

North Carolina Rules of Evidence with Objections

Fourth Edition

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North Carolina Rules of Evidence with Objections

Fourth Edition

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National Institute for Trial Advocacy

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AMBIGUOUS QUESTIONS

Objection

- *I object on the grounds that the question is (ambiguous–vague–unintelligible).*

Response

- *In most circumstances, it is better to rephrase the question unless counsel is certain of the question's clarity.*

Cross Reference to North Carolina Rule

There is no North Carolina Rule specifically covering forms of questions. The court has discretion to sustain the objection pursuant to Rule 611(a).

Explanation

An ambiguous question is one that is susceptible to at least two interpretations or that is so vague or unintelligible as to make it likely to confuse the jury or witness.

APOLOGY BY MEDICAL PROVIDER

A
B
C

Objection

- *I object. The proffered evidence is evidence of a statement by a health care provider that*
 - › *apologizes for an adverse outcome in medical treatment; or*
 - › *offers to undertake corrective or remedial treatment or actions; or*
 - › *is a gratuitous act to assist affected persons.*

Response

The evidence is admissible because it does not fall within the scope of this rule, which is limited to medical malpractice actions.

Cross Reference to North Carolina Rule of Evidence 413

Explanation

Evidence of statements by a health-care provider that apologize for adverse outcomes, offer corrective or remedial actions, or are gratuitous acts are excluded when offered in a medical malpractice action against the provider.

ARGUMENTATIVE QUESTIONS

Objections

- *I object. The question is argumentative.*
- *I object. Counsel is arguing to the jury.*

Response

- *I am attempting to elicit evidence from the witness.*

Cross Reference to North Carolina Rule

There is no North Carolina Rule specifically covering forms of questions. The court has complete discretion to sustain the objection pursuant to Rule 611(a) to protect witnesses from harassment. *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142 (1990).

Explanation

An argumentative question is one that does not seek information from the witness but rather makes an argument to the jury in the guise of a question.

The objection to an argumentative question is not intended to cover the situation where the questioning counsel is arguing with the witness; rather, it applies to the situation where counsel comments on the evidence or attempts to draw inferences from the evidence thereby seeking the witness's response to such comments. It is jury argument in the guise of a question.

ASKED AND ANSWERED QUESTIONS

A
B
C

Objections

- *I object. That question has been asked and answered.*
- *I object. The witness has already answered the question.*

Responses

- *Opposing counsel is incorrect. The witness has not yet answered the question.*
- *The question has not been answered during my examination.*

Cross Reference to North Carolina Rule

There is no North Carolina Rule specifically covering forms of questions. The court has discretion to sustain the objection pursuant to Rule 611(a). The objection may be sustained, however, pursuant to Rule 403.

Explanation

A question may be objected to as “asked and answered” when it calls for the repetition of testimony from a witness who has previously given the same testimony in response to a question asked by examining counsel. It is designed to prevent cumulative evidence through repetition of testimony.

ASSUMING FACTS NOT IN EVIDENCE

Objection

- *I object. The question assumes a fact not in evidence. There has been no testimony that* (insert facts that have been assumed).

A
B
C

Responses

- *I will elicit that fact from the witness in a separate question.*
- *That fact has been proved during the earlier testimony of this witness.*
- *That fact has been proved during the testimony of* (insert the name of another witness who has already testified).
- *This fact will be testified to during the testimony of* (insert the name of another witness who will testify later).

Cross Reference to North Carolina Rule

There is no North Carolina Rule specifically covering forms of questions. The court has discretion to sustain the objection pursuant to Rule 611(a).

Explanation

A direct examination question is objectionable if it assumes, in the asking, facts that have not already been proved. These questions are another form of leading questions and are referred to as “misleading” questions. However, the trial court has discretion to depart from the usual order of presentation of evidence when necessary. *State v. Brice*, 320 N.C. 119, 357 S.E. 2d 353 (1987).

AUTHENTICATION OF INSTRUMENTS

Objection

- *I object. This exhibit has not been authenticated.*

Responses

- *This instrument has been authenticated by stipulation of counsel.*
- *The instrument has been authenticated by the testimony of (insert name of witness who has testified) that*
 - › *the witness created the writing; or*
 - › *the witness was present when the writing was created and testified that it is in the same basic condition as at the time of its creation; or*
 - › *the witness knows the handwriting because he or she saw the author write or sign the instrument; or*
 - › *the witness knows the handwriting from having seen the author sign at another time; or*
 - › *the witness knows the handwriting by circumstantial evidence (state such circumstantial evidence); or*
 - › *(where document is proved by an expert witness) the expert has compared the handwriting in question with an authentic handwriting exemplar and that the expert's opinion to a reasonable degree of*

certainty is that the handwriting in question is that of (insert name of purported author); or

› *the witness was present at the time the tape recording, audio, or video was made; or*

› *the witness saw the scene or items portrayed in the photograph at a relevant time and that the photograph is a fair and accurate representation of what he or she saw.*

- *I request the court compare the handwriting in question with an admittedly authentic handwriting exemplar and find that it is the handwriting of (insert name of purported author).*

Cross Reference to North Carolina Rule 901

Explanation

Unless an instrument is self-authenticating under Rule 902, its proponent must establish its identity and authorship before it can be accepted into evidence. The proponent of an instrument can fulfill the requirements of Rule 901 in a variety of ways, including stipulation, circumstantial evidence, or the testimony of a witness with knowledge of its identity and authorship.

AUTHENTICATION OF TELEPHONE CONVERSATION AND VOICES

Objections

- *I object. The telephone conversation has not been authenticated.*
- *I object. The participants in the telephone conversation have not been properly identified.*

Responses

- *The identity of the participants in the telephone conversation has been established through the testimony of (insert name of witness) who has testified that*
 - › *the witness is familiar with and recognized the voice; or*
 - › *the witness called the number listed for (insert name of participant) and the other party identified himself or herself as (insert name of participant); or*
 - › *the witness called the number listed for (insert name of participant) and the content of the conversation showed (insert name of person) to be the person who answered the call; or*
 - › *the witness called the number listed for (insert name of business) and the conversation related to business conducted by (insert name of business) over the telephone; or*

- › (where proof is established by expert witness testimony) *the expert has compared the voice in question with an authentic voice exemplar and that the expert's opinion to a reasonable degree of certainty is that the voice in question is that of* (insert name of purported speaker).

Cross Reference to North Carolina Rule 901

Explanation

Authentication of telephone conversations and voices is the process of proving the identity of the persons involved in the conversation. Before testimony can be had that a telephone conversation occurred, testimony must be elicited to prove the identity of the participants in the conversation.

CHARACTER EVIDENCE

GENERALLY

A
B
C

Objection

- *The question calls for evidence of character on propensity.*

Response

- *This evidence is*
 - › *offered on propensity pursuant to Rule 404(a)(1) or 404(a)(2); or*
 - › *offered for a relevant non-propensity purpose pursuant to Rule 404(b); or*
 - › *offered to prove propensity where character is an essential element of a claim, charge, or defense pursuant to Rule 405.*

Cross Reference to North Carolina Rules 404 and 405

Explanation

The evidence of a person's character is generally inadmissible as irrelevant when offered on the issue of that person's propensity to act in conformity with such character trait. When a criminal defendant puts in issue his or her own character, or the character of

the alleged victim, or where the character of a party is an essential element of a claim, charge, or defense in either the criminal or civil context, character evidence is admissible to show propensity.

CHARACTER EVIDENCE ACCUSED OR VICTIM IN A CRIMINAL CASE

A
B
C

Objections

- *I object. The prosecution is attempting to offer evidence of the defendant's character where the defendant has not offered any character evidence.*
- *I object. The prosecution is attempting to offer evidence of the victim's character where none has been offered by the defendant.*

Responses

- *The defendant has opened the door on his or her character by offering evidence of his or her pertinent character trait.*
- *The defendant's character is an essential element of the charge or defense.*
- *The defendant has opened the door to examine the victim's character by*
 - › *offering evidence of the victim's character; or*
 - › *offering evidence that the victim was the first aggressor in a homicide case.*

Cross Reference to North Carolina Rules 404 and 405

Explanation

Where the accused in a criminal case opens the door to his or her own good character pursuant to Rule 404(a)(1) or to the victim's character pursuant to Rule 404(a)(2), then the prosecution is permitted to rebut that evidence with contrary character evidence. Rule 404(a)(1) permits a criminal defendant to offer reputation or opinion evidence, through a character witness, to show lack of propensity to commit the crime charged. Rule 404(a)(2) allows the criminal defendant to offer evidence of the victim's relevant character trait to show the propensity of the victim to act in a certain way where pertinent. Rule 404(a)(1) and Rule 404(a)(2) character evidence may only be proved by reputation or opinion evidence pursuant to Rule 405(a). And under Rule 405(a), expert testimony on character is inadmissible. Rule 405(b) provides that if the character of the defendant is an essential element of the charge or defense, that character may be proved by specific instances of conduct by the defendant in addition to by way of reputation and opinion evidence, including expert testimony.

CHARACTER EVIDENCE OTHER ACTS, CRIMES, OR WRONGS

A
B
C

Objection

- *I object. This evidence is inadmissible character evidence offered on propensity.*

Response

- *This evidence is not offered on propensity but rather for the purpose of showing (state purpose), a relevant, non-propensity purpose pursuant to Rule 404(b).*

Cross Reference to North Carolina Rule 404(b)

Explanation

Rule 404(b) is not an exception to the general rule forbidding the use of character evidence to show propensity. Rather, Rule 404(b) admits character evidence where it involves specific crimes, wrongs, or acts, other than those involved in the case at bar, for any relevant, non-propensity purpose, including the commonly enumerated purposes illustrated in the rule—proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident. Assuming that the prior act is otherwise admissible, the quantum of

proof necessary for its admission must meet the Rule 104 standard of sufficient evidence that the jury could find that the specific instance of conduct occurred.

A
B
C

CHARACTER EVIDENCE

RAPE OR SEX OFFENSE CASES

RELEVANCE OF VICTIM'S PAST BEHAVIOR

A
B
C

Objections

- (Opinion or reputation evidence) *I object. The question calls for opinion or reputation evidence concerning the alleged victim's sexual activity.*
- (Specific instances of prior sexual activity) *I object. The proffered evidence of prior sexual activity on the part of the alleged victim is irrelevant.*

Responses

- (Opinion or reputation evidence) *There is no appropriate response because this evidence is never admissible.*
- (Specific instances of prior sexual activity)
 - › *The evidence of prior sexual activity was between the complainant and the defendant. Proper notice has been given, and the court has determined the evidence is relevant.*
 - › *The evidence of prior sexual behavior is offered for the purpose of showing that the act or acts charged were not committed by the defendant. Proper notice has been given, and the court has determined the evidence is relevant.*

- › *The evidence of prior sexual activity is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version as to tend to prove that the complainant consented or that the complainant behaved in such a manner as to lead the defendant to reasonably believe the complainant consented. Proper notice has been given, and the court has determined the evidence is relevant.*
- › *The evidence is offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the acts or acts charged. Proper notice has been given, and the court has determined the evidence is relevant.*

Cross Reference to North Carolina Rule 412

Explanation

Evidence of reputation or opinion concerning the alleged victim's past sexual activity is never admissible. Evidence of specific instances of the alleged victim's sexual activity is admissible only if such behavior was between the complainant and the defendant; if such behavior is offered to show the defendant did not commit the acts charged; if such behavior tends to prove consent or the defendant's reasonable belief of consent; or if such behavior is the basis of a psychological or psychiatric expert's opinion that the complainant invented the acts charged.

COMPETENCE TO TESTIFY

Objections

- *I object to the calling of this witness on the ground of incompetence to testify because the witness lacks the ability to (state relevant reason), which has been shown on the voir dire of the witness.*
- *I move to strike the witness's testimony and object to further testimony on the ground that the witness is incompetent in that his or her testimony has shown the inability to (state relevant reason).*

Responses

- *The witness is competent because he is capable of expressing himself directly or through an interpreter.*
- *The witness is competent because he is capable of understanding his duty to testify truthfully.*
- *The witness is competent to testify, and any questions regarding the witness's testimonial capacity go to the weight of the evidence rather than the competence of the witness.*

Cross Reference to North Carolina Rules 601, 602, 603, 604, 605, and 606

Explanation

A
B
C

A person is competent to testify if he or she possesses the ability to perceive the events about which testimony will be given and further possesses the abilities to remember, to communicate intelligibly, and to appreciate the obligation to tell the truth, which is imposed by oath or affirmation.

COMPOUND QUESTIONS

Objection

- *I object. The question is compound.*

Response

- *I withdraw the question and will ask separate questions.*

Cross Reference to North Carolina

There is no North Carolina Rule specifically covering forms of questions. The court has discretion to sustain the objection pursuant to Rule 611(a).

Explanation

A compound question asks for two or more items of information at the same time, so that it is impossible to understand the meaning of the answer to the question. Objections to compound questions are best made only when the compound question is likely to mislead the jury to the detriment of objecting counsel's client. Otherwise the objection merely makes the opponent a better questioner.

COMPROMISE/OFFERS OF COMPROMISE

A
B
C

Objection

- *I object. The proffered evidence is evidence of compromise negotiations offered on liability and/or damages.*

Responses

- *The evidence is admissible because*
 - › *there was no dispute between the parties at the time of the compromise discussions; or*
 - › *the evidence is not offered on liability or damage issues but rather for another purpose, such as to show bias, no undue delay, or an effort to subvert a criminal investigation.*

Cross Reference to North Carolina Rules 408 and 413

Explanation

Evidence of settlement or of settlement negotiations in a disputed civil claim are inadmissible to prove liability or the amount of the claim. Evidence of settlement, offers to settle, or statements made during the course of settlement negotiations may be admissible for another relevant purpose, for example, to show bias, to negate allegations of undue delay, or to show an effort to subvert a criminal investigation or prosecution.

CROSS-EXAMINATION

GENERALLY

A
B
C

Objection

- *I move to strike the direct testimony of the witness because I have not had the opportunity to conduct a full and fair cross-examination. I ask that the jury be instructed to disregard the testimony of the witness.*

Responses

- *The purposes of cross-examination have been substantially completed.*
- *Counsel has waived the right to a full and complete cross-examination by (insert reasons).*

Cross Reference to North Carolina Rule

There is no North Carolina Rule that specifically addresses the issue of the right to a full and fair cross-examination. The court may sustain the objection under Rule 611(a).

Explanation

For every witness presented by a party, the adverse party has the right to a full and fair cross-examination. The remedy for the denial of such right is to have the testimony stricken from the record.

CROSS-EXAMINATION SCOPE

A
B
C

Objection

- *I object. The question on cross-examination exceeds the proper scope of cross-examination.*

Responses

- *The subject matter of the question is relevant to a specific issue in the case.*
- *The question seeks to elicit information that is relevant to the credibility of the witness.*

Cross Reference to North Carolina Rule 611(b)

Explanation

North Carolina follows the common law practice, rather than that adopted by the Federal Rules of Evidence, of permitting cross-examination on any matter relevant to any issue in the case, including credibility.

DEAD MAN'S STATUTE

Objections

- *I object. The witness's testimony violates the Dead Man's statute.*
- *I object. The witness is incompetent to testify.*

Responses

- *The witness's testimony does not concern an oral communication between the decedent or lunatic and himself.*
- *The witness is not a party with a direct interest in the outcome of the litigation.*
- *The witness is not a person from whom the interest in the outcome of the litigation is derived.*
- *The testimony is on behalf of the deceased person or the lunatic (the door has been opened by testimony given on behalf of the deceased person or the lunatic relating to the same transaction).*
- *The testimony of the lunatic or deceased person is given in evidence concerning the same oral communication.*

Cross Reference to North Carolina Rule 601(c)

Explanation

The Dead Man's Statute, codified at Rule 601(c), prohibits an interested witness from testifying to a conversation with a deceased person or lunatic, based on a concern that the inability to hear the decedent's or lunatic's own version of the oral communication could cause hardship or fraud.

EXHIBITS DEMONSTRATIVE

Objections

- *I object. The proffered exhibit has not been properly authenticated.*
- (To-scale model) *I object. The proffered exhibit has not been shown to be a fair and accurate representation of an object in issue.*

D
E
F

Responses

- *The demonstrative exhibit has been authenticated by the testimony of (insert name of witness). The witness has testified that (summarize the testimony of the witness).*
- (To-scale models)
 - › *The exhibit is a fair and accurate representation of a scene in issue; or*
 - › *The witness has testified that the exhibit is a to-scale model and is a fair and accurate representation of an object that is in issue.*

Cross Reference to North Carolina Rule

There is no specific rule on demonstrative exhibits. All exhibits must be authenticated pursuant to Rule 901(a).

Explanation

Typical demonstrative exhibits are to-scale models and sufficiently identical duplicates of the actual tangible evidence. The requirement of authentication of such exhibits is satisfied by evidence sufficient to support a finding that the exhibit is a fair and accurate depiction or representation of something that is in issue in a case.

EXHIBITS ILLUSTRATIVE

Objections

- *I object. The proffered illustrative exhibit has not been properly authenticated.*
- *I object. The proffered exhibit has not been shown to be a fair and accurate depiction of a relevant scene.*
- *I object. The proffered illustrative exhibit is confusing and/or misleading.*
- *I object. The proffered illustrative exhibit contains markings that will lead the witness in reciting testimony.*

Responses

- *The illustrative exhibit has been authenticated by the testimony of (insert name of witness). The witness testified that*
 - › *the witness recognizes what the exhibit portrays;*
and
 - › *that the exhibit will aid in illustrating and/or explaining the witness's testimony.*
- *The witness has testified that the exhibit shows a relevant scene as it appeared at a relevant time, the exhibit is a fair and accurate depiction of that scene, and the exhibit will aid in illustrating the witness's testimony.*

- *The exhibit is not offered as a to-scale diagram; it is merely an aid to the explaining of testimony. Any matters affecting the weight to be given the illustrative exhibit can be demonstrated during cross-examination.*
- (Insert name of witness) *has already testified as to what the markings contained on the exhibit portray. The exhibit is offered merely to illustrate that testimony.*

Cross Reference to North Carolina Rule

There is no specific rule on illustrative exhibits. All exhibits must be authenticated pursuant to Rule 901(a). Under N.C.G.S. § 8-97 a photograph may be admitted as either illustrative or substantive evidence upon a proper foundation.

Explanation

Illustrative exhibits are those that assist a witness in the rendering of testimony. Examples of illustrative exhibits are diagrams, charts, graphs, and photographs (although photographs may also be introduced as substantive evidence). The requirement of authentication is satisfied for illustrative exhibits by testimony that the exhibit will aid in illustrating or explaining testimony.

EXHIBITS TANGIBLE OBJECTS

Objection

- *I object. The proffered exhibit is incompetent for lack of proper foundation.*

Response

- *I have shown through the testimony of (insert name of witness) that*
 - › *he or she perceived the exhibit at a relevant time,*
 - › *the exhibit is the one perceived; and*
 - › *it is in substantially the same condition as it was at the relevant time.*

Cross Reference to North Carolina Rule

There is no specific rule on tangible objects exhibits. All exhibits must be authenticated pursuant to Rule 901(a).

Explanation

In order to introduce a tangible object into evidence, the proponent must show that it can be identified by a witness who had knowledge of the tangible object at a relevant time and who can testify that the tangible object is in the same or substantially the same condition as it was at a relevant time.

EXHIBITS WRITINGS

Objection

- *I object to the introduction of this exhibit. There is an improper foundation because*
 - › *it is not relevant; or*
 - › *authenticity has not been shown; or*
 - › *the original document rule has not been met; or*
 - › *the writing is hearsay.*

Response

- *The foundational requirements regarding relevance, authentication, the original document rule, and hearsay have been met through the testimony of (insert names of witnesses) who have testified that (insert a portion of the relevant testimony).*

Cross Reference to North Carolina Rule

Relevance is governed by rules in Article 4, authenticity is governed by rules in Article 9, original documents rule concerns are governed by rules in Article 10, and hearsay is governed by rules in Article 8.

Explanation

In order to introduce a writing into evidence, four foundational requirements must be met. The writing must be shown to be relevant, to be authentic, to meet the requirements of the original document rule, and either to qualify as non-hearsay or to meet an exception to the hearsay rule.

EXHIBITS USE BY JURY

Objection

- *Objection, I would like to be heard. (Possible objections are time-consuming, cumulative, or prejudicial.)*

Response

- *The statute authorizes jury use of exhibits.*

Cross-reference to North Carolina Rule

Under N.C.G.S. § 1-181.2, the court has discretion, after allowing the parties to be heard, to allow the jury, if they so request, to take into the jury room admitted exhibits that have been passed to the jury, including photographs and any illustrative exhibits used by a witness while testifying. Depositions may be taken into the jury room only upon consent of the parties. Excluded from this provision are summaries, lists, and similar documents prepared in the courtroom.

EXPERT OPINION

Objections

- *I object to the qualification of the witness as an expert.*
- *I object to the admission of expert testimony because the discipline in which the witness purports to qualify as an expert is not considered to be sufficiently reliable in the field to which it belongs.*
- *I object to the admission of the witness's opinion because it is beyond the area of expertise in which he or she has been qualified.*
- (Medical malpractice cases) *I object to the qualification of the witness as an expert, or I object to the admission of the witness's opinion, because the witness*
 - › *does not specialize in the same or similar specialty as the party about whom the testimony is offered; or*
 - › *has not, during the year preceding the litigated occurrence, devoted the majority of his or her professional time engaged in either the active practice of, or instruction in, the same health profession and specialty as the party about whom the testimony is offered.*

Responses

- *I have shown that the witness is qualified as an expert in (insert field of expertise) by showing*

- › *that the expert's method of proof is sufficiently reliable;*
- › *that the witness is actually qualified in that field;*
and
- › *that the expert's testimony is relevant in the branch of the discipline to which it belongs.*
- *The court has qualified the expert in the area of (insert field of expertise), and the witness's opinion is within that area.*
- (Medical malpractice cases)
 - › *I have shown that the witness is qualified as an expert and to give an opinion in accordance with the requirements of Rule 702(b).*
- *I have shown extraordinary circumstances exist to allow this witness to testify in this particular case to serve the ends of justice.*

Cross Reference to North Carolina Rules 702, 703, 704, 705, and 706 and *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 597 S.E.2d 674 (2004).

Explanation

Where the proponent seeks to offer opinions, conclusions, or inferences to assist the fact finder in determining a fact in issue, and such opinions are be-

yond the ability of the fact finder, the proponent may offer such opinions, conclusions, or inferences from a witness qualified as an expert in the relevant field. Where the expert is proffered to testify regarding a novel scientific principle, the trial judge must consider the reliability of the method, including the expert's use of established techniques, the expert's professional background in the field, the expert's use of visual aids so that the jury is not forced to blindly accept scientific conclusion, and independent research conducted by the expert. North Carolina case law follows these principles, rejecting the federal standard established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Rule 702(b) requires a heightened showing of qualifications and experience before an expert may offer an opinion in medical malpractice cases. Unless extraordinary circumstances are shown, the witness must have direct and recent experience in the same specialty or performing the same procedure as the party about whom the witness offers an opinion.

FIRSTHAND KNOWLEDGE

Objection

- *I object. There has been no foundation to show the witness has personal knowledge of the matter about which he or she has been asked.*

Response

- *The witness has shown firsthand knowledge of the subject matter of the witness's testimony. A foundation has been laid that demonstrates the witness was in position to know those items about which his or her testimony will be given.*

Cross Reference to North Carolina Rule 602

Explanation

A witness may testify only as to the matters about which he or she has personal or firsthand knowledge. Lack of personal knowledge makes the witness incompetent to testify as to particular facts. Generally, the proponent of the witness must lay a foundation on the issue of personal knowledge by offering evidence sufficient to support a finding that the witness had firsthand knowledge of the subject matter about which testimony will be given.

GUILTY PLEAS OFFERS OF PLEAS AND RELATED STATEMENTS

Objection

- *I object that this evidence is inadmissible as a withdrawn guilty plea, no contest plea, or as an offer to so plead.*

Response

- *This evidence is admissible against the criminal defendant because another statement made in the course of the same plea discussion has been introduced and this statement should in fairness be considered contemporaneously with it.*

Cross Reference to North Carolina Rule 410

Explanation

The only exception to the nonadmissibility of withdrawn guilty pleas or no contest pleas is to allow these statements if necessary to put into context other statements relating to the same plea or plea discussions.

HABIT AND ROUTINE PRACTICE

Objection

- *I object. This evidence is irrelevant as a prior act offered on the issue of propensity.*

Response

- *This evidence is relevant because it shows a consistent habit or routine practice that raises a permissible inference that the party or organization likely acted in this case according to the habit or routine practice.*

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Cross Reference to North Carolina Rule 406

Explanation

Evidence of a personal habit or of the routine practice of an organization is admissible as relevant to show that on a specific occasion, such person or organization acted in conformity with the proffered habit or practice. By its nature, habit or routine practice testimony is circumstantial proof that certain conduct, or an act consistent therewith, occurred. Habit or routine practice evidence is admissible even when there is firsthand evidence of the conduct in question.

HEARSAY GENERALLY

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *The statement is not being offered for the truth of the matter asserted. Instead, it is offered to show the statement was made. The making of the statement in question is relevant to show*
 - › *the effect on a person who heard the statement; or*
 - › *a prior inconsistent statement; or*
 - › *an operative legal fact or a verbal act; or*
 - › *the knowledge of the declarant; or*
 - › *corroboration of the testifying witness.*

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Cross Reference to North Carolina Rule 801

Explanation

The foolproof hearsay test: Ask whether the relevant purpose for offering the out-of-court statement is its truth. If the answer to that question is yes, the out-of-court statement is hearsay. If the answer to

the question is not clearly yes, ask this next question: “Must the content of the out-of-court statement be believed in order to be relevant?” If yes, the evidence is hearsay. A prior consistent statement of a witness is admissible to corroborate his or her testimony and is not considered hearsay because it is not admitted for its truth, but only to prove the statement was made. *State v. Medley*, 295 N.C. 75, 243 S.E.2d 374 (1978).

Hearsay and the Confrontation Clause

Under the Confrontation Clause of the Sixth Amendment, a defendant is guaranteed the right to effectively cross-examine a witness. When hearsay evidence is offered against a criminal defendant, the court must determine whether the hearsay is “testimonial.” Statements are testimonial if they were made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. If the hearsay is found to be testimonial, the Confrontation Clause will block its admission against a criminal defendant unless the hearsay declarant has previously been cross-examined or is available for cross-examination at trial. *Crawford v. Washington*, 541 U.S. 36 (2004).

HEARSAY

ATTACKING AND SUPPORTING THE CREDIBILITY OF A HEARSAY DECLARANT

Objection

- *I object. The question seeks to attack the credibility of a person who has not appeared as a witness.*

Response

- *The person whose credibility is being attacked is a hearsay declarant, whose statement was offered through the testimony of (insert name of witness). This impeachment of an out-of-court declarant is permissible to the same extent available for a testifying witness.*

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Cross Reference to North Carolina Rule 806

Explanation

Impeachment of an out-of-court declarant is permissible to the same extent available for a testifying witness. Impeachment by prior inconsistent statement of a hearsay declarant is permitted despite the inability to confront the declarant with the inconsistency. Impeachment of the hearsay declarant as to bias, interest, prejudice, or improper motive may be accomplished without the usual foundational requirement of denial of the same.

HEARSAY

NON-HEARSAY ADMISSIONS

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *The statement is not hearsay pursuant to Rule 801(d) because I have shown that*
 - › *the statement was made by the party opponent; or*
 - › *the statement was made by a person and was adopted by the party opponent as the party's own, and thus, is a vicarious admission of the party opponent; or*
 - › *the statement was made by an agent authorized to speak on behalf of a party opponent, and thus, is a vicarious admission of the party opponent; or*
 - › *the statement was made by an agent or servant of the party opponent concerning a matter within the scope of the declarant's agency or employment, and was made during the existence of the declarant's agency or employment, and thus, is a vicarious admission of a party opponent; or*
 - › *the statement was made by a co-conspirator of the party opponent during the course of the conspiracy*

and in furtherance of the conspiracy, and thus, is a vicarious admission of the party opponent.

Cross Reference to North Carolina Rule 801(d)

Explanation

The North Carolina Rules create a hearsay exception for any admission of a party opponent. An admission is an out-of-court statement made by a party, or attributable to a party, offered for its truth by the opponent in the lawsuit. For purposes of proving the existence of a conspiracy for co-conspirator admissions, the proponent must establish the conspiracy by independent evidence and may not offer the alleged co-conspirator statement itself.

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HEARSAY WITHIN HEARSAY

Objections

- *I object to this statement because it contains inadmissible hearsay within hearsay.*
- *I move to strike the answer because it contains hearsay within hearsay.*

Response

- *Both statements are admissible because each either comes within a hearsay exception or is non-hearsay.*

Cross Reference to North Carolina Rule 805

Explanation

In order to admit hearsay within hearsay, the proponent must account for both out-of-court statements with either a hearsay exception or an argument that the out-of-court statement is offered for a relevant, non-hearsay purpose.

HEARSAY EXCEPTION ABSENCE OF ENTRY IN BUSINESS RECORDS

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *The absence of an entry in this record is admissible to show the nonoccurrence of an event pursuant to Rule 803(7). I have shown through the testimony of (insert name of witness), who is the custodian of the business records, or other qualified person,*
 - › *that a business record exists, pursuant to Rule 803(6); and*
 - › *the matter that is not recorded in the record is of a kind for which a record would regularly be made and preserved; and*
 - › *the source of the information or other circumstances fail to indicate a lack of trustworthiness.*

Cross Reference to North Carolina Rule 803(6) and (7)

Explanation

If the proponent is able to lay a foundation for a record of regularly conducted activity pursuant to Rule 803(6), testimony or the offer of the record for the purpose of demonstrating that a particular entry does not appear in the record is permitted for the purpose of proving that the event, about which the record would have been made, did not occur.

HEARSAY EXCEPTION ABSENCE OF PUBLIC RECORDS OR ENTRY

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- The absence of a public record concerning the event in question is admissible to prove that the event did not occur pursuant to Rule 803(10). I have shown that
 - › *a public agency or office regularly makes and preserves records of a particular kind of matter; and*
 - › *the document is self-certifying pursuant to Rule 902; and*
 - › *a diligent but unavailing search of such records failed to disclose a record, report, statement, data compilation, or entry that such entry exists.*

Cross Reference to North Carolina Rule 803(10)

Explanation

The absence of a public record or entry concerning an event that would normally be the subject of a public record is admissible to prove that the event did not occur.

HEARSAY EXCEPTION EXCITED UTTERANCE

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *The statement is admissible as an excited utterance pursuant to Rule 803(2).*
- *I have shown through the testimony of (insert name of witness) that*
 - › *the statement relates to a startling event or condition; and*
 - › *was made while the declarant was under the stress or excitement caused by the event or condition.*

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Cross Reference to North Carolina Rule 803(2)

Explanation

When the declarant is sufficiently startled into making a spontaneous utterance, the assumption is there was neither sufficient time nor presence of mind to fabricate. The event that gives rise to the statement relating to it must be sufficiently startling, and the

statement must be made under the stress of that event so as to remove the likelihood self-serving reflection in the making of the statement.

HEARSAY EXCEPTION FAMILY RECORDS

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *This statement is admissible as a family record pursuant to Rule 803(13).*
- *I have shown through the testimony of (insert name of witness) that this is a statement of fact concerning personal or family history, contained in a family Bible, genealogy, or the like.*

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Cross Reference to North Carolina Rule 803(13)

Explanation

Statements of personal or family history contained in volumes or in other places where, if they were inaccurate, would have been corrected, are admissible to prove the content of those statements. Note the absence of a requirement of contemporaneity of entry. However, such writing, like any other, must be authenticated.

HEARSAY EXCEPTION FORMER TESTIMONY

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *The statement is admissible as former testimony pursuant to Rule 804(b)(1).*
- *I have shown through the testimony of (insert name of witness) that*
 - › *the declarant is unavailable pursuant to Rule 804(a), and the statement is testimony given at another hearing of the same or different proceeding, or in a deposition in the course of the same or a different proceeding; and*
 - › *the party against whom it is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*

Cross Reference to North Carolina Rule 804

Explanation

Former testimony is any testimony given under oath in an earlier proceeding. It is admissible at a later hearing if the declarant is unavailable and the party against whom it is now offered had the opportunity and a similar motive to develop, by questioning of the declarant, the earlier testimony when it was given. The reliability of these statements is gained from the fact that they were given under oath and could be tested by examination by the party against whom they are now offered.

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HEARSAY EXCEPTION JUDGMENT AS TO PERSONAL, FAMILY, OR GENERAL HISTORY, OR BOUNDARIES

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Response

- *This statement is admissible as a judgment relating to personal, family, or general history, or boundaries pursuant to Rule 803(23).*
- *I have shown through the testimony of (insert name of witness) that*
 - › *this statement is a judgment offered as proof of matters of personal, family, or general history, or boundaries essential to the judgment; and*
 - › *it is provable by evidence of reputation.*

Cross Reference to North Carolina Rule 803(23)

Explanation

This section must be read in conjunction with Rule 803(19) and 803(20). Rule 803(23) only permits admissibility of such evidence where the

judgment proves facts that would be provable by reputation evidence.

HEARSAY EXCEPTION LEARNED TREATISES

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *This statement is admissible as a statement contained in a learned treatise pursuant to Rule 803(18).*
- *I have shown through the testimony of (insert name of witness) that the expert, witness has relied on the statement and that it is authoritative.*
- *(If on cross-examination) I have called the statement to the attention of the expert, and the statement is contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art that has been established as a reliable authority by the testimony or admission of the expert witness, by other expert testimony, or by judicial notice.*

Cross Reference to North Carolina Rule 803(18)

Explanation

A learned treatise is a book or article established as a reliable authority on a matter, ordinarily the subject

of expert opinion, that is called to the attention of an expert witness on cross-examination or is relied upon by the expert in direct examination. A foundation for the learned treatise may be laid through the expert who is on the stand, through some other expert, or through the taking of judicial notice by the trial judge of the learned nature of the writing. The learned treatise is admissible to either support or attack the testimony of an expert witness. Note that the treatise may only be read to the jury and may not be received as an exhibit. If admitted, the statement contained in the learned treatise may be read into evidence but may not be admitted as an exhibit.

HEARSAY EXCEPTION MARKET REPORTS AND COMMERCIAL PUBLICATIONS

Objection

- *I object. The document is an out-of-court statement and is therefore hearsay.*

Response

- *This statement is admissible as a market report or commercial publication pursuant to Rule 803(17).*
- *I have shown the document is a market quotation, tabulation, list, directory, or other published compilation, which is generally used and relied upon by the public or persons in particular occupations.*

Cross Reference to North Carolina Rule 803(17)

Explanation

Market reports or commercial publications are out-of-court statements that compile facts or data used by either the general public or by persons in particular professions or occupations and are relied upon for the purposes of carrying out daily business.

HEARSAY EXCEPTION MARRIAGE, BAPTISM, AND SIMILAR CERTIFICATES

Objection

- *I object. The document is an out-of-court statement offered for its truth and is hearsay.*

Response

- *This statement is admissible as a marriage, baptismal, or similar certificate pursuant to Rule 803(12). I have shown through the testimony of (insert name of witness) that*
 - › *this is a statement of fact contained in a certificate that shows the maker performed a marriage or other similar ceremony; and*
 - › *was made by a clergyman, public official, or other person authorized by law or the practices of a religious organization to perform the act certified; and*
 - › *purports to be issued at the time of the act or within a reasonable time thereafter.*

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Cross Reference to North Carolina Rule 803(12)

Explanation

Examples of facts that could be proved by the use of Rule 803(12) are paternity through a baptismal certificate and marriage through a marriage certificate.

HEARSAY EXCEPTION

OTHER EXCEPTIONS

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *The statement is admissible pursuant to the residual exception to the hearsay rule contained in Rule 803(24) or Rule 804(b)(5). I have shown through the testimony of (insert the name of the witness) that*
 - › *the statement is not specifically covered by any of the enumerated hearsay exceptions; and*
 - › *the statement has circumstantial guarantees of trustworthiness equivalent to that of the enumerated exceptions; and*
 - › *the statement is offered as evidence of a material fact; and*
 - › *the statement is more probative on the point for which it is offered than any other evidence that I can procure through reasonable efforts; and*
 - › *the general purposes of these rules in the interests of justice will be best served by the admission of this statement into evidence; and*

› *I have given the adverse parties notice sufficiently in advance of trial or hearing of my intention to offer the statements so as to afford them a fair opportunity to prepare to meet it.*

Cross Reference to North Carolina Rules 803(24) and 804(b)(5)

Explanation

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The residual exceptions to the hearsay rule provide identical catch-all provisions that permit the admission of hearsay where, although not fitting any of the enumerated exceptions, the proffered hearsay possesses guarantees of trustworthiness equivalent to that of the enumerated exceptions and is more probative of the fact for which it is offered than any other available, admissible evidence.

HEARSAY EXCEPTION PRESENT SENSE IMPRESSION

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Response

- *This statement is admissible as a present sense impression pursuant to Rule 803(1).*
- *I have shown through the testimony of (insert name of witness) that*
 - › *the statement describes or explains an event or condition; and*
 - › *was made while the declarant was perceiving the event or condition, or immediately thereafter.*

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Cross Reference to North Carolina Rule 803(1)

Explanation

A present sense impression is an out-of-court statement that describes or explains an occurrence or condition made at the time the declarant was perceiving the occurrence or condition, or immediately thereafter. The event described in the statement need not be

exciting or startling. The guarantee of reliability for this hearsay exception is spontaneity or contemporaneity.

HEARSAY EXCEPTION PUBLIC RECORDS AND REPORTS

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*
- (Criminal cases only) *I object. The report is not admissible against a criminal defendant.*

Responses

- *The out-of-court statement is admissible under the hearsay exception Rule 803(8) for public records and reports.*
- *I have shown through the testimony of (insert name of witness) that*
 - › *the document is a record, report, statement, or data compilation of a public office or agency setting forth the activities of the office or agency; or*
 - › *the records (etc.) are of a public office or agency setting forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report.*
- (Criminal cases) *The report falls under Rule 803(8) (A), setting forth the activities of the office and that the report is not testimonial, therefore not excluded under the Confrontation Clause.*

Cross Reference to North Carolina Rule 803(8)

Explanation

Such public records and reports are admissible unless the source of information or other circumstances indicate a lack of trustworthiness in the making or keeping of such records or reports. These records or reports gain their reliability from the public duty or the duty imposed by law that accompanies the maker's obligation to observe and record events. Records otherwise qualifying for admission pursuant to this exception are not admissible in a criminal case against the defendant when they are matters reported by law enforcement authorities.

HEARSAY EXCEPTION RECORDS OF DOCUMENTS AFFECTING AN INTEREST IN PROPERTY

Objection

- *I object. The document is an out-of-court statement offered for its truth and is therefore hearsay.*

Response

- *The statement is admissible as a record of a document affecting an interest in property pursuant to Rule 803(14).*
- *I have shown through the testimony of (insert name of witness) that*
 - › *this is a record of a public office; and*
 - › *an applicable statute authorizes the recording of documents of that kind in such office.*

Cross Reference to North Carolina Rule 803(14)

Explanation

A record of a document affecting an interest in property is an out-of-court writing that either relates to or establishes interest in property. It must be shown

to be kept in an office that has the statutory authority to keep such records.

HEARSAY EXCEPTION RECORDED RECOLLECTION

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Response

- *This statement is admissible as recorded recollection pursuant to Rule 803(5).*
- *I have shown through the testimony of (insert name of witness) that*
 - › *it is a memorandum or record concerning a matter about which a witness once had knowledge, but now has insufficient recollection to enable him or her to testify fully and accurately; and*
 - › *was made or adopted by the witness when the matter was fresh in the witness's memory so as to reflect that knowledge correctly.*

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Cross Reference to North Carolina Rule 803(5)

Explanation

Past recollection recorded must be distinguished from present recollection refreshed. Though both

require a failure of memory as a predicate, present recollection refreshed presents no hearsay problem at all. Present recollection refreshed refers to a situation where a witness has a failure of memory. The witness is then shown the item that serves to refresh his or her recollection; the item is then removed from the witness, and the witness testifies from a refreshed recollection. Past recollection recorded refers to a document created by the witness, or at the witness's direction, when the matter was fresh in the witness's mind so as to accurately reflect that knowledge. Note that the document may only be read to the jury and may not be received as an exhibit.

HEARSAY EXCEPTION

RECORDS OF REGULARLY CONDUCTED ACTIVITY (BUSINESS RECORDS)

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *This statement is admissible as a business record pursuant to Rule 803(6).*
- *I have shown through the testimony of (insert name of witness) who is a custodian of the records, or person who has knowledge of the record-keeping system, that the statement is contained in a*

(For manually entered records)

- › *memorandum, report, record, or data compilation;*
- › *recording acts, events, conditions, opinions, or diagnoses;*
- › *made at or near the time the acts or events took place;*
- › *by or from information transmitted by one with personal knowledge of the event or act;*
- › *where such record is kept in the course of regularly conducted business activities; and*

- › *it was the regular practice of the business to make such a record.*

(For computer-generated records, repeat the above steps and add)

- › *the computer and the program used are generally accepted in the field;*
- › *the computer was in good working order at relevant times; and*
- › *the computer operator possessed the knowledge and training to correctly operate the computer.*

Cross Reference to North Carolina Rule 803(6)

Explanation

A record of regularly conducted activity, known in the common law as a business record, is a writing or compilation of data that records activities or happenings, including opinions, made in the course of a regularly conducted activity, and kept in the course of such activity, and created by and from a person with personal knowledge of the contents of the record at or near the time of the event recorded. The exception covers records of regularly conducted activities on the part of all entities, whether or not they are formed for the purpose of making a profit.

HEARSAY EXCEPTION RECORDS OF RELIGIOUS ORGANIZATIONS

Objection

- *I object. The record is an out-of-court statement offered for its truth and is hearsay.*

Response

- *This statement is admissible as a record of a religious organization pursuant to Rule 803(11).*
- *I have shown through the testimony of (insert name of witness) that the statement is one of personal or family history and is contained in a regularly kept record of a religious organization.*

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Cross Reference to North Carolina Rule 803(11)

Explanation

This rule creates a hearsay exception for records of personal and family history so long as such records are maintained in a regularly kept record of some religious organization.

HEARSAY EXCEPTION RECORDS OF VITAL STATISTICS

Objection

- *I object. The record is an out-of-court statement offered for its truth and is hearsay.*

Response

- *The out-of-court statement is admissible pursuant to Rule 803(9) as a record of a vital statistic in that it is a record regarding a vital statistic that records a report made to a public official required by law to keep such record.*

Cross Reference to North Carolina Rule 803(9)

Explanation

As with other out-of-court writings that are offered pursuant to a hearsay exception, records of vital statistics must be authenticated either through the testimony of the public officer who creates and maintains the records or, more easily, by the proffer of a certified copy of the public record pursuant to Rule 902(4).

HEARSAY EXCEPTION REPUTATION AS TO CHARACTER

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Response

- *This statement is admissible as reputation as to character pursuant to Rule 803(21).*
- *I have shown through the testimony of (insert name of witness) that this is a statement of reputation of a person's character within the witness's community.*

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Cross Reference to North Carolina Rule 803(21)

Explanation

Reputation is a collection of hearsay. Reputation of a person's character that is found among his or her associates in some community is admissible as a hearsay exception, subject to the relevance requirements of Rules 404, 405, and 608.

HEARSAY EXCEPTION REPUTATION CONCERNING BOUNDARIES OR GENERAL HISTORY

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of reputation concerning boundaries or general history pursuant to Rule 803(20). I have shown through the testimony of (insert name of witness) that*
 - › *this statement is a statement of reputation in a community, arising before the controversy, as to boundaries of, or customs affecting, lands in the community; or*
 - › *as to events of general history important to the community or state or nation in which located.*

Cross Reference to North Carolina Rule 803(20)

Explanation

Reputation concerning boundaries or general history involves a collection of hearsay drawn from a

community regarding events of general import or knowledge in that community. The exception gains reliability from the force of general community knowledge.

HEARSAY EXCEPTION

REPUTATION CONCERNING

PERSONAL OR FAMILY HISTORY

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Response

- *The statement is admissible as a statement of reputation concerning personal or family history pursuant to Rule 803(19).*
- *I have shown through the testimony of (insert name of witness) that this is a statement of reputation among family members of one's family (or among one's associates or in the community) concerning a person's adoption, birth, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.*

Cross Reference to North Carolina Rule 803(19)

Explanation

The witness who testifies concerning the reputation clearly must be familiar with that reputation.

This familiarity is shown by (a) the witness being a member of the relevant family, community, or group of associates, and by (b) the witness's familiarity with the reputation, having either heard it discussed or taken part in such discussions.

HEARSAY EXCEPTION

REQUIREMENT OF UNAVAILABILITY FOR RULE 804 HEARSAY EXCEPTIONS

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *The out-of-court statement meets (insert the appropriate 804(b) exception).*
- *The declarant is unavailable because declarant*
 - › *is exempted from testifying concerning the subject of the statement by ruling from the court on the ground of privilege; or*
 - › *persists in refusing to testify concerning the subject of the statement despite a court order to do so; or*
 - › *testifies to a lack of memory on the subject of the statement; or*
 - › *is unavailable to testify at the hearing because of death or illness; or*
 - › *is absent from the hearing, and I have been unable to procure his or her attendance through process or other means; or*
 - › *Provide any other reason for the witness's absence.*

Cross Reference to North Carolina Rule 804(a) and (b)

Explanation

Unavailability of a hearsay declarant does not, in and of itself, create an exception to the hearsay rule. Unavailability is merely the first requirement for all Rule 804 exceptions to the hearsay rule. The types of unavailability listed in Rule 804(a) are not the exclusive circumstances of unavailability. Rather, this rule lists circumstances that per se amount to unavailability but fails to exclude any other legitimate showing of unavailability that the trial judge determines acceptable pursuant to Rule 804.

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HEARSAY EXCEPTION STATEMENT AGAINST INTEREST

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *This statement is admissible as a statement against interest pursuant to Rule 804(b)(3).*
- *I have shown through the testimony of (insert name of witness) that the statement was made by a declarant who is now unavailable pursuant to Rule 804(a), and*
 - › *was at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest; or*
 - › *so far tended to subject the declarant to criminal or civil liability; or*
 - › *to render invalid a claim by the declarant against another; and*
 - › *that a reasonable person in the declarant's position would not have made this statement unless he or she believed it to be true; and*
 - › *(If the statement tends to expose the declarant to criminal liability) corroborating circumstances clearly indicate the trustworthiness of the statement.*

Cross Reference to North Carolina Rule 804(b)(3)

Explanation

There is a special treatment for a statement against criminal or penal interest that requires corroborating circumstances that indicate the truthfulness or reliability of the statement against criminal liability or penal interest.

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HEARSAY EXCEPTION STATEMENT IN ANCIENT DOCUMENTS

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement contained in an ancient document pursuant to Rule 803(16).*
- *I have shown through the testimony of (insert name of witness) that the statement is contained in a document in existence twenty years or more, the authenticity of which is established.*

Cross Reference to North Carolina Rule 803(16)

Explanation

The foundational requirements for establishing authenticity of an ancient document require the condition of the document to create no suspicion regarding its authenticity, the document must have been kept in a place where it likely would be kept if it were authentic, and it must have been in existence for at least twenty years at the time of its proffer at trial.

HEARSAY EXCEPTION STATEMENT IN DOCUMENTS AFFECTING AN INTEREST IN PROPERTY

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *This statement is admissible pursuant to Rule 803(15) as a statement in a document affecting an interest in property.*
- *I have shown through the testimony of (insert name of witness) that*
 - › *the statement is contained in a document purporting to establish or affect an interest in property;*
 - › *the matter stated was relevant to the purpose of the document; and*
 - › *dealings with the property since the document was made have not been inconsistent with the truth of the statement or the purpose of the document.*

Cross Reference to North Carolina Rule 803(15)

Explanation

The requirements for qualification of admissibility under this rule are as follows: First, the factual statement contained in the document must relate to or be relevant to the purpose of the document. Second, the document would only be admissible so long as the dealings with the property have not been inconsistent with the truth of the statement or the purport of the document that was offered.

HEARSAY EXCEPTION STATEMENT OF PERSONAL OR FAMILY HISTORY

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *This statement is admissible as a statement of personal or family history pursuant to Rule 804(b)(4).*
- *I have shown through the testimony of (insert name of witness) that*
 - › *the declarant is now unavailable pursuant to Rule 804(a), and the statement concerns the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or*
 - › *the statement concerns the foregoing matters, as well as the death of another person, where the declarant was related to the other person by blood, adoption, or marriage, or was so intimately associated with the other's family as to be likely to give accurate information concerning the matter declared.*

Cross Reference to North Carolina Rule 804(b)(4)

Explanation

The requirement of declarant's personal knowledge, which ordinarily must be apparent from the circumstances of the making of a declarant's admissible hearsay statement, is explicitly dispensed with pursuant to Rule 804(b)(4).

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HEARSAY EXCEPTION

STATEMENT FOR PURPOSES OF

MEDICAL DIAGNOSIS OR TREATMENT

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *This statement is admissible as a statement for purposes of medical diagnosis or treatment pursuant to Rule 803(4).*
- *I have shown through the testimony of (insert name of witness) that the statement was made*
 - › *for purposes of medical diagnosis or treatment and was made for describing medical history; or*
 - › *for describing past or present symptoms, pain, or sensations; or*
 - › *for describing the inception or general character of the cause or external source thereof and was reasonably pertinent to diagnosis or treatment.*

Cross Reference to North Carolina Rule 803(4)

Explanation

Statements made to persons other than those immediately able to render medical assistance can qualify for this hearsay exception if made for purposes of obtaining medical diagnosis or treatment. However, statements of causation or the external source of the physical condition mentioned in the out-of-court statement will only be admissible if pertinent to the medical diagnosis or treatment. The key inquiry is whether the statement is germane to the diagnosis or treatment of a medical patient. Where and how an injury occurs is usually germane; who caused the injury usually is not.

HEARSAY EXCEPTION STATEMENT UNDER BELIEF OF IMPENDING DEATH

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *The statement is one made under belief of impending death pursuant to Rule 804(b)(2).*
- *I have shown through the testimony of (insert name of witness) that the statement*
 - › *was made by a declarant who is now unavailable pursuant to Rule 804(a); and*
 - › *was made by the declarant while believing that his or her death was imminent; and*
 - › *concerns the cause or circumstances of what the declarant believed to be his or her impending death.*

Cross Reference to North Carolina Rule 804(b)(2)

Explanation

The Rule does not require a declarant to die as a foundational requirement to the offering of a statement

under belief of impending death. The guarantee of reliability is found in the reasonable belief on the part of the declarant that he or she is about to die.

HEARSAY EXCEPTION THEN-EXISTING MENTAL OR EMOTIONAL CONDITION

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Responses

- *This statement is admissible as a statement of a then existing mental or emotional condition pursuant to Rule 803(3).*
- *I have shown through the testimony of (insert name of witness) that the statement*
 - › *is of the declarant's then existing state of mind, emotions, or sensation; and*
 - » *does not include a statement of memory or belief offered to prove the fact remembered or believed;*
or
 - » *even though a statement of memory or belief, it relates to the execution, revocation, identification, or terms of declarant's will.*

Cross Reference to North Carolina Rule 803(3)

Explanation

It is critical to note that only statements regarding a present mental or emotional condition fit within the exception. A statement regarding a past mental or emotional condition will not be admissible because there is no substantial guarantee of reliability, except when the statement relates to the declarant's will.

HEARSAY EXCEPTION THEN-EXISTING PHYSICAL CONDITION

Objections

- *I object. The question calls for a hearsay answer.*
- *I move to strike the answer as hearsay.*

Response

- *This statement is admissible as a statement of a then existing physical condition pursuant to Rule 803(3).*
- *I have shown through the testimony of (insert name of witness) that the statement is of the declarant's then existing physical condition.*

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Cross Reference to North Carolina Rule 803(3)

Explanation

A statement of a then existing physical condition gains its reliability from the contemporaneity of the statement and the existence of the physical condition described by the declarant. It is critical to note that only statements regarding present physical condition come within the exception. A statement regarding a past condition will not be admissible because there is no substantial guarantee of reliability.

IMPEACHMENT BIAS, PREJUDICE, INTEREST, AND IMPROPER MOTIVE

Objections

- (For questions posed on cross-examination) *I object. Counsel is attempting to impeach the witness on improper grounds. The testimony that counsel is attempting to elicit is irrelevant.*
- (To extrinsic evidence) *I object. Counsel has not laid the proper foundation for use of extrinsic evidence to impeach. The witness who counsel is attempting to impeach has not yet been called as a witness or was not confronted with the alleged bias, interest, or improper motive on cross-examination.*

Responses

- (For objections posed on cross-examination) *I am attempting to show that the witness is biased (or prejudiced, or has an interest in the outcome of the case, or has an improper motive for giving testimony).*
- (For an objection posed to extrinsic evidence where the witness with the alleged bias, etc., has not yet been called to testify) *The witness has been listed as a witness by my opponent, and I offer it as evidence conditionally to avoid recalling the witness presently on the stand.*

- (For an objection posed to extrinsic evidence where the witness with the alleged bias, etc., has already testified) *I confronted* (insert name of witness) *with his or her bias, etc., during cross-examination when I asked* (insert question), *and he or she denied it.*

Cross Reference to North Carolina Rule

There is no North Carolina Rule that specifically deals with bias, prejudice, interest, or improper motive. These are traditional areas of impeachment that fall within the general impeachment provision of Rule 607.

Explanation

Bias, prejudice, interest, and improper motive are particularly fertile areas for impeachment and are probably the most typical areas of impeachment with most witnesses. They all depend on the relationship of the witness with one of the parties or the subject of the litigation.

IMPEACHMENT CHARACTER EVIDENCE

Objections

- *I object. The character witness has insufficient knowledge of the witness's character to give an opinion.*
- *I object. The character witness has insufficient knowledge of the witness's reputation for dishonesty to give reputation testimony.*

Response

- *A foundation has been laid to demonstrate the character witness's sufficient familiarity with*
 - › *the witness's character for dishonesty, or*
 - › *the witness's reputation for honesty in the community.*

Cross Reference to North Carolina Rule 608(a) and (b)

Explanation

A witness may be impeached by opinion or reputation testimony that the witness has bad character for honesty. Once a witness has been impeached by evidence of dishonest character, such witness may be rehabilitated by the calling of a character witness who will testify as to the witness's character for honesty or

truthfulness by way of opinion or reputation evidence. Expert testimony on character is prohibited under Rule 405(a) and 608(a).

IMPEACHMENT MEMORY

Objection

- *I object. The question seeks to elicit irrelevant information. The question involves improper impeachment.*

Response

- *The question calls for an answer that will show the witness's inability to remember the events about which testimony has been given. This is proper cross-examination.*

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Cross Reference to North Carolina Rule

There is no North Carolina Rule that specifically deals with impeachment with regard to faulty memory. *See* Rule 607.

Explanation

A witness may be impeached by showing that the witness has an impaired ability to remember the events in question or by showing the unlikelihood that the witness can actually remember those items about which testimony is given. This form of impeachment is often coupled with impeachment showing bias, prejudice, etc.

IMPEACHMENT PERCEPTION

Objection

- *I object. The question seeks to elicit irrelevant information. The question involves improper impeachment.*

Response

- *The question calls for an answer that will show the witness's inability to perceive. This is proper cross-examination.*

Cross Reference to North Carolina Rule

There is no North Carolina Rule that specifically deals with impeachment regarding the ability to perceive. *See* Rule 607.

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Explanation

A witness may be impeached by showing an impaired ability to perceive the events in question. Such impeachment is typically accomplished by showing the time, place, and circumstances in which the perception occurs, from which the lawyer can argue and the jury can infer that the witness is not worthy of belief. Matters of perception include the ability to see, hear, smell, or feel some particular matter or item in question.

IMPEACHMENT PRIOR CONVICTIONS

Objections

- *I object. The proffered conviction is not a crime that is a felony or Class A1, Class 1, or Class 2 misdemeanor.*
- *I object. The date of conviction and the witness's release date from his sentence occurred more than ten years ago, written notice has not been given, and/or the probative value of the conviction on the issue of credibility does not substantially outweigh the prejudice to a party of admitting such conviction.*

Responses

- *The proffered conviction is a conviction of a felony or Class A1, Class 1, or Class 2 misdemeanor.*
- *Though the proffered conviction and the witness's release date occurred longer than ten years ago, written notice has been given and the probative value of the conviction on impeachment substantially outweighs any purported prejudice.*

Cross Reference to North Carolina Rule 609(a)–(e)

Explanation

Rule 609(a) deals with the admissibility of convictions for impeachment purposes for crimes that are either felonies or misdemeanors in Classes A1, 1 or 2. Inquiry on cross-examination is limited to the name of the crime, the time and place of conviction, and the punishment imposed. Admissibility of convictions more than ten years old requires a specific showing that their use is substantially more probative than prejudicial. With a criminal defendant, the admission of a conviction more than ten years old would be prejudicial if the prior conviction and the present charges are similar.

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IMPEACHMENT

PRIOR INCONSISTENT STATEMENTS

Objections

- *I object. The proffered statement is not inconsistent with the witness's testimony and is irrelevant.*

Responses

- *The witness has testified during direct examination that (insert testimony), and this statement is inconsistent with the thrust of the direct testimony.*
- *The witness testified during direct examination that (insert testimony), and this statement is inconsistent in that it omits facts testified to during direct examination.*

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Cross Reference to North Carolina Rule 613

Explanation

The North Carolina Rules do not require a formal foundation for impeachment by a prior inconsistent statement. Good tactics dictate, however, that counsel show, by way of foundation, the time, place, and circumstances of the inconsistent statement for maximum effect. In addition, it is tactically advisable to give a copy of written inconsistent statements

to the witness who is about to be impeached. This is especially important when the prior statement is inconsistent by omission.

IMPEACHMENT

SPECIFIC INSTANCES OF MISCONDUCT

Objections

- (On cross-examination) *I object. The specific instance of conduct does not show lack of truth-telling ability.*
- (To extrinsic evidence, written or oral) *I object. Extrinsic evidence of specific instances of conduct relating to truthfulness is inadmissible.*

Response

- *The specific instance of conduct shows lack of truth-telling ability in that* (insert reason or testimony).
- (Extrinsic evidence) *There is no appropriate response because extrinsic evidence of instances of misconduct is never allowed under Rule 608(b).*

Cross Reference to North Carolina Rule 608(b)

Explanation

Specific instances of conduct that show, without reference to the subject matter of the lawsuit, that a witness is not a truth-teller are admissible pursuant to Rule 608(b). Extrinsic evidence of instances of misconduct relating to honesty is not admissible.

INSURANCE AGAINST LIABILITY

Objection

- *I object that the proponent is offering evidence of liability insurance on the issue of negligence or other wrongful conduct or to show the proper amount of damages. I move for a mistrial.*

Response

- *This evidence of liability insurance is not offered on the issue of negligence or damages but to show ownership, agency, control, or bias, or some purpose other than liability.*

Cross Reference to North Carolina Rule 411

Explanation

Contrary to common belief, the mere mention of the defendant being insured against liability is not necessarily inadmissible, nor need it lead to a mistrial. Evidence of insurance generally is not admissible only on the issues of liability and the ability of a party to pay damages. It is admissible for other relevant purposes.

JUDICIAL NOTICE

Objection

- *I object to the court judicially noticing (insert fact offered) because it is not generally known in this jurisdiction and/or it is open to dispute and not capable of ready and certain verification.*

Responses

- *Judicial notice of (insert fact offered) is appropriate because*
 - › *the fact is generally known by people in this local jurisdiction and to require other proof would waste the time of the court; or*
 - › *it is capable of ready and certain verification, and I have provided the court with evidence that proves the existence of the fact.*

Cross Reference to North Carolina Rule 201

Explanation

Where the court is provided with authoritative sources that prove the fact, judicial notice, on request, is mandatory. The court may judicially notice an appropriate fact on its own motion. The opposing party has the right to be heard concerning the propriety of judicial notice.

LAY OPINION EVIDENCE

Objections

- *I object. The question calls for an opinion.*
- *I move to strike the answer because it is stated in the form of opinion.*

Response

- *This is permissible opinion from a lay witness because*
 - › *it is rationally based on the perception of the witness; and*
 - › *it would help the trier of fact to understand the witness's testimony and determine a fact in issue in this lawsuit.*

Cross Reference to North Carolina Rules 701 and 704

Explanation

Lay opinion is generally allowed where its admission makes the jury's fact-finding easier and more accurate. A typical admissible lay opinion occurs where a witness provides an inference to the jury that takes the place of describing a series of perceptions that in common experience add up to a rather ordinary inference or characterization (for example, testimony that someone looked happy, sad, confused, or angry).

LEADING QUESTIONS

Objection

- *I object to the question as leading.*

Responses

- *The question does not suggest the answer to the witness.*
- *Leading questions are permitted because*
 - › *this is a preliminary matter; or*
 - › *they are necessary to develop the witness's testimony;*
or
 - › *the party is hostile, an adverse party, or identified with an adverse party.*

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Cross Reference to North Carolina Rule 611(c)

Explanation

A leading question is one that suggests the desired answer to the witness so that it puts the desired answer in the witness's mouth or is one that makes it unclear as to whether the witness or the lawyer is testifying.

MISQUOTING THE WITNESS

Objection

- *I object. Counsel is misquoting the witness. The witness has testified to* (insert substance of witness's testimony).

Response

- *The witness previously testified to* (insert substance of witness's testimony).

Cross Reference to North Carolina Rule

There is no North Carolina Rule that specifically covers forms of questions. The court has discretion to sustain the objection pursuant to Rule 611(a).

Explanation

This objection is designed to prevent opposing counsel from shading the testimony of the witness as it had previously been rendered. The objection can serve as a reminder to the witness to listen carefully to opposing counsel's questions before answering.

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NARRATIVES

Objections

- *I object. The question calls for a narrative response.*
- *I object. The witness is testifying in the form of a narrative.*

Response

- *The witness is testifying to relevant and admissible matters.*

Cross Reference to North Carolina Rule

There is no North Carolina Rule that specifically covers forms of questions. The court has discretion to sustain the objection pursuant to Rule 611(a).

Explanation

This objection seeks to prevent the situation where counsel is not provided with notice by the question as to potential objectionable testimony by a witness. The best tactic for objecting counsel is to state, at the bench, the reasons for the objection, that is, to prevent inadmissible evidence from being heard by the jury and possibly cemented by a motion to strike. At the first instance when the witness testifies to inadmissible evidence during the narrative, opposing counsel should move to strike, approach the bench, and ask

the judge to reconsider the objection to testimony in a narrative form.

NON-RESPONSIVE ANSWERS

Objection

- *I move to strike the answer of the witness as non-responsive.*

Responses

- (If the objection is made by questioning counsel)
The answer of the witness is responsive to the question. The question put to the witness was (insert the form of the question).
- (If the objection is made by opposing counsel)
I accept the answer.

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Cross Reference to North Carolina Rule

There is no North Carolina Rule that specifically covers forms of questions. The court has discretion to sustain the objection pursuant to Rule 611(a).

Explanation

The objection of non-responsiveness belongs only to questioning counsel. Answers that exceed the scope of the question may be the subject of a motion to strike by opposing counsel on specific substantive grounds. Opposing counsel may also object to the testimony of a witness as testimony in a narrative form, which is treated under **Narratives** in this text.

OBJECTIONS GENERALLY

Objections

- *See specific objections under appropriate captions in this text for forms of objections.*

Responses

- *See specific responses under appropriate captions in this text for forms of responses.*

Cross Reference to North Carolina Rule 103

Explanation

Generally, failure to object waives appellate consideration of any error in the admission of evidence at trial. Objections must state the specific ground for exclusion of evidence unless the ground for objection is obvious. Objections must be timely in that they must be stated as soon as the objectionable nature of the question or answer becomes apparent.

OFFERS OF PROOF

Forms of the Offer

- *Ask the witness to state for the record, outside the hearing of the jury, what the witness's testimony would have been if the judge had not excluded it.*

Cross Reference to North Carolina Rules 103(a)(2) and 103(b)

Explanation

The offer of proof must be made to preserve error when the court's ruling excludes evidence. The offer of proof must be made outside the hearing of the jury at the time of the sustaining of an objection or it will be waived. The theory behind this rule is to provide the trial judge with the most information to make the proper ruling.

ORIGINAL DOCUMENT RULE (BEST EVIDENCE RULE)

Objection

- *I object to the proponent's offer to show the contents of a writing by the use of secondary evidence.*

Responses

- *The terms of the writing are not an issue in the lawsuit and thus the original is not required. The writing is offered to prove (state reason).*
- *The original's absence has been sufficiently accounted for and the secondary evidence is admissible because*
 - › *the original has been shown to have been lost or destroyed, not at the behest of my client; or*
 - › *the original cannot be obtained by any available judicial process or procedure; or*
 - › *the original is in the possession of an opposing party against whom the contents are offered,*
 - » *that party has failed to produce it; and*
 - » *that party has been put on notice, by pleadings or otherwise, that the contents would be the subject of proof at trial.*

Cross Reference to North Carolina Rules 1001–1008

Explanation

The key to understanding the original document rule is this rule applies where the facts contained in the document are directly in issue in the case and the facts do not exist independent of the document. Typical documents that fall within the rule are written contracts, leases, or wills, when the lawsuit is about the existence or interpretation of those documents.

PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Objection

- *I object. This evidence is inadmissible as an offer to pay medical expenses.*

Response

- *This statement is admissible because it is not offered on the issue of liability.*

Cross Reference to North Carolina Rule 409

Explanation

Evidence of offers to pay medical and similar expenses, or payments of the same, are excluded only on the issue of liability and can be offered for any other relevant purpose.

PRESUMPTIONS

Form of Motion

- *I move for a directed verdict on (the fact presumed) because my opponent failed to come forward with sufficient evidence to rebut it.*

Response

- *A directed verdict is inappropriate because we have produced sufficient evidence to rebut the presumption such that a reasonable juror could find for my client on this fact.*

Cross Reference to North Carolina Rules 301 and 302

Explanation

A presumption is a fact that is automatically proved by the proof of some other fact. In civil actions and proceedings, the creation of a presumption forces the opponent to come forward with sufficient evidence to rebut or meet the presumed fact. The presumption does not, however, shift the original burden of proof. A common example is the delivery and receipt of information, once it is shown to be have been put in the U.S. mail with proper address, postage, and return address. The opponent has the ability to offer evidence to rebut the presumption of delivery and receipt.

PRIVILEGE

Objection

- *I object to the admission of this evidence on the ground that it is privileged pursuant to* (state the particular form of privilege).

Response

- *This evidence is admissible because it does not fall within the privilege, or if privileged, such privilege has been waived.*

Cross Reference to North Carolina Rule 501 and N.C.G.S. §§ 8-53 through 8-57

Explanation

While, generally, no person has a privilege to refuse to testify or to prevent another person from testifying, the North Carolina constitution, statutes, and case law recognize communications between parties in certain relationships as privileged from disclosure. A privilege is a right that can be voluntarily waived. A commonly encountered common law privilege covers communications between attorneys and clients. There are a large number of statutorily created privileges including those covering communication to spouses, physicians, and clergy.

REFRESHING PRESENT RECOLLECTION

Objections

- *I object to the attempt to refresh the witness's recollection in the absence of a demonstrated failure of memory.*
- *I object to the witness's reading from the exhibit used to refresh his or her recollection because it is not in evidence and because it is hearsay.*

Responses

- *The witness has shown a failure of memory, and I am attempting to refresh his or her recollection pursuant to Rule 612.*
- *The exhibit used to refresh the witness's recollection is already in evidence, and it is either not hearsay or the exhibit meets an exception to the hearsay rule.*

Cross Reference to North Carolina Rule 612

Explanation

The steps in refreshing a witness's memory are as follows:

- (1) Establish the witness's failure of memory (full or partial).

- (2) Mark the refreshing document for identification.
- (3) Show the witness the refreshing document and ask the witness to read it silently.
- (4) Ask if the witness has read it.
- (5) Ask if the witness's memory is refreshed with respect to the forgotten fact.
- (6) Take the refreshing exhibit from the witness.
- (7) Re-ask the question that drew the original failure of memory.

RELEVANCE GENERALLY

Objections

- *I object on the ground that the question calls for an irrelevant answer.*
- *I move to strike the answer as irrelevant.*

Response

- *The evidence is relevant because*
 - › *it has some tendency to make more likely a fact that is material to either a claim or defense in the lawsuit; or*
 - › *it bears on the weight or credibility of a witness or of the evidence.*

Cross Reference to North Carolina Rules 401 and 402

Explanation

Often, the terms “relevance” and “materiality” are used interchangeably. This is incorrect. Materiality has a more precise meaning than relevance and can be seen as being a term that is within the meaning of relevance. Materiality is the relationship between the proposition for which the evidence is offered and the

issues in the case. If the evidence is offered to prove a proposition that is not a matter in issue, the evidence is said to be immaterial. Relevancy includes both the test of materiality and something more. Relevancy is the tendency of the evidence in question to establish a material proposition.

RELEVANCE CONDITIONAL ADMISSIBILITY

Objections

- *I object. The proffered evidence is not relevant and admissible unless other facts are proved.*
- *I move to strike the conditionally admitted evidence of (insert name of witness or evidence). Counsel has failed to prove additional facts that are necessary to show the relevance of that conditionally admitted evidence.*

Responses

- *I will show the relevance of the proffered evidence by proof of the following additional facts through the testimony of (insert name of witness).*
- *The relevance of the conditionally admitted facts has been shown through the additional evidence given in the testimony of (insert name of witness).*

Cross Reference to North Carolina Rule 104(b)

Explanation

The judge is given a great deal of authority in making the preliminary findings necessary to determining the admissibility of evidence.

RELEVANCE

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Objections

- *I object on the ground that this evidence is inadmissible because its probative value is substantially outweighed by the prejudicial effect of the evidence.*
- *The introduction of this evidence will confuse the issue before the jury.*
- *The evidence is merely cumulative.*

Responses

- *The evidence is admissible because it is logically relevant under Rule 401; and*
 - › *its probative value is not substantially outweighed by the danger of unfair prejudice; or*
 - › *any potential confusion of issues is easily cured by an instruction by the court; or*
 - › *the evidence is corroborative of an issue central to the case.*

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Cross Reference to North Carolina Rule 403

Explanation

The balancing test of Rules 401 and 403 is tilted heavily in favor of the admissibility of logically relevant evidence or evidence with probative value, in that the prejudice must substantially outweigh the probative value in order to require exclusion.

RELEVANCE LIMITED ADMISSIBILITY

Objections

- *I object. The question calls for irrelevant information on the issue (insert the issue).*
- *I object. I move that the court instruct the jury the answer is irrelevant and inadmissible on the issue (insert the issue), and I request a limiting instruction.*
- *I object. The question calls for irrelevant information as against my client.*
- *I object. I move the court instruct the jury the answer is irrelevant as to my client, and I request a limiting instruction.*

Responses

- *The evidence offered is relevant and admissible for all purposes and a limiting instruction is inappropriate.*
- *The evidence is relevant and admissible against all parties and a limiting instruction is inappropriate.*

Cross Reference to North Carolina Rule 105

Explanation

It is incumbent upon opposing counsel to seek limitation of the evidence to its proper admissible purpose and to request a limiting instruction by the judge. Failure to do so will allow consideration of the evidence for all purposes.

RELEVANCE

RULE OF COMPLETENESS

Objections

- *I object to the admissibility of the proffered writing (or recording) unless other portions of the writing (or recording) are also admitted. These other portions are necessary to explain or to put in context the proffered writing (or recording).*
- *I object to the admissibility of the proffered writing (or recording) unless other related writings (or recordings) are also admitted. These other writings (or recordings) are necessary to explain or to put in context the proffered writing (or recording).*

Response

- *The proffered statement (or recording) does not need explanation or context. Other portions of the statement (or recording), or additional writings (or recordings), are not necessary to a fair understanding of the proffered statement (or recording).*

Cross Reference to North Carolina Rule 106

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Explanation

The rule of completeness embodied in Rule 106 is essentially a rule of fairness. Because the appearance of unfairness can seriously damage the credibility of the proponent, the rule of completeness should be anticipated by proffering counsel and every effort should be made to fairly show the appropriate context in which an offered statement or recording was made.

SUBSEQUENT REMEDIAL MEASURES

Objection

- *I object. This is evidence of a subsequent remedial measure.*

Responses

- *This evidence is not offered on the issue of negligence or culpable conduct, but is offered to show notice, ownership, control, feasibility of precautionary measures, or impeachment.*
- *My opponent has “opened the door” to this evidence by his or her pleadings or the questioning of (insert name of witness).*

Cross Reference to North Carolina Rule 407

Explanation

The reason for the evidentiary prohibition against subsequent remedial measures is to create an incentive to correct of defective conditions. Such evidence is per se inadmissible only on the issues of negligence or culpable conduct.

North Carolina Rules of Evidence

Effective July 1, 1984

Including amendments received
through December 1, 2007

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NORTH CAROLINA RULES OF EVIDENCE

Article 1. General Provisions

Rule 101. Scope

These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101.

Rule 102. Purpose and Construction

(a) In General. These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

(b) Subordinate Divisions. For the purpose of these rules only, the subordinate division of any rule which is labeled with a lower case letter shall be a subdivision.

Rule 103. Rulings on Evidence

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

Rule 103(b)

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court;

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of Offer and Ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Review of Errors Where Justice Requires. Notwithstanding the requirements of subdivision (a) of

this rule, an appellate court may review errors affecting substantial rights if it determines, in the interest of justice, it is appropriate to do so.

Rule 104. Preliminary Questions

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions or other motions to suppress evidence in criminal trials in superior court shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

Rule 104(e)

(e) **Weight and Credibility.** This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 106. Remainder of or Related Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Article 2. Judicial Notice

Rule 201. Judicial Notice of Adjudicative Facts

(a) **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary.** A court may take judicial notice, whether requested or not.

(d) **When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to Be Heard.** In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing Jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

*Article 3. Presumptions in Civil Actions
and Proceedings*

**Rule 301. Presumptions in General in Civil
Actions and Proceedings**

In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision, or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact.

Rule 302. Applicability of Federal Law in Civil Actions and Proceedings

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

Article 4. Relevancy and Its Limits

Rule 401. Definition of “Relevant Evidence”

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its 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.

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) *Character Evidence Generally.* Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a class A, B, C, D, or E felony if committed by an adult.

Rule 405. Methods of Proving Character

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Rule 406. Habit; Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment.

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or

its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Payment of Medical and Other Expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury is not admissible to prove liability for the injury.

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible for or against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of no contest;

(3) any statement made in the course of any proceedings under Article 58 of General Statutes Chapter 15A or comparable procedure in district court, or proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable procedure in another state, regarding a plea of guilty which was later withdrawn or a plea of no contest;

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

**Rule 412. Rape or Sex Offense Cases;
Relevance of Victim's Past Behavior**

(a) As used in this rule, the term “sexual behavior” means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) was between the complainant and the defendant; or

(2) is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion

Rule 412(c)

that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

(d) Notwithstanding any other provision of law, unless and until the court determines that evidence of sexual behavior is relevant under subdivision (b), no reference to this behavior may be made in the presence of the jury and no evidence of this behavior may be introduced at any time during the trial of:

(1) A charge of rape or a lesser included offense of rape;

(2) A charge of a sex offense or a lesser included offense of a sex offense; or

(3) An offense being tried jointly with a charge of rape or a sex offense, or with a lesser included offense of rape or a sex offense.

Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S.15A-952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an in camera

hearing, which shall be transcribed, to consider the proponent's offer of proof and the arguments of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. Notwithstanding subsection (b) of Rule 104, if the relevancy of the evidence which the proponent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the in camera hearing or at a subsequent in camera hearing scheduled for that purpose, shall accept evidence on the issue of whether that condition of fact is fulfilled and shall determine that issue. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

(e) The record of the in camera hearing and all evidence relating thereto shall be open to inspection only by the parties, the complainant, their attorneys and the court and its agents, and shall be used only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the in camera hearing without the questions being repeated or the evidence being resubmitted in open court.

Rule 413. Medical Actions; Statements to Ameliorate or Mitigate Adverse Outcome

Statements by a health care provider apologizing for an adverse outcome in medical treatment, offers to undertake corrective or remedial treatment or actions, and gratuitous acts to assist affected persons shall not be admissible to prove negligence or culpable conduct by the health care provider in an action brought under Article 1B of Chapter 90 of the General Statutes.

Article 5. Privileges

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with law of this State.

Article 6. Witnesses

Rule 601. General Rule of Competency; Disqualification of Witness

(a) General Rule. Every person is competent to be a witness except as otherwise provided in these rules.

(b) Disqualification of Witness in General. A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

(c) Disqualification of Interested Persons. Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning any oral communication between the witness and the deceased person or lunatic. However, this subdivision shall not apply when:

- (1) The executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf regarding the subject matter of the oral communication.

Rule 602

(2) The testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.

(3) Evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, committee or person so deriving title or interest.

Nothing in this subdivision shall preclude testimony as to the identity of the operator of a motor vehicle in any case.

Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Rule 603. Oath or Affirmation

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Rule 604. Interpreters

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

Rule 605. Competency of Judge as Witness

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

Rule 606. Competency of Juror as Witness

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether

Rule 607

any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rule 607. Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling him.

Rule 608. Evidence of Character and Conduct of Witness

(a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) **Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on

cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs

Rule 609(c)

its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon. Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his

credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias.

Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

**Rule 612. Writing or Object Used
to Refresh Memory**

(a) While Testifying. If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) Before Testifying. If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) Terms and Conditions of Production and Use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains privileged information or information not directly related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any

such portions, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if justice so require, declaring a mistrial.

Rule 613. Prior Statements of Witnesses

In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

Rule 614. Calling and Interrogation of Witnesses by Court

(a) Calling by Court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party.

Rule 614(c)

(c) Objections. No objections are necessary with respect to the calling of a witness by the court or to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled.

Rule 615. Exclusion of Witnesses

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) a person whose presence is determined by the court to be in the interest of justice.

Article 7. Opinions And Expert Testimony

Rule 701. Opinion Testimony by Lay Witness

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Rule 702. Testimony by Experts

(a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

(1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care

Rule 702(b)

as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the

subject of the complaint and have prior experience treating similar patients; or

b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner;

or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection (b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical

Rule 702(e)

practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

(f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(h) Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital, or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, about the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or

Rule 704

inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question.

Rule 706. Court Appointed Experts

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses

agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

Rule 706(d)

(d) Parties' Experts of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Article 8. Hearsay

Rule 801. Definitions and Exception for Admissions of a Party-Opponent

The following definitions apply under this Article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Exception for Admissions by a Party-Opponent. A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement

by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by statute or by these rules.

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not includ-

ing a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded Recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity,

and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data compilation was regularly made and preserved, unless the source of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, or public offices or agencies, setting for (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law en-

forcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the

maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent

with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. Statements in a document in existence 20 years or more the authenticity of which is established.

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to Character. Reputation of a person's character among his associates or in the community.

(22) [Reserved].

(23) Judgment as to Personal, Family or General History, or Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the

Rule 804(a)

proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of Unavailability. “Unavailability as a witness” includes situations in which the declarant:

- (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) Testifies to a lack of memory of the subject matter of his statement; or
- (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception un-

der subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) *Statement Under Belief of Impending Death.* A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

(3) *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary

interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) *Statement of Personal or Family History.* (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Other Exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material

fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a

Rule 901(a)

statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Article 9. Authentication and Identification

Rule 901. Requirement of Authentication or Identification

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

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of Witness With Knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert Opinion on Handwriting.* Non-expert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by Trier or Expert Witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone Conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public Records or Reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data

compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient Documents of Data Compilations.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or System.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods Provided by Statute.* Any method of authentication or identification provided by statute.

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic Public Documents Under Seal.* A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory or insular possession thereof, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause

shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) **Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

(5) **Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

(6) **Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.

(7) **Trade Inscriptions and the Like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) **Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions Created by Law. Any signature, document, or other matter declared by any law of the United States or of this State to be presumptively or prima facie genuine or authentic.

Rule 903. Subscribing Witness' Testimony Unnecessary

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

Article 10. Contents of Writings, Recordings and Photographs

Rule 1001. Definitions

For the purposes of this Article the following definitions are applicable:

(1) Writings and Recordings. "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing,

Rule 1002

magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. “Photographs” includes still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original.”

(4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure; or

(3) **Original in Possession of Opponent.** At a time when an original was under the control of a party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) **Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue.

Rule 1005. Public Records

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Rule 1007. Testimony or Written Admission of Party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original.

Rule 1008. Functions of Court and Jury

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

*Article 11. Miscellaneous Rules***Rule 1101. Applicability of Rules**

(a) Proceedings Generally. Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State.

(b) Rules Inapplicable. The rules other than those with respect to privileges do not apply in the following situations:

(1) *Preliminary Questions of Fact.* The determination of questions of fact preliminary to

Rule 1102

admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) *Grand Jury*. Proceedings before grand juries.

(3) *Miscellaneous Proceedings*. Proceedings for extradition or rendition; first appearance before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise.

(4) Contempt Proceedings. Contempt proceedings in which the court is authorized by law to act summarily.

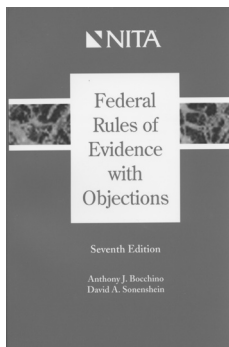
Rule 1102. Short Title

These rules shall be known and may be cited as the “North Carolina Rules of Evidence.”

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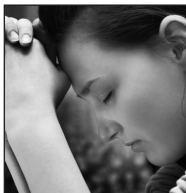
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