, or other suitable means, and thereafter enter a scheduling order that limits the time:

- (1) to join other parties and to amend the pleadings;
- (2) to file and hear motions; and
- (3) to complete discovery.

The scheduling order also may include:

- (1) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (2) any other matters appropriate in the circumstances of the case.

In deciding the content of any scheduling order, the court shall give consideration to minimizing the time that jurors are not directly involved in the trial or deliberations. A schedule once ordered shall not be modified except by leave of the judge upon a showing of good cause.

16.02. Pretrial Conferences; Objectives.—In any action, the court may in its discretion, or upon motion of any party, direct the attorneys for the parties and any unrepresented parties to participate in a pretrial conference or conferences in person or by telephone, mail, or other suitable means, for such purposes as:

- (1) expediting the disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because

of lack of management;

(3) discouraging wasteful pretrial activities;

(4) encouraging more thorough trial preparation;

(5) facilitating the settlement of the case; and

(6) minimizing the time that jurors are not directly involved in the trial or deliberations.

### **Advisory Commission Comment**

The new language in the next to last sentence of Rule 16.01 is designed to encourage judges to make serious efforts to reduce the time that jurors are required to be at the courthouse when not directly involved in the case. When entering scheduling orders, judges should take this factor into consideration.

The new language in Rule 16.02(6) is designed to encourage judges to make serious efforts to reduce the time that jurors are required to be at the courthouse when not directly involved in the case. Pretrial conferences may greatly facilitate the efficient use of juror time by encouraging the pretrial resolution of evidentiary and other issues and the early preparation of jury instructions and juror notebooks.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

26.02. Discovery Scope and Limits.—Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

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**Advisory Commission Comment**

The introduction to Rule 26.02 is amended to delete a reference to nonexistent Tennessee Rule of Evidence 412.1, a proposal withdrawn by the Supreme Court during the 2002 legislative session.

# TENNESSEE RULES OF CIVIL PROCEDURE

## RULE 43

### EVIDENCE

43.03. Order of Expert Testimony.—In trials involving conflicting expert testimony and with the consent of all parties, courts may reorder the ordinary proof process to increase the likelihood that jurors will be able to comprehend and evaluate expert testimony.

#### **Advisory Commission Comment**

The new procedure in Rule 43.03 is designed to assist jurors in understanding conflicting expert testimony by providing judges and lawyers with considerable flexibility in the scheduling and mode of that testimony. On rare occasions, it may be helpful if expert testimony on the same subject be given in the same block of time rather than separated by days or weeks and given during each party's proof process. For example, in a tort case where both sides will present expert testimony on causation, jurors may benefit if the plaintiff's causation experts testify, followed immediately by the defendant's causation experts. This procedure may give the jurors a better way of resolving the issue of causation. Because of the tactical, financial, scheduling, and procedural issues raised by this new procedure, it can only be utilized with the consent of the court and all parties.

# TENNESSEE RULES OF CIVIL PROCEDURE

## RULE 43A

### JUROR INFORMATION

43A.01. Juror Notetaking.—Jurors shall be instructed that they may take notes during the trial. The court shall provide suitable materials for this purpose. Jurors shall have access to their notes during recesses and deliberations. After the jury has rendered a verdict, the notes shall be collected by court personnel who shall destroy them promptly.

43A.02. Juror Notebooks.—When the court deems it helpful in a particular case, jurors may be provided with notebooks to use in collecting and organizing appropriate materials, including such items as jury instructions, copies of exhibits, and the juror's own notes. Counsel should be apprised of this procedure and invited to prepare exhibits and other materials in a way that facilitates their inclusion in the jurors' notebooks. At the end of the trial, the notebooks should be collected by court personnel and their contents destroyed, unless the court instructs to the contrary.

43A.03. Juror Questions of Witnesses.—In the court's discretion, a juror desiring to propound a question to a witness may be permitted to do so. The juror must put the question in written form and submit it to the judge through a court officer at the end of a witness' testimony. The judge shall review all such questions and, outside the hearing of the jury, shall consult the parties about whether the question should be propounded. The judge, in his or her discretion, may ask the juror's question in whole or part and may change the wording of the juror's question before propounding it to the witness. The judge may permit counsel to ask the question in its original or amended form in whole or part, in the judge's discretion. When juror questions are permitted, early in the trial jurors shall be instructed about the mechanics of asking a question. In addition, the jurors shall be instructed to give no meaning to the fact that the judge chose not to ask a question or altered the wording of

a question submitted by a juror. A juror's question shall be anonymous, so that the juror's name is not included in the question. All jurors' questions, whether approved or disapproved by the court, shall be retained for the record.

### **Advisory Commission Comment**

This new rule adds three procedures designed to assist jurors in the effective performance of their important functions.

Rule 43A.01 specifically states that jurors are allowed to take notes during the trial and to use those notes during deliberations. The court is to provide the necessary materials and to collect and destroy the notes at the end of the trial. The premise of this rule is that jurors, like judges and lawyers, may find it helpful to take notes during the trial in order to assist in remembering the evidence.

Rule 43A.02 authorizes the court, in its discretion, to provide jurors with notebooks to use in collecting and organizing the various materials presented to the jury. The notebook might include such items as jury instructions, copies of exhibits (photographs, charts, etc.), basic definitions of words used in the trial, and any other appropriate materials.

The court is given the discretion whether to use notebooks. The court might want to ask counsel to assist in the preparation of the notebooks. The content and financial aspects of the notebooks might be discussed and resolved during pretrial conference. After the trial, the court may collect the notebooks and destroy any contents that will not be used again, although the exact disposition is left to the court's discretion.

Rule 43A.03 gives the court the discretion to allow jurors to ask questions of witnesses. This rule is designed to assist jurors in their understanding of evidence and to make them feel more involved in the trial process. The procedure in this rule should ensure that improper questions are not propounded to witnesses. After a witness has completed testimony, a juror desiring to ask a question must submit that question in writing to a court officer who will give it to the judge. The question shall be submitted without identifying the juror who asked it. The judge then screens the question. Counsel shall be invited to comment on the propriety of the question out of the hearing of the jury. The court is given the discretion to reject or ask the question in whole or in part, to rephrase it, and to have counsel ask the question of the witness. If necessary, the court may accompany the question or the rejection of the question with appropriate jury instructions. All questions are to be retained for the record.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 44A

INTERIM COMMENTARY

During the course of the trial, the court may permit counsel to address the jury in order to assist jurors in understanding the evidence that has been presented or will be presented. The trial court may place reasonable time limits on such statements and shall permit all counsel to respond to the remarks of any one lawyer.

**Advisory Commission Comment**

This new rule gives the court the discretion to allow counsel to speak directly to the jury during the trial in order to assist the jurors in understanding the context of the evidence. For example, the court may allow counsel to make a short explanation of what legal issue the next two witnesses will address. The court is given the discretion to place time and content limits on these statements, but each counsel must be given a chance to respond to the interim commentary of any lawyer.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 45

SUBPOENA

**Advisory Commission Comment**

[Change citation in 1987 comment to Rule 45.07 from DR 7-106(C)(7) to Tenn. Sup. Ct. R. 8, RPC 3.4(c).]

# TENNESSEE RULES OF CIVIL PROCEDURE

## RULE 47

### JURORS

47.01. Examination of Jurors.—The court shall permit the parties or their attorneys to conduct the examination. At or near the beginning of jury selection, the court shall permit counsel to introduce themselves and make brief, non-argumentative remarks that inform the potential jurors of the general nature of the case. The court, upon motion of a party or on its own motion, may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors.

47.02. Additional Jurors.—The court may direct prior to the start of jury selection that one or more jurors in addition to the regular jury of twelve persons be called and impaneled. The additional jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. If one or more additional jurors are called, each party is entitled to one peremptory challenge for each such additional juror, up to the maximum provided by law. Such additional peremptory challenges may be used against any regular or additional juror. The trial court in its discretion may use either of the following methods to select and impanel additional jurors:

(1) During the jury selection or the trial of the case, there shall be no distinction made by the court as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve or such other number as the law provides. A juror who is not

selected to be a member of the final jury shall be discharged when that jury retires to consider its verdict.

(2) Following the selection of the jury of twelve regular jurors or such other number as the law provides, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors in the order in which they are called shall replace regular jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

47.03. Procedures for Exercising Peremptory Challenges.—After prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror in the group of the first twelve (or more if additional jurors are seated) who has been seated that either counsel elects to challenge peremptorily. Upon each submission, each counsel shall submit either a challenge or a blank sheet of paper. Neither party shall make known the fact that the party has not challenged. Replacement jurors will be seated in the panel of twelve (or more) in the order of their selection. If necessary, additional replacement jurors will then be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, to the trial judge, the name of any juror in the group of twelve (or more) that counsel elects to challenge peremptorily. This procedure will be followed until a full jury has been selected and accepted by counsel. The trial judge will keep a list of those challenged and, if the same juror is challenged by both parties, each will be charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror.

#### **Advisory Commission Comment**

The new material in the second and third sentences of Rule 47.01 provides two new procedures designed to assist jurors in understanding the proceedings and in protecting their privacy

while encouraging juror candor. The new language gives counsel the right to make brief, non-argumentative statements near the beginning of the jury selection process. These statements may be made before selection begins or when counsel is first permitted to ask questions of prospective jurors. During these remarks counsel should introduce themselves and briefly describe the nature of the case. This process should give jurors a better sense of the participants in the trial and the nature of the responsibility the jurors may be chosen to undertake.

The new language also specifically authorizes courts to use individual voir dire of potential jurors when appropriate. It is likely this will occur primarily in cases where potential jurors are questioned about sensitive matters. By substantially reducing the audience present when the juror must answer such questions, jurors should be more candid and feel that their privacy is respected. This rule mirrors existing Criminal Procedure Rule 24(a).

Amended Rule 47.02 permits the trial court to use one of two alternative methods for selecting and impaneling additional jurors in civil cases. The rule parallels the existing system set out in Criminal Procedure Rule 24(e) governing jury trials in criminal cases. In adopting the two alternative methods, Amended Rule 47.02 essentially formalizes current practice in civil cases, under which individual trial courts already use either of these methods.

Rule 47.02(1), the first alternative method, eliminates the distinction between regular and alternate jurors. If the court decides to seat extra jurors in case a regular juror becomes unable to serve, the additional jurors are combined with the other jurors for all purposes during the trial. Thus, if a court decides to use twelve jurors plus two additional jurors, all fourteen jurors are considered to be the jurors during the entire trial. Under this alternative, before the jury retires to deliberate the court will randomly deselect the additional jurors, leaving the desired number of jurors, ordinarily twelve. The deselected jurors are then discharged when the remaining jurors retire to deliberate.

Rule 47.02(2), the second alternative method, provides for the more traditional practice of selecting the regular jurors and then selecting additional jurors, who are designated as alternate jurors. Under this method, an alternate juror would replace a regular juror who becomes unable or disqualified to perform his or her duties; an alternate juror who does not replace a regular juror is discharged when the jury retires to consider its verdict.

Rule 47.02, as amended, also modifies the use of peremptory challenges in the selection of additional jurors by reducing the number of peremptory challenges per additional juror from two to one. The amendment, however, specifically authorizes the practice of “backstriking” by which peremptory challenges, including those authorized for the additional juror(s), may be used against any juror. This procedure should provide lawyers with more flexibility in the exercise of peremptory challenges. Under prior law, the extra challenges could only be used against an alternate juror.

This rule must be read in conjunction with Tenn. Code Ann. § 22-3-105, which places a limit on the total number of peremptory challenges in a civil case. Under this statute, each side in a civil case, irrespective of the number of parties on that side, is limited to a maximum of eight peremptory challenges. That maximum number is not changed by additional peremptory challenges for

additional jurors. For example, under Tenn. Code Ann. § 22-3-105 a civil plaintiff is entitled to four peremptory challenges. If an additional juror is seated, that plaintiff is now entitled to five peremptory challenges (four under Tenn. Code Ann. § 22-3-105 and one for the additional juror). If there are two plaintiffs, under the statute each is entitled to four peremptory challenges. If the court seats additional jurors, no additional peremptory challenges are given to the two plaintiffs since the statutory maximum of eight peremptory challenges per side has been reached.

The new procedure in Rule 47.03 adopts the procedure long used in Tennessee criminal cases and required by Criminal Procedure Rule 24(c). It provides a well-tried and widely adopted method of exercising peremptory challenges in a way that does not divulge which lawyer excluded the juror. Under this model, lawyers for all parties write their decision whether to exercise a peremptory challenge on a piece of paper, which is given to the judge. The judge then announces the result. No one should be able to detect which lawyer exercised the peremptory challenge. If more than one counsel excludes a particular juror, each counsel is charged with one peremptory challenge. Peremptory challenges may be used against any regular or additional juror, pursuant to Rule 47.02.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 51

INSTRUCTIONS TO JURY; OBJECTION

51.01. Requests for Instructions.—At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury. The court may, in its discretion, entertain requests for instructions at any time before the jury retires to consider its verdict.

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51.03. Timing.—(1) At Beginning of Trial. Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the general nature of the case, and the elementary legal principles that will govern the proceeding.

(2) Before and After Closing Argument. Jury instructions on the applicable law may be given before closing argument, in the court's discretion. All or part of such instructions may be repeated after closing argument. Additional instructions concerning organizational and related matters also may be given after closing argument.

51.04. Written Form.—If the judge elects to reduce to writing the instructions given under Rule 51.03(2), the judge shall give the jury one or more copies of the written instructions, in their entirety, for use in the jury room during deliberations. After the deliberations are concluded, the written charge shall be returned to the judge.

**Advisory Commission Comment**

The deleted language of Rule 51.01 delaying final jury instructions until after arguments to the jury has been replaced by the addition of Rule 51.03(2).

New Rule 51.03 deals with the timing of jury instructions. Rule 51.03(1) requires the court to give basic instructions on procedures and law at the beginning of the trial. This requirement should better enable jurors to understand the evidence and apply the proof to the applicable law. With this background, jurors will be able to put the proof in the context of the legal rules involved in the dispute.

Rule 51.03(2) provides the court the option of giving the bulk of the final jury instructions before closing argument. This procedure may improve the utility of counsel's closing argument by enabling the lawyers to make specific reference to the law at issue in the case. This option should greatly assist jurors in their efforts to apply the facts to the law. If such instructions are given before closing argument, the court should provide additional housekeeping instructions after that argument. The court may also repeat some of the substantive instructions already given before the closing argument.

New Rule 51.04 provides that *if* the judge in a civil case elects to reduce to writing the jury instructions specified in Rule 51.03(2), the judge is required provide jurors with one or more copies of the written jury instructions for use during deliberations. This provision is similar to Rule 30(c) of the Tennessee Rules of Criminal Procedure (requiring that the written instructions be provided to the jury), which has been part of Tennessee law for many years. Because written jury instructions can markedly increase the jurors' understanding of the often complex law they must apply in the case, trial judges are encouraged to reduce their jury instructions to writing and, pursuant to this rule, to provide the jury with the written instructions. The court is given discretion regarding how many copies to provide the jury. Although the better practice is for each juror to be given his or her own copy of the instructions, the rule permits the court to provide one or more copies but less than one per juror.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 62

STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

62.05. Bond for Stay.–

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(3) If the amount of a judgment is fully bonded as provided in subsection (1), the court upon motion may order the judgment creditor to remove any judgment lien from the register's office.

**Advisory Commission Comment**

Rule 62.05(3) is a procedure needed to prevent abuse when a judgment creditor unnecessarily files a judgment lien despite the judgment being fully bonded. Some trial judges have heretofore been sympathetic with a judgment debtor's plight but found no vehicle for relief.