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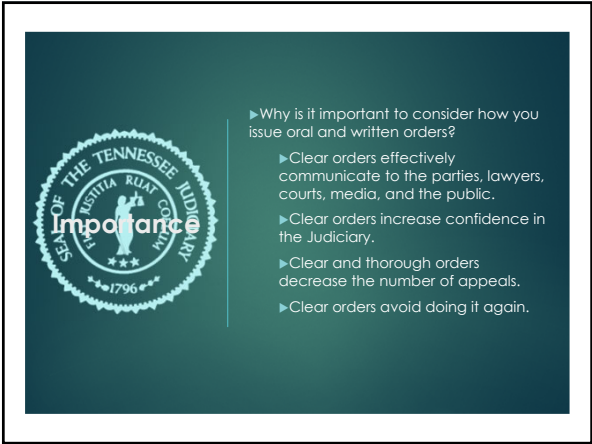
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**Importance**

► Why is it important to consider how you issue oral and written orders?

► Judicial opinions "are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic."

► See *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 313 (Tenn. 2014) (citation omitted).

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**Step 1:**  
Know the  
Standard of  
Appellate  
Review

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**Standards of  
Appellate  
Review**

► Why is knowing the standard of appellate review helpful?

► The standards can guide the decision-making process and help ensure the orders contain the essential information.

► It helps keep the issue resolved, rather than coming back for another hearing.

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**Standards of Appellate Review**

**Review of Factual Findings**

► Review of your factual findings:

► Civil Cases: Tenn. R. App. P. 13(d)

► Review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.

► Criminal Cases:

► The same is largely true for criminal cases where the court makes findings.

► See *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996) ("[A] trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." ).

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**Standards of Appellate Review**

**Abuse of Discretion**

► Abuse of Discretion Review:

A court abuses its discretion when it causes an injustice to the party challenging the decision by

- (1) applying an incorrect legal standard,
- (2) reaching an illogical or unreasonable decision, or
- (3) basing its decision on a clearly erroneous assessment of the evidence.

See *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citations omitted).

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**Standards of Appellate Review**

**Abuse of Discretion**

► Abuse of Discretion Review (cont'd):

When practical, under an abuse of discretion standard of review,

- (1) Identify the legal standard on the record;
- (2) Explain what options are open and why a particular option is selected;
- (3) Identify the factual findings upon which the and, if the facts depend on credibility, say so.

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**Standards of Appellate Review**  
**Abuse of Discretion**

► Abuse of Discretion Review (cont'd):

► **Civil Cases:**

- Motions made pursuant to TRCP 52.02, 59 and 60
- Awards of alimony
- Decision to impose sanctions and determination of the appropriate sanction
- Grant or denial of permissive intervention
- Rulings on discovery issues
- Rulings on continuances
- Rulings on evidentiary issues
- Determination of whether to grant a mistrial
- Setting child support
- Custody determination or decisions concerning a parenting schedule

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**Standards of Appellate Review**  
**Abuse of Discretion**

► Abuse of Discretion Review (cont'd):

► **Criminal Cases:**

- Most evidentiary rulings
- Decision to change venue
- Appointment of interpreter
- Severance of cases or defendants
- Amendment of the indictment
- Denial of expert funding
- Conduct of trials, including excusal of jurors, examination of witnesses, and arguments of counsel
- Rule 35 Motions

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**Standards of Appellate Review**  
**Mixed Standards**

► **Mixed Standards** of Appellate Review:

► Sometimes, the standard of appellate review is mixed.

► **Attorney's Fees Example:**

- Regarding whether the Wife was entitled to a grant of attorney's fees under the MDA, the proper standard of review is de novo because the issue is a question of law. The proper standard for reviewing the **amount** of the fees awarded under the MDA is abuse of discretion.
- Conversely, with regard to a trial court's award of attorney's fees under section 36-5-103(c), the standard of review is abuse of discretion for **both** the issue of whether the party is entitled to an award **and** the issue of the amount of the fees awarded.

► See **Eberbach v. Eberbach**, 535 S.W.3d 467, 479 (Tenn. 2017).

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Standards of Appellate Review  
Mixed Standards

► **Mixed Standards** of Appellate Review(cont'd):

► Hearsay Example:

- The standard of review for rulings on hearsay evidence has "multiple layers."
- The trial court's "factual and credibility findings" when considering whether a statement is hearsay "are binding on a reviewing court unless the evidence in the record preponderates against them."
- "Once the trial court has made its factual findings, the next questions—whether the facts prove that the statement (1) was hearsay and (2) fits under one [of] the exceptions to the hearsay rule—are questions of law subject to de novo review."
- See **Kendrick v. State**, 454 S.W.3d 450, 479 (Tenn. 2015).

► **Motions to Suppress Evidence**

- See, e.g., **State v. Echols**, 382 S.W.3d 266, 277 (Tenn. 2012).

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Standards of Appellate Review  
Conditional Standards

► **Conditional Standards** of Appellate Review:

► Sometimes, the standard of appellate review will depend upon the trial court's actions:

- Tenn. R. Evid. 404(b):
  - If the trial court substantially complied with Tennessee Rule of Evidence 404(b), its ruling will overturn the ruling only if the trial court abused its discretion.
  - See **State v. DuBose**, 953 S.W.2d 649, 652 (Tenn. 1997)
- Sentencing Decisions. See **State v. Bise**, 380 S.W.3d 682, 705 (Tenn. 2012)
- Probation Revocation. See **State v. Dagnan**, 641 S.W.3d 751, 759 (Tenn. 2022)

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THE TENNESSEE  
FIAT JUSTITIA RUAT COELUM  
1796

**Step 2:**  
Advanced  
Preparation

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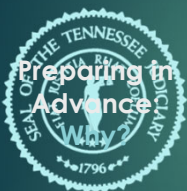
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### Preparing in Advance

- ▶ Why would a judge prepare for a hearing in advance?
  - ▶ Preparation makes for a better hearing and a better order.

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### Preparing in Advance

- ▶ Back to Basics:
  - ▶ Read the pleadings, the legal issues, and the relevant parts of the record.
  - ▶ Review the applicable law, including especially:
    - ▶ Burdens of proof
    - ▶ Legal standards or criteria

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### Preparing in Advance

- ▶ Back to Basics (cont'd):
  - ▶ Consider preparing a rough draft or outline
    - ▶ Incorporate applicable legal standards and basic facts
  - ▶ Consider developing checklists or forms for common issues, particularly involving statutory factors:
    - ▶ Custody, alimony, property division
    - ▶ Bail Modification

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**Step 3:**  
Know When to  
Trust the Lawyers  
and the Parties

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**Lawyers and Parties Assumptions**

- Principal danger of relying on the parties:
  - Don't assume the lawyers know
    - the applicable law; or
    - What is required to meet the burden of production
  - The burden is always on the court to identify and apply the correct law.

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**Lawyers and Parties Deficient Performance**

- (Not so) Hypothetical:
  - Your pre-hearing preparation reveals the court should consider several factors to decide the particular legal issue.
  - But, the attorneys have not introduced proof about those factors or, by blind luck, only asked about a few.
  - What do you do when the lawyers don't put on the evidence you need to make a decision?

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**Lawyers and Parties**  
Beneficial Performance

► (Not so) Hypothetical (cont'd):

► What does the judge do?

- Identify the burdens of proof
- Identify the missing factors in your analysis
- Explain how the missing evidence affects your ability to decide the issue under the law.

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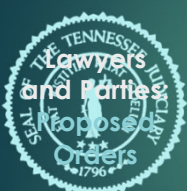
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**Lawyers and Parties**  
Proposed Orders

► Orders Submitted by Counsel:

- READ the Order.
- Review proposed orders carefully to ensure the order identifies **your view** of the relevant facts and law.
- Make sure the order includes **only** matters appropriate for the determination.
- Where **objections** are present, consider revising the proposed order to address the objections.

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**Lawyers and Parties**  
Proposed Orders

► Orders Submitted by Counsel (cont'd):

- "We wish to point out that before adopting findings prepared by counsel, the trial judge should carefully examine them to establish that **they accurately reflect [the judge's] views and conclusions, and not those of counsel.** [The judge] should also ascertain that they adequately dispose of all material issues, and to assure that matters not a proper part of the determination have not been included."

► See *Delevan-Delta Corp. v. Roberts*, 611 S.W.2d 51, 53 (Tenn. 1981) (emphasis added).

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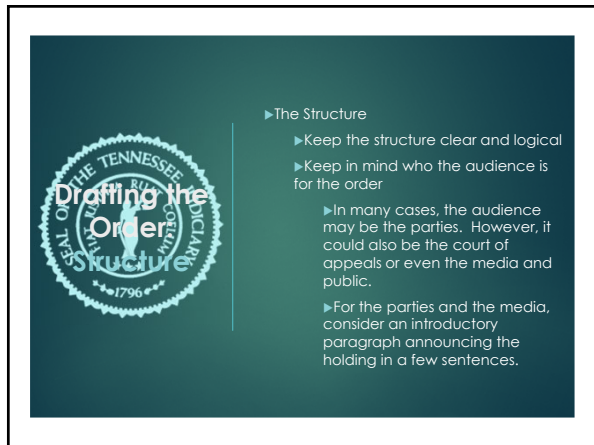
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Seal of the Tennessee Judicial Branch. The seal features a central figure holding a scale, surrounded by the text 'SEAL OF THE TENNESSEE JUDICIAL BRANCH' and '1796'. Overlaid on the seal is the text 'Drafting the Order' and 'The Facts'.

► The Facts (cont'd):

- Draft the statement of facts using the relevant legal factors as a guide. This will help the order focus only on the relevant facts.
- That said, set forth the facts needed to address the issues raised in the case.
- You may choose to present all the facts in one section.
- But depending on the complexity and number of issues, you may wish to address specific facts when discussing each legal issue.

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► The Facts (cont'd):

- A statement of facts is not the same as a finding of fact.
- **Conflicts in the Evidence:**
  - Make sure to resolve all factual issues and conflicts in the evidence.
  - When possible, make credibility determinations expressly.
  - The implicit credibility determinations may sometimes be evident from the ultimate holding.
  - But the findings will help appellate review, particularly on a de novo standard.

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Seal of the Tennessee Judicial Branch. The seal features a central figure holding a scale, surrounded by the text 'SEAL OF THE TENNESSEE JUDICIAL BRANCH' and '1796'. Overlaid on the seal is the text 'Drafting the Order' and 'The Analysis'.

► The Analysis:

- **Address All Issues:** Make sure to address all of the legal issues raised by the parties.
- **Legal Standards:** Identify the legal standards governing the particular issue and use these standards as a roadmap to guide the analysis.

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Seal of the Tennessee Judicial Branch. The seal features a central figure holding a scale, surrounded by the words 'SEAL OF THE TENNESSEE JUDICIAL BRANCH' and the year '1796'. Overlaid on the seal is the text 'Drafting the Order The Analysis'.

► The Analysis:

- **Alternate Factual Findings:** If the legal conclusion follows from a particular factual finding, consider the result if the finding cannot be made.
  - Child custody issues addressing a material and substantial change in circumstances.
  - Probation revocations with several violations.
- **Alternate Legal Grounds:** If an alternate legal ground can justify the reasoning, please say so. This analysis will greatly help appellate review.
  - Post-conviction review with issues that are either waived or previously determined.

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Seal of the Tennessee Judicial Branch. The seal features a central figure holding a scale, surrounded by the words 'SEAL OF THE TENNESSEE JUDICIAL BRANCH' and the year '1796'. Overlaid on the seal is the text 'Drafting the Order The Analysis'.

► The Analysis (cont'd):

- **Formatting:**
  - Consider rearranging issues if needed.
  - Consider breaking the analysis up with a heading for each issue.
  - A single citation is generally better than a string citation without parentheticals.
- **Be Judicious:** Refrain from sarcasm or criticizing an argument or lawyer unnecessarily.

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Seal of the Tennessee Judicial Branch. The seal features a central figure holding a scale, surrounded by the words 'SEAL OF THE TENNESSEE JUDICIAL BRANCH' and the year '1796'. Overlaid on the seal is the text 'Drafting the Order Conclusion'.

► Conclusion:

- Consider having a conclusion at the end clearly stating the holding(s) of the court.
- Make sure the conclusion is consistent with the holdings reached in the analysis.

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**Step 5:**  
Examples of  
Specific Orders

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**Specific Orders**

- ▶ General Domestic Orders 
- ▶ Order Dismissing Complaint 
- ▶ Sentencing 
- ▶ Other Civil Orders 

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**Step 6:**  
Edit, Edit, Edit,  
and Edit

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► In the editing stage of an order:

- **Structure:** Check the overall structure of the order.
  - Review the organization.
  - See whether the order can be shortened by eliminating unnecessary facts or analysis.
  - Review whether footnotes are necessary or whether the footnoted text should be part of the analysis.

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► In the editing stage of an order (cont'd):

- Check for wordiness.
- Try to identify unclear passages or confusing language.
  - Use plain language where possible and where it does not sacrifice needed accuracy.
  - Also eliminate unnecessary words, such as "clearly" and "that."
- Minimize unnecessary humor or characterizations ("red herring").

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► In the editing stage of an order (cont'd):

- Consider investing in a grammar checker, such as Grammarly.
- Consider using Westlaw Drafting Assistant to check for quotes and citations.

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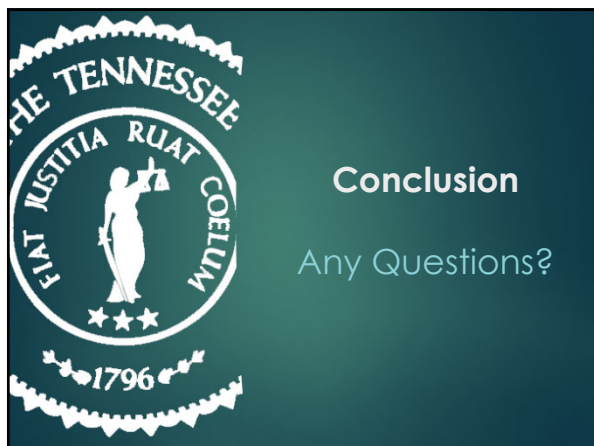
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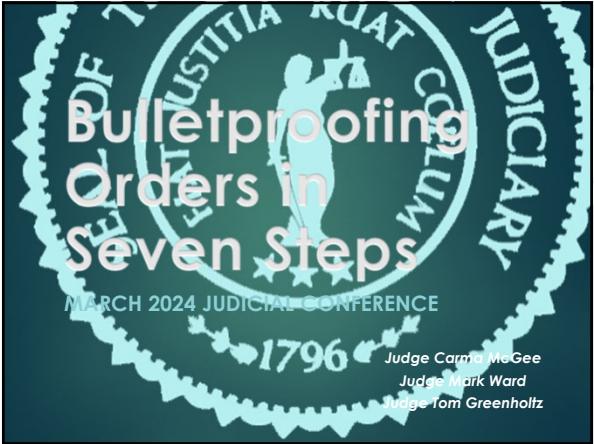
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