

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 2

PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay and of unnecessary claims on the time of jurors.

**Advisory Commission Comment**

The new language at the end of the second sentence is designed to stress that the efficient use of jurors' time is a public interest that courts should consider in construing the Tennessee Rules of Criminal Procedure.

TENNESSEE RULES OF CRIMINAL PROCEDURE

RULE 15

DEPOSITIONS

(h) Definition of Unavailability.—As used in this rule, “unavailability of a witness” includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the declarant’s statement; or
- (2) Persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or
- (3) Demonstrates a lack of memory of the subject matter of the declarant’s statement; or
- (4) Is unable to be present or to testify at the hearing because of the declarant’s death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of the declarant’s statement has been unable to procure the declarant’s attendance by process or other reasonable means.

**Advisory Commission Comment**

Paragraph (h)(3) is new, making lack of memory a ground of unavailability in conformity with Evidence Rule 804(a)(3).

## TENNESSEE RULES OF CRIMINAL PROCEDURE

### RULE 17.1

#### PRETRIAL CONFERENCE

At any time after the filing of the indictment, presentment or information, the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial and, to the extent feasible, will minimize the time that jurors are not directly involved in the trial or deliberations. At the conclusion of the conference, the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or the defendant's attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and the defendant's attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel.

#### **Advisory Commission Comment**

The new language at the end of the first sentence 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 CRIMINAL PROCEDURE

RULE 24

TRIAL JURORS

(a) Examination.—The court shall cause the prospective jurors to be sworn or affirmed to answer truthfully the questions they will be asked during the selection process, identify the parties and their counsel, and briefly outline the nature of the case. 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 may put to the respective jurors appropriate questions regarding their qualifications to serve as jurors in the case and shall permit questioning by the parties for the purpose of discovering bases for challenge for cause and enabling an intelligent exercise of peremptory challenges. 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.

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(e) 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. For each additional juror to be selected, each side is entitled to one peremptory challenge for each defendant. 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, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors in the order in which they are called shall replace 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.

### **Advisory Commission Comment**

The added language of the new second sentence in Rule 24(a) gives counsel the right to make brief, non-argumentative statements near the beginning of the jury selection process. These 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.

Amended Rule 24(e), like the former version of the rule, provides for two alternative methods for selecting and impaneling additional jurors. Rule 24(e)(1), the first method, makes no 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 rule, 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 24(e)(2), the second method, provides for the selection of the twelve regular jurors and then the selection of the 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.

Each side is given one peremptory challenge for each additional juror. The amended rule 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 provides counsel with considerable flexibility in the exercise of peremptory challenges. (The former rule did not permit “backstriking.”)

# TENNESSEE RULES OF CRIMINAL PROCEDURE

## RULE 24.1

### JUROR INFORMATION

(a) 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.

(b) 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.

(c) 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 24.1(a) 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 24.1(b) 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 actual disposition is left to the court's discretion.

Rule 24.1(c) 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 is submitted to the judge 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 CRIMINAL PROCEDURE

## RULE 26.3

### 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**

This new rule 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. There are many possible methods that can be used pursuant to this rule. 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 criminal homicide case where both sides will present expert testimony on causation, jurors may benefit if the prosecution's causation experts testify, followed immediately by the defendant's causation experts. This procedure may give the jurors a better way of resolving the critical 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 CRIMINAL PROCEDURE

RULE 29.2

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 CRIMINAL PROCEDURE

RULE 30

INSTRUCTIONS

(a) Special Requests.—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. At the same time copies of such requests shall be furnished to adversary counsel. The court shall inform counsel of its proposed action upon the requests, and any other portion of the instructions concerning which inquiries are made, 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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(c) Character, Use, and Disposition of Instructions.—[Change the second sentence to read:]  
The written charge shall be read to the jury, and it shall be taken to the jury room by the jury when it retires to consider its verdict.

(d) Timing of Jury Instructions.—

(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 or after closing argument, in the court's discretion. All or part of such instructions given before closing argument may be repeated after closing argument. Additional instructions concerning organizational and related matters also may be given after closing argument.

### **Advisory Commission Comment**

Rule 30(a) deals with the timing of jury instructions. The omitted language in Rule 30(a) concerning jury instructions after final arguments has been replaced by new Rule 30(d)(2).

Amended Rule 30(c) corrects a spelling error; there is no substantive change.

Rule 30(d)(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 30(d)(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.