

TENNESSEE RULES OF EVIDENCE

RULE 404

CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE
CONDUCT; EXCEPTIONS; OTHER CRIMES

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(b) Other Crimes, Wrongs, or Acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

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

Advisory Commission Comment

The third condition for admitting other crimes, clear and convincing proof, has been required by case law before and after adoption of the Rules of Evidence. This principle was first enunciated in *Wrather v. State*, 179 Tenn. 666 (1943), reversing a mother's conviction for murdering her adult son by arsenic poisoning. Evidence that she killed her father-in-law and brother-in-law with arsenic was not clear and convincing. The Supreme Court again approved this standard in *State v. Parton*, 694 S.W.2d 299 (1985).

TENNESSEE RULES OF EVIDENCE

RULE 409.1

EXPRESSIONS OF SYMPATHY OR BENEVOLENCE

(a) That portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault that is part of, or in addition to, any of the above shall not be inadmissible because of this Rule.

(b) For purposes of this Rule:

(1) “Accident” means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) “Benevolent gestures” means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) “Family” means an injured party’s spouse, parent, grandparent, stepparent, child, grandchild, sibling, half sibling, adopted sibling, or parent-in-law.

Advisory Commission Comment

Rule 409.1 renders inadmissible certain statements and actions reflecting sympathy for persons injured in accidents. This Rule, like Evidence Rules 408, 409, and 410, is designed to encourage the settlement of lawsuits. It complements Evidence Rule 409, which makes inadmissible payment of medical and related expenses on the issue of liability. The underlying theory of Rule 409.1 is that a settlement of a lawsuit is more likely if the defendant is free to express sympathy for the plaintiff’s injuries without making a statement that would be admissible as an admission of a party opponent. Without this rule, a defendant’s statement such as “I am sorry that you have suffered so much from the accident” might well be admissible as an admission of a party opponent. Accordingly, defense counsel may advise against making such statements in order to avoid the

creation of harmful evidence. Yet a simple apology may go a long way toward making an injured party feel more comfortable with a nonjudicial settlement of the matter. This process is consistent with the modern focus on mediation and other methods of dispute resolution that seek to avoid a trial by facilitating a resolution acceptable to all parties.

The rule is similar to that enacted in Massachusetts (Mass. Ann. Laws ch. 233, § 23D) and California (West's Ann. Cal. Evid. Code § 1160). A Texas provision is also consistent with Rule 409.1. *See* Vernon's Tex. Stat. & Code Ann., Civ. Prac. & Remedies Code § 18.061.

Rule 409.1 embraces only civil cases involving an "accident." It is inapplicable in criminal cases. It also extends only to "benevolent gestures"; it does not exclude statements of fault.

TENNESSEE RULES OF EVIDENCE

RULE 501

PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Advisory Commission Comment

[Delete Tenn. Code Ann. §§ 33-10-301–304, repealed.]

[Add in place of the deleted sections:]

Tenn. Code Ann. § 33-3-114. EXCEPTIONS TO EVIDENTIARY PRIVILEGE OF MENTAL HEALTH PROFESSIONALS

Notwithstanding any evidentiary privilege, [sic] a qualified mental health professional may have, including §§ 24-1-207, 63-11-213, 63-22-114, and 63-23-107, the qualified mental health professional may be compelled to testify in:

(1) Judicial proceedings under this title to commit a person with mental illness, serious emotional disturbance, or developmental disability to treatment if the qualified mental health professional decides that the service recipient is in need of compulsory care and treatment; and

(2) In proceedings for which the qualified mental health professional was ordered by the court to examine the service recipient if the service recipient was advised that communications to the qualified health professional would not be privileged.

TENNESSEE RULES OF EVIDENCE

RULE 613

PRIOR STATEMENTS OF WITNESSES

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness.—Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 803(1.2).

Advisory Commission Comment

Paragraph (b) is amended to add the words “and until.” The effect is to incorporate the holding in *State v. Martin*, 964 S.W.2d 564 (Tenn. 1998): “extrinsic evidence remains inadmissible until the witness either denies or equivocates as to having made the prior inconsistent statement.”

Note that Rule 806 does not require a foundation before impeaching a hearsay declarant by inconsistent statement.

TENNESSEE RULES OF EVIDENCE

RULE 803

HEARSAY EXCEPTIONS

The following are not excluded by the hearsay rule:

* * * *

(25) Children's Statements.—Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation. Declarants of age thirteen or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

Advisory Commission Comment

Rule 803(25) is amended to extend the children's statements exception to some issues in a divorce action tried in circuit or chancery courts. Note that a condition precedent to admissibility in any court, including juvenile, is that "the circumstances indicate trustworthiness" of the hearsay.

Another change incorporates revisions in statutory citations.

TENNESSEE RULES OF EVIDENCE

RULE 804

HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability.—“Unavailability of a witness” includes situations in which the declarant:

* * * *

(6) For depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing.

Advisory Commission Comment

Paragraph (a)(6) is amended to restrict the 100 mile unavailability ground to depositions in civil, not criminal, trials.

TENNESSEE RULES OF EVIDENCE

RULE 902

SELF-AUTHENTICATION

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required as to the following:

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(11) Certified Records of Regularly Conducted Activity.—The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit of its custodian or other qualified person certifying that the record—

- (A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of and a business duty to record or transmit those matters;
- (B) was kept in the course of the regularly conducted activity; and
- (C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

Advisory Commission Comment

The business duty element of a foundation for the business records hearsay exception is inserted in Rule 902(11)(A) to conform to Rule 803(6).