# I. Tennessee Civil Procedure

## A. Pleading comparative fault.

1. Tennessee Rule 8.03 requires the defendant to set forth in the answer to a complaint the facts supporting a comparative fault defense and to include the identity or description of any other alleged comparative tortfeasors. If a defendant fails to identify other potential tortfeasors as required by 8.03, fault cannot be attributed to such persons and the defendant is liable for all damages except those attributable to the fault of the plaintiff. George v. Alexander, 931 S.W.2d 517 (Tenn. 1996).

2. Federal Rule 8(c) does not require defendants to set forth facts supporting the affirmative defense of the comparative fault of co-defendants or others, albeit it does require that the defense of "contributory negligence" be affirmatively pled.

3. *Note too that the identification of non-parties alleged to be at fault in an answer or an amended answer has bearing on whether and when the 90-day extension of the statute of limitation is triggered under Tenn. Code Ann. § 20-1-119. This is true in state and federal courts. For a good discussion of this topic, see generally 17 Tenn. Prac. Tennessee Law of Comparative Fault § 5:8 (2018 ed.) (federal court) and 17 Tenn. Prac. Tennessee Law of Comparative Fault § 5:7 (2018 ed.) (state court).

## B. Mandatory disclosures.

1. Federal Rule 26(a) requires disclosure of specific information listed therein, "without awaiting a discovery request." These mandatory disclosures must be made by each party at various stages of the proceeding: initial disclosures, expert testimony disclosures, and pre-trial disclosures.

2. Tennessee has no such procedure. If you want something in state practice, you must request it.

## C. Disclosure of Liability Insurance Information.

1. With the mandatory disclosures in federal court, parties must produce for inspection and copying "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." Fed. R. Civ. P. 26(a)(1)(A)(iv).

2. There is no similar provision in Tennessee and under Thomas v. Oldfield, 279 S.W.3d 259 (Tenn. 2009), information regarding a defendant's liability insurance is not discoverable.

### D. The "Bearman rule."

1. A unique Tennessee provision is located in the last sentence of Tennessee Rule 32.01(3), which states: "depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01(1)." Therefore, in Tennessee, the "discovery" deposition of an expert cannot be used as substantive proof. This prohibition was applied in Dickey v. McCord, 63 S.W.3d 714 (Tenn. Ct. App. 2001). There, the plaintiffs deposed a defense expert expected to testify at trial. He was not called as a witness. Consequently, the plaintiffs could not introduce the discovery deposition as former testimony.

2. There is no such provision in the Federal Rules. Unless agreed to by counsel, a deposition of an expert is an "evidentiary" deposition, which may be used as substantive evidence at trial to the extent allowed under Fed. R. Civ. P. 32 and applicable evidentiary rules.

### E. Expert disclosures.

1. Under Tennessee Rule 26.02(4)(a)(i), a party may through interrogatories require any other party to identify experts who they expect to call at trial and to provide a summary of the facts and opinions to which the expert is expected to testify, among other things. These disclosures are drafted and signed by the attorney who retained the expert.

2. In federal court, however, expert disclosures are mandated and absent a stipulation or court order, must be made at least 90 days prior to the trial. Furthermore, under Federal Rule 26(a)(2), the disclosure of the identity of the expert "must be accompanied by a written report—*prepared and signed by the witness*," and not by the attorney. (emphasis added).

### F. Nonsuits.

1. Federal nonsuits taken as a matter of right must be taken early. The absolute right of a plaintiff to voluntarily dismiss an action under Federal Rule 41(a) without prejudice ends with service of an answer or summary judgment motion, "whichever first occurs." In federal court, moreover, a second nonsuit of the same claim(s) operates as an adjudication on the merits, thereby foreclosing any further filing of the claim(s).

2. Tennessee nonsuits can be taken as a matter of right very late in the proceedings, either before the judge directs a verdict or before the jury retires to deliberate, "except when a motion for summary judgment made by an adverse party is pending." On first glance, moreover, Tennessee's Rule 41.01(2) misleadingly appears to allow two "free" nonsuits with only the third nonsuit resulting in a final adjudication on the merits, or res judicata. But do not forget the saving statute, Tenn. Code Ann. § 28-1-105. Once a plaintiff nonsuits outside the original statute of limitations, the case must be refiled within one year. Another nonsuit during that year can be taken, but remember that a second nonsuit after expiration of the saving year will result in the action being time barred.

**G. Voir dire.**

1. In federal court, the judge may conduct the examination of the jurors without participation from the attorneys. Fed. R. Civ. P. 47(a).

2. But under Tennessee Rule 47.01, the attorneys have a right to examine the jury pool.

**H. Objections to charge.**

1. In Federal court, the trial lawyer must pay close attention while the federal judge is instructing the jury. If there is either an inaccurate statement of law or an omission of law, the lawyer must object "*promptly* after learning that the instruction or request will be, or has been, given or refused" or risk waiver of the issue. Fed. R. Civ. P. 51(c)(2)(B) (emphasis added). Some federal courts construe this rule strictly to require that objection be made before the jury retires to deliberate.

2. Tennessee Rule 51.02 is more lawyer-friendly. Failure to object promptly following the charge at trial "shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for new trial." In other words, in Tennessee, there is time to have the charge typed up, to review it, and to conduct some legal research. But see Rule v. Empire Gas Corp., 563 S.W.2d 551 (Tenn. 1978) (finding that one cannot hold a judge in error for failure to charge law arguably raised by the evidence unless a written special request is submitted).

**I. Amending ad damnum after verdict.**

1. Federal Rule 54(c) requires the court to "grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." A fair reading of this Rule indicates that an amendment conforming to the proof would be permitted when a jury returns a verdict higher than the amount demanded in the complaint.

2. That is not true in Tennessee. Under Tennessee Rule 54.03, "the court shall not give the successful party relief, though such party may be entitled to it, where the propriety of such relief was not litigated and the opposing party had no opportunity to assert defenses to such relief." Perhaps more pointedly, Rule 15.02 on amendments to conform to the evidence states that an "amendment after verdict so as to increase the amount sued for in the action shall not be permitted."

**J. Final judgment.**

1. Federal courts generally prepare and enter judgments without attorney input. Fed. R. Civ. P. 58(b).

2. Attorneys in state cases are much more involved in the process under Tennessee Rule 58. Typically, in state court, the victorious attorney drafts a judgment, signs it, and submits it to the opposing side for approval and signature. Then it is presented to the judge, who signs and gives it to the clerk for entry. This is true of most orders entered in state court—before, during, and after trial.

**K. Motion for new trial.**

1. If you wish to reserve issues for appeal after a verdict in a Tennessee state court, then a motion for new trial is mandatory. Tennessee Rule of Appellate Procedure 3(e) states that in all cases tried by a jury, "no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."

2. This motion may or may not be a prerequisite to preserving issues in federal court, depending on the circumstances and the district court presiding over the case. Consult the local rules and applicable case law, as well as Federal Rules 50 and 59. If, for example, the losing party plans to raise facts not already in evidence or claims juror misconduct or relies on newly discovered evidence, the only way to put it in the record is by affidavit supporting a new trial motion. If in doubt, err on the side of timely filing the motion.

**L. Supplementation of Discovery Reponses.**

Tennessee rule 26.05, as clarified in the 2001 comment, requires that deposition answers of all witnesses be supplemented. Federal rule 26(e) addresses only the depositions of experts. Both rules require supplementation of answers to interrogatories and responses to requests for production of documents.

**M. Miscellaneous Differences between the Tennessee and Federal Rules of Civil Procedure.**

1. Under Federal Rule 26(d), parties may not serve written discovery until they have conferred about discovery pursuant to Rule 26(f). Fed. R. Civ. P. 26(d)(1). Under the Tennessee Rules, plaintiffs can serve written discovery simultaneously with the Complaint and Summons. <u>See</u> Tenn. R. Civ. P. 33.01; 34.02.

2. Interrogatories in federal court are limited to twenty-five (25). Fed. R. Civ. P. 33(a)(1). The Tennessee Rules do not contain a limit on the number of interrogatories. However, many state courts limit the number of interrogatories to 30 by local rule.

3. Under the Federal Rules of Civil Procedure, each deposition is limited to seven (7) hours, see Fed. R. Civ. P. 30(d)(1), and each side is limited to ten (10) depositions total, see Fed. R. Civ. P. 30(a)(2)(A)(i). There are no such limitations under the Tennessee Rules on depositions.

4. In federal court, attorneys can issue and sign subpoenas; therefore, it is not necessary to obtain the clerk's signature. Fed. R. Civ. P. 45(a)(3). In state court, the court clerk must issue and sign all subpoenas. Tenn. R. Civ. P. 45.01.

5. Federal Rule 12(a) only provides the defendant 21 days after service of the summons and complaint to file an answer. A defendant in Tennessee has 30 days to

file an answer to a complaint within 30 days after service of the summons and complaint.

## II. Tennessee Appellate Procedure

A. An appeal starts with the timely and proper filing of a notice of appeal in the Tennessee Appellate Court.

1. The filing timely and proper filing of a notice of appeal is jurisdictional in civil cases (but not in criminal cases). Tenn. R. App. P. 4(a).

2. All notices of appeal must initially be filed in the appellate court. Tenn. R. App. P. 4(a); *Story v. Bunstine*, 538 S.W.3d 455, 459 n.1 (Tenn. 2017).

B. An appeal of right typically lies only from a final order, subject to exceptions that permit immediate appeal from a non-final order.

1. Appeal typically lies only from a final order. Tenn. R. App. P. 3(a); *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003)

2. There are statutory and rule-based exceptions to the final-order requirement. *See, e.g.*, Tenn. Code Ann. § 29-5-319(a)(1); Tenn. Sup. Ct. R. 10B, § 2.01.

3. Immediate interlocutory appeals are discretionary. *See* Tenn. R. Civ. P. 54.02; Tenn. R. App. P. 9; Tenn. R. App. P. 10; *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 557–58 (Tenn. 1990).

C. Where multiple appellants appeal from a single judgment, Tennessee state courts do not require the filing of notices of cross-appeal or notices of separate appeal.

1. Only one notice of appeal is required per lawsuit, even where there are multiple separate parties seeking to appeal. Tenn. R. App. P. 3(h); Tenn. R. App. P. 13(a); *Rowe v. Hamilton Cty. Bd. of Educ.*, 2015 WL 4197059, at *7 (Tenn. Ct. App. July 13, 2015)).

2. Even though notices of cross-appeal and separate appeal are not required, only issues properly raised in the trial court may be asserted on appeal. *See Fayne v. Vincent*, 301 S.W.3d 162, 171 (Tenn. 2009); *Waters v. Farr*, 291 S.W.3d 873, 918 (Tenn. 2009).

D. The Tennessee Supreme Court mostly exercises only discretionary review.

1. For most cases, appellate review by the Tennessee Supreme Court is discretionary. Tenn. R. App. P. 11. *But see* Tenn. Code Ann. § 39-13-206(a)(1); Tenn. Code Ann. § 50-6-225(a); Tenn. Sup. Ct. R. 51, § 1.

2. The Tennessee Supreme Court typically accepts discretionary review only for cases of especial importance. Tenn. R. App. P. 11.

E. Electronic filing is available in Tennessee appellate courts.

1. Attorneys may but (for now) are not required to register for electronic filing in Tennessee appellate courts. Tenn. Sup. Ct. R. 46, §§ 1.02, 3.03; https://www.tncourts.gov/E-Filing.

2. E-filed documents have special formatting requirements. *Compare* Tenn. Sup. Ct. R. 46, § 3.02 *with* Tenn. R. App. P. 27 & 30.

## III. Tennessee Rules of Evidence

A. The admission of evidence typically is up to the trial court's discretion. *State v. Edison*, 9 S.W.3d 75, 77 (Tenn. 1999); *see State v. Herron*, 461 S.W.3d 890, 904 (Tenn. 2015).

B. Evidentiary objections must be made promptly and specifically, unless the trial court has decided the evidentiary issue via a motion in limine. *Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 192 n.11, 196 (Tenn. Ct. App. 2008); *Grandstaff v. Hawks*, 36 S.W.3d 482, 488 (Tenn. Ct. App. 2000); *see* Tenn. R. Evid. 103.

1. Courts typically admit evidence unless a party asserts a valid objection to admissibility. *See* Tenn. R. Evid. 103

2. Objections to evidence must be timely and specific. *See* Tenn. R. Evid. 103(a); *Pullum v. Robinette*, 174 S.W.3d 124, 136 (Tenn. Ct. App. 2004); *Wright v. United Servs. Auto. Ass'n*, 789 S.W.2d 911, 914 (Tenn. Ct. App. 1990).

3. Continuing objections to evidence are not required where the same objection was clearly and definitively denied via a motion in limine. *Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 192 n.11 (Tenn. Ct. App. 2008); *Grandstaff v. Hawks*, 36 S.W.3d 482, 488 (Tenn. Ct. App. 2000).

4. Where evidence is presented before an objection can be made, the objecting party must move to strike the evidence to carry out and preserve the objection. *See* Tenn. R. Evid. 103(a)(1); *State v. Melvin*, 913 S.W.2d 195, 200 (Tenn. Crim. App. 1995).

C. Tennessee state trial courts must permit offers of proof concerning excluded evidence. Tenn. R. Evid. 103(a)(2), (b); *Bean v. Wilson Cty. Sch. Sys.*, 488 S.W.3d 782, 794 (Tenn. Ct. App. 2015); *Singh v. Larry Fowler Trucking, Inc.*, 390 S.W.3d 280, 286 (Tenn. Ct. App. 2012).

D. Tennessee state statutes and rules provide various evidentiary presumptions not contained in the Tennessee rules of evidence. *See, e.g.*, Tenn. Code Ann. § 36-2-304; Tenn. Code Ann. § 55-10-401; Tenn. Code Ann. § 55-10-411(a); Tenn. R. Civ. P. 36;

1. Evidentiary presumptions have the effect of automatically permitting or requiring the factfinder to draw certain legal inferences from established facts. *See* Tenn. R. Civ. P. 36; *State v. Campbell*, No. 123, 1986 WL 14365, at *3 (Tenn. Crim. App. Dec. 16, 1986).

2. Evidentiary presumptions are typically created by state or federal statute or court rule. Trial counsel should keep a lookout for applicable evidentiary presumptions.

E. Tennessee state trial courts have limited discretion to initiate the presentation of testimony.

1. Judges in Tennessee state trial courts have limited power to call their own witnesses (as compared with federal courts). *Compare* Tenn. R. Evid. 614(a)–(b) *with* Fed. R. Evid. 614(a), (c).

2. Judges in Tennessee state trial courts have limited power (as compared with federal courts) to appoint their own experts. *Compare* Fed. R. Evid. 706(a) *with* Tenn. R. Evid. 706(a).

F. Expansive cross-examination is permitted in Tennessee state courts (as compared with federal courts): in Tennessee state courts, cross-examination is not limited to the scope of direct examination plus credibility. *Compare* Tenn. R. Evid. 611(b)–(c). *with* Fed. R. Evid. 611(b)–(c).

G. Tennessee state courts permit the impeachment of witness credibility based on a wide range of crimes (as compared with federal courts). *Compare* Tenn. R. Evid. 609(a) *with* Fed. R. Evid. 609(a); *see also* Fed. R. Evid. 403; Tenn. R. Evid. 403; *Anderson v. Poltorak*, No. M2015-02512-COA-R3-CV, 2017 WL 176639, at *5–7 (Tenn. Ct. App. Jan. 17, 2017).

H. Tennessee state courts impose strict requirements for admitting expert testimony: in Tennessee state courts, reliable testimony by a qualified expert still must substantially assist the trier of fact to be admissible. *Compare* Tenn. R. Evid. 702 *with* Fed. R. Evid. 702; *see Usher v. Charles Blalock & Sons, Inc.*, 339 S.W.3d 45, 61 (Tenn. Ct. App. 2010).

I. Exhibits must always be authenticated before they are offered as evidence, including business records and public records.

1. Authenticating exhibits involves proving that they are what the proponent claims them to be. Tenn. R. Evid. 901(a).

2. There are multiple valid ways to authenticate exhibits. *State v. Craig*, No. E2017-00257-CCA-R3-CD, 2018 WL 1831119, at *10 (Tenn. Crim. App. Apr. 16, 2018); *Watson v. Watson*, 196 S.W.3d 695, 702 (Tenn. Ct. App. 2005) (internet evidence).

3. Hearsay exceptions permit the admission of business records and public records. *See* Tenn. R. Evid. 801(c); Tenn. R. Evid. 803(6), (8).

4. To be admissible, business records and public records must be proved authentic by live testimony or by the affidavit of a business-records custodian (subject to sufficient pre-hearing notice). Tenn. R. Evid. 902(11).

5. Business records and public records may be rendered self-authenticating. Tenn. R. Evid. 902(1)–(4).

J. Evidence used for summary judgment must be admissible. Tenn. R. Civ. P. 56.06; *Meyers v. First Tenn. Bank, N.A.*, 503 S.W.3d 365, 379 (Tenn. Ct. App. 2016); *Versa v. Policy Studies, Inc.*, 45 S.W.3d 575, 582 (Tenn. Ct. App. 2000).