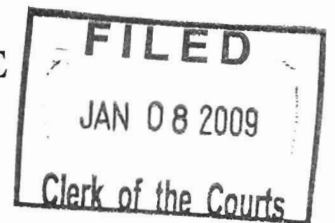


IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE



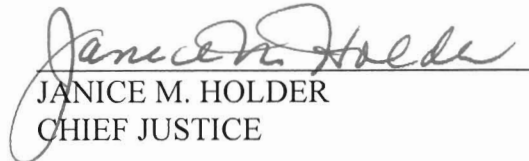
IN RE: **AMENDMENT TO TENNESSEE
 RULES OF EVIDENCE**

ORDER

The Court adopts the attached amendments effective July 1, 2009, subject to approval by resolutions of the General Assembly. The rules amended are as follows:

RULE 404 CHARACTER EVIDENCE NOT ADMISSIBLE TO
 PROVE CONDUCT; EXCEPTIONS; OTHER
 CRIMES
RULE 703 BASES OF OPINION TESTIMONY BY EXPERTS
RULE 803 HEARSAY EXCEPTIONS
RULE 804 HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE.

FOR THE COURT:


JANICE M. HOLDER
CHIEF JUSTICE

TENNESSEE RULES OF EVIDENCE

RULE 404

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

[Amend 404(a) to read as follows:]

(a) Character Evidence Generally.—Evidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused.—In a criminal case, evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same or, if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of Alleged Victim.—In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of Witness.—Evidence of the character of a witness as provided in Rules 607, 608, and 609.

2009 Advisory Commission Comment

If the accused attacks the character of the alleged victim, amended Rule 404(a)(1) allows the prosecution to prove the accused’s character for the same trait. This is an additional way the accused “opens the door” to character evidence.

TENNESSEE RULES OF EVIDENCE

RULE 703

BASES OF OPINION TESTIMONY BY EXPERTS

[Amend 703 to read as follows:]

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

2009 Advisory Commission Comment

The third sentence is new. Normally a jury should not be allowed to hear the reliable but inadmissible bases underlying an expert's opinion.

TENNESSEE RULES OF EVIDENCE

RULE 803

HEARSAY EXCEPTIONS

The following are not excluded by the hearsay rule:

* * * *

[Add the following new 803(26):]

(26) Prior Inconsistent Statements of a Testifying Witness.—A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:

(A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.

(B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.

(C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

2009 Advisory Commission Comment

Subsection (26) alters Tennessee law by permitting some prior inconsistent statements to be treated as substantive evidence. Many other jurisdictions have adopted this approach to address circumstances where witnesses suddenly claim a lack of memory in light of external threats of violence which cannot be directly attributed to a party, for example. This rule incorporates several safeguards to assure that the prior inconsistent statements are both reliable and authentic.

To be considered as substantive evidence the statement must first meet the traditional conditions of admissibility which include the procedural aspects of inconsistent statements as addressed in Rule 613. This reference also makes clear that only prior inconsistent statements, and not consistent statements, are within the ambit of this rule.

Assuming the inconsistent statement is otherwise admissible to impeach the testifying witness, the party may then seek to have the statement treated as substantive evidence by complying with the rule's other requirements. Other rules address authenticity of documents and recordings which clearly apply here. *See e.g.* Rule 1001. However, this rule contains additional express requirements regarding the form of the prior statement so that the jury is assured that the statement contains the actual "words" of the witness on a prior occasion. For example the prior statement must be an audio or video recorded statement. A "police report" or insurance investigator's "transcription" of the recorded statement would not qualify since it is not literally the witness's own words contained on audio or video media.

If not recorded, the prior statement can be in written form (created by the witness or by another) but then must be signed by the witness. The commission intends that the "signed" requirement must be equated with an actual signature as opposed to some email document which happens to have the witness's name on the address. Finally, the rule permits a prior statement to be treated as substantive evidence if given under oath.

The rule requires that the party seeking to have the statement treated as substantive evidence request a hearing out of the presence of the jury to satisfy the judge "by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness." This is to prevent fraud such as where a parent tape records a child after training the child to say "bad things" about the other parent in anticipation of a custody dispute. Rules 703 (Bases of Opinion Testimony by Experts) and 803(6) (Records of Regularly Conducted Activity) contain similar judicial gate-keeping requirements.

TENNESSEE RULES OF EVIDENCE

RULE 804

HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(b) Hearsay Exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

* * * *

[amend 804(b)(2) to read as follows:]

(2) Statement Under Belief of Impending Death.—In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.

2009 Advisory Commission Comment

The revised language makes admissible a dying declaration even though the declarant is not the victim of the homicide being prosecuted. The exception would apply, for example, where there were multiple victims but the prosecutions were severed. The revision also admits dying declarations in civil cases where relevant and material.