Tennessee Judicial

Benchbook

2014 Edition

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PREFACE

This benchbook is designed to be a general guide for judges with civil and/or criminal jurisdiction. Although the benchbook is an excellent resource, judges should not rely exclusively on it. The benchbook is designed to guide judges to the relevant rules, statutory provisions, and case law, and should be considered as a starting point for additional research.

HOW TO USE THIS BOOK

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TENNESSEE JUDICIAL BENCHBOOK

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CHAPTER 1

ETHICS

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1.01 GENERAL

It has been said that "justice *is* as it is *perceived to be*." Thus, judges must be prepared to serve as role models for the justice system on and off the bench. To the extent judges are viewed as ethical and honest, the system is more likely to be viewed as ethical and honest. Conversely, if judges seem injudicious, public trust and confidence in the justice system will falter.

A judge's professional and personal activities are affected by the role he or she has assumed. Judges often must scrutinize their attendance at public or political gatherings. They must monitor their expressions of personal opinion when the subject might affect the citizen's view of the justice system. Virtually everything a judge does, on and off the bench, must be re-examined in light of the high ethical standards required of members of the judiciary.

Above all, judges must strive to maintain independence, integrity, and impartiality. Each of these ethical mandates requires the judge to be mindful of situations in which disqualification is required, when conflicts might affect a judge's ruling, and when politics might interfere with the appropriate disposition of a case. Thus, judges must be aware of disqualification standards. They must recognize that conflicts may arise because of personal, financial, or family relationships. Judges must also remain cognizant of the limits placed on their political activities both during and after a campaign. More subtle ethical issues faced by judges include whether judges can serve as employment or educational references, whether judges may raise funds for charitable organizations, and whether judges can engage in extra-judicial employment. Assistance in answering all of these

questions can be found in the multiple resources governing judicial conduct in the state of Tennessee.

1.02 GOVERNING STANDARDS

The basic standards governing the conduct of judges are found in Article 6, Section 11 of the Tennessee Constitution, Title 17 of the Tennessee Code, and the Code of Judicial Conduct as adopted and amended by the Supreme Court of Tennessee. *See* Tenn. Sup. Ct. R. 10.

A. Constitutional standards

Article 6, Section 11 of the Tennessee Constitution provides for the mandatory recusal of judges from cases in which they are interested, related to a party, or in which they have either served as counsel or as judge in a lower court, except with the consent of all the parties. A separate provision, Article 6, Section 9, prohibits judges from commenting on the evidence in a jury trial.

B. Statutory and rule standards

1. The Tennessee Board of Judicial Conduct

The body designated to monitor and enforce judicial ethics is the Tennessee Board of Judicial Conduct, a panel of ten judges from various courts, three lawyers, and three lay members. The Board is given the power to investigate, hear, and rule upon complaints filed against judges. T.C.A. § 17-5-201. The Board has the authority to appoint disciplinary counsel, whose duties include receiving, screening, and investigating complaints against judges, making recommendations to investigative panels of the Board as to disposition of complaints, and filing and prosecuting formal charges. T.C.A. § 17-5-301.

Judicial offenses of which the Board of Judicial Conduct may take cognizance are set out in T.C.A. § 17-5-302. If a formal charge of misconduct is brought against a judge, the Board of Judicial Conduct, through a hearing panel, may dismiss the charges at the conclusion of the hearing or impose sanctions. T.C.A. § 17-5-309.

The Board of Judicial Conduct's investigatory and adjudicatory powers are set out in detail in Tennessee Code Annotated, Title 17, Chapter 5. The Board is required to file certain information concerning complaints received and the disposition of such complaints with the Chief Clerk of the House of Representatives and the Chief Clerk of the Senate on a monthly basis, with additional reporting requirements to be filed quarterly and annually. T.C.A. §17-5-207.

A decision of the Board of Judicial Conduct is appealable to the Supreme Court within thirty (30) days of the entry of judgment by the Board of Judicial Conduct. The appeal is a de novo review of the record made before the Board of Judicial Conduct with

no presumption of correctness as to the Board's findings or conclusions. The Supreme Court decision is final, except that in the event the Supreme Court affirms a recommendation of removal, the question of removal must be transferred to the legislature for final determination. T.C.A. §§ 17-5-310, 311.

2. Statutory Provisions

Two additional statutes impose obligations upon trial judges. One requires judges to hold court at regular times unless prevented by sickness or necessity from doing so. The other provides that failure to open court within the first three days of each regular term without sufficient excuse, according to the statute, is punishable by a deduction of $100 salary. T.C.A. §§ 17-1-201, 202.

3. Supreme Court Rules

The Code of Judicial Conduct, found in Rule 10 of the Tennessee Supreme Court Rules, establishes standards for the ethical conduct of judges. A violation of the code may result in a charge of misconduct by the Board of Judicial Conduct. T.C.A. § 17-5-302(3).

The code, which was revised effective July 1, 2012, contains four canons, which are broad statements for ethical conduct. Under each canon are specific rules to provide clarity to specific areas of judicial conduct. The 2012 revisions added new sections to the beginning of the Rule titled "Preamble," which provides an overview of the need and purpose of the Code of Judicial Conduct, "Scope," which provides additional guidance in the interpretation and application of the Code of Judicial Conduct, "Terminology," which provides definitions for certain terms used in the Code of Judicial Conduct, and "Application," which establishes various types of judges and the applicability of the Code of Judicial Conduct to each defined type of judge. The Application section will be of particular interest to both Continuing Part-Time Judges and Pro Tempore Part-Time Judges. The canons, rules, and application sections are authoritative and are intended to be binding upon judges. The commentary, conversely, is offered as an explanation of the canons and rules.

C. Other Supreme Court Rules

Rule 11 of the Rules of the Tennessee Supreme Court provides for supervision of the judicial system. Provisions of that rule applicable to trial judges are those that pertain to timeliness of decisions. Cases cannot be held under advisement for more than sixty (60) days. Matters that delay the trial date or final disposition must be decided in thirty days. Tenn. Sup. Ct. R. 11, §III(c). The rule provides a method for applying to either the presiding judge or the supervising circuit justice to force compliance with the deadlines. Tenn. Sup. Ct. R. 11, §III(c).

Additionally, some portions of Supreme Court Rule 8, Rules of Professional Conduct, apply directly to judges.

1.03 RESOURCES

The Supreme Court has established a Judicial Ethics Committee charged with issuing formal opinions upon the request of any judge governed by the Code of Judicial Conduct. The committee's membership and responsibilities are set out in Supreme Court Rule 10A. An indexed compilation of Opinions issued by the Judicial Ethics Commission is available from the Administrative Office of the Courts.

1.04 TRANSITION FROM LAWYER TO JUDGE

It is clear that full-time judges cannot practice law. This absolute prohibition for trial judges appears in a statute passed by the Tennessee Legislature in 1817 which provides in relevant part, "[j]udges and chancellors are prohibited from practicing law in any of the courts of this state." T.C.A. § 23-3-102. *See also*, T.C.A. § 17-1-105.

Canon 3, Rule 3.10 provides that "[a] judge shall not practice law." Excluded from the "practice of law" are *pro se* representations and uncompensated drafting and reviewing of documents for family members, or advising family members. Newly appointed or elected judges, then, must discontinue the practice of law. The Code of Judicial Conduct and statutory law are specific as to this obligation. "A newly elected or appointed judge can practice law only in an effort to wind up his or her practice, ceasing to practice law as soon as reasonably possible and in no event longer than 180 days after assuming office." S. Ct. R. 10, RJC 3.10. No new cases can be accepted. *See also*, T.C.A. §§ 17-1-105, 23-3-102. Continuing Part-Time Judges and Pro Tempore Part-Time Judges should note the limitations on the application of this rule found in the Application section of the Code of Judicial Conduct.

1.05 ADJUDICATIVE RESPONSIBILITIES

A. Generally

Canon 2 begins with Rule 2.1, which makes the straight-forward observation that the performance of a judge's official duties takes "precedence over all the judge's other activities." Judges' duties are adjudicative, administrative, and disciplinary. In the area of adjudicative responsibilities, a judge is required to promptly, efficiently, and fairly hear and decide maters assigned, be faithful to the law and competent in it. Additionally, a judge must exercise judicial independence and "shall not be swayed by partisan interests, public clamor, or fear of criticism." S. Ct. R. 10, RJC 2.4.

Rule 2.6 admonishes judges to accord to every person or the person's lawyer the "right to be heard according to law." S. Ct. R. 10, RJC 2.6. The right to be heard by a constitutionally qualified judge is a constitutional right in Tennessee which can only be waived personally by a party. *State v. Blackmon*, 984 S.W.2d 589 (1998). The waiver must clearly appear on the record.

It is a judge's responsibility to maintain order and decorum, be patient, dignified and courteous to all who come before the judge, perform judicial duties without bias or prejudice, and require lawyers to refrain from manifesting bias and prejudice. S. Ct. R. 10, RJC 2.3 - 2.6.

B. *Ex Parte* Communications

A judge shall not initiate, permit, or consider *ex parte* or other extra-judicial communications concerning a pending or impending proceeding. S. Ct. R. 10, RJC 2.9. Exceptions to the *ex parte* contact rule are contacts that concern scheduling, administrative or emergency matters not dealing with the merits of a case. Even under these circumstances, however, the judge has to reasonably believe that no party will gain an advantage as a result of the contact and must promptly notify the other parties and allow response. *Id.* A judge may engage in *ex parte* communications when the law expressly allows. *Id.*

A judge does not violate the fair hearing or *ex parte* communication concerns by seeking the "advice of a disinterested expert on the law," provided the judge "gives notice to the parties" and affords them a "reasonable opportunity to respond." S. Ct. R. 10, RJC 2.9(A)(2). A judge may consult with other judges or with court personnel whose duties require them "to aid the judge in carrying out the judge's adjudicative responsibilities." S. Ct. R. 10, RJC 2.9(A)(3).

C. Public Comment

Judges are frequently asked questions about their decisions or pending litigation. Judges are not prohibited from making public statements in the course of their official duties or from explaining court procedures. S. Ct. R. 10, RJC 2.10(D). They are prohibited and are required to prohibit their staff, however, from making public comments about pending or impending proceedings that "might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing". S. Ct. R. 10, RJC 2.10(A)-(C). A judge should exercise great caution in providing comment about a case to make certain the comment will not affect the fairness of the proceeding.

D. Disqualification

The right to be heard can only be meaningful if the hearing is before a fair and impartial judge. In recognition of this fundamental right, the Tennessee Constitution provides that no judge may sit in a case in "which [the judge] may be interested;" in which either of the parties is "connected with [the judge] by affinity [or] consanguinity, within such degrees as may be prescribed by law;" in which the judge "may have been of counsel;" or in which the judge "may have presided in any inferior Court." Tenn. Const. Art. 6, Section 11.

The Code of Judicial Conduct adds to the constitutional and statutory disqualification provisions by a general disqualification of a judge whose “impartiality might reasonably be questioned" or a judge who has either a “personal bias or prejudice” against a party or lawyer or personal knowledge of disputed facts. S. Ct. R. 10, RJC 2.11(A). In addition to this general rule of disqualification is a list of specific interests and relationships that require disqualification. S. Ct. R. 10, RJC 2.11.

1. Disqualification due to questioned impartiality

Often the answer to whether the judge should be disqualified is less than clear. For example, should a judge preside over a case in which a former law partner or associate is involved? Should a judge hear a case against a bank where a family member has a loan? Should a judge continue to hear a case in which the judge has been verbally abused by a defendant during the course of a long and difficult criminal trial?

The test in these circumstances is found in the Code’s requirement that a judge should be disqualified when the judge's "impartiality might reasonably be questioned." The judge should ask: would an objective person, knowing all the relevant facts, reasonably question my impartiality?

The test for disqualification is not a subjective one, but an objective one. Thus, even an appearance of impropriety, absent actual impropriety should result in the judge’s disqualification. *See Kinard v. Kinard*, 986 S.W.2d 220 (Tenn. App. 1998); *Alley v. State*, 882 S.W.2d 810 (Tenn. Crim. App. 1994).

In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the United States Supreme Court held that a judge who had endured a series of personal attacks during the course of a criminal trial should have stepped aside and allowed another judge to hear the charge of contempt against the defendant. Even though the judge could have addressed each instance of contempt as it occurred, the Court held that, under the Due Process Clause, the substitution of another judge would have avoided any possibility of reprisal by the offended judge or of injury to the authority of the court. *Id.*

2. Disqualification due to family relationships

Under the Constitution, a judge is disqualified when related to a party within the sixth degree of affinity or consanguinity computed by the civil law. Tenn. Const. Art.VI, § 11. *See also* T.C.A. §17-2-101(2). A separate statutory disqualification prohibits a judge from sitting in a felony criminal case in which the victim upon whose property the felony was committed is related to the judge within the sixth degree of affinity or consanguinity. T.C.A. §17-2-101(5).

Under the judicial code, a judge is disqualified if the judge knows that the judge, the judge’s spouse, child, or any other member of the judge’s household living with the judge has an economic interest in the subject matter in controversy or in a party. A

judge is also disqualified by the Code of Judicial Conduct when the judge, judge's spouse, or any person within the third degree or relationship to either the judge or spouse is a party (or an officer, director, or trustee of a party), a lawyer in the case, has more than a de minimus interest in the outcome of the proceeding, or, to the judge's knowledge, is likely to be a material witness. S. Ct. R. 10, RJC 2.11(A)(2)-(3).

3. Disqualification due to financial interests

A judge's disqualification from a case is mandatory if the judge, the judge's spouse, or the judge's minor child "residing in the household" has an economic interest in the subject matter in controversy or in a party. S. Ct. R. 10, Canon 3E(1)(c). An economic interest includes more than de minimus ownership, an equitable interest, or certain relationships as officers, directors, and active participants. S. Ct. R. 10, RJC 2.11(A)(2)-(3). The Code of Judicial Conduct places a duty on every judge to "keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household." S. Ct. R. 10, RJC 2.11(B).

4. Remittal of disqualification

In the event the Code suggests that a judge should be disqualified under Canon 3E, the judge may disclose the reason for the disqualification on the record and ask the parties to consider, out of the judge's presence, whether to waive disqualification. If all parties agree to waive the disqualification, the agreement shall be incorporated in the record and the judge may participate in the proceeding. S. Ct. R. 10, RJC 2.11(C). This remittal of disqualification procedure does not apply when the disqualification is based on the judge's bias or prejudice against a party or lawyer. Under those circumstances, disqualification cannot be waived. *Id.*

1.06 DISCIPLINARY RESPONSIBILITIES

Rule 2.15 sets out a judge's responsibility to report potential ethical violations of other judges of lawyers. S. Ct. R. 10, RJC 2.15. In addition, a judge has a duty to take appropriate action with regard to a lawyer or another judge whom the judge reasonably believes to be impaired by drugs or alcohol, or by a mental, emotional or physical condition. S. Ct. R. 10, RJC 2.14. Such action may include a confidential referral to a lawyer or judicial assistance program. *Id.*

1.07 ADMINISTRATIVE RESPONSIBIITIES

A judge is required to make appointments in a manner that is impartial and on the basis of merit, avoiding nepotism, favoritism and unnecessary appointment. S. Ct.

R. 10, RJC 2.13(A). Similar standards are applicable to community resources that may be required as a condition or requirement of litigation. S. Ct. R. 10, RJC 2.13(D).

Administrative duties associated with supervising court staff or court officials require that the judge ensure that such persons act in a manner consistent with the judge's obligation under the Code of Judicial Conduct. S. Ct. R. 10, RJC 2.12(A). Should a judge serve as presiding judge or have other supervisory authority for the performance of other judges, then the supervising judge is required to take reasonable measures to ensure that the supervised judges properly discharge their judicial duties, including promptly disposing of matters before them. S. Ct. R. 10, RJC 2.12(B).

1.08 EXTRA-JUDICIAL ACTIVITIES

In addition to dictating standards for on-the-bench behavior, the Code of Judicial Conduct also provides standards which must be followed when a judge is not acting in a judicial capacity. A judge is required to conduct extra-judicial activities so as to assure that they minimize the risk of conflict with judicial office. S. Ct. R. 10, Canon 3. Any extra-judicial activity should not interfere with the proper performance of judicial duties, lead to frequent disqualification of the judge, or undermine judicial independence or impartiality. S. Ct. R. 10, R. 3.1

Canon 3 provides specific guidance in the following areas: appearing before governmental bodies (3.2), testifying as a character witness (3.3), appointments to governmental positions (3.4), use of non-public information (3.5), affiliation with discriminatory organizations (3.6), participation in civic or other public organizations (3.7), appointments to serve as a fiduciary (3.8), service as a mediator or arbitrator (3.9), practice of law (3.10), financial activities (3.11) and compensation, reimbursement and reporting requirements related to compensation (3.12 – 3.15). S. Ct. R. 10, RJC 3.2 – 3.15.

1.09 POLITICAL ACTIVITY

In an effort to remove judges from the influence of politics, the Code of Judicial Conduct provides in Canon 4 that a judge, or candidate for judicial office, is prohibited from participating in political or campaign activity that is inconsistent with the independence, impartiality and integrity of judicial office. S. Ct. R. 10, Canon 4. Therefore, a judge may not or hold office in a political organization, give speeches on behalf of a political organization, publicly endorse or oppose another candidate for any public office, solicit funds or pay an assessment to a political organization, or make a contribution to a political candidate. S. Ct. R. 10, RJC 4.1. The prohibition against contributing to a political candidate is qualified by language in Rule 4.2, which allows a judge or judicial candidate to purchase tickets for and attend political gatherings, identify himself as a member of a political party, and make contributions to a political

organization or candidate up to the limitations established in T.C.A. § 2-10-301 *et seq.* S. Ct. R. 10, RJC 4.2.

Although many of Tennessee's judges must seek election to office, the Code of Judicial Conduct carefully proscribes the conduct of those seeking judicial positions. Judges, or those seeking judicial office are required to "act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary." S. Ct. R. 10, RJC 4.2(A)(1). Compliance with all campaign, campaign finance and fund raising laws and regulations is also required. S. Ct. R. 10, RJC 4.2(A)(2).

Canon 4 provides specific guidance in the following areas: 1) general requirements (including judicial candidates) (4.1), political and campaign activities (4.2), activities of candidates to appointed office (4.3), campaign committees (4.4) and activities of judges who become candidates for non-judicial office. (4.5).

1.10 COMPENSATION FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES

A judge may receive compensation for permissible extra-judicial activities. All such compensation, however, must be reported. A statute requires that all judges file annual financial disclosure statements with the Secretary of State. *See* T.C.A. §8-50-502 *et seq*. The Administrative Office of the Courts furnishes the annual disclosure forms. Reimbursements in excess of actual expenses incurred should be treated as compensation and reported as well.

1.11 USE OF STATUS OF OFFICE

A judge may not use the status or prestige of office to advance the judge's private interests or the private interests of others. The comments to this rule state specifically that judicial letterhead "must not be used for conducting a judge's personal business." S. Ct. R. 10, RJC 1.3. However, in recognition of the fact that judges are often in a position to lend valuable information about the employment potential of others, the comments further provide that a judge may serve as a reference or provide a letter of recommendation based on the judge's personal knowledge. *Id.* Judges may also participate in the judicial selection process by providing information on the qualities and abilities of a judicial candidate to the appointing authority or screening committee. *Id.*

1.12 JUDICIAL IMMUNITY

Judges are not liable for their judicial acts, even if those acts were allegedly done maliciously or corruptly so long as the acts were not in clear absence of all jurisdiction. Immunity for judicial acts is absolute. Immunity for non-judicial acts, however, is

qualified so that a judge whose non-judicial acts violate clearly established law may be liable for damages that result from the acts. In order to determine whether absolute or qualified immunity exists for a judge's acts, the question is whether the acts in question were a part of or integral to the judicial decision making process. If so, absolute immunity exists. If, instead, the acts were administrative or not part of a judge's function at all, qualified immunity only will apply. Tenn. Op. Atty. Gen., No. 99-001 (Jan. 19, 1999); *Barrett v. Harrington*, 130 F.3d 246 (6th Cir. 1997), *cert. denied,* 523 U.S. 1075 (1997) (holding that a general sessions judge is absolutely immune for requesting investigation of a litigant believed to be a threat to the judge, but not immune for comment to the media about the litigant).

CHAPTER 2

COURTROOM SECURITY

Contents **Section**

2.01 SCOPE

Courts should be conducted in dignified and secure surroundings. A courthouse should be designed and operated in a manner that limits the opportunities for violence and disruption. Plans should be in place to deal with security emergencies quickly and safely. Security programs, however, should not interfere with the maintenance of courtroom dignity and respect for individual rights.

2.02 SECURITY STANDARDS

The Tennessee Judicial Conference and Tennessee General Sessions Judges Conference adopted minimum security standards to promote the security and safety of the judiciary, court personnel, and the public. The conference recognized that the cost of these standards is more than offset by the security and protection that the standards offer against bodily injury, loss of life, and destruction of property. They are as follows:

Minimum Courtroom Security Standards

(1) Silent bench panic button connected directly to the sheriff's department or police department.
(2) A bullet-proof bench.
(3) Availability of an armed, uniformed guard (court officer) in each courtroom during court sessions.
(4) Court security training sessions for court officers.
(5) Hand-held detectors (minimum of two) or magnetometers in each county to assure the safety in each courthouse or courtroom.

2.03 SECURITY PROCEDURES

The Tennessee Judicial Conference and Tennessee General Sessions Judges Conference have also adopted minimum security procedures.

They are as follows:

Minimum Courtroom Security Procedures

(1) Contact liaison on court security in the state court administrator's office for information on court security.
(2) Conduct periodic security evaluations in each courtroom.
(3) Prior to any new courtroom construction or courtroom renovation, the state court administrator should be consulted on matters relating to court security.
(4) Medical and family data on each judge to be kept in the clerk's office including blood type, allergies or reactions to medications, and any other type of medical problems that should be known in case of an emergency, and the names, addresses, and telephone numbers of the next of kin.
(5) An emergency procedures plan for each courtroom and judge's chambers for incidents involving hostage taking, fires, bomb threats, general evacuation and power failure or other sudden emergencies to be made known to all court personnel.
(6) Establish a courtroom security plan that covers everything from firearm exhibits to who has courtroom keys.
(7) Establish well-defined procedures for the transportation and handling of prisoners. The transportation of prisoners through areas where the public is present should be avoided. A holding cell should be provided convenient to the courtroom if the jail is not convenient.
(8) A mobile security plan or team should be available for trials that are perceived as being extremely high risk.
(9) All judicial staff employees should receive an orientation on courtroom security.

2.04 LEGISLATIVE REQUIREMENTS

State law requires that each county establish a court security committee. The committee is required to examine the facilities and determine the security needs for the courtrooms. After examination, the committee is required to review the standards for security and procedure outlined by the Tennessee Judicial Conference and report its findings each year to the county legislative body and the Administrative Office of the Courts. County legislative bodies are directed to consider the security needs in preparing their budgets and are required to report action taken to meet the security needs to the Administrative Office of the Courts each year. The Administrative Office of the Courts must then report on each county's compliance to the General Assembly each year. T.C.A. § 16-2-505(d)(2), (3), (4).

The legislature passed a law, effective July 1, 2008, which requires deputy sheriffs newly assigned to courts to provide courtroom security to complete 40 hours of basic training in courthouse security within 12 months of assignment to the courtroom security detail. Further, the legislation requires that each year after the initial 40-hour training is completed, deputies assigned to provide courtroom security must complete a minimum of 16 hours of training specific to courthouse security (The Peace Officer Standards and Training Commission must approve this training). T.C.A. § 5-7-108(a)(2).

2.05 THE JUDGE AND COURTROOM SECURITY

A judge must exercise caution when establishing obvious and heightened security measures for individual cases, particularly those tried by a jury. While the judge must take appropriate steps to assure that the courtroom is safe, judges should guard against making assumptions about security needs based solely on the background of a particular party. If the judge is alerted or becomes aware of the need for heightened security measures based on some objective factors or if some overt sign of danger is observed, the judge should impose special security measures. If possible, the judge should avoid security measures that indicate to the jury that a party is dangerous and/or cause the jury to prejudge the party.

The nature of the case or information about the case may sometimes cause a judge to regulate passage into and out of the courtroom. The judge may want to limit the times at which people can exit and enter the courtroom and may want to limit the number of spectators to the number of available seats. In all such circumstances, the judge must be prudent and fair in the selection and operation of the procedures used and must also assure that the individuals charged with implementing the procedures understand this necessity.

Judges who have a handgun carry permit are authorized to carry a weapon while in the actual discharge of official duties as a judge. T.C.A. § 39-17-307.

2.06 THE JUDGE AND THE COURT OFFICER

A judge is often best equipped to decide the extent to which security measures should be adopted to prevent disruption of the trial, harm to those in the courtroom, escape of the accused, and the prevention of other crimes. If special security measures are required in a particular case, those measures and the reasons for their necessity should be described completely on the record.

Under Tennessee law, the sheriff is responsible for court officer duties unless the county legislative body appoints someone else to perform them. T.C.A. § 5-7-108. Judges should thoroughly discuss routine security measures with their court officers. In the event the need arises for additional security measures, the judge should fully inform the court officer.

2.07 GENERAL SUGGESTIONS

The security and privacy of judges may be protected by isolating their chambers and access ways including parking lots, building entrances, corridors, and elevators. The removal of names from entrance ways, parking places, and house directories may be employed as a precautionary measure. Facilities for jurors should isolate the jurors from lawyers, witnesses, parties, and the media.

2.08 COURTROOM SECURITY COSTS

Statutory authority exists to collect monies earmarked for courtroom security. These collections come from two different types of court costs. First, T.C.A. § 8-21-401(i)(3) requires that a court cost of $7.00 be collected for continuances. Of the $7.00 continuance fee, $2.00 is earmarked for use by the local government for courtroom security. The statute requires that this $2.00 continuance fee be taxed for each continuance and collected at the conclusion of the case. Tenn. Code Ann. § 8-21-401(i)(3). Second, effective July 1, 2008, local governing bodies are authorized to adopt a litigation tax of $25.00 for all civil and criminal cases. Proceeds of this litigation tax are to be used for courtroom security. T.C.A. § 67-4-601(b)(6). However, effective July 1, 2012, this litigation tax may also be used "for the purpose of obtaining and maintaining software and hardware associated with collecting, receiving and maintaining records for law enforcement agencies including county sheriff offices, jails and municipal or metropolitan police departments." T.C.A. § 67-4-601(b)(7)(B). This may reduce the amount of money available to use for court security.

CHAPTER 3

DISQUALIFICATION AND SUBSTITUTION OF JUDGES

Contents **Section**

3.01 GROUNDS OF LEGAL INCOMPETENCY AND DISQUALIFICATION PROCEDURES

A. Grounds for Disqualification

Judicial incompetency refers to the lack of ability, legal qualification, or fitness to discharge the required duties of a judge. Unless the parties consent, no judge is competent to sit when the judge:

(a) has an interest in the cause;
(b) is connected with any party, or if a felony, connected to the victim, by affinity or consanguinity within the sixth degree by civil law;
(c) has been of counsel in the cause;
(d) has presided over the same cause in a lower court; or
(e) In criminal cases for felony, where the person upon whom, or upon whose property, the felony has been committed, is connected with the judge or chancellor by affinity or consanguinity within the sixth degree, computing by the civil law.

T.C.A. § 17-2-101; Tenn. Const. Art. 6 § 11.

The Code of Judicial Conduct also provides guidance regarding disqualification. S. Ct. R. 10, RJC 2.11. A separate statute provides that upon a party's request, a judge or chancellor must transfer a case in which the judge or chancellor is interested to any court in an adjoining district or division "which such adverse party may choose . . . ." T.C.A. § 20-4-208(a). Where the judge or chancellor is incompetent for any other reason, upon motion of either party, the case must be transferred to the nearest court having jurisdiction of such cases where the judge does not suffer from the same incompetency. T.C.A. § 20-4-208(b).

Blanket disqualification because one of the parties happens to be a lawyer is not listed or contemplated by the canons as a basis for recusal. Judicial Ethics Committee's Opinion No. 91-5.

B. Disqualification Procedures

The Tennessee Supreme Court adopted a new rule concerning the disqualification or recusal of judges that became effective on July 1, 2012. Supreme Court Rule 10B establishes procedures for seeking disqualification or recusal of judges of courts of record, appellate court judges, judicial officials for courts other than courts of record, and an expedited appeal process for decisions on motions for recusal or disqualification. *See* S. Ct. R. 10B.

1. *Courts of Record*

A party may file a motion seeking the disqualification or recusal of a judge of a court of record, or a court acting as a court of record (e.g., a general sessions court exercising domestic relations jurisdiction, etc.), supported by a sworn affidavit that states all personal knowledge relating to the motion. The motion should state all factual and legal grounds in support of disqualification of the judge and include an affirmation that the motion is not made for any improper purpose. A party represented by counsel may not file a pro se motion for recusal or disqualification. S. Ct. R. 10B, § 1.01. While the motion is pending, the judge whose disqualification is sought is not permitted to take any action on the case, except for good cause, which must be stated in the order in which such action is taken. S. Ct. R. 10B, § 1.02. The judge must "act promptly" on the motion, entering a written order granting or denying the motion. When denying the motion, the order shall include the grounds upon which the motion is denied. S. Ct. R. 10B § 1.03. When a judge recuses from a case, whether by granting a party's motion or upon the Court's own initiative, the recusing judge shall not participate in selecting his or her successor unless all parties agree to allow the judge to participate. If the parties agree, the judge may seek interchange. Otherwise, the presiding judge of the judicial district may enter an interchange order. If such an interchange cannot be obtained or the presiding judge is the recusing judge, the presiding judge shall request a designation by the Chief Justice. S. Ct. R. 10B, § 1.04.

2. *Appellate Court Judge or Supreme Court Justice*

The process for seeking the disqualification or recusal of a Judge on the Court of Appeals, Court of Criminal Appeals or a Justice of the Supreme Court is similar to process for seeking the disqualification or recusal of a judge of a court of record. A motion stating factual and legal grounds for disqualification, supported by a sworn affidavit of personal knowledge and certifying that the motion is not filed for an improper purpose must be filed with the appropriate court. A party represented by counsel may not file a pro se motion for recusal or disqualification. S. Ct. R. 10B, § 3.01. The judge or justice must "act promptly" to enter a written order denying or granting the motion, stating specific grounds if the motion is denied. S. Ct. R. 10B, §§ 3.02, 3.03.

3. *Judicial Officers other than Judges of a Court of Record*

The process for seeking the recusal or disqualification of a judicial official that presides over a tribunal that is not a court of record or an appellate court is similar to the process utilized for judges of courts of record and appellate court judges and justices. The process set out in S. Ct. R. 10B, § 4 applies to general sessions courts (when not exercising jurisdiction that belongs to a court of record), municipal courts, judicial

commissioners, magistrates, masters and other judicial officers. One significant difference in the process for these types of officials is that the motion for recusal or disqualification may be made either orally or in writing. In either case, the motion should be supported by factual and legal grounds for the disqualification and certification that the motion is not being made for an improper purpose. A party represented by counsel cannot make a pro se motion for recusal or disqualification. S. Ct. R. 10B, § 4.01. A judicial officer is not permitted to make further orders in the case except for good cause stated in the order taking action, while the motion for recusal is pending. S. Ct. R. 10B, § 4.02. The judicial officer must "act promptly" to enter a written order denying or granting the motion. A notation on the warrant, citation or other pleading is sufficient to meet the written order requirement. S. Ct. R. 10B, §4.03.

4. *Appeals of Orders Denying a Motion for Recusal*

An appeal may be sought as of right from an order denying a motion for recusal or disqualification in a court of record. An accelerated interlocutory appeal may be sought by filing a petition for recusal appeal in the appropriate appellate court within fifteen days of the trial court's entry order. An appeal on the recusal motion may also be sought at the conclusion of the case. However, the appeal is the exclusive method of appellate review of any issue concerning the denial of a motion for recusal or disqualification. S. Ct. R. 10B, § 2.01. The Supreme Court Rule establishes the requirements for the contents of the petition and the filing of an appellate bond. S. Ct. R. 10B, § 2.02. The trial court proceedings are not automatically stayed by the filing of an appeal. However, either the trial court or appellate court may issue a stay upon the motion of a party or the Court's own initiative. S. Ct. R. 10B, § 2.04. The appellate court may find that the petition and supporting documents are sufficient to require no answer from the other parties and act summarily on the appeal, order the other parties file an answer, or require further briefing by the other parties pursuant to a schedule set by the court. S. Ct. R. 10B, § 2.05. The appellate court may act without oral argument, reviewing the record *de novo*. Orders on the appeal must state with particularity the basis for the ruling. S. Ct. R. 10B, § 2.06. A decision by the appellate court on the issue of disqualification or recusal may be appealed to the Supreme Court by permission, and will be reviewed de novo. S. Ct. R. 10B § 2.07.

When appealing the denial of a motion for recusal or disqualification of a judge of Court of Appeals or Court of Criminal Appeals, the party may file a motion seeking *de novo* review by the other judges of the court within fifteen days of the order. If the motion for review is denied, an accelerated appeal as of right lies to the Tennessee Supreme Court and may be sought within fifteen days of the denial of review. S. Ct. R. 10B, § 3.02.

An appeal from the denial of a motion for recusal or disqualification of a justice of the Supreme Court, the party may file a motion, within fifteen days of the order of denial, seeking a *de novo* review of the order by the remaining justices of the Supreme Court. S. Ct. R. 10B, § 3.03.

Appeals from other judicial officials depend upon the forum of the court where the motion for recusal or disqualification is sought. The laws applicable to appeals from the forum court are applicable to appeals of the order on the motion for recusal. S. Ct. R. 10B, § 4.04.

5. *Ethical Complaints*

The provisions of Tennessee Supreme Court Rule 10B do not affect the right of any person to file an ethical complaint against a judge with the Board of Judicial Conduct. Such complaints must be filed pursuant to the process established by Title 17, Chapter 5, Tennessee Code Annotated and the Rules of Procedure adopted by the Board of Judicial Conduct. S. Ct. R. 10B, § 5.

3.02 SPECIAL JUDGES

A. Trial Judges

When a judge of a trial court is incompetent to try a case, fails to attend, or is unable to hold court, the following procedure shall be followed, in the sequence designated, for the selection of a substitute judge:

1) The judge shall seek to interchange with another trial court judge (the judge cannot participate in selecting the judge's successor under certain circumstances);

2) The judge shall apply to the presiding judge of the judicial district to effect an interchange with an active judge of that judicial district;

3) The presiding judge of the judicial district shall effect an interchange with a judge from another judicial district by requesting assistance from other presiding judges;

4) The presiding judge of the judicial district shall request from the AOC the designation of a judge by the chief justice.

Tenn. Sup. Ct. R. 11, § VII(c).

Only if the procedures set forth above fail to provide a judge to preside over the docket or case will a judge appoint a lawyer to preside as a substitute judge. Such appointments must conform to the following requirements:

B. Alternate Procedure – Lawyer as Substitute Judge

1) The attorney appointed as a substitute judge must possess all the qualifications of a judge, including age and residency requirements, and must be in good standing. The substitute judge shall be subject to the Code of Judicial Conduct.

2) The substitute judge shall take an oath of office as provided in T.C.A. § 17-2-120, and the substitute judge shall certify compliance by affixing his or her signature to the consent form, which is appended to Supreme Court Rule 11.

3) The authority of a substitute judge to fix fees pursuant to T.C.A. § 17-2-118 is

limited to cases in which the exact amount of the fees is set by statute.

4) The substitute judge must ensure that all litigants who are present at the beginning of each proceeding give their consent to the use of a substitute judge in their case. All litigants who are present at the beginning of the proceedings in a case and the attorneys of record for all parties who consent to the service of a substitute judge must complete Part B of the substitute judge consent form. Without such consent, the substitute judge shall not preside on that case. Part C of the substitute judge consent form must be completed by the substitute judge in each case in which that judge presides.

5) The incompetent or absent judge must complete Part A of the substitute judge consent form. The judge must specify the reason for his or her incompetence or absence. If the judge cites absence for a cause other than a reason listed in Tennessee Code Annotated section 17-2-118(a), the specific reason for the absence must be set forth on the form.

6) The clerk of the court shall certify that the appointment was made, that the substitute judge took the statutory oath of office, and that the oath of office was filed in the clerk's office. The certification shall be made on Part D of the substitute judge consent form.

7) At the end of each month, all substitute judge consent forms will be transmitted by the presiding judge of the judicial district to the Administrative Office of the Courts, Nashville City Center, Suite 600, 511 Union Street, Nashville, Tennessee 37219, where they will be available for public inspection during regular business hours. Such forms shall be maintained on file at the AOC for at least eight (8) years after they are received.

Tenn. Sup. Ct. R. 11, § VII(d).

The substitute judge provisions listed above shall not apply where a judge finds it necessary to be absent from holding court and appoints as a substitute judge:

a) a duly elected or appointed judge of any inferior court; or

b) a full-time officer of the judicial system under the judge's supervision whose duty it is to perform judicial functions, such as a juvenile court magistrate, a child support magistrate, or a clerk and master, who is a licensed attorney in good standing with the Tennessee Supreme Court. Such judicial officer shall only serve as special judge in matters related to that officer’s duties as a judicial officer.

T.C.A. § 17-2-118(f).

Policy 4.01, concerning the interchange, designation and substitution of trial and appellate court judges, also addresses this topic.

Special judges may be utilized to alleviate congestion and delay in the disposition of litigation and to try cases for any judge who, for any reason is unable to do so. In both circumstances, the chief justice assigns a special judge to hear the case. T.C.A. § 17-2-109, 110.

Separate statutes give the governor the power to commission a special judge to serve in the place of an incompetent, sick, or disabled judge. T.C.A. § 17-2-105, 116. The statutes require that the governor appoint someone with the qualifications required of a chancellor or judge. T.C.A. § 17-2-116 (a)(1).

B. General Sessions Judges

1. General Procedure

If a general sessions or juvenile court judge finds it necessary to be absent from holding court, the judge may seek a special judge in accordance with the requirements of and in the numerical sequence provided by T.C.A. § 16-15-209(a).

1) The judge shall attempt to interchange with another current general sessions or juvenile court judge, either within the county or outside the county. If another judge cannot serve by interchange, the judge may seek to find a former or retired judge who will, by mutual agreement, sit as special judge by designation of the chief justice of the supreme court;

2) The judge may request assistance from the AOC in locating a judge to sit as special judge by designation of the chief justice of the supreme court;

3) ***Only after exhausting the procedures set out above***, a judge may appoint a lawyer ***from a list, on a rotating basis***, of lawyers that have been previously approved by the judge or judges of the district or county who are constitutionally qualified, in good standing, and possess sufficient experience and expertise.

T.C.A. § 16-15-209 (emphasis added). Lawyers appointed as special judge are subject to the limitations discussed in the subsection 3 which follows.

The statute provides separate provisions for the appointment of special judges in Shelby County. *Id.* at (e) - (h).

2. "Sudden and Unexpected Emergency"

Notwithstanding the procedures set out in the General Procedure section above, a general sessions or juvenile court judge who encounters a sudden and unexpected emergency which causes the judge to be absent from court may forego the procedural requirements of those subsections and appoint a lawyer in accordance with T.C.A. § 16-15-209(a)(3). The circumstances requiring the appointment of a lawyer pursuant to this subsection shall be entered upon the minutes or other permanent record of the court in addition to the information required in subdivision (a)(3). T.C.A. § 16-15-209(d).

3. Limitations on Lawyers Sitting as Special Judge

A lawyer who serves as a special judge in general sessions or juvenile court is subject to the following limitations:

1) The lawyer may preside only if the parties and counsel are notified that the duly elected or appointed judge will be absent and that a practicing lawyer will serve as a special judge;

2) The parties choose to proceed and not to continue the case pending return of the duly elected or appointed judge; and

3) The lawyer shall not approve the payment of attorney's fees, involving an indigent defense claim or any discretionary fees. A special judge shall approve fees only when the exact amount is set by statute.

4) At the opening of any court session presided over by a lawyer appointed pursuant to this procedure, an announcement shall be made to persons in attendance conveying the information contained in numbers (1) and (2) above. The making of such an announcement constitutes compliance with the notice requirements.

T.C.A. § 16-15-209(a)(3). There are specific provisions concerning appointment, service requirements and/or limitations, and reporting requirements on the use of special judges in general sessions courts that are applicable to Shelby County. These provisions are found in T.C.A. § 16-15-209(e)-(h).

3.03 SUBSTITUTE JUDGES

Tennessee law also provides for the appointment of substitute judges by a sitting judge for good cause including illness, physical incapacity, vacation, or absence related to the judge's duties. T.C.A. § 17-2-118. The substitute judge is required to have the qualifications required for judicial office. The appointment is limited to three days or until the completion of any trial commenced during the appointment. *Id.*

3.04 INTERCHANGE

Judges may interchange with each other whenever the incompetency of the judge to try a case, or personal convenience, may require. A judge sitting for another by interchange need not be commissioned by the governor and has the same power and jurisdiction as the judge or chancellor in whose place the judge is acting.

State judges have an affirmative duty to interchange if a judge has died, is unable to hold court, if two or more judges have agreed to a mutually convenient interchange, if a judge is incompetent under T.C.A. §17-2-101, or if the chief justice has assigned the judge

by order and pursuant to Tennessee Supreme Court Rule 11 to another court. T.C.A. § 17-2-202. Special judges appointed under Sections § 17-2-116 and -117 have the same power to interchange as regular judges. T.C.A. § 17-2-207.

Likewise, a statute specifically allows judges of general sessions courts and juvenile courts to interchange with each other as cause or mutual convenience may require. Except for residence requirements, the judge sitting by interchange must possess all the qualifications of the regular judge. T.C.A. § 17-2-208. In addition, general sessions judges are authorized to sit by interchange for municipal court judges. T.C.A. § 16-18-312. In addition, general sessions judges are authorized to sit by interchange for municipal court judges. T.C.A. § 16-18-312.

CHAPTER 4

OATHS

Contents **Section**

4.01 OATHS OF OFFICE

Every person elected or appointed to any “office of trust or profit” under the Tennessee Constitution or laws must take an oath of office and an oath to support the United States and Tennessee Constitutions. Tenn. Const. Art. 5, § 1. The oath of office, if not otherwise specified by statute, is: "I do solemnly swear that I will perform with fidelity the duties of the office to which I have been appointed (or elected), and which I am about to assume." T.C.A. § 8-18-111.

4.02 JUDGES

Every judge before beginning the duties of office must take an oath or affirmation to support the United States and Tennessee Constitutions, to administer justice without respect of persons, and to discharge impartially all the duties incumbent on a judge to the best of the judge’s skill and ability. T.C.A. § 17-1-104. Administration of the oath is governed by T.C.A. §§ 17-1-104, 16-15-203, 8-18-107, and 8-18-109. Such an oath may be taken any time after the judge’s election results are certified but before beginning the duties of the office. Tenn. Op. Atty. Gen. No 80-427.

4.03 JUDGES ADMINISTERING OATHS TO OTHER OFFICERS

When the statutes do not otherwise provide, judges, chancellors, retired judges, and retired chancellors are authorized to administer oaths of office. T.C.A. §§ 8-18-107, 109. While many of the oaths for particular offices are specified by statute, a general oath to be used in the absence of a specific one is found at T.C.A. § 8-18-111.

4.04 GRAND JURY

The judge shall administer the following oath to the foreperson and members of the grand jury:

> You, as members of the grand jury, do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, of all offenses given you in charge, or otherwise brought to your knowledge, committed or triable within this county; that you will keep secret the state's counsel, the other jurors', and your own; that you will present no person from hatred, malice, or ill will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but that you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God.

Tenn. R. Crim. P. 6(a)(4).

4.05 JURY OF INQUEST

A jury of inquest shall consist of seven (7) jurors who "shall be summoned by the coroner and be sworn by such coroner to inquire who the person was, and when, where and by what means such person came to . . . death and to render a true verdict thereon, according to the evidence offered them, or arising from inspection of the body." T.C.A. § 38-5-104.

4.06 PAUPER'S OATH

According to statute, any state resident may commence any civil action without giving security for costs and without paying litigation costs by filing this oath of poverty: "I do solemnly swear, under penalty of perjury, that, owing to my poverty, I am not able to bear the expense of the action which I am about to commence, and that I am justly entitled to the relief sought, to the best of my belief." T.C.A. § 20-12-127. The oath must be accompanied by an affidavit of indigency as prescribed by court rule. The oath does not relieve the person from responsibility for the payment of costs ultimately, but suspends collection until taxed by the court. *Id.*

4.07 INTERPRETERS

Tennessee Rule of Evidence 604 provides that interpreters are subject to the rules and statutes relating to both qualifications as an expert and the administration of an oath or affirmation to make a true interpretation. The interpreter oath can be found in Section 4(b) of Tennessee Supreme Court Rule 42.

4.08 JURORS

Jurors in Tennessee are sworn according to the common law form as follows: "Do you and each of you solemnly swear (or affirm) that you will well and truly try the issues to be joined between _____and _____and a true verdict render thereto according to the law and evidence." In a felony case, no juror is sworn until all jurors are selected. The whole jury is then sworn together. T.C.A. § 40-18-106.

4.09 WITNESSES

Before testifying, a witness must declare by oath or affirmation that the witness will testify truthfully. The oath or affirmation must be administered in a form "calculated to awaken the witness' conscience and impress the witness' mind with the duty" to testify truthfully. Tenn. R. Evid. 603.

Witnesses before the grand jury are administered the oath by either the clerk of the court or the foreperson of the grand jury. Tenn. R. Crim. P. 6(j)(4).

4.10 CHILD WITNESSES

In *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993), the Tennessee Supreme Court said that the common law rule allowed a child to testify if the child understood the nature and meaning of the oath, was of sufficient intelligence to comprehend the things about which the child is asked to testify, and is capable of knowing and relating the facts accurately. Rule 601 of the Tennessee Rules of Evidence casts some doubt upon whether these specifics are required, but in light of the Supreme Court's post-rules pronouncement in *Ballard*, a judge who uses the *Ballard* procedure is assured of not running afoul of the requirements.

4.11 GUARDIANS, NEXT OF FRIENDS, AND PERSONAL REPRESENTATIVES

Three statutes provide for civil suits to be prosecuted or commenced by individuals appointed to represent others as guardian, guardian *ad litem*, next of friend, or personal representative. These representatives are not required to give bond or post security for costs. Instead they must subscribe to an oath that the representative has no property of the represented person or that the represented person has insufficient property to bear the expense of the action and that the representative believes that the represented person is entitled to the relief sought. Although the statutes vary somewhat as to whether an affidavit of indigency is mandatory, T.C.A. §§ 20-12-129, -130, or discretionary, T.C.A. § 20-12-128, the better procedure would suggest that an affidavit of indigency accompany the oath.

CHAPTER 5

JUROR SELECTION

Contents **Section**

5.01 RIGHT TO JURY

The United States and Tennessee Constitutions provide for the right to a jury trial in most cases. U.S. Const. amend. VI; U.S. Const. amend VII; Tenn. Const. Art. I, § 6; Tenn. Const. Art. VI, § 14. While the right to a jury trial in a civil case is waived unless demanded, the right to a jury trial in a criminal case is mandatory unless waived. Tenn. R. Civ. P. 38; Tenn. R. Crim. P. 23.

5.02 NUMBER OF JURORS

Pursuant to Tenn. R. Civ. P. 47 and Tenn. R. Crim. P. 24, a "regular jury" in both civil and criminal cases consists of 12 persons. In civil cases, the parties may agree to a jury of fewer than 12 jurors or agree that a verdict of the majority of jurors will be considered the verdict of the jury. Tenn. R. Civ. P. 48. In a criminal case, fewer than 12 jurors may render a verdict under limited circumstances. *See State v. Bobo*, 814 S.W.2d 353, 359 (Tenn. 1991).

5.03 QUALIFICATIONS

A person is qualified and competent to serve as a juror if he or she: (1) is at least 18 years of age; (2) is a United States citizen; (3) is a Tennessee resident; (4) has been a resident of the county for 12 months; and (5) has not been convicted of perjury,

subornation of perjury, a felony or any other infamous offense. T.C.A. §§ 22-1-101 -102. Unless all parties consent, the law also excludes from service those who are interested in a case or are connected with a party within six degrees. T.C.A. § 22-1-104.

5.04 EXEMPTIONS / HARDSHIPS / POSTPONEMENTS

Exemptions from jury service no longer exist in Tennessee. *See* 2008 Tenn. Pub. Acts ch. 1159. A prospective juror may seek a temporary postponement of the initial appearance date. *See* T.C.A. §§ 22-1-103 (hardship procedures); 22-2-315 (postponement procedures). However, the juror cannot be excused from service permanently unless the judge "determines that the underlying grounds for being excused are of a permanent nature." T.C.A. § 22-1-103.

5.05 SELECTION OF JURY LIST, POOL, AND VENIRE / PANEL

A. Jury Commissioners

Jury commissioners have been replaced in each county by a jury coordinator, who shall be the circuit court clerk unless the judges appoint another person to serve in that position. T.C.A. § 22-2-201.

B. Jury List and Jury Pool

The names of prospective jurors for the jury list, which cannot be retained for more than two years, shall be selected from "licensed driver records or lists, tax records, or other available and reliable sources" other than permanent voter registration records. T.C.A. §§ 22-2-301, -302. These names shall be selected by random, automated means unless this technology is unavailable, in which case the county may manually select the names. *Id.* If the names are selected manually, the jury coordinator selects the number of names designated by the presiding judge. T.C.A. § 22-2-302. The presiding judge may delegate this responsibility, and any other responsibilities related to the jury selection process, to another chancellor or judge who is authorized to conduct jury trials in the county at issue. T.C.A. § 22-2-316.

The members of the jury pool are selected, either manually or through automated means, from the jury list. T.C.A. §§ 22-2-304, -305. The presiding judge directs the jury coordinator to select a particular number of jurors to be included in the jury pool, and all members receive a jury service summons. *Id.*; T.C.A. § 22-2-307, -308.

C. Summons

The jury coordinator may, but is not required to, utilize the jury summons form drafted by the AOC. If the coordinator does not use the AOC's form, which is posted on the AOC's website, the summons prepared by the coordinator must include all of the information listed in T.C.A. § 22-2-306. Although personal service must be conducted by

the sheriff, either the sheriff or the jury coordinator may summon jurors by first class mail. T.C.A. § 22-2-307.

D. Venire / Panel

The grand jury and the jury venire/panel are groups of jurors selected from the jury pool. A petit jury is selected from the jury venire/panel.

5.06 FAIR CROSS-SECTION

Criminal defendants "are not entitled to a jury of any particular composition," nor are they entitled to petit juries which "mirror the community and reflect the various distinctive groups in the population." *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975); *State v. Hester*, 324 S.W.3d 1, 36-47 (Tenn. 2010) (discussing multiple jury selection issues, including a fair cross-section issue). However, they are constitutionally entitled to a petit jury which is "drawn from a source fairly representative of the community." *Id.*

It is not necessary for the defendant to be a member of the class (a particular gender or race, for instance) to have standing to object to the exclusion of that class. *Taylor*, 419 U.S. at 526. Instead, to establish a prima facie violation, the defendant merely must demonstrate the following:

> (1) that the group alleged to be excluded is a "distinctive group" in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to the systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979); *see also Berghuis v. Smith*, 130 S.Ct. 1382 (2010).

If the defendant satisfies this burden, the state then "bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." *Duren*, 439 U.S. at 368.

5.07 FAILURE TO APPEAR

Pursuant to T.C.A. § 22-2-306, the juror summons must include, among other things, the processes by which a juror may attempt to be excused due to a hardship or otherwise request a postponement of jury service, and must also specify the penalty for a juror's failure to appear or respond to the summons in the manner specified by the court. If a summoned juror who has not been excused or discharged fails to appear or respond as directed, the court shall issue a show cause order. T.C.A. § 22-2-309. If the court finds the juror's explanation to be inadequate, the court shall find the juror to be in civil contempt and assess a penalty of not more than $500 plus costs, but the court

must suspend payment of the amount in excess of $50 with the condition that the juror complete his or her service. *Id.*

5.08 PROCEDURES

Although the examination of jurors and the number and nature of challenges are discussed in general terms below, trial courts should consult Tenn. R. Civ. P. 47 and Tenn. R. Crim. P. 24 regarding the detailed procedures that must be followed during the jury selection process. Failure to comply with the rules' requirements may result in reversal. *See State v. Coleman*, 865 S.W.2d 455, 458 (Tenn. 1993).

5.09 RIGHT TO EXAMINE

Parties in civil and criminal cases have a right to examine prospective jurors, and this questioning will assist them in exercising their peremptory challenges and challenges for cause. T.C.A. § 22-3-101; Tenn. R. Civ. P. 47; Tenn. R. Crim. P. 24. The court itself may also question jurors. Tenn. R. Crim. P. 24; *State v. Doleman*, 620 S.W.2d 96, 100 (Tenn. Crim. App. 1981).

The court may allow individual voir dire during the examination process, and this method is frequently used to question prospective jurors regarding the extent of their knowledge of the facts of a high-publicity case as well as their views regarding the death penalty in a capital murder case. Tenn. R. Civ. P. 47; Tenn. R. Crim. P. 24; *State v. Reid*, 91 S.W.3d 247, 291-92 (Tenn. 2002) (appendix). However, the court is not required to permit individual voir dire. The method and scope of voir dire are within a court's discretion, and the court will not be reversed absent an abuse of that discretion. *See Reid*, 91 S.W.3d at 291.

Although Tenn. R. Crim. P. 24 requires the court to disclose personal information regarding prospective jurors upon the request of a party in a criminal case, courts have the discretion to impanel anonymous jurors under limited circumstances. *State v. Ivy*, 188 S.W.3d 132, 142-45 (Tenn. 2006).

5.10 CHALLENGES FOR CAUSE

Either party to an action may challenge for cause any potential juror who is unqualified, incompetent, or otherwise statutorily excluded from service. T.C.A. §§ 22-1-101, -102, -104, -105; 22-3-102, -103. In addition, Tenn. R. Crim. P. 24 provides that in a criminal case a juror may be challenged for cause if the "prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror." As the Tennessee Supreme Court has found, mere exposure to information regarding a case is not adequate to require the juror's removal:

> Implicit in Rule 24 is the recognition that jurors do not live in a vacuum. Because certain cases are by their very nature apt to

generate publicity, it is not inconceivable that some jurors will have formed an impression or opinion concerning the case. In addressing this problem, the United States Supreme Court has observed:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard.

Accordingly, jurors may sit on a case, even if they have formed an opinion on the merits of the case, if they are able to set that opinion aside and render a verdict based upon the evidence presented in court.

> Accordingly, in interpreting Rule 24, this court has held that prospective jurors who have been exposed to information which will be developed at trial are acceptable, if the court believes their claims of impartiality. With respect to jurors who have been exposed to information which is inadmissible at trial because of its prejudicial effect, Rule 24 implicitly places the burden upon the trial court to assess the level of prejudice apart from the juror[s'] statements. In either case, the determination of impartiality remains a matter within the trial court's discretion. In other words, [a] trial court's findings of juror impartiality may be overturned only for manifest error.

State v. Mann, 959 S.W.2d 503, 531-32 (Tenn. 1997) (internal quotations and citations omitted).

5.11 PEREMPTORY CHALLENGES

A. Number

In a civil case, each party is allotted four peremptory challenges. If there is more than one party on a “side” of a case, four additional challenges shall be granted to that side. However, the total challenges per side shall not exceed eight, and the court shall use its discretion to distribute the number of challenges among the parties on each side

of the case. Serving as both a plaintiff and defendant in the same case does not entitle a party to more than four challenges. T.C.A. § 22-3-104.

In a criminal case, the number of peremptory challenges depends on the nature of the charged offense. In capital murder cases, each defendant is entitled to 15 challenges, and the state is entitled to 15 challenges per defendant. If the offense is punishable by imprisonment for more than one year, each defendant is entitled to eight challenges, and the state is entitled to eight challenges per defendant. Finally, for an offense which is punishable by imprisonment for less than one year and/or by fine, "each side is entitled to three peremptory challenges for each defendant." Tenn. R. Crim. P. 24. Pursuant to Tenn. R. Civ. P. 47 and Tenn. R. Crim. P. 24, the selection of alternate jurors involves peremptory challenges in addition to those noted above.

B. ***Batson v. Kentucky***

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court concluded that a defendant is not required to establish a long-standing pattern of a prosecutor's discriminatory use of peremptory challenges in order to establish an equal protection violation. Although the propriety of peremptory challenges must be evaluated on a case-by-case basis and the law continues to develop in this area, *Batson* and its progeny provide extensive guidance regarding the manner in which trial courts must evaluate allegations of the discriminatory striking of jurors.

A *Batson* objection can be raised by any party in a civil or criminal case, and the objecting party need not be a member of the suspect class to have standing. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Powers v. Ohio*, 499 U.S. 400 (1991). The parties bear the following burdens when this issue is raised: (1) The objecting party must establish a *prima facie* case of purposeful discrimination; (2) The burden then shifts to the opposing party, which must offer a neutral explanation for the challenge(s); and (3) The court must determine whether, considering all of the circumstances, the objecting party has established purposeful discrimination. *See State v. Kiser*, 284 S.W.3d 227 (Tenn. 2009); *Zakour v. UT Medical Group, Inc.*, 215 S.W.3d 763 (Tenn. 2007); *State v. Hugueley*, 185 S.W.3d 356 (Tenn. 2006) (discussing the parties' burdens, the types of proof that are adequate to satisfy those burdens, and the comprehensive findings that must be made by the trial judge).

Appellate courts can rely upon transcripts to determine such things as whether peremptory challenges are exercised differently on similarly-situated prospective jurors of different races. *Miller-El v. Dretke*, 545 U.S. 231 (2005). The United States Supreme Court has stressed the importance of the role of the trial judge, who is in the best position to observe the demeanor of the jurors and attorneys and to make factual findings on the record regarding credibility issues. *Snyder v. Louisiana*, 128 S.Ct. 1203 (2008). However, while a prospective juror's demeanor is important, the Court's holdings in *Snyder* and *Batson* do not stand for the proposition that "a demeanor-based explanation must be rejected if the [trial] judge did not observe or cannot recall the juror's demeanor." *Thaler v. Haynes*, 130 S.Ct. 1171, 1174 (2010).

C. Court's Refusal to Excuse a Juror Counsel Seeks to Strike

Peremptory strikes are not constitutionally required, so a court's erroneous denial of a party's request to strike a particular juror does not alone entitle the party to relief, even if the juror is aware that he or she has been challenged. *Rivera v. Illinois*, 129 S.Ct. 1446 (2009). However, because the peremptory strike procedure is a creature of state law/procedure, states have the authority to devise their own remedies for violations thereof. *Id.*

5.12 ORIENTATION OF THE JURORS

Judges should welcome the opportunity to orient jurors as they commence their jury service. During orientation, the judge will often: (a) make a general statement of the importance of jury service; (b) summarize the jury selection process; (c) review the juror's oath and its purpose; (d) detail the steps of the trial, the purpose of conferences outside the jury's presence, and the importance of following instructions; and (e) describe the expected conduct of jurors during the trial and in the jury room.

In criminal cases, the judge also is required to admonish the jury regarding its conduct during the selection process. After swearing the jurors, the judge must instruct the jury:

> (1) not to communicate with other jurors or anyone else regarding any subject connected with the trial; (2) not to form or express any opinion about the case until it is finally submitted to the jury; (3) to report promptly to the court: (A) any incident involving an attempt by any person improperly to influence any jury member; or (B) a juror's violation of any of the court's admonitions; (4) not to read, hear, or view any news reports concerning the case; and (5) to decide the case solely on the evidence introduced in the trial.

Tenn. R. Crim. P. 24.

5.13 JUROR COMPENSATION

A. Courts

Jurors are entitled to receive a minimum of $10.00 per day unless they are sequestered, in which case they will receive a minimum of $30.00 per day. Counties have the authority to increase the $10.00 daily rate and/or to compensate jurors for mileage. T.C.A. §§ 22-4-101, -103.

B. Employers

An employer must excuse an "employee from employment for each day the employee's service as a juror . . . exceeds three (3) hours." T.C.A. § 22-4-106(a). However, "no employer shall be required to compensate an employee for more time than was actually spent serving and traveling to and from jury duty." T.C.A. § 22-4-106(b). For example, an employee who serves as a juror for four hours (including travel) is not required to return to work that day, but the employer is only required to compensate the juror for four hours as opposed to compensating the juror for eight hours if the juror typically works an eight-hour day. Moreover, the employer has the discretion to deduct the compensation the court paid the juror for the juror's service. *Id.* For additional information regarding exempt employers as well as the provisions governing employees who work the night shift, see T.C.A. § 22-4-106.

5.14 EXCLUDING PUBLIC FROM COURTROOM DURING VOIR DIRE

Although there are exceptions, the general rule is that the accused has a right to a public trial, and this right extends to the voir dire process. Likewise, members of the public have a corresponding right to be present regardless of whether any participants in the proceeding assert that right. Finally, the court must consider alternatives to closing the proceedings even absent the parties' proffer of an alternative. *Presley v. Georgia*, 130 S.Ct. 721 (2010).

5.15 RIGHT TO EXPERTS AND SUBPOENAS IF CHALLENGING JURY SELECTION PROCEDURES

"[A] defendant who makes a *prima facie* showing of a statutory or constitutional violation with regard to the preparation of lists of prospective jurors or the selection of jury venires or petit juries has the right to subpoena appropriate witnesses and documents." *State v. Hester*, 324 S.W.3d 1, 52 (Tenn. 2010). While the appointment of an expert in statistics or demographics may be appropriate in some cases when a particularized need has been established, "[d]efendants do not have an inherent statutory or constitutional right" to such an expert. *Id.* at 48.

CHAPTER 6

WITNESSES

Contents **Section**

6.01 SUBPOENAS

A. Civil Cases

In civil cases, the process for the issuance and service of a subpoena is set forth in Tennessee Rules of Civil Procedure Rule 45. The subpoena must be issued by the clerk and must contain the name of the court and the title of the action. It shall command the witness' attendance at a specified time and place. Tenn. R. Civ. P. 45.01. A subpoena may also be issued for documentary evidence pursuant to the rule. Tenn. R. Civ. P. 45.02

In 2013, several amendments to Rule 45 were adopted which clarify the obligations of the parties concerning the use and enforcement of subpoenas. That rule should be consulted to help resolve any disputes that arise concerning subpoenas.

Although some persons are exempt from subpoena by statute, a judge may compel the personal attendance of such a witness upon affidavit of a party or a party's attorney that the witness' testimony is important and that the "just and proper effect of the testimony cannot in a reasonable degree be obtained without an oral examination in court." Tenn. R. Civ. P. 45.05(2).

The Uniform Interstate Depositions and Discovery Act was enacted in 2008. This act specifies the procedure by which a subpoena for deposition or discovery, issued by a court outside of Tennessee, may be issued and served through a Tennessee local court clerk. T.C.A. § 20-9-201 *et seq.*

B. Criminal Cases

In criminal cases, the procedure for the issuance and service of subpoenas for witnesses is set forth in Tennessee Code Annotated Sections 40-17-107 through -110 and Tennessee Rules of Criminal Procedure 17. The clerk of the court is required to issue subpoenas for witnesses requested by the state and the defense and for

witnesses whose names are endorsed by the district attorney general on the indictment. The subpoena must name the court and the title of the proceeding, and must direct the witness to attend court on a designated date. T.C.A. § 40-17-107(a) & (b). As in civil actions, the subpoena may require the production of documentary evidence which may be quashed by the judge if the request is unreasonable or oppressive. As an alternative, the judge may require that the documentary evidence be brought to court for inspection by the court before it is offered as evidence at trial. Statements of witnesses, however, are not subject to subpoena in criminal cases, but must be produced pursuant to Rule 26.2 of the Tennessee Rules of Criminal Procedure upon motion, following the direct examination testimony of the witness. Tenn. R. Crim. P. 17(h).

Tennessee has adopted the "Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings." Its provisions are detailed in Tennessee Code Annotated Sections 40-17-201 through -212 and discussed below.

C. Reissuance

A witness who is subpoenaed to testify at a civil case is required to appear until discharged by the court or by the party who subpoenaed the witness. If a case is continued, the witness is not deemed to be discharged and must reappear without a subpoena unless discharged permanently by the court or the party. T.C.A. § 24-2-101. Similarly, in a criminal case the subpoena extends to command a witness' appearance to subsequent terms of the court as the court requires until the case is finally completed. T.C.A. § 40-17-110.

6.02 SERVICE OF SUBPOENAS

Subpoenas are served by delivering or offering to deliver a copy of the subpoena to the person to whom the subpoena is directed. Tenn. R. Civ. P. 45.03; Tenn. R. Crim. P. 17(d). In criminal cases, service may also be accomplished by leaving a copy with an adult occupant of the witness' usual residence. Tenn. R. Crim. P. 17(f).

Any person authorized by law to serve process may serve a subpoena. The obligation to serve subpoenas falls upon the sheriff, T.C.A. § 8-8-201, but sheriffs may call upon persons to perform the service pursuant to the provision of the law. T.C.A. § 8-8-220; T.C.A. § 40-17-109.

An attorney licensed in the state or the attorney's agent, who is eighteen years of age or older, is also authorized to serve subpoenas if the attorney or any member of the firm is involved in the case for which the subpoenas are issued. For this service to be valid, both the attorney and the agent must sign the subpoena and the persons serving the subpoena must file an affidavit of return with the issuing clerk naming the person served and detailing the date, place, and manner of service. T.C.A. § 23-2-105.

Alternatively, a witness may acknowledge service in writing on the subpoena. Tenn. R. Civ. P. 45.03; Tenn. R. Crim. P. 17(f). A subpoena may be served at any place within the state. Tenn. R. Civ. P. 45.05; Tenn. R. Crim. P. 17(f).

6.03 BAIL FOR MATERIAL WITNESS

If it appears by affidavit that the testimony of a person is material in any criminal proceedings and if it is shown that the witness has refused or will refuse to respond to process, the court may require the witness to give bail. If the person fails to give bail, the court may commit the witness to the custody of the sheriff pending final disposition of the proceeding in which the testimony is needed, may order the release if the witness has been detained for an unreasonable length of time, and may modify at any time the bail requirement. T.C.A. § 40-11-110. Bond may be forfeited. T.C.A. §§ 40-11-110, -120, -139.

6.04 FAILURE TO APPEAR

A witness who willfully disobeys the requirements of a subpoena in a civil or criminal case may be punished for contempt. T.C.A. § 29-9-102; Tenn. R. Civ. P. 45.06; Tenn. R. Crim. P. 17(g). Contempt is punishable by a fine, imprisonment, or both. Unless the law specifies otherwise, the courts of record are limited to a fine of $50 and imprisonment not to exceed ten days for each act of contempt. T.C.A. § 29-9-103. *See* Chapter 13, Contempt.

The subpoenaed witness who fails to appear in civil cases is also subject to a penalty of $125 for the failure to appear. T.C.A. § 24-2-102. In addition to the $125 penalty for failure to appear, a witness is also liable to the action of the party for the full damages sustained because of the absence of the witness' testimony. The penalty is to be recovered by scire facias in the name of the state. An alternate procedure, whereby a party who subpoenaed a witness that failed to appear may seek a conditional judgment of $25 and scire facias, is set out in T.C.A. § 24-2-104.The witness may be relieved from the payment of the penalty if the witness can show sufficient cause for failure to attend. T.C.A. § 24-2-106.

Every witness legally bound to appear shall appear and continue to attend until discharged by the court or party at whose instance the witness is summoned. In the event of a continuance, the party need not reissue the subpoena for the witness unless the witness were expressly discharged by the court or party at whose instance they were summoned. T.C.A. § 24-2-101.

6.05 UNIFORM LAW (Criminal Cases)

Tennessee has adopted the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings. T.C.A. §§ 40-17-201 - 210. It applies only to states of the United States and the District of Columbia and not to

foreign countries. *Stubbs v. State*, 393 S.W.2d 150 (Tenn. 1965). It applies to witnesses whose testimony is desired in a grand jury proceeding, investigation, or a criminal proceeding.

A. Within the State

When a judge of a Tennessee court of record in a county where the witness is found receives a certificate from a court of record in a demanding state that has also adopted the uniform law, the Tennessee judge must set a time and place for a hearing and order the witness to appear. The certification from the demanding state must be under the seal of the court and must certify that there is a pending criminal action or grand jury investigation, that the person sought is a material witness, and that the witness' presence is required for a specified number of days. T.C.A. § 40-17-203.

At the hearing, the court must issue the summons for the witness with a copy of the certificate attached if the judge determines that: (a) the witness is material and necessary; (b) the subpoena will not cause the witness undue hardship if required to testify in the other state; and (c) the laws of the other state and any state through which the witness will have to travel will protect the witness from arrest and service of process. The certificate is prima facie evidence of all the facts stated in the certificate. T.C.A. § 40-17-204. If the judge issues the summons, it must direct the witness to appear and testify at the time and place specified. T.C.A. § 40-17-205.

If the certificate from the demanding state recommended custody of the witness, the court may direct that the witness be brought immediately before the judge rather than notifying the witness of the hearing. The judge may also order the witness delivered to an officer of the demanding state rather than issue a summons for the witness' appearance. T.C.A. § 40-17-205.

If after being paid or offered payment for mileage and attendance, as provided in Chapter 4 of Title 24, the witness fails, without good cause, to appear and testify, the witness is punished the same as an in-state witness who fails to obey a summons. T.C.A. § 40-17-206.

B. Outside the State

A judge of a court of record in Tennessee in which a criminal action or grand jury proceeding is pending may likewise issue a certificate under seal stating that a person who is present in another state is required to appear and testify in this state and the number of days that the witness' appearance will be required. The certificate, which may include a recommendation that the witness be taken into immediate custody and delivered to this state rather than summoned, is only valid in states with laws which provide for commanding persons to attend and testify in criminal proceedings out of state. T.C.A. § 40-17-207.

A witness summoned under the act is entitled to compensation as other witnesses in the state. The witness may not be required to remain in the state longer than specified in the certificate. T.C.A. § 40-17-208. While traveling to or from a state

as a result of a court order based on the provisions of the act, the witness is immune from arrest or service of process in connection with matters which arose prior to the witness' entrance into this state under the summons. T.C.A. § 40-17-209.

6.06 COMPETENCY

The Tennessee Rules of Evidence establish a presumption that every person is competent to be a witness unless a rule or statute specifically provides otherwise. Tenn. R. Evid. 601. This presumption is qualified, however, by evidence rules which require that witnesses testify only as to matters within their personal knowledge, Tenn. R. Evid. 602, and that witnesses must declare by oath or affirmation that they will testify truthfully. Tenn. R. Evid. 603. The oath or affirmation must be administered so as to "awaken the witness' conscience and impress the witness' mind with the duty to [testify truthfully.]" Tenn. R. Evid. 603. Thus, the threshold question for the judge is whether the witness understands the obligations of the oath and will promise to abide by the obligations.

The most prominent example of a situation in which a statute provides that a witness is not competent is the dead man's statute found at Tennessee Code Annotated Section 24-1-203. Under the provisions of that law, parties are "incompetent," i.e. prevented from testifying, as to transactions with a deceased person in actions by or against estates. T.C.A. § 24-1-203.

Judges should be aware that the effect of Rule 601 is to reverse the common-law presumption regarding children under the age of fourteen. While those children were presumed incompetent to testify at common law, *Ball v. State*, 219 S.W.2d 166 (Tenn. 1949), the presumption now is just the opposite. Unless evidence is offered to rebut the presumption, a child under fourteen years of age, and virtually all other witnesses, are presumed competent to testify. *State v. Campbell*, 904 S.W.2d 608 (Tenn. Crim. App. 1995). It is incumbent on the judge, however, to assure that the requirements of Rules 602 and 603 are met. Thus, the Tennessee Supreme Court has held that a judge should determine whether a child witness understands the nature and meaning of the oath, has sufficient intelligence to understand the subject matter of the testimony, and is capable of relating the facts accurately. *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993).

6.07 EXAMINATION

A. Scope of Witness Examination

The trial judge is vested with considerable discretion in regulating the manner of examination of witnesses. Tenn. R. Evid. 611. A witness is subject to cross-examination, however, on any matter relevant to any issue in the case, including credibility. Thus, Tennessee follows the wide open cross-examination rule and does not limit cross-examination to the scope of direct examination except in one specific circumstance. If a hostile witness, adverse party or witness identified with an adverse party is called by a party, cross-examination is limited to the subject matter of the direct

examination, but may be accomplished by the use of leading questions. Tenn. R. Evid. 611(c)(2).

If the judge limits cross-examination, the judge must be certain to do so without abusing the exercise of reasonable discretion. On appeal, only a plain abuse of the judge's discretion will provide a basis for reversal. *State v. Gaylor*, 862 S.W.2d 546 (Tenn. Crim. App. 1992).

B. Leading Questions

The trial court likewise has discretion to permit the asking of leading questions. Tenn. R. Evid. 611(c). A judge should not allow leading questions on direct examination except as may be required to develop the witness' testimony. Leading questions are permitted and customary on cross-examination. If a party calls a witness which the court finds to be hostile, the court may allow leading questions. Tenn. R. Evid. 611(c).

C. Jury Questions

Under Tenn. R. Crim. P. 24.1(c) and Tenn. R. Civ. P. 43A.03, jurors may submit written questions to be asked of witnesses, if the court, in its discretion, chooses to allow such questions. However, allowing extensive examination of the witnesses by the jury in a criminal case has been found to be an abuse of discretion. *State v. Jeffries*, 644 S.W.2d 432 (Tenn. 1982).

CHAPTER 7

ADMISSION OF RECORDS

Contents **Section**

7.01 IN GENERAL

Both the Tennessee Rules of Evidence and various statutes provide the mechanisms for the introduction of records. Rule 101 of the Tennessee Rules of Evidence provides for the applicability of the rules in all trial courts except as otherwise provided by statute or Supreme Court rule. Tenn. R. Evid. 101.

7.02 LOST RECORDS

In the event a record or paper that had been filed in a court action becomes lost, a statute allows the evidence to be supplied by the best evidence available given the nature of the case. The statute is for the purpose of enabling one who has previously filed a record in the action to supply evidence of that record in the event it is lost, stolen, or destroyed, and if the record is believed to be necessary to a correct adjudication of the action. T.C.A. § 24-8-109. Both the loss and contents of the record must be established by the best evidence available. *Strunk v. State*, 289 S.W. 532 (Tenn. 1926). In order to be accepted by the court with the same force and effect as the original evidence, the evidence must be sufficiently clear, cogent, and definite. *Goins v. University of Tenn. Mem. Research Ctr. & Hosp.*, 821 S.W.2d 942 (Tenn. App. 1991). Examples of acceptable replacement evidence include: affidavits of the district attorney general and the grand jury officer and documentation from the grand jury book to prove a lost indictment or presentment; the clerk's docket and judge's notes when a record book is lost; affidavit of the clerk or counselor to prove lost papers in a case.

In order to file a replacement record for a lost one, an application to do so must be filed with an order of the court granting the application and accepting the replacement evidence. T.C.A. § 24-8-109.

Rules 1001 – 1003 of the Tennessee Rules of Evidence apply when the contents of a writing must be proved and the original is lost.

7.03 HOSPITAL RECORDS

Hospital records are defined at Tennessee Code Annotated § 68-11-302(5)(A)-(C). Under the Medical Records Act of 1974, hospital records remain the property of the hospital subject to a court order to produce the records. T.C.A. § 68-11-304(a)(1). A person who requests a patient's records is responsible for the reasonable costs of copying and mailing the records. The statute contains presumed reasonable fees. T.C.A. § 68-11-304(a)(2)(A)(i)-(iii). The production and introduction of hospital records as evidence is governed by the Hospital Records as Evidence Act found in Tennessee Code Annotated §§ 68-11-401 *et seq.*

7.04 RECORDS OF REGULARLY CONDUCTED ACTIVITIES

Records of regularly conducted activities or the absence of such records are admissible as an exception to the hearsay rule in Tennessee under Tennessee Rules of Evidence 803(6). An essential element to this exception is that the record was made because of a business duty to record or transmit the information. Otherwise, the requisite trustworthiness is not present. For purposes of this hearsay exception, a business includes every kind of business, institution, association, profession, occupation, and calling, whether or not the business is conducted for profit.

7.05 TELEPHONE RECORDS

Tennessee Code Annotated § 24-7-116 provides for the introduction of telephone records as evidence in judicial proceedings.

7.06 PUBLIC RECORDS OR REPORTS

Records, reports, statements, or data compilations in any form from public offices or agencies are generally admissible. If, however, the circumstances of preparation of the records indicate a lack of trustworthiness, the records are not admissible. Tenn. R. Evid. 803(8). Records and reports of law enforcement officers and personnel are specifically excluded from coverage. Tenn. R. Evid. 803(8). Authentication of public records, including foreign documents, is dealt with in Tenn. R. Evid. 901-902.

A. Records of Judgments

Both the rules of evidence and a statute address the admissibility of court records. Tennessee Code Annotated § 24-6-101 provides for the admission of certified copies of final judgments or decrees of courts of record. The evidence rules likewise admit court records, either as public records or as judgments of previous convictions. Tenn. R. Evid. 803.

B. Statutes and Regulations

Judges must take judicial notice of the common law, the federal and state constitutions and statutes, and federal and state supreme court rules. The court may take judicial notice, upon request, of ordinances of local governments, other adopted rules of court, published regulations of federal and state agencies, and the laws, treaties, and conventions of foreign countries. The party requesting that optional judicial notice of law be taken must give reasonable notice of the request to the adverse party. Tenn. R. Evid. 202.

A statute allows an appellate court to take judicial notice of foreign law. T.C.A. § 24-6-207.

C. Accident Reports

Accident reports prepared by drivers or law enforcement officers under the provisions of state law are not admissible as evidence in any trial. T.C.A. § 55-10-114(b). If requested by a court or party, the Department of Safety must issue a certificate showing that a specified accident report has or has not been made to be in compliance with law. T.C.A. § 55-10-114(b).

7.07 REPORTS FOR CHEMICAL TESTS FOR INTOXICATION

Admissibility of reports regarding chemical tests for intoxication are governed by statute. T.C.A. §§ 55-10-405 – 412.

7.08 FAMILY RECORDS

Births, deaths, marriages, divorces, baptisms, and other vital statistics may be proven by records of public offices if the report was made pursuant to a legal requirement. They may also be established through statements in marriage, baptism or similar certificates or through records in Bibles, engravings in rings, genealogies, inscriptions on portraits, tombstones, urns, or similar evidence. Tenn. R. Evid. 803(9), (12), (13).

CHAPTER 8

STATUTORY PRESUMPTIONS

Contents **Section**

8.01 CONVEYANCES

Instruments of conveyance that are executed in official capacity by public officers are admissible and are prima facie evidence of the facts recited in the instrument. T.C.A. § 24-5-101.

8.02 MEDICAL, HOSPITAL, AND DOCTOR BILLS

In a personal injury action in which medical, hospital, or doctor bills were incurred or paid because of the injury, proof that the bills were paid or incurred because of the injury and that they were reasonable and necessary shall be prima facie presumed if the bills are itemized in the complaint and a copy of the bills is attached as an exhibit to the complaint. T.C.A. § 24-5-113 (a)(1)&(2). The presumption is only applicable when the total amount of the bills does not exceed $4000. T.C.A. § 24-5-113 (a)(3).

A rebuttable presumption that the bills are reasonable shall attach if the complaint with itemization or copies of the bills appended is served on the other parties at least ninety days prior to the trial date. To rebut the presumption, a party must serve a statement of the intention to rebut at least forty-five days before trial. T.C.A. § 24-5-113(b).

8.03 NEGLIGENCE OF BAILEE

In any action against a bailee for loss or damage to personal property, proof that the property was delivered to the bailee in good condition and not returned according to the contract, or returned in damaged condition shall constitute prima facie evidence that the bailee was negligent. This presumption does not apply if the loss or damage was due to the inherent nature of the bailed property. T.C.A. § 24-5-111.

8.04 SETTLEMENTS OF PERSONAL REPRESENTATIVES AND GUARDIANS

The settlements of personal representatives and guardians are to be taken as prima facie correct. T.C.A. § 24-5-102.

8.05 SWORN ACCOUNTS

An affidavit of the plaintiff or the plaintiff's agent to the correctness of an account accompanied with the certificate of a state commissioner, a notary public, or a general sessions judge (with a certificate from the county clerk that the judge is acting judge in the county) is admissible in an action on an account. It is conclusive evidence against the party sued unless that party denies the account under oath. T.C.A. § 24-5-107.

8.06 REPAIR BILLS

In civil actions seeking damages for injury to or improper repair of property, proof that bills were incurred and paid to repair either real or personal property creates a rebuttable presumption of the amount paid and of the need for the repairs. T.C.A. § 24-5-114.

CHAPTER 9

INTERPRETERS AND COURT ACCESSIBILITY ISSUES

Contents **Section**

9.01 GENERALLY

Interpreters may be required for persons involved in court proceedings who are deaf or hard of hearing, or who have limited English proficiency. An interpreter must qualify as an expert and take an oath, and is subject to impeachment. Tenn. R. Evid. 604; *State v. Millsaps*, 30 S.W. 3d 364, 370-71 (Tenn. Crim. App. 2000).

9.02 INTERPRETERS FOR PERSONS WITH LIMITED ENGLISH PROFICIENCY

"Many persons who come before the courts are partially or completely excluded from full participation in the proceedings due to limited English proficiency ("LEP"). It is essential that the resulting communication barrier be removed, as far as possible, so that these persons are placed in the same position as similarly situated persons for whom there is no such barrier." Tenn. Sup. Ct. R. 41. Appointing an interpreter is a matter of judicial discretion. Tenn. Sup. Ct. R. 42, § 3(a).

Pursuant to Tennessee Supreme Court Rule 42 ("Rule 42"), a court is required to appoint a certified interpreter if one is reasonably available. If a court is unable to locate a certified interpreter after making a "diligent, good faith" effort to do so, the court may appoint a registered interpreter. A non-credentialed interpreter may be appointed only if neither a certified nor a registered interpreter is reasonably available and "the court has evaluated the totality of the circumstances including the gravity of the judicial proceeding and the potential penalty or consequence involved." Section 3 of Rule 42 provides additional guidance regarding the findings required prior to the appointment of a non-credentialed interpreter. *See also State v. Banks*, 271 S.W.3d 90 (Tenn. 2008) (commenting upon the circumstances in which the use of a non-credentialed interpreter may constitute reversible error).

To locate certified and registered interpreters, consult the court interpreter roster on the interpreter page of the AOC's website. To get to this page, go to www.tncourts.gov and select "Programs" and then "Court Interpreters." The roster is arranged alphabetically by language and then by city. Regardless of whether a court appoints a credentialed or non-credentialed interpreter, the court should always attempt to appoint a neutral, unbiased interpreter who has no interest in the outcome of the case. *State v. Van Tran*, 864 S.W.2d 465, 476 (Tenn. 1993).

The AOC compensates interpreters who interpret during all juvenile, general sessions, trial and appellate court hearings whether the case is a civil or criminal case and whether the parties are indigent or not. In cases where the defendants would be entitled to court appointed counsel due to indigency, the AOC will compensate interpreters for assisting defense counsel with out-of-court communication as well as for interpreting for the defendant and any other participants who require such services during an in-court proceeding. Courts can find a sample order of appointment, blank invoices, sample invoices, and billing instructions on the interpreter page of the AOC's website.

Section 7 of Supreme Court Rule 42 establishes the proceedings which are covered, the rates interpreters are to be paid, interpreter expenses that are eligible to be paid, and the procedure by which interpreters may seek payment from the AOC.

The Tennessee Supreme Court Rules do not specify whether the prosecutor, defense counsel, or court is required to secure the services of an interpreter. The court can resolve this matter by issuing an order placing the burden on the person or persons the court deems appropriate. Each judicial district may wish to consider adopting a local rule which sets out who is responsible for securing the services of an interpreter.

Due to the level of concentration required to accurately conduct a simultaneous interpretation, interpreters require frequent breaks. Courts should consider appointing multiple interpreters for complicated or lengthy hearings. Tenn. Sup. Ct. R. 42, § 3(g). Courts should require each interpreter to submit to the interpreter oath prior to the proceedings. Tenn. Sup. Ct. R. 42, § 4(b).

For additional information or assistance regarding the credentialing or appointment of foreign language interpreters, or the billing and compensation of interpreter services, contact the court services division at the AOC. For assistance with billing or compensation issues in indigent criminal defendant cases, contact the indigent defense department at the AOC.

9.03 INTERPRETERS FOR THE DEAF AND HARD OF HEARING

Tennessee Annotated Code section 24-1-211 sets out the statutory requirements for the appointment of interpreters for the deaf and hard of hearing. This statue provides that the fee for the services of such an interpreter shall be paid by the county if the person needing assistance is a complainant, defendant, or witness in any case arising out of law or equity in any court. Should the request for an interpreter come from any other individual, please contact the ADA State Judicial Program Coordinator at the AOC for advice on whether the county, municipality or state is responsible for payment of the interpreter's fee. For assistance locating an interpreter, please refer to the information below. The contact information for these organizations changes periodically. Please see the AOC's website (www.tncourts.gov) for updated information.

Centers for the Deaf and Hard of Hearing
Please contact the center serving your county

Memphis Interpreting Services for the Deaf (serving Fayette, Haywood, Lauderdale, Shelby, and Tipton counties)

Phone: (901) 278-9307
Emergency Pager: (901) 392-4768
(Sign Language Interpreting Service)

Jackson Center for Independent Living- Deaf & Hard of Hearing Services (serving Benton, Carroll, Chester, Crockett, Decatur, Dyer, Gibson, Hardeman, Hardin, Henderson, Henry, Hickman, Humphreys, Lake, Lawrence, Lewis, Madison, McNairy, Obion, Perry, Wayne, and Weakley counties)

Phone: (731) 664-3986
Video Phone: (731) 256-7026
Emergency: (731) 282-2858 or 888-877-8830 (Enter "2858" at the prompt)
(Sign Language Interpreting Service)

Nashville - BRIDGES (serving Cheatham, Davidson, DeKalb, Dickson, Houston, Macon, Montgomery, Maury, Robertson, Rutherford, Smith, Steward, Sumner, Trousdale, Williamson, and Wilson counties)

Phone: (615) 248-8828 (V & TTY)
Franklin Office: (615) 887-0446 (V&TTY)
Emergency: (615) 244-0979
(Sign Language Interpreting Service and TypeWell)
**The TypeWell transcription system is a meaning-for-meaning system. This means the transcriber does not type every word that is said, but rather condenses and rewords, while maintaining the full meaning intended by the speaker. This may not be an appropriate type of interpretation for judicial proceedings.

Chattanooga Partnership Services for Family, Children, and Adults – Services for the Deaf & Hard of Hearing (serving Bedford, Bledsoe, Bradley, Cannon, Coffee, Franklin, Giles, Grundy, Hamilton, Lincoln, Marion, Marshall, McMinn, Meigs, Monroe, Moore, Polk, Rhea, Sequatchie, Van Buren, and Warren counties)

Phone: (423) 697-3842
Video Phone: 1-866-754-0932
Fax: (423) 697-3846
Emergency Pager: (423) 395-1913
(Sign Language Interpreting Service)

Knoxville Center for the Deaf (serving Anderson, Blount, Campbell, Clay, Cumberland, Fentress, Grainger, Jackson, Jefferson, Knox, Loudon, Morgan, Overton, Pickett, Putnam, Roane, Scott, Sevier, Union, and White counties)

Phone: (865) 579-0832

Emergency: (865) 579-0832 (Enter “50” at the prompt)
(Sign Language Interpreting Service)

Johnson City Communication Center for the Deaf and Hard of Hearing (serving Carter, Claiborne, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington counties)

Phone: (423) 434-0447
Emergency Pager: (423) 410-6318
(Sign Language Interpreting Service)

Communication Access Realtime Translation (CART)

A CART provider/interpreter’s role is to facilitate communication. CART is a word-for-word transcription service. If you require the assistance of a CART provider, contact the ADA State Judicial Program Coordinator at the AOC.

9.04 ACCESSIBILITY FOR PERSONS WITH DISABILITIES

The Administrative Office of the Courts has adopted a policy in order to ensure that all individuals have equal access to judicial programs and to prohibit discrimination against any individual on the basis of physical or mental disability in accessing or participating in its programs. Generally, it is the policy of the Judicial Branch of the State of Tennessee to prohibit discrimination against any qualified individual on the basis of physical or mental disability in accessing or participating in its judicial programs. The Judicial Branch shall conduct its services, programs or activities, when viewed in their entirety, in a manner that is readily accessible to and usable by qualified individuals with disabilities.

The AOC established this policy during the resolution of litigation that was filed against the State of Tennessee and twenty-five (25) counties in the District Court for the Middle District of Tennessee alleging discrimination against persons with disabilities for failing to conduct the judicial program in accessible courthouses in violation of Title II of the Americans with Disabilities Act (ADA). While county courthouses are county owned buildings, the judicial programs that occur in these buildings are both county programs (general sessions, juvenile, etc.) and state programs (circuit, chancery, etc.). The policy establishes a procedure by which persons with disabilities can request and receive appropriate modifications in order to ensure access to the court system.

Each county has at least one Local Judicial Program ADA Coordinator to serve as a contact person for persons with disabilities who need access to the judicial system. There is also a statewide Judicial Program ADA Coordinator located in the AOC offices.

The judicial program is operated by municipal, county and state governments. Therefore, the Supreme Court has adopted Supreme Court Rule 45 which makes the ADA policy regarding access to the judicial program applicable to all courts, without limitation, including municipal courts, general sessions courts, juvenile courts, circuit courts, chancery courts, criminal courts, and the respective appellate courts. The policy contains a

procedure for a person to make a request for an accommodation, and for that request to be considered and acted on. One step in the process involves review by a judge.

Finally, information concerning the ADA policy, Local Judicial Program ADA Coordinators, Request for Modification forms, sample signage and other important ADA information can be found at the ADA page at the AOC website, www.tncourts.gov.

CHAPTER 10

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Contents **Section**

10.01 IN GENERAL: CIVIL CASES

In nonjury civil cases, the court must "find the facts specially, state its conclusions of law separately, and direct the entry of the appropriate judgment." Under a previous version of the rule, findings of fact and conclusions of law were only required to be written where a party requested them to be written. However, the current rule requires the court to make such findings in writing. Written findings are not necessary for motions filed under Rules 12 or 56 of the Tennessee Rules of Civil Procedure, or any other motion, save for motions for temporary injunctions or motions for involuntary dismissal. It is sufficient if the findings and conclusions appear in an opinion or memorandum of the court. The findings and conclusions of a master, to the extent the court adopts them, are considered the findings of the court. Tenn. R. Civ. P. 52.01.

10.02 PREPARATION, CONTENT, FILING

The preparation of findings of fact and conclusions of law is a function for the trial judge. It is generally improper for the judge to require or permit counsel for the successful party to prepare the findings, *Murray Ohio Mfg. Co. v. Vines*, 498 S.W.2d 897 (Tenn. 1973), but the judge may request proposed findings and conclusions from the parties. *Delevan-Delta Corp. v. Roberts*, 611 S.W.2d 51 (Tenn. 1981). If the judge contemplates adopting any of the findings prepared by counsel, the judge should carefully examine the findings and determine that they are accurate and adequate. *Id.*

10.03 AMENDMENTS

Upon motion made by a party within thirty days after the entry of judgment, the judge may amend or make additional findings and amend the judgment accordingly. Tenn. R. Civ. P. 52.02. The motion for amended or additional findings may be made with the motion for new trial.

10.04 FAILURE TO MAKE FINDINGS AND CONCLUSIONS

Prior to the passage of the Tennessee Rules of Civil Procedure, a judgment would be reversed and the case remanded if the judge failed to make findings of fact and conclusions of law when requested to do so. After adoption of the rules, where the rules required findings of fact and conclusions of law to be written only when requested by a party, the Tennessee courts held that the failure to make findings and conclusion to be harmless error, despite the mandatory language of Rule 52. *Bruce v. Bruce*, 801 S.W.2d 102 (Tenn. App. 1990). In 2009, the language of Tenn. R. Civ. P. 52.01 was amended to read, "the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment." This change deletes that language that required such findings and conclusions be entered at the request of counsel. Tenn. R. Civ. P. 52.01. Subsequent to the change in the rule, the Court of Appeals has vacated the ruling of trial courts and remanded the case for further proceedings where written findings of facts and conclusions of law have not been made. *See Clement Homes, Inc. v. Chilcutt*, 2010 WL 2812574 (Tenn. Ct. App. 2010); *Lake v. Haynes*, 2011 WL 2361563 (Tenn. Ct. App. 2011). However, the Court of Appeals has also held that in some instances, it is not necessary to vacate and remand where findings of fact and conclusions of law were not written as required by the rule. *See Wall v. Wall*, 2011 WL 2732269 (Tenn. Ct. App. 2011) (where relied upon evidence was either undisputed or supported by a preponderance of the evidence at trial which could be reviewed in the record); *Eldridge v. Hundley*, 2011 WL 3925563 (Tenn. Ct. App. 2011) (where record contained evidence presented at trial and a transcript of the hearing that included the trial court's oral findings and conclusions).

10.05 APPEAL

The question of the sufficiency of the evidence to support the court's findings may be raised on appeal whether the party raising the question has objected to the findings in the trial court or moved to amend or for judgment. Tenn. R. Civ. P. 52.02.

10.06 IN GENERAL: CRIMINAL CASES

In a criminal case, upon ruling on a motion for new trial and upon the request of either party, the court must "make and state into the record findings of fact and conclusions of law to explain its ruling on any issue not determined by the jury." Tenn. R. Crim. P. 33(c).

CHAPTER 11

COURT COSTS AND FINES

Contents **Section**

11.01 CIVIL CASES

Costs are the expenses incurred in litigation as provided for by statute. The Constitution does not restrict the legislature's power to tax litigation as the legislature deems appropriate.

Tennessee law provides that the successful party in all civil actions is entitled to full costs unless otherwise directed by law or by a court of record. T.C.A. § 20-12-101. In cases of nonsuit, dismissal, abatement due to the death of the plaintiff, or discontinuance, the defendant is the successful party and is entitled to recover costs. T.C.A. § 20-12-110. Statutory provisions regarding court costs in civil cases are found in T.C.A. §§ 20-12-101 – 144.

11.02 CRIMINAL CASES

Costs in criminal cases include all costs incident to the arrest and safekeeping of the defendant, before and after conviction, due and incident to the prosecution and conviction, and incident to the carrying out of the judgment or sentence of the court. T.C.A. § 40-25-104. Statutory provisions regarding costs and fees in criminal cases are found in T.C.A. §§ 40-25-101 – 143.

11.03 MENTAL HEALTH PROCEEDINGS

Pursuant to legislative authority, the Supreme Court has adopted provisions for the payment of costs of the indigent in mental health proceedings arising under Tennessee Code Annotated Title 33, Chapters 3-8. Tenn. S. Ct. R. 15.

11.04 FINES IN CRIMINAL CASES

Defendants who are fined may be ordered to pay the fine immediately, at a later date, in periodic payments or as a condition of probation. T.C.A. § 40-24-101. Judges may, for good cause, release a defendant from a fine or forfeiture. T.C.A. § 40-24-102. Statutory provisions regarding fines in criminal cases are found in T.C.A. §§ 40-24-101 – 109.

CHAPTER 12

COURTROOM MISCONDUCT

Contents **Section**

12.01 IN GENERAL

Dignity, order, and decorum are the hallmark of all court proceedings. "It is ultimately the authority and responsibility of the trial judge which must be exercised to maintain the atmosphere appropriate for a fair, rational and civilized determination of the issues and governance of the conduct of all persons in the courtroom, including the attorneys." ABA Standards on the Judge's Role in Dealing with Trial Disruptions. State law recognizes the authority of Tennessee judges to enforce order in their presence and to control judicial officers. T.C.A. § 16-1-102.

12.02 LITIGANTS

When a litigant is disruptive during court proceedings, the judge has the authority to take reasonable measures under the circumstances to assure that the decorum and dignity of the courtroom is observed. If corrective action is taken, judges should describe the action and the reasons that prompted the action on the record.

Not all, but many courtroom disruptions occur in criminal cases. First, it must be understood that those accused of crime are entitled to appear in court “free from all bonds and shackles.” *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1972), *cert. denied sub nom, Kennedy v. Gray*, 416 U.S. 959 (1974). Such physical restraint is said to be an affront to the very dignity and decorum of the judicial proceedings that the judge is bound to uphold. But, at times, the conduct of the accused leaves the court with no choice but to take some action to protect the courtroom from inappropriate disruptions.

In the criminal context, the United States Supreme Court has said that “[t]he flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. . . . [T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.” *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970). Thus, the Court concluded, that a trial judge could handle such a situation in at least "three constitutionally permissible ways: bind and gag the defendant thereby keeping the defendant present in the courtroom; cite the defendant for contempt; or exclude the defendant from the courtroom until the defendant promises to act appropriately." *Illinois v. Allen*, 397 U.S. 337 (1970). Removal of a disruptive defendant from the courtroom does not violate the defendant’s right to

confrontation; the defendant has waived the right by his or her behavior. *Illinois v. Allen*, 397 U.S. 337 (1970) (note that the Court emphasized that the judge had repeatedly warned the defendant before the exclusion and that the circumstances indicated that threat of a contempt finding would have been ineffective); *see also State v. Carruthers*, 35 S.W.3d 516 (Tenn. 2000); *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000).

The American Bar Association Project on Standards Relating to Criminal Justice, Standards Relating to Trial By Jury, Section 4.1(c) provides that restraints should not be used against witnesses or defendants unless the trial judge has found such restraint reasonably necessary to maintain order. If a restraint is ordered, the standards suggest that the judge should place the reasons for the restraint in the record. In the event the defendant in a criminal case is restrained, the judge should instruct the jurors that such restraint is not to be considered in assessing the proof or determining guilt.

The Tennessee courts have applied the principles set forth in *Illinois v. Allen* to uphold physical restraint of a defendant only as a last resort. In *Willocks v. State*, 546 S.W.2d 819 (Tenn. Crim. App. 1976), the court noted that there is a presumption against the necessity of in-court restraint with the burden of showing the necessity of physical measures resting on the state. "[B]ecause every criminal defendant is entitled . . . to a fair and impartial trial . . . a defendant should never be shackled during . . . trial before a jury except in extraordinary circumstances. . . [and] upon a *clear showing* of necessity." *Willocks v. State*, 546 S.W.2d 819, 822 (Tenn. Crim. App. 1976). Shackling is to be used as a last resort only when less drastic security measures will not suffice. Likewise, the *Willocks* opinion and others following it have emphasized the requirement that judges who do impose physical restraints on criminal defendants caution the jury against allowing the fact of restraint affect their judgment. *State v. Thompson*, 832 S.W.2d 577 (Tenn. Crim. App. 1991).

The use of a stun belt on a disruptive defendant has also been upheld in *Mobley v. State,* 397 S.W.3d 70 (Tenn. 2013), based on a similar analysis. The opinion states that, should a stun belt inadvertently become visible to the jury, the trial court should give cautionary instructions that it should in no way affect the jury's determinations.

12.03 COUNSEL

Judges also have the authority to act to prevent disruption by counsel in the courtroom. Counsel's misconduct may take the form of improper remarks made in open court or by a failure to obey a judge's instruction. Some examples of misconduct by counsel include:

singling out a juror and appealing personally to that juror, *Scarbrough v. City of Lewisburg*, 504 S.W.2d 377 (Tenn. App. 1973); *Pendleton v. Evetts,* 611 S.W.2d 607 (Tenn. App. 1981);

implying to the jury that a civil defendant is insured, *Lovin v. Stanley,* 493 S.W.2d 725 (Tenn. App. 1973);

unwarranted and improper reference to a party's or counsel's character not based on evidence, *Hager v. Hager,* 66 S.W.2d 250 (Tenn. App. 1933);

improperly arguing to appeal to passion, prejudice and sentiment, *Nashville, C. & St. L. Ry. v. Mangrum,* 15 Tenn. App. 518 (1932);

reacting to opposing counsel's misconduct with misconduct, *Nashville Ry. & Light Co. v. Owen,* 11 Tenn. App. 19 (1929);

commenting on failure of accused to testify in violation of the right to be free from self-incrimination, *Turner v. State,* 394 S.W.2d 635 (Tenn. 1965);

deliberately misquoting previous testimony, *Finks v. Gillum,* 273 S.W.2d 722 (Tenn. App. 1954);

arguing theories of law to the jury as authoritative instruction, *Zang v. Leonard,* 643 S.W.2d 657 (Tenn. App. 1982).

Often when counsel has engaged in misconduct requiring court action, the misconduct also constitutes a violation of the Rules of Professional Conduct, Tennessee Supreme Court Rule 8. A judge who has knowledge (defined as actual knowledge or knowledge inferred from the circumstances) that a lawyer has committed such a violation "that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer" is required to inform the appropriate authority which may include the Board of Professional Responsibility. Code of Judicial Conduct, Canon 3(D)(2).

12.04 SPECTATORS

The courtroom must remain an open and public place in which the courts conduct their business in the presence of the public. Not only does the public have a right to be in the courtroom, their presence serves to assure the integrity of the proceedings. Exclusion of all spectators in advance of a trial may violate a defendant's right to a fair trial. *In re Oliver*, 333 U.S. 257 (1948). A juvenile court may exclude members of the general public from a proceeding only in the circumstances provided in Rule 27 of the Tennessee Rules of Juvenile Procedure. T.C.A. § 37-1-124. The general public may also be excluded in most mental health proceedings. *See* T.C.A. § 33-3-706.

Despite the public nature of the courtroom, a spectator's right to attend a court proceeding is not absolute. Judges may impose reasonable limitations upon the unrestricted occupation of a courtroom by the members of the public. Thus, the judge may impose reasonable time, place, and manner restrictions in order to accomplish order and fairness. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555 (1980).

When spectators engage in misconduct in the courtroom, they may be cited for contempt or removed from the courtroom. As in the case of misbehaving counsel, the judge may summarily cite and punish the misbehaving spectator for contempt if the contemptuous behavior occurred in the judge's presence. Tenn. R. Crim. P. 42.

12.05 COURT OFFICERS

Officers of the court likewise may not engage in courtroom misconduct. They should conduct themselves with dignity and treat the parties, counsel, spectators, and the jury with equal dignity and respect. Court officers should prevent anyone from attempting to influence the jury; should assure that nothing interferes with their eligibility as jurors; and should not engage in any misconduct that might tend to prejudice the jury in favor of or against any party.

CHAPTER 13

MEDIA COVERAGE IN THE COURTROOM

Contents **Section**

13.01 IN GENERAL

Tennessee Supreme Court Rule 30 provides the authority for media coverage in the courtroom. It's important to note that Rule 30 particularly addresses camera (video and still) and audio coverage of the courtroom. Provided a courtroom proceeding is not closed to the public for some other reason, general media coverage is always permitted. An evidentiary hearing shall be held before placing restrictions on coverage outside the general provisions provided for in the rule.

13.02 DEFINITIONS

- **Coverage** - any recording or broadcasting of a court proceeding by the media using television, radio, photographic, or recording equipment
- **Media** - *legitimate* news gathering and reporting agencies and their representatives whose function is to inform the public, or persons engaged in the preparation of educational films or recordings
- **Proceeding** - any trial, hearing, motion, argument on appeal, or other matter held in open court that the public is entitled to attend … proceeding includes any activity in the building in which the judicial proceeding is being held or any official duty performed in any location as part of the judicial proceeding
- **Presiding Judge** - means the judge, justice, master, referee or other judicial officer who is scheduled to preside, or is presiding, over the proceedings
- **Minor** - means any person under eighteen (18) years of age

13.03 PRESUMPTION

Media coverage shall be allowed and is subject at all times to authority of the presiding judge.

13.04 REASONS FOR LIMITING COVERAGE

- Control the conduct of the proceedings before the court
- Maintain decorum and prevent distractions
- Guarantee the safety of any party, witness, or juror
- Ensure the fair and impartial administration of justice in the pending case

13.05 REQUESTS FROM MEDIA

- In writing, to presiding judge, although judge may choose to designate someone else – court clerk, law clerk, assistant, etc.
- Two business days notice (often waived)

13.06 NOTICE TO PARTIES

- Clerk notifies attorneys of record in writing
- Individual notice can be waived if:
  - request is for entire docket
  - notice posted in “conspicuous place ... outside courtroom”
  - Any party may request a continuance
  - Need solid reasons to grant continuance

13.07 PROHIBITIONS

- Any coverage of a minor in any role, unless charged as an adult
- Jury Selection
- Jurors during proceedings
- Closed proceedings
- **Juvenile Proceedings**
  - Court will notify the parties and their counsel of media request
    - Prior to start of the proceedings:
    - Court advises accused, parties, witnesses of personal right to object
    - If consent is given, it must be in writing
  - Objections by a witness:
    - Will suspend media coverage as to that person only
    - Objections by the accused in a criminal case or any party to a civil action will prohibit media coverage of the entire proceeding

13.08 CONFERENCES OF COUNSEL

- Nothing recorded - includes close-up video (bench conferences & attorneys & clients)
- co-counsel

13.09 DISCRETION OF JUDGE

- Presiding judge has discretion to:
  - refuse, limit, terminate, or temporarily suspend media coverage of entire case or portions of a case
- Reasons:
  - (i) control the conduct of the proceedings before the court; (ii) maintain decorum and prevent distractions; (iii) guarantee the safety of any party, witness, or juror; and (iv) ensure the fair administration of justice in the pending cause

13.10 EVIDENTIARY HEARINGS

- Presiding judge shall hold an evidentiary hearing before:
  - denying, limiting, suspending, or terminating media coverage, if such a hearing will not delay or disrupt the judicial proceeding
- Hearing not possible? Affidavits may be used
- Burden of proof on party seeking limits on media coverage
- If there is no opposition to media coverage, judge may consider matters properly the subject of judicial notice.
- Media requesting coverage shall be allowed to present proof, at hearing or by affidavit.
- Any finding that coverage should be limited must be supported by substantial evidence that at least one of the four interests is involved.

13.11 EQUIPMENT & PERSONNEL

- **Cameras permitted**
  - *One, but no more than two television cameras* with one operator each
  - Two still photographers - not more than two cameras each
  - One audio system for radio broadcast purposes
- **Pooling Arrangements**
  - When more than one request for media coverage:
    - Media shall select representative to be liaison responsible for arranging pooling
    - Identity of representative shall be filed with clerk of the court
    - Sole responsibility of the media and cannot call upon judge to mediate disputes
    - If no advance media agreement, judge **shall** exclude all contesting media personnel from a proceeding

- **Personal Recorders**
  - Media personnel may use hand-held cassette tape recorders without notice if the recorder are no more sensitive than the human ear
  - For recordings used as personal notes, not for any purpose, or broadcast
- **Print media**
  - Basically anyone not using “camera or electronic equipment”
  - Applies to very few today as all reporters are multimedia reporters
- **Sound & Light**
  - Only equipment that does not produce distracting sound or light allowed to cover proceedings
  - Signal lights or devices to show when equipment is operating shall not be visible. No moving lights, flash attachments, or sudden light changes.
  - Audio pickup from existing systems or from a camera's built-in microphone.
  - Microphones/related wiring shall be unobtrusive and placed in places designated in advance by the judge.
  - Court proceedings shall not be interrupted because of a equipment problem
- **Location of Equipment & Media**
  - Judge designates location for “reasonable coverage”
  - No movement
  - Personnel shall “attire and deport themselves” as to not detract from proceedings
- **Use of Media Material**
  - Shall not be used:
    - in the proceeding out of which it arose
    - any proceedings subsequent and collateral thereto
    - or upon any retrial or appeal of such proceeding

13.12 ELECTRONIC DEVICES & SOCIAL MEDIA

When Rule 30 was adopted in 1995 and updated in 1999, the technological tools available today did not exist or were not widely used. Because of this, the rule does not address cell phones, cell phone cameras, laptops, digital notebooks, combination video/still cameras, texting or social media. It is up to the judge presiding over the courtroom to determine if and how these devices and information outlets are to be used in the courtroom. It is important for the judge to make her/his wishes known prior to the start of the proceedings.
Some things to consider:

- Are cell phone cameras allowed? If so, is posting photos on social media or websites during the course of the proceedings permitted?
- Are laptops or digital tablets allowed? If so, can a reporter continue typing during the proceedings? Is using social media and posting details of proceeding as it happens permitted?
- Do witnesses yet to testify have access to realtime coverage of the proceedings? Could that compromise the case?

CHAPTER 14

CONTEMPT POWERS

Contents **Section**

14.01 SCOPE OF POWER GENERALLY; TERMINOLOGY

Contempt of court is any act that tends to hinder or delay the administration of justice. *Winfree v. State*, 135 S.W.2d 454 (Tenn. 1940). Courts must possess the authority to punish those who disregard the dignity and authority of the court. Thus, the contempt power is exercised to maintain order and decorum in court proceedings, to punish for disrespect shown the court or the court's orders, to enforce the court's writs and orders, and to punish acts that obstruct the administration of justice.

The basis for contempt power in Tennessee is statutory. T.C.A. §§ 29-9-101 – 108; 40-24-105 (contempt for willfully refusing to pay a fine). The statutory provision regarding general sessions judges' contempt power is found at T.C.A. § 16-15-713.

The judge has discretion in determining the existence of and dealing with contempt. The judge's determination is final unless the judge abuses his or her discretion. While the power to punish for contempt should be used in appropriate cases, it should not be used unless the case clearly calls for its exercise. Such power should be exercised only when necessary to prevent direct obstruction of, or interference with, the administration of justice. *Robinson v. Air Draulics Engineering Co.*, 377 S.W.2d 908 (Tenn. 1964).

A tribunal cannot punish for an act that is actually a contempt of another court. *Raht v. Southern Ry. Co.*, 387 S.W.2d 781 (Tenn. 1965). A state court cannot punish for an act that constitutes contempt of a federal court. However, in counties where a court has several parts, a judge or chancellor of one part can punish for a contempt of another division or branch of the court. *Mayhew v. Mayhew*, 376 S.W.2d 324 (Tenn. App. 1963).

Contempts are classified as criminal or civil; direct or indirect. Whether a fine or imprisonment is imposed is not the distinguishing test of classification. The test stems from the nature of the contemptuous act itself. *O'Brien v. State ex rel. Bibb*, 170 S.W.2d 931 (Tenn. App. 1942).

A. Criminal Contempt

A criminal contempt occurs when an act of misconduct is directed against the dignity and authority of the court. It is an act obstructing the administration of justice which tends to bring the court into disrepute or disrespect. *Garrett v. Forest Lawn Memorial Gardens, Inc.,* 588 S.W.2d 309 (Tenn. App. 1979). Generally, the primary purpose for exercising the power of contempt in a criminal contempt situation is to preserve the court's authority and punish for the disobedience of the court's orders. A criminal contempt can arise in the course of any proceeding.

B. Civil Contempt

A civil contempt occurs when one refuses or fails to comply with an order of the court. The purpose of punishment is to provide a remedy for the injured party and to coerce compliance with the court order. If the court order is obeyed, the contempt will be fully discharged. *Shiflet v. State*, 400 S.W.2d 542 (Tenn. 1966).

C. Direct Contempt

A direct contempt is based on conduct committed in the presence of the court or so near the court's presence to obstruct or interrupt proceedings. *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978). While the judge has the power to punish direct contempt summarily, summary punishment should be reserved for exceptional circumstances where instant action is required. *Harris v. United States*, 382 U.S. 162 (1965). The better procedure, even in a direct contempt situation, is to proceed with notice and a hearing.

D. Indirect Contempt

An indirect contempt is based on conduct not committed in or near the judge's presence. The most frequent use of the term is with reference to the failure or refusal of a party to obey a lawful court order, injunction, or decree. *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978). Actions constituting an indirect contempt can only be punished after notice and a hearing.

14.02 PREREQUISITES TO THE PROCEEDING

A direct criminal contempt may be punished summarily if the judge certifies that he or she saw or heard the conduct constituting the contempt and that it was committed in the presence of the court. The order of contempt must recite the facts and be signed by the judge and entered of record. Tenn. R. Crim. P. 42; *State v. Maddux*, 571 S.W.2d 819 (Tenn. 1978).

All other contempts, including indirect criminal contempts, must be initiated by the filing of a petition with the court or by the filing of notice. In an indirect criminal contempt, the notice must state the time and place of the hearing and must allow a reasonable time for the preparation of the defense. The notice must also state the essential facts constituting the criminal contempt charged and describe it as such. In a criminal contempt

case, the notice may be given orally in court by the judge in the defendant's presence, on application of the district attorney general or an attorney appointed for that purpose, or by an order to show cause or an order of arrest. A defendant is entitled to admission to bail on a charge of criminal contempt. Tenn. R. Crim. P. 42. If the criminal contempt involves criticism of the judge, the judge is disqualified from hearing the matter. *State v. Green*, 783 S.W.2d 548 (Tenn. 1990).

Civil contempts are generally initiated by the filing of a petition requesting the issuance of a show cause order. The court issues a show cause order for the defendant to appear and demonstrate why a contempt finding should not be made. The court may grant an attachment of the defendant's body pending the hearing. If a show cause order is issued, it must be served on the defendant along with notice of the hearing.

The notice must fairly and completely apprise the defendant of the events and conducts constituting the alleged contempt. *Storey v. Storey*, 835 S.W.2d 593 (Tenn. App. 1992).

14.03 DEFENDANT'S RIGHTS

A. Counsel

As a general rule, a defendant has a right to counsel in a contempt proceeding if incarceration is a potential punishment. With regard to child support enforcement, if a finding of civil contempt may result in the incarceration of the contemnor, the United States Supreme Court has held that where the custodial parent is unrepresented by counsel, it is not necessary to provide an indigent noncustodial parent with an attorney. However, the State must have alternative procedures assuring fundamental fairness in the determination of the critical incarceration related question. *Turner v. Rogers, et al.*, 131 S.Ct. 2507 (2011).

B. Jury

In most contempt cases the judge or chancellor is the sole determinant of the facts and law. *Pass v. State*, 184 S.W.2d 1 (Tenn. 1945). But if there is a measure of damages to be assessed as under Tennessee Code Annotated § 29-9-105, early case law suggested that a jury could be impaneled for the purpose of setting the amount of damages. *Robins v. Frazier,* 52 Tenn. 100 (1871).

Although the defendant does not generally have a right to a trial by jury in a contempt proceeding, *Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000), a defendant charged with a failure to pay child support under Tennessee Code Annotated § 36-5-104 which is defined as a criminal offense does have a right to a jury trial. *Brown v. Latham*, 914 S.W.2d 887 (Tenn. 1996). Additionally, the right to a jury trial exists to the same extent as for other crimes. *Bloom v. Illinois*, 391 U.S. 194 (1968).

C. Bail

If a defendant is arrested under an attachment to answer a contempt citation, the alleged offender is entitled to make bond insuring appearance unless the act of contempt is

the failure to perform the requirements of a court order. T.C.A. § 29-9-106. The judge is required to set bail, but if the judge fails to do so, the bail will be $250. T.C.A. § 29-9-106.

D. Self-Incrimination

In both civil and criminal proceedings, the defendant can invoke the protection against self-incrimination. *Gompers v. Bucks Stove*, 221 U.S. 418, 444 (1911).

E. Conflict-Free Prosecution

Under circumstances in which the prosecutor in the contempt action is a lawyer in a collateral suit, a conflict of interest may exist. *Young v. U.S. ex rel. Vuitton*, 481 U.S. 787 (1987) (contempt finding reversed due to conflict); *Wilson v. Wilson*, 984 S.W.2d 898 (Tenn. 1998) (no due process violation when prosecutor was also lawyer in civil case).

F. Double Jeopardy

Double jeopardy bars a contempt conviction and a criminal conviction for the same act unless the two offenses do not have the same elements. *United States v. Dixon*, 509 U.S. 688 (1993); *see also Cable v. Clemmons*, 36 S.W.3d 39 (Tenn. 2001).

G. Confrontation

Except under a summary proceeding for direct criminal contempt, a defendant arguably has the right to confront the witnesses against the defendant.

H. Evidentiary Rulings

In a contempt proceeding, the court should not burden the defendant's ability to prove a defense by unnecessary strictness and technical rulings on the admissibility of evidence. *Bowdon v. Bowdon*, 278 S.W.2d 670 (Tenn. 1955).

14.04 BURDEN OF PROOF

In criminal contempts, the defendant is presumed to be innocent and must be proved to be guilty beyond a reasonable doubt. *Nashville Corp. v. United Steelworkers*, 215 S.W.2d 818 (Tenn. 1948). Civil contempts must be proven by clear and convincing evidence.

14.05 DEFENSES

Often the contemnor will argue that the actions were as a result of the advice of counsel. In *Robinson v. Air Draulics Engineering Co.*, 377 S.W.2d 908 (Tenn. 1964), the supreme court suggested that reliance on advice of counsel should be considered in mitigation when defendant established reliance in good faith on counsel's advice.

An inability to perform the order of the court, if not the result of the defendant's voluntary acts, is a defense. *Mayer v. Mayer*, 532 S.W.2d 54 (Tenn. Ct. App. 1975).

The fact that the court's order was erroneous is not a defense to a contempt action. Even an erroneous order must be obeyed at the risk of contempt. *Nuclear Fuel v. Local Union*, 719 S.W.2d 550 (Tenn. Crim. App. 1986).

14.06 APPEAL

Appeals arising out of contempts in civil cases are to the Court of Appeals; appeals of contempts arising from a criminal matter are to the Court of Criminal Appeals. *B.H. Stief Jewelry Co. v. Walker*, 256 S.W.2d 392 (Tenn. App. 1952); T.C.A. §§ 16-4-108 & -5-108. However, if the contempt was in the presence of the court, no relief can be sought by appeal. The remedy against arbitrary and oppressive judgments in such cases is by *habeas corpus* or by a petition for certiorari and supersedeas to the appellate court. *Brizendine v. State*, (Tenn. 1899). A losing party has no right to appeal an acquittal in a contempt case. *Zwick v. Jones*, 589 S.W.2d 664 (Tenn. Ct. App. 1979).

PROCEDURE[1]

DIRECT CONTEMPT - CRIMINAL (RULE 42 (a)) ELEMENTS CHECKLIST

I. Does the conduct occur in the presence of the judge?

II. Does the actor know or should the actor know that the conduct in question is impermissible?

III. Does the actor know the consequences of such continuing conduct?

IV. Is the conduct willful or intentional?

V. Is the conduct:

A. Obstructive? or
B. Disruptive? or
C. Interruptive? or
D. Derogatory?

VI. Are immediate punishment and/or restrictive sanctions necessary to maintain order and decorum or to preserve the authority of the judge?

[1] The checklists are part of a presentation made to the Tennessee Judicial Conference by Judge C. Creed McGinley on March 15, 2013.

DIRECT CONTEMPT - CRIMINAL
DISPOSITION CHECKLIST

1. Make findings on the record for each of the elements of direct criminal contempt beyond a reasonable doubt.

2. Give the actor an opportunity to respond to the findings.

3. Make a finding of guilt.

4. Give the actor an opportunity for allocution.

5. Summarily impose a statutory or reasonable fine not to exceed $50.00 and/or any sentence of 10 days or less and/or other restrictive sanctions.

6. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

PROCEDURE

INDIRECT CONTEMPT - CRIMINAL (RULE 42 (b))
ELEMENTS CHECKLIST

I. Does the conduct occur <u>outside the presence</u> of the judge?

II. Does the actor know or should he or she know that the conduct in question is impermissible?

III. Does the actor know the consequences of such continuing conduct?

IV. Is the conduct willful or intentional?

V. Is the conduct:

A. Obstructive? or
B. Disruptive? or
C. Interruptive? or
D. Derogatory?

VI. Are immediate punishment and/or restrictive sanctions necessary to maintain order and decorum or to preserve the authority of the judge?

INDIRECT CONTEMPT - CRIMINAL
DISPOSITION CHECKLIST

1. Give notice of time and place of hearing allowing reasonable time for preparation of defense and state essential facts constituting criminal contempt charged. (Notice may be oral in open court or by charging instrument.)

2. If charge involves disrespect to or criticism of judge, recusal mandatory.

3. Make finding of guilt beyond a reasonable doubt.

4. Upon finding of guilt by the court, order to be entered fixing punishment of not more than $50.00 nor more than 10 days in jail.

PROCEDURE

DIRECT CONTEMPT - CIVIL
ELEMENTS CHECKLIST

I. Is the order of the court violated in the presence of the judge?

II. Does the actor know that the conduct in question was prohibited or directed by the order of the court?

III. Does the actor know the consequences of such continuing conduct?

IV. Is the violation willful or intentional? Does the actor have the means or ability to comply?

V. Is the punishment necessary to compel compliance with the order?

DISPOSITION CHECKLIST
DIRECT CIVIL CONTEMPT

1. Make findings on the record for each of the elements of direct civil contempt.

3. Make a finding of guilt.

4. Give the actor a final opportunity to comply with the order and to purge the contempt.

5. Summarily impose any reasonable fine and/or sentence which terminates upon compliance with the order.

PROCEDURE

INDIRECT CONTEMPT - CIVIL
ELEMENTS CHECKLIST

I. Is the order of the court violated outside the presence of the judge?

II. Does the actor know that the conduct in question was prohibited or directed by the order of the court?

III. Does the actor know the consequences of such continuing conduct?

IV. Is the violation willful or intentional? Does the actor have the means or ability to comply?

V. Is the punishment necessary to compel compliance with the order?

INDIRECT CONTEMPT - CIVIL
DISPOSITION CHECKLIST

1. Upon notice of violation of the court's order, notice the actor to appear and to show cause why he or she should not be found in contempt of court.

2. After hearing make findings on the record for each of the elements of indirect civil contempt.

3. Make a finding of guilt.

4. Grant the actor a reasonable time to purge the contempt.

5. Upon a failure to purge, impose any reasonable fine and/or sentence which terminates upon compliance with the order.

CHAPTER 15

INITIATING PROSECUTION

Contents **Section**

15.01 METHODS AND FORMS

Under the United States and Tennessee Constitutions, anyone accused of a criminal offense has a right to be tried only upon indictment, presentment, or impeachment. T.C.A. § 40-3-101; U.S. Const. amend. V.; Tenn. Const. art. I, §14. Tenn. R. Crim. P. 7 provides that the form and content of indictments, presentments, and informations shall be "as provided by law."

15.02 GRAND JURY

For general information regarding grand jury issues, see Tenn. R. Crim. P. 6 and T.C.A. §§ 8-7-501 to -503, 22-2-301 to -315, 40-12-101 to -218, and 40-13-101 to -221. "[P]rosecutorial abuse of the grand jury process occurs when the dominant purpose of a grand jury proceeding is to investigate a defendant for an offense for which he or she has already been indicted," but there is a presumption of regularity and the defendant has the burden of proving otherwise. If the court concludes that abuse has occurred, the appropriate remedy depends upon the status of the proceedings at the time of the court's determination. *State v. Mangrum*, 403 S.W.3d 152, 165-66 (Tenn. 2013).

15.03 INDICTMENT AND AMENDMENT OF INDICTMENT

An indictment is a written accusation presented by the grand jury charging a person with an indictable offense. Indictable offenses include all felonies and misdemeanors. T.C.A. §§ 40-13-101, -102. Acquiring a valid indictment requires compliance with numerous provisions regarding procedure, form and content. T.C.A. §§ 40-3-104; 40-13-103 to -221; 40-17-106; Tenn. R. Crim. P. 7.

For certain offenses, statutes set forth what is necessary to constitute a sufficient indictment. That includes, but is not necessarily limited to, the following offenses: (1) Fraud; (2) Perjury; (3) Libel; (4) Conspiracy; (5) Gaming; (6) Dealing in futures; (7) Liquor violations; (8) Violating graves; (9) Embezzlement or breach of trust; and (10) Possession of counterfeit money. T.C.A. §§ 40-13-212 to -221.

No judge, attorney, clerk, grand juror or any other officer of the court may reveal the fact that a defendant has been indicted until the defendant's appearance has been secured. Violation of this provision is a misdemeanor. T.C.A. § 40-13-112.

An indictment may always be amended with the defendant's consent. It may also be amended without the defendant's consent before jeopardy has attached if no additional or different offenses are charged and no substantial rights of the defendant are prejudiced. Tenn. R. Crim. P. 7.

15.04 INFORMATION

An information is a written statement by a district attorney general charging a person with the commission of a criminal offense. T.C.A. § 40-3-103(b). An accused may, with the consent of the court and the accused's attorney, waive the right to be tried upon presentment or indictment and consent to prosecution by information. T.C.A. §§ 40-3-101, -103. Prior to accepting this waiver, the court should consult T.C.A. § 40-3-103 regarding additional requirements.

15.05 PRESENTMENT

Any criminal violation may be prosecuted by presentment, and may be made upon the information of any one member of the grand jury. T.C.A. § 40-3-102. Tennessee laws pertaining to indictments pertain equally to presentments if the context permits. T.C.A. § 40-13-101(b).

15.06 FRAUD AND ECONOMIC CRIMES PROSECUTION ACT

The intent of the legislature in passing the Fraud and Economic Crimes Prosecution Act was, among other things, to provide a method for obtaining restitution in bad check cases prior to the institution of formal charges. T.C.A. § 40-3-202. For additional information regarding this Act and its procedures, see T.C.A. §§ 40-3-201 to -210.

CHAPTER 16

BAIL

Contents **Section**

16.01 RIGHT TO BAIL

An accused has the right to bail prior to trial for all offenses except for capital offenses "where the proof is evident or the presumption great." Tenn. Const. art. I, §15; T.C.A. § 40-11-102. Upon conviction, bail pending appeal is permitted in limited circumstances. T.C.A. §§ 40-11-113, 40-26-102 to -104; Tenn. R. Crim. P. 32(d); Tenn. R. App. P. 8.

16.02 MAKING BAIL

The various types of bail and the relevant statutory provisions are as follows:

A. Release on Recognizance or Unsecured Appearance Bond

- T.C.A. § 40-11-115

B. Release on Non-Financial Conditions

- T.C.A. § 40-11-116(b)

C. Secured Bail Bond

- T.C.A. §§ 40-11-117, -118

D. Guaranteed Arrest or Bail Bond Certificate

- T.C.A. §§ 40-11-145, -146

E. Bail Bond Secured by Real Estate or Sureties

- T.C.A. §§ 40-11-122, -123

F. Release During Trial

- T.C.A. § 40-11-141

16.03 SETTING AND TAKING BAIL

A defendant arrested and/or held for a bailable offense is entitled to bail by the committing magistrate or by any judge of the circuit or criminal courts. In limited circumstances, a clerk of the circuit or criminal court may also set the amount of bail. There are statutory limits on the amount a clerk may set, and the clerk must give notice that the defendant has a right to petition the court for a reduction in the amount of bail set by the clerk. T.C.A. § 40-11-105. For the provisions regarding which officials may take bail, see T.C.A. §§ 40-11-106 to 40-11-109.

A. Factors for consideration

Excessive bail shall not be required. Tenn. Const., art. I, §16. In determining whether release on recognizance or on an unsecured bond will reasonably assure the defendant's appearance, and in setting an amount of bail where appropriate, the magistrate should consider the factors set out in T.C.A. §§ 40-11-115 and 40-11-118. If a defendant does not qualify for release upon recognizance, the magistrate shall impose the least onerous conditions reasonably likely to assure the defendant's appearance in court. T.C.A. § 40-11-116.

B. Review of determination

Defense counsel may file a written motion for a change in bail or other conditions of release if dissatisfied with the court's determination. The motion must be served upon opposing counsel within a reasonable time. In granting or denying the motion, the court must set forth the reasons for its action in writing. T.C.A. § 40-11-143.

When a defendant is charged with a bailable offense while released on bail, the judge must set bail on each new offense in an amount not less than twice that which is customarily set for the offense charged. T.C.A. § 40-11-148.

16.04 FORFEITURE OF BAIL

If the defendant does not appear according to the terms of release, a conditional judgment may be entered against defendant and defendant's sureties or the court may grant an extension. T.C.A. § 40-11-201. In the court's discretion, the sureties may be exonerated upon surrender of the defendant and the payment of the costs. T.C.A. § 40-11-203.

16.05 DOMESTIC VIOLENCE AND ALCOHOL-RELATED OFFENSES

If a defendant is charged with DUI, vehicular assault, vehicular homicide by intoxication, or aggravated vehicular homicide, see T.C.A. §§ 40-11-118 and 40-11-148. If a defendant is charged with stalking, aggravated stalking, especially aggravated stalking, or certain offenses involving domestic violence, or if the defendant is in violation of an order of protection, see T.C.A. §§ 40-11-150 and 40-11-152.

16.06 DEFENDANT NOT LAWFULLY PRESENT IN THE UNITED STATES

If a defendant who is not lawfully present in the U.S. is arrested for causing a traffic accident resulting in death or serious bodily injury to another and if the defendant was driving without a valid driver license and evidence of financial responsibility, see T.C.A. §§ 40-11-105(c) and 40-11-118(e).

16.07 RELEASE OF BONDSMAN/SURETY FOLLOWING INITIAL DISPOSITION

A bondsman or surety must be released if the charges are disposed of by "acquittal, agreement with the state, whether diversion or otherwise, or retirement." T.C.A. § 40-11-138(b)(1). In contrast, the bond remains in effect until the defendant is sentenced if the defendant is convicted or enters a guilty plea. T.C.A. § 40-11-138(b)(2)(A). Between the time of the conviction/plea and the time of sentencing, however, the bond cannot be forfeited or included in a bondsman's capacity or solvency. T.C.A. § 40-11-138(b)(2)(B).

CHAPTER 17

SEARCH WARRANTS

Contents **Section**

See the "Warrantless Searches" chapter of this benchbook for additional information regarding searches.

17.01 IN GENERAL

The Fourth Amendment to the United States Constitution provides that "[the] right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Tennessee Constitution speaks in broader terms than the federal constitution, protecting "possessions" from unreasonable searches and seizures to limit searches of real and personal property. Tenn. Const. Art. I, § 7.

The Fourth Amendment only limits governmental activity. Therefore, evidence secured by private persons, even by illegal means, creates no constitutional violation. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). A private party acting for a reason independent of a governmental purpose does not implicate the Fourth Amendment. *State v. Burroughs*, 926 S.W.2d 243, 246 (Tenn. 1996).

The two clauses of the Fourth Amendment are referred to as the warrant clause and the reasonableness clause. Under both the federal constitution and our state constitution, a search without a warrant is presumptively unreasonable. Any evidence obtained pursuant to such a search is subject to suppression unless the state demonstrates that the search was conducted under one of the narrowly defined exceptions to the warrant requirement. *State v. Garcia*, 123 S.W.3d 335, 343 (Tenn. 2003) (citing *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997) and *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971)); see also *Katz v. United States*, 389 U.S. 347, 357 (1967).

Tennessee has approved of and adopted exceptions to the requirement of obtaining a

valid search warrant, including search incident to arrest, plain view, stop and frisk, hot pursuit, search under exigent circumstances, and consent. *State v. Cox*, 171 S.W.3d 174, 179 (Tenn. 2005). If a search falls under one of the exceptions to the warrant requirement, the relevant inquiry in determining the reasonableness of a warrantless search is not whether it would have been reasonable to get a warrant, but rather whether the search that occurred was reasonable under all of the circumstances. The consequence of an illegal search or seizure in most situations is the suppression or exclusion of the evidence obtained. *Mapp v. Ohio*, 367 U.S. 643 (1961).

17.02 ISSUANCE

By statute, judicial commissioners, county mayors, presiding officers of any municipal or city court, and judges of the supreme, appellate, chancery, circuit, general sessions, and juvenile courts have the authority to issue search warrants. T.C.A. § 40-1-106. Search warrants must be issued by a neutral and detached magistrate and not by one having a direct, personal, or pecuniary interest. *In re Dender*, 571 S.W.2d 491 (Tenn. 1978). Persons whose compensation is contingent upon issuance or non-issuance are prohibited from issuing a search warrant. T.C.A. § 40-5-106.

A search warrant can only be issued by a magistrate with jurisdiction within the county wherein the property sought is located. Tenn. R. Crim. P. 41(a). A warrant may be issued upon request of the district attorney general, assistant district attorney general, criminal investigator, or any other law-enforcement officer. Tenn. R. Crim. P. 41(a).

17.03 GROUNDS

The grounds for issuance of a search warrant are that probable cause exists to believe that the items or person(s) sought are in a particular place at a particular time. A search warrant may be issued to search for and seize any of the following: (1) evidence of a crime; (2) contraband, the fruits of a crime, or items otherwise criminally possessed; (3) property designed or intended for use, or that has been used in a crime; (4) a person whose arrest is supported by probable cause; or (5) a person who is unlawfully restrained. Tenn. R. Crim. P. 41(b). A search warrant may also be issued for property that was stolen or embezzled, property that was used as a means of committing a felony, and property in the possession of any person who has the intent to use it as a means of committing a public offense (or in another's possession for the purpose of concealing it). T.C.A. § 40-6-102.

17.04 PARTICULARS OF ISSUANCE

NOTE: See 17.09 relative to electronic communication when seeking a warrant. The pertinent statutory provision became effective 7/1/14 and terminates 7/1/15.

A warrant may issue only on an affidavit or affidavits sworn to before the magistrate and establishing the grounds for issuance. Tenn. R. Crim. P. 41(c)(1). The magistrate, before

issuing the warrant, must examine the complainant and any witness produced under oath, take their affidavits in writing, and require those swearing to the information to sign the affidavit, which must set forth facts tending to establish the grounds of the application or probable cause for believing that they exist. T.C.A. § 40-6-104. The probable cause necessary for issuance of a search warrant must be based only upon the evidence appearing in the written and sworn affidavit, which must present facts upon which "a neutral and detached magistrate, reading the affidavit in a common sense and practical manner," can determine the existence of probable cause for the issuance of the search warrant. The affidavit must provide more information than just the affiant's conclusory allegations to ensure that the magistrate exercises independent judgment. In reviewing the existence of probable cause for issuance of a warrant, the magistrate may only consider the affidavit, and may not consider any other evidence known by the affiant or provided to or possessed by the issuing magistrate. *State v. Carter*, 160 S.W.3d 526, 533 (Tenn. 2005).

While an affidavit must be retained in order to ensure subsequent judicial review of the probable cause determination, there is no statute or rule in Tennessee which requires an affidavit upon which a search warrant is issued to be attached or otherwise kept with the warrant. *State v. Davis*, 185 S.W.3d 338, 345 (Tenn. 2006). It is, however, good practice, particularly if a previous affidavit's contents are also considered in the issuance of the warrant. An affidavit that is neither referred to nor incorporated in a search warrant is subject to being disregarded by the court reviewing the magistrate's probable cause determination. *State v. Smith*, 836 S.W.2d 137 (Tenn. Crim. App. 1992).

The affidavit must, within its four corners, establish probable cause to believe that items (or a person) subject to seizure are in a particular place at a particular time. The test for probable cause is whether the facts and circumstances within the affiant's knowledge and of which the affiant has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that items subject to seizure are presently to be found at a certain place. It is the probability, and not the certainty, of criminal activity that must be shown to establish probable cause. An affiant's mere belief or suspicion that evidence is located at a particular place is insufficient for the issuance of a search warrant. *Earls v. State*, 496 S.W.2d 464 (Tenn. 1973).

Probable cause may consist of first-hand probable cause, that which the affiant is aware of through the affiant's personal senses, and hearsay probable cause, that which the affiant is made aware of by another. Both types of probable cause are acceptable, but warrants based on hearsay probable cause may be required to establish the basis for believing the hearsay declarant as well as the basis of the declarant's information.

If the affidavit is based on the officer's own observations, only the officer's basis of knowledge need be set out. However, if the affidavit is based on hearsay statements of an informant, facts regarding the informant's credibility and reliability, as well as the informant's basis of knowledge, must be set out in the affidavit. To ensure that the magistrate exercises independent judgment, the affidavit must contain more than mere conclusory allegations by the affiant. While independent police corroboration can make up deficiencies in either prong, each prong represents an independently important consideration that must be separately considered and satisfied in some way. *State v. Henning*, 975 S.W.2d 290, 295 (Tenn. 1998).

Although a criminal informant's information is inherently suspect, information provided by an ordinary citizen is presumed to be reliable, and the affidavit need not establish that the source is credible or that the information is reliable. In order for the informant to be considered a citizen informant, the affidavit should contain more than conclusory allegations that the informant was a "concerned citizen source," "acted on civic duty," or "asked for no payment for their information." Generally, a more particularized showing of the law-abiding nature of the person supplying the information is needed. The reliability of the informant, as well as the information furnished, must be judged from all the circumstances and from the entirety of the affidavit. *See State v. Echols*, 382 S.W.3d 266, 279 (Tenn. 2012) (reliability of information is not presumed in the absence of information regarding whether the informant is a citizen informant); *State v. Williams*, 193 S.W.3d 502, 506-09 (Tenn. 2006) (estranged girlfriend potentially motivated by revenge was neither a criminal informant nor a citizen informant, and her information was not presumptively reliable); *State v. Smotherman*, 201 S.W.3d 657, 663-64 (Tenn. 2006) ("reference in the affidavit to the confidential informant as an 'agent,' alone, is insufficient to establish that the informant was a law enforcement officer whose information is considered reliable"). Although the age of the informant is certainly relevant, the mere fact that the citizen is a juvenile does not preclude a finding of reliability. *State v. Yeomans*, 10 S.W.3d 293, 296 (Tenn. Crim. App. 1999).

If the source for the affidavit is a criminal informant, reliability must be determined by the two-pronged *Aguilar-Spinelli* test, as adopted by the Tennessee Supreme Court in *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1989). The two-pronged test requires "(1) the basis for the informant's knowledge, and either (2)(a) a basis establishing the informant's credibility or (2)(b) a basis establishing that the informant's information is reliable." *State v. Stevens*, 989 S.W.2d 290, 294 (Tenn. 1999). Although the United States Supreme Court abandoned the *Aguilar-Spinelli* approach as too troublesome for the trial courts and adopted a "totality of the circumstances" approach in *Illinois v. Gates,* 462 U.S. 213 (1983), Tennessee courts still adhere to the *Aguilar-Spinelli* standard. In *Jacumin*, the Tennessee Supreme Court noted that this standard is more in keeping with the Tennessee Constitution's requirement that a search warrant not issue "without evidence of the fact committed." The affidavit must do more than merely state that the informant is reliable or credible; it must state facts demonstrating this. As long as there is some verifying information, such as prior information from this informant resulting in arrests, seizures or convictions, it is sufficient. If the affidavit merely states that past information given by the criminal informant has proven true and accurate, it is merely conclusory and not sufficient. *State v. Lowe*, 949 S.W.2d 300, 304-06 (Tenn. Crim. App. 1996).

To establish probable cause, an affidavit must set forth facts from which a reasonable conclusion may be drawn that the evidence will be found in the place for which the warrant authorizes a search. *See State v. Saine*, 297 S.W.3d 199 (Tenn. 2009) (although the affidavit did not contain direct information connecting the objects of the search with the suspect's residence, the magistrate could reasonably infer that the drugs were located in the residence based upon the affidavit's assertion that the officers observed the defendant leave his residence, sell drugs to a confidential informant, and return to his residence). In addition, the affidavit must contain information which will allow a magistrate to determine whether the facts are too stale to establish probable cause at the time issuance of the warrant is sought. *State v. Vann*, 976 S.W.2d 93, 105 (Tenn. 1998). While the lapse of time between the commission of a

crime and the issuance of a search warrant may affect the likelihood that incriminating evidence will be found, probable cause is a case-by-case determination. In making this determination, the issuing magistrate should consider whether the criminal activity under investigation was an isolated event or a protracted pattern of conduct, the nature of the property sought, the normal inferences as to where a criminal would hide the evidence, and the perpetrator's opportunity to dispose of incriminating evidence. *State v. Reid*, 164 S.W.3d 286, 327 (Tenn. 2005). There is, however, no requirement that a particular date be specified. *State v. McCormick*, 584 S.W.2d 821 (Tenn. Crim. App. 1979). Service of the warrant within five days, as provided in Tennessee Code Annotated section 40-6-107, creates a rebuttable presumption that a warrant retains the probable cause validity attributed to it at the time of issuance. *State v. Evans*, 815 S.W.2d 503 (Tenn. 1991). The challenger of the warrant may defeat the presumption by showing that probable cause no longer existed and that something objective occurred that reasonably put the police on notice of that fact. *Id*.

If the magistrate is satisfied that probable cause exists, the magistrate is required to issue a signed search warrant directed to any law enforcement officer and commanding the officer to search the person or place named for the property or person specified. The magistrate is required to make two copies of the warrant, endorse the officer's name, the hour, and the date on the warrant, and retain a copy of the warrant. The failure of the magistrate to copy or endorse the warrant, or the failure of the officer to leave a copy of the warrant with the person upon whom the search warrant is served (if possible), renders the search and seizure illegal. Tenn. R. Crim. P. 41(c) & (d); *State v. Bobadilla*, 181 S.W.3d 641 (Tenn. 2005); *State v. Coffee*, 54 S.W.3d 231 (Tenn. 2001).

An affidavit which is sufficient upon its face may be impeached in two circumstances: (1) when a false statement was made with intent to deceive the court, regardless of whether the statement was material to the establishment of probable cause, or (2) when a false statement is recklessly made and is essential to establish probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978). Recklessness may be established by showing that a statement was false when made and that the affiant did not have reasonable grounds for believing it at the time it was made. *State v. Little*, 560 S.W.2d 403 (Tenn. 1978). An innocent or mere negligent misrepresentation is not sufficient to invalidate a warrant or nullify a search. *Woods v. State*, 552 S.W.2d 782 (Tenn. Crim. App. 1977).

17.05 SCOPE

The scope of a search warrant is described in the Fourth Amendment. It provides that "[w]arrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. amend. IV. The Tennessee Constitution is even more specific: "General warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted." Tenn. Const. art. I, § 7.

The Fourth Amendment requires a search warrant to contain a description of the place

to be searched with such particularity that the searching officer may with reasonable effort ascertain and identify the intended place. The Tennessee Constitution prohibits general warrants, and Tennessee Code Annotated section 40-6-103 requires search warrants to describe particularly the property and the place to be searched. This requirement is met if the description "particularly points to a definitely ascertainable place so as to exclude all others, and enables the officer to locate the place to be searched with reasonable certainty, without leaving it to his discretion." *State v. McCary*, 119 S.W.3d 226, 247 (Tenn. Crim. App. 2003). A search warrant confers no right to search premises other than those described in the warrant. If the warrant is for the search of a unit in a multi-unit dwelling, it must describe the subunit intended to be searched with sufficient definiteness to exclude the search of an unintended subunit, unless the police are understandably misled into believing that a house was a single dwelling unit. *State v. Stinnett*, 629 S.W.2d 1 (Tenn. 1982).

17.06 EXECUTION AND RETURN

A. Execution

A search warrant must be executed and returned to the issuing magistrate within five days after its issuance date or it is void. T.C.A. § 40-6-107. The search warrant may only be executed by the officer or officers to whom it was directed unless the officer requests assistance by other officers. Even then, the officer to whom the warrant is directed must be present. Tenn. R. Crim. P. 41(e). The warrant can be executed in the daytime or at night. T.C.A. § 40-6-107.

The United States Supreme Court has determined that the federal rule requiring that officers knock and announce their purpose before entering is integrated into the Fourth Amendment. *Richards v. Wisconsin*, 520 U.S. 385 (1997); *Wilson v. Arkansas,* 514 U.S. 927 (1995). A higher standard of suspicion is not required if property damage occurs during execution. *United States v. Ramirez*, 523 U.S. 65 (1998). Tennessee follows the "knock and announce" rule. Before making a forced entry into an occupied residence, the officer must give notice of the officer's authority and purpose. Tenn. R. Crim. P. 41(e)(2). If not admitted after having given this notice, the officer is authorized to "break open any door or window . . . or any part thereof, described to be searched in the warrant to the extent that it is reasonably necessary to execute the warrant and does not unnecessarily damage the property." *Id.* The purpose of the knock and announce rule is threefold: to provide protection from violence, ensuring the safety and security of both the occupants and the entering officers; to protect "the precious interest of privacy summed up in the ancient adage that a man's house is his castle"; and to protect against the needless destruction of property. Typically, officers must wait a reasonable period of time before they may break and enter into the premises to be searched. However, an officer is not required to comply with the knock and announce rule if doing so would increase the officer's peril, or if the officer perceives indications of flight or indications that evidence is being destroyed. *State v. McCary*, 119 S.W.3d 226, 249-50 (Tenn. Crim. App.

2003). The knock and announce rule does not apply to interior doors because the officer's admission into the residence has already served to breach any expectation of privacy the residents had. *State v. Starks*, 658 S.W.2d 544 (Tenn. Crim. App. 1983). Although exigent circumstances may eliminate the requirement, they cannot be created by the police. *State v. Lee*, 836 S.W.2d 126 (Tenn. Crim. App. 1991). The best practice in such cases is for the officer to seek from the magistrate a "no-knock" warrant. A "no-knock" warrant provides permission to enter forcibly without notice based on specific allegations related to the safety or security of the items sought.

B. Detention During Execution

The United States Supreme Court has recognized law enforcement officers' authority to detain the occupants of the premises while the officers are executing a search warrant. *Michigan v. Summers*, 101 S.Ct. 2587 (1981). However, this authority does not extend to individuals who are beyond the immediate vicinity of the premises. *Bailey v. United State*s, 133 S.Ct. 1031 (2013). While some distances clearly are outside the immediate vicinity, courts can consider "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and any other relevant factors" in closer cases. *Id.* at 1042. If an individual is outside the immediate vicinity of the premises and therefore his detention cannot be justified under the *Summers* rule, law enforcement officers still have the authority to detain the individual if the officers have probable cause to justify an arrest or reasonable suspicion to justify a brief seizure. *Id.* at 1042-43.

C. Return

The officer taking property under the warrant must give the person from whose premises the property was taken a copy of the warrant and a receipt for the property taken. In the alternative, the officer must leave the copy and receipt at the place from which the property was taken. Tenn. R. Crim. P. 41(e)(4).

The "magistrate shall transmit the executed original warrant with the officer's return and inventory to the clerk of the court having jurisdiction of the alleged offense in respect to which the search warrant was issued." Tenn. R. Crim. P. 41(f)(2). To ensure that these items will be accessible in the future, the clerk may wish to file them in a permanent warrant book.

17.07 CONTEST

A. Motion to Suppress

A person aggrieved by an unlawful or invalid search or seizure must move the court prior to trial to suppress any evidence obtained as a result thereof. *State v. Blair*, 145 S.W.3d 633, 641 (Tenn. Crim. App. 2004); Tenn. R. Crim. P. 12(b)(2)(C). Prior to trial means

sometime earlier than the first day of the trial. *State v. Roberts*, 755 S.W.2d 833 (Tenn. Crim. App. 1988). A defendant waives any right to contest the admissibility of evidence if a written motion to suppress the evidence is not filed and heard before the trial. *State v. Eldridge*, 749 S.W.2d 756 (Tenn. Crim. App. 1988). In the trial court's discretion, and for good cause shown, a motion to suppress may be raised at trial. *State v. Wilson*, 611 S.W.2d 843 (Tenn. Crim. App. 1980).

The rule excluding illegally-obtained evidence also excludes evidence seized as the result of an unlawful search. *Wong Sun v. United States*, 371 U.S. 471 (1963). This fruit of the poisonous tree doctrine has exceptions. As a general rule, if the search warrant was based on an affidavit predicated on facts obtained as result of an unreasonable search or seizure, anything seized under the warrant must be suppressed. However, if enough untainted, independent facts were alleged, those facts could independently support probable cause such that the warrant would not be invalidated. *State v. Vanderford*, 980 S.W.2d 390, 399-400 (Tenn. Crim. App. 1997). Likewise, if the derivative evidence is so far removed from the illegally seized evidence by time or circumstance, *i.e.*, the taint of the original illegality has been purged or dissipated, the derivative evidence would not need to be excluded. Moreover, if the derivative evidence would have been discovered via an independent source even without the use of the illegal evidence, the derivative evidence would not be excluded. *Wong Sun v. United States*, 371 U.S. 471 (1963). Finally, if the prosecution establishes that certain proper and predictable investigatory procedures would have been utilized in the case at bar and that those procedures would have inevitably led to the discovery of the derivative evidence, the evidence need not be suppressed. *Nix v. Williams*, 467 U.S. 431 (1984).

B. Return of the Property

If property is unlawfully seized, the party may move for the return of the property pursuant to Tenn. R. Crim. P. 41(g).

17.08 DISPOSITION OF PROPERTY

The general rule is that seized property, other than contraband, should be returned to its rightful owner once the criminal proceedings have terminated. *State v. Casey*, 868 S.W.2d 737 (Tenn. Crim. App. 1993). Contraband cannot be returned to an accused from whom it was unlawfully taken, since possession of the property would constitute an offense. Tenn. R. Crim. P. 12(g).

17.09 ELECTRONIC COMMUNICATION WHEN SEEKING WARRANT

Pursuant to 2014 Public Chapter 769, electronic communication is permitted under limited circumstances when seeking/issuing a search warrant. T.C.A. § 40-6-109. This law became effective July 1, 2014, and ceases to be effective on July 1, 2015.

Updated 7/1/14

CHAPTER 18

WARRANTLESS SEARCHES

Contents **Section**

18.01 IN GENERAL

The guarantee of the Fourth Amendment of the United States Constitution must be liberally construed in favor of the citizen. *Hughes v. State*, 141 S.W.2d 477 (Tenn. 1940). Since the Fourth Amendment requires warrants, a warrantless search and seizure is presumed to be illegal. Thus, the state bears the burden of establishing an applicable exception to the search warrant requirement and demonstrating the reasonableness of the search or seizure. The relevant inquiry in determining the reasonableness of a warrantless search is not whether it would have been reasonable to get a warrant, but rather whether the search that occurred was reasonable.

Exceptions to the search warrant requirement generally include a search that is incident to a lawful arrest, a search with consent, a search that is in plain view, most vehicle searches, a search that is of an open field or abandoned property, or a search made under exigent circumstances. If a warrantless search is valid, the scope of the search is no narrower - and no broader - than the scope of a search authorized by a warrant supported by probable cause. *State v. Hawkins*, 706 S.W.2d 93 (Tenn. Crim. App. 1985).

18.02 STOP AND FRISK (PERSONS AND VEHICLES)

Long recognized is the right of police to make minimal intrusions into a person's privacy. Since the intrusion is less significant, the courts have reasoned that a lesser degree of suspicion will be reasonable in justifying the intrusion. Thus, police may encounter a person on

the street and ask questions with no suspicion of criminal behavior at all. The person, of course, retains the right to walk away and ignore the questions.

If the officer has an articulable suspicion about an individual in light of the officer's experiences (but not sufficient suspicion to allow an arrest or search), and that suspicion leads the officer objectively to believe that criminal activity is afoot and that the individual might be armed and dangerous, the officer may make a limited stop of the person. The limited stop is not an arrest because it is not as significant an intrusion of the privacy rights of the individual as an arrest. Thus it does not require probable cause. This intrusion is referred to as a stop.

During the stop, the officer may make inquiry of the person. The officer may also perform a protective frisk of a suspect where the officer has reasonable suspicion that the suspect is armed. *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *State v. Bridges*, 963 S.W.2d 487, 492 (Tenn. 1997). Reasonable suspicion is suspicion supported by specific and articulable facts. *Id.* These facts may be derived from information obtained from other law enforcement personnel or citizens, known patterns of criminal behavior, or the officer's experience. *State v. Winn*, 974 S.W.2d 700, 703 (Tenn. Crim. App. 1998). Courts have upheld frisks as reasonable when the suspected crime typically involves a weapon. Furthermore, even if the suspected crime does not involve a weapon, "other circumstances" may justify a *Terry* frisk. *Id.* at 703-04. Such circumstances include a characteristic bulge in the suspect's clothing; observation of an object in the pocket which might be a weapon; an otherwise inexplicable sudden movement toward a pocket or other place where a weapon could be concealed; an otherwise inexplicable failure to remove a hand from a pocket; backing away by the suspect under circumstances suggesting he or she was moving back to obtain time and space to draw a weapon; awareness that the suspect had previously been engaged in serious criminal conduct; awareness that the suspect had previously been armed; or discovery of a weapon in the suspect's possession.

When an officer stops a vehicle on the highway as a result of probable cause or articulable reasonable suspicion, the officer may order the driver out of the car. *Ohio v. Robinette*, 519 U.S. 33 (1966); *see also State v. Donaldson*, 380 S.W.3d 86 (Tenn. 2012) (recognizing the permissibility of ordering a driver out of a car during the issuance of a citation and noting that determining where a *de minimis* intrusion ends and an undue delay begins is a fact-specific inquiry); *State v. Brown*, 294 S.W.3d 553 (Tenn. 2009) (explaining the permissible scope of the temporary detention); *State v. Berrios*, 235 S.W.3d 99 (Tenn. 2007) (explaining the circumstances in which it is appropriate to frisk the driver and place him in a patrol car). The same rule applies to passengers in the vehicle. *Maryland v. Wilson*, 519 U.S. 408 (1997); *see also Brendlin v. California*, 127 S.Ct. 2400 (2007) (traffic stop results in seizure of driver and passengers, all of whom have standing to challenge the constitutionality of the stop). As with a *Terry* stop of a person on the street, an officer who has conducted a *Terry* stop of a vehicle may search the driver and/or passengers upon reasonable suspicion that they may be armed and dangerous. *Arizona v. Johnson*, 129 S.Ct. 781 (2009). These rules are based upon concern for the arresting officer's safety as well as the diminished expectation of privacy a person has while traveling in an automobile.

An anonymous tip that a person is carrying a gun, without more, is not sufficient to justify a police officer's stop and frisk of that person. *Florida v. J.L.*, 529 U.S. 266 (2000); *see also State v. Williamson*, 368 S.W.3d 468 (Tenn. 2012) (applying *Florida v. J.L.* and finding a lack of reasonable suspicion). However, when an individual in a high crime area flees upon seeing a caravan of police, the officers are permitted to pursue the individual. *Illinois v.*

Wardlow, 528 U.S. 119 (2000). Presence in a high crime area alone is not sufficient to support a reasonable suspicion of criminal activity, but the characteristics of the location are relevant in determining whether the circumstances are suspicious enough to merit further investigation.

For additional guidance regarding when a person pursued by a law enforcement official has been seized and/or what circumstances are adequate to constitute reasonable suspicion justifying such a seizure, see *State v. Nicholson*, 188 S.W.3d 649 (Tenn. 2006). *See also Navarette v. California*, 134 S.Ct. 1683 (2014) (caller's use of the 911 system is an indicator of veracity); *State v. Moats*, 403 S.W.3d 170 (Tenn. 2013) (distinguishing between a full-scale arrest, brief investigatory detention, and brief police-citizen encounter, discussing the community caretaking function, and noting that the activation of blue lights does not always constitute a seizure); *State v. Brotherton*, 323 S.W.3d 866 (Tenn. 2010) (reiterating that *Terry* requires an "articulable and reasonable suspicion" of a violation of the law to justify a stop and further investigation as opposed to requiring proof that there was an actual violation of the law); *State v. Hanning*, 296 S.W.3d 44 (Tenn. 2009) (finding that, under the facts of this case, an anonymous tip reporting reckless driving was adequate to justify an investigatory stop); *State v. Day*, 263 S.W.3d 891 (Tenn. 2008) (without addressing the community caretaking exception, which was not before the court, finding that an officer does not have adequate reasonable suspicion to stop a car when another driver merely gets the officer's attention and points to the car at issue).

18.03 INCIDENT TO ARREST

An officer has the authority to conduct a warrantless search incident to a lawful arrest substantially contemporaneous with that arrest, but the search is limited to the area within the arrestee's immediate control, which includes "the area from within which he might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969). The permissible search includes the opening of containers. *United States v. Robinson*, 414 U.S. 218 (1973). Moreover, officers may conduct a "protective sweep" in the immediate vicinity of the arrest if the arrest is made in a home. *Maryland v. Buie*, 494 U.S. 325 (1990). The arrest typically must precede the search, but a search preceding an arrest has been upheld in a circumstance in which the officer had probable cause to arrest prior to the search. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

The authority to conduct a search incident to a lawful arrest applies to vehicle searches as well. *New York v. Belton*, 453 U.S. 454 (1981). However, this authority is not without limits, as the United States Supreme Court concluded in a case in which the arrestee had been handcuffed and placed in the patrol car, and therefore no longer had access to the interior of his vehicle:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 129 S.Ct. 1710, 1723-24 (2009).

The United States Supreme Court also has held that an officer cannot conduct a full vehicle search when the driver of an automobile is given a traffic citation but is not arrested, even if the state statute under which the driver is cited authorizes arrest for the offense. *Knowles v. Iowa*, 525 U.S. 113 (1998). In contrast, if state law requires the issuance of a citation for a particular offense but the officer conducts an arrest instead of issuing the citation, thereby violating state law, the Fourth Amendment does not preclude the warrantless arrest (if based upon probable cause) or a search incident to that arrest. *Virginia v. Moore*, 128 S.Ct. 1598 (2008). State law is irrelevant to the Fourth Amendment analysis, so the issue is not whether state law requires the issuance of a citation or authorizes an actual arrest. Instead, the controlling factor is whether, irrespective of state law requirements, the officer arrests the person or merely issues a citation. An arrest involves greater potential danger for the officer than the issuance of a citation, so an officer who is making an arrest has authority to search the offender incident to that arrest while an officer issuing a citation does not have that authority. *Moore*, 128 S.Ct. 1607-08. It is unclear whether an analysis under Tennessee's Constitution would yield a different result. *See State v. Richards*, 286 S.W.3d 873 (Tenn. 2009) (stating that the offense must be one for which a full custodial arrest is permitted, but failing to rely upon Tennessee's Constitution or to acknowledge the holding in *Virginia v. Moore*).

Finally, the United States Supreme Court has held that the authority to conduct a search incident to an arrest does not extend to cell phones. *Riley v. California*, 134 S.Ct. 2473 (2014). Likewise, T.C.A. § 40-6-110 precludes law enforcement officers from searching cell phones unless the officer obtains a search warrant, the owner/possessor consents to the search, the owner/possessor has abandoned the phone, or the exigent circumstances exception applies.

18.04 CONSENT

A search by consent is based upon an individual's waiver of constitutional protections. Anyone can consent to a warrantless search, or even to an unreasonable search. The consent must be "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1998). Moreover, consent to search which is preceded by an illegal seizure must be "sufficiently attenuated from the intrusive act." *State v. Berrios*, 235 S.W.3d 99 (Tenn. 2007). Whether or not there was consent is determined by the "totality of circumstances test" set out in *State v. Cox*, 171 S.W.3d 174, 184-186 (Tenn. 2005). It is not necessary that the officer inform the person of the right to refuse consent. *United States v. Drayton*, 536 U.S. 194, 206 (2002). The government has the burden of proving that consent was voluntarily, intelligently, and knowingly given. The voluntariness of consent to search is necessarily undermined when police utilize trickery, fraud, or misrepresentation. *State v. McMahon*, 650 S.W.2d 383 (Tenn. Crim. App. 1983). While an officer is not required to advise an accused of the right to refuse to consent, the failure to do so is one factor that should be considered in determining whether the totality of the circumstances support a finding of a knowing, intelligent, and voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248, 93 S. Ct. 2041 (1973). Mere acquiescence or consent in the face of an announced or apparent intention to search with or without a warrant or permission does not constitute a waiver. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

In addition to determining the validity of the consent given, the court must determine if the person who allegedly gave consent was authorized to do so. In some situations, persons have mutual authority to consent to a search of certain premises. For example, persons having equal rights to use or occupy premises may each consent to a search of the premises, and the consent will be binding on all co-occupants. *McGee v. State*, 451 S.W.2d 709 (Tenn. Crim. App. 1969). Thus, a spouse can consent to a search of the marital home. It is not a question of ownership, but one of who has common authority over the premises. The common authority does not rest upon the law of property, but "rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). The state may satisfy its burden of proof in this regard either by demonstrating that the third party in fact possessed common authority as defined above or, alternatively, by demonstrating that the facts available to the searching police officers would have warranted a man of reasonable caution in the belief that the consenting party had authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990). Generally, while parents may consent to a search of their children's rooms, a child cannot authorize a search of the family residence. *Hembree v. State*, 546 S.W.2d 235 (Tenn. Crim. App. 1976).

While persons having common authority over the premises have the authority to consent to a search, consent of one occupant is not adequate if another present occupant objects to the search. *Georgia v. Randolph*, 126 S.Ct. 1515 (2006). Law enforcement officers are not bound by the objection of an absent occupant, however, and this is true even if the occupant's absence was caused by the authorities as long as the occupant's detention or arrest was lawful. *Fernandez v. California*, 134 S.Ct. 1126 (2014).

18.05 PLAIN VIEW

When an officer seizes an item lying in the open, no legitimate privacy interest has been affected. Thus, the search of an area open to the public or the seizure of an item found lawfully in plain view does not require a search warrant. In order to be justified under the plain view doctrine, however, the officer must be in a place where the officer has a legitimate right to be. *State v. Goad*, 549 S.W.2d 377 (Tenn. 1977). For example, the officer might be in a public place, alongside a car that has been stopped for a traffic violation, or inside a home pursuant to consent or to the execution of an arrest warrant. If the original intrusion is justified, objects observed in "plain view" are admissible so long as it is immediately apparent to the officer that the items are subject to seizure. *State v. Hawkins*, 969 S.W.2d 936, 938 (Tenn. Crim. App. 1997).

Once an official is rightfully on private premises, the officer may look into a car window without intruding upon the defendant's expectation of privacy. The fact that the officer looks deliberately and not inadvertently does not transform a mere observation into a search in the constitutional sense. It is not a search within the meaning of the Fourth Amendment merely to look and observe that which is open to view. *State v. Byerley*, 635 S.W.2d 511 (Tenn. 1982). The United States Supreme Court dispensed with the inadvertent discovery requirement under the United States Constitution in *Horton v. California*, 496 U.S. 128, 137-38 (1990). The Tennessee Supreme Court reached the same conclusion under the Tennessee Constitution in

State v. Cothran, 115 S.W.3d 513, 525 (Tenn. 2003). However, if an officer suspects, has a feeling, or knows of the possibility of finding the items at the location and avoids getting a search warrant because the suspicion does not rise to probable cause, the plain view doctrine may not support the warrantless search. *Arizona v. Hicks*, 480 U.S. 321 (1987).

The officer may also use senses other than sight. Thus, an officer who is lawfully patting down a suspect and feels something that is known to the officer not to be a weapon, but is believed to be contraband, may seize that evidence without a warrant, pursuant to the officer's plain touch. *Minnesota v. Dickerson*, 508 U.S. 366 (1993). This "plain feel" doctrine was adopted in Tennessee in *State v. Bridges*, 963 S.W.2d 487, 493-94 (Tenn. 1997).

Although simple observation of an article is not proscribed under the Fourth Amendment, it does not follow that the seizure of the same article does not invoke Fourth Amendment scrutiny. It is possible that while the visual observation of an article does not violate any reasonable expectation of privacy, the seizure of the same article may intrude upon such reasonable privacy expectations. In essence, the observation of the article may provide probable cause, but seizure without a warrant may be permissible only if exigent circumstances exist. *State v. Byerley*, 635 S.W.2d 511 (Tenn. 1982).

18.06 VEHICLES

Vehicles are frequently subject to search without a warrant. The first question a court must address, of course, is whether the behavior at issue constitutes a "search" for purposes of the Fourth Amendment. For example, installing a GPS device on a target's vehicle and using that device to monitor the movement of the vehicle constitutes a search. *U.S. v. Jones*, 132 S.Ct. 945 (2012).

Assuming the action/behavior at issue constitutes a search, such a search may be conducted without a warrant under certain circumstances. For example, a search may be based on consent. *See State v. Brown*, 294 S.W.3d 553 (Tenn. 2009) (addressing the permissible scope of the consent to search a vehicle, including the propriety of peeling tape from a package to assist in determining the nature of its contents). It may also be incident to a valid, custodial arrest. *New York v. Belton*, 453 U.S. 454 (1981); *State v. Blair*, 632 S.W.2d 567 (Tenn. Crim. App. 1982). The officer with the right to arrest has the corresponding right to search at that time the interior of the automobile and all containers therein, both to protect the officer and preserve evidence. This authority is not without limits, though, and courts should consult *Arizona v. Gant*, 129 S.Ct. 1710, 1723-24 (2009), if the search was conducted when the automobile's occupant(s) no longer had access to the interior of the vehicle.

In addition to these warrantless automobile searches, an officer with probable cause to believe that an automobile contains items subject to seizure may search the automobile without a warrant. *United States v. Ross*, 456 U.S. 798 (1982); *see also Florida v. Harris*, 133 S.Ct. 1050 (2013) (identifying relevant considerations for determining whether a drug-detection dog's "alert" on a vehicle during a traffic stop constitutes probable cause to search the vehicle). This rule was originally based on the nature of the automobile, particularly its mobility and its heightened regulation by the state. Thus, for a time, Tennessee courts held that the exception did not apply once the vehicle had completed its journey and was no longer mobile. *Fuqua v. Armour*, 543 S.W.2d 64 (Tenn. 1976). This proposition has been explicitly rejected by the

United States Supreme Court on two occasions. *See Maryland v. Dyson*, 527 U.S. 465 (1999); *Pennsylvania v. Labron*, 518 U.S. 928 (1996). Thus, unless the Tennessee courts deemed *Fuqua* to rely upon independent state constitutional or statutory grounds, its holding is no longer good law.

Reliance on the mobility justification has diminished in the face of the United States Supreme Court's reasonable expectation of privacy analyses. The Court now emphasizes the reduced privacy interest in an automobile as a reason to allow an automobile search even when the car has been stopped or is not capable of being moved from the scene. *California v. Carney*, 471 U.S. 386 (1985). Thus, if an officer has probable cause to search an automobile, the officer can search the passenger's belongings in the car if the belongings are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295 (1999). The Court's reasoning is that the passenger, like the driver, has a reduced expectation of privacy in an automobile.

When an officer has probable cause to search an automobile under the vehicle exception, the officer may search all places where the item for which there is probable cause could be concealed. *United States v. Ross*, 456 U.S. 798 (1982). The Supreme Court has emphasized that when probable cause to search an automobile exists, the scope of the warrantless search is as broad as a search conducted with a warrant would be.

An officer may also conduct a warrantless automobile search as a result of a standard departmental inventory policy, and may open unlocked containers when necessary to prepare a complete and meaningful inventory. *State v. Roberge*, 642 S.W.2d 716 (Tenn. 1982). This inventory search is justified based on three purposes**:** protection of the owner's property while in police custody; protection of police against claims of lost property; and protection of police from potential danger. If the driver, even though arrested, is able to make his or her own arrangements for the custody of the vehicle, or if the vehicle can be parked and locked without obstructing traffic or endangering the public, arguably the police should permit that action rather than impounding the car against the will of the driver. But the United States Supreme Court has upheld an inventory search conducted pursuant to an established, routine departmental police even when it was not necessary to impound the vehicle. *Florida v. Wells*, 495 U.S. 1 (1990). In Tennessee, conversely, the courts seem to require the state to present sufficient evidence to show the reasonableness of the impoundment. *Drinkard v. State*, 584 S.W.2d 650 (Tenn. 1979). When it is clear that the procedure used is a valid inventory and not merely a pretext for a search, it will be upheld regardless of whether there was some suspicion that contraband or other evidence might be found. *State v. Glenn*, 649 S.W.2d 584 (Tenn. 1983). In *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999), the Tennessee Supreme Court held that if a friend volunteers to drive the car home after the defendant is arrested, the car cannot be towed and subjected to an inventory search. The court's opinion in *Crutcher* includes a helpful analysis of the increasing application of constitutional restrictions implicated by a casual investigatory stop, a search incident to arrest, and an inventory search after arrest. *Id.* at 300-01.

18.07 ABANDONED PROPERTY, OPEN FIELDS, CURTILAGE, AND COMMON AREAS

The seizure of an abandoned article does not violate the constitutional guaranty against unlawful seizure. *Graves v. State*, 489 S.W.2d 74 (Tenn. Crim. App. 1972). Likewise, the search of an open field does not constitute a search. Under the so-called "open fields doctrine," a search of open fields without a search warrant is not constitutionally unreasonable. *Hester v. United States*, 265 U.S. 57 (1924). An open field is an area outside the curtilage of a residence and thus, an area in which there is a reduced expectation of privacy. *See State v. Jennette*, 706 S.W.2d 614 (Tenn. 1986). The curtilage is considered the area used in conjunction with the domestic life and economy of the residence.

With regard to curtilage, the United States Supreme Court has recognized the right of a law enforcement officer to approach a home, knock on the door, and speak with the person who answers the door. *Kentucky v. King*, 131 S.Ct. 1849 (2011). However, it does not follow that that same officer has the authority to use a drug-sniffing dog to investigate the contents of the person's home via its curtilage (in this case the porch), as this behavior constitutes a search under the Fourth Amendment. *Florida v. Jardines*, 133 S.Ct. 1409 (2013).

With regard to abandoned property, the Tennessee Supreme Court has held that a person's expectation of privacy is lost if the person disclaims any interest in the object at issue. *State v. Ross*, 49 S.W.3d 833, 840-42 (Tenn. 2001) (person who disclaimed interest in a motel unit had no reasonable expectation of privacy). Moreover, common, unlocked/unsecured areas of an apartment building do not qualify for a reasonable expectation of privacy. *State v. Talley*, 307 S.W.3d 723, 732, n.4 (Tenn. 2010). With regard to locked/secured common areas in a condominium or apartment complex, the Tennessee Supreme Court declined to adopt a bright-line rule and held that "the totality of the circumstances test is best-suited for determining the reasonableness of an expectation of privacy." *Id.* at 734. Under the facts in *Talley*, the Court concluded that the defendant did not have a reasonable expectation of privacy in the locked, commonly shared interior hallway of the 21-unit condominium building in which he lived.

18.08 EXIGENT CIRCUMSTANCES

The United States Supreme Court has recognized an exception to the warrant requirement in circumstances in which "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment," and the Court has identified the following types of exigencies which may justify the warrantless search of a home: (1) Emergency aid - "[O]fficers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury"; (2) Hot pursuit - "[O]fficers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect"; and (3) Evidence destruction – Officers may enter a home without a warrant "to prevent the imminent destruction of evidence." *Kentucky v. King*, 131 S.Ct. 1849, 1856-57 (2011) (citations omitted); s*ee also Ryburn v. Huff*, 132 S.Ct. 987 (2012) (discussing the propriety of entering a residence if there is an objectively reasonable basis for fearing that violence is imminent); *Michigan v. Fisher*, 130 S.Ct. 546 (2009) (reiterating that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception"). The rule "applies when the police do not gain

entry to premises by means of an actual or threatened violation of the Fourth Amendment," and the police do not "impermissibly create an exigency" by knocking loudly on a door and announcing that they are the police. *King*, 131 S.Ct. at 1862-63.

With regard to blood tests for persons suspected of driving while under the influence of an intoxicant, there may be circumstances in which the potential for "evidence destruction" due to the natural dissipation of alcohol could justify the taking of blood in the absence of a warrant. *Schmerber v. California*, 86 S.Ct. 1826 (1966). However, the Court declined to adopt a *per se* rule exempting law enforcement officials from securing a warrant in these circumstances. Instead, the totality of the circumstances must be considered on a case-by-case basis. *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

For a thorough discussion regarding situations in which a warrantless search supported by probable cause is permissible based upon exigent circumstances, see *State v. Meeks*, 262 S.W.3d 710 (Tenn. 2008), in which the Tennessee Supreme Court found that officers were justified in entering a motel room in which persons were actively operating a methamphetamine laboratory.

18.09 ADMINISTRATIVE SEARCHES AND INSPECTIONS

A well-established exception to the constitutional search warrant requirement allows warrantless searches of pervasively regulated businesses and closely regulated industries. The reasonableness of warrantless searches by administrative agencies depends upon the specific enforcement needs and privacy guarantees of each statute. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). The expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections. *State v. McClure*, 74 S.W.3d 362, 370 (Tenn. Crim. App. 2001).

18.10 SEARCH BY GOVERNMENT EMPLOYER

The Fourth Amendment applies when the government acts in its capacity as an employer. For a discussion regarding the relevant considerations when determining the propriety of a government employer's search of an employee's employer-issued electronic equipment, see *Ontario v. Quon*, 130 S.Ct. 2619 (2010).

18.11 ROADBLOCKS/CHECKPOINTS

Stopping vehicles at roadblocks/checkpoints is permitted in limited circumstances. *See State v. Hayes*, 188 S.W.3d 505 (Tenn. 2006) (*citing State v. Downey*, 945 S.W.2d 102 (Tenn. 1997), and *State v. Hicks*, 55 S.W.3d 515 (Tenn. 2001)). However, T.C.A. § 38-8-125 bars law enforcement officers from having any involvement in a voluntary motor vehicle checkpoint/stop conducted by a private company or research group that is collecting human samples for research or statistical purposes.

18.12 DNA TESTING OF ARRESTED OR CONVICTED FELONS

The Tennessee Supreme Court upheld the constitutionality of Tennessee Code Annotated section 40-35-321's requirement that persons convicted of certain offenses provide biological specimens for the purpose of DNA analysis. *State v. Scarborough*, 201 S.W.3d 607 (Tenn. 2006). The legislature subsequently broadened that statute to require persons arrested for certain violent felonies on or after January 1, 2008 to provide biological specimens as well. Although *Scarborough* analyzed the pre-2008 version of the statute and therefore did not address the constitutionality of requiring arrestees to provide biological samples, the United States Supreme Court subsequently concluded that if an individual is arrested and detained for a serious offense based upon probable cause, "taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." *Maryland v. King*, 133 S.Ct. 1958, 1980 (2013).

18.13 SEARCH OF PAROLEE'S PERSON, RESIDENCE AND VEHICLE

Although declining to address the propriety of a warrantless search of a probationer, the Tennessee Supreme Court has held that "the Tennessee Constitution permits a parolee to be searched without any reasonable or individualized suspicion where the parolee has agreed to warrantless searches by law enforcement officers." *State v. Turner*, 297 S.W.3d 155, 162-66 (Tenn. 2009). However, "the totality of the circumstances surrounding a warrantless, suspicionless search of a parolee must be examined to determine whether the search is constitutionally unreasonable." *Id.* at 167.

18.14 SEARCHES BY PUBLIC SCHOOL EMPLOYEES

By virtue of the Fourteenth Amendment, public school officials are subject to the Fourth Amendment's prohibition on unreasonable searches and seizures. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). The officials are not required to obtain a warrant prior to searching a student, but when determining the appropriateness of the search courts should consider the following balance reached by the United States Supreme Court:

> We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. Under ordinary circumstances, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up

> evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Id. at 340-41 (quotation marks and citations omitted); *see also Safford Unified School Dist. #1 v. Redding*, 129 S.Ct. 2633 (2009) (addressing the constitutionality of the "strip search" of a student).

Although the United States Supreme Court's opinion in *T.L.O.* limited its application to a situation in which a school official is acting independently of law enforcement, the Tennessee Supreme Court has concluded as follows with regard to situations in which a law enforcement officer is involved with the search:

> After balancing the competing interests between [the student's] legitimate expectations of privacy and the State's need for effectively investigating breaches of public order, we hold that the reasonable suspicion standard is the appropriate standard to apply to searches conducted by a law enforcement officer assigned to a school on a regular basis and assigned duties at the school beyond those of a ordinary law enforcement officer such that he or she may be considered a school official as well as a law enforcement officer, whether labeled an 'SRO' or not. However, if a law enforcement officer not associated with the school system searches a student in a school setting, that officer should be held to the probable cause standard.

R.D.S. v. State, 245 S.W.3d 356, 369 (Tenn. 2008). The Court also set out multiple factors for courts to consider when determining the applicable standard. *Id.* at 369-70.

18.15 SEARCHES BY PRISONS/JAILS DURING INTAKE PROCESS

Although the Court could reach a different conclusion if an arrestee was not going to be assigned to the general jail population and/or would not have substantial contact with other detainees, the United States Supreme Court deferred to correctional officials regarding necessary intake procedures under the facts of this case and rejected the argument that "persons arrested for a minor offense could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process" absent "reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband." *Florence v. Bd. of Chosen Freeholders*, 132 S.Ct. 1510 (2012). However, Tennessee's judges should consult T.C.A. § 40-7-119, which defines "strip search" and identifies circumstances in which strip searches of arrestees are not permitted.

18.16 ELECTRONIC DEVICES AND DRONES

Absent a search warrant or a statutory exception to the search warrant requirement, law enforcement officials are precluded from obtaining location information from an electronic device. T.C.A. § 39-13-610. Likewise, with limited exceptions, law enforcement officials cannot

use drones to gather evidence or information in the absence of a search warrant. T.C.A. § 39-13-609.

The United States Supreme Court has held that the authority to conduct a search incident to an arrest does not extend to cell phones. *Riley v. California*, 134 S.Ct. 2473 (2014). Likewise, T.C.A. § 40-6-110 precludes law enforcement officers from searching cell phones unless the officer obtains a search warrant, the owner/possessor consents to the search, the owner/possessor has abandoned the phone, or the exigent circumstances exception applies.

CHAPTER 19

PRELIMINARY HEARING

Contents **Section**

19.01 GENERALLY

A defendant who is arrested or served with a criminal summons prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing. Tenn. R. Crim. P. 5(e)(1). Unless the hearing is waived by the defendant, the hearing "shall be conducted as expeditiously as possible" and should be scheduled to be held within 10 days if the defendant is in custody and 30 days if the defendant has been released from custody. Tenn. R. Crim. P. 5. A defendant waives the right to a preliminary hearing by failing to appear for a scheduled hearing unless the defendant subsequently "presents before the general sessions court" and, within 14 days of the scheduled hearing, the "court finds by clear and convincing evidence that the defendant's absence was beyond the defendant's control." Tenn. R. Crim. P. 5(e)(2).

The defendant has the right to cross-examine witnesses and introduce evidence at the preliminary hearing. Tenn. R. Crim. P. 5.1(a)(2). With very limited exceptions, a magistrate's finding that there is probable cause to believe that the defendant committed the offense at issue shall not be based upon inadmissible hearsay. Tenn. R. Crim. P. 5.1(a)(1). If the proof establishes that an offense has been committed and there is probable cause to believe that the defendant committed the offense, the magistrate shall bind the defendant over to the grand jury. Tenn. R. Crim. P. 5.1(b). If the proof does not so establish, the magistrate shall discharge the defendant. However, the state is not precluded from instituting a subsequent prosecution for the offense. Tenn. R. Crim. P. 5.1(c).

The preliminary hearing "shall be preserved by electronic recording or its equivalent." In the event the defendant is subsequently prosecuted by indictment or presentment and the recording of the preliminary hearing is unavailable or inaudible, the court shall follow the procedures set out in Tenn. R. Crim. P. 5.1(a)(3).

If an indictment or presentment is returned against a defendant who has not waived the right to a preliminary hearing, the indictment or presentment shall be dismissed if the defendant files a motion within 30 days from the arraignment. This dismissal shall be without prejudice, and the court shall remand the case to the general sessions court for a preliminary hearing. Tenn. R. Crim. P. 5(e)(4).

19.02 RIGHTS OF DEFENDANT

The preliminary hearing is a critical stage of the proceedings. Therefore, the defendant is entitled to the assistance of counsel. *State v. Blye*, 130 S.W.3d 776, 780 (Tenn. 2004).

As a general rule, the parties are not entitled to discovery pursuant to Tenn. R. Crim. P. 16. *State v. Willoughby*, 594 S.W.2d 388, 390 (Tenn. 1980). However, the Tennessee Court of Criminal Appeals has held that the State must provide the defendant with a copy of the affidavit underlying a search warrant. *State v. Boyd*, No. W2003-02444-CCA-R9-CD, Madison County (Tenn. Crim. App. March 17, 2004).

CHAPTER 20

ARRAIGNMENT

Contents **Section**

20.01 ARRAIGNMENT NECESSITY

The defendant must be arraigned in open court before being tried for any offense with the following exceptions:

(a) if the defendant appears through counsel who presents the defendant's written waiver of the right to be present;
(b) if the defendant is a corporation, limited liability company, or limited liability partnership, which is represented by counsel;
(c) if the maximum penalty for the offense is a $50 fine;
(d) if the defendant, initially present, has been removed for disruptive behavior or is voluntarily absent; and
(e) if the arraignment is conducted by electronic audio-visual conference.

Tenn. R. Crim. P. 10, 43(b), (d). Failure to raise the lack of arraignment prior to trial constitutes a waiver.

20.02 ARRAIGNMENT PROCEDURE

The Tennessee Rules of Criminal Procedure provide for a formal arraignment procedure. The procedure requires that the judge:

(a) ensure that the defendant has a copy of the charging instrument;
(b) read the indictment, presentment, or information to the defendant or state the substance thereof;
(c) require the defendant to enter a plea (If a defendant refuses to plead, the judge must enter a plea of not guilty for the defendant); and
(d) make an entry of record of the arraignment.

The judge may arraign jointly charged defendants together or separately. Tenn. R. Crim. P. 10, 11.

20.03 DISCOVERY AT ARRAIGNMENT

At the arraignment or as soon after as practical, the state may give notice to the defendant of its intent to use certain evidence at trial so that the defendant can raise pre-trial objections to the evidence through a motion to suppress. The defendant may request such notice if the defendant is entitled to discovery of the evidence under Rule 16. Tenn. R. Crim. P. 12(d).

CHAPTER 21

APPOINTMENT OF COUNSEL

Contents **Section**

21.01 RIGHT TO COUNSEL

Criminal defendants have a right to counsel and must be appointed counsel if they are indigent. U.S. Const. amend. VI; Tenn. Const. art I, § 9; T.C.A. § 40-14-202; Tenn. Sup. Ct. R. 13; Tenn. R. Crim. P. 44. "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel" regardless of whether a public prosecutor is involved in, or even aware of, the initial proceeding. *Rothgery v. Gillespie County*, 128 S.Ct. 2578 (2008) (distinguishing between the issues of attachment (whether formal judicial proceedings have begun) and critical stage (whether counsel, if not waived, must be present at a post-attachment proceeding)). Tennessee Supreme Court Rule 13 provides additional guidance regarding the types of criminal and civil proceedings in which a party is entitled to the appointment of counsel.

21.02 ESTABLISHING INDIGENCY

An indigent person is one "who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney." T.C.A. § 40-14-201(1). When determining if someone is indigent, the court should consider the factors set forth in Tennessee Code Annotated section 40-14-202(c) as well as the Uniform Affidavit of Indigency provided in Supreme Court Rule 13. When appointing counsel for an indigent defendant, "the court shall appoint the district public defender's office, the state post-conviction defender's office, or other attorneys employed by the state for indigent defense . . . if qualified pursuant to this rule and no conflict of interest exists, unless in the sound discretion of the trial judge appointment of other counsel is necessary." Tenn. Sup. Ct. R. 13, §1(e)(4). If the circumstances warrant, a court may declare a defendant partially indigent and require partial payment of attorney fees. T.C.A. § 40-14-202(e).

21.03 WAIVER/FORFEITURE OF RIGHT TO COUNSEL

A. Waiver Generally

In *Faretta v. California*, 95 S.Ct. 2525 (1975), the United States Supreme Court recognized the constitutional right to self-representation and found error when a state forced an accused to be represented by a public defender over the accused's objections. The right to self-representation becomes absolute if the accused timely asserts the right, makes a clear and unequivocal request, and knowingly and intelligently waives the right to counsel. *State v. Herrod*, 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988), *app. denied* (Tenn. July 25, 1988); *see also Lovin v. State*, 286 S.W.3d 275 (Tenn. 2009) (discussing the right to self-representation at trial, during a post-conviction proceeding, and on appeal of both types of proceedings). To be valid, a waiver of the right to counsel must be in writing. Tenn. R. Crim. P. 44(b)(2). Moreover, a court should accept a competent and intelligent waiver only after advising the accused in open court of the right to counsel at every stage of the proceedings, conducting an extensive inquiry regarding the pitfalls of self-representation, and inquiring into the background, experience, and conduct of the accused. *Smith v. State*, 987 S.W.2d 871 (Tenn. Crim. App. 1998); Tenn. R. Crim. P. 44(b)(1). The Tennessee Court of Criminal Appeals recommends that trial courts question defendants according to the guidelines contained in 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986). Those guidelines are as follows:

> When a defendant states that he wishes to represent himself, you should . . . ask questions similar to the following:
>
> (a) Have you ever studied law?
>
> (b) Have you ever represented yourself or any other defendant in a criminal action?
>
> (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)
>
> (d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court must impose an assessment of at least $ ___ and could sentence you to as much as ___ years in prison and fine you as much as $ ____? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)
>
> (e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?
>
> (f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.
>
> (g) Are you familiar with the [Tennessee] Rules of Evidence?

(h) You realize, do you not, that the [Tennessee] Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?

(i) Are you familiar with the [Tennessee] Rules of Criminal Procedure?

(j) You realize, do you not, that those rules govern the way in which a criminal action is tried in [this] court?

(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

(l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.

(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, [and in your opinion the waiver of counsel is knowing and voluntary,] you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."

(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

Standby counsel, to which these guidelines refer, is referred to as “advisory counsel” in Tennessee. Appointment of advisory counsel is within the trial court’s discretion. Hybrid representation, in which the defendant and counsel are both permitted to participate in the proceedings, should only be permitted in exceptional circumstances. *State v. Small*, 988 S.W.2d 671 (Tenn. 1999).

B. Waiver vs. Forfeiture

There are limited circumstances in which a court can require a defendant to represent himself absent a request by, and even over the objections of, the defendant. For a thorough discussion regarding the differences between affirmative waiver, implicit waiver, and forfeiture of the right to counsel, as well as the court's obligations as to each, see *State v. Holmes*, 302 S.W.3d 831 (Tenn. 2010). With regard to an alleged physical attack upon an attorney by a client, the Supreme Court provided trial courts with guidance as to the necessary procedural steps:

> For the benefit of trial courts in future cases where a criminal defendant is alleged to have physically attacked his lawyer, we suggest that the following procedure be followed. Counsel should be allowed to withdraw if requested. Then, unless the attack occurred in full view of the court, the trial court should conduct promptly an evidentiary hearing, with the defendant present and permitted to testify, and make findings of fact on the basis of the proof presented. The trial court should determine, on the basis of the facts found, whether the defendant engaged in "extremely serious misconduct" sufficient to justify the extraordinary sanction of an immediate forfeiture (or implicit waiver) of counsel. In making this determination, the trial court should consider (a) the stage of the proceedings; (b) whether the lawyer attacked is initial counsel or is a successor to other lawyers allowed to withdraw due to problems with the defendant; (c) whether the defendant had previously been warned about the potential loss of counsel as a result of misbehavior; (d) whether the defendant engaged in the misconduct deliberately and with the aim of disrupting, delaying, or otherwise manipulating the proceedings; (e) the degree of violence involved and the seriousness of any injury inflicted; and (f) whether measures short of forfeiture will be adequate to protect counsel. If the trial court concludes that the defendant did not commit "extremely serious misconduct" so as to justify a forfeiture, the trial court should (1) appoint new counsel (assuming prior counsel withdrew); (2) inform the defendant of the potential consequences of future misbehavior and the risks of proceeding *pro se*; and (3) order such measures as are necessary to protect new counsel from future misbehavior by the defendant.

Id. at 848.

21.04 APPOINTMENT OF COUNSEL – SELF-REPRESENTATION WHEN COMPETENCY IS AT ISSUE

Questioning the defendant regarding the guidelines listed above in Section 21.03 may not be adequate, particularly if the State is seeking the death penalty and/or the defendant's competency has been an issue during the proceedings. In those circumstances, it may be necessary for the court to examine the defendant further and/or appoint counsel to represent the defendant during the competency hearing. Assuming the

court concludes that the defendant is entitled to represent himself at trial, the court has the authority to appoint advisory counsel over the defendant's objection. For additional guidance regarding these issues and other competency issues, including issues involving the involuntary medication of a defendant, trial courts should consult the Court of Criminal Appeals' opinion in *State v. Richard Taylor*, No. M2005-01941-CCA-R3-DD (Tenn. Crim. App., filed March 7, 2008). Moreover, in cases in which competency is at issue, the trial judge should be aware that the United States Constitution "permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States*, 362 U.S. 402 (1960)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." *Indiana v. Edwards*, 128 S.Ct. 2379 (2008).

21.05 QUALIFICATION AND COMPENSATION OF APPOINTED ATTORNEYS

Tennessee Supreme Court Rule 13 governs the qualifications and compensation of appointed attorneys. Please refer to that rule for guidance regarding those issues.

CHAPTER 22

PLEA AGREEMENTS

Contents **Section**

22.01 PLEA AGREEMENTS

Most defendants ultimately dispose of their cases by negotiation and plea agreements. The process of plea negotiations, thus, is essential to the efficient administration of criminal justice. The nature of the process was described by the United States Supreme Court:

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned. . . . [A]ll of these considerations presuppose fairness in securing agreement between an accused and a prosecutor.

Santobello v. New York, 404 U.S. 257 (1971). Promises made by the prosecution to the defendant in plea negotiations must be kept. If they are not, the defendant is entitled to relief. *Santobello v. New York*, 404 U.S. 257 (1971). If the defendant dishonors the agreement before the plea agreement is accepted by the court, the prosecution's promises are not enforceable. *Metheny v. State*, 589 S.W.2d 943 (Tenn. Crim. App. 1979).

A prosecutor does not violate due process by threatening a defendant with other justified prosecutions if the defendant does not agree to plead guilty. The plea bargaining process is one of give and take, and the defendant may freely choose to accept or reject a

plea offer. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Blankenship v. State*, 858 S.W.2d 897 (Tenn. 1993).

In Tennessee, plea agreements are governed by Rule 11 of the Rules of Criminal Procedure. The prosecutor and defendant's counsel (defendant, if *pro se*) may confer in order to reach an agreement. In exchange for a defendant's entry of a guilty or *nolo contendere* plea to the charged or some lesser offense, the prosecutor may move for a dismissal of other charges, recommend (or agree not to oppose) a defendant's request for a particular sentence, or agree that a specific sentence is appropriate. If an agreement is reached, the parties must inform the judge at arraignment or at such later time as the judge directs. Tenn. R. Crim. P. 11(c).

The Tennessee Supreme Court has consistently held that a "plea-bargained sentence is legal so long as it does not exceed the maximum punishment authorized for the plea offense." *Hoover v. State*, 215 S.W.3d 776, 781 (Tenn. 2006) (*citing State v. Mahler*, 735 S.W.2d 226 (Tenn. 1987), and *Hicks v. State*, 945 S.W.2d 706 (Tenn. 1997)); *see also Davis v. State*, 313 S.W.3d 751 (Tenn. 2010) (reiterating the scope of habeas corpus relief in the context of a plea bargain, and distinguishing between "illegal" sentences and sentences which contain "errors").

22.02 COURT'S ROLE IN PLEA AGREEMENTS

The judge shall not participate in any plea discussions. Tenn. R. Crim. P. 11(c)(1). Upon being informed that the parties have reached a plea agreement, the judge must require the disclosure of the agreement on the record in open court, unless good cause requires an *in camera* proceeding. Tenn. R. Crim. P. 11(c)(2)(A). If the agreement is to dismiss certain charges or to agree to a particular sentence, the judge may accept or reject the agreement or defer decision until the presentence report is considered. Tenn. R. Crim. P. 11(c)(3).

If the judge accepts the agreement, the judge must advise the defendant that the plea agreement has been accepted and will be incorporated into the court's judgment. Tenn. R. Crim. P. 11(c)(4). If the judge rejects the agreement, the judge must, on the record and in open court (or, for good cause, *in camera*), advise the defendant that the court is not bound by the agreement, inform the parties that the court rejects the agreement, allow the defendant the opportunity to withdraw the plea, and advise the defendant that persisting in the plea may lead to a disposition less favorable toward the defendant than provided in the agreement. Tenn. R. Crim. P. 11(c)(5)

If the parties announce an agreement to recommend (or not oppose) a particular sentence pursuant to Rule 11(c)(1)(B), the judge must advise the defendant, before the plea is entered, that if the recommendation is not accepted, the defendant has no right to withdraw the plea. Tenn. R. Crim. P. 11(c)(3)(B).

22.03 EVIDENTIARY VALUE OF PLEA AGREEMENTS IN SUBSEQUENT CIVIL OR CRIMINAL PROCEEDINGS

See Tenn. R. Evid. 410 for information regarding the admissibility of a plea, plea discussions or plea-related statements. Tenn. R. Crim. P. 11(d).

22.04 *NOLO CONTENDERE* PLEAS

The defendant cannot enter a plea of *nolo contendere* absent the court's consent. In determining whether to consent to the plea, the court must consider the interests of the parties and the public. Tenn. R. Crim. P. 11(a)(2). The procedure for handling pleas of *nolo contendere* is identical to that of guilty pleas.

22.05 GUILTY PLEAS

Before a judge can accept a guilty plea, which has the same effect as a guilty verdict, it is essential that the judge ascertain whether the plea is voluntarily made, whether defendant is aware of the rights a plea surrenders, whether the plea is made intelligently with knowledge of the consequences, and whether a factual basis for the plea exists. *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)); *see also* Tenn. R. Crim. P. 11(b)(3) (factual basis required for guilty plea but not for *nolo contendere* plea). The defendant must be competent, must understand the nature of the proceedings, and must be capable of intelligently entering the plea. *Brady v. United States,* 397 U.S. 742 (1970).

A guilty plea waives the nonjurisdictional defects in the indictment. *State v. Pettus*, 986 S.W.2d 540 (Tenn. 1999). It also admits every essential element of the charge. *State v. Carter*, 988 S.W.2d 145 (Tenn. 1999).

A defendant who wishes to enter a conditional plea of guilty or *nolo contendere* must comply with the requirements of Tenn. R. Crim. P. 37(b). Tenn. R. Crim. P. 11(a)(3).

22.06 PLEA PROCEDURE

A defendant who pleads guilty or *nolo contendere* waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront the accusers. A judge must not accept a guilty or *nolo contendere* plea without first addressing the defendant personally in open court and determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead results from prior discussions between the district attorney general and the defendant or his attorney. Tenn. R. Crim. P. 11(b)(2).

Before a plea of guilty or *nolo contendere* can be entered, a trial judge must ensure the defendant's understanding of the information listed in Tenn. R. Crim. P. 11(b). *See Howell v. State*, 185 S.W.3d 319 (Tenn. 2006). A verbatim transcript of the plea

proceedings must reflect the trial court's compliance with Tenn. R. Crim. P. 11(b) and (c). Tenn. R. Crim. P. 11(e). Moreover, the plea must be reduced to writing and signed by the defendant. *Id*.

A judge who accepts a guilty or *nolo contendere* plea must make it clear to the defendant that the resulting conviction may be used in a subsequent proceeding to enhance punishment. *State v. McClintock*, 732 S.W.2d 268 (Tenn. 1987); *see also Howell v. State*, 185 S.W.3d 319 (Tenn. 2006). When the defendant is entering a plea to an offense for which a sentence of lifetime community supervision is mandatory, the trial court is required to advise the defendant of this consequence. *Ward v. State*, 315 S.W.3d 461, 476 (Tenn. 2010). However, this requirement does not apply retroactively. *Bush v. State*, 428 S.W.3d 1 (Tenn. 2014).

Although the court is not required to advise a defendant that he is subject to the sexual offender registry requirement, the Supreme Court encourages trial courts to advise defendants of this consequence prior to accepting a plea. *Ward*, 315 S.W.3d at 472.

For a thorough summary concerning the trial court's obligations with regard to pleas of guilty or *nolo contendere*, see *Lane v. State*, 316 S.W.3d 555 (Tenn. 2010). Although literal compliance with the applicable authorities is not required, substantial compliance is required. Moreover, the Supreme Court encouraged trial courts to conclude the colloquy by asking the defendant "How do you plead?" and awaiting the defendant's response. Failure to do so is not fatal in all cases, though, and the Court will evaluate the issues on a case-by-case basis. *Id.*

22.07 VICTIMS' RIGHTS DURING PLEA PROCEEDINGS

A victim's right to confer with the prosecutor does not authorize the victim to direct the prosecution of the case, and the prosecutor's failure to confer with the victim (or the victim's family) will not affect the validity of the case's disposition. *State v. Layman*, 214 S.W.3d 442, 453 (Tenn. 2007). Moreover, victims and their attorneys do not have the right to "appear before the court and offer legal arguments in opposition to those of the prosecutor." *Id.* at 454 (*citing* T.C.A. § 40-38-114(c)). Finally, because hearings regarding plea agreements and *nolle prosequis* are not "critical stages of the criminal justice process" as defined by the relevant authorities, victims do not have a right to be heard during those proceedings. *Id.* at 453-54.

22.08 EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA PROCESS

A. Standard

When considering whether defense counsel was ineffective during the plea process, courts should consider the following:

> When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, . . . he or she must prove that counsel performed deficiently and "there is a reasonable probability that, but for counsel's

> errors, he would not have pled guilty and would have insisted on going to trial." The primary consideration is whether the deficiency in performance "affected the outcome of the plea process." The petitioner is not, however, required to demonstrate that he would have fared better at trial than by a plea of guilt.

Grindstaff v. State, 297 S.W.3d 208, 216-17 (Tenn. 2009) (citations omitted).

B. Risk of Deportation

Defense "counsel must inform her client whether his plea carries a risk of deportation." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010). However, the Court recognized that immigration law can be very complex and that counsel's duty regarding this issue will vary from case-to-case, noting:

> When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.

Id. at 1483 (footnote omitted).

The Court also concluded that counsel's failure to properly advise a defendant regarding this issue does not automatically entitle him to post-conviction relief on a claim of ineffective assistance of counsel. Petitioner must still demonstrate that he suffered prejudice as a result of counsel's omission. *Id.* at 1487; *see also Garcia v. State*, 425 S.W.3d 248, 256-61 (Tenn. 2013). Finally, the Court subsequently held that *Padilla* does not apply retroactively to cases whose direct appeals concluded (conviction(s) became final) prior to the issuance of the Court's opinion. *Chaidez v. United States*, 133 S.Ct. 1103 (2013).

Following the Court's ruling in *Padill*a, Tenn. R. Crim. P. 11 was amended to add subsection (b)(1)(J), which addresses the manner in which the immigration/naturalization issue should be addressed by a court when a defendant is pleading guilty or *nolo contendere*. The Tennessee Supreme Court has declined to address the issue of whether the trial court's failure to comply with this rule-based requirement constitutes a constitutional error. *Garcia*, 425 S.W.3d at 264-65.

C. Available Sentencing Options

Counsel's performance is considered deficient if counsel incorrectly informs his client that the client is eligible for an alternative sentence. *See Grindstaff v. State*, 297 S.W.3d 208, 221 (Tenn. 2009). However, it does not necessarily follow that the client is entitled to relief. The prejudice prong of *Strickland* must be evaluated on a case-by-case basis. *Id.* at 221-23.

D. Lifetime Community Supervision

"[A] lawyer's failure to advise his or her client about the mandatory lifetime community supervision sentence, where the client is considering a plea to one or more of the relevant offenses, is deficient performance" for purposes of the first prong of the ineffective counsel analysis. However, the defendant is not entitled to relief absent a showing of prejudice. *Calvert v. State*, 342 S.W.3d 477 (Tenn. 2011).

E. Communication of Plea Offers

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused . . . [and] [w]hen defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012). With regard to the prejudice prong, the Court held as follows:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Id. at 1409.

F. Rejecting Plea Offer as a Result of Ineffective Assistance of Counsel

For guidance regarding the prejudice prong of *Strickland v. Washington*, 104 S.Ct. 2042 (1984) and *Hill v. Lockhart*, 106 S.Ct. 366 (1985) as well as the available remedies when the inadequate assistance of counsel results in the rejection of a plea offer that was more favorable than the ultimate disposition of the case, see *Lafler v. Cooper*, 132 S.Ct. 1376 (2012). An attorney's violation of ethical norms is not *per se* ineffective. *Burt v. Titlow*, 134 S.Ct. 10, 18 (citing *Mickens v. Taylor*, 535 U.S. 162 (2002)).

G. Waiver of Appeal

An attorney's failure to file a written waiver of appeal pursuant to Tenn. R. Crim. P. 37(d) does not always constitute deficient performance for post-conviction purposes. *See Arroyo v. State*, 434 S.W.3d 555 (Tenn. 2014).

22.09 WITHDRAWAL OF PLEA

Tenn. R. Crim. P. 32(f) provides for the withdrawal of a guilty plea under certain circumstances. A court may permit the withdrawal prior to sentencing "for any fair and just reason." Tenn. R. Crim. P. 32(f)(1). When considering the request, trial courts should consider the following non-exclusive factors:

> 1. The length of time between the entry of the guilty plea and the filing of the motion to withdraw it;
> 2. Why the grounds for withdrawal were not presented to the court at an earlier point in the proceedings;
>
> 3. Whether the defendant has asserted and maintained his innocence;
>
> 4. The circumstances underlying the entry of the plea of guilty, the nature and background of the defendant, and whether the defendant has admitted guilt; and
>
> 5. Once the defendant has established a fair and just reason, whether the prosecution will be prejudiced should the plea be withdrawn.

State v. Phelps, 329 S.W.3d 436, 447 (Tenn. 2010). Although a trial court should not allow a defendant to "pervert this process into a tactical tool for purposes of delay or other improper purpose," "where a trial court applies the correct non-exclusive multi-factor analysis and determines that the balance of factors weighs in the defendant's favor, the trial court should allow the defendant to withdraw his plea, even if the defendant's reasons could be characterized as a 'change of heart.'" *Id.* at 448.

If the sentence has been imposed but the judgment has not become final, the court may permit the defendant to withdraw the plea to correct manifest injustice. Tenn. R. Crim. P. 32(f)(2).

22.10 WAIVER OF APPEAL FOLLOWING PLEA

If a defendant has a right to appeal pursuant to Tenn. R. Crim. P. 37(b)(2) and chooses to waive that right, the defendant's attorney must file a written waiver that complies with the requirements of Tenn. R. Crim. P. 37(d). However, failure to comply with this requirement does not always constitute deficient performance for post-conviction purposes. *See Arroyo v. State*, 434 S.W.3d 555 (Tenn. 2014).

22.11 PLEA CHECKLIST

A verbatim record of the plea proceedings is required pursuant to Tenn. R. Crim. P. 11(e), and the colloquy should include the substantive and procedural elements listed below. Substantial compliance is required. *See Lane v. State*, 316 S.W.3d 555, 564-65 (Tenn. 2010).

1. Judge addresses defendant in open court on the record and under oath.

2. Judge verifies defendant's identity.

3. If defendant is represented by counsel, judge must ascertain that defendant has discussed the plea and its ramifications with counsel.

4. Judge ascertains whether defendant's decision to plead guilty or *nolo contendere* is a result of prior discussions between the district attorney general and defendant or defendant's counsel.

5. If defendant is not represented by counsel, judge advises defendant of the right to counsel at every stage of the proceedings and that counsel will be appointed for defendant if defendant cannot afford counsel. Judge secures signed waiver of counsel if defendant proceeds *pro se*.

6. Judge ascertains that defendant is entering the plea voluntarily, knowingly and intelligently, and not as a result of force, threats, or promises (other than plea agreement promises). Judges often will inquire as to defendant's educational background, opportunity to review the case and the proposed plea with counsel, competency issues, potential effects of drug or alcohol use or mental health issues, and defendant's reasons for entering the plea.

7. Judge advises defendant of the nature of the charge(s) as well as the maximum and minimum penalties.

8. Judge advises defendant that if defendant pleads guilty or *nolo contendere*, defendant will waive certain constitutional rights including:

    Right to plead not guilty (also advise of right to persist in a not-guilty plea)
    Right to jury trial
    Right to have guilt proved by state
    Right to confront and cross-examine adverse witnesses
    Right not to be compelled to incriminate self

9. Judge advises defendant that if defendant pleads guilty or *nolo contendere*, there will be no further trial of any kind except as to sentence.

10. Judge advises defendant that the judge may ask defendant questions about the offense and that if defendant answers those questions under oath, on the record, and in the presence of counsel, the answers may later be used against defendant in a prosecution for perjury or aggravated perjury.

11. Judge advises defendant that prior convictions or other factors may be used by the judge or jury in determining defendant's punishment, and that the conviction resulting from the current plea may be used to enhance punishment for subsequent convictions.

12. When defendant is entering a plea to an offense for which a sentence of lifetime community supervision is mandatory or which would subject him to

the sex offender registry (or other registry) requirement, judge advises defendant of these consequences.

13. Judge advises defendant that if he pleads guilty or *nolo contendere* it may have an effect upon defendant's immigration or naturalization status. If defendant is represented by counsel, the judge shall determine that defendant has been advised by counsel of the immigration consequences of the plea.

14. If the plea agreement is one in which the prosecutor recommended, or agreed not to oppose defendant's request for, a particular sentence, with the understanding that the recommendation/request is not binding on the judge, the judge advises defendant that defendant has no right to withdraw the plea if the judge does not accept the recommendation/request.

15. Judge asks defendant "How do you plead?" and awaits his response.

16. After accepting a guilty plea, but before entering judgment, the judge must determine that a factual basis for the plea exists. There is no such requirement for a *nolo contendere* plea.

17. If the judge accepts the plea agreement, the judge advises defendant that the judge will embody in the judgment and sentence the disposition provided in the agreement.

18. Defendant must sign the plea, which must be reduced to writing.

Tenn. R. Crim. P. 11; *Howell v. State*, 185 S.W.3d 319 (Tenn. 2006); *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1997).

IMPORTANT: If the defendant is entering a conditional plea pursuant to Tenn. R. Crim. P. 11(a)(3), the judge should verify compliance with Tenn. R. Crim. P. 37(b).

CHAPTER 23

COMPETENCY TO STAND TRIAL

Contents **Section**

23.01 RAISING ISSUE

"When a defendant charged with a criminal offense is believed to be incompetent to stand trial . . . the criminal, circuit, or general sessions court judge may, upon such judges (sic) own motion or upon petition by the district attorney general or by the attorney for the defendant and after hearing, order the defendant to be evaluated on an outpatient basis." T.C.A. § 33-7-301(a)(1). T.C.A. § 33-7-301 provides additional information regarding what organization(s) must conduct the evaluation, who compensates the evaluator(s), under what circumstances an inpatient evaluation is warranted, at what point a representative of the prosecution is entitled to evaluate the defendant, and what action the court should take if it concludes that the defendant is not competent to stand trial.

23.02 STANDARD

"The Fourteenth Amendment to the United States Constitution and Article I, section 8 of the Tennessee Constitution prohibit the trial of a person who is mentally incompetent. To be competent to stand trial, a defendant in a criminal case must have 'the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.'" *State v. Reid*, 164 S.W.3d 286, 306 (Tenn. 2005), *cert. denied* (Oct. 3, 2005) (citations omitted). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but . . . even one of these factors standing alone may, in some circumstances, be sufficient." *Drope v. Missouri*, 95 S.Ct. 896, 908 (1975).

The defendant has the burden of proving his or her incompetency to stand trial by a preponderance of the evidence. *Reid*, 164 S.W.3d at 307-08; *see also State v. Reid*, 213 S.W.3d 792 (Tenn. 2006), *reh'g denied* (Jan. 17, 2007) (addressing multiple competency hearing issues in the text of the opinion as well as in the appendix). Following an initial finding of incompetency, however, the burden shifts and the State must prove competency by a preponderance of the evidence. *State v. Richard Taylor*, No. M2005-01941-CCA-R3-DD (Tenn. Crim. App., filed March 7, 2008). The defendant is not entitled to a jury trial on the competency issue. *Van Tran v. State*, 6 S.W.3d 257, 270 (Tenn. 1999) (*citing State v. Johnson*, 673 S.W.2d 877, 880 (Tenn. Crim. App. 1984)).

For guidance regarding competency as it relates to the waiver of the right to counsel, see Chapter 21 (Appointment of Counsel) of this benchbook.

23.03 EFFECT OF DETERMINATION

If a court declares a defendant incompetent to stand trial, the court must delay the trial until the defendant becomes competent. The court should consult T.C.A. § 33-7-301(b) to determine if judicial hospitalization is warranted. If the court orders such hospitalization, the court must then follow the procedures set out in T.C.A. §§ 33-7-301(c) and (d).

23.04 DISCOVERY/ADMISSIBILITY OF DEFENDANT'S STATEMENTS

Pending the adoption of an applicable discovery rule, the Tennessee Supreme Court created "temporary procedures governing the discovery and disclosure of evidence in pretrial competency proceedings in criminal cases." *State v. Harrison*, 270 S.W.3d 21, 36 (Tenn. 2008). In 2010, Tenn. R. Crim. P. 12.2 and the accompanying Advisory Commission Comment were amended to include discovery procedures as well as limitations on the use of statements (and fruits of the statements) made by the defendant during the competency evaluation. Tenn. R. Crim. P. 12.2(f) and (g).

CHAPTER 24

DOUBLE JEOPARDY

Contents **Section**

24.01 SOURCE OF LAW

The United States Constitution provides that "[n]o person shall, for the same offense, be twice put in jeopardy of life or limb." U. S. Const. amend. V. The state constitution, Tenn. Const. art. 1, § 10, has a similar prohibition. Additionally, the federal injunction against double jeopardy applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969); Tenn. R. Crim. P. 11, 12.

24.02 SCOPE / BLOCKBURGER TEST

The double jeopardy clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *Schiro v. Farley*, 510 U.S. 222, 229 (1994); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *State v. Denton*, 938 S.W.3d 373, 378 (1996). The accused is not just protected from unreasonable convictions but from the strain and harassment of multiple trials. *Abney v. United States*, 431 U.S. 651 (1977).

In *State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012), the Court abandoned the four-factor test the Court created in *State v. Denton*, 938 S.W.2d 373 (Tenn. 1996), and adopted the same elements test set out in *Blockburger v. United States*, 52 S.Ct. 180 (1932) for the purpose of determining whether multiple convictions under separate statutes are prohibited by the Double Jeopardy Clause. Multiple punishments are not precluded if the legislature authorized those punishments. Therefore, if the legislative intent is clear, no additional analysis is necessary.

The double jeopardy protection at issue in *Watkins* was the protection against multiple punishments for the same offense in a single prosecution. The test that should be utilized by a court when analyzing this issue depends upon whether the single-prosecution/multiple-

punishment claim is a "unit-of-prosecution" or "multiple description" claim.[1] A unit-of-prosecution claim is at issue if the defendant is convicted for multiple violations of the same statute and asserts that those convictions are for the "same offense." When analyzing that issue, a court must determine the legislature's intent with regard to what constitutes a single unit of conduct. A multiple description claim is at issue if the defendant is convicted of violating two separate statutes and asserts that those convictions are for the "same offense."

In *Watkins*, the defendant was convicted of reckless homicide and aggravated child abuse following the death of a child who was in his care, so a "multiple description" claim was at issue. Therefore, the threshold inquiry was whether the alleged violations arose from the "same act or transaction." Courts should refer to the charging instrument and applicable statutory provisions when making this determination. Courts also should consider whether discrete acts or multiple victims are at issue. If the court concludes that the convictions do not arise from the same act or transaction, there is not a double jeopardy violation and no further analysis is necessary. If the court concludes that the threshold has been met, the court must next determine whether the crimes at issue constitute the "same offense." If each statute includes an element which is not included in the other, the crimes are not the same offense and multiple convictions are permissible. Courts must analyze the elements of the offense as opposed to the facts of the case. Since only one statute is at issue in a "unit-of-prosecution" claim, this second step will never be utilized when evaluating such a claim. This step is only necessary for a "multiple description" claim.

Utilizing the *Blockburger* test, the Court ultimately concluded that aggravated child abuse and reckless homicide are not the "same offense" such that multiple convictions would violate the double jeopardy prohibition. In an opinion released contemporaneously with *Watkins*, the Court utilized the *Blockburger* test and concluded that Class D felony evading arrest and Class E reckless endangerment do not constitute the same offense (or lesser-included offenses) and, therefore, multiple convictions are permissible. *State v. Cross*, 362 S.W.3d 512 (Tenn. 2012). The Court also noted that if the charging instrument refers to the public at large or the general public as opposed to identifying individual victims, there are not "multiple" victims for the purpose of analyzing the "same act or transaction" prong of the *Blockburger* test. *Id.* at 519-20.

24.03 WHEN DOES JEOPARDY ATTACH?

Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution. *Breed v. Jones*, 421 U.S. 519 (1975). Jeopardy attaches in a jury trial when the jury is empaneled and sworn and in a nonjury case when the first witness is sworn. *Crist v. Bretz*, 437 U.S. 28 (1978); *Serfass v. United States*, 420 U.S. 377 (1975). This is a bright-line rule. *Martinez v. Illinois*, 134 S.Ct. 2070 (2014) (rejecting the argument that jeopardy did not attach because the prosecution declined to participate in the trial and the defendant, therefore, was not genuinely at risk of conviction).

1Charging a single offense in multiple counts of an indictment is referred to as multiplicity. *See State v. Smith*, ___ S.W.3d ___ (Tenn., filed June 19, 2014, at Nashville).

24.04 FORMER JEOPARDY

A defendant may raise the issue of former jeopardy prior to trial, but it is not mandatory. Tenn. R. Crim. P. 12. In order to establish that jeopardy requires the dismissal of a pending case, the record must show a previous acquittal or conviction for the same offense. *Bell v. State*, 423 S.W.2d 482 (Tenn. 1968).

IMPORTANT NOTE: A particular former jeopardy problem arises when sequential jury instructions are given in first degree murder cases where there are indictment counts on a single murder charging both premeditated first degree murder and felony murder. In this situation the Tennessee Supreme Court has stated the better practice thusly:

> While it was not error for the trial court to deliver sequential jury instructions, *see Harris v. State*, 947 S.W.2d 156, 175 (Tenn. Crim. App. 1996), we have previously urged trial courts to allow juries to consider all theories of first-degree murder. *See State v. Cribbs*, 967 S.W.2d 773, 787-88 (Tenn. 1988[)]; *Carter v. State*, 959 S.W.2d 620, 624-25 n. 6 (Tenn. 1997). We are compelled to emphasize this point again; a trial court should instruct a jury to render a verdict as to each count of a multiple count indictment which requires specific jury findings on different theories of first-degree murder. If the jury does return a verdict of guilt on more than one theory of first-degree murder, the court may merge the offenses and impose a single judgment of conviction. *See State v. Addison*, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997). The benefits of instructing the jury in this manner are important. *First, the double jeopardy problem of retrying a defendant after a subsequent appellate opinion reverses a conviction as unsupported by evidence is precluded.* (Emphasis added). Second, the State will have a basis to protect other convictions to which it may be entitled. Third, in light of our decision in *State v. Middlebrooks*, 840 S.W.2d 317 (1992), a jury verdict on each charged offense will allow the State to use the felony murder aggravator as an aggravating circumstance in sentencing. *See State v. Hall*, 958 S.W.2d 679, 692-92 (Tenn. 1997).

State v. Howard, 30 S.W.3d 271, 274-75 n.4 (Tenn. 2000).

24.05 MISTRIAL

If a defendant requests a dismissal on jeopardy grounds because a previous trial on the same offense resulted in a mistrial, it must first be determined if jeopardy attached in the previous trial. If a mistrial was required by manifest necessity, jeopardy does not bar a retrial. *Illinois. v. Somerville*, 410 U.S. 458 (1973); T.C.A. § 40-18-109. A defendant who successfully moves for a mistrial on the basis of prosecutorial or judicial conduct must establish that the offending conduct was intended to provoke the mistrial motion in order to raise the mistrial as a bar to retrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982). The state must establish manifest

necessity in these circumstances to lift the double jeopardy bar. *State v. Smith*, 871 S.W.2d 667 (Tenn. 1994).

Similarly, the constitutional protection against double jeopardy does not prevent a retrial of a defendant after a mistrial caused by a genuinely deadlocked jury. *See Renico v. Lett*, 130 S.Ct. 1855 (2010). The trial judge has inherent authority to terminate prosecution where it appears that, at future trials, substantially the same evidence will be presented with a high probability of additional mistrials. *State v. Witt*, 572 S.W.2d 913 (Tenn. 1978).

24.06 ACQUITTAL

The state cannot appeal from a verdict of acquittal without violating the double jeopardy clause. *United States v. Ball*, 163 U.S. 662 (1896). The form of acquittal is not important. *See Martinez v. Illinois*, 134 S.Ct. 2070 (2014). Thus, the granting of a motion for a judgment of acquittal bars appeal as does a jury verdict of acquittal. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). This is true even if the court's granting of the motion for a judgment of acquittal is based upon the court's erroneous understanding of the facts or the law. *Evans v. Michigan*, 133 S.Ct. 1069 (2013).

24.07 DIFFERENT SOVEREIGNS

Different sovereigns may institute separate actions against the same defendant without offending double jeopardy. This dual sovereignty exception to the double jeopardy rule provides that two sovereigns may prosecute the accused for substantially the same offense, because different interests are involved. *Bartkus v. Illinois*, 359 U.S. 121 (1959).

A municipality and a state, however, may not try someone for the same offense. *Waller v. Florida*, 397 U.S. 387 (1970). This applies even if the city proceedings are denominated civil, provided they involve the prospect of some kind of punishment, i.e. fine or imprisonment. *Metropolitan Government of Nashville and Davidson Co. v. Miles*, 524 S.W.2d 656 (Tenn. 1975). The *Waller* holding did not overturn the old dual sovereignty exception to double jeopardy, but merely held that a state and a municipality within the state are not separate sovereigns. The Tennessee statute also sets forth the rule of *Waller*. T.C.A. § 40-3-105.

24.08 COLLATERAL ESTOPPEL / ISSUE PRECLUSION

Inherent in the prohibition against double jeopardy is the doctrine of collateral estoppels, which provides that if the same ultimate facts are to be decided in each case, double jeopardy forbids more than one trial. For example, if an offense involves one act committed against multiple victims, an acquittal on the charge relating to one victim would prohibit the state from charging the offense with regard to a different victim. *Ashe v. Swenson*, 397 U.S. 436 (1970)(robbery of multiple victims); s*ee also Yeager v. United States*, 129 S.Ct. 2360 (2009) (holding that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the preclusive force of the acquittals under the Double Jeopardy Clause); *Bobby v. Bies*, 129 S.Ct. 2145 (2009) (finding

that double jeopardy / issue preclusion considerations did not bar a full hearing on the issue of mental retardation when mental retardation was raised as a mitigating circumstance at trial but the issue of the defendant's mental capacity was not fully litigated as an independent issue); *State v. Thompson*, 285 S.W.3d 840 (Tenn. 2009) (finding that collateral estoppel precluded prosecution for felony murder when the defendant was acquitted of the underlying predicate offense in a previous trial). Collateral estoppel applies even if the first jury did not consider all relevant evidence, including circumstances in which some evidence was improperly excluded. *Harris v. Washington*, 404 U.S. 55 (1971).

"Affirmative" or "offensive" collateral estoppel, in which the prosecution asserts collateral estoppel against a defendant in a criminal case, is not permitted in Tennessee. *State v. Scarbrough*, 181 S.W.3d 650 (Tenn. 2005). However, the prosecution is not precluded from introducing "evidence of the prior conviction if the trial court determines that its probative value is not substantially outweighed by the risk of unfair prejudice to the defendant." *Id.* at 660-61. The conviction at issue in *Scarbrough* was a prior conviction for a felony which served as the underlying felony for a pending felony murder charge.

24.09 RE-SENTENCING

No absolute bar prohibits giving a more severe sentence upon reconviction at a new trial, but reasons for the more severe sentence must be given. The more severe sentence must be based on the accused's conduct after the original sentence or on factors that could not have been known or discovered at the time of the original sentence. *North Carolina v. Pearce*, 395 U.S. 711 (1969).

24.10 WAIVER

If the accused seeks and is granted a new trial, a plea of double jeopardy is generally not applicable.

CHAPTER 25

STATEMENTS / CONFESSIONS

Contents **Section**

25.01 TERMINOLOGY

In the context of an attempt to suppress a statement, courts and litigants often refer to the person's statement as a "confession". However, the constitutional considerations at issue apply equally to a statement, whether inculpatory or exculpatory, that does not rise to the level of a confession. *Miranda v. Arizona*, 86 S.Ct. 1602, 1612 (1966). As the United States Supreme Court has observed, "If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution." *Id.* at 1629. Therefore, when the term "confession" is utilized in this Chapter, the proposition at issue applies equally to any statement.

Moreover, although many state and federal court opinions refer to the person being questioned as the "suspect," it is now well settled that "any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda*." *Stansbury v. California*, 114 S.Ct. 1526, 1530 (1994). Therefore, although the terms "suspect" and "accused" will be utilized in this Chapter, the Fifth Amendment's protections apply equally to all persons who are subjected to custodial interrogation regardless of whether those persons are considered suspects.

25.02 *MIRANDA V. ARIZONA*

A. Generally

The Fifth Amendment provides in relevant part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *U.S. Const. amend V.* This provision is applicable to the states via the Fourteenth Amendment. *Malloy v. Hogan*, 84 S.Ct. 1489 (1964). Similarly, Tennessee's Constitution provides in relevant part that "in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself." *Tenn. Const. art I, § 9*. "Encompassed within these constitutional provisions is the right to counsel, which is applicable whenever a suspect requests that counsel be present during police-initiated custodial

interrogation." *State v. Saylor*, 117 S.W.3d 239, 244 (Tenn. 2003), *cert. denied*, 124 S.Ct. 1483 (2004) (footnote and citations omitted).

A person's constitutional rights must be communicated to him prior to an interrogation by a government official or agent if the accused is in custody or otherwise deprived of freedom in any significant way. Specifically, the accused must be informed that he has the right to remain silent, anything he says can be used against him in a court of law, he has the right to the presence of an attorney, and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. The warnings need not be given verbatim, but they must fairly communicate the accused's constitutional rights. *Florida v. Powell*, 130 S.Ct. 1195, 1203-06 (2010); *California v. Prysock*, 101 S.Ct. 2806, 2809-10 (1981). As noted by the Tennessee Supreme Court, law enforcement officials also are required to repeat the previously conveyed *Miranda* warnings under certain circumstances:

> A valid waiver of *Miranda* rights remains valid unless the circumstances change so seriously that the suspect's answers to interrogation are no longer voluntary or unless the suspect is no longer making a knowing and intelligent waiver of his rights. Courts must examine the totality of the circumstances to determine whether renewed warnings are required.
>
> Factors to be considered when assessing the totality of the circumstances include: 1) the amount of time that has passed since the waiver; 2) any change in the identity of the interrogator, the location of the interview, or the subject matter of the questioning; 3) any official reminder of the prior advisement; 4) the suspect's sophistication or past experience with law enforcement; and 5) any indicia that the suspect subjectively understands and waives his rights. Because of the infinite variety of circumstances a case may present, the list of factors is by no means exhaustive. The weight to be accorded different factors will vary depending on the particular facts of the case.

State v. Downey, 259 S.W.3d 723, 734 (Tenn. 2008) (quoting *State v. Rogers*, 188 S.W.3d 593, 606 (Tenn. 2006)).

B. Custody

Because *Miranda* warnings are only required in the context of a custodial interrogation, it is necessary for a reviewing court to determine if the person was in fact in custody at the time of the interrogation. The Tennessee Supreme Court recommends that courts consider the following when determining whether a person is in custody for purposes of *Miranda*:

> Having determined that the focus or progress of the investigation is not relevant to determine whether a person is in custody, we deem it necessary to briefly delineate some of the factors that are pertinent to the inquiry. Again, we emphasize that the test is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest.
>
> Some factors relevant to that objective assessment include the time and location

> of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will. The listed factors are by no means exclusive. The totality of the circumstances surrounding each interrogation must be closely examined when evaluating whether an individual is in custody for purposes of *Miranda*. It is a very fact specific inquiry. Application of the appropriate, relevant factors to the facts is a task for which the trial court is especially suited.

State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996) (citations omitted).

When determining whether someone is in custody for purposes of *Miranda*, the person's age is also relevant to the custody determination "[s]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer . . .." *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2406 (2011).

In *State v. Bush,* 942 S.W.2d 489 (Tenn. 1997), the Tennessee Supreme Court concluded that the defendant was not in custody for *Miranda* purposes when he gave a statement to the police. Although he was transported to the police station in a police car, his father rode with him and neither man was restrained. Moreover, the defendant initiated contact with the police, offered to make a statement, was not given any reason to believe that he was not free to leave, and did most of the talking while the police asked very few questions. *Bush*, 942 S.W.2d at 499-500. In reaching its conclusion, the court noted that the "undisclosed knowledge or suspicions of law enforcement officials are irrelevant to the question of whether a reasonable person in the position of [the interviewee] would have considered himself deprived of freedom of movement to a degree associated with a formal arrest." *Id.* at 500.

In contrast, the court concluded in *State v. Dailey*, 273 S.W.3d 94 (Tenn. 2009), that the defendant was in custody despite the fact that he drove himself to the police station, that he was not subjected to prolonged questioning, and that the officers' tone of voice and demeanor were conversational. In support of its conclusion, the court noted, among other things, that the officers lied to the defendant regarding the reason they wanted to speak with him, the defendant was interviewed in a small interrogation room in a secured area of the building, the door of the room was closed, a police officer was sitting between the defendant and the door, the questioning was "accusatory and demanding, aimed at convincing the [d]efendant that the police already had sufficient evidence to convict him," and one of the officers was armed. *Dailey*, 273 S.W.3d at 103-04; *see also R.D.S. v. State*, 245 S.W.3d 356 (Tenn. 2008) (analyzing a custody issue in a school setting); *State v. Munn*, 56 S.W.3d 486, 498-99 (Tenn. 2001) (person was not in custody despite the fact that the officers were "extremely inquisitive and often times accusatory"); *State v. Walton*, 41 S.W.3d 75, 83 (Tenn. 2001) (person who was handcuffed and confined to the back seat of a patrol car with two officers present was in custody for purposes of *Miranda* despite a claim that

the handcuffs were only for security purposes); *State v. Mann*, 959 S.W.2d 503, 528-29 (Tenn. 1997), *reh'g denied* (Tenn. Feb. 17, 1998), *cert. denied*, 118 S.Ct. 2376 (1998) (Appendix) (not in custody for *Miranda* purposes despite being in a conference room at the police station).

With regard to on-the-scene questioning, the general rule is that this type of questioning does not implicate *Miranda*, so *Miranda* warnings are not required. *Miranda*, 86 S.Ct. at 1629. There are exceptions to that rule, however. Therefore, courts should consider the factors listed in *Anderson* in these types of cases as well.

The considerations differ somewhat regarding whether an inmate/prisoner is in custody for purposes of *Miranda* because such a person would necessarily feel that he was not free to leave the jail/prison. For those individuals, courts should consider the following factors: "(1) the language used to summon the inmate, (2) the physical surroundings of the interrogation, (3) the extent to which he is confronted with evidence of his guilt, and (4) the additional pressure exerted to detain the inmate." *State v. Goss*, 995 S.W.2d 617, 628 (Tenn. Crim. App. 1998), *app. denied* (Tenn. April 26, 1999); *see also Howes v. Fields*, 132 S.Ct. 1181 (2012) (rejecting the argument that a prisoner is *per se* in custody for purposes of *Miranda* if he is "taken aside and questioned about events that occurred outside the prison walls" and setting out the various factors courts must consider when determining whether the prisoner was "in custody").

C. Interrogation

The *Miranda* safeguards apply to "questioning initiated by law enforcement officers" as well as to the "functional equivalent" of questioning, which includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Arizona v. Mauro*, 107 S.Ct. 1931, 1935 (1987) (quoting *Rhode Island v. Innis*, 100 S.Ct. 1682 (1980) and *Miranda v. Arizona*, 86 S.Ct. 1602 (1966)). "[T]he latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Rhode Island v. Innis*, 100 S.Ct. 1682, 1690 (1980).

Whether the law enforcement officers' conversation about the offense at issue within earshot of a suspect constitutes interrogation for *Miranda* purposes must be evaluated on a case-by-case basis, and courts should consider whether law enforcement officials utilized "psychological ploys, such as casting blame on the victim or society, minimizing the culpability of the offender, or minimizing the moral seriousness of a crime." *State v. Northern*, 262 S.W.3d 741, 753 (Tenn. 2008) (finding that the conversation constituted interrogation); *see also Innis*, 100 S.Ct. at 1688-91 (finding that the conversation did not constitute interrogation).

Although there are situations in which questioning by someone other than a law enforcement officer could constitute "interrogation" for purposes of *Miranda*, the United States Supreme Court held in *Arizona v. Mauro* that, under the facts of that particular case, the suspect's conversation with his wife at his wife's insistence did not constitute interrogation despite the fact that an officer was present during the conversation and recorded it in anticipation that the suspect might make an incriminating statement. *Mauro*, 107 S.Ct. at 1936-37. Likewise, the court has concluded that "[v]olunteered statements of any kind are not barred by the Fifth Amendment." *Miranda*, 86 S.Ct. at 1630 ("There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a

confession or any other statement he desires to make"); *see also State v. Hurley*, 876 S.W.2d 57 (Tenn. 1993), *cert. denied*, 115 S.Ct. 328 (1994) (finding that an inmate who made self-serving statements to a detective he had summoned to his cell had volunteered his statement and was not entitled to *Miranda* warnings). Moreover, "police officers are permitted to ask follow-up questions to a defendant's voluntary statement without first having to give *Miranda* warnings, unless the officer has reason to believe that the follow-up questions are 'reasonably likely to elicit an incriminating response.'" *Walton*, 41 S.W.3d at 85.

D. Questioning By Undercover Law Enforcement Official Or Government Agent

Assuming that a statement is otherwise voluntary and that the person's Sixth Amendment right to counsel has not attached to the offense at issue, a statement made by a person in custody as a result of questioning by an undercover police officer or anyone else who, unbeknownst to the suspect, is serving as an agent of the government (family member, friend, or fellow inmate, for example) is admissible even in the absence of *Miranda* warnings. *See Illinois v. Perkins*, 110 S.Ct. 2394 (1990) (holding that "*Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement"); *State v. Branam*, 855 S.W.2d 563, 568-69 (Tenn. 1993) (finding no constitutional violation when the police "wired" a family member before she spoke to the suspect, but recognizing that "under some circumstances, deceptive interrogation practices by law enforcement officers may be so unfair that they offend notions of due process"). Although such a person is in "custody" and is being "interrogated" for purposes of *Miranda*, the United States Supreme Court offered the following explanation for the inapplicability of the *Miranda* warnings when the person is unaware that the interrogator is a government employee or agent:

> The warning mandated by *Miranda* was meant to preserve the privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere." That atmosphere is said to generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated."
>
> Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a "police-dominated atmosphere" and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking.

Perkins, 110 S.Ct. at 2397 (citations omitted).

E. Invocation

A suspect must unequivocally and unambiguously invoke his right to counsel or to remain silent, and this same standard applies in both the pre-waiver and post-waiver contexts. *Berghuis*

v. Thompkins, 130 S.Ct. 2250 (2010); *Davis v. United States*, 114 S.Ct. 2350 (1994); *State v. Climer*, 400 S.W.3d 537 (Tenn. 2013). As the Tennessee Supreme Court has noted,

> an unequivocal invocation requires a suspect to "articulate his desire to have counsel present sufficiently clearly that a reasonable officer in the circumstances would understand the statement to be a request for an attorney." Questions that merely probe the parameters of *Miranda* rights are properly characterized as "equivocal statements made by a person who is still in the decision making process."

Climer, 400 S.W.3d at 563 (citations omitted); *see also Salinas v. Texas*, 133 S.Ct. 2174 (2013) (If *Miranda* warnings are neither required nor given during a noncustodial interview and the defendant fails to invoke his privilege against self-incrimination at the time of the questioning, his silence can be used by the prosecution in its case-in-chief.)

Although the invocation issue must be evaluated on a case-by-case basis, the Tennessee Supreme Court concluded that a suspect's statement to a transporting officer that he "intended to turn himself in after he got an attorney" did not constitute an unequivocal request for an attorney. *Downey*, 259 S.W.3d at 732. Similarly, in *Climer* the court concluded that a suspect failed to unequivocally invoke his right to counsel when he asked, "You mean I can have an uh an appointed lawyer right now?" and also said, "I'm scared to without an attorney here" and "I can't afford a lawyer." *Climer*, 400 at 562-63. The court gave numerous examples of statements various courts have found to be equivocal or ambiguous. *Id.* at 563-64.

F. Waiver

If a suspect fails to invoke his right to remain silent and/or his right to counsel, his statement is still inadmissible unless the state establishes by a preponderance of the evidence that he voluntarily and knowingly waived his rights. *Climer*, 400 S.W.3d at 564-66. The waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and must also be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 106 S.Ct. 1135 (1986). Whether the waiver constitutes "a knowing and intelligent relinquishment or abandonment of a known right or privilege [is] a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Edwards*, 101 S.Ct. 1880, 1884 (1981); *see also McNeil v. Wisconsin*, 111 S.Ct. 2204, 2208 (1991); *North Carolina v. Butler*, 99 S.Ct. 1755 (1979).

"[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Miranda*, 86 S.Ct. at 1628; *Climer*, 400 S.W.3d at 565-66 (state failed to establish that the suspect understood his *Miranda* rights). However, even absent a written waiver or other express waiver, the *Miranda* requirements are met if the circumstances establish that the person received adequate warnings, understood those warnings, and had an opportunity to invoke his rights before making any statements. *Berghuis*, 130 S.Ct. at 2263; *see also State v. Chalmers*, 28 S.W.3d 913, 920 (Tenn. 2000), *cert. denied*, 121 S.Ct. 1367 (2001) (Appendix) ("'law does not require a written waiver' as long as the record demonstrates the defendant was advised of his

rights and did, in fact, waive them"); *Mann*, 959 S.W.2d at 529-30 (written waiver is not required). "In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." *Berghuis*, 130 S.Ct. at 2264.

While the accused's mental condition is relevant to the issue of voluntariness, "coercive police activity is a necessary predicate" to a conclusion that the accused's *Miranda* waiver or statement was not made voluntarily. *Colorado v. Connelly*, 107 S.Ct. 515, 520-24 (1986) ("[W]hile mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry"); *see also Bush*, 942 S.W.2d at 500-01 ("assuming that the defendant's decision to execute the waiver could have been influenced by mental illness" lower courts properly upheld the waiver's validity "in the absence of police overreaching"); *but see State v. Blackstock*, 19 S.W.3d 200 (Tenn. 2000) (concluding that defendant's mental condition prevented him from voluntarily, knowingly and intelligently waiving his Fifth Amendment rights). With regard to intoxication, the Tennessee Supreme Court has stated:

> The law in this state is well-established that the ingestion of drugs and alcohol does not in and of itself render any subsequent confession involuntary. It is only when an accused's faculties are so impaired that the confession cannot be considered the product of a free mind and rational intellect that it should be suppressed. The test to be applied in these cases is whether, at the time of the statement, the accused was capable of making a narrative of past events or of stating his own participation in the crime.

State v. Morris, 24 S.W.3d 788 (Tenn. 2000), *cert. denied*, 121 S.Ct. 786 (2001) (citations and quotation marks omitted) (rejecting defendant's claim that cocaine use rendered his statement involuntary and unknowing); *see also State v. Dailey*, 273 S.W.3d 94, 110-11 (Tenn. 2009) (listing the accused's sobriety (as it relates to his ability to understand his *Miranda* rights) as one factor in determining voluntariness for purposes of a question-first interrogation).

The state is not required to present expert proof that a *Miranda* waiver was knowingly and intelligently executed merely because the defendant presented expert testimony to the contrary. *State v. Bush*, 942 S.W.2d 489, 500 (Tenn. 1997).

G. Post-Invocation Obligations

1. Right to Counsel

As a general rule, after *Miranda* warnings are given the interrogation must cease until an attorney is present if the suspect invokes his right to counsel, and the interrogation must cease completely if the suspect invokes his right to remain silent. *Miranda*, 86 S.Ct. at 1627-28; *Saylor*, 117 S.W.3d at 244; *see also Minnick v. Mississippi*, 111 S.Ct. 486, 489-91 (1990) (interpreting "until counsel has been made available to him" to mean that counsel must be present, not merely that the suspect has consulted with counsel outside the interrogation room). While a voluntary *Miranda* waiver is adequate during the initial interrogation, it is not adequate during questioning (in the absence of an attorney) which follows a suspect's invocation of the right to counsel unless the suspect "initiates further communication, exchanges, or conversations with the police."

Maryland v. Shatzer, 130 S.Ct. 1213, 1219-20 (2010); *Minnick*, 111 S.Ct. at 492; *Edwards v. Arizona*, 101 S.Ct. 1880, 1885 (1981).

However, because a blanket prohibition against initiating communication with a suspect who has invoked his right to counsel would "be eternal" regardless of whether a subsequent interrogation pertained to a different crime or was conducted by a different government authority, the United States Supreme Court has limited the presumption of involuntariness of a post-invocation waiver by adopting a 14-day break-in-custody rule. *Shatzer*, 130 S.Ct. at 1223. Therefore, a suspect whose post-invocation interrogation falls outside of this 14-day period is no longer entitled to the presumption that a *Miranda* waiver which precedes it is involuntary; however, the suspect can still argue that the waiver was involuntary. *Id.* at 1223, n. 7. For purposes of this rule, returning an inmate to the general prison population constitutes a break in custody. *Id.* at 1224-25.

2. Right to Remain Silent

If the person who is being interrogated invokes his right to remain silent at any point prior to or during the interrogation, the questioning must cease. *Miranda*, 86 S.Ct. at 1627. The admissibility of a statement which follows the invocation depends upon whether the interviewer "scrupulously honored" the accused's request. *Michigan v. Mosley*, 96 S.Ct. 321, 326 (1975). A failure to do so renders the statement inadmissible during the state's case-in-chief regardless of whether the failure was intentional or inadvertent. *State v. Crump*, 834 S.W.2d 265, 271 (Tenn. 1992).

Courts should consider the totality of the circumstances when determining whether law enforcement scrupulously honored a request to remain silent. *State v. Huskey*, 177 S.W.3d 868, 877-80 (Tenn. Crim. App. 2005), *app. denied* (Tenn. Oct. 31, 2005). This includes, but is not limited to, the following factors: (1) whether the questioning ceased immediately upon the invocation of the right to remain silent; (2) whether the interrogator attempted to persuade the person to reconsider the invocation, including any efforts to curry favor; (3) whether a significant period of time passed between the invocation and the resumption of questioning; (4) whether the location, interrogator, and/or subject matter of the interrogation changed; and (5) whether the interrogator informed the person of his *Miranda* rights and gave him an opportunity to invoke or waive those rights prior to the post-invocation interview(s). *Mosley*, 96 S.Ct. at 327; *Huskey*, 177 S.W.3d at 880 (officers attempted to curry favor by allowing the interviewee to shower and to telephone family members). "[R]einterrogation of a suspect concerning the same subject matter does not constitute a *per se* violation of *Miranda* . . . [but] it is an important factor to consider." *Huskey*, 177 S.W.3d at 880.

25.03 SIXTH AMENDMENT

A. Generally

The Sixth Amendment to the United States Constitution provides in relevant part that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." *U.S. Const. amend VI.* This provision is applicable to the states via the Fourteenth Amendment. *State v. Rollins*, 188 S.W.3d 553, 565, n.8 (Tenn. 2006). Similarly, the Tennessee

Constitution provides that "in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . .." *Tenn. Const. art I, § 9*; *see also Rollins*, 188 S.W.3d at 565, n.10 (reiterating that the Tennessee Supreme Court has construed the state constitution consistently with the federal constitution with regard to the right to counsel). While the emphasis under the Fifth Amendment is protection against coercion, the emphasis under the Sixth Amendment is "the right to legal assistance in any critical confrontation with state officials, irrespective of coercion." *State v. Berry*, 592 S.W.2d 553, 557 (Tenn. 1980).

Although the "core of this right has historically been, and remains today, the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial," the United States Supreme Court has held that "the right extends to having counsel present at various pretrial critical interactions between the defendant and the State, including the deliberate elicitation by law enforcement officers (and their agents) of statements pertaining to the charge." *Kansas v. Ventris*, 129 S.Ct. 1841, 1844-45 (2009), *reh'g denied*, 129 S.Ct. 2853 (2009) (citations and internal quotation marks omitted). Thus, following the initiation of judicial proceedings, the government is precluded from deliberately eliciting incriminating statements from an accused in the absence of counsel or the waiver of counsel. *See Brewer v. Williams*, 97 S.Ct. 1232 (1977); *Massiah v. United States*, 84 S.Ct. 1199 (1964).

With regard to the Sixth Amendment, the Tennessee Supreme Court has summarized the pertinent rights and procedures as follows:

> A presumption exists that the accused requests the services of counsel at every *critical stage* of the prosecution. The purpose of the Sixth Amendment counsel guarantee -- and hence the purpose of invoking it -- is to protec[t] the unaided layman at critical confrontations with his expert adversary, the government, *after* the adverse position of government and defendant have solidified with respect to a particular alleged crime.
>
> After the initiation of formal charges against an accused, the Sixth Amendment right to counsel attaches, guaranteeing the accused the right to rely on counsel as a medium between himself and the State in any critical confrontation with state officials. In Tennessee, the adversarial judicial process is initiated at the time of the filing of the formal charge, such as the indictment or arrest warrant. Once formal criminal proceedings have begun, statements deliberately elicited from a defendant without an express waiver of the right to counsel are inadmissible in the prosecution's case-in-chief. The waiver of an accused's right to counsel after receiving *Miranda* warnings, or their equivalent, will generally suffice to establish a knowing and intelligent Sixth Amendment waiver of right to counsel, thus permitting the introduction of post-arrest statements.

Downey, 259 S.W.3d at 733 (citations and quotation marks omitted) (emphasis in original); *see also Montejo v. Louisiana*, 129 S.Ct. 2079, 2085 (2009), *reh'g denied*, 130 S.Ct. 23 (2009). (reiterating that interrogation by the state is a critical stage); *Rollins*, 188 S.W.3d at 566 (noting that the adversarial process is "initiated when formal charges are filed, i.e., an arrest warrant issues, a preliminary hearing is held (if no arrest warrant is issued), or an indictment or presentment is returned" and rejecting defendant's argument that police are barred from approaching him for questioning once the right to counsel attaches).

In *Michigan v. Jackson*, the United States Supreme Court held that, for Sixth Amendment purposes, "if police initiated interrogation after a defendant's assertion, at an arraignment or other similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." 106 S.Ct. 1404, 1411 (1986). However, the court subsequently overruled *Michigan v. Jackson*, noting that a person cannot invoke his *Miranda* rights anticipatorily in a proceeding or context other than custodial interrogation, and concluding that the *Miranda-Edwards-Minnick* line of cases adequately protects defendants' rights under both the Fifth and Sixth Amendments. *Montejo*, 129 S.Ct. at 2089-91. Thus, a defendant may waive his Sixth Amendment right even if he is represented by counsel, but only if it is a voluntary, knowing and intelligent waiver, which typically occurs via a *Miranda* waiver. *Id.* at 2085.

B. Deliberate Elicitation

1. Generally

Direct questioning is not required for law enforcement's actions to constitute a Sixth Amendment violation. Even in the absence of such questioning, the government violates this provision by "intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel." *United States v. Henry*, 100 S.Ct. 2183, 2189 (1980). For instance, the "Christian burial speech" made by officers in the presence of the accused was "tantamount to interrogation." *See Brewer*, 97 S.Ct. at 1239-40.

2. Questioning by Undercover Law Enforcement Official or Government Agent

Absent a valid waiver after the Sixth Amendment right to counsel attaches, neither the government nor its agent (such as a fellow inmate, co-defendant, friend or relative) may question the defendant without the presence of counsel regardless of whether the defendant is incarcerated or otherwise in custody at the time of the questioning, and regardless of whether the defendant is aware that the person is a government employee or agent. *Maine v. Moulton*, 106 S.Ct. 477 (1985); *Henry*, 100 S.Ct. at 2186-89; *Massiah*, 84 S.Ct. at 1201-03. If the defendant is unaware that the person to whom he is speaking is acting on behalf of the government, the defendant clearly has not knowingly and voluntarily waived his Sixth Amendment right by engaging in a conversation with that person. *Henry*, 100 S.Ct. at 2188. However, the United States Supreme Court has also clarified the scope of the Sixth Amendment's protection as follows:

> The primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since "the *Sixth Amendment* is not violated whenever – by luck or happenstance – the State obtains incriminating statements from the accused after the right to counsel has attached," a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Kuhlmann v. Wilson, 106 S.Ct. 2616, 2630 (1986) (citations omitted).

C. Critical Stage

For Sixth Amendment purposes, a pre-trial "critical stage" includes (in addition to interrogations) "preliminary hearings, post-indictment lineups, and any post-indictment proceedings on motions for court-ordered mental evaluations of the defendant." *State v. Blye*, 130 S.W.3d 776, 780 (Tenn. 2004), *cert. denied*, 125 S.Ct. 289 (2004) (citations omitted). In contrast, the Sixth Amendment right to counsel does not include a right to have counsel present when the state presents a photographic lineup to a witness, during a court-ordered mental examination of the defendant, or during "systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like." *Id.* at 781. Likewise, "a post-presentment, *ex parte* search warrant proceeding to obtain a blood sample from the defendant is not a critical stage of the prosecution." *Id.* at 782.

D. Offense Specific

It is important to recognize that "[t]he Sixth Amendment right . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced . . .." *Sepulveda v. State*, 90 S.W.3d 633, 638 (Tenn. 2002) (quoting *McNeil v. Wisconsin*, 111 S.Ct. 2204 (1991)); *see also Texas v. Cobb*, 121 S.Ct. 1335, 1339 (2001) (Sixth Amendment right to counsel is offense specific, and does not extend to "other offenses 'closely related factually' to the charged offense"). With regard to offenses for which the Sixth Amendment right has not attached, government officials must simply comply with *Miranda* and its progeny regarding the notification, waiver, and/or invocation of a person's Fifth Amendment rights, and they must do so only in the context of a custodial interrogation.

25.04 VOLUNTARINESS OF STATEMENT

A. Voluntariness

As noted above, the state is required to prove the voluntariness of a *Miranda* waiver and a subsequent statement by a preponderance of the evidence. *Bush*, 942 S.W.2d at 500 (citing *Colorado v. Connelly*, 107 S.Ct. 515 (1986)). Assuming a statement was made voluntarily, its truth or falsity is a question of fact for the jury, not a question of admissibility. *State v. Housler*, 193 S.W.3d 476, 488-91 (Tenn. 2006), *cert. denied*, 127 S.Ct. 499 (2006).

"[C]oercive police activity is a necessary predicate to the finding that a statement is not 'voluntary'" pursuant to the United States Constitution. *Connelly*, 107 S.Ct. at 522. Moreover, "[w]hen *Miranda* warnings are given and a waiver obtained, the state has 'a virtual ticket of admissibility' for any resulting custodial statement of the defendant. Indeed, 'maintaining that a statement is involuntary even though given after warnings and a voluntary waiver of rights requires unusual stamina' and usually is a losing argument in court." *Northern*, 262 S.W.3d at 749 (citations omitted). With regard to the voluntariness requirement pursuant to Tennessee's Constitution, the Tennessee Supreme Court has stated:

> The test of voluntariness for confessions under article I, § 9 of the Tennessee Constitution is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment. In Tennessee, for a confession to be considered voluntary, it must not be the product of any sort of threats or violence . . . any direct or implied promises, however slight, nor by the exertion of any improper influence. The essential question therefore is whether the behavior of the State's law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined.

Downey, 259 S.W.3d at 733-34 (citations and quotation marks omitted).

When determining whether a suspect's statement was voluntary in nature, courts should consider the following:

> The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

State v. Huddleston, 924 S.W.2d 666, 671 (Tenn. 1996) (quoting *People v. Cipriano*, 431 Mich. 315, 429 N.W.2d 781, 790 (Mich. 1988)).

Although this issue must be evaluated on a case-by-case basis, denying an accused's request to make a phone call, requiring him to reduce his oral confession to writing despite his request that he be permitted to do so "later", and assuring him that his statement could not hurt him do not necessarily render a statement involuntary. *Downey*, 259 S.W.3d at 734-36; *see also Walton*, 41 S.W.3d at 95 (reiterating that custody alone is not sufficient to vitiate the voluntariness of a confession); *State v. Smith*, 933 S.W.2d 450 (Tenn. 1996) (informing the suspect that there will be certain consequences if he refuses to cooperate and making accurate assertions about the suspect's predicament do not constitute coercion).

B. Question-First Interrogations

Whether a statement can be considered knowing and voluntary if it follows an incriminating admission during an unwarned custodial interrogation (commonly known as a "question-first interrogation") is evaluated on a case-by-case basis and involves multiple fact-specific considerations. *See Missouri v. Seibert*, 124 S.Ct. 2601 (2004); *Dailey*, 273 S.W.3d at 110 (discussing the relevant factors under both the Tennessee and United States constitutions and ultimately concluding that the post-*Miranda* statement was not admissible); *Northern*, 262 S.W.3d at 763-66 (discussing the relevant factors under both the Tennessee and United States constitutions and ultimately concluding that the post-*Miranda* statement was admissible).

25.05 USE OF STATEMENTS OBTAINED IN VIOLATION OF CONSTITUTION(S) AS WELL AS EVIDENCE OBTAINED AS A RESULT OF THOSE STATEMENTS

A. Statements

A truly coerced or involuntary statement may not be introduced at trial during the state's case-in-chief, to impeach a defendant who testifies, or for any other purpose. *New Jersey v. Portash*, 99 S.Ct. 1292 (1979); *Mincey v. Arizona*, 98 S.Ct. 2408 (1978). In contrast, a statement which is elicited in technical violation of the Fifth Amendment or Sixth Amendment is inadmissible during the state's case-in-chief but is admissible to impeach a defendant who testifies as long as the statement was made voluntarily and is otherwise admissible. *Ventris*, 129 S.Ct. 1844-47; *Harris v. New York*, 91 S.Ct. 643 (1971); *Dailey*, 273 S.W.3d at 102, n.4. The admissibility of a statement which follows an illegally obtained statement is evaluated on a case-by-case basis, and the Tennessee Supreme Court has set forth numerous factors which must be considered by a reviewing court. *Dailey*, 273 S.W.3d at 110-12.

B. Non-Testimonial Evidence

"[A] defendant may seek suppression of non-testimonial evidence discovered through his or her unwarned statements only when the statements are the product of an actual violation of the privilege against self-incrimination, *i.e.*, such as when actual coercion in obtaining the statement is involved or when the invocation of the right to remain silent or to have counsel present is not 'scrupulously honored.'" *Walton*, 41 S.W.3d at 92. Suppression of the "fruit of the poisonous tree" is not an available remedy for a *Miranda* violation if the statement was made voluntarily. *Climer*, 400 S.W.3d at 566-67.

25.06 PROBABLE CAUSE DETERMINATION FOLLOWING WARRANTLESS ARREST

A. Fourth Amendment

1. Violation Determination

In *Gerstein v. Pugh*, 95 S.Ct. 854 (1975), the United States Supreme Court held that the Fourth Amendment requires "a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Gerstein*, 95 S.Ct. at 869. An adversary hearing is not required, and the probable cause determination is not a critical stage at which the accused is entitled to appointed counsel. *Id.* at 866-67.

The court subsequently concluded that making the probable cause determination "within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *County* of *Riverside v. McLaughlin*, 111 S.Ct. 1661, 1670 (1991). However, if the accused can establish that the determination was delayed unreasonably, a court could find a constitutional violation even if the determination was made within the 48-hour period. *Id.* The court noted that practical realities often will cause reasonable delays, but stated that "[e]xamples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.*; *see also State v.*

Bishop, 431 S.W.3d 22, 38-39 n.9 (Tenn. 2014) (utilizing a 48-hour hold procedure to gather additional evidence is unconstitutional). If the period between a warrantless arrest and the probable cause determination exceeds 48 hours, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance." *Id.; see also Baker v. McCollan*, 99 S.Ct. 2689, 2694 (1979) (issuance of a valid arrest warrant satisfies the probable cause requirement).

2. Effect of Violation

If a person is arrested without a warrant and the court concludes that the Fourth Amendment has been violated because a probable cause determination was not made in a timely fashion, a confession/statement made following the violation "should be excluded unless the prosecution establishes that the confession 'was sufficiently an act of free will to purge the primary taint of the unlawful invasion.'" *State v. Carter*, 16 S.W.3d 762, 766 (Tenn. 2000) (quoting *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996)). The state has the burden of establishing the statement's admissibility by a preponderance of the evidence, and courts should consider: "(1) the presence or absence of *Miranda* warnings; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances; and finally, of particular significance, (4) the purpose and flagrancy of the official misconduct." *Id.*

With regard to the second factor, the Tennessee Supreme Court acknowledged that "if the statement was given prior to the time the detention ripened into a constitutional violation, it is not the product of the illegality and should not be suppressed," but also recognized that the passage of time following a violation exacerbates the problem because the custody would necessarily become more oppressive over time. *State v. Huddleston*, 924 S.W.2d 666, 675 (Tenn. 1996). With regard to the third factor, being released on bail after arrest but prior to the statement could purge the taint, as could the suspect's consultation with a friend, relative, attorney or priest prior to making a statement. *Id.* Finally, with regard to the fourth factor, detaining the suspect for the purpose of gathering additional evidence to justify the arrest weighs in favor of suppression of the statement. However, the "harsh conditions" under which a suspect is held do "not bear on whether the officers had ulterior reasons for the unlawful detention . . . and [the authorities'] treatment of [the suspect] while he was detained is irrelevant" under the fourth factor. *Carter*, 16 S.W.3d at 768. However, the authorities' treatment of the accused, including the conditions of confinement, is relevant to the admissibility of a statement obtained following an unnecessary delay pursuant to Rule 5(a) of the Tennessee Rules of Criminal Procedure.

B. Tenn. R. Crim. P. 5(a)

Tennessee Rule of Criminal Procedure 5(a) provides in relevant part that "[a]ny person arrested – except upon a capias pursuant to an indictment or presentment – shall be taken without unnecessary delay before the nearest appropriate magistrate . . .." Failing to comply with the probable cause requirement within 72 hours constitutes an "unnecessary delay" but does not require the automatic suppression of a statement that was obtained during the period of unnecessary delay. *Huddleston*, 924 S.W.2d at 670; *see also State v. Davis*, 141 S.W.3d 600, 625-26 (Tenn. 2004), *cert. denied*, 125 S.Ct. 1306 (2005) (delay of 12-13 hours does not constitute an "unnecessary delay"). Instead, a court should exclude the statement only if the court, upon examining the totality of the circumstances, concludes that the statement was not voluntarily given. *Huddleston*, 924 S.W.2d at 670-71. The "focus on unnecessary delay should

not be solely on the length of the delay, but rather on the circumstances of the delay and their effect on the accused." *Carter*, 16 S.W.3d at 769 (quoting *Huddleston*, 924 S.W.2d at 671).

25.07 STATEMENTS MADE DURING MENTAL HEALTH EVALUATION

"[W]here a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit a crime, the prosecution may offer evidence from a court-ordered psychological examination for the limited purpose of rebutting the defendant's evidence." *Kansas v. Cheever*, 134 S.Ct. 596, 603 (2013) (rejecting the argument that rebuttal evidence is not permitted when the issue is voluntary intoxication as opposed to a "mental disease or defect"); *see also Buchanan v. Kentucky*, 483 U.S. 402 (1987); Tenn. R. Crim. P. 12.2(f) and (g) (discovery and admissibility provisions relative to competency examinations).

CHAPTER 26

CONFRONTATION

Contents **Section**

26.01 IN GENERAL

In all criminal prosecutions, the accused has the right to confront the witnesses, and the standards of the federal guarantee apply to the states. U.S. Const. amend. VI; *Pointer v. Texas*, 380 U.S. 400 (1965). Although the Tennessee Constitution specifies that the accused shall have the right to "confront the witnesses face to face," the courts have interpreted the state constitution as offering no more rights than the United States Constitution. *See* Tenn. Const. art. I, § 9; *State v. Lewis*, 235 S.W.3d 136, 144-45 (Tenn. 2007) (declining to interpret Tennessee's constitutional protections more broadly than the Sixth Amendment's protections).

The United States Supreme Court has interpreted the Confrontation Clause as a trial right. It includes both the right to cross-examination and the right to have the witness testify under oath in the presence of the defendant and the fact-finder. *California v. Green*, 399 U.S. 149 (1970) (right includes: examination under oath, opportunity to cross-examine, and jury observation of the witness' demeanor and credibility).

26.02 *CRAWFORD V. WASHINGTON*

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court overruled *Ohio v. Roberts* regarding the admissibility of testimony or other evidence that impacts the defendant's Sixth Amendment right of confrontation. Prior to *Crawford*, an unavailable witness' statement was admissible if it bore "adequate 'indicia of reliability,'" which essentially meant that the statement fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). In *Crawford*, the defendant's wife did not testify at trial due to the marital privilege, but the state introduced a statement she made during a police interrogation following the incident at issue. Finding this to be error, the Supreme Court overruled *Ohio v. Roberts* and concluded that an unavailable witness' out-of-court statement is inadmissible under the Confrontation Clause if the statement is testimonial and the defendant did not previously have an opportunity to cross-

examine the witness. *Crawford*, 541 U.S. at 38-69; *see also Hardy v. Cross*, 132 S.Ct. 490 (2011) (discussing the lengths to which the state must go to establish a "good-faith effort" to locate an allegedly unavailable witness, and noting that the Court has never required the state to issue a subpoena if the state is attempting to prove that a witness who goes into hiding is unavailable); *State v. Cannon*, 254 S.W.3d 287, 306 (Tenn. 2008) (noting that "unavailability must be supported by proof, not by unsupported statements of counsel").

The Court declined to define "testimonial" for purposes of the Confrontation Clause but found that some types of statements would be considered "testimonial" under any definition, noting that "whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford*, 541 U.S. at 68. The Court also summarized the focus of the Confrontation Clause:

> It applies to witnesses against the accused -- in other words, those who bear testimony. Testimony, in turn, is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51-52 (citations and quotation marks omitted); *see also State v. Franklin,* 308 S.W.3d 799 (Tenn. 2010) (reiterating the relevant factors for determining whether a statement is testimonial in nature); *Cannon*, 254 S.W.3d at 301-03 (summarizing the applicable standards under *Crawford* and its progeny, and noting that *Crawford* cited business records and statements in furtherance of a conspiracy as examples of nontestimonial statements).

If the witness who made the out-of-court testimonial statement is present at the trial and is available for cross-examination, allowing the jury to consider the out-of-court statement does not violate the defendant's right of confrontation. *Crawford*, 541 U.S. at 59, n.9; s*ee also State v. Banks*, 271 S.W.3d 90, 118-19 (Tenn. 2008) (finding that because the victim was available at trial and was cross-examined by defense counsel, the trial court did not violate the defendant's right of confrontation by admitting into evidence the victim's pretrial statement to a police officer in which the victim identified the defendant as the shooter). If a statement is considered nontestimonial, the Confrontation Clause is not implicated, and the tests set out in *Ohio v. Roberts* and *Crawford v. Washington* should not be utilized. Instead, the trial court should determine admissibility by analyzing the issue under the Tennessee Rules of Evidence. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007); *Lewis*, 235 S.W.3d at 144-45.

26.03 ADMISSIBILITY TEST - *CRAWFORD V. WASHINGTON*

Courts might find the following test helpful when analyzing a *Crawford* issue:

1. Does the out-of-court statement ("statement") constitute hearsay? If the answer is "Yes" proceed to question 2. If the answer is "No" stop here because the defendant's confrontation rights are not implicated.

2. Does the statement satisfy a hearsay exception? If the answer is "Yes" proceed to question 3. If the answer is "No" the statement is not admissible.

3. Is the statement testimonial in nature (see the relevant factors listed below)? If the answer is "Yes" proceed to question 4. If the answer is "No" stop here because the defendant's confrontation rights are not implicated (the court still must determine if the statement is otherwise admissible).

4. Did the witness appear at trial such that he/she is available for cross-examination? If the answer is "Yes" confrontation considerations do not preclude the introduction of the statement (the court still must determine if the statement is otherwise admissible). If the answer is "No" proceed to question 5.

5. Did the court make a finding that the witness is "unavailable"? If the answer is "Yes" proceed to question 6. If the answer is "No" the statement is not admissible.

6. Did the defendant (or his/her counsel) previously have an opportunity to cross-examine the unavailable witness regarding his/her statement? If the answer is "Yes" the statement is admissible under the Confrontation Clauses of the United States and Tennessee constitutions (the court still must determine if the statement is otherwise admissible). If the answer is "No" the statement is not admissible.

When determining whether evidence is testimonial or nontestimonial, courts should consider the intent of a reasonable person in the position of the questioner and declarant, including considering the following nonexclusive list of factors:

> (1) whether the declarant was a victim or an observer; (2) whether contact was initiated by the declarant or by law-enforcement officials; (3) the degree of formality attending the circumstances in which the statement was made; (4) whether the statement was given in response to questioning, whether the questioning was structured, and the scope of such questioning; (5) whether the statement was recorded (either in writing or by electronic means); (6) the declarant's purpose in making the statements; (7) the officer's purpose in speaking with the declarant; and (8) whether an objective declarant under the circumstances would believe that the statements would be used at a trial.

State v. Parker, 350 S.W.3d 883, 898-99 (Tenn. 2011) (citations omitted).

26.04 POLICE INTERROGATIONS AND ONGOING EMERGENCIES

In *Davis v. Washington*, 547 U.S. 813 (2006), the Court explained that a "police interrogation" is not always conducted by a police officer, that the statements made during the interrogation can be considered either testimonial or nontestimonial depending on the circumstances, and that the statements can evolve from nontestimonial to testimonial as the circumstances change, holding:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution.

Davis, 547 U.S. at 822.

For purposes of this opinion, the Court found that the acts of a 911 operator constituted the acts of the police. *Id.* at 823, n.2. The victim's statements in response to a 911 operator's questions regarding an ongoing incident were considered nontestimonial while, in the companion case, the victim's statements in response to a police officer's questions regarding an incident which had concluded were considered testimonial. The Court noted that statements made by a victim/witness to a 911 operator are not always considered nontestimonial. For instance, statements made to a 911 operator after the emergency has concluded may be considered testimonial. Finally, the Court concluded that the location of the "interrogation" (at the alleged crime scene or at the police station, for example) is not dispositive. *Id.* at 826-33.

The Court subsequently revisited the "primary purpose"/"ongoing emergency" issue in *Michigan v. Bryant*, 131 S.Ct. 1143 (2011), in the context of a "nondomestic dispute" in which the mortally-wounded victim identified the shooter and location of the shooting when talking to the police in a public place. Finding that the victim's statements were not testimonial hearsay and noting that the "existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public," the Court considered numerous factors including, but not limited to, the informality of the situation, the type of weapon used by the perpetrator, the type of dispute at issue, the severity of the victim's injuries, and the context of the officers' questions and the victim's answers. *Michigan*, 131 S.Ct. at 1156-1167. The Court further noted:

> The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the "primary purpose of the interrogation" because of the effect it has on the parties' purpose, not because of its actual existence.

Id. at 1157, n.8.

26.05 AFFIDAVITS/EXPERTS

An affidavit establishing that a substance seized by the police was cocaine is testimonial and the analysts (affiants) were witnesses for Sixth Amendment purposes, so such an affidavit is inadmissible unless the analysts are available at trial for cross-examination or the analysts are unavailable to testify and the defendant had a prior opportunity to cross-examine them. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2427 (2009) (also noting that "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records"); *see also Lewis*, 235 S.W.3d at 150-51 (allowing an expert to testify regarding the results of a DNA test when that expert evaluated data gathered by a colleague and the colleague failed to appear at trial for cross-examination). Likewise, a forensic laboratory report that reflects the defendant's blood alcohol level is not admissible through the testimony of an analyst who had no involvement in the testing of the blood sample or the recording of the test results. *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011).

As is often done in cases involving the comparison of DNA found at a crime scene with DNA located in a database, an expert witness may express an opinion based upon facts that have been made known to the witness but about which the witness is not competent to testify, and this testimony does not violate the Confrontation Clause. *See Williams v. Illinois*, 132 S.Ct. 2221 (2012).

26.06 STATEMENTS MADE TO MEDICAL PERSONNEL

Consistent with *Crawford*, whether statements made by a victim to a sexual assault nurse examiner or other medical personnel are considered testimonial or nontestimonial depends upon the circumstances, with the focus being on the primary purpose of the statements. If a statement is given for the primary purpose of medical diagnosis and treatment, the statement is nontestimonial and its admissibility is governed by the rules of evidence as opposed to confrontation considerations. In contrast, if the primary purpose of the statement is to establish or prove past events which may be relevant to a criminal prosecution, the statement is testimonial. As with statements made to law enforcement personnel, statements made to medical personnel can evolve from testimonial to nontestimonial, and trial courts should redact any portions which violate a defendant's right of confrontation. *Cannon*, 254 S.W.3d at 303-06.

26.07 STATEMENTS BETWEEN PRIVATE PARTIES

Although acknowledging that the United States Supreme Court has not resolved this issue, the Tennessee Supreme Court noted that there is some support for the proposition that statements between private parties are categorically nontestimonial. *See Parker*, 350 S.W.3d at 898.

26.08 DYING DECLARATIONS

Assuming a dying declaration is otherwise admissible under the Tennessee Rules of Evidence, admitting it at trial does not violate the defendant's right of confrontation regardless

of whether the statement is considered testimonial or nontestimonial. *Lewis*, 235 S.W.3d at 148; *but see Michigan v. Bryant*, 131 S.Ct. 1143, 1151, n.1 (2011) (noting that the Court has not yet decided whether the Sixth Amendment incorporates an exception for testimonial dying declarations).

26.09 WRITTEN RECORD OF LICENSE PLATE NUMBER

In *State v. Franklin*, 308 S.W.3d 799 (Tenn. 2010), the victim of a robbery asked a bystander to write down the license plate number of a van in which the victim believed the alleged perpetrator was fleeing the scene. The police subsequently used this number to identify the defendant as the owner of the van, and the defendant objected to the admission of the number into evidence because the bystander who recorded the number was not testifying at the trial. Recognizing that there is a "growing consensus that statements establishing the identity of the perpetrator are nontestimonial when made in informal settings during the immediate aftermath of a crime," the Tennessee Supreme Court concluded that under the specific facts of this case the number was nontestimonial hearsay, the defendant's confrontation rights were not implicated, and the number was admissible pursuant to the excited utterance exception to the hearsay rule.

26.10 WAIVER, FORFEITURE, RETROACTIVITY, HARMLESS ERROR

A. Waiver

The right of confrontation may be waived, including by failure to object to the evidence at issue. States may adopt procedural rules governing the exercise of such objections. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009); *see also Cannon*, 254 S.W.3d at 303, n.9 (choosing to address the *Crawford* issue on its merits, but noting that the defendant "risked waiving this issue by not objecting at trial").

B. Forfeiture

If the absence of the witness is caused by the defendant, the defendant forfeits his right to confrontation. *Davis v. Washington*, 547 U.S. at 832-34; *Crawford v. Washington*, 541 U.S. at 62. However, the defendant's conduct must have been designed to prevent the witness from testifying, and would include such things as bribing, intimidating, or killing the witness. The mere fact that the defendant killed the witness is not adequate unless the defendant did so in an effort to prevent the witness from testifying. *Giles v. California*, 128 S.Ct. 2678 (2008); *see also State v. Brooks*, 249 S.W.3d 323 (Tenn. 2008).

C. Retroactivity

Courts should apply *Crawford* to future trials and retroactively to cases pending on direct review, but not to cases on collateral review via a habeas corpus petition in federal court. Although states are not required to apply *Crawford* retroactively to cases at the state post-conviction stage, states are not precluded from doing so. *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008); *Whorton v. Bockting*, 549 U.S. at 416-21.

D. Harmless Error

"The erroneous admission of testimony in violation of an accused's right of confrontation is not structural error mandating reversal. Such a violation is subject to harmless error review." *Cannon*, 254 S.W.3d at 306-07.

26.11 PROCEEDINGS AT ISSUE

The "criminal prosecutions" in which the United States and Tennessee constitutional provisions apply regarding a defendant's right to confront witnesses do not appear to include sentencing hearings or probation revocation hearings. *See State v. Stephenson*, 195 S.W.3d 574, 590-91 (Tenn. 2006) (addressing the merits of the defendant's complaint, but noting that the federal appellate courts have held that the Sixth Amendment right of confrontation does not apply at sentencing); *State v. Walker*, 307 S.W.3d 260 (Tenn. Crim. App. 2009), *perm. app. denied* (Tenn. Jan. 25, 2010) (declining to extend *Crawford* to probation revocation hearings).

CHAPTER 27

IDENTIFICATION PROCEDURES

Contents **Section**

27.01 GENERALLY

Out-of-court identification procedures include, by are not necessarily limited to, lineups, showups, and photographic arrays. An accused may be compelled to participate in a lineup. *State v. Briley,* 619 S.W.2d 149, 152 (Tenn. Crim. App. 1981). Following the initiation of adversarial proceedings, however, lineups are considered a critical stage at which the accused is entitled to the assistance of counsel. *State v. Blye*, 130 S.W.3d 776, 780 (Tenn. 2004); *State v. York*, 605 S.W.2d 837, 839-40 (Tenn. Crim. App. 1980). In contrast, the accused does not have a right to have counsel present when a witness views a pretrial photographic display. *Id.* at 781.

Showups, in which only one individual is shown to a witness or victim as a means of identification, are widely condemned. *State v. Cribbs*, 967 S.W.2d 773, 794 (Tenn. 1998). The Tennessee Court of Criminal Appeals has noted, however, that the identification made during a showup may be admissible under certain limited circumstances:

> An identification procedure violates due process if it is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." A showup is a type of identification procedure that is inherently suggestive. Identifying a suspect of a crime in a showup procedure has been condemned repeatedly unless (1) imperative circumstances necessitate the showup, or (2) the showup occurs as part of an on-the-scene investigatory procedure shortly after the crime is committed.
>
> Although a showup may be suggestive, the identification may satisfy due process as reliable and admissible under the totality of the circumstances. This court must consider five factors in determining if an identification is reliable and thus admissible: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

State v. Edmondson, No. M2005-01665-CCA-R3-CD (Tenn. Crim. App., filed July 18, 2006) (citations omitted).

If a court determines that a pretrial identification procedure was so impermissibly suggestive that it violated an accused's due process rights, both out-of-court and in-court identifications are automatically excluded. *State v. Philpott*, 882 S.W.2d 394, 400 (Tenn.

Crim. App. 1994). If the identification procedure does not involve state action, due process rights are not implicated and it is not necessary for the court to determine if the identification procedure was unduly suggestive. *See Perry vs. New Hampshire*, 132 S.Ct. 716 (2012) (holding that the "Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement"); *State v. Reid*, 91 S.W.3d 247, 271-73 (Tenn. 2002) (witnesses implicated the defendant after seeing television coverage of his arrest).

27.02 Expert Testimony

When a defendant wishes to present expert testimony regarding the reliability of eyewitness identification, the trial court should evaluate its admissibility under the rule established in *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997). *State v. Copeland*, 226 S.W.3d 287 (Tenn. 2007). To the extent it held otherwise, the Tennessee Supreme Court's opinion in *State v. Coley*, 32 S.W.3d 831 (Tenn. 2000), has been overruled. *Id.*

CHAPTER 28

SELF-INCRIMINATION

Contents **Section**

See the Statements/Confessions chapter of this benchbook for additional information regarding the Fifth Amendment.

28.01 GENERAL RULE

The United States and Tennessee Constitutions provide similarly that "no person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; Tenn. Const. art. 1, § 9. The Fifth Amendment standards apply to the state, *Malloy v. Hogan*, 378 U.S. 1 (1964). Some characteristics of the privilege against self-incrimination are:

(a) it can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. *Kastigar v. United States*, 406 U.S. 441 (1972).

(b) it extends not only to answers which would support a conviction, but also those which would furnish a link in the chain of evidence needed to prosecute. *Malloy v. Hogan*, 378 U.S. 1 (1964).

(c) it protects a person's private papers since they are considered communications. *Bellis v. United States*, 417 U.S. 85 (1974).

(d) it is personal and applies only to natural persons; it cannot be invoked by a corporation, *Curcio v. United States*, 354 U.S. 118 (1957), an unincorporated association, *United States v. White*, 322 U.S. 694 (1944) or a partnership, *Bellis v. United States*, 417 U.S. 85 (1974).

(e) it grants the right to remain silent, not to give false answers. *United States v. Knox*, 396 U.S. 77 (1969).

28.02 SUSTAINING THE PRIVILEGE

To claim the privilege, the information sought need only tend to incriminate the individual. The privilege will be sustained if it is evident from the implications of the question

that a responsive answer to the question or an explanation of why it cannot be answered might tend to incriminate the individual. For a judge to reject the privilege, it must be perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer or answers cannot possibly have a tendency to incriminate. *Hoffman v. United States*, 341 U.S. 479 (1951). In order to invoke the privilege, the hazards of incrimination must be substantial, real and apparent as distinguished from trifling or imaginary. *Marchetti v. United States*, 390 U.S. 39 (1968).

The Fifth Amendment applies only to compelled disclosures. *State v. Blackstock*, 19 S.W.3d 200 (Tenn. 2000). Thus, seizure of papers from a third party, *Fisher v. United States*, 425 U.S. 391 (1976), and voluntary disclosures to third parties or within a third party's presence do not fall within the amendment's protection. *Hoffa v. United States*, 385 U.S. 293 (1966); *State v. McCary*, 119 S.W.3d 226 (Tenn. Crim. App. 2003).

The privilege applies only to disclosures that are testimonial in nature. The following have been held to be nontestimonial in nature: (a) field sobriety test, *Trail v. State*, 526 S.W.2d 127 (Tenn. Crim. App. 1974); (b) blood sample, *Schmerber v. California*, 384 U.S. 757 (1966); (c) handwriting sample, *Gilbert v. California*, 388 U.S. 263 (1967); *State v. Harris*, 839 S.W.2d 54 (Tenn. 1992); (d) voice sample, *United States v. Wade*, 388 U.S. 218 (1967); (e) modeling clothing, *Holt v. United States*, 218 U.S. 245 (1910); (f) fingerprints, *Schmerber v. California*, 384 U.S. 757 (1966); *State v. Cole*, 155 S.W.3d 885 (Tenn. 2005); (g) hair sample, *State v. Jackson*, 889 S.W.2d 219 (Tenn. Crim. App. 1993); (h) clothing scent, *State v. Barger*, 612 S.W.2d 485 (Tenn. Crim. App. 1980); and (i) breathalyzer/implied consent, *State v. Frasier*, 914 S.W.2d 467 (Tenn. 1996).

28.03 WAIVER AND IMMUNITY

The privilege is waived if the defendant takes the stand and testifies to related matters during direct examination. The defendant cannot set forth to the jury all the facts that favor the defendant, without being required to submit to cross-examination on those facts. *Brown v. United States*, 356 U.S. 148 (1958).

While the privilege protects against compelling testimony to use against a person, it does not protect against all compelled testimony. Thus, a witness under a sufficient grant of immunity may be compelled to testify. Use immunity - prohibiting the use of testimony or evidence derived from the testimony - is all that is required. *Kastigar v. United States*, 406 U.S. 441 (1972).

If a defendant shows that he or she testified under a grant of immunity previously, the burden is on the prosecution to prove a source independent of the immunized testimony in order to proceed with charges against the immunized defendant. *Kastigar v. United States*, 406 U.S. 441 (1972); *State v. Desirey*, 909 S.W.2d 20 (Tenn. Crim. App. 1995).

28.04 RAMIFICATIONS OF INVOCATION OF THE PRIVILEGE

No economic sanction, including the loss of job or disbarment, can be imposed against one who invokes the privilege. *Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New York*, 385 U.S. 493 (1967). This applies equally to private and public employees. *Uniformed Sanitation Men Ass'n. Inc. v. Commissioner of Sanitation*, 392 U.S. 280 (1968). Moreover, the failure of an accused to testify creates no presumption, and neither the prosecutor nor the court may comment on the failure to testify. *Griffin v. California*, 380 U.S. 609 (1965).

CHAPTER 29

DELIBERATIONS AND VERDICT

Contents **Section**

29.01 DELIBERATIONS – INSTRUCTIONS AND EXHIBITS

In addition to reading the instructions to the jury, the judge must provide the jury with a written copy of the instructions when it retires to deliberate. Tenn. R. Crim. P. 30(c). Moreover, "[u]nless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received in evidence." Tenn. R. Crim. P. 30.1. According to the Advisory Commission Comments, an exhibit might not be sent to the jury room if it could "endanger the health and safety of the jurors" or "be subjected to improper use by the jury," or if "a party may be unduly prejudiced by submission of the exhibit to the jury."

29.02 DEADLOCKED JURY

In *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975), the Tennessee Supreme Court abandoned the use of a "dynamite charge" when a jury is deadlocked. Instead, the trial court should include T.P.I. Crim. – 43.02 (Jury: Deliberation – Deadlocked Jury Charge) in its main charge before the jury retires for deliberation. *Kersey*, 525 S.W.2d at 145. If the jury subsequently reports that it is deadlocked, the court should "admonish the jury, at the very outset, not to disclose their division or whether they have entertained a prevailing view. *Id.* at 141. The only permissive inquiry is as to progress and the jury may be asked whether it believes it might reach a verdict after further deliberations." *Id.* If the court determines that "further deliberations might be productive," the court may repeat the instruction set out in T.P.I. 43.02. *Id.* Under certain circumstances, a trial court may also utilize a *Kersey* instruction during the penalty phase of a capital murder trial. *See State v. Torres*, 82 S.W.3d 236, 253-58 (Tenn. 2002); *see also* T.C.A. § 39-13-204(h).

In limited circumstances, it may be necessary for the court to declare a mistrial due to a deadlocked jury. *See Renico v. Lett*, 130 S.Ct. 1855 (2010). For additional information regarding procedures to follow if the court has instructed the jury on lesser-included offenses and the jury reports that it cannot unanimously agree on a verdict, see Tenn. R. Crim. P. 31(d)(2).

29.03 VERDICT

The jury's verdict must be unanimous, and it must be returned in open court. Tenn. R. Crim. P. 31(a), (b). After the verdict is returned but before it is recorded, "the court shall – on a party's request or on the court's own initiative – poll the jurors individually" to verify that the verdict is unanimous. Tenn. R. Crim. P. 31(e). If the verdict is not unanimous, the court may either discharge the jury or direct it to retire for further deliberations. *Id*.

A verdict of guilt by the trier of fact resolves all conflicts in the evidence in favor of the prosecution's theory. *State v. Rice*, 184 S.W.3d 646, 661 (Tenn. 2006) (*citing State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)).

29.04 INTERFERENCE WITH DELIBERATIONS

Interference with a jury's deliberations is a serious matter and, in some instances, constitutes a crime. For instance, a person who "privately communicates with a juror with intent to influence the outcome of the proceeding on the basis of considerations other than those authorized by law" is guilty of a Class A misdemeanor. T.C.A. § 39-16-509. Likewise, it is a Class E felony if a person, by means of coercion, "[i]nfluences or attempts to influence a juror in the exercise of the juror's official power or in the performance of the juror's official duty" or "[i]nfluences or attempts to influence a juror not to vote or to vote in a particular manner." T.C.A. § 39-16-508. Finally, bribing a juror is a Class C felony. T.C.A. § 39-16-108.

Once a party challenging a verdict presents admissible evidence that the jury was exposed to extraneous prejudicial information or was subjected to an improper outside influence there is a presumption of prejudice that the other party must rebut, and the court should consider the following factors when determining whether the party satisfied its burden:

> (1) the nature and content of the information or influence, including whether the content was cumulative of other evidence adduced at trial; (2) the number of jurors exposed to the information or influence; (3) the manner and timing of the exposure to the juror(s); and (4) the weight of the evidence adduced at trial. No single factor is dispositive. Instead, trial courts should consider all of the factors in light of the ultimate inquiry – whether there exists a reasonable possibility that the extraneous prejudicial information or improper outside influence altered the verdict.

State v. Adams, 405 S.W.3d 641, 654 (Tenn. 2013) (citation omitted).

The permissible scope of the inquiry is very narrow, and trial courts should consult *State v. Adams* prior to conducting a hearing regarding this issue. For example, while Tenn. R. Evid. 606 permits a juror to testify concerning "the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion," a juror is

not permitted to testify concerning the impact/influence/effect of the extraneous information on the jury's deliberations. Instead, trial courts should:

> limit the questions asked the jurors to whether the communication was made and what it contained, and then, having determined that the communication took place and what exactly was said, to determine – without asking the jurors anything further and emphatically without asking them what role the communication played in their thoughts or discussion – whether there is a reasonable possibility that the communication altered their verdict.

Adams, 405 S.W.3d at 652 (citations omitted).

29.05 RECALL OF DISCHARGED JURY

"[O]nce a jury has returned a complete verdict, or the jurors have separated and passed from the control of the court, the jury cannot be reassembled to act on the case for any purpose." *State v. Nash*, 294 S.W.3d 541, 550-53 (Tenn. 2009); *see also State v. Green*, 995 S.W.2d 591, 614 (Tenn. Crim. App. 1998).

CHAPTER 30

POST-CONVICTION RELIEF

Contents **Section**

For information regarding the effective assistance of counsel during the plea process, see the plea agreement chapter of this benchbook.

30.01 POST-CONVICTION PROCEDURE ACT

The Post-Conviction Procedure Act (T.C.A. §§ 40-30-101 *et seq.*) and Rule 28 of the Tennessee Supreme Court Rules ("Rule 28") set out the procedure for post-conviction actions in Tennessee.

30.02 GROUNDS FOR RELIEF

A court must grant relief "when petitioner's conviction or sentence is void or voidable because of the violation of any right guaranteed by the state or federal constitution, including a right not recognized as existing at the time of the trial or sentencing if either constitution requires retrospective application of that right." Tenn. Sup. Ct. R. 28, § 9(B); *see also* T.C.A. § 40-30-103. A court shall also grant relief if the petitioner was unconstitutionally denied the right to appeal the original conviction. T.C.A. § 40-30-113.

In the absence of a criminal conviction, a petitioner is not entitled to relief pursuant to the Post-Conviction Procedure Act. For example, a finding of criminal contempt pursuant to T.C.A. § 29-9-102 does not constitute a criminal conviction for post-conviction purposes. *Baker v. State*, 417 S.W.3d 428 (Tenn. 2013). Likewise, if an offender enters a guilty plea, successfully completes judicial diversion, and has his or her record expunged, a judgment of conviction is never entered and, therefore, there is no conviction for post-conviction purposes. *Rodriguez v. State* ___ S.W.3d ___ (Tenn., filed April 4, 2014, at Nashville).

30.03 COMMENCEMENT

A post-conviction action is commenced by the filing of a petition. This petition is "an application to the court, filed by or on behalf of a person convicted of and sentenced for the commission of a criminal offense, that seeks to have the conviction or sentence set aside or an appeal granted" on state or federal constitutional grounds. Tenn. Sup. Ct. R. 28, § 2(A).

The petition must be filed within one year of the date of the final action of the highest state appellate court to which an appeal was taken. If no appeal was taken, the petition must be filed within one year of the date the judgment became final. T.C.A. § 40-30-102(a). In very limited circumstances, due process considerations require the tolling of the statute of limitations. *See Whitehead v. State*, 402 S.W.3d 615 (Tenn. 2013); *Smith v. State*, 357 S.W.3d 322, 355-61 (Tenn. 2011). However, as a general rule, the one-year period can be extended in only three circumstances. In the event the petition is based upon an appellate decision recognizing a retroactive constitutional right not existing at the time of trial, the limitations period is one year from the date of the ruling of the highest court establishing that right. If the claim is based upon a sentence that was enhanced as a result of a conviction that was later determined to be invalid, the limitations period is one year from the finality of the decision invalidating the prior conviction. If the claim is based upon new scientific evidence establishing a claim of actual innocence, no limitations period is set. T.C.A. § 40-30-102(b).

The petition must be filed in the court of conviction or sentence, if a court of record; if the conviction or sentence did not occur in a court of record, the petition must be filed in a court of record in the county where the conviction or sentence occurred. T.C.A. § 40-30-104(a). Although a trial court has the authority to treat a habeas corpus petition as a petition for post-conviction relief, T.C.A. § 16-1-116 does not authorize a trial court to transfer the petition to another county for disposition. *Carter v. Bell*, 279 S.W.3d 560 (Tenn. 2009).

30.04 PLEADINGS

A. Petitions, Answers, Preliminary Orders

A petitioner may file only one post-conviction petition per judgment. T.C.A. § 40-30-102(c). If a prior petition was resolved on the merits, the trial court must summarily dismiss any subsequent petition(s). If a petitioner wishes to attack multiple judgments entered in separate trials, he or she must file a separate petition for each trial. T.C.A. § 40-30-104(c). Under very narrow circumstances, a petitioner may request the reopening of a petition which has already been considered. T.C.A. § 40-30-102(c).

A post-conviction petition must be verified pursuant to T.C.A. § 40-30-104, and should include the information specified in Section 5(E) of Rule 28 as well as T.C.A. § 40-30-104. The petition should substantially conform to the form printed in Appendix A to Rule 28. If the court determines that the initial petition is inadequate, the court may require the petitioner to file an amended petition or, under certain circumstances, may appoint counsel

and require counsel to file an amended petition on the petitioner's behalf. T.C.A. §§ 40-30-106, -107.

Following the filing of an amended petition, if one was required, the court can either dismiss the petition or order further proceedings. ***Id.***; Tenn. Sup. Ct. R. 28, § 6(B). If the court orders further proceedings, the order should appoint counsel (assuming the petitioner is indigent and the court did not previously appoint counsel), set a deadline for the filing of an amended petition (if counsel did not previously file an amended petition), and direct the state to disclose the information subject to discovery. *But see Blackmon v. State*, No. M2004-03070-CCA-R3-PC (Tenn. Crim. App., filed Jan. 11, 2007), *app. denied* (Tenn. May 14, 2007) (denying relief when petitioner refused appointed counsel and subsequently argued that the absence of counsel denied him a full and fair hearing). The preliminary order must also direct the state to answer the petition and, if appropriate, require the state to provide the clerk with transcripts, exhibits, and other records from the trial or hearing at issue. Tenn. Sup. Ct. R. 28, § 6(B)(3).

In its answer, the state must admit or deny every allegation set forth in the petition. To raise a statute of limitations, waiver, previous determination, jurisdiction, or multiple filing defense, the state must file a motion to dismiss. This motion may also include an allegation that the facts alleged fail to demonstrate that petitioner is entitled to relief. Tenn. Sup. Ct. R. 28, § 5(G).

Following the filing of the state's answer, the court is again required to review the pleadings to determine whether a colorable claim has been stated. If a colorable claim has not been stated, the court is required to dismiss the petition by written order setting out findings of fact and conclusions of law. If a colorable claim has been stated, the court is required to set an evidentiary hearing. The court must file this order within 30 days of the filing of the state's answer. T.C.A. § 40-30-109; Tenn. Sup. Ct. R. 28, § 6(B)(6).

B. Motion to Reopen

A motion to reopen is a request filed by or on behalf of a person whose original petition for post-conviction relief has been finally ruled upon. Its purpose is to reopen the proceeding to consider a new claim of constitutional error. Tenn. Sup. Ct. R. 28, § 2(C). A motion to reopen is appropriate when the claim is based upon: (1) a newly recognized constitutional right that has been given retroactive effect; (2) new scientific evidence establishing actual innocence; or (3) a sentence enhanced by an invalid conviction. In addition, petitioner must show that "the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced." T.C.A. § 40-30-117(a). Although it is more likely to arise in a motion to reopen, "a freestanding claim of actual innocence based on new scientific evidence is cognizable in an initial petition for post-conviction relief under the Tennessee Post-Conviction Procedures Act." *Dellinger v. State*, 279 S.W.3d 282 (Tenn. 2009).

The motion to reopen, which should substantially conform to the form set out in Appendix D to Rule 28, must set out the factual basis underlying each claim and must be supported by affidavit(s) containing only admissible evidence. The court must determine whether the facts, if true, satisfy the requirements listed above for reopening a case. If they

do, the procedure mirrors that followed upon the filing of an original petition. If they do not, the court must dismiss the motion. T.C.A. § 40-30-117(b).

An intellectually disabled (previously referred to as "mentally retarded") or incompetent defendant cannot be executed. T.C.A. § 39-13-203; *Coleman v. State*, 341 S.W.3d 221 (2011) (discussing intellectual disability issues at length). However, the Tennessee Supreme Court's opinion in *Coleman* did not establish a new constitutional right upon which a motion to reopen a post-conviction petition can be based pursuant to T.C.A. § 40-30-117(a)(1), nor does actual innocence as contemplated by T.C.A. § 40-30-117(a)(2) include an allegation that an offender is not eligible for the death penalty due to an intellectual disability. *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012).

30.05 HEARINGS AND DISPOSITIONS

At the hearing on the petition or motion, the petitioner is required to appear and give testimony unless an affidavit or deposition is permitted. The petitioner bears the burden of proving the allegations of fact by clear and convincing evidence. The rules of evidence apply at the proceeding, which must be recorded. T.C.A. § 40-30-110.

The petitions of petitioners who have been sentenced to death "shall be given priority over all other matters in docketing by the courts having trial and appellate jurisdiction of the cases." T.C.A. § 40-30-121. If indigent, these petitioners will be represented by the Office of the Post-Conviction Defender. T.C.A. § 40-30-206(a).

If the court finds that a petitioner's rights were violated such as to render the judgment void or voidable, the court is required to set aside the judgment or order a delayed appeal, whichever is appropriate. T.C.A. §§ 40-30-111, -113. Unless the order simply grants a delayed appeal, it must be in writing and must contain findings of fact and conclusions of law with regard to each claim presented. The court must rule within 60 days of the conclusion of the proof. This deadline cannot be extended unless the court finds "unforeseeable circumstances [that] render a continuance a manifest necessity." T.C.A. § 40-30-111.

If the petitioner alleges the unconstitutional deprivation of an appeal in addition to asserting other grounds for relief, the court must bifurcate the proceedings and address the appeal issue while holding the other issues in abeyance. The court shall consider the remaining claims only "after the outcome of the delayed appeal if allowed, or after the appeal of the claim, if denied." Tenn. Sup. Ct. R. 28, § 8(D)(3).

30.06 APPEALS

If the court denies relief, the petitioner has a right to appeal to the Tennessee Court of Criminal Appeals, and that appeal is governed by the Tennessee Rules of Appellate Procedure. T.C.A. § 40-30-116. If the case is a capital case, the appellate court must render its decision within nine months of oral argument or submission and must dispose of any rehearing petitions within 30 days of filing. *Id*.

If the court denies a motion to reopen, the petitioner has 30 days to file an application in the Court of Criminal Appeals seeking permission to appeal. The state has 30 days to respond. If the appellate court finds that the trial court abused its discretion in denying the motion, it is required to remand the case to the trial court for further proceedings. Tenn. Sup. Ct. R. 28, § 10(B). If the appellate court affirms the denial of a motion to reopen, the petitioner has 60 days to seek permission to appeal in the Supreme Court by filing a Rule 11 application. *Id*.

30.07 STAYS OF EXECUTION

The trial court in which a capital conviction occurred must stay an execution upon the filing of a petition for post-conviction relief. The court cannot stay the execution date before the filing of a petition unless it finds that petitioner is unable to file a petition before the execution date and that the inability is due to "extraordinary circumstances beyond the petitioner's control." T.C.A. § 40-30-120(a). If the petition filed is not the first petition, the court may not stay the execution unless the judge finds that a motion to reopen has been granted, there is a significant possibility that the death sentence will be invalidated, and there is a significant possibility that the death sentence will be carried out before consideration of the petition is concluded. T.C.A. § 40-30-120(b) & (c).

Motions for review of execution stay requests may be acted upon by a single appellate judge or by a three-judge panel. The motion for review must be filed within five days of the trial court's ruling on the stay request. Tenn. Sup. Ct. R. 28, § 10(C). The appellate judge(s) may allow a response but must rule within five days of the motion's filing. *Id.*; T.C.A. § 40-30-120(f).

30.08 POST-CONVICTION DNA ANALYSIS ACT OF 2001

Pursuant to the Post-Conviction DNA Analysis Act of 2001, petitioners may request "the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence." T.C.A. § 40-30-303. For additional information regarding the applicable procedures as well as the circumstances in which such analysis is required, trial courts should consult T.C.A. §§ 40-30-301 et seq., *District Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S.Ct. 2308 (2009) (addressing constitutional claims regarding the right, or lack thereof, to DNA testing), and *Powers v. State*, 343 S.W.3d 36 (Tenn. 2012) (discussing the history and application of the DNA Analysis Act of 2001).

30.09 COMPETENCY ISSUES DURING POST-CONVICTION PROCEEDINGS

A post-conviction petition may be filed by a "next friend" on behalf of an inmate under limited circumstances adequately demonstrating present mental incompetency. *See Holton v. State*, 201 S.W.3d 626 (Tenn. 2006). For guidance regarding the procedure for determining competency when a petitioner seeks to withdraw a previously-filed post-conviction petition or to toll the statute of limitations, or when a "next friend" attempts to

have the person declared incompetent, see *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478 (Tenn. 2013). *See also Reid v. State*, 197 S.W.3d 694 (Tenn. 2006), *reh'g denied* (July 20, 2006); Tenn. Sup. Ct. R. 28, § 11.

30.10 RIGHT TO COUNSEL

As previously noted, a trial court has the authority to appoint counsel to a post-conviction petitioner under certain circumstances. However, petitioners also have a right to self-representation at the post-conviction stage if certain requirements are met. *See Lovin v. State*, 286 S.W.3d 275 (Tenn. 2009) (discussing the right to self-representation at trial, during a post-conviction proceeding, and on appeal of both types of proceedings).

30.11 SCOPE OF CROSS-EXAMINATION OF TESTIFYING PETITIONER

Section 8(C)(1)(d) of Tennessee Supreme Court Rule 28, as opposed to Tennessee Rule of Evidence 611(b), governs the scope of the cross-examination of a testifying petitioner during a post-conviction hearing. *Keough v. State*, 356 S.W.3d 366, 371 (Tenn. 2011). Although noting other states' positions regarding whether the constitutional right against self-incrimination applies to post-conviction proceedings, the Court declined to address that issue in *Keough* because the question presented could be resolved on non-constitutional grounds. *Id.* at 371-72.

CHAPTER 31

HABEAS CORPUS AND ERROR CORAM NOBIS

Contents **Section**

31.01 HABEAS CORPUS

Habeas corpus proceedings are governed by T.C.A. §§ 29-21-101 through 29-21-130. A court may grant the writ *sua sponte* if the court "has evidence, from a judicial proceeding, that any person within the jurisdiction of such court or officer is illegally imprisoned or restrained of liberty." T.C.A. § 29-21-104. However, this type of proceeding typically is initiated by the filing of a petition that has been verified by affidavit. T.C.A. § 29-21-107. Such an application "should be made to the court or judge most convenient in point of distance to the applicant, unless a sufficient reason be given in the petition for not applying to such court or judge." T.C.A. § 29-21-105. Although a trial court has the authority to treat a habeas corpus petition as a petition for post-conviction relief, T.C.A. § 16-1-116 does not authorize a trial court to transfer the petition to another county for disposition. *Carter v. Bell*, 279 S.W.3d 560 (Tenn. 2009).

The circumstances in which relief may be granted are quite limited, and the Tennessee Supreme Court has summarized them as follows:

> The grounds upon which habeas corpus relief is available are narrow. A petitioner is entitled to habeas corpus relief only if the petition establishes that the challenged judgment is void, rather than merely voidable. A judgment is void "only when it appears on the face of the judgment or the record of the proceedings upon which the judgment is rendered that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." A void or illegal sentence is one whose imposition directly contravenes a statute. A voidable conviction or sentence is valid on its face and requires evidence beyond the face of the record or judgment to demonstrate its invalidity. A trial court may dismiss a habeas corpus petition without a hearing if the petition fails to establish that the challenged judgment is void.

Hogan v. Mills, 168 S.W.3d 753, 755 (Tenn. 2005) (citations omitted); *see also Cantrell v. Easterling*, 346 S.W.3d 445 (Tenn. 2011) (distinguishing between clerical mistakes, appealable errors, and fatal errors and discussing the procedures and relief available under each circumstance, but also noting that, subsequent to petitioner's plea, the legislature amended the habeas corpus statute to limit the circumstances in which a petitioner is entitled to relief); *Davis v. State*, 313 S.W.3d 751 (Tenn. 2010) (reiterating the scope of habeas corpus relief in the context of a plea bargain, and distinguishing between "illegal" sentences and sentences which contain "errors"); *Edwards v. State*, 269 S.W.3d 915, 924

(Tenn. 2008) (finding that "habeas corpus relief is not available to correct errors or irregularities in offender classification"); *May v. Carlton*, 245 S.W.3d 340 (Tenn. 2008) (granting narrow relief when the trial court's judgment form contained an erroneous finding of infamy); *Summers v. State*, 212 S.W.3d 251 (Tenn. 2007) (providing additional guidance regarding when the appointment of counsel is necessary and when summary dismissal is appropriate).

In 2009, the legislature narrowed the circumstances in which habeas corpus relief is available to a petitioner who entered a guilty plea with a negotiated sentence. Pursuant to this legislation, such a petitioner is not entitled to relief under the following circumstances: (1) petitioner received concurrent sentencing where there was a statutory requirement for consecutive sentencing; (2) petitioner's sentence included a release eligibility percentage where petitioner was not entitled to any early release; or (3) petitioner's sentence included a lower release eligibility percentage than he was entitled to under statutory requirements. T.C.A. § 29-21-101(b).

31.02 ERROR CORAM NOBIS

A defendant typically files a petition for writ of error coram nobis in an attempt to secure a new trial based upon newly-discovered evidence. *See* T.C.A. § 40-26-105; *State v. Vasques*, 221 S.W.3d 514, 524-29 (Tenn. 2007). This relief is most often sought following a trial, but a writ is also a "viable remedy to attack the knowing and voluntary nature of guilty pleas which serve as the basis for convictions." *Wlodarz v. State*, 361 S.W.3d 490, 506 (Tenn. 2012). As a general rule, a "petition for writ of error coram nobis is untimely unless filed within one year of the time a judgment becomes final in the trial court." *State v. Mixon*, 983 S.W.2d 661, 671 (Tenn. 1999) (footnote omitted); T.C.A. § 27-7-103. Under limited circumstances, however, due process considerations may require the tolling of the statute of limitations. *See Workman v. State*, 41 S.W.3d 100, 101-04 (Tenn. 2001); *see also Harris v. State*, 301 S.W.3d 141 (Tenn. 2010) (finding the delay to be unreasonable as a matter of law under the facts of this case). If the petition is filed during the pendency of the defendant's appeal, trial and appellate courts should follow the procedure set out in *State v. Mixon*. *See Mixon*, 983 S.W.2d at 671-72.

The Court of Criminal Appeals has summarized the relevant error coram nobis policies and procedures as follows:

> The writ of error coram nobis is an "extraordinary procedural remedy," filling only a "slight gap into which few cases fall." The "purpose of this remedy is to bring to the attention of the court some fact unknown to the court which if known would have resulted in a different judgment." The decision to grant or deny a petition for writ of error coram nobis rests within the sound discretion of the trial court.
>
> A petition for writ of error coram nobis must relate: (1) the grounds and the nature of the newly-discovered evidence; (2) why the admissibility of the newly-discovered evidence may have resulted in a different judgment had the evidence been admitted at the previous trial; (3) that the petitioner was without

> fault in failing to present the newly-discovered evidence at the appropriate time; and (4) the relief sought by the petitioner.
>
> * * *
>
> The grounds for seeking a petition for writ of error coram nobis are not limited to specific categories, as are the grounds for reopening a post-conviction petition. Coram nobis claims may be based upon any "newly discovered evidence relating to matters litigated at the trial" so long as the petitioner also establishes that the petitioner was "without fault" in failing to present the evidence at the proper time. Coram nobis claims therefore are singularly fact-intensive. Unlike motions to reopen, coram nobis claims are not easily resolved on the face of the petition and often require a hearing. The coram nobis statute also does not contain provisions for summary disposition or expedited appeals. Although coram nobis claims also are governed by a one-year statute of limitations, the State bears the burden of raising the bar of the statute of limitations as an affirmative defense.

Carney v. State, No. M2005-01904-CCA-R3-CO (Tenn. Crim. App., filed July 31, 2006) (citations omitted); *see also Wilson v. State*, 367 S.W.3d 229 (Tenn. 2012) (concluding that a prosecutor's handwritten note regarding witness credibility was work product which was neither discoverable nor admissible and, therefore, was not newly discovered evidence).

CHAPTER 32

EXTRADITION AND DETAINER

Contents **Section**

32.01 UNIFORM CRIMINAL EXTRADITION ACT

Tennessee has adopted the Uniform Criminal Extradition Act, which establishes extradition procedures. Extradition is the surrender by one state to another of an individual who is within the jurisdiction of the second state but is either accused or convicted of an offense within the first state. The first state, if competent to try or punish the offender, may demand the surrender of the offender from the state in which he or she is located.

32.02 EXTRADITION PROCEDURE

If a defendant in Tennessee is charged with the commission of a crime in another state and with having fled from that state (or with having committed an act in Tennessee or a third state resulting in crime in the demanding state), that state, known as the demanding state, may seek to extradite the accused by one of two methods. The first method is upon the oath of a credible person before a judge or magistrate in Tennessee charging that the accused has committed a crime in another state. The second method for seeking extradition of a person in Tennessee is upon a complaint made in Tennessee before a judge or magistrate. The complaint must be based on the affidavit of a credible person in the demanding state and must state that a crime has been committed in the demanding state, that the accused has been charged with the crime, and that the accused has fled the jurisdiction. T.C.A. §§ 40-9-103, -113.

Upon either the oath or complaint, the court will issue a warrant directed to the sheriff of the county where the charge or complaint is filed. The warrant will require that the accused be arrested and held to answer the charge. T.C.A. § 40-9-103. The accused may be arrested without a warrant for offenses carrying punishment in excess of one year. If the accused is arrested without a warrant, he or she must be taken before a judge or magistrate "with all practicable speed." T.C.A. § 40-9-104.

The judge must commit the person to jail if it appears that the accused is the person charged and that the accused probably committed the crime. In order to hold the accused, the judge must also find that the accused has fled from the other state, unless the warrant was a result of an act committed in Tennessee or a third state that resulted in a crime in the demanding state. T.C.A. § 40-9-105.

The burden is on the accused to show that he or she was not in the demanding state at the time the crime was committed. *State ex rel. Ezell v. Evatt*, 512 S.W.2d 673, 676

(Tenn. Crim. App. 1974). In making the determination, the court is not bound by the same rigid rules of evidence as used in a criminal trial. Evidence should be construed liberally in favor of the demanding state. *McLaughlin v. State*, 512 S.W.2d 657, 661 (Tenn. Crim. App. 1974).

If the judge commits the accused, the commitment is for a specified time to enable the governor to issue a warrant for the accused's arrest. T.C.A. § 40-9-105. The judge must set bail unless the offense charged is punishable by death or life imprisonment. T.C.A. § 40-9-106. If the accused is admitted to bail and fails to appear, the judge shall declare the bond forfeited and treat the failure to appear as in the case of other bonds given by the accused in criminal proceedings. T.C.A. § 40-9-107.

If the accused is not arrested under warrant of the governor by the time specified in the original arrest warrant, the judge may discharge, recommit, or again take bail. After this second period has expired, the judge may discharge the accused or set a new bond. The judge may not release the accused if the accused has filed a protest or requested a hearing before the governor. T.C.A. § 40-9-108.

When arrested on the governor's warrant, the accused must be apprised of the demand for surrender, the charge, and the right to counsel. If the accused, friends, or counsel indicate a desire to test the legality of the arrest, the accused must be taken before a judge of a court of record, and the judge must set a reasonable time in which the accused may apply for a writ of *habeas corpus*. T.C.A. § 40-9-119.

The Uniform Criminal Extradition Act also sets forth the procedure by which the governor of Tennessee can request the extradition of individuals for charges in Tennessee. T.C.A. §§ 40-9-121 to 128.

32.03 INTERSTATE COMPACT ON DETAINERS

Tennessee has adopted the Interstate Compact on Detainers. T.C.A. §§ 40-31-101 *et seq*. Under the Compact, mandatory time periods apply for trying a prisoner transferred from another state to a state in which the prisoner has pending charges. Article IV(c) requires that the trial must be held within 120 days of the prisoner's arrival. The judge may grant any necessary or reasonable continuance if the prisoner and counsel are present, upon good cause shown in open court.

Under Article III of the Compact, prisoners who are serving a sentence in one state may demand trial on any untried indictments upon which a detainer has been lodged in another state by filing written notice of the place of imprisonment and a request for final disposition. In this circumstance, the trial must be held no more than 180 days after the request for final disposition is received. *State v. Lock*, 839 S.W.2d 436 (Tenn. Crim. App. 1992). The judge has authority to grant any necessary or reasonable continuance if the prisoner and counsel are present, upon good cause shown in open court.

Under either article, the failure to conduct the trial within the prescribed period requires the dismissal of the charges with prejudice.

The Compact applies not just between states but also between state custody and federal custody regardless of whether the transfer is within the same geographic state. *State v. Springer*, 406 S.W.3d 526, 532 (Tenn. 2013). However, pursuant to T.C.A. § 40-31-101 and relevant caselaw, the provisions of Article III (prisoner requesting final disposition) and Article IV (appropriate officer of receiving state requesting custody of the prisoner) only apply if a detainer has been lodged against the prisoner. A "detainer is a request filed by a criminal justice agency with the institution in which a prisoner is incarcerated, asking the institution either to hold the prisoner for the agency or to notify the agency when release of the prisoner is imminent." *Springer*, 406 S.W.3d at 532, n.7 (citation omitted). A *writ of habeas corpus ad prosequendum* does not constitute a detainer for this purpose. *State v. Henretta*, 325 S.W.3d 112, 135-36 (Tenn. 2010).

The Compact does not include a pretrial detainee because the detainee is not serving a "term of imprisonment" as contemplated by the Compact. A term of imprisonment "begins when a prisoner has been sentenced and confined, even when the prisoner is serving the sentence in a temporary detention facility of a county jail. The plain meaning of 'term of imprisonment' indicates the time period begins when the prisoner is imprisoned after being sentenced. It does not refer to the place of the incarceration." *Springer*, 406 S.W.3d at 538.

CHAPTER 33

DEATH PENALTY

Contents **Section**

33.01 ELIGIBILITY

A defendant convicted of first degree murder may be sentenced to life imprisonment, life imprisonment without the possibility of parole (only for offenses committed on or after July 1, 1993), or death. T.C.A. § 39-13-204. A defendant is not eligible for the death penalty or life without the possibility of parole unless one of the statutory aggravating circumstances listed in T.C.A. § 39-13-204(i) applies. If the state intends to seek the death penalty, it must file a notice not less than 30 days prior to trial, and the notice must specify the aggravating circumstance(s) upon which the state intends to rely. Tenn. R. Crim. P. 12.3(b).

Capital case attorneys are available to assist trial judges who preside over death penalty cases. These attorneys are very familiar with the intricacies involved in the pre-trial, trial, and post-trial phases of a capital murder case. A judge who is appointed to a capital case may ask the AOC which capital case attorney is assigned to the judge's district.

33.02 MISCELLANEOUS ISSUES

The issues that may arise during a capital murder trial are too numerous to discuss at length in this brief summary. However, some of the issues a court may encounter during a capital murder case are as follows:

1. An indigent defendant is entitled to the appointment of two death penalty qualified attorneys, and may be entitled to funds for expert and investigative services. Tenn. Sup. Ct. R. 13.

2. The defendant is not entitled to a bill of particulars regarding the factual basis for each aggravating circumstance. *State v. Bush*, 942 S.W.2d 489, 520 (Tenn. 1997) (Appendix).

3. The defendant is not automatically entitled to a jury consultant. *State v. Dellinger*, 79 S.W.3d 458, 468-69 (Tenn. 2002); *State v. Smith*, 993 S.W.2d 6, 28 (Tenn. 1999) (Appendix).

4. Juror questionnaires are often used but are not required. *See State v. Suttles*, 30 S.W.3d 252, 269-70 (Tenn. 2000) (Appendix). If a questionnaire is utilized, *see State*

v. Sexton, 368 S.W.3d 371 (Tenn. 2012), regarding the hazards of excusing a juror based exclusively on the juror's responses to questions that appear on the questionnaire.

5. If the defendant intends to present expert mental health testimony during the penalty phase of the trial, the court must follow the procedures set out in *State v. Reid*, 981 S.W.2d 166, 174 (Tenn. 1998).

6. During jury selection, each party is entitled to 15 peremptory challenges. Tenn. R. Crim. P. 24(e)(1).

7. Defendants often request a change of venire or change of venue due to the publicity surrounding capital cases, and both are permissible. T.C.A. § 20-4-201; Tenn. R. Crim. P. 21.

8. Jurors must be sequestered during a trial in which the state is seeking the death penalty. T.C.A. § 40-18-116; *State v. Bondurant*, 4 S.W.3d 662, 672 (Tenn. 1999).

9. A potential juror must be excused from service if his views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Pike*, 978 S.W.2d 904, 924 (Tenn. 1998) (Appendix). Individual questioning of potential jurors is often permitted but is not required. *See State v. Cribbs*, 967 S.W.2d 773, 796 (Tenn. 1998) (Appendix); *State v. Cauthern*, 967 S.W.2d 726, 749 (Tenn. 1998) (Appendix).

10. In limited circumstances, the defendant may be granted a bench trial on the issues of guilt and/or penalty. T.C.A. § 39-13-205.

11. A capital murder trial is bifurcated. The trier of fact determines guilt during the first phase. If the trier of fact convicts the defendant of first degree murder during the first phase, it must determine the penalty during the second phase. T.C.A. § 39-13-204. Under certain circumstances it is permissible for the trial court to replace a regular juror with an alternate juror for the penalty phase of the trial even if the alternate juror did not participate in the guilt-phase deliberations. *State v. Hester*, 324 S.W.3d 1, 62-67 (Tenn. 2010). The parties are precluded from mentioning the aggravating circumstance(s) during the first phase of the trial.

12. The defendant is not entitled to separate juries for the guilt and penalty phases of the trial. *State v. Dellinger*, 79 S.W.3d 458, 478-79 (Tenn. 2002) (Appendix).

13. Victim impact testimony is typically permitted during the penalty phase of the trial. If the court allows such testimony, it must also instruct the jury regarding the manner in which to consider the testimony. T.C.A. § 39-13-204(c); *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008) (Appendix); *State v. Nesbit*, 978 S.W.2d 872, 887-94 (Tenn. 1998). T.C.A. § 39-13-204 permits "a member or members, or a representative or representatives of the victim's family to testify" during the penalty phase of the trial. The Supreme Court concluded that a "blood or marital relationship is not a prerequisite" and that a fiancée should not be excluded from testifying solely on the basis of her status. The Court declined to decide under what circumstances a

victim's "friend" would be permitted to testify. *State v. Jordan*, 325 S.W.3d 1, 56-57 (Tenn. 2010).

14. Anything favorable to the defendant, regardless of whether it is statutory or non-statutory, presented by the defense or the prosecution, or presented during the guilt or penalty phase of the trial, may be considered mitigation evidence by the jury when it is deciding which penalty to impose. T.C.A. § 39-13-204(j); *State v. Cauthern*, 967 S.W.2d 726, 738-39 (Tenn. 1998).

15. The court must instruct the jury as to all ***applicable*** ***statutory*** aggravating circumstances. *State v. Blanton*, 975 S.W.2d 269, 281 (Tenn. 1998). The court will also instruct the jury on all statutory and non-statutory mitigating circumstances, and must provide a catch-all instruction regarding mitigation proof. Finally, the court must instruct the jury on the manner in which to weigh the aggravating and mitigating circumstances. T.C.A. § 39-13-204(e). These instructions can be found in the pattern jury instruction book.

16. Many issues have arisen over the years regarding the application of various aggravating circumstances and/or what types of evidence are admissible to prove those circumstances. Moreover, the weighing process (aggravators vs. mitigators), available penalties, and applicability of certain aggravators vary greatly depending upon the date of the offense. Prior to trial, the trial court and/or the capital case attorney assisting the court should thoroughly research these issues.

17. A defendant who committed his offense prior to July 1, 1993, is not eligible for a sentence of life without the possibility of parole. *State v. Austin*, 87 S.W.3d 447, 481-82 (Tenn. 2002) (Appendix). Likewise, if an offender committed the offense prior to July 1, 1993, the trial court is not required to instruct the jury that the offender will not be eligible for parole until the offender has served at least 25 full calendar years. *State v. Odom*, 336 S.W.3d 541, 567, n.11 (Tenn. 2011).

18. Constitutional challenges to the death penalty repeatedly have been rejected by the appellate courts. *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008); *State v. Reid*, 91 S.W.3d 247, 312-14 (Tenn. 2002) (Appendix); *State v. Austin*, 87 S.W.3d 447, 486-88 (Tenn. 2002) (Appendix).

19. See T.C.A. § 40-23-114 for the applicable methods of execution.

20. If the jury indicates that it is unable to reach a verdict during the penalty phase of the trial, the court should consult T.C.A. § 39-13-204(h). See also *State v. Torres*, 82 S.W.3d 236, 253-58 (Tenn. 2002).

21. States are not permitted to execute a juvenile convicted of any offense or an adult convicted of rape, regardless of whether the rape victim was an adult or a child. *See Kennedy v. Louisiana*, 128 S.Ct. 2641 (2008). Moreover, an intellectually disabled (previously referred to as "mentally retarded") or incompetent defendant cannot be executed. T.C.A. § 39-13-203; *Hall v. Florida*, 134 S.Ct. 1986 (2014); *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007); *Atkins v. Virginia*, 122 S.Ct. 2242 (2002); *Coleman v. State*, 341 S.W.3d 221 (2011) (discussing intellectual disability issues at

length); *State v. Irick*, 320 S.W.3d 284, 294-95 (Tenn. 2010) (stating that "[a]ny portions of *Van Tran* or *Coe* that can be read as inconsistent with *Panetti* are hereby renounced as obsolete" and explaining the relevant standards/tests); *Bobby v. Bies*, 129 S.Ct. 2145 (2009) (finding that double jeopardy/issue preclusion considerations did not bar a full hearing on the issue of mental retardation when mental retardation was raised as a mitigating circumstance at trial but the issue of the defendant's mental capacity was not fully litigated as an independent issue); *State v. Strode*, 232 S.W.3d 1 (Tenn. 2007); *Van Tran v. State*, 66 S.W.3d 790, 805 (Tenn. 2001); *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000). However, the Tennessee Supreme Court's opinion in *Coleman* did not establish a new constitutional right upon which a motion to reopen a post-conviction petition can be based pursuant to T.C.A. § 40-30-117(a)(1), nor does actual innocence as contemplated by T.C.A. § 40-30-117(a)(2) include an allegation that an offender is not eligible for the death penalty due to an intellectual disability. *Keen v. State*, 398 S.W.3d 594 (Tenn. 2012).

22. A competent defendant has the right to preclude his attorney from presenting mitigation evidence and making a closing argument during the penalty phase of a capital murder trial, but the trial court must follow the procedures set forth by the appellate courts regarding the waiver as well as the defendant's competency to execute such a waiver. *See State v. Johnson*, 401 S.W.3d 1 (Tenn. 2013); *State v. Kiser*, 284 S.W.3d 227 (Tenn. 2009); *State v. Smith*, 993 S.W.2d 6, 13-16 (Tenn. 1999); *Zagorski v. State*, 983 S.W.2d 654, 660 (Tenn. 1998). It is not necessary for the court to follow the *Zagorski* procedures if the defendant is proceeding *pro se*. *State v. Richard Taylor*, No. M2005-01941-CCA-R3-DD (Tenn. Crim. App., filed March 7, 2008).

23. When a defendant waives his right to testify through the procedure set out in *Momon v. State*, 18 S.W.3d 152 (Tenn. 1999), counsel is not required to inform the defendant through this colloquy in open court that the defendant may "testify to collateral mitigating factors in a death penalty sentencing hearing without waiving his privilege against self incrimination." *State v. Rimmer*, 250 S.W.3d 12, 28 (Tenn. 2008).

24. The state is not required to plead aggravating circumstances in the indictment. *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008) (Appendix).

25. The trial court should instruct the jury regarding residual doubt under certain circumstances. *State v. Kiser*, 284 S.W.3d 227 (Tenn. 2009).

26. *See Bobby v. Van Hook*, 130 S.Ct. 13 (2009) regarding the standards for determining (during a post-conviction proceeding) whether the defendant's attorneys provided ineffective assistance at the trial. This case includes a discussion regarding the relevance of "guides" such as the ABA Standards. For additional discussion regarding ineffective assistance of counsel claims in capital cases, see *Wong v. Belmontes*, 130 S.Ct. 383 (2009) and *Sears v. Upton*, 130 S.Ct. 3259 (2010).

27. A defendant does not have a constitutional right to plea bargain. *State v. Odom*, 336 S.W.3d 541, 569 (Tenn. 2011).

28. For a thorough discussion regarding the application of Tenn. R. Evid. 615 (Exclusion of Witnesses) to a death penalty case, see *State v. Jordan*, 325 S.W.3d 1, 37-53 (Tenn. 2010).

33.03 RULE 12 REPORTS

Rule 12 of the Tennessee Supreme Court Rules ("Rule 12") requires the trial court to submit a report for every conviction for first-degree murder regardless of punishment and regardless of whether the conviction resulted from a trial or a plea. Separate reports must be filed for each co-defendant found guilty of first-degree murder.

Portions of the form must be completed by defense counsel and the prosecutor in advance of the hearing on the motion for new trial. After these portions are completed, the court must complete the form and return it to counsel for comments. Counsel must note any comments and return the form to the court no later than 10 days after the ruling on the motion for new trial. The comments are attached to the report and made a part of the record.

The trial court is responsible for completing the report and certifying its accuracy to the Supreme Court. Within 15 days after ruling on the motion for new trial, the court must transmit a copy of the report and a certified copy of the order disposing of the new trial motion to the Clerk of the Supreme Court in Nashville. A duplicate copy of the report must be filed with the record on appeal. A copy of the required report is appended to Rule 12.

33.04 APPEAL

Appellate review of capital murder cases is governed by T.C.A. § 39-13-206. *See also State v. Godsey*, 60 S.W.3d 759, 781-93 (Tenn. 2001).

CHAPTER 34

PLEADINGS

Contents **Section**

34.01 CLAIMS FOR RELIEF, ANSWERS, AND REPLIES

In a civil action, claims for relief include a complaint or original claim, a counterclaim, a cross-claim, and a third-party claim. Tenn. R. Civ. P. 8.01. An answer is allowed for each complaint and cross-claim; a reply to a counter-claim is allowed; and a third-party answer is allowed to be filed as to a third-party complaint. No other pleadings are allowed unless the court orders a reply to the answer of a third-party. Tenn. R. Civ. P. 7.01.

Each claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment. Each answer or reply must state in short and plain terms the defense or defenses asserted and must admit or deny each of the averments alleged in the complaint, counterclaim, cross-claim, or third-party claim. Tenn. R. Civ. P. 8.01 & 8.02. Affirmative defenses must be specially and specifically pled in short and plain terms. Tenn. R. Civ. P. 8.03. A list of affirmative defenses that must be pled is found in Tenn. R. Civ. P. 8.03.

Pleadings relying upon statutes must either specifically refer to the statute or state all the facts necessary to constitute the breach of the statute so that the other party is apprised that a statutory violation is alleged. Tenn. R. Civ. P. 8.05(1).

Certain matters must be specially pled. Tenn. R. Civ. P. 9.01 – 9.07. If a pleading relies upon any written instrument, other than a policy of insurance, the pertinent parts of the writing must be attached to the pleading as an exhibit unless the writing is either a matter of public record or in the possession of the adverse party, or if the attachment would be unnecessary or impracticable as stated in the pleading. Tenn. R. Civ. P. 10.03.

34.02 SIGNING OF PLEADINGS

Rule 11 of the Tennessee Rules of Civil Procedure provides that all pleadings, motions, and papers filed with the court must be signed by at least one attorney of record or by a party appearing *pro se*. The paper must also bear the signer's address, telephone number, and bar number. Unsigned papers must be stricken unless promptly corrected. Tenn. R. Civ. P. 11.01.

The signing of a pleading, motion or other court document is tantamount to making certain certifications, listed in Tenn. R. Civ. P. 11.02, concerning the contents of the signed document. If the signed document does not comply with the requirements of Tenn. R. Civ.

P. 11.02, the opposing party may file a motion for sanctions pursuant to Tenn. R. Civ. P. 11.03(1)(a). If the court determines that a violation of this rule has occurred, after notice and a reasonable opportunity to respond, the court may impose an appropriate sanction upon the violating attorney, law firm, or *pro se* party. Tenn. R. Civ. P. 11.03(2). The court may, in its own discretion, enter an order describing the conduct and directing the appropriate person to show cause why a violation of Rule 11.02 has not occurred. Tenn. R. Civ. P. 11.03(1)(b).

In determining whether a Rule 11 violation has occurred, the applicable standard for the court's application is whether an attorney's conduct is objectively reasonable under all the circumstances. The reasonableness must be assessed in light of the circumstances existing at the time the action was taken. *Krug v. Krug*, 838 S.W.2d 197 (Tenn. 1992). Sanctions imposed are for the purposes of deterring repetition of the violation or comparable violations. The sanctions may include nonmonetary directives and monetary penalties including payment to the movant of costs and fees or payment into the court except in limited situations. Tenn. R. Civ. P. 11.03(2). An order imposing sanctions must describe the conduct found to be in violation of the rule and must explain the basis for the imposed sanction. Tenn. R. Civ. P. 11.03(3).

34.03 SUPPLEMENTAL PLEADINGS

Initial amendments to pleadings which are filed before a responsive pleading is filed, or within fifteen days of service if no responsive pleading is allowed, are a matter of right. Amendments thereafter may be made only by written consent or with the court's permission. The rule anticipates, however, that courts will act liberally in the granting of permission to amend. *Henderson v. Bush Bros. & Co.*, 868 S.W.2d 236 (Tenn. 1993). In the event a motion to amend is denied, the trial court must give a reasoned explanation for the denial. The proper way for a party to seek to amend is for the party to attach a copy of the proposed amendment to the motion so that a copy of the proposed amendment becomes a part of the record, which an appellate court can review if asked to do so. *Taylor v. Nashville Banner Publishing Co.*, 573 S.W.2d 476 (Tenn. Ct. App. 1978), *cert. denied*, 441 U.S. 923 (1979).

Supplemental pleadings, setting forth additional allegations, are also freely allowed. Tenn. R. Civ. P. 15.04. The rule provides that supplemental pleadings may be allowed even if the party failed to plead the claim or defense in the original pleading.

CHAPTER 35

DISCOVERY

Contents **Section**

35.01 GENERALLY

The Tennessee Rules of Civil Procedure outline the discovery methods for civil actions in Tennessee in Rules 26 through 37. The methods include depositions, interrogatories, requests for productions of documents, permission to enter upon land or property for inspections, requests for physical and mental examinations, and requests for admissions.

35.02 COURT INVOLVEMENT

To a large extent, discovery is controlled and managed by the parties. However, when discovery matters are disputed by the parties, the parties often seek guidance from the court in settling the issue(s).

A. Protective orders

For good cause, a judge may enter an order to protect a party or person from discovery sought for the purpose of annoyance, embarrassment, oppression or undue burden or expense. Tenn. R. Civ. P. 26.03. The protective order issued by the court may require one or more of the remedies listed in Tenn. R. Civ. P. 26.03.

B. Orders to compel

A party may file a motion seeking an order to compel discovery. The motion may be made if a party or other person fails to answer questions at a deposition or in an interrogatory, if the answers are evasive or incomplete, or if the party fails to provide other requested discovery. The court may enter an order requiring the party or other person to provide a response to the discovery request. In addition to granting the motion, if appropriate, the court may require that the reasonable expenses incurred by the moving party be paid by the party whose actions necessitated the motion. Tenn. R. Civ. P. 37.01.

C. Sanctions

Sanctions that may be imposed for the failure to comply with an order compelling discovery may be found in Tenn. R. Civ. P. 37.02.

Where a party fails to admit the genuineness of a document or to the truth of a matter, and such document or matter is proven through the presentation of evidentiary proof, the court may order sanctions found in Tenn. R. Civ. P. 37.03. Exceptions to the imposition of this sanction are also found in Tenn. R. Civ. P. 37.03.

Tenn. R. Civ. P. 37.04 sets out the sanctions that may be imposed if a party or its designee fails to attend a properly noticed deposition or to answer questions or requests properly posed under the rules in writing. In such circumstances, the judge must require the payment of reasonable expenses incurred, including attorney fees because of the failure to attend the deposition or answer submitted discovery. Tenn. R. Civ. P. 37.04.

Finally, the general rule requiring the good faith participation of a party or party's attorney in the establishment of a discovery plan is found at Tenn. R. Civ. P. 37.05. Failure to participate in good faith makes the party or party's attorney subject to the sanctions listed in Tenn. R. Civ. P. 37.05.

35.03 ELECTRONIC DISCOVERY

The Supreme Court adopted amendments, effective July 1, 2009, to the Rules of Civil Procedure concerning discovery to add provisions that address the discovery of electronic material. These new rules do not require mandatory, automatic discovery, as in the federal courts. However, the courts have the authority to control the discovery process with regard to electronic materials, taking into consideration the burdens and costs to the parties.

CHAPTER 36

PRETRIAL MOTIONS

Contents **Section**

36.01 DISPOSITIVE MOTIONS

In civil actions, certain defenses may be raised by motion before pleading. Defenses or objections which are raised in motions or in pleadings are not waived if joined with other defenses or motions which are raised in motions or pleadings. A list of such defenses can be found at Tenn. R. Civ. P. 12.02. Other such specific special matters can be found in Tenn. R. Civ. P. 9.

If any of the motions specified in rule 12.02 are raised, the judge, upon application of a party, must hear and determine the motion before trial, unless the court specifically defers the ruling until the trial. Tenn. R. Civ. P. 12.04. The same applies for a motion for judgment on the pleadings discussed below. *Id.* T.C.A. § 20-12-119(c) now provides that a party who prevails on a 12.02 (6) motion be awarded reasonable and necessary costs and attorney's fees, subject to some limitations.

Rule 12 also recognizes a motion for judgment on the pleadings, which permits the court to dismiss the action if the pleadings fail to support a cause of action or defense. Tenn. R. Civ. P. 12.03. If outside materials are used to support a motion for judgment on the pleadings, the motion is treated as a motion for summary judgment. *Id.*

36.02 OTHER MOTIONS

- **Motion to strike** - The court may remove an "insufficient defense or any redundant, immaterial, impertinent or scandalous matter" from the pleadings. Tenn. R. Civ. P. 12.06.

- **Motion for more definite statement** - The court may require more specificity in pleadings when a pleading is found to be "so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading." Tenn. R. Civ. P. 12.05.

CHAPTER 37

INJUNCTIONS

Contents **Section**

37.01 IN GENERAL

Injunctive relief can be obtained by (1) restraining order, (2) temporary injunction or (3) permanent injunction in a final judgment. While a restraining order may only restrict the commission of an act, an injunction may restrict or mandate the commission of an act. Every injunctive order must be specific in terms and describe in reasonable detail, and not by reference to the pleadings, the act that is restrained or enjoined. Tenn. R. Civil P. 65.01, 65.02.

37.02 RESTRAINING ORDERS

A restraining order may be granted either at the beginning of an action or while it is pending. Notice is not required in certain circumstances set out in Tenn. R. Civ. P. 65.03(1)(A)-(B). First, it must be clearly shown by verified complaint or affidavit that the applicant's rights are being or will be violated by the adverse party and that the applicant will suffer immediate and irreparable injury, loss, or damage before notice and a hearing can be accomplished. In addition, the person applying for the injunction must certify his efforts to give notice to the opposing party and state specific reasons why notice should not be required. Tenn. R. Civ. P. 65.03(1). Other requirements concerning the content of restraining orders and the process by which restraining orders are issued can be found at Tenn. R. Civ. P. 65.03.

A restraining order becomes effective when it is served upon the party restrained or when the party is informed of the order, whichever is sooner. All temporary restraining orders granted without notice expire at a date the court orders, which shall not exceed fifteen days from issuance. The court may extend the order for fifteen additional days or the party restrained may consent to the continuation of the order. In the event of an extension, the judge must enter the reasons for the extension on the record. Tenn. R. Civ. P. 65.03(5).

37.03 TEMPORARY INJUNCTIONS

Temporary injunctions may only be granted with notice. The prerequisites for issuance are a clear showing by verified complaint, affidavit or other evidence that the applicant's rights are being or will be violated by an adverse party, and that the applicant will suffer immediate and irreparable injury, loss, or damage pending a final judgment, or that acts of the adverse party will render any final judgment ineffectual. Tenn. R. Civ. P. 65.04(1) & (2). Other requirements concerning the content of temporary injunction orders and the process by which such orders are issued can be found at Tenn. R. Civ. P. 65.04.

A temporary restraining order becomes effective and binding when the order is entered and remains in effect until it is modified, dissolved, or until a permanent injunction is entered. If an application for a preliminary injunction is pending, the court may consolidate the hearing with the trial of the action on the merits. Tenn. R. Civ. P. 65.04(5), (7).

37.04 INJUNCTION BONDS

No temporary restraining order or injunction may be granted without the giving of an injunction bond in an amount that the court deems proper "for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined." Tenn. R. Civ. P. 65.05(1). Requirements and restrictions concerning injunction bonds can be found at Tenn. R. Civ. P. 65.05.

37.05 ENFORCEMENT OF RESTRAINING ORDERS AND INJUNCTIONS

Upon a showing of proof by evidence or affidavit that a violation or threatened violation of a restraining order or injunction has occurred, a judge may compel compliance with the order and/or punish disobedience as contempt. Tenn. R. Civil P. 65.06.

37.06 EXCEPTIONS TO REQUIREMENTS

Judges who issue restraining orders or injunctions in domestic relations cases may include the terms and conditions and expiration dates as seem just and proper notwithstanding the provisions of Rule 65. Tenn. R. Civ. P. 65.07.

37.07 ISSUANCE OF AN INJUNCTION

The issuance of injunctions is governed by the provisions outlined above unless the provisions of Rule 65 conflict with a statute. Tenn. R. Civil P. 65.07. Tennessee Code Annotated contains numerous statutes that supersede the rule in specific circumstances. *See* T.C.A. Title 29, Chapter 23 as an example of statutes superseding the Rules of Civil Procedure on injunctive relief.

Injunctive relief is extraordinary and should be granted with great caution and only after full and ample evidence that injunctive relief is necessary. Injunctive relief is not a matter of right, but a matter committed to the sound discretion of the judge. The expected harm must be a reasonable probability of irreparable harm. If a full and adequate remedy at law exists, the harm is not irreparable and injunctive relief should not be granted. *Hall v. Britton*, 292 S.W.2d 524 (Tenn. Ct. App. 1953).

CHAPTER 38

MULTIPLE PARTIES

Contents **Section**

38.01 COUNTERCLAIMS

There are two types of counterclaims: compulsory and permissive. Compulsory counterclaims are defined and explained in Tenn. R. Civ. P. 13.01. Permissive counterclaims are defined and explained in Tenn. R. Civ. P. 13.02. The court may allow supplemental pleadings to assert omitted counterclaims or counterclaims that matured after the service of the responsive pleading. Tenn. R. Civ. P. 13.05 & 13.06. The court may order any party necessary for complete relief to be brought in as a defendant if jurisdiction can be obtained. Tenn. R. Civ. P. 13.08. A court may also order a separate trial on a counterclaim. Tenn. R. Civ. P. 13.09.

38.02 CROSS-CLAIMS

A party may bring a cross-claim against a co-party that either arises out of the same transaction or occurrence that is the subject matter of the original action or counterclaim or that relates to property that is the subject matter of the original action or counterclaim. The cross-claim must assert that the party against whom the claim is asserted may be liable to the cross-claimant for all or part of the claim asserted in the action against the cross-claimant. Tenn. R. Civ. P. 13.07. As in the case of counterclaims, the court may order any party necessary for complete relief to be brought in as a defendant if jurisdiction can be obtained and separate trials may be ordered on an original claim and cross-claim. Tenn. R. Civil P. 13.08, 13.09.

38.03 THIRD-PARTY PRACTICE

After the action is commenced, a defendant can bring in anyone who may be liable to the defendant for all or part of the plaintiff's claim against the defendant. This third-party defendant can likewise bring in anyone who may be liable to the third-party defendant in

the action. Any party can move to strike the third-party claim, for severance, or for a separate trial. A plaintiff may cause a third party to be brought in the same way if a counterclaim is asserted against the plaintiff. Tenn. R. Civil P. 14.

38.04 COMPULSORY JOINDER

A person subject to the court's jurisdiction must be joined as a party if (1) complete relief between the original parties is otherwise impossible or (2) the person has an interest in the action that cannot be otherwise protected or which will cause an original party a substantial risk of incurring inconsistent obligations from additional litigation. The court may make the party either a defendant or an involuntary plaintiff. Tenn. R. Civ. P. 19.01.

If a necessary person cannot be made a party, the court must consider whether the action should continue without the person. Factors to consider include: (1) how prejudicial such a judgment would be to the original parties or the absent person; (2) whether the prejudice could be lessened by court action; (3) whether judgment rendered in the person's absence would be adequate; and (4) whether dismissal of the action would leave the plaintiff an adequate remedy. Tenn. R. Civil P. 19.02.

Any pleading for relief must include the names of any necessary parties who have not been joined and the reason they have not been joined. Tenn. R. Civil P. 19.03. Rule 19 does not apply to class actions. Tenn. R. Civil P. 19.04.

38.05 PERMISSIVE JOINDER

Parties who assert a right to joint or several relief, a right to relief arising out of the same transaction or occurrence, or a right to relief with common questions of law or fact may join in one action as plaintiffs. Tenn. R. Civ. P. 20.01. Parties against whom joint or several relief, relief arising out of the same transaction or occurrence, or relief with common questions of law or fact is asserted may join in one action as defendants. Tenn. R. Civ. P. 20.01. Judgment, however, may be given for one or more of the plaintiffs and against one or more the respective defendants. Tenn. R. Civ. P. 20.01.

The court may order separate trials or other appropriate relief to prevent a party embarrassment, delay, or expense caused by the presence of another party against whom the party asserts no claim and who asserts no claims against the party. Tenn. R. Civil P. 20.02.

38.06 MISJOINDER

If parties are misjoined, the appropriate remedy is to drop or add parties by court order at any stage of the proceeding and upon the motion of either party or the court. Dismissal is not appropriate. Tenn. R. Civil P. 21.

38.07 INTERPLEADER

A plaintiff or defendant may interplead, or join others with claims that might expose the plaintiff or defendant to multiple liability. The claims do not have to be consistent with each other. If liability is admitted by the party seeking interpleader, the amount admitted may be required to be deposited with the court or otherwise preserved. The court may then enjoin further action by the parties relating to the amount deposited. Tenn. R. Civ. P. 22.01 & 22.02.

38.08 CLASS ACTIONS

The sections of Rule 23 of the Tennessee Rule of Civil Procedure establish procedural authority concerning class action lawsuits. Rule 23.01 establishes the prerequisites for an action to be maintained as a class action. Tenn. R. Civ. P. 23.01. In addition to these prerequisites, the rules also require that one of three conditions be satisfied. Either (1) the prosecution of separate actions must create a risk of (a) inconsistent or varying adjudications or (b) adjudications which would dispose of or seriously impede non-class members interests; or (2) the opposing party must have refused to act on grounds applicable to the whole class; or (3) a class action must be the superior method for efficient adjudication since common questions of law or fact predominate over individual ones. Tenn. R. Civ. P. 23.02.

When an action is commenced as a class action, the judge is required to determine whether it will be allowed to proceed as a class action as soon as practicable after the commencement. Tenn. R. Civ. P. 23.03 (1). The decision is left to the sound discretion of the trial judge and can be modified on appeal only if the judge's discretion was abused. *Meighan v. United States Sprint Communication Co.*, 924 S.W.2d 632 (Tenn. 1996). If the action proceeds as a class action, the judge must direct that the members of the class receive the best notice practicable under the circumstances including individual notice or publication, where appropriate. The notice shall advise the members that they may opt out of the class; that if they do not opt out of the class, any judgment rendered will include their claims; and that any member who does not opt out may enter an appearance. Tenn. R. Civ. P. 23.03 (2) & (3).

The judge may order that an action be maintained as a class action with respect to particular issues or that classes be divided into subclasses with each subclass treated as a separate class. Tenn. R. Civ. P. 23.03(4). Any judgment entered in a class action must describe those who are found to be members of the class and must specify those to whom notice was directed who did not opt out as class members. Tenn. R. Civ. P. 23.03(3).

A class action cannot be involuntarily dismissed or compromised without court approval. All members of the class are entitled to notice of any proposed dismissal or compromise in the manner the court directs. Tenn. R. Civ. P. 23.05.

Class action complaints filed by shareholders to enforce a right of a corporation or of an unincorporated association must be verified and must allege that the plaintiff was a shareholder or member at the time of the transaction or that plaintiff's share(s) devolved by operation of law. Tenn. R. Civ. P. 23.06. The complaint must also describe the plaintiff's

efforts to obtain the action desired from the directors or other appropriate authority. Tenn. R. Civ. P. 23.06.

Rule 23 applies only to procedure; it does not create substantive rights where there is no standing. *Bennett v. Stutts*, 521 S.W.2d 575 (Tenn.1975).

38.09 INTERVENTION

Anyone may intervene in a suit on timely application as a matter of right if the intervening party has an unconditional statutory right to intervene; the parties agree to intervention; or if the intervening party has an interest in the subject matter of the suit that cannot otherwise be adequately protected. Tenn. R. Civ. P. 24.01. Further, intervention is permitted if the intervening party has a conditional statutory right to intervene or if the intervening party's claim or defense has a question of law or fact in common with the action. Tenn. R. Civ. P. 24.02.

To intervene, an intervening party must serve on all parties a motion to intervene stating the grounds for intervention, accompanied by an appropriate pleading. If any case involves the validity of a state statute or administrative rule, the judge must require that notice be given to the State Attorney General, specifying the challenged statute or regulation. Tenn. R. Civ. P. 24.04.

38.10 CONSOLIDATED AND SEPARATE TRIALS

The court may order pending actions consolidated when they involve a common question of law or fact. In jury trials, the judge may order a separate trial on any one or more claims on which all parties have waived the right to a jury trial. In non-jury trials, the court may also order separate trials on any one or more claims. Tenn. R. Civ. P. 42.01, 42.02.

38.11 PEREMPTORY CHALLENGES IN MULTIPLE PARTY CASES

A party to a civil action may exercise four peremptory challenges. Likewise, a party that is both a plaintiff and a defendant may exercise four peremptory challenges. If there is more than one party on a side, four additional challenges are allowed with a maximum of eight challenges allowed on a side regardless of the number of parties. The judge is required to divide the aggregate number between the parties on the same side if necessary. T.C.A. § 22-3-104.

CHAPTER 39

MASTERS AND REFEREES

Contents **Section**

39.01 APPOINTMENT AND COMPENSATION

A judge may issue an order of reference to appoint a special master (or the clerk and master) in any pending action. Tenn. R. Civ. P. 53.01. The master or special master's compensation is addressed in Tenn. R. Civ. P. 53.01.

39.02 POWERS

The order of reference specifies or limits the powers of the master. The master is required to exercise the power to regulate all proceedings in every hearing the master conducts and is required to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require evidence to be produced, rule on its admissibility, swear and examine witnesses, and issue sanctions for contempt against defaulting witnesses. If a party requests, a record must be made of the evidence offered and excluded. Tenn. R. Civ. P. 53.02 & 53.03(2).

39.03 PROCEEDINGS

When a judge enters an order of reference, the master must set a time and place within twenty days of the date of the order for the parties to meet, unless the order requires otherwise. Masters must conduct proceedings with all reasonable diligence. Tenn. R. Civ. P. 53.03(1). A party may, with notice, seek an order from the court directing the master to expedite the proceedings. The master may proceed in a party's absence or, in the master's discretion, may reschedule the proceedings. Tenn. R. Civ. P. 53.03(1).

39.04 REPORT

The master must file a report with the clerk on the matters referred, at the time and in the manner specified by the court. Tenn. R. Civ. P. 53.04. The court may require that the master make findings of fact and conclusions of law. Tenn. R. Civ. P. 53.04. Unless the order directs otherwise, the master must file with the order a transcript of the proceedings and the exhibits. The clerk must notify the parties of the filing. Tenn. R. Civ. P. 53.04.

39.05 ACTION OF THE COURT

If the action is nonjury, the judge must act upon the master's report by adopting, modifying, or rejecting the report in whole or in part. The judge may also receive additional evidence or may refer the matter again with additional instructions. Tenn. R. Civ. P. 53.04(2). The parties, in such a case, have ten days from the date they are served with notice of the master's filing to file any objections to the report. Tenn. R. Civ. P. 53.04(2).

If the action is to be tried with a jury, the master may or may not be directed to report the evidence. If the master is directed to report the evidence, the master's findings are admissible as evidence of the matters found and may be read to the jury. Tenn. R. Civ. P. 53.04 (3). The submission is subject to the court's rulings on any objections as to points of law. The parties may also submit other proof and may cross-examine the master as to the findings. Tenn. R. Civ. P. 53.04(3).

The parties may stipulate the findings as final, in which case only questions of law can be disputed. Tenn. R. Civil P. 53.04. If the trial judge approves the master's findings, the findings will not be disturbed on appeal unless (1) the matter was not properly referred; (2) the findings were based upon an error of law or a mixed question of fact and law; or (3) the findings were not supported by any material evidence. *Moore v. Moore*, 602 S.W.2d 252 (Tenn. App.1980).

CHAPTER 40

SUMMARY JUDGMENT

Contents **Section**

40.01 IN GENERAL

A motion for summary judgment is designed to provide a quick, inexpensive means of concluding cases on which no dispute exists as to material facts. *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993). It is not intended as a substitute for trial, but is to be rendered by the trial judge when it is shown that no genuine issue as to any material fact exists so that the moving party is entitled to judgment as a matter of law. In ruling on a motion for summary judgment, the trial judge must view all of the affidavits in the light most favorable to the opponent of the motion and draw all legitimate inferences in that party's favor. Thus, judgment is appropriate only when both facts and conclusions drawn from the facts permit reasonable persons to reach but one result. *Id.*

In 2008, the Tennessee Supreme Court decided the case of *Hannan v. Alltel Publishing Co.*, which held that, "in Tennessee, a moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party's claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008). The Tennessee General Assembly passed legislation that overturned the holding of the *Hannan v. Alltel Publishing Co.* case in 2011. T.C.A. § 20-16-101 now states, "In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it: (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." It is important to note that the *Hannan* standard is applicable to cases filed prior to July 1, 2011 and the standard established in T.C.A. § 20-16-101 is applicable to cases filed on or after July 1, 2011. *See Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18 (Tenn. 2011).

40.02 PROCEDURE FOR FILING

Any party seeking to recover on a complaint, counterclaim, or cross-claim may file a motion for complete or partial summary judgment, with or without supporting affidavits, any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment filed by the adverse party. Tenn. R. Civ. P. 56.01. A

party against whom a complaint, counterclaim, or cross-claim has been filed may move for summary judgment at any time. Tenn. R. Civ. P. 56.02. All summary judgment motions must be filed at least thirty days before the hearing date. Tenn. R. Civ. P. 56.04. The response to the motion, including affidavits, must be filed no later than five days before the hearing. Tenn. R. Civ. 56.04. Local Rules of Court may apply alternate time periods concerning filing of responses and scheduling of hearings.

40.03 CONTENTS OF MOTION AND SUPPORTING AFFIDAVITS

The Tennessee Rules of Civil Procedure have specified what must be filed with a motion for summary judgment. Each motion must be:

> accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.

Tenn. R. Civ. P. 56.03. A responding party must file with the pleadings opposing the motion, a response to each fact asserted by the moving party. The response must either agree that the fact is undisputed, agree that the fact is undisputed only for summary judgment purposes, or demonstrate that the fact is in dispute. Each disputed fact, likewise, must be supported by specific citation to the record. Tenn. R. Civ. P. 56.03.

Supporting and opposing affidavits must be made on personal knowledge and must include only those facts that would be admissible in evidence. The affidavit must show affirmatively that the affiant is competent to testify on the matter stated in the affidavit. If the affidavit refers to a document, a sworn or certified copy of the document must be attached. Expert opinion affidavits are governed by the evidence rules pertaining to expert testimony. Tenn. R. Civ. P. 56.06. The opposing party may not simply rely on allegations or denials of information contained in the moving part's pleadings, but must set forth specific facts showing that there is a genuine dispute concerning material fact(s). *Id.*

If a party opposing a summary judgment motion is unable to procure an affidavit in opposition, the party may, by affidavit, request, and the court may grant, a continuance to allow affidavits or depositions to be obtained. Tenn. R. Civ. P. 56.07.

If a party submits or opposes a motion by filing an affidavit presented in bad faith or for the purpose of delay, the court shall order the party employing such affidavits to pay the other party the amount of reasonable expenses that the filing of the affidavits caused, including attorney fees. The offending party may also be found guilty of contempt. Tenn. R. Civ. P. 56.08.

40.04 PROCEEDINGS ON THE MOTION

The court may grant summary judgment on the entire case or on some of the issues in the case. If the court grants partial summary judgment, the court shall ascertain what

material facts are actually in controversy, shall issue an order specifying the facts that appear to be without controversy, and shall direct further proceedings as are required. Tenn. R. Civ. P. 56.05.

40.05 REVIEW

No presumption of correctness applies to decisions granting summary judgment since they involve only questions of law. *Hembree v. State*, 925 S.W.2d 513 (Tenn. 1996).

CHAPTER 41

EXECUTION

Contents **Section**

41.01 ISSUANCE AND RETURN

All money judgments of any court of the state may are enforced by execution. T.C.A. § 26-1-103. To aid execution, the judgment creditor may take discovery pursuant to Rules 26-37, excluding Rule 35, of the Tennessee Rules of Civil Procedure. Tenn. R. Civ. P. 69.03. If judicial process or execution cannot operate to carry into effect the judgment, the court may enforce its judgment by an attachment for contempt. T.C.A. § 26-1-102.

If the judgment debtor is a corporation, the court may authorize a *fieri facias* to be levied against the things to which the corporation may have a legal right in addition to an execution on the goods, lands, and tenements. The court may appoint a receiver to collect the proceeds. T.C.A. § 26-1-105. Court executions are tested the day of issuance. T.C.A. § 26-1-109.

The court clerk may issue executions in favor of the successful party without demand. T.C.A. § 26-1-201. From courts of record, the issuance may be any time after thirty days following judgment. T.C.A. § 26-1-203. In all other cases, the court shall issue to the plaintiff, plaintiff's agent, or plaintiff's counsel execution on demand. T.C.A. § 26-1-207. An accelerated execution may be issued upon a showing that the defendant is about to fraudulently dispose of, conceal, or remove the defendant's property. T.C.A. § 26-1-206. No alias or pluries execution can be issued until the original is accounted for satisfactorily by affidavit. T.C.A. § 26-1-108.

Requirements for endorsement and docketing of an execution by the court clerk are found in T.C.A. §§ 26-1-301 – 304. Executions must be returned within thirty days after their issuance. T.C.A. § 26-1-401. The officer who receives the execution must give a receipt, if requested, and make sufficient return along with the money collected on or before the return day. T.C.A. § 26-1-402.

Proceedings to enforce judgments, including execution, may be stayed for various reasons and through specified methods delineated in Tenn. R. Civ. P. 62. The sections of this rule have no effect on the provisions concerning immediate issuance of execution, found at T.C.A. § 26-1-206.

41.02 EXEMPTIONS

The debtor can claim certain property as exempt from execution pursuant to provisions of the Tennessee Code Annotated. The exemptions that may be claimed, and are also applicable as exemption claims in bankruptcy proceedings pursuant to T.C.A. § 26-2-112, are found in T.C.A. §§ 26-2-101 *et seq.*

On the application of the judgment creditor, the court may inquire into the accuracy of any exemption claimed by the debtor. If the court finds that a knowingly false claim of exemption was made, the court may enter an order denying the debtor the right to claim any further exemption as to that creditor. T.C.A. § 26-2-115.

A stipulation in a note waiving the right of exemption is void as against public policy. *Sherwin Williams Co. v. Morris*, 156 S.W.2d 350 (Tenn. App. 1941).

41.03 LEVY OF EXECUTION

The former requirement that personalty must be levied upon before realty is repealed. Tenn. R. Civ. P. 69.02. Specific requirements concerning the levy of execution are found in T.C.A. §§ 26-3-101 *et seq.* Provisions concerning a levy, lien of levy or sale of execution on personalty are found in Tenn. R. Civ. P. 69.06. Different types of execution on realty, including lien lis pendens, judgment lien, levy, sale and termination statement are located in Tenn. R. Civ. P. 69.07 and T.C.A. §§ 25-5-101 *et seq.*

41.04 TIME FOR JUDGMENT - EXTENSION

If a judgment remains unsatisfied, a judgment creditor may, within ten years from entry of a judgment, move the court for an extension of the judgment for an additional ten years. The same procedure can be repeated within any ten year period until the judgment is satisfied. Tenn. R. Civ. P. 69.04.

41.05 UNSATISFIED EXECUTIONS

If an officer cannot satisfy the debt upon execution before the return date, the officer must return the execution and an alias or pluries execution will issue. T.C.A. § 26-3-114. Such alias or pluries execution shall show endorsements indicating the amounts paid upon any former execution, and specifying the amount for which the sureties are bound, if less than the unsatisfied balance. *Id.*

41.06 SALE

Provisions which set out the specific process and procedures for conducting a land sale, including requirements for redemption of such realty, are found in T.C.A. § 26-5-101 *et seq.* When corporate stock is sold, the executing officer executes an assignment to the purchaser and the return on the execution is notice to all the world of the sale. The corporate officer, when shown such assignment, must make the transfer on company books. T.C.A. § 26-5-106. Special provision is made for the sale of liquors. T.C.A. § 26-5-107.

41.07 FOREIGN JUDGMENTS

Tennessee has enacted the Uniform Enforcement of Foreign Judgments Act. T.C.A. §§ 26-6-101 *et seq.* A copy of a foreign judgment authenticated in accordance with the law may be filed in the office of any chancery or circuit court. It has the same effect and is subject to the same rules that apply to other judgments in the state. T.C.A. § 26-6-104. This procedure does not prohibit a judgment creditor from bringing an action to enforce the creditor's judgment instead of proceeding under the foreign judgments act.

41.08 CRIMINAL CASES

All personalty exemptions apply to criminal as well as civil cases. T.C.A. § 26-2-113.

CHAPTER 42

GARNISHMENT

Contents **Section**

42.01 IN GENERAL

One of the remedies that may be implemented at the commencement of and during the course of an action for the purpose of securing satisfaction of a judgment is garnishment. Tenn. R. Civ. P. 64. Tennessee has adopted the Personal Property Owner's Rights and Garnishment Act of 1978 which is codified in Tennessee Code Annotated Section 26-2-101 *et seq.* Garnishment refers to any legal or equitable procedure through which the earnings of an individual are required to be withheld for payment of any debt. T.C.A. § 26-2-102.

42.02 PROPERTY AFFECTED

All property, debts, and effects of and in the possession or under the control of the garnishee at the time notice is served (or under the garnishee's control if acquired subsequent to the service of notice but before judgment) are subject to garnishment to satisfy the garnishee's debt. T.C.A. § 26-2-202. The words "property, debts, and effects" include real estate and things to which the person may have a legal right whether due or not, judgments before a court, and money or stocks in an incorporated company. T.C.A. § 26-2-201.

Garnishment of salaries, wages, or other compensation due from the state or from any county or municipality to any employee is permissible. A special procedure for these garnishments is set forth in T.C.A. § 26-2-221. Certain earnings, however, are exempt from garnishment. *See* T.C.A. §§ 26-2-104 to -111 (concerning exemptions). For example, pensions, some retirement funds, certain insurance benefits, and some child support payments are exempt from garnishment. *Id.*

42.03 ATTACHMENT PROCEDURE

To attach by garnishment, written notice is left for the defendant's debtor or the person holding the defendant's property (garnishee) that appearance is required before the court at a certain time and place to respond to questions about the defendant's property. The garnishee may answer in person or in writing. T.C.A. §29-7-103. The form for the

summons and notice are set out in T.C.A. § 26-2-203. The garnishee is required to retain possession of all of defendant's property. T.C.A. § 26-2-203; T.C.A. § 29-7-104. The garnishee may be required to answer under oath questions pertaining to the defendant's property. The garnishee's answer is not conclusive. T.C.A. § 26-2-205.

If the court determines that the garnishee holds property of the defendant's the court may enter judgment and execution for the property. T.C.A. § 26-2-206. If the examination makes it appear that others hold defendant's property, the plaintiff may request that they be given notice and that similar proceedings commence. T.C.A. § 26-2-207. If the garnishee fails to appear, a conditional judgment is rendered against the garnishee. If the garnishee, upon notice, fails to appear and show cause why judgment should not be rendered, the judge must make the conditional judgment a final judgment holding the garnishee liable for the plaintiff's entire debt and costs. T.C.A. § 26-2-209.

42.04 EXECUTION PROCEDURE

Anyone may be summoned in writing as a garnishee to appear in the court which issued the execution or to which the execution is returnable. The time set for appearance must be within ten days of issuance. If the court has issued the execution, the court shall set the time at which the garnishee shall appear. The summons to the garnishee must notify the garnishee to determine whether the defendant's property is in his or her possession and to furnish a copy of the summons to the defendant either by mailing it to the last address appearing in the garnishee's records or by actual delivery. T.C.A. § 26-2-203.

42.05 FEDERAL RESTRICTIONS

In its capacity to regulate interstate commerce, Congress has enacted several restrictions on state garnishment laws. The federal statutes are not an attempt to create or establish garnishment proceedings, but are meant only to preempt state laws that are less restrictive, thus guaranteeing every debtor a minimum of protection regardless of residence.

The major restrictions and the comparable Tennessee statutes are as follows:

FEDERAL	TENNESSEE
The exemption of personal earnings is 25% of disposable earnings OR the excess over the Federal minimum wage multiplied by thirty, 15 U. S. C. A. 1673.	T.C.A. § 26-2-106

42.06 RIGHTS OF GARNISHEE

TENNESSEE

A garnishee has rights established by Tennessee statutory law. These rights are set out in T.C.A. §§ 29-7-101 – 119.

FEDERAL

A garnishee has rights established by federal statutory law. These rights are set out in 15 U.S.C.A. 1673 and 15 U.S.C.A. 1674.

CHAPTER 43

STAY OF PROCEEDINGS TO ENFORCE JUDGMENT

Contents **Section**

43.01 INITIAL STAY AND ADDITIONAL STAY

Executions on judgments cannot be issued until the expiration of thirty days following the entry of the judgment. Actions involving removal of public officers, custody of minor children, injunctions and receiverships are not subject to the initial stay. Tenn. R. Civ. P. 62.01.

The execution on a judgment is also stayed for thirty days after the entry of an order made upon a timely motion for judgment in accordance with a directed verdict motion, motion to amend or make additional findings of fact, motion to alter or amend the judgment, or a motion for a new trial. Tenn. R. Civ. P. 62.02.

43.02 STAY AND BOND PENDING APPEAL

If an appeal is taken of any action, other than alimony or child support actions and those specified in Rule 62.01, the appellant may, upon the giving of an appropriate bond, obtain a stay of execution on the judgment pending the appeal. Such bond is within the court's discretion and upon such terms as the court deems appropriate to secure the other party to the action. Tenn. R. Civ. P. 62.03, 63.04. The bond must be sufficiently secured. Tenn. R. Civ. P. 62.05. Bond requirements for money judgments are found in Tenn. R. Civ. P. 62.05(1). For judgments requiring possession, delivery, sale, or assignment of real or personal property, the bond requirements are set out in Tenn. R. Civ. P. 62.05(2).

The judge may also exercise discretion to allow the stay of an execution on a bond amount that is less than that specified in Rule 62.05 for good cause shown, upon a consideration of the appropriate factors including financial condition of the appealing party. A party proceeding as a poor person may proceed without giving any security under the terms of Rule 18 of the Tennessee Rules of Appellate Procedure. Those provisions allow individuals who have proceeded as a poor person at trial to continue to do so on appeal unless the trial judge finds and rules in writing that the person is not entitled to so proceed. A party who did not proceed as a poor person at trial, but wishes to do so on appeal, must first request permission to do so from the trial judge. If the trial judge denies permission, the party may request permission in the appellate court. Tenn. R. Civ. P. 62.05(2).

Tenn. R. Civ. P. 62.06 addresses the granting of a stay where the appellant is a state, county or municipal governmental entity. Tenn. R. Civ. P. 62.07 specifies that the rules concerning the granting of a stay to enforce judgment are not to serve as a limit to the power of a trial court judge. Similarly, Tenn. R. Civ. P. 62.08 specifies that such rules are

not to serve as a limit to the power of an appellate court judge. Finally, Tenn. R. Civ. P. 62.09 addresses the application of the stay provisions/rules where multiple claims and/or multiple parties are concerned.

CHAPTER 44

ENFORCEMENT OF SPOUSAL AND CHILD SUPPORT

Contents **Section**

44.01 IN GENERAL

A judge granting an absolute divorce or decreeing a perpetual or temporary separation may order spousal and child support. T.C.A. § 36-5-101. An order for support is a judgment enforceable as any other judgment. T.C.A. § 36-5-101(f)(1). If the amount due is not paid by the due date, the unpaid amount becomes a judgment for that amount which accumulates interest at the rate of twelve percent from the date of arrearage. The accumulated interest is considered child support. T.C.A. § 36-5-101(f)(1).

44.02 IN-STATE ENFORCEMENT

All orders for child support issued or modified after July 1, 1994, must include an order for an immediate assignment of wages. T.C.A. § 36-5-501. This mandate is subject to three exceptions: (1) the judge makes a finding in a case modifying support that a wage assignment would not be in the best interests of the child and finds that the support has been timely; (2) the parties consent in writing and the court approves; or (3) the support order is being enforced by the state and the Department of Human Services agrees to the exemption. T.C.A. § 36-5-501(a)(2). If a wage assignment is not originally ordered, it may be requested by affidavit and activated by the clerk if the support is not paid on the due date. T.C.A. § 36-5-501(b)(1)(D).

In proceedings under the Uniform Family Support Act, T.C.A. § 36-5-2001 *et seq.*, discussed below, an income assignment issued by another state may be sent to an employer in this state without first registering the order in this state or filing a similar petition in this state. The employer is required to treat the order as one received from this state if the order appears regular on its face. T.C.A. § 36-5-2501. If the obligor wishes to contest the order, the obligor must give notice of contest to the support enforcement agency that is assisting the obligee, each employer that has directly received an income-withholding order relating to the obligor, and the person designated in the order to receive the payments. T.C.A. § 36-5-2506.

Alternatively, if a person who owes a child support obligation (obligor) is more than thirty days in arrears, the clerk may issue, upon written request (by the custodial parent or guardian of the children), a summons for the person, or, in the court's discretion, an attachment setting a bond of not less than $250 up to the amount of the arrearage. The court may also require the giving of bond to secure other support obligations, which may be forfeited upon failure to appear. T.C.A. § 36-5-101(f)(2). The court may then conduct proceedings to determine whether the person is in willful contempt of the court's support order. T.C.A. § 36-5-101(f)(3). The court may also award reasonable attorney fees and costs for the benefit of the party who was forced to bring the action to enforce the court's order. T.C.A. § 36-5-101(l)(1).

Support orders may also be enforced by interception of federal income tax refunds and by administrative order of wage assignment issued pursuant to a court order. T.C.A. § 36-5-103(d)-(e). An obligee may also seek the revocation of certain state licenses for failure to comply with a child support order. T.C.A. § 36-5-101(f)(5); s*ee also* T.C.A. § 36-5-701 *et seq.*

By operation of law, a lien arises against real and personal property in the state owned by an obligor who owes child or spousal support in any case that is being enforced by the Department of Human Services. T.C.A. § 36-5-901. Special provisions regarding the operation of support liens are set forth in Tennessee Code Annotated sections 36-5-901 *et seq.* The available methods of enforcement include seizing payments due to the obligor, attaching and seizing the obligor's assets held in financial institutions, attaching retirement funds, and forcing the sale of property. T.C.A. § 36-5-904. The department also can issue an administrative order of seizure directed to any person or entity with assets of the obligor. T.C.A. § 36-5-905.

44.03 INTERSTATE ENFORCEMENT

The law requires the Department of Human Services to use the same enforcement procedures in response to a request from another state to enforce support duties as it uses for intrastate cases. T.C.A. § 36-5-1201. This includes searching various available state databases to determine whether information is available about the obligor.

44.04 JURISDICTION - UNIFORM INTERSTATE FAMILY SUPPORT ACT

Tennessee also has adopted the Uniform Interstate Family Support Act. T.C.A. §§ 36-5-2001 *et seq*. A court in Tennessee may exercise personal jurisdiction over a nonresident individual or that individual's guardian or conservator in a proceeding to establish, modify, or enforce a support order or to determine parentage if: (1) the individual is served with notice in the state; (2) the individual consents to jurisdiction either by general appearance, consent, or by filing a responsive document; (3) the individual resided with the child in this state; (4) the individual resided in the state and provided prenatal expenses or support for the child; (5) the child resides in the state as a result of the acts or directives of the individual; (6) the individual engaged in sexual intercourse in the state at which time the child may have been conceived; (7) the individual asserted parentage in the putative father registry in this state; or (8) any other basis consistent with the constitution exists for personal jurisdiction. T.C.A. § 36-5-2201.

Tennessee is both an initiating and responding state for purposes of the Act. If a pleading has been filed in another state or foreign country, the court in Tennessee may exercise jurisdiction only if the petition filed in Tennessee is filed within the time required to respond in the other state or foreign country and challenges jurisdiction; the contesting party challenges jurisdiction in the other state; and Tennessee is the home state of the child. Similarly, if a petition is pending in this state and the contesting party files a petition in another state or foreign country within the time required to respond in Tennessee, challenging jurisdiction, and that state or foreign country is the home state, Tennessee courts shall not exercise jurisdiction. T.C.A. § 36-5-2204.

A Tennessee court issuing a lawful support order maintains continuing, exclusive jurisdiction over the child support order if the obligor, the obligee, or the child resides in the state, or until all parties file a written consent to allow another state to assume jurisdiction. T.C.A. § 36-5-2205. Continuing, exclusive jurisdiction over a spousal support order remains as long as the support obligation exists.

When different courts have issued multiple orders in support cases, the Act provides rules for determining which order should be recognized. T.C.A. § 36-5-2207.

44.05 COMMENCEMENT

An individual or a support enforcement agency may file a proceeding under the Act either in a state with personal jurisdiction over the obligor or in an initiating tribunal for forwarding to a responding tribunal or by filing a petition or comparable proceeding directly in a tribunal or another state or foreign country which has or can obtain personal jurisdiction over the respondent. T.C.A. § 36-5-2301(b). If a petition is filed in an initiating tribunal, the tribunal is required to forward the petition and accompanying documents to the responding tribunal or to the appropriate support enforcement agency in the responding state or foreign country, or if the agency is unknown, to the state information agency with a request to forward to the appropriate tribunal and acknowledge receipt. T.C.A. § 36-5-2304(a). If requested by the responding tribunal, a tribunal of this state shall issue a certificate or other document and make findings required by the law of the responding state. If the responding tribunal is in a foreign country, upon request the tribunal of this state shall specify the amount of support sought, convert that amount into the equivalent amount in the foreign currency under the applicable official or market exchange rate as publicly reported, and provide any other documents necessary to satisfy the requirements of the responding foreign tribunal. T.C.A. § 36-5-2304(b).

If an obligee wishes to gain enforcement of a support order in a responding tribunal, the obligee may (1) have any income assignment order sent directly to the obligor's employer for compliance, (2) provide the order to the support enforcement agency in the state for registration, or (3) submit the order for registration and enforcement along with a sworn statement to the tribunal in the responding state or foreign country. T.C.A. §§ 36-5-2502, -2507, -2602.

44.06 FORM AND PROCEDURE

The petition to establish or modify a support order must be verified and, unless otherwise ordered, must contain the name, residential address, and social security number of the obligor and the petitioner, and the name, sex, residential address, social security number, and date of birth for each child for whom support is sought. T.C.A. § 36-5-2311(a). A certified copy of any support order in effect must accompany the petition. The petition must specify the relief sought. T.C.A. § 36-5-2311(b).

Costs and attorney fees may be assessed against an obligor if the petitioner prevails. T.C.A. § 36-5-2313(b). If the court determines that the hearing was requested for the purposes of delay (which is presumed if a support order is confirmed or enforced without change), the court is required to order the payment of costs and fees. T.C.A. § 36-5-2313(c).

The Act sets out special rules of evidence and procedure. For example, the physical presence of the obligor is not a prerequisite to the establishment, enforcement, or modification of a support order by a responding tribunal. T.C.A. § 36-5-2316. A verified petition and affidavit substantially complying with the federally mandated forms, and a document incorporated by reference, which would not be excluded by the hearsay rule if given in person, is admissible if given under oath by a party or witness residing in another state. T.C.A. § 36-5-2316(b). Likewise, a copy of the child support payment records certified as "true" by the custodian is admissible to establish whether payments were made in the responding tribunal. T.C.A. § 36-5-2316(b). Special rules also apply to electronically transmitted documentary evidence and electronic and audio-visual depositions. T.C.A. § 36-5-2316(e) – (f).

If in a proceeding under the Act, a witness refuses to testify on the basis of the Fifth Amendment, the fact finder may draw an inference from the refusal. Neither the spousal privilege nor the parent-child or husband-wife immunity defense applies in proceedings under the Act. T.C.A. 36-5-2316 (g) – (i).

The Act provides a separate procedure for inter-county enforcement of support orders. Primarily, this portion of the statute allows for transfers without re-filing, jurisdiction of the court to which the filing is transferred, and admission of the certified court orders from the transferring court without the need for the record keeper's testimony. T.C.A. §§ 36-5-3001 *et seq*.

44.07 OTHER REMEDIES

Remedies under the act are in addition to and not instead of other remedies. T.C.A. § 36-5-2103.

44.08 CRIMINAL REMEDIES

The failure to support is also a criminal offense in Tennessee. T.C.A. § 36-5-104. The governor may demand the surrender of one found in another state who is charged criminally in

this state with having failed to support. T.C.A. § 36-5-2801(b)(1). Our governor's responsibility is the same upon receipt of a demand from another state. T.C.A. § 36-5-2801(b)(2).

CHAPTER 45

POST-TRIAL MOTIONS AND APPEALS

Contents **Section**

45.01 POST-TRIAL MOTIONS

The Tennessee Rules of Civil Procedure provide for post-trial motions in both Rules 59 and Rule 60. Rule 59 provides for motions for judgment in accordance with a directed verdict motion, motions for additional or altered findings of fact, motions for new trial, and motions to alter or amend the judgment. These are the only motions that extend the time for taking an appeal in Tennessee. Tenn. R. Civ. P. 59.01. They must be filed and served within thirty days after judgment has been entered. Tenn. R. Civ. P. 59.02. A judgment is deemed entered pursuant to Tenn. R. Civ. P. 58.

If a motion for new trial is based upon affidavits, the affidavits must be filed and served with the motion unless otherwise authorized by the court. Tenn. R. Civ. P. 59.03. The opposing party has ten days to reply unless the court grants or the parties stipulate to an extension for a maximum for twenty days. If the motion is granted on the grounds that the verdict was contrary to the weight of the evidence, either party may request that the new trial be conducted by a different judge or chancellor. Tenn. R. Civ. P. 59.06.Tenn. Code Ann. § 16-15-727 provides for a process whereby judgment orders may be amended in the General Sessions Courts as set out in Tenn. R. Civ. P. 60.01 and 60.02.

A court may alter or amend a judgment or grant a new trial on its own motion, or after giving the parties notice and an opportunity to be heard on a timely filed motion for new trial, the court may grant such motion on grounds not stated in the motion. In either case, the grounds for such action shall be stated specifically in the order. Tenn. R. Civ. P. 59.05.

Rule 60 also provides for post-trial motions when relief is required for orders or judgments due to clerical mistakes, inadvertence, excusable neglect, fraud or other enumerated reasons. The rule requires that the motion be made within a reasonable time, but if the motion is based upon mistake, inadvertence, excusable neglect, fraud, misrepresentation, or misconduct of the adverse party, such motion must be made within one year of the judgment. Tenn. R. Civ. P. 60.02. Motions under Rule 60 do not affect the finality of the judgment or suspend its operation. The court may, however, enter an order doing so if the circumstances require it.

45.02 APPEALS

As in criminal cases, appeals are governed by the Tennessee Rules of Appellate Procedure. An appeal as of right lies from every final judgment entered by a trial court.

Tenn. R. App. P. 3(a). An appeal is perfected by the filing of a notice of appeal within thirty days after the entry of judgment in the trial court. The notice of appeal is filed with the clerk of the trial court. Tenn. R. App. P. 3 – 4. The trial court is required to approve the transcript and authenticate the exhibits as soon as practicable after they are filed, but in no event later than thirty days following the period of time allowed for the appellee to object to the compiled record. Tenn. R. App. P. 24(f).

CHAPTER 46

ORDERS OF PROTECTION

Contents **Section**

46.01 IN GENERAL

Tennessee law provides protection for anyone who has been subjected to or threatened with abuse by a current or former spouse; someone with whom he/she has lived or is currently living; someone he/she has dated or is currently dating; someone with whom he/she has or had a sexual relationship; someone to whom he/she is related by blood or adoption; someone to whom he/she is related or was formerly related by marriage; or a child of a person who falls within any of these categories. T.C.A. § 36-3-601. Abuse means "inflicting, or attempting to inflict, physical injury on an adult or minor by other than accidental means, placing an adult or minor in fear of physical harm, physical restraint, malicious damage to the personal property of the abused party, including inflicting, or attempting to inflict, physical injury on any animal owned, possessed, leased, kept, or held by an adult or minor, or placing an adult or minor in fear of physical harm to any animal owned, possessed, leased, kept, or held by the adult or minor." *Id*.

Protection is also provided for anyone who has been subjected to, threatened with, or placed in fear of sexual assault or stalking. *Id*.

46.02 PROCEDURE

The person seeking protection must file a sworn petition alleging abuse. The AOC, in consultation with the domestic violence coordinating council, has developed the forms for orders of protection. The clerk's office must make these forms available to individuals who are seeking an order of protection. T.C.A. § 36-3-604. However, petitioners are not limited to the use of these forms and may present to the court any legally sufficient petition in whatever form. *Id*.

The clerk's office is required to assist a person seeking protection who is proceeding *pro se*. Moreover, a petition filed by a *pro se* petitioner must be liberally construed in the petitioner's favor. *Id*.

46.03 EX PARTE ORDERS

Upon the filing of a petition, the court may, for good cause shown, issue an *ex parte* order of protection. A finding of immediate and present danger of abuse shall constitute good cause. T.C.A. § 36-3-605. A copy of the petition and *ex parte* order as well as notice of the date set for the hearing must be served on the respondent at least five days prior to the hearing. The notice must advise the respondent of the right to be represented by counsel.

In every case, unless the court finds that the action would create a threat of serious harm to the minor, when a petitioner is under 18 years of age, a copy of the petition, notice of hearing and any *ex parte* order of protection shall also be served on the parents of the minor child, or in the event that the parents are not living together and jointly caring for the child, upon the primary residential parent.

46.04 HEARINGS

If an *ex parte* order is issued, the respondent is entitled to a hearing, which must occur within 15 days of service of the *ex parte* order of protection. At the hearing, the court must either dissolve the *ex parte* order or extend the protective order for a definite period not to exceed one year. T.C.A. § 36-3-605. Further hearings and extensions may occur.

If an *ex parte* order has not been entered prior to the hearing but the petitioner establishes the allegations of abuse, stalking, or sexual assault by a preponderance of the evidence at the hearing, the court may issue an order of protection for a definite period not to exceed one year. *Id*.

If a respondent is properly served and afforded the opportunity for a hearing and is found to be in violation of the order, the court may extend the order of protection up to five years. If a respondent is properly served and afforded the opportunity for a hearing, and is found to be in a second or subsequent violation of the order, the court may extend the order of protection up to 10 years. No new petition is required to be filed in order for a court to modify or extend an order. *Id*.

46.05 SERVICE

Copies of orders of protection, modifications, and dismissals are required to be issued to the petitioner, the respondent, and local law enforcement agencies in the jurisdiction where petitioner resides. Specific requirements for service on the respondent are contained in T.C.A. § 36-3-609. If a party lives outside the county in which the order was issued, the clerk may transmit the order to the sheriff in the appropriate county via facsimile or other electronic transmission. *Id*.

46.06 SCOPE AND ENFORCEMENT

The scope of a protective order is set out in T.C.A. § 36-3-606. Enforcement of orders of protection is provided for in T.C.A. § 36-3-610.

46.07 COSTS

No victim shall be required to bear the costs, including any court costs, filing fees, litigation taxes or any other costs associated with the filing, issuance, registration, service, dismissal or nonsuit, appeal or enforcement of an *ex parte* order of protection, order of protection, or a petition for either such order, whether issued inside or outside the state. If the court, after the hearing, issues or extends an order of protection, all court costs, filing fees, litigation taxes and attorney fees shall be assessed against the respondent. T.C.A. § 36-3-617.

If the court does not issue or extend an order of protection and the court finds by clear and convincing evidence that the petitioner is not a domestic abuse victim, stalking victim, or sexual assault victim (such determination not being based on the fact that the petitioner requested that the petition be dismissed, failed to attend the hearing or incorrectly filled out the petition) and the court finds by clear and convincing evidence that the petitioner knew that the allegation of domestic abuse, stalking, or sexual assault was false at the time the petition was filed, the court may assess all court costs, filing fees, litigation taxes and attorney fees against the petitioner, because the petitioner was not found to be a victim. *Id*.

46.08 OUT-OF-STATE ORDERS

Any valid protective order related to abuse, domestic abuse, or domestic or family violence that is issued by a court of another state, tribe, or territory is entitled to full faith and credit by the courts of this state if the requirements of T.C.A. § 36-3-622 regarding notice and opportunity to be heard have been met. In order to secure enforcement of a foreign order of protection, the petitioner may present a certified copy of the foreign order to the clerk of the court having jurisdiction over protective orders. No fees or costs shall be charged. T.C.A. § 36-3-622.

46.09 FIREARMS

If an order of protection is granted in a manner that fully complies with 18 U.S.C. § 922(g)(8), the respondent will be required to terminate physical possession of all firearms within 48 hours of issuance of the order. It is a criminal offense for any such respondent to be in possession of a firearm while the order is in effect. Upon issuance of the order of protection, the court shall instruct the respondent to complete and file an “Affidavit of Firearm Dispossession”. T.C.A. § 36-3-625.

CHAPTER 47

ALTERNATIVE DISPUTE RESOLUTION

Contents **Section**

47.01 IN GENERAL

Pursuant to Section 2 of Tennessee Supreme Court Rule 31 ("Rule 31"), parties in any civil action (except forfeitures of seized property, civil commitments, adoption proceedings, habeas corpus and extraordinary writs, or juvenile delinquency cases) may be ordered to participate in a judicial settlement conference or mediation upon motion of either party or by the court's own motion. In addition, with consent of the parties a court may order a case evaluation, non-binding arbitration, mini-trial, summary jury trial, or other appropriate alternative dispute proceedings. The term "extraordinary writs" does not encompass claims or applications for injunctive relief. See Section 4 of Rule 31 regarding the procedure for selecting a Rule 31 Neutral ("neutral").

47.02 COSTS

Pursuant to Section 8 of Rule 31, the costs of any Rule 31 ADR Proceeding ("ADR proceeding"), including the costs of the services of a neutral may, at the neutral's request, be charged as court costs. The court has the authority to waive or reduce those costs. If an appeal of the case is filed, the parties shall advise the court in their appellate briefs whether the neutral requested that the cost of the neutral's services be included in the court costs.

47.03 QUALIFIED NEUTRALS AND THEIR RESPONSIBILITIES

In order to participate as a neutral in a Rule 31 ADR proceeding, an individual must qualify under the provisions of the rule. Among the requirements for continued listing as a Rule 31 Mediator ("mediator"), which is a type of neutral, each mediator must be available to conduct three *pro bono* mediations per year, not to exceed 20 total hours. At the initiation of a mediation, the court may, upon a showing by one or more parties of an inability to pay, direct that the mediator serve without pay. No mediator will be required to conduct more than three *pro bono* proceedings or serve *pro bono* for more than 20 hours in any continuous 12-month period.

47.04 COMPENSATION

With the exception of the *pro bono* requirement and the fee waiver/reduction options noted above, neutrals are entitled to reasonable compensation for their services. However, pursuant to Tennessee Supreme Court Rule 38 and Tennessee Code Annotated Title 36, Chapter 6, Part 4, there may be circumstances in which a neutral will provide services to indigent persons at reduced cost or no cost. Subject to the availability of funds, the neutral will be compensated for those services pursuant to Rule 38 and T.C.A. § 36-6-413 (Divorcing Parent Education and Mediation Fund).

47.05 RULE 31 MEDIATORS

No person shall act as a Rule 31 mediator without first being listed by the Alternative Dispute Resolution Commission ("ADRC"). To be listed, mediators must pay application fees set by the ADRC and comply with the qualification and training requirements set forth in Rule 31. A database of actively listed mediators is maintained on the AOC's website and can be accessed at the following address: www.tncourts.gov/programs/mediation/find-mediator.

CHAPTER 48

PARENTING PLANS

Contents **Section**

48.01 IN GENERAL

Tennessee law requires the filing of a parenting plan in all divorce cases where there are minor children of the marriage. T.C.A. §§ 36-6-401 *et seq*. The parenting plan, the purpose of which is to assign responsibility for parenting, replaces the longstanding notions of sole custody and visitation with the ideas of primary residential parent and parenting time. The parenting responsibilities allocation agreed to by the parties will be accepted by the court if it is consistent with any limitations on parental decision making mandated by law; is voluntary and knowing; and is in the child's best interest. T.C.A. § 36-6-407.

In certain limited circumstances, alternative dispute resolution methods may not be utilized in the parenting plan or as the mechanism for approval of the plan. These exceptions are set out fully in T.C.A. § 36-6-406.

48.02 CONTENTS OF PARENTING PLAN

As provided by statute, a parenting plan shall (1) provide for the child's changing needs in a way that minimizes the need for modification of the plan; (2) establish the authority and responsibility of each parent; (3) minimize the child's exposure to harmful parental conflict; (4) provide for a process for dispute resolution before court action unless precluded by law; (5) allocate decision making authority regarding the child's education, health care, extracurricular activities, and religions upbringing; (6) provide that each parent may make day-to-day decisions regarding the child while the child is residing with the parent; (7) provide that when mutual decision making is designated but cannot be accomplished, each parent will make a good-faith effort to resolve the issue through appropriate dispute resolution processes; (8) require an annual report of income as defined by the child support guidelines; and (9) specify that a parent shall make appropriate transportation arrangements if the parent does not have a valid driver license. A permanent parenting plan must also include a residential schedule. T.C.A. § 36-6-404.

48.03 TEMPORARY PARENTING PLANS

Courts must incorporate a temporary parenting plan in any temporary order of the court in actions for divorce, separation, annulment, or separate maintenance involving a minor child. The plan must include the provisions set forth above which are applicable at the time the temporary plan is prepared and must include a residential schedule. If the parties agree to a temporary parenting plan, a written plan is not required. If they cannot agree, on either's request, the court may order mediation to establish a temporary plan unless the law prohibits alternative dispute resolution. T.C.A. § 36-6-403. If mediation is not appropriate, an expedited hearing may be requested to establish a temporary plan. In either mediation or in an expedited hearing, each party must submit a proposed temporary plan, a verified statement of income, and a verified statement that the plan is proposed in good faith and is in the child's best interest. If only one party submits a plan, that party may request adoption by default.

48.04 PERMANENT PARENTING PLANS

Any final or modified decree in divorce, separation, annulment, or separate maintenance proceedings involving a minor child must incorporate a permanent parenting plan that includes all of the contents set forth above. If the parties cannot agree on a permanent parenting plan, the court may order, or either party may request, resolution through alternative dispute resolution proceedings pursuant to Rule 31 of the Tennessee Supreme Court Rules. T.C.A. § 36-6-404.

48.05 MODIFYING PARENTING PLANS

When a modification of a parenting plan is sought, a proposed parenting plan must be filed and served with the modification petition and with the response to the petition. If the modification applies only to the amount of child support, a proposed plan is not required, but the obligor parent must file a verified statement of income pursuant to the child support guidelines and other related provisions. T.C.A. § 36-6-405(a).

48.06 OTHER PROVISIONS

Every parent who seeks a divorce must attend a Parent Education Seminar, unless excused by the court. The seminar is intended to help parents focus on the potential effects that divorce and separation may have on children, various parenting arrangements, communication techniques, and alternatives to the judicial process. No court shall deny granting a divorce for failure of one or both parties to attend the seminar. T.C.A. § 36-6-408.