

PERFECTING YOUR APPEAL BEFORE THE TRIAL EVEN ENDS

By David L. Raybin

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*‘When **I** use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what **I** choose it to mean – neither more nor less.’*

*‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’*

*‘The question is,’ said Humpty Dumpty, ‘which is to be **master**--that’s all.’*

Lewis Carroll, *Alice in Wonderland*

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While the writings of Mr. Raybin are respected by the members of this Court, Mr. Raybin’s authorings are not law and are not binding upon any court in this state. We decline the Petitioner’s invitation to elevate Mr. Raybin’s writings to the status of binding legal precedent.

Earnest v. State, 2005 WL 2453951(Tenn.Crim.App. 2005)

1. Winning an appeal is first accomplished at the trial level.

Integrity of system: *ours is a system of checks and balances.*

Ms. DeLong's current predicament [on appeal] is the result of questionable tactics and multiple inadvertences of her lawyers with regard to the state court proceeding. Without more, the conduct of her lawyers would not provide grounds for relief under Tenn. R. Civ. P. 60.02(5). DeLong v. Vanderbilt University, 186 S.W.3d 506(Tenn.Ct.App.2005).

The best appellate brief and appellant argument will not resurrect a sloppy record or avoid forfeiture of an issue which has been waived below. Therefore, always practice “projective” law and live in both “the here and now” of the trial and the “hereafter” of the appeal.

2. To know appellate law issues you need to read the appellate opinions. Learn about cutting-edge issues pending in the Tennessee Supreme Court.

Change the law: *jury trials have little value as precedent except perhaps in the mind of the public – appeals do.*

Read the Appellate Opinion for more than the Holding: *the opinion is the story of a trial lost and the attempt of the winner to hold on to victory.*

Read over and over again the campaigns of Alexander, Hannibal, Caesar, Gustavus, Turenne, Eugene and Frederic. ... This is the only way to become a great general and master the secrets of the art of war.

Napoleon

Appellate opinions are the “stuff of the law.” We studied the opinions when we were in law school but we forget to read them religiously after we become attorneys. Nobody can call themselves a trial lawyer or a trial judge unless they religiously read the Appellate Court opinions every day to see what is “new.” They come out on the TBA link for free and are even summarized for you. We demand that doctors keep up with the

latest medical techniques and we should demand that of ourselves: our clients insist on that and the public deserves no less.

When the Tennessee Supreme Court grants review in a particular case then you know that it is a “hot” issue and that the law may change. Get a jump on the law at the trial level by figuring out what issues are pending in the Tennessee Supreme Court so you can ride the pipeline if an issue becomes retroactive and you have raised the issue in a timely fashion.

How do you know what the “hot” issues are? The Tennessee Attorney’s Memo has a list and there are several publications out there which contain a summary of the various Supreme Court cases that are pending. Or, if you would like the information for free, you can hop on my website HWYLA.W.COM where we analyze every Supreme Court grant within seventy-two hours of the Order and even predict how the case will be decided.

All of this is a function of being aware of what is happening in the law and how you can use these new procedures and rules to help you win at trial. As General Patton said (paraphrased):

“Nobody ever won a war by dying for his country.

He won it by making the other fellow die for his country.”

Thus: The best appeal in the world is where you force the other side to appeal.

SIDEBAR: Discussion of retroactivity Rules: When the Supreme Court releases an opinion involving an entirely new doctrine of law, the Court frequently articulates how that doctrine will impact pending cases and appeals. For example, in *State v. Dyle*, 899 S.W.2d 607 (Tenn. 1995), the Supreme Court discussed a new jury instruction on witness identification. At page 612, the Court held that “this ruling is applicable to cases now on appeal and those cases tried after the release of this opinion.” This meant that the opinion was given “*pipeline*” application.

In *State v. Walker*, 905 S.W.2d 554 (Tenn. 1995), the Court held that persons under criminal sentence who present themselves for incarceration but are turned away by the sheriff, may consider the sentence satisfied under certain circumstances. The Supreme Court held, at page 557, that “*we are also persuaded that the rule announced today should be prospective only and should apply only to cases tried or retried after the*

date of this opinion and in cases on appeal in which the issue has already been raised.”

In *State v. Enochs*, 823 S.W.2d 539 (Tenn. 1991), the Court found that the thirteenth juror rule applied to all cases which were pending on direct review at the time the rule was reinstated and became effective. Lawyers who raised the issue prior to the release of *Enochs* obtained a new trial for their clients after *Enochs* was rendered. See e.g., *State v. Barone*, 852 S.W.2d 216, 218 (Tenn. 1993).

This “pipeline” doctrine is not limited only to criminal cases. In *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), the Supreme Court adopted new rules regarding comparative fault. At page 58, the Court held that the opinion would apply to “all cases tried or retried after the date of this opinion and all cases on appeal in which the comparative fault issue has been raised at an appropriate stage in the litigation.” Identical language can be found in *McClung v. Delta Square Partnership*, 937 S.W.2d 891, 905 (Tenn. 1996) (landlord liability for crimes committed against innocent third parties by criminals on the premises); *Broadwell v. Holmes*, 871 S.W.2d 471, 477 (Tenn. 1994) (parental immunity); and *Hataway v. McKinley*, 830 S.W.2d 53, 60 (Tenn. 1992) (the “lex loci delicti” choice of law doctrine in a wrongful death action).

On occasion a Court neglects to articulate how a decision will “run” and must resolve the question in a later appeal:

We are constrained to note, however, that the absence of language directing the retroactivity of the *Jordan* decision was a product of oversight rather than the result of a judicial decision to limit *Jordan* to prospective application only. ... We hold that *Jordan* [loss of consortium damages were recoverable under wrongful death statute] applies retroactively to: (1) all cases tried or retried after the date of our decision in *Jordan*; and (2) to all cases pending on appeal in which the issue decided in *Jordan* was raised at an appropriate time. We are aware that our holding will require retrial of some cases and the expenditure of additional judicial resources. Still, we cannot perpetuate denial of retroactive application of *Jordan* when that result was not our intention.

Hill v. City of Germantown, 31 S.W.3d 234, 240 (Tenn. 2000).

More frequently, the appellate courts give a new decision pipeline application even without an express decision articulating retroactivity. For example, *State v. Rickman*, 876 S.W.2d 824 (Tenn. 1994) (limitations on proof-of-other-crimes in child sex abuse cases) did not articulate how it would apply in the future. Yet, the Supreme Court itself applied *Rickman* to pipeline appeals. See e.g. *State v. McCary*, 922 S.W.2d 511 (Tenn. 1996), and *State v. Dutton*, 896 S.W.2d 114 (Tenn. 1995), *State v. Woodcock*, 922 S.W.2d 904 (Tenn. Crim. App. 1995). See also *State v. Stokes*, 24 S.W.3d 303 (Tenn.2000) (*State v. Burns* applied to determine lesser- included offense in case which was in appellate “pipeline” prior to release of Supreme Court’s *Burns* opinion).

3. Has Your Case been subject to an Earlier Appeal? If so, the “Law of the Case” doctrine may apply

An appellate court’s decision on an issue of law is binding if the facts on a second trial or appeal are substantially the same as the facts on the first trial or appeal. See discussion in *Memphis Pub. Co. v. Tennessee Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303 (Tenn. 1998):

The law of the case doctrine is not a constitutional mandate nor a limitation on the power of a court. Rather, it is a longstanding discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited.This rule promotes the finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of lower courts to the decisions of appellate courts. Therefore, when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand. There are limited circumstances which may justify reconsideration of an issue which was issue decided in a prior appeal: (1) the evidence offered at a trial or hearing

after remand was substantially different from the evidence in the initial proceeding; (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand; or (3) the prior decision is contrary to a change in the controlling law which has occurred between the first and second appeal.see e.g. *Jett*, 175 Tenn. at 299, 133 S.W.2d at 999 (“The former opinion of the Court of Appeals was the law of the case on the second trial, and the evidence being the same, the circuit judge could not have done otherwise than to submit this issue of sound health to the jury....”); *Clingan v. Vulcan Life Ins. Co.*, 694 S.W.2d 327 (Tenn.App.1985) (The initial appeal did not establish the law of the case because the facts in the second appeal were not substantially the same as the facts in the prior appeal); *Arizona v. California*, 460 U.S. 605, 618, n. 8, 103 S.Ct. 1382, 1391, n. 8, 75 L.Ed.2d 318 (1983) (The doctrine does not apply if the court is “convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.”); *Sherley v. Commonwealth*, 889 S.W.2d 794, 798 (Ky.1994) (The law of the case doctrine does not apply where there has been an intervening change of controlling authority.)

The Law of the Case Doctrine applies in Criminal Cases: *State v. Jefferson*, 31 S.W.3d 558 (Tenn. 2000) (law of the case doctrine barred trial court from granting relief); *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003) (with respect to the issue of the law of the case, an issue decided in a prior appeal may be reconsidered if: (1) the evidence offered at the hearing on remand was substantially different from the evidence at the first proceeding, (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand, or (3) the prior decision is contrary to a change in the controlling law occurring between the first and second appeal).

4. Keep an APPEAL FILE on counsel table in plain view.

Write the word “APPEAL FILE” in big letters on the front of a file folder. Every time the judge does something you don’t like, write it down and make a big production about opening the appeal file and put your note in the APPEAL file. After a time folks will get the message. Seriously, you want to keep things in a handy place that may have something to do with a possible appeal.

5. Your contract with your client for trial work should specifically exclude the appeal.

The lawyers always get themselves in trouble by failing to limit their obligation to a client in a particular case by the level of representation. Clients will frequently tell the lawyer, particularly in criminal cases, I thought you were going to represent me “for the whole thing.” “The whole thing” – being in the mind of the client – the trial and the appeal. Make sure your retainer contract with your client specifically excludes an appeal and mentions affirmatively that an appeal will be a separate item addressed later. Many lawyers are “stuck” with doing an appeal where they neglect to clearly indicate the scope of representation in the initial contract. Making clear about the appellate fee is particularly important in contingency fee cases.

.....The legal fee in this matter is \$75,000 which will include all matters related to the homicide case in Williamson County, Tennessee as it concerns proceedings in General Sessions and Criminal Court. In other words, given the seriousness of the case, this case will certainly go to Criminal Court beyond the General Sessions level. The retainer fee here does not include an appeal to the Court of Criminal Appeals or to the Tennessee Supreme Court. I do not quote appellate fees in cases that are at the trial level because there is no way to anticipate this far out as to what might be involved. Thus, this matter would involve my representation only through the Criminal Court of Williamson County, Tennessee.

6. Always write down the dates of all of your trial court proceedings and always get the name of your court reporter.

A short pencil is better than a long memory ~~~

Stick important information in your appeal file. Think about all the time you have wasted as a lawyer running around trying to remember when you had this hearing or that hearing and trying to figure out who the court reporter was for a particular proceeding. You cannot have an appeal without a transcript and you cannot have a transcript if nobody remembers the name of the court reporter.

**7. Determine at the outset what issues are likely to be appealed:
Plan Ahead!**

“No Battle Plan survives first contact with the enemy.”
Prussian Field Marshal Helmuth Graf von Moltke,

“A pint of sweat today, saves a gallon of blood tomorrow.”
General George Patton

Some “cutting edge” cases may be doomed to failure in the trial court and are “test cases” for an appeal. Such cases include: matters of exceptions to the statute of limitations, new theories of recovery, or attacking bars to recovery. For example, an issue pending today in the Supreme Court deals with the “original tortfeasor rule” which says that if injuries are aggravated by negligent medical treatment the negligence of the original wrongdoer is regarded as the proximate cause of the damage flowing from the medical treatment. If you have a case involving aggravated injuries caused by poor medical care then you may want to consider whether an appeal might be inevitable depending on the extent of the application of the tortfeasor rule. Of course, if you do not read my firm’s on-line “hot list” you would not even know that the tortfeasor rule is possibly subject to change. Your opponent knows because she reads my web site!

8. Appeals begin as early as the Complaint and the Answer in Civil Cases or the Arrest Warrant or Indictment in a Criminal Case.

All of your theories of recovery have to be stated in the Complaint. In particular, all of your affirmative defenses need to be promptly raised or you risk the horror of waiver. In criminal cases, if you do not promptly attack the arrest warrant or the indictment you risk the horror of waiver.

Smith v. State, 2005 WL 468308 (Tenn.Crim.App.2005):

Addressing the contentions in order, we first conclude that the issue concerning the untruthful juror was raised and denied in the motion for new trial; therefore, it has been previously determined. Additionally, the petitioner failed to raise the issue on direct appeal; therefore, it has been waived. As to the issue of venue, we again note that this issue was previously determined when it was raised in the petitioner's motion for new

trial and denied by the trial court. Moreover, the petitioner again failed to raise the issue on direct appeal; therefore, it has been waived. Regarding the instruction of accomplice liability, we conclude that this issue was previously determined on direct appeal, as this Court found that the issue was waived for failure to make a timely objection at trial. As to the final contention, concerning the reasonable doubt jury instruction, we conclude that the issue was raised and denied in the motion for new trial. Moreover, the petitioner has waived this issue as a claim for post-conviction relief by failing to present it on direct appeal.

9. The Horror of Waiver !!!!!!!!!

Discussion. The most frightening example of the consequences of failing to raise what at least one set of state lawyers thought was a “frivolous” issue involved Machetti and Smith. They were husband and wife who were tried together by the same jury and both given death sentences!! The upshot of the opinions is that the husband (Smith) was executed but the wife (Machetti) lived due to the preservation of the jury composition issue. *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982) (state jury selection procedure that permitted any woman who did not wish to serve on a jury to opt out merely by sending notice to the jury commissioners deprived petitioner of her right to an impartial jury trial); *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.1983) (petitioner waived right to object to jury composition by failing to assert issue at trial).

The most common cause of the “lost appeal” is because the lawyer “waived” something in the trial court. If you count up all “the lost appeals” in Tennessee, you would find that every reason combined does not approach the number of appeals that have failed because of some waiver. The failure to perfect an appeal or the failure to win an issue is invariably a function of failing to comply with the procedural rules regarding raising the issue in the trial court in the first place.

Appellate courts delight in going through the prerequisites of raising an issue and if you have not hit all the bases you will not get to home plate no matter how far you have hit that ball. Thus, where you have a case-deciding issue the very best thing is to come up with a “waiver checklist.” Figure out all the things that you need to do to perfect the

issue and write them out and come up with your own little list and make sure that you have hit all of the bases so the issues are preserved.

Faulks v. Crowder, 99 S.W.3d 116, 125 (Tenn.Ct.App.2003):

Rule 12 .08 provides “A party waives all defenses ... which the party does not present either by motion ... or, if the party has made no motion, in the party's answer.” Furthermore, insufficiency of process may not be raised by amendment to the answer. Rule 12.08. As a general rule, defects in process, service of process, and return of service may be waived. The Tennessee Rules of Civil Procedure expressly state that where the issue is not raised properly, the defendant waives the objection. The failure of a defendant to challenge insufficiency of process in accordance with Rule 8.03 will constitute a waiver of the matter raised in a motion. It is also generally held that a defendant may also, by his conduct, be estopped to object that proper service was not made. Such conduct may include participating in discovery, in addition to failing to raise the issue of insufficiency of service clearly or with the necessary specificity.

Griswold v. Income Properties, II, 880 S.W.2d 672 (Tenn.Ct.App.1993):

Defendant waived defense based on plaintiff's alleged failure to join interested or indispensable party, even though defendant alleged in his answer that plaintiff's action for declaratory judgment should be dismissed because an entity had not been joined as party; defendant did not raise defense in response to plaintiff's motion for partial summary judgment on issue of liability, defendant filed its own motion for partial summary judgment in spite of absence of party, and defendant did not bring defense to attention of trial court until after issue of liability had been decided in favor of plaintiff and after hearing on issue of damages.

State v. Villaneuva, 1991 WL 89843 (Tenn.Cr.App1991):

The fourth issue is without merit. It is the responsibility of the appellant to have prepared a transcript of “such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.” Rule 24(b), T.R.A.P. In the absence of the entire charge to the jury, this Court must assume that the jury was correctly instructed. If the defendant does not assign the alleged erroneous instruction, or the

alleged omission in the instruction, as a ground in his motion for a new trial, the same is waived.The fifth issue is without merit. The appellant has waived his right to assert ineffective assistance of counsel, as set forth in our discussion of the first issue.....The sixth issue is without merit. The appellant has waived his right to assert ineffectiveness of counsel on this issue as set forth in our discussion of the first issue. Also, this issue has been waived because appellant has not made any citations to the record and he has not cited any legal authorities to support his position.The seventh issue is without merit. Appellant has waived this issue as set forth in our discussion of the first issue. The eighth issue raised by the appellant has been waived because he fails to cite any legal authorities to support his position.Finding no merit to any of the issues raised by the appellant, the judgment of the trial court is affirmed.

10. The appeal begins in earnest when dealing with pretrial motion practice.

The danger here is being sure you have raised all your issues in appropriate pretrial motions or the appellate court will not consider the issues. For example, a discovery complaint in civil court is almost always waived if not raised prior to trial.

Campbell County Bd. of Educ. v. Brownlee-Kesterson, Inc., 677 S.W.2d 457 (Tenn.App.1984). “*The Trial Court correctly allowed the letter into evidence because the basis of the objection, work product rule, had clearly been waived by the defendant's voluntary relinquishment of the report to the plaintiff. Since the objection that the expert did not testify is raised only on appeal, it also has been waived.*”

Tenn. R. Civ. P. 12.02 provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim

upon which relief can be granted, (7) failure to join a party under Rule 19, and (8) specific negative averments made pursuant to Rule 9.01. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Tenn. R. Civ. P. 12.04 provides:

On application of any party, the defenses specifically enumerated (1) through (8) in 12.02, whether made in a pleading or by motion, and the motion for judgment mentioned in 12.03 shall be heard and determined before trial unless the court orders that the hearing and determination thereof be deferred until the trial.

In criminal cases the rules are similar: there are mandatory times when certain issues must be raised or they are waived. For example, you cannot object to a search and seizure in the middle of a trial. That must be raised prior to trial or you have waived the issue. Pretrial motions are governed primarily, but not exclusively, by Tenn. R. Crim. P. 12.

Pretrial motions fall into three general classes depending on their “waivability” for failure to raise the issue at the appropriate time.

The first class would consist of motions relating to the lack of jurisdiction of the court or the failure of the indictment to charge an offense. These may be raised prior to, during or after the trial, including the appeal. The Statute of Limitations, while not jurisdictional, is only waivable if the waiver was knowingly and voluntarily entered.

The second class involves all motions which must be raised prior to trial or they are waived. Since this class of motions is so large, these motions could be categorized based on the requested relief. While not intended to be exclusive, pretrial motions of the second class could be subdivided into the following categories:

1. Motions affecting the indictment. This includes technical defects in the indictment and defects in the grand jury or previous prosecution such as the preliminary hearing. These motions are generally raised in a motion to dismiss. The state may also file motions affecting the indictment, such as amendments.

2. Motions affecting joinder or severance. These motions deal with the joinder and severance of offenses and the joinder and severance of defendants.

3. Motions affecting evidence. These motions, when filing by the defense, include suppression of evidence such as searches, confessions and identifications by witnesses. Motions of the state include motions for compelling non-testimonial evidence of the defense, such as handwriting examples.

4. Motions for discovery. These motions include reciprocal discovery under Tenn. R. Crim. P. 16, notice of intent to use evidence under Tenn. R. Crim. P. 12, notice of alibi, bill of particulars and depositions.

5. Motions affecting the mental state of the defendant. These include motions affecting the competency of the defendant to stand trial and motions for evaluations regarding sanity.

6. Motions affecting venue. Motions relating to a lack of proper venue are of the first class since it is a matter of jurisdiction of the court. Motions relating to change of venue should be raised prior to trial but can be raised during the jury selection process if based upon some previously unknown ground.

The third class of motions includes former jeopardy, former acquittal, former conviction, and immunity. These motions may be raised prior to trial, or at the latest, at the close of the state's case at trial.

11. Always consider the rules regarding admissibility of evidence before any evidence is introduced so you can properly object to the evidence and raise the issue on appeal. Conversely, anticipate what objections will be raised to your proof and come up with justifications for your critical proof. Begin the trial thinking about special mid-trial instructions to the jury as it relates to the admissibility of evidence.

“In war, the general alone can judge of certain arrangements. It depends on him alone to conquer difficulties by his own superior talents and resolution.”

Napoleon

"Be always sure you are right - then go ahead."

Davy Crockett

Most jury instructions lessen or modify the impact of a particular piece of evidence such as the “standard” instruction on expert testimony. Think about instructions which must be given during the trial. For example, in criminal cases the judge must give a contemporaneous instruction to the jury when prior inconsistent statements are used to impeach a witness. See, *State v. Reece*, 637 S.W.2d 858 (Tenn. 1982). Unless you ask for these mid-trial instructions during a trial you cannot raise them on appeal.

There are six criteria that must usually be met for evidence to be admissible:

First: Most physical and some testimonial evidence must be disclosed to the adverse party prior to trial pursuant to the rules of discovery in both criminal and civil cases.

Second: The evidence must be relevant to prove or disprove a fact and issue. As we know, relevance is the threshold test which must be passed whenever a question is raised regarding the admissibility of evidence.

Third: The evidence must be sufficiently reliable to promote accuracy in the fact-finding process. Reliability is often an issue in scientific tests or opinions. Where evidence is less than totally reliable the courts may require additional proof to support a conviction such as requiring the corroboration of an accomplice in a case.

Fourth: The probative value of the evidence must not be substantially exceeded by its potential for prejudice. For example, a horrible photograph of a traffic wreck may prove something but it may be tremendously prejudicial.

Fifth: The disclosure of the evidence at trial must outweigh any competing policy interest in nondisclosure. This is usually an issue with regard to privileges.

Sixth: Reception of the evidence must not undermine the integrity of the judicial process. For example, the exclusionary rule in criminal cases or the prohibition of wiretapping evidence in civil cases.

12. All evidentiary issues must be subject to objection or you risk waiver on appeal.

Without doubt, the greatest failure in any appeal is the failure to make a proper objection at trial. This is a function of the “waiver” horror which is almost always enforced on appeal. An objection serves two purposes. First, the objection seeks to persuade the judge not to allow the evidence to be introduced. Second, even if unsuccessful, the objection serves to preserve the issue for later review on a motion for new trial or on appeal.

If you fail to object then you are held to have acquiesced in the error and you cannot complain.

The only exception to the “waiver rule is where the Court finds “plain error” which is extremely rare. A plain error is almost reserved for issues of matters of constitutional magnitude. *State v. Adkisson*, 899 S.W.2d 626 (Tenn. Crim. App. 1994) (plain error requires that the record clearly established what occurred in the trial court, a clear rule of law must have been violated, the substantial right of the defendant must have been adversely affected, the defendant did not waive the issue for technical reasons, and consideration of the error is necessary for substantial justice; extensive discussion of issue); *State v. Page*, 184 S.W.3d 223 (Tenn.2006) (“We now address whether it is appropriate to review the trial court's failure to give a lesser-included offense instruction, even if the issue was not properly preserved for appeal, under the doctrine of plain error. When determining whether plain error review is appropriate, the following five factors must be established: (a) the record must clearly establish what occurred in the trial

court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused [must not have waived] the issue for tactical reasons; and (e) consideration of the error [must be] "necessary to do substantial justice." An error would have to be especially egregious in nature, striking at the very heart of the fairness of the judicial proceeding, to rise to the level of plain error. In the present case, at trial, the defendant failed to request a lesser-included offense instruction on facilitation of second degree murder. The defendant has failed to show that he did not waive this issue for tactical reasons. Therefore, the trial court's failure to instruct on facilitation of second degree murder does not rise to the level of plain error.”).

13. Motion to Strike.

Occasionally a lawyer will fail to object at the proper time but, after erroneous evidence is introduced, a party can still subsequently move to strike the evidence and ask that it be excluded. Tenn R Evid 103 and *State v. Pilkey*, 776 S.W.2d 943 (Tenn. 1989).

14. The time for an objection

A motion to strike is always dangerous because it may not always be sufficient to preserve the issue. Even worse, the jury has, by definition, heard the offending proof. The best thing is to make a “contemporaneous objection.” Remember that objections to improper procedure must be voiced contemporaneously to give the trial judge the opportunity to correct the error on the spot. In the absence of a contemporaneous objection, any error is waived. Relief is not available to a party who does not take whatever action is necessary to prevent or nullify the harmful effect of an alleged error.

We have concluded the plaintiff is not entitled to the relief sought. This is because a party has an obligation to aid the trial court, when such is reasonably available, to prevent the harmful effect of an omission in a jury charge. See Tenn. R.App. P. 36(a). Here, the plaintiff failed to take action that was reasonably available to prevent or nullify the harmful effect of the alleged error. Id. Basham v. Greaves, 2006 WL 3613587 (Tenn.Ct.App.2006).

We find Wife's failure to oppose an award of attorney's fees either through a written response or an appearance at the hearing, constituted such a "failure to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Tenn. R. App. P. 36 (2008). Therefore, Wife is entitled to no relief from the judgment. Ballard v. Ballard, 2009 WL 152576 (Tenn. Ct.App.2009).

15. Motion in Limine.

An anticipatory objection is called a Motion in Limine. The question is whether a Motion in Limine preserves the issue when the evidence comes in during a trial. The better practice is to "renew" the objection even if the Motion in Limine has been overruled. There are some cases which suggest that the lawyer need not renew the objection during the trial where the judge clearly ruled on the matter prior to trial. However, this is still an unsettled question for all purposes. See *State v. McGhee*, 746 S.W.2d 460 (Tenn. 1988) and *State v. Brobeck*, 751 S.W.2d 828 (Tenn. 1988).

16. Additional Technical objection requirements.

Remember that some objections have special technical requirements. For example, Tenn. Code Ann. § 29-14-107(b) requires notice to the Attorney General when the constitutional validity of a general state law is challenged in a declaratory judgment action. Tenn. R. Civ. P. 24.04 requires notice to the Attorney General when the constitutional validity of a state statute is challenged in a civil action.

Generally, a constitutional question must be first raised in the trial court or it will not be entertained by an appeal. See *Lawrence v. Stanford*, 655 S.W.2d 927 (Tenn. 1983).

17. Manner of objection: The *Specific Objection* requirement.

"Exceptions" are no longer necessary. To raise an issue on appeal it is necessary for the party to inform the court of the action that the party desires the court to take, or the party's objection to the action of the court and the grounds of the objection are clear

from the record. Tenn. R. Crim. P. 51. Remember that “once counsel has entered his objections and the reasons therefore, he has preserved his client rights and need not continue his argument after the court’s ruling.” *State v. DePriest*, 697 S.W.2d 597 (Tenn. Crim. App. 1985).

Rule 103 of the Tennessee Rules of Evidence provides that the objection must “appear of record.” In other words, the transcript must clearly establish that some objection was rendered to the challenged evidence. Make sure that the court reporter gets your objection!

The rule also requires that the specific ground be stated in the objection. Tennessee law prohibits “general objections.” A general objection which does not specify the reason for the objection is insufficient. A specific objection is required so that the opposite party may be given the opportunity to act advisedly and not be entrapped into error after it is too late to remedy the matter by introducing other evidence which might have been done if a specific objection were made. The appellate courts are uniform in the proposition that from a trial judge’s standpoint, a specific objection which advances a particular reason allows the judge an opportunity to consider and pass upon it and avoid the mistake, if any, that is being made. *Cooper v. State*, 138 S.W. 826 (Tenn. 1911). In rare instances, a party must renew the objection such as where two witnesses testify to a similar issue. See *State v. Groseclose*, 615 S.W.2d 142 (Tenn. 1981).

When making an objection, the court may allow the attorney to make the objection out the presence of the jury. Tenn. R. Evid. 103(c). *However, be careful that the court reporter picks up the objection where it is an objection made “at the bench.”*

18. Requirement of specific ruling.

An objection is useless unless the ruling of the judge on a particular issue is apparent from the record. The record must demonstrate whether the judge has granted, denied, or overruled the objection. See *Laird v. State*, 565 S.W.2d 38 (Tenn.Crim.App. 1978) where the court held that “it is error for the judge to fail to announce the specific reason regarding the apparent ruling of admissibility because the omission makes appellate review difficult but the blame is laid to the feet of the defendant because he made no request for a specific ruling.”

19. You cannot raise a different legal theory on appeal without a specific objection.

As a general rule, a party may not allege an alternative theory on appeal where the same ground was not presented at trial in the form of a specific objection based on that alternative ground. *Dotson v. State*, 454 S.W.2d 174 (1970) (“An Appellate Court will not entertain an objection to the competency of testimony on a ground distinct from an insufficient objection raised in the court below.”)

20. Waiver of an objection: “opening the door” and “invited error.”

A defendant waives an objection by not making a timely and specific objection. Objections can be waived by “opening the door.” For example, in *Pulley v. State*, 506 S.W.2d 164 (Tenn.Crim.App. 1973) the defense attorney was the first one who asked about the illegal confession and could not later object to it. A party calling out evidence on cross-examination may not assign it as error. *Gass v. State*, 172 S.W. 305 (1914). Similarly, the opposing party may be entitled to introduce otherwise inadmissible evidence to rebut improper evidence introduced by the other party. See *Mackey v. State*, 537 S.W.2d 704 (Tenn.Crim.App. 1975).

Occasionally the client may have his hand on the knob, such as in *State v. Bray*, 669 S.W.2d 684 (Tenn.Crim.App. 1983) where even though the State was precluded from questioning the defendant about his prior drug use, the questions became proper when the defendant volunteered that he did not “mess with no drugs.”

A related proposition is called “invited error” such as where a defendant could not later object to the failure of the testimony of a certain witness where the defendant did not call the witness. *Mallicoat v. State*, 539 S.W. 54 (Tenn.Crim.App. 1976). Thus, a party cannot take advantage of errors which he himself committed or invited or induced the trial court to make which were the consequences of his own neglect or misconduct. *State v. Garland*, 617 S.W.2d 176 (Tenn.Crim.App. 1981).

While a function of the harmless error rule, Tennessee follows the rule that the admission of evidence or the exclusion of evidence is said to be “cured” by the proper admission of similar evidence through another source. *Turner v. State*, 15 S.W. 838 (1891).

Where a party fails to object to evidence, the jury may consider the evidence notwithstanding that the evidence might be inadmissible under some other rule. In *State v. Smith*, 24 S.W.3d 274 (Tenn. 2000), the Court held that a trial court has no duty to exclude evidence or provide a limiting instruction in the absence of a timely objection: a party may consent to the admissibility of evidence which is otherwise prohibited; when a party does not object to the admissibility of evidence the evidence becomes admissible notwithstanding any other evidence ruled to the contrary and the jury may consider that evidence for the natural effect as if it were admissible.

Closing arguments – if there is no objection – warrant reversal only in exceptional circumstances. Accordingly, “[w]e bear in mind that fleeting comments that passed without objection during the rough-and-tumble of closing argument in the trial court should not be unduly magnified when the printed transcript is subjected to painstaking review in the reflective quiet of an appellate judge's chambers.” *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008).

21. Curative instructions.

When improper evidence is introduced, and an objection is entered and sustained, courts occasionally allow the error to be “cured” by later instructions from the judge and/or withdrawal of the offending proof. See *Blankenship v. State*, 410 S.W.2d 159 (Tenn. 1966) (“it is well settled that when incompetent proof is introduced and the judge withdraws it there is no cause for reversal unless real doubt is raised as to whether the judicial warning was effective.”).

22. Offer of proof of excluded evidence.

Tenn. R. Evid. 103(a)(2) provides that if there is an objection to the exclusion of evidence, the party desiring to introduce the evidence cannot raise the issue on appeal unless the substance of the evidence was made known to the court by an offer or was apparent from the context within which the question was asked. Rule 103(b) permits an offer of proof in question and answer form.

Once the court makes a definitive ruling on the record admitting or excluding the evidence either at or before trial, a party need not renew an objection or an offer of proof to preserve a claim of error for appeal. Tenn. R. Evid. 103(a). The trick here, of course, is whether the trial judge made a “definitive ruling.” Thus, the parties should make a contemporaneous objection at trial to preserve the record.

23. Documenting the record.

An appeal is useless unless the evidence or testimony at issue appears in the record. See *State v. Cooper*, 736 S.W.2d 125 (Tenn.Crim.App. 1987) “*Before an exhibit may be considered by the Appellate Court it must have been received into evidence, not by the trial judge, clerk or court reporter as having been received into evidence as an exhibit, authenticated by the trial judge and included in transcript of evidence transmitted to the appellate court.*” Thus, the search warrant which was not included as an exhibit which was the subject of the appeal could not be considered.

Adequate record preservation is a prerequisite to appellate review. This is particularly the case where constitutional issues are raised in criminal cases. See *State v. Nance*, 521 S.W.2d 814 (Tenn. 1975) (“We wish to make it very clear to the trial bench and to the trial bar, both for the prosecution and for the defense that when constitutional issues of this magnitude have been raised, it is incumbent upon all concerned that a full and complete record be made and preserved for transmission on appeal.”).

Stegall v. Stegall, 2001 WL 846047 (Tenn.Ct.App.2001):

At the outset, we express our concern about the effect that the informality of the proceedings during and after the June 1998 trial had on the appellate record. Both the trial court and counsel for the parties appear to have lost sight of the fact that Tennessee's civil trial courts are “courts of record” whose proceedings are governed by the Tennessee Rules of Civil Procedure. Accordingly, all motions or other applications to the trial court for an order, unless made during the course of a trial, should be in writing and filed with the court. Tenn.R.Civ.P. 7.02(1). Similarly, all of a trial court's orders and judgments, excluding rulings made during the course of trial, should be reduced to writing and entered on the minutes.This case is also another example of the problems that can occur when a trial court chooses to communicate its decisions to the parties using some means other

than an order entered on its minutes. Accordingly, the trial court's decision-which is of pivotal importance in the case-would have been missing had Ms. Steagall's appellate lawyer not requested that his client's copy be included in the record. The trial court should have responded to Ms. Steagall's lawyer's July 8, 1999 facsimile with a written order that could have been entered on the minutes of the court. ...Notwithstanding these shortcomings, we have pieced together the events that most likely occurred in the trial court. If we are mistaken in any particular, our error is due, not to a lack of effort to read the tea leaves we have been provided, but rather to the lack of an adequate appellate record. We are, at least, confident that the record, such as it is, provides an adequate factual basis for our disposition of this appeal.

24. Jury instructions.

One study has suggested that as many as thirty-eight percent of the reversals in one particular State were based in whole or in part upon erroneous jury instructions. See also *Adcock v. State*, 236 S.W.2d 88 (Tenn. 1949): “*This Court has been compelled so often to reverse for failure of the trial court to charge the law correctly and accurately, that citation of authority is unnecessary.*” In my own practice I first go to the jury instructions when I am hired to appeal a case for another attorney.

Just like objections to evidence during trial, there are certain peculiar rules regarding the manner of objecting to jury instructions. Tennessee Rule of Civil Procedure 51.02 and Tennessee Rule of Criminal Procedure 30(d) provide that a party shall be given an opportunity to object to jury instructions but the failure to make an objection shall not prejudice the right of the party to assign the basis of the objection as error in support of a Motion for New Trial.

This rule does not mean what it says. Tennessee courts do not require an objection to the judge’s affirmative inclusion of an allegedly erroneous instruction. A party may allege error based upon either the inaccuracy of the charge as given or the failure to give an appropriate specially requested instruction. *Rule v. Empire Gas Corporation*, 563 S.W.2d 551 (Tenn. 1978). However, nothing in the rule relieves trial counsel of the burden of requesting an instruction to cover an omission in the instructions as given. *Rule v. Empire Gas Corporation, supra*.

In the absence of an objection or special request, a defendant may not later raise an issue regarding an omission in the judge's instruction. *State v. Reece*, 637 S.W.2d 858 (Tenn. 1982). Similarly, an objection or special request is required to challenge an inadequate, as opposed to an inaccurate jury instruction. *State v. Reece, supra*.

Special requests or objections are therefore mandatory as to omissions or inadequacy.

A special request for jury instruction must be in writing. See Tenn. R. Crim. P. 30.

To obtain later appellate review on an issue it is critical that a denied special request be made part of the record. *Keebler v. State*, 463 S.W.2d 151 (Tenn.Crim.App. 1970). Merely setting forth the denied special requests in a Motion for New Trial is inadequate: the denied instruction must be filed as an exhibit or otherwise be made part of the record. *Pulley v. State*, 506 S.W.2d 164 (Tenn.Crim.App. 1973).

Objecting to an instruction or filing a special request is not sufficient to preserve the issue for appeal since the issue must ALSO be renewed in the Motion for New Trial. See e.g. *State v. Caldwell*, 671 S.W.2d 459 (Tenn. 1984).

It is also elementary that the judge's entire instructions be included in the record on appeal for the appellate court to entertain an issue regarding the jury charge. See *Tillery v. State*, 565 S.W.2d 509 (Tenn.Crim.App. 1978).

It is the responsibility of the appellant to have prepared a transcript of "such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b) In the absence of a record containing the entire charge to the jury, the Court must assume that the jury was correctly instructed. *State v. Arnold*, 719 S.W.2d 543 (Tenn.Crim.App.1986).

25. Protecting your Verdict.

I'm no idealist to believe firmly in the integrity of our courts and in the jury system -- that is no ideal to me, it is a living, working reality. Gentlemen, a court is no better than each man of you sitting before me on this jury. A court is only as sound as its jury, and a jury is only as sound as the men who make it up.

Harper Lee, Author

The character, Atticus Finch, in his argument to the jury "*To Kill a Mockingbird*"

Most modern trials have a verdict form. Attorneys should be careful to examine the jury form regarding the verdict to be certain that it is responsive to the issues. In criminal cases, the jury form must be specific as the degree of the crime, or designating the particular offense in a multiple count indictment or, for example, in theft cases, the value of the property taken. In civil cases, of course, the rules permit special verdicts which is a topic worthy of a separate presentation. Generally see Tenn. R. Civ. P. 49.

26. Motion for Directed Verdict.

In civil cases, a Motion for a Directed Verdict may be made at various points in the trial. Note that Rule 50.04 of the Tennessee Rules of Civil Procedure provides that if a Motion for a Directed Verdict is denied, the party who prevailed on that motion may, as appellee, by assignments of error assert grounds entitling the party to a new trial. Note also Tenn. R. Civ. P. 50.05 that where a court grants a directed verdict it is not necessary for the party against whom the verdict was entered to file a Motion for a New Trial.

In criminal cases we have a Motion for a Judgment of Acquittal rather than a Motion for a Directed Verdict. See Tenn. R. Crim. P. 29. A Motion for Judgment of Acquittal is typically made at the end of the State's case-in-chief at the close of all the evidence, and after the verdict. There are various rules regarding the method of attacking the sufficiency of the evidence depending on whether the defense attorney in a criminal case "stands on the Motion for Judgment of Acquittal" or presents proof. See generally *Mathis v. State*, 590 S.W.2d 449 (Tenn. 1979).

In addition, if a judgment of acquittal is granted prior to a verdict or after a hung jury, the defendant may not be retried based on double jeopardy considerations. See *Sanabria v. United States*, 437 U.S. 54 (1978) and *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

If the motion is granted after a guilty verdict, the State may appeal and if the trial judge is in error the guilty verdict may be reinstated. See *State v. McMahan*, 614 S.W.2d 83 (Tenn.Crim.App. 1981).

27. Findings by the court in non-jury matters.

Attorneys should be aware of Tenn. R. Civ. P. 52.01, which provides that in actions tried upon facts without a jury and, upon request made by any party prior to the entry of the judgment, the “court shall state the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.” If there is a failure to make specific findings of fact, an appellate court will review the record to determine the preponderance of the evidence. See *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997). In other words, an absence of a finding of fact by the trial judge removes the presumption of correctness of the findings of the trial judge. See *Stewart v. Sewell*, 215 S.W.3d 815 (Tenn. 2007). Accordingly, a party prevailing in a case will want a finding of fact and conclusion of law to assist in sustaining the judgment: fireproof your victory!

28. Post-trial motion practice.

An extended discussion of post-trial motions is a topic worthy of a separate presentation. In general, note that the Motion for a New Trial is essential for the preservation of issues for later appeal. It is mandatory that a Motion for a New Trial be filed within thirty days after judgment in civil cases. See Tenn. R. Civ. P. 59.02. In criminal cases, the Motion for New Trial must be filed within thirty days of the date of the order of sentence. See Tenn. R. Crim. P. 33(b).

In criminal and civil cases affidavits in support of a Motion for New Trial may be filed. In criminal cases, the court “shall consider any such affidavits as evidence.” , Tenn. R. Crim. P. 33(c)(2)(A).

The most important thing to remember about a Motion for New Trial is that “in any 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 New Trial; otherwise such issues will be treated as waived.” Tenn. R. App. P. 3(e). The purpose of this rule is so that the trial judge might be given an opportunity to consider or reconsider alleged errors committed during the course of the trial. *McCormick v. Smith*, 659 S.W.2d 804 (Tenn. 1983).

This policy is identical to the rule which requires a timely objection to evidence and is similar to the requirement of a prompt pretrial objection to certain legal matters. The grounds stated in a Motion for New Trial must be specific. This requirement was addressed in great detail in *Fahey v. Eldridge*, 46 S.W.3d 138 (Tenn. 2001). The opinion provides that a Motion for New Trial should contain a concise factual statement of the error and the motion should also contain a specific legal ground alleged for the error. *Fahey v. Eldridge* is essential reading:

It has long been the rule in this state that in order to preserve errors for appeal, the appellant must first bring the alleged errors to the attention of the trial court in a motion for a new trial. ...This requirement was initially imposed by this Court to make more efficient the process of reviewing “the ever increasing number of appeals,” and we have recognized that this practice significantly aids the functions of the appellate courts by limiting and defining the issues for review. See Board of Equalization v. Nashville, C. & St. L. Ry., 148 Tenn. 676, 680, 257 S.W. 91, 93 (1923) (noting that this Court “was constrained to exercise its power of prescribing rules of practice, requiring that errors be first assigned in a motion for new trial presented to the trial court, and ... limiting the inquiry on appeal to error assigned in the motion”). Moreover, and perhaps most importantly, motions for a new trial also help to ensure that the trial judge might be given an opportunity to consider or to reconsider alleged errors committed during the course of the trial or other matters affecting the jury or the verdict, such as alleged misconduct of jurors, parties, or counsel which either occurred after the trial or could not reasonably have been discovered until after the verdict.

In modern appellate practice, the requirement of filing a motion for a new trial to preserve most errors is governed by Rule of Appellate Procedure 3(e), which reads in relevant part,

[I]n 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.

Although Rule 3(e) requires that the grounds for the motion be “specifically stated,” the Rule is silent as to how specific these grounds must be. Decisions from this Court have long stated the standard for specificity as being “as specific and certain as the nature of the error complained of will permit.” While this standard says little more than does Rule 3(e) itself, several principles may be determined from the Rules and case law as to the degree of specificity needed in a motion for new trial to properly preserve issues for appeal.

*First, the motion should contain a concise factual statement of the error, “sufficient to direct the attention of the court and the prevailing party to it.” Under this standard, it is clearly improper to simply allege, in general terms, that the trial court committed error, either by taking some action or by admitting or excluding evidence; ... rather, the motion should identify the specific circumstances giving rise to the alleged error so that it may be reasonably identified in the context of the entire trial. Accordingly, a well-drafted motion alleging improper admission or exclusion of testimony, for example, should identify the witness giving the testimony and provide a short and plain summary of the testimony improperly admitted or excluded. Moreover, a well-drafted motion alleging error in the jury instructions should set forth the language of the instruction given by the court and the language of the instruction rejected by the court if an alternative instruction was requested. FN6. See, e.g., *Cloyd v. State*, 202 Tenn. 694, 696, 308 S.W.2d 467, 468 (1957) (“[C]ertain evidence was*

improperly submitted to the jury.”); Loeffler v. Kjellgren, 884 S.W.2d 463, 472 (Tenn.Ct.App.1994) (“The trial court erred in jury instructions in the second trial.”); State v. Gauldin, 737 S.W.2d 795, 798 (Tenn.Crim.App.1987) (“The instructions given by the court to the jury were unclear and confusing.”).

Second, as it is well-settled in law that a general objection is usually not sufficient to assign error, Tenn. R. Evid. 103(a)(1); Jack M. Bass & Co. v. Parker, 208 Tenn. 38, 48, 343 S.W.2d 879, 883 (1961), the motion should also contain a specific legal ground alleged for the error. Accordingly, in addition to setting forth a concise statement of the factual grounds, a well-drafted motion for a new trial should also identify, with reasonable clarity, the legal ground upon which the trial court based its actions and contain a concise statement asserting the legal reasons why the court’s decision was improper. However, because motions for a new trial should not be expanded “into all the voluminosity of ‘briefs’ and printed arguments,” National Hosiery & Yarn Co. v. Napper, 124 Tenn. 155, 171, 135 S.W. 780, 784 (1911), the movant is not required to identify such errors in the motion with the same precision expected in the appellate courts. Therefore, precise citation to a rule, statute, or case as the legal ground for the alleged error is normally not required to preserve the issue for appeal under Rule 3(e), although to the extent that citation to authority aids in fairly bringing the legal nature of the error to the attention of the trial judge, such a practice ought to be encouraged. [FN7] FN7. This is not to say that the trial court cannot require precise citation to authority in considering a motion for a new trial. It is only to say that such precision is not otherwise required to preserve the error for appeal under Rule 3(e), so long as the legal ground for the alleged error is clearly and fairly presented to the trial court. Finally, Rule of Appellate Procedure 1 provides that the Rules “shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits.” Accordingly, when an appellate court reviews a motion for a new trial under Rule 3(e), it should view the motion in the light most favorable to the appellant, and it should resolve any doubt as to whether the issue and its grounds were specifically stated in favor of preserving the issue. Any other method of review would result in needlessly favoring “technicality in form” over substance, a practice specifically discouraged by the comments to Rule 1. Thus, while courts cannot find

error where none has actually been alleged, no matter how liberal a construction is given to the motion, Jacks v. Williams-Robinson Lumber Co., 125 Tenn. 123, 128-29, 140 S.W. 1066, 1067 (1911) (“But this court will not search the record at large to find errors. The presumption is that the judgment of the lower court is correct. The burden is upon the appellant to specifically point out the errors complained of, and affirmatively show that they exist.”), courts may not deem a motion for a new trial insufficient to preserve errors for appeal merely because it fails to enumerate specific issues. Accordingly, just as parties must endeavor to specifically state the issues raised so as to avoid any potential for future waiver, appellate courts should not lightly dismiss an issue on appeal under a strict or technical application of Rule 3(e).”

Note that in criminal cases, on motion by either party, the trial judge must make and state in the record findings of fact and conclusions of law to explain the ruling on any issue not determined by the jury. Rule 33(c), Tennessee Rules of Criminal Procedure. In appropriate cases, such a request for a specific finding can assist in narrowing an issue for later appellate review.

29. Interlocutory appeals.

My presentation assumes a “normal” appeal as of right following a judgment in a civil case or a final conviction in a criminal case. In rare instances a party may take a “premature” appeal in the “middle” of the proceedings in the trial court. This is an interlocutory appeal by permission of the trial court under Tenn. R. App. P. 9 or an extraordinary appeal by the Appellate Court alone under Tenn. R. App. P. 10. These interlocutory appeals are beyond the scope of this presentation but counsel should be aware that these appeals are rare, see generally, *State v. Gilley*, 173 S.W.3d 1 (Tenn. 2005) (“Interlocutory appeals to review pretrial orders or rulings are disfavored, particularly in criminal cases.”).

Interlocutory appeals are available for the litigation of a particularly controlling issue of law which may be determinative of the entire case. Usually, an interlocutory appeal is appropriate for a naked issue of law. See e.g. *State v. Harrison*, 270 S.W.3d 21 (Tenn. 2008) (competency to stand trial issue). See also *State v. Williams*, 193 S.W.3d

502 (Tenn. 2006) (Motion to Suppress in criminal case); *Thomas v. Oldfield*, 279 S.W.3d 259 (Tenn. 2009) (interlocutory appeals granted to determine whether liability insurance coverage is subject to discovery).

30. Trial and Appellate procedures are only vehicles for resolving substantive disputes; the art of appellate advocacy as to the merits.

“Every tub must stand on its own bottom.”

Justice Joe Henry: *Farris v. State*, 535 S.W.2d 608, 622 (Tenn. 1976).

Counsel should follow the procedural rules of the trial and appellate courts so that matters of form do not detract from the merits of the appeal. As to the merits of the case Raybin’s Rules of Appeals are as follows:

If an issue is worthy of presentation, the argument should frame the exact issue so that the complaint is clear. For example, an issue might inquire: “Whether Mr. Brown’s Constitutional Rights against Self-incrimination were violated by the District Attorney arguing to the jury that Mr. Brown had not testified at the trial.”

The argument should first specify the pages of the record where the error took place and, in this example, actually quote the statement at issue. Point out the trial objection, the judge’s ruling, and where you renewed the issue in the motion for a new trial. Show the Court you have avoided the horror of waiver!

The argument should next cite authorities as to why the issue constitutes error. Obviously citation of authorities should conform to the manner required by the appellate rules. Whatever authority is cited it is important that the facts of the case be addressed in light of the authority to show why the issue violates some rule, statute or court opinion. The argument should be developed point by point in a succinct manner.

Having established that some occurrence at trial violated a certain legal procedure, many lawyers will halt their argument and will conclude that “error is present.” This is not enough because the appellate court will respond: “so what?” You must anticipate a finding of harmless error and establish why the error is harmful to your client.

Your brief should be a self-contained product that permits the judges to understand the procedural posture of the case, the facts, the law and the issues which are determinative of the appeal. When you set about drafting your brief the goal is not mere communication, nor even persuasive enlightenment of the judges and their clerks, but rather that the judges cast aside the clerks and lift wholesale your language to achieve the result you desire!

Justice is a relative term that means different things to different people. BUT we all can agree that if the settled rules are followed then there is a good chance that justice will be attained. Consequently, if the rules were not followed below there is a good chance the result below was not just. The rules were not followed by the learned judge x in this case, so learned judge x gets to try the case again.

Thus, to prevail on Appeal, persuade the appellate court that The Rules were not followed, your client was prejudiced, and thus Justice is in Doubt. No appeal ever prevailed unless the Higher Court is convinced that the cost of a new trial is less than the cost of an injustice either for that litigant or, more frequently, for those whose cases will be tried tomorrow.

Sidebar: It is not enough then to only allege and establish error. Error comes in many flavors: plain, harmless, cumulative, and various other adjectives including errors of the “first magnitude,” *Sampson v. State*, 553 S.W.2d 345, at 347 (Tenn. 1977), and “patently invalidating errors,” *Hicks v. State*, 533 S.W.2d 330 (Tenn. Crim. App. 1975). Harmless error, under Tennessee law, depends upon the nature of the error. An “evidentiary error” will be deemed harmless in direct proportion to the degree of the margin by which the proof exceeds the standard to convict. In other words, “overwhelming evidence of guilt” will usually render the error harmless. In a “close case” the error may not be harmless. Where the error resulted in “prejudice to the judicial process,” the case may be reversed without an “inquiry as to the weight of the evidence.” *State v. Furlough*, 797 S.W.2d 631

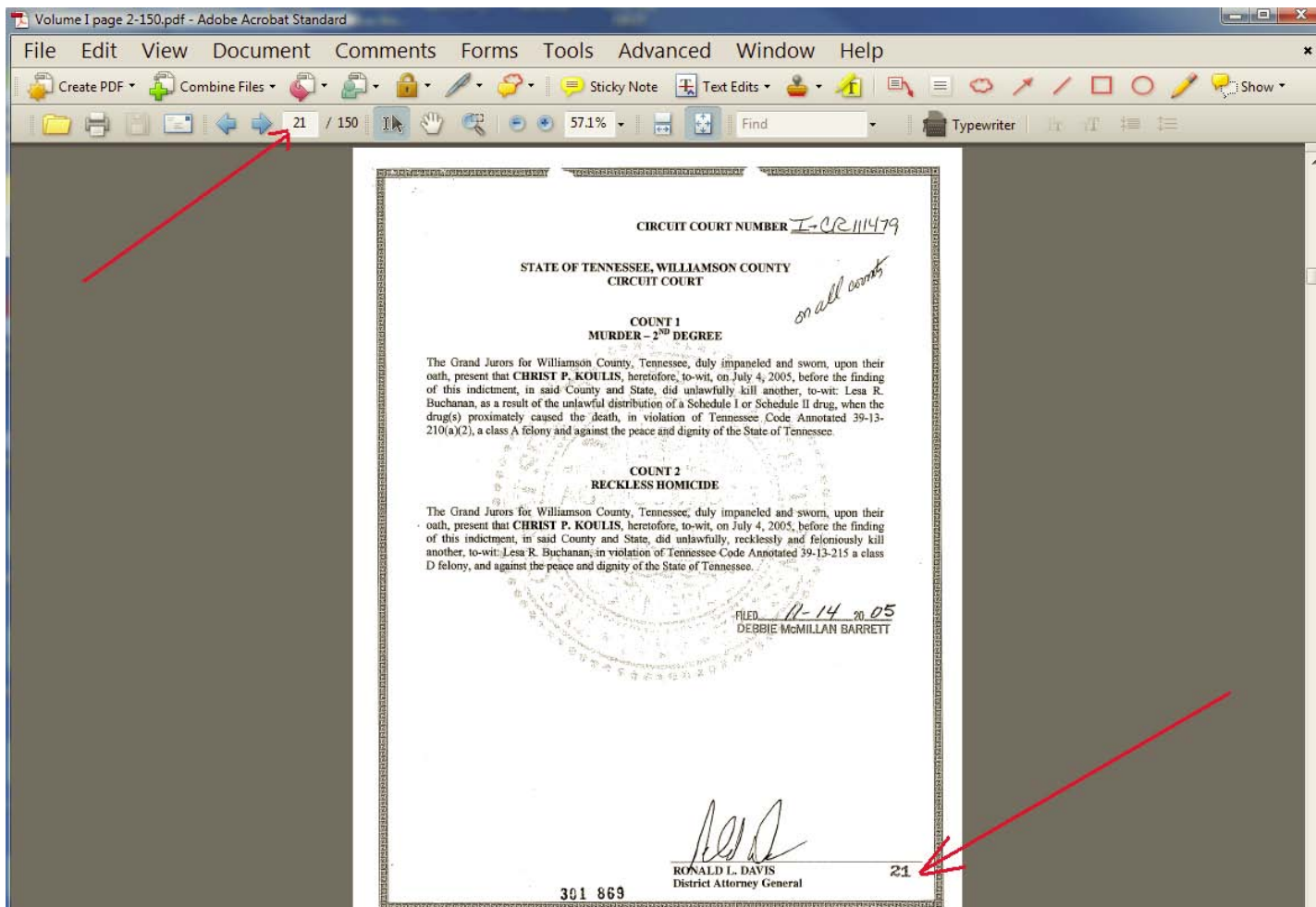
State v. Koulis Appellate Record and Briefs on CD **READ ME FIRST**

The documents in these files are copied from the record and the briefs as filed with the Court. The scanned copies of the briefs are in separate, labeled files.

The scanned copies of the transcripts have been edited by removing the court reporter certification pages so that the Adobe Acrobat page numbers correspond exactly to the sequentially numbered transcript. In this fashion the page number on the Acrobat software will enable one to skip to the identical page in the transcript of the evidence.

The transcripts can be searched by typing the desired word in the “Find” box.

Some of the cover sheets in the technical record volumes have been removed in the scanned version so the page numbers on the Acrobat software will enable one to skip to the identical page in the technical record.



32. Put links in your Trial Memos

Paragraph 8 of the pre-sentence report recites that: **“Both of the firearms would have been legal to possess had they been properly registered as required by 26 U.S.C. § 5841.”** This is absolutely correct. One need only obtain proper registration (see the forms in the appendix) and [pay a \\$200 fee](#) and almost any citizen in [most of the states](#) (including Tennessee, Tenn. Code. Ann. [§ 39-17-1302 \(B\)\(7\)](#)) can acquire his or her own machine gun. These weapons (called Class III weapons) are for sale over the internet. Pay the purchase price, have it shipped to a gun dealer, present the proper registration and virtually any non-felon can have a fully automatic weapon such as the following firearms identical to the one Mr. Smith turned over to the BATF.

33. Give your Memos some COLOR ~~

TRIAL MEMO

A.

In response to the State’s argument it would be well to first briefly review the facts of our case. It is undisputed in this record that Mr. William Talley is the joint property owner of a twenty-one unit condominium located in urban Nashville.



ALL photos part of Collective Exhibit 3



After dark, the police came to the front door of Mr. Talley's private condominium in response to an anonymous tip that Mr. Talley might be selling drugs from his residence inside the condominium.

34. When doing your Appeal BE YOURSELF .

END