Evidence Errors to Avoid

by Penny J. White

DON'T CONFLATE THE A'S: The Dual "Double A Requirement"

All evidence must be both authenticated and admissible. This "Double A Requirement" rarely causes confusion when we are dealing with testimonial evidence because we know that witnesses, except for experts, may only testify to information that is within their personal knowledge. Compare Tenn. R. Evid. 703 and Tenn. R. Evid. 602. To use the terminology of the "Double A Requirement," a witness' testimony is authenticated by introducing evidence "sufficient to support a finding that the witness has personal knowledge of the matter." Tenn. R. Evid. 602. The threshold authentication requirement is met by establishing evidence sufficient to support a finding that the witness has personal knowledge, but of course personal knowledge alone does not make the witness' testimony admissible. To be lawyerly about it, authentication is a condition precedent to admissibility. Before admissibility requirements can even be considered, authentication must be established.

The same "Double A Requirement" applies to tangible and documentary evidence, but the dual requirement seems to cause more difficulty when applied to those types of evidence. Rule 901(a) mirrors Rule 602 in establishing an authentication requirement as a condition precedent to admissibility; before tangible or documentary evidence may be admitted, the evidence must be authenticated, either by "evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims," Tenn. R. Evid. 901(a); by self-authentication, Tenn. R. 902; or by one of the illustrated methods of authentication set out in Rule 901(b).

1st A
AUTHENTICATION

Rule 901(a)
(a) General Provision - The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.

2nd A
ADMISSIBILITY

Rule 401- Relevance
Rule 501- Privilege
Rule 602- Personal Knowledge
Rule 701, 702- Opinion
Rule 801- Hearsay
Rule 1001- Original Writing

The precise language of Rule 901(a) is important. While it is the judge who must determine whether threshold authentication has been established, the judge does so in light of what the trier of fact could so find.

My opinion, derived from practice and teaching but not backed up by empirical study, is that two reasons account for the more frequent conflation of the two A's when we are offering tangible or documentary evidence but not when we are offering testimonial evidence. My first supposition is this: it is apparent to us that a witness' credibility turns on the authentication of the witness' testimony. In other words, we know as lawyers that the factfinder will not put much stock in our witness' story if they don't first know how our witness knows the story. Because of that, we are careful to have the witness explain how he knows before the witness explains what he knows. In this way, we are actually establishing Rule 602 threshold authentication.

But with documentary evidence, it may be less apparent to us that we need to establish for the factfinder first, what the document is before we establish what the document establishes. After all, we have investigated, discovered, and deposed. We know what the document is and it is likely that our witness knows as well. We are anxious to get to the heart of the document—what we claim it proves—so we fail, at times, to use the same degree of care in establishing threshold authentication for documentary or tangible evidence that we do for testimonial evidence.

My second unsubstantiated opinion about the conflation of the two A's when dealing with tangible and documentary evidence may be the more accurate hypothesis. Authenticating witness testimony is easy—it rarely takes more than one question: what did you see? But authenticating documentary evidence can be more difficult, requiring a number of carefully-phrased questions. See Tenn. R. Evid. 901(b) (7)-(9). Even when the rules have simplified authentication requirements, by making certain types of frequently-used documents self-authenticating, see Tenn. R. Evid. 902(11) (making certified records of regularly conducted activity self-authenticating), we must still meet pre-authentication procedural (and, sometimes substantive) requirements. Id. (requiring notice and particularized certification). Given the complexity that accompanies the authentication of documentary or tangible evidence, we may get lost in the authentication trees and forget about the admissibility forest.

Records of regularly conducted activity create a frequent trap leading lawyers to forget the "admissibility" forest. Establishing that a so-called business record is authentic (either by testimony or affidavit of the custodian), does not establish that the record is admissible under the similar, but not identical, hearsay exception. Rule 803(6) admits only those authenticated business records that are "made at or near the time by or from a person with knowledge and a business duty to record or transmit" the record. Tenn. R. 803(6) (emphasis added). The record is authenticated if it is shown by the custodian's testimony or affidavit to be kept "in the course of a regularly conducted business activity" and if "the regular practice of the business is to keep the record," Tenn. R. Evid. 902(11), but it is not admissible unless the record was created by a person with knowledge and a business duty to create it at or near the time of the occurrence.

Similarly, the authentication of public records can create traps for the lawyer preoccupied with authentication. Although many public records are self-authenticating, see Tenn. R. Evid. 902 (1)-(3) (providing for self-authentication for foreign and domestic public documents), all authenticated public documents are not admissible under the similar, but not identical hearsay exception. Tenn. R. Evid. 803(8) ("excluding, however, matters observed by police officers and other law enforcement personnel.")

continued to page 19

continued from page 18

The more complex the documentary evidence, the more likely that we will conflate the two A's and, as a result, ignore the Double A Requirement. For example, when admitting electronic evidence such as webpages, text messages, tweets, or emails, it is common to be so relieved that the court has accepted the electronic evidence as authentic, that we fail to realize that the electronic evidence is not admissible. The key to avoiding this tendency is to simply remember that all electronic evidence consists of out-of-court statements, which should be scrutinized under the hearsay, opinion and original writing rules, and that electronic evidence, like testimonial evidence, potentially violates relevance, character, and impeachment evidence rules as well as, in criminal cases, the constitutional right to confrontation.

DON'T ASSUME THAT SIMILAR RULES ARE THE SAME

As noted above, a common evidentiary error worth avoiding is the assumption that similar evidence rules are the same. While two good examples are the different authentication and admissibility requirements for business and public records, a better example may be the different balancing tests for the admissibility of evidence that may mislead or unfairly prejudice the trier of fact.

A basic premise underlying the adoption of evidence rules may be the premise that rule writers, who are presumably lawyers and judges, know best what evidence can be considered properly by the jury and what evidence would likely mislead or prejudice them. As a result of this "insight," the rules of evidence protect the jury from some specific types of evidence that would be admissible but for a special protective rule. The best example of a special protective rule is, of course, Rule 403, the scales of justice rule, which empowers a judge to exclude relevant evidence that poses certain dangers to the jury or the justice system after applying a specific balancing test. Tenn. R. Evid. 403 (allowing exclusion of relevant evidence when the probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.")

Other rules of evidence aimed at protecting the jury from evidence that might be used have a similar, but different balancing test. Because of our familiarity with Rule 403's balancing test, we tend to miss the sometimes subtle and other times drastically different variations in the tests. See Tenn. R. Evid. 404(b) (4); 412 (c) (4); 608 (b) (3); 609 (a) (3); 703. Incorrectly applying the Rule 403 balancing test to other contexts may result in the introduction of inadmissible character, impeachment, and hearsay evidence.

In addition to applying the wrong balancing test, we may fail to scrutinize what exactly is being balanced. Rule 403 balances the general probative value of relevant evidence against certain enumerated dangers, but other balancing tests articulate more precisely what exactly is being balanced. Glossing over these distinctions results in the wrong admissibility analysis.

A good example of a balancing test that sets out specifically what is to be balanced is the balancing test in Rule 703 that applies to the admissibility of the underlying facts and data supporting an expert's opinion. Experts are allowed to base their opinion on facts or data that they personally perceive, as well as those "made known to the expert at or before the hearing;" if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Tenn. R. Evid. 703. To determine the admissibility of the otherwise inadmissible facts and data relied upon, Rule 703 applies a different balancing test, reversing the test set out in Rule 403; Rule 703 also delineates what is to be balanced. The court must balance the probative value of the otherwise in admissible facts and data "in assisting the jury to evaluate the expert's opinion," against the prejudicial effect, not the information's more general probative value to the issues of the case. Additionally, with regard to Rule 703 balancing, the 2009 Advisory Comments set out additional guidance: "[n]ormally a jury should not be allowed to hear the reliable but inadmissible bases underlying an expert's opinion."

Perhaps the most complicated examples of similar, but different, balancing tests are the balancing tests that apply to the introduction of impeachment evidence, which not only employ tests different from the balancing test set out in Rule 403, but also delineate precisely what is to be balanced.

The impeachment rules, in general, recognize that while the credibility of a witness is important to the overall evaluation of the case, impeachment evidence diverts the trial from the main issue, thus making the trial process less efficient, while also potentially unfairly influencing the jury. As a result, most of the rules that allow impeachment evidence set limits on its introduction through procedural requirements and balancing tests. Contra Tenn. R. Evid. 616.

Rules 608 permits a witness to be impeached by opinion or reputation evidence concerning the witness' character for truthfulness. Specific instances of conduct can generally not be proved by extrinsic evidence, but the witness may be cross-examined about specific instances related to untruthfulness, after compliance with procedural requirements and after the application of a reverse Rule 403 balancing test.

SIMILAR, BUT NOT THE SAME

Rule 404(b)
Character Evidence Not Admissible to Prove Conduct; Exceptions
(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Rule 412
Sex Offense Cases; Relevance of Victim's Sexual Behavior
(4) If the court determines that the evidence which the accused seeks to offer satisfies subdivisions (b) or (c) and that the probative value of the evidence outweighs its unfair prejudice to the victim . . . .

Rule 703
Bases of Opinion Testimony by Experts
Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

continued to page 22

continued from page 19

Similarly, Rule 609 allows a witness who has been convicted of certain crimes to be impeached with evidence of those convictions, but also subjects that evidence to procedural and balancing requirements. Neither Rule 608 nor Rule 609 adopt the Rule 403 balancing test which places the burden of exclusion of the evidence on the party opposing the evidence. Rather, both require that the proponent of the impeachment evidence satisfy the court that the probative value substantially outweighs the prejudicial effect.

Moreover, both Rule 608 and Rule 609 particularize the balancing test beyond that done in Rule 403. Rule 608 requires the court to consider "specific facts and circumstances" supporting the probative value of specific instance impeachment evidence. Rule 609 demonstrates even more particularity, by requiring that the court consider whether the probative value of a conviction "on credibility" "outweighs its unfair prejudicial effect on the substantive issues." While this particular specification is intuitively obvious, lawyers often forget to focus on the particular when attempting to admit or exclude impeachment evidence. For example, in a criminal case, a serious felony conviction may be inadmissible against the accused because of the nature of the felony. A conviction for aggravated assault or distribution of cocaine arguably has little probative value on an accused's credibility, while the tendency to inflame, or at least aggravate, the jury is likely.

DON'T FORGET OLD CHIEF: Evaluating Alternative Methods of Proof

Another evidence error that impacts the application of balancing tests is the failure to consider the principle established in the case of Old Chief v. United States, 519 U.S. 172 (1997). Although Old Chief involved the interpretation of Federal Rules of Evidence 403, the federal and state rules are verbatim. Moreover, the underlying rationale of the case is logically sound.

Rule 403 gives a judge discretion to exclude otherwise relevant evidence when the probative value of the evidence is substantially outweighed by certain dangers. But what happens when there are alternative means of proving the same fact, including some that carry dangers but others that do not? The majority in Old Chief holds that when the alternative means of proof have at least equivalent evidentiary value, a judge abuses discretion by admitting the evidence that poses a risk of prejudice instead of the evidence that does not. This does not mean that you can force an opposing party to stipulate a disputed fact, but it does mean that to exercise discretion properly, a judge must consider in the balance equivalent evidence.

SIMILAR, BUT NOT THE SAME

Rule 608
Evidence of Character and Conduct of Witness
[Specific instances of conduct probative of truthfulness may be inquired into on cross-examination if procedural requirements are met and if ...

(b)(2) the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect . . . .

Rule 609
Impeachment by Evidence of Conviction of Crime
[To impeach the accused, the State must comply with procedural requirements]

(a) (3) the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues.

[A conviction that is otherwise admissible but more than ten years old may be admitted if]

(b) the court determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

DON'T FALL FOR THE NON-TOMA FAST TALK: Apply the PV-FWP-Relevance Inquiry

Lawyers habitually respond to hearsay objections by claiming that they are not offering the statement objected to for its truth and, of course, if their non-TOMA (not offered for the truth-of-the-matter-asserted) claim is legitimate, they have circumvented the hearsay objection because hearsay, by definition, is an out-of-court statement offered in court to prove the truth of what is asserted in the statement. Tenn. R. Evid. 801(c).

But because the non-TOMA claim is often not legitimate, the objecting attorney needs to carefully scrutinize the claim. First, the objecting attorney must understand exactly what the non-TOMA claim is. When a proponent claims that an out-of-court statement is not being offered for its truth, the proponent is saying that the statement has probative value regardless of its truth. In other words, the probative value, and thus the relevance of the statement, are not contingent upon the statement being true. The statement is of value in the case even if it is not true.

So the first inquiry for the responding attorney is to evaluate the claim that the statement is not being offered for its truth by asking whether the statement has probative value regardless of its truth. The second, related inquiry, and a way to keep opposing counsel honest while simultaneously making a record, is to ask the court to require counsel to state the purpose of the evidence. The FWP rule, helpful in numerous evidentiary contexts, requires the proponent of evidence to respond to a simple question: for what purpose is the evidence offered, counselor? Once counsel responds, the asserted purpose of the evidence can then be tested against the relevance inquiry. Given counselor's statement of the purpose of the evidence, does the evidence have any tendency to make a fact of consequence more or less probable? Often, this dogged response to the claim that a statement is non-TOMA will reveal either that the statement is being offered for its truth, or that the statement is irrelevant.

When the statement has a legitimate non-TOMA purpose, opposing counsel must guard against an actual TOMA use either by counsel in closing argument or by the court in ruling on a motion

continued to page 23

continued from page 22

for directed verdict or for a judgment of acquittal. For example, if a witness testifies that he overheard a customer tell the shop owner that a banana peel was in the frozen food aisle, for the purpose of establishing that the shop owner was put on notice, counsel may argue that the shop owner should have checked, perhaps, but not that evidence establishes that the peel was there. Opposing counsel must object if such an argument is made, or if the judge misconstrues the evidence and denies a directed verdict.

DON'T EQUATE ALL IMPEACHMENT METHODS: They are Not Equal The Gift of Bias under Tenn. R. Evid. 616

The introduction of impeachment evidence can run afoul of two of the primary goals of the rules of evidence: efficiency and fairness. Juries may react unfairly to impeachment evidence, giving it more credit that it deserves; additionally, lawyers may fumble with the technical and mechanical aspects of impeachment, wasting valuable court time. As a result, several common-law rules emerged to limit the introduction of impeachment evidence including the voucher rule, the no-bolster rule, the extrinsic evidence rule, and the good-faith rule. While the codified rules of evidence have abolished at least one of these, see Tenn. R. Evid. 607, the other rules restricting impeachment methods and the types remain. See Tenn. R. Evid. 608 (limiting direct evidence of character for untruthfulness to reputation and opinion evidence); Tenn. R. Evid. 609 (placing numerous restrictions on the introduction of criminal convictions to impeach).

At common-law, impeachment by evidence of bias or prejudice (presumably also including impeachment by motive or influence) for or against a party was not subject to the same limitations that applied to other types of impeachment. See Creeping Bear v. State, 113 Tenn. 322, 87 S.W. 653 (1905). The Tennessee Rules of Evidence, but not the Federal Rules, specifically retain this common-law flexibility for evidence of bias. Tenn. R. Evid. 616, but see Davis v. Alaska, 415 U.S. 308 (1974) (noting that the right to confrontation includes the right to show a witness' potential bias). To take advantage of this flexible approach, counsel should "frame" impeachment as bias when possible. By doing so, counsel may offer extrinsic evidence to prove the bias if the witness denies it.

> When there is "no cognizable difference between the evidentiary significance of [two alternative means of proving the same fact], and [when] the functions of the competing evidence [are] distinguishable only by the risk inherent in the one and wholly absent from the other, the only reasonable conclusion [is] that the risk of unfair prejudice substantially outweighs [the] probative value."
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> **Rule 616**
> **Impeachment by Bias or Prejudice**
> A party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness.

Framing impeachment evidence as bias is another illustration of the FWP principle. When a judges asks "for what purpose is the evidence offered, counselor?", a lawyer who can legitimately answer "to show bias, your Honor," stands a better chance at getting the evidence admitted and of keeping the witness honest. This principle is illustrated by Davis v. Alaska, 415 U.S. 308 (1974), a case in which the lower court barred evidence of a juvenile adjudication under a state rule similar to Tennessee's Rule 609 (d). Counsel argued that the juvenile's adjudications were being offered not to impeach the juvenile because he had been adjudicated delinquent, but rather to show that he might be inclined to favor the prosecution in his testimony because of his status as a probationer under state supervision. The trial court's exclusion of the evidence was error because the jurors "as sole judge of the credibility of a witness . . . were entitled to have the benefit of the [evidence] before them so that they could make an informed judgment as to the weight to place on [the witness' testimony].

DON'T LET THE RULE TITLES CONFUSE YOU: A Party's Statement [Though Wrongly called an Admission in 803(1.2)], Does Not have to Admit

The Tennessee Rules of Evidence differ significantly from the Federal Rules of Evidence, but sometimes the difference does not make a difference. For example, the Federal Rules of Evidence delineate certain types of prior statements and statements by the parties as "not hearsay," while the Tennessee Rules treat some of those same types of statements as hearsay exceptions. Contrast Fed. R. Evid. 801 (d) with Tenn. R. Evid. 803 (1.1) & (1.2). Both the Tennessee and Federal Rules allow statements of a party opponent in evidence when offered against a party. Under the Federal Rule, statements of a party opponent are not considered as hearsay, Fed. R. Evid. 801(d) (2), while under the state rule, Tenn. R. Evid. 803.1.2, statements of a party opponent are considered hearsay exceptions.

Confusion sometimes arises because the Tennessee hearsay exception is entitled "Admission of a Party Opponent," while the Federal exclusion, after the December 2011 restyling of the Federal Rules, is more correctly referred to as "An Opposing Party's Statement." The important point is that statements of a party opponent are admissible against the party regardless of whether they admit anything. This stands in contrast to the hearsay exception in Rule 804(b) (3) admitting statements against interest. As long as an opposing party's statement is relevant, and offered against the party, it is admissible.

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