LEGISLATIVE RESEARCH COMMISSION

EVIDENCE LAWS

REPORT TO THE 1983 GENERAL ASSEMBLY OF NORTH CAROLINA

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STATE OF NORTH CAROLINA

LEGISLATIVE RESEARCH COMMISSION

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January 12, 1982

TO THE MEMBERS OF THE 1983 GENERAL ASSEMBLY:

The Legislative Research Commission herewith reports to the 1983 General Assembly on the laws of evidence. The report is made pursuant to Resolution 61 (SJR 698) of the 1981 General Assembly.

This report was prepared by the Legislative Research Commission's Study Committee on The Laws of Evidence and is transmitted by the Legislative Research Commission for your consideration.

Respectfully submitted,

Liston B. Ramsey

W. Craig Lawing

CoChairmen
Legislative Research Commission

TABLE OF CONTENTS

	Page
Legislative Research Commission	i
Study Committee and Its Activities	ii
North Carolina Should Adopt an Evidence Code	iii
The Code Should Be Based on the Federal Rules of Evidence	iv
Effective Date	v
Recommendation	vi

RULES

Article I.	General Provisions:	
	Rule 101. Scope	1
	Rule 102. Purpose and construction	1
	Rule 103. Rulings on evidence:	
	(a) Effect of erroneous ruling:	
	(1) Objection	3
	(2) Offer of proof	3
	(b) Record of offer and ruling	3
	(c) Hearing of jury	3
	(d) Plain error	3
	Rule 104. Preliminary questions:	
	(a) Questions of admissibility generally	4
	(b) Relevancy conditioned on fact	5
	(c) Hearing of jury	5
	(d) Testimony by accused	5
	(e) Weight and credibility	5
	Rule 105. Limited admissibility	9
	Rule 106. Remainder of or related writings or recorded statements	10
Article II.	Judicial Notice:	
	Rule 201. Judicial notice of adjudicative facts:	
	(a) Scope of rule	11
	(b) Kinds of facts	11
	(c) When discretionary	11
	(d) When mandatory	11
	(e) Opportunity to be heard	11
	(f) Time of taking notice	11
	(g) Instructing jury	11
Article III.	Presumptions in Civil Actions and Proceedings:	
	Rule 301. Presumptions in general in civil actions and proceedings	14
	Rule 302. Applicability of State law in	

civil actions and proceedings . 17
Article IV. Relevancy and Its Limits:
Rule 401. Definition of "relevant evidence" 17
Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible 20
Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time 21
Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes:
(a) Character evidence generally:
(1) Character of accused 23
(2) Character of victim 23
(3) Character of witness 23
(b) Other crimes, wrongs, or acts . . . 23
Rule 405. Methods of proving character:
(a) Reputation or opinion 28
(b) Specific instances of conduct . . . 29
Rule 406. Habit; routine practice 31
Rule 407. Subsequent remedial measures . . . 34
Rule 408. Compromise and offers to compromise 36
Rule 409. Payment of medical and other expenses 38
Rule 410. Inadmissibility of pleas, plea discussions, and related statements 40
Rule 411. Liability insurance 44
Rule 412. Rape or sex offence cases; relevance of victim's past behavior 44
Article V. Privileges:
Rule 501. General rule 47
Article VI. Witnesses:
Rule 601. General rule of competency; disqualification of witness . . 48
(a) General rule 48
(b) Disqualification of witness 48
Rule 602. Lack of personal knowledge 50
Rule 603. Oath or affirmation 51
Rule 604. Interpreters 51
Rule 605. Competency of judge as witness . . 52
Rule 606. Competency of juror as witness:
(a) At the trial 52
(b) Inquiry into validity of verdict or indictment 52
Rule 607. Who may impeach 55
Rule 608. Evidence of character and conduct of witness:
(a) Opinion and reputation evidence of character 56
(b) Specific instances of conduct . . . 56
Rule 609. Impeachment by evidence of conviction of crime:
(a) General rule 59
(b) Time limit 59

(c) Effect of pardon 60
(d) Juvenile adjudications 60
(e) Pendency of appeal 60
Rule 610. Religious beliefs or opinions . . 61
Rule 611. Mode and order of interrogation and presentation:
(a) Control by court 62
(b) Scope of cross-examination 62
(c) Leading questions 62
Rule 612. Writing or object used to refresh memory 64
(a) While testifying 64
(b) Before testifying 65
(c) Terms and conditions of production and use 65
Rule 613. Prior statements of witnesses . . 66
Rule 614. Calling and interrogation of witnesses by court:
(a) Calling by court 67
(b) Interrogation by court 67
(c) Objections 67
Rule 615. Exclusion of witnesses 68
Article VII. Opinions and Expert Testimony:
Rule 701. Opinion testimony by lay witnesses 70
Rule 702. Testimony by experts 71
Rule 703. Bases of opinion testimony by experts 71
Rule 704. Opinion on ultimate issue 72
Rule 705. Disclosure of facts or data underlying expert opinion . . . 73
Rule 706. Court appointed experts:
(a) Appointment 74
(b) Compensation 75
(c) Disclosure of appointment 75
(d) Parties' experts of own selection . 75
Article VIII. Hearsay:
Rule 801. Definitions and exception for Admissions of Party-Opponent . 76
(a) Statement 76
(b) Declarant 76
(c) Hearsay 76
(d) Exception for admissions by a party-opponent 76
Rule 802. Hearsay rule 82
Rule 803. Hearsay exceptions; availability of declarant immaterial:
(1) Present sense impression . 82
(2) Excited utterance 83
(3) Then existing mental, emotional, or physical condition 83
(4) Statements for purposes of medical diagnosis or treatment 83
(5) Recorded recollection . . . 83
(6) Records of regularly conducted activity . . . 83
(7) Absence of entry in records

kept in accordance with the provisions of paragraph (6) 84
(8) Public records and reports. 84
(9) Records of vital statistics 85
(10) Absence of public record or entry 85
(11) Records of religious organizations 85
(12) Marriage, baptismal, and similar certificates . . 85
(13) Family records 86
(14) Records of documents affecting an interest in property . 86
(15) Statements in documents affecting an enterest in property 86
(16) Statements an ancient documents 86
(17) Market reports, commercial publications 86
(18) Learned treatises 87
(19) Reputation concerning personal or family history 87
(20) Reputation concerning boundaries or general history 87
(21) Reputation as to character. 87
(22) (Reserved) 87
(23) Judgment as to personal, family, or general history, or boundaries 87
(24) Other exceptions 88
Rule 804. Hearsay exceptions; declarant unavailable:
(a) Definition of unavailability . 102
(b) Hearsay exceptions:
(1) Former testimony . 103
(2) Statement under belief of impending death . 103
(3) Statement against interest 103
(4) Statement of personal or family history 104
(5) Other exceptions . 104
Rule 805. Hearsay within hearsay 110
Rule 806. Attacking and supporting credibility of declarant . . . 111
Article IX. Authentication and Identification:
Rule 901. Requirement of authentication or identification:
(a) General provision 113
(b) Illustrations:
(1) Testimony of witness with knowledge . . . 114

(2) Nonexpert opinion on handwriting . 114
(3) Comparison by trier or expert witness 114
(4) Distinctive characteristics and the like . . . 114
(5) Voice identification 114
(6) Telephone conversations . . 114
(7) Public records or reports 115
(8) Ancient documents or data compilations . . 115
(9) Process or system . 115
(10) Methods provided by statute 115
Rule 902. Self-authentication:
(1) Domestic public documents under seal 121
(2) Domestic public documents not under seal 121
(3) Foreign public documents . . . 121
(4) Certified copies of public records 122
(5) Official publications 122
(6) Newspapers and periodicals . . 122
(7) Trade inscriptions and the like 122
(8) Acknowledged documents 122
(9) Commercial paper and related documents 123
(10) Presumptions created by law . 123
Rule 903. Subscribing witness testimony unnecessary 126
Article X. Contents of Writings, Recordings, and Photographs:
Rule 1001. Definitions:
(1) Writings and recordings 127
(2) Photographs 127
(3) Original 127
(4) Duplicate 129
Rule 1002. Requirement of original 129
Rule 1003. Admissibility of duplicates . . 130
Rule 1004. Admissibility of other evidence of contents:
(1) Originals lost or destroyed 131
(2) Original not obtainable . . 131
(3) Original in possession of opponent 131
(4) Collateral matters 131
Rule 1005. Public records 133
Rule 1006. Summaries 134
Rule 1007. Testimony or written admission of party 134
Rule 1008. Functions of court and jury . . 135

Article XI. Miscellaneous Rules:
Rule 1101. Applicability of rules:
(a) Proceedings generally . . 136
(b) Rules inapplicable:
(1) Preliminary proceedings . . . 136
(2) Grand in jury . . . 136
(3) Miscellaneous proceedings . . . 137
(4) Contempt proceedings 137
Rule 1102. Short title 137

EFFECTIVE DATE 137

LEGISLATIVE RESEARCH COMMISSION

The Legislative Research Commission, created by Article 6B of Chapter 120 of the General Statutes, is authorized pursuant to the direction of the General Assembly "to make or cause to be made such studies of and investigations into governmental agencies and institutions and matters of public policy as will aid the General Assembly in perfoming its duties in the most efficient and effective manner" and "to report to the General Assembly the results of the studies made," which reports "may be accompanied by the recommendations of the Commission and bills suggested to effectuate the recommendations." G.S. 120-30.17. The Commission is co-chaired by the Speaker of the House and the President Pro Tempore of the Senate. The Commission consists of the following five Representatives, who were appointed by the Speaker, and five Senators, who were appointed by the President Pro Tempore. G.S. 120-30.10(a).

House Speaker Liston B. Ramsey, Chairman	Senate President Pro Tem W. Craig Lawing, Chairman
Representative Chris S. Barker, Jr.	Senator Henson P. Barnes
Representative John T. Church	Senator Carolyn Mathis
Representative Gordon H. Greenwood	Senator William D. Mills
Representative John J. Hunt	Senator Russell Walker
Representative Lura S. Tally	Senator Robert W. Wynne

At the direction of the 1981 General Assembly, the Legislative Research Commission has undertaken studies of numerous subjects which were grouped into broad categories. Pursuant to G.S. 120-30.10(b) and (c), the Commission Co-Chairmen appointed committees consisting of legislators and public members to conduct the studies. Each member of the Legislative Research Commission was delegated the responsibility of overseeing one group of studies and causing the findings and recommendations of the various committees to be reported to the Commission. In addition, one Senator and one Representative from each committee were designated Co-Chairmen.

STUDY COMMITTEE AND ITS ACTIVITIES

Resolution 65 (House Joint Resolution 1177) of the 1979 General Assembly authorized the Legislative Research Commission to study the laws of evidence and to direct its efforts toward a proposed evidence code for North Carolina. Henson Barnes, Ralph Stockton, Charles Becton, James Black, Walter Brock, Kenneth Broun, Robert Byrd, Patricia Conner, William Hancock, Willis Whichard, Herbert Lamson, Jr., John C. Martin, McNeil Smith, R. C. Soles, Robert S. Swain, and John B. Warlick were appointed members of the Committee to Study the Laws of Evidence and Comparative Negligence. Donald Hunt, A. W. Turner, and Dennis Bryan served as counsel for the committee. The committee met 10 times and gave tentative approval to approximately one half of the evidence code. Resolution 61 (House Joint Resolution 1292 of the 1981 General Assembly) authorized the Legislative Research Commission to continue its study on the laws of evidence.

The following persons were appointed to the evidence Laws Study Committee.

Senator Henson P. Barnes, Co-Chairman	Representative Paul Pulley, Co-Chairman
Honorable Anthony Brannon	Representative Austin M. Allran
Dean Kenneth Broun	Representative Joe Hackney
Senator William Gerry Hancock, Jr.	Representative Parks Helms
Senator Joseph E. Johnson	Representative George A. Hux
Honorable Philip O. Redwine	Honorable William H. McMillan
Senator R. C. Soles	Representative Dennis A. Wicker

The following persons served as staff for the committee.

Mr. Donald B. Hunt - Chief Counsel and Draftsman of Commentary

Miss Genie Rogers - Counsel

Professor Walker Blakey - Consultant

Judy Britt - Clerk

The Evidence Laws Study Committee met eight times and reviewed the rules tentatively approved by the prior committee as well as rules in the areas the prior committee had not addressed.

NORTH CAROLINA SHOULD ADOPT AN EVIDENCE CODE

The Evidence Laws Study Committee found that the need for an evidence code clearly exists in North Carolina.

The most compelling reason why North Carolina should codify the law of evidence is to make that law easier to find and to use. W. Blakey, Moving Toward an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina, 13 N.C. Cent. L.J. 1, 5 (1981). At present the rules of evidence are a complex and confusing morass of cases and statutes. Id. at 5. The rules governing the introduction of evidence often lie buried in the hundreds of volumes of North Carolina decisions or scattered throughout the General Statutes. M. Patrick, Toward a Codification of the Law of Evidence in North Carolina, 16 Wake Forest L. Rev. 669 (1980).

North Carolina evidence law has benefited a great deal from the labors of Professor Stansbury and Dean Brandis. See D. Stansbury, The North Carolina Law of Evidence (1st ed. 1946 & 2d ed. 1963); D. Stansbury, North Carolina Evidence (Brandis rev. 1973); H. Brandis, Brandis on North Carolina Evidence (1982). Nevertheless, trial judges must decide most evidence questions within a few seconds. W. Blakey, supra, at 5. These treatises cannot meet the needs of the judge or lawyer during a pressured trial.

Even when a judge or practitioner has time to research an evidence question at his leisure, his efforts frequently yield no clear answer. He often finds "no law on point or numerous precedents seemingly at war with themselves." M. Patrick, supra, at 669. To codify the law would alleviate this problem, giving far greater access to the rules of evidence by putting them together in one place and grouping them in logical order. Furthermore, if the rules are easier to locate, presumably they will be more predictably and uniformly applied in courts throughout the State, and the quality of jurisprudence in North Carolina will be improved.

Enactment of an integrated and thorough code would also obviate the need for waiting on slowly developing case law to fill in gaps in the law of evidence. Because the rules of evidence in North Carolina are largely derived from decisional law, unsettled issues are often left while the profession waits for a case that raises them. Codification is a way of filling in these gaps.

Another good reason for codifying the rules of evidence is that codification can serve as a vehicle for badly needed reform in some areas of evidence law. As Dean Brandis states:

> "Although the fundamentals of most of the judicial and statutory rules can be justified, and while some currently unacceptable common law rules have been modified or rejected, there is still room for criticism. Some rules, still sound in their general features, have acquired

> artificial refinements through the accidents of decisions in individual cases. Some originated in a misunderstanding of previous decisions. For a few, no understandable reason can be discovered. ***
>
> Important changes for the better have been made by statute or decision, but a state of perfection has certainly not been reached. Popular mistrust of the efficiency of judicial procedure is based to a substantial extent on the layman's experience with and observation of the rules of evidence in operation. *** Much popular criticism is the result of ignorance or misunderstanding, but some is justified, and the cure for this is intelligent reform rather than undiscriminating defense of every feature of the existing system." Brandis on North Carolina Evidence, supra, §2, at 3-4 (footnotes omitted).

Although Justice Lake asserted in State v. Vestal, 278 N.C. 561, 589 (1971), that "no branch of the law should be less firmly bound to a past century than the rules of Evidence," it is doubtful that needed changes will be effected through continued reliance on the slow case-by-case approach of the common law. According to one commentator:

> "Much of the blame for this failure lies with the dynamics of the adversary system, a system that most often denies appellate courts the opportunity to improve the law of evidence. The trial lawyer's primary duty is to obtain the best result for the client, not to risk the client's fortunes while attempting to reform the law of evidence. Nor will a trial judge often risk reversal on appeal, with the resulting new trial, merely to discard a well-established but outdated evidence rule." M. Patrick, supra, at 673.

Even though codification would not resolve all the disputes and correct all the mistakes in the law of evidence, the adoption of an evidence code offers a unique opportunity to make strides at once toward that goal while making evidence rules more accessible.

THE CODE SHOULD BE BASED ON THE FEDERAL RULES OF EVIDENCE

In the view of the Evidence Laws Study Committee, an evidence code for North Carolina should be based on the Federal Rules of Evidence.

Since adoption of the Federal Rules of Evidence in 1975, at least 19 States have adopted evidence codes based on the Federal Rules. The Federal Rules are already well enough known to be understood and followed. W. Blakey, supra, at 9. Many North Carolina attorneys practice in the federal courts and are

familiar with the Federal Rules. Adoption of a code based on the Federal Rules would promote uniformity and greatly simplify the task of learning evidence law for attorneys that practice in both the State and federal courts in North Carolina.

The Federal Rules succeed at being thorough while remaining manageable. Professor Mueller contended that

> "Evidence law has come a long way when its essence can be distilled in a readable and acceptable form in some 62 rules, and those can be printed in full in a pamphlet of manageable size. Just such an achievement is the Federal Rules of Evidence." C. Mueller, Symposium on the Federal Rules of Evidence, 12 Land & Water L. Rev. 585.

Although some practitioners who are thoroughly familiar with current North Carolina evidence law may be concerned about learning a new set of evidence rules, the Committee's view is that this detriment is far outweighed by the benefits of an evidence code. The Federal Rules are, by and large, a restatement of general principles of existing North Carolina evidence law. W. Blakey, supra, at 3. In the view of the Committee, the task for the experienced attorney in becoming familiar with the evidence code and making the transition to practicing under the evidence code will not be difficult. In fact, trial practice for all attorneys should be simplified under evidence rules that are more accessible. The advantages of evidence rules that are clear and accessible are even more significant for attorneys who have not had extensive trial experience.

The Evidence Law Study Committee used the Federal Rules as a guide in drafting the Evidence Code. According to Professor Moore, the Federal Rules are firmly rooted in tradition and "[t]here is nothing revolutionary about them." 10 J. Moore, Federal Practice, §1, at 5 (2d ed. 1979). The Committee found that most of the federal rules were consistent with current North Carolina practice. In some instances the Committee found that the Federal rule was superior to current North Carolina law and recommended the federal rule. In other instances, the Committee found that the current North Carolina law was superior and retained the North Carolina rules. The commentary beneath each rule indicates whether the rule differs from the federal rule and whether the rule is consistent with current North Carolina practice.

EFFECTIVE DATE

As the commentary to the rules indicates, upon adoption of an evidence code conforming amendments should be made to many sections of the General Statutes. In the view of the Committee, the Evidence Code should become effective July 1, 1984. This would give the General Assembly sufficient time to enact conforming amendments and give the courts and the bar sufficient

time to become familiar with the rules.

RECOMMENDATION

In the view of the Evidence Laws Study Committee, North Carolina should adopt an evidence code based upon the Federal Rules of Evidence. Such a code will simplify the rules of evidence and make them more accessible. An evidence code should retain the principles of North Carolina evidence law that are superior to the federal rules but not those that are outmoded. Accordingly, the Evidence Laws Study Committee voted unanimously to recommend that the General Assembly enact the following North Carolina Evidence Code.

Short Title: Simplify Evidence Laws. (Public)

Referred to:

A BILL TO BE ENTITLED

AN ACT TO SIMPLIFY AND CODIFY THE RULES OF EVIDENCE.

The General Assembly of North Carolina enacts:

Section 1. A new Chapter is added to the General Statutes to read:

"CHAPTER 8B.

"Evidence Code.

"§ 8B-1. Rules of evidence.--The North Carolina Rules of Evidence are as follows:

"APTICLE 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.

COMMENTARY

This rule differs from Fed. R. Evid. 101 only in that "courts of this State" has been substituted for "courts of the United States and before United States magistrates." Rule 1101 provides greater details regarding the applicability of these rules in various proceedings.

"Rule 102. Purpose and Construction.

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.

COMMENTARY

This rule is identical to Fed. R. Evid. 102. The commentary to each rule indicates whether the rule is identical to or different from its counterpart in the federal rules. The intent is to make applicable, as an aid in construction, the federal decisional law construing identical or similar provisions of the Federal Rules of Evidence.

Of course, federal precedents are not binding on the courts of this State in construing these rules. Nonetheless, these rules are not adopted in a vacuum. A substantial body of law construing these rules exists and should be looked to by the courts for enlightenment and guidance in ascertaining the intent of the General Assembly in adopting these rules. Uniformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical.

Problems of construction may arise that have not been settled by federal precedents. In these instances, our courts should examine North Carolina cases as well as federal cases for enlightenment.

Although these rules answer the vast majority of evidence questions that arise in our courts, there are some evidentiary questions that are not within the coverage of these rules. In these instances, North Carolina precedents will continue to control unless changed by our courts.

The commentary to each rule indicates whether the rule is consistent with current North Carolina practice. The discussion of North Carolina law is included to highlight the changes made by these rules.

Rule 102 provides that these rules shall be construed to promote growth and development of the law of evidence. Of course, this provision is not intended to give discretion to construe the rules unfettered by the language of the rules. Rather, the language of Rule 102 permits a flexible approach to problems not explicitly covered by the rules.

"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

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;

(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.

(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) Plain Error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

COMMENTARY

This rule is identical to Fed. R. Evid. 103.

Subdivision (a) adopts the "substantial rights" language used in the majority of states in testing for harmless error. North Carolina Civ. Pro. Rule 61 provides that no error is grounds for reversal unless the error amounts to the denial of a substantial

right. Subdivision (a) is not intended to affect the additional requirement in criminal cases that a reasonable possibility exist that a different result would have been reached if the error had not been committed. See G.S. 15A-1443.

Subdivision (a) also provides that rulings on evidence cannot be assigned as error unless the nature of the error was called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures. This is in accord with North Carolina practice. See Brandis on North Carolina Evidence §27, at 107 (1982); G.S. 15A-1446.

The provisions of subdivision (b) are substantially the same as current North Carolina practice. North Carolina Civ. Pro. Rule 43(c) and G.S. 15A-1446(a) should be amended to conform to Rule 103.

Subdivision (c) is in accord with North Carolina practice. Subdivision (d) adopts the "plain error" principle for both civil and criminal cases.

G.S. 15A-1446(b) provides that even though a timely objection was not made, an appellate court may review errors "in the interest of justice if it determines it appropriate to do so." G.S. 15A-1446(d) lists grounds that may be the subject of appellate review even though no objection was made at the trial level.

In civil cases, North Carolina courts have held that the admission of evidence may be reversible error even in the absence of objection when the introduction or use of the evidence is forbidden by statute in the furtherance of public policy. Professor Brandis has described this rule on reversible error in the absence of objection where a statute would exclude the evidence as a principle in need of re-examination. Brandis on North Carolina Evidence §27 (1982). It is anticipated that in civil cases appellate courts will rarely exercise the authority to take notice of errors that were not brought to the attention of the trial court.

"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 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.

(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.

COMMENTARY

This rule is identical to Fed. R. Evid. 104.

Subdivision (a) states as a general rule that preliminary questions shall be determined by the judge. This is in accord with North Carolina practice. See H. Brandis, Brandis on North Carolina Evidence § 8 (1982). The Advisory Committee's Note to the federal rule states:

> "The applicability of a particular rule of evidence often depends upon the existence of a condition. Is the alleged expert a qualified physician? Is a witness whose former testimony is offered unavailable? Was a stranger present during a conversation between attorney and client? In each instance the admissibility of evidence will turn upon the answer to the

question of the existence of the condition. Accepted practice, incorporated in the rule, places on the judge the responsibility for these determinations. McCormick § 53; Morgan, Basic Problems of Evidence 45-50 (1962).

To the extent that these inquiries are factual, the judge acts as a trier of fact. Often, however, rulings on evidence call for an evaluation in terms of a legally set standard. Thus when a hearsay statement is offered as a declaration against interest, a decision must be made whether it possesses the required against-interest characteristics. These decisions, too, are made by the judge.

In view of these considerations, this subdivision refers to preliminary requirements generally by the broad term 'question,' without attempt at specification.

This subdivision is of general application. It must, however, be read as subject to the special provisions for 'conditional relevancy' in subdivision (b) and those for confessions in subdivision (d)."

The second sentence of subdivision (b) provides that in making its determination on preliminary questions, the court is not bound by the rules of evidence except those with respect to privileges. The Advisory Committee's Note states:

"If the question is factual in nature, the judge will of necessity receive evidence pro and con on the issue. The rule provides that the rules of evidence in general do not apply to this process. McCormick § 53, p. 123, n. 8, points out that the authorities are 'scattered and inconclusive,' and observes:

'Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied to this hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.'

This view is reinforced by practical necessity in certain situations. An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted

declaration against interest must be considered in ruling whether it is against interest. *** Another example is the requirement of Rule 602 dealing with personal knowledge. In the case of hearsay, it is enough, if the declarant 'so far as appears [has] had an opportunity to observe the fact declared'. McCormick § 10, p. 19.

If concern is felt over the use of affidavits by the judge in preliminary hearings on admissibility, attention is directed to the many important judicial determinations made on the basis of affidavits. ***

The rules of Civil Procedure are more detailed. Rule 43(e), dealing with motions generally, provides:

'When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral or testimony or depositions.'

. . . Rule 56 provides in detail for the entry of summary judgment based on affidavits. Affidavits may supply the foundation for temporary restraining orders under Rule 65(b)."

Subdivision (b) concerns relevancy conditioned on fact. The Advisory Committee's Note states:

"In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sence has been labelled 'conditional relevancy'. Morgan, Basic Problems of Evidence 45-46 (1962). Problems arising in connection with it are to be distinguished from problems of logical relevancy, e.g., evidence in a murder case that accused on the day before purchased a weapon of the kind used in the killing, treated in Rule 401.

If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (1), the functioning of the jury as a trier of fact would be greatly restricted

and in some cases virtually destroyed. These are appropriate questions for juries. Accepted treatment, as provided in the rule, is consistent with that given fact questions generally. The judge makes a preliminary determination whether the foundation evidence is sufficient to support a finding of fulfillment of the condition. If so, the item is admitted. If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for them. If the evidence is not such as to allow a finding, the judge withdraws the matter from their consideration. ***

The order of proof here, as generally, is subject to the control of the judge."

Subdivision (b) is in accord with North Carolina practice in making an exception to the general rule that preliminary questions are for the court. When the relevancy of evidence depends upon the existence of some other fact which also requires proof, the determination of the preliminary fact question is for the jury. Brandis on North Carolina Evidence § 8, p. 27-28 (1982).

Subdivision (c) concerns when hearings on preliminary questions will be out of the hearing of the jury. The Advisory Committee's Note states:

"Preliminary hearings on the admissibility of confessions must be conducted outside the hearing of the jury. See Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Otherwise, detailed treatment of when preliminary matters should be heard outside the hearing of the jury is not feasible. The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury. Much evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. A great deal must be left to the discretion of the judge who will act as the interests of justice require."

Subdivision (c) is in accord with North Carolina practice.

Subdivision (d) provides that the accused does not, by testifying upon a preliminary matter, subject himself to

cross-examination as to other issues in the case. As the Advisory Committee's Note states:

> "The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally. The provision is necessary because of the breadth of cross-examination under Rule 611(b). The rule does not address itself to questions of the subsequent use of testimony given by an accused at a hearing on a preliminary matter. See Walder v. United States, 347 U.S. 62 (1954); Simmons v. United States, 390 U.S. 377 (1968); Harris v. New York, 401 U.S. 222 (1971)."

There are no North Carolina cases on this point.

Subdivision (e) makes it clear that after the court makes its determination on a preliminary question of fact, the party opposing the ruling is entitled to introduce before the jury evidence that relates to the weight or credibility of certain evidence. For example, even if the court determines that a confession was not coerced, the defendant may introduce evidence of coercion, since this is relevant to the weight of the evidence.

Subdivision (e) is in accord with North Carolina practice.

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 105. The Advisory Committee's Note states:

> "A close relationship exists between this rule and Rule 403 which requires exclusion when 'probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.' The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and

effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In Bruton v. United States, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious."

Rule 105 is in accord with the general rule in North Carolina that evidence that is inadmissible for one purpose may be admitted for other and proper purposes. See Brandis on North Carolina Evidence § 79 (1982).

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 106. The Advisory Committee's Note states:

"The rule is an expression of the rule of completeness. McCormick § 56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.

The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. *** The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.

For practical reasons, the rule is limited to writings and recorded statements and does not

apply to conversations."

N. C. Civ. Pro. Rule 32(a)(5), which applies to depositions, is similar to Rule 106.

"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. 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 201. The Advisory Committee's Note states:

> "This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of 'adjudicative' facts. No rule deals with judicial notice of 'legislative' facts. ***
>
> The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. ***
>
> What, then, are 'adjudicative' facts? Davis refers to them as those 'which relate to the parties,' or more fully:
>
> 'When a court or an agency finds facts concerning the immediate parties --who did what, where, when, how, and with what motive or intent--the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts....
>
> 'Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.' 2 Administrative Law Treatise 353."

Current North Carolina law does not deal with procedure for taking judicial notice of facts. Judicial notice of domestic and foreign law is dealt with in G.S. Chapter 8, Article 1, which remains in force.

Subdivision (b) concerns the kinds of facts that may be judicially noticed. The Advisory Committee's Note states:

> "With respect to judicial notice of adjudicative facts, the tradition has been one of caution in

requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent."

Subdivision (b) is consistent with current North Carolina practice. See Brandis on North Carolina Evidence § 11 (1982).

Subdivisions (c) and (d) govern when judicial notice is discretionary and when it is mandatory. The Advisory Committee's Note states:

> "Under subdivision (c) the judge has a discretionary authority to take jucicial notice, regardless of whether he is so requested by a party. The taking of judicial notice is mandatory, under subdivision (d), only when a party requests it and the necessary information is supplied. This scheme is believed to reflect existing practice. It is simple and workable. It avoids troublesome distinctions in the many situations in which the process of taking judicial notice is not recognized as such."

North Carolina cases have not dealt with this issue.

Subdivision (e) entitles a party, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice. The Advisory Committee's Note states:

> "Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. The rule requires the granting of that opportunity upon request. No formal scheme of giving notice is provided. An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely...."

If judicial notice is taken by an appelate court, an opportunity to be heard must be given upon timely request.

Subdivision (e) departs from current North Carolina practice which generally does not require an opportunity to be heard prior to the court taking judicial notice on its own initiative. See Brandis on North Carolina Evidence §11 (1982).

With respect to notice at administrative hearings, see G.S. 150A-30.

Subdivision (f) is in accord with North Carolina practice in allowing judicial notice to be taken at any stage of the proceedings, whether in the trial court or on appeal.

Subdivision (g) concerns instructing the jury with respect to judicially noticed facts. The Advisory Committee's Note states:

> "Within its relatively narrow area of adjudicative facts, the rule contemplates there is to be no evidence before the jury in disproof. The judge instructs the jury to take judicially noticed facts as established. This position is justified by the undesirable effects of the opposite rule in limiting the rebutting party, though not his opponent, to admissible evidence, in defeating the reasons for judicial notice, and in affecting the substantive law to an extent and in ways largely unforeseeable. Ample protection and flexibility are afforded by the broad provision for opportunity to be heard on request, set forth in subdivision (e)."

Subdivision (g) is in accord with North Carolina practice in civil cases by not allowing evidence to be introduced to dispute a fact that has been judicially noticed. See Brandis on North Carolina Evidence § 11, at 34 (1982).

However, subdivision (g) differs from North Carolina practice by permitting evidence to be introduced in a criminal trial to rebut a fact that has been judicially noticed. In adopting subdivision (g), Congress was of the view that a mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is contrary to the spirit of the right to a jury trial.

"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.

COMMENTARY

The first sentence of this rule is identical to Fed. R. Evid. 301, except that the phrase "by statute, by judicial decision" is used in lieu of the phrase "by Act of Congress." The last three sentences of the rule, which were modeled upon Alaska Rule of Evidence 301 (1979), clarify the effect of the rule.

A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed or inferred from another fact established in the action. The term "basic fact" is used to designate the fact from which the assumption or inference is made and the term "presumed fact" is used to indicate the fact assumed or inferred.

The rule does not apply to "conclusive presumptions", which are merely statements of substantive law and have nothing to do with the law of evidence. See Brandis on North Carolina Evidence § 215, at 170 (1982).

In some situations, when the basic fact has been established, the presumed fact may (but need not) be found to exist. The

existence of the presumed fact is for the trier of fact to determine from all the evidence pro and con. The term "permissive presumption" is used to describe this situation. Id. at 171. Or it is said that the basic fact is prima facie evidence of the fact to be inferred. Rule 301 does not apply in situations where a statute or judicial decision creates a "permissive presumption" or merely provides that one fact shall be "prima facie" evidence of another.

The term "mandatory presumption" is used when the presumed fact must be found when the basic fact has been established, unless sufficient evidence of the nonexistence of the presumed fact is forthcoming. Id. at 171. Rule 301 is intended to govern mandatory presumptions.

Care should be taken to determine whether the presumption in question is within the scope of this rule since the term presumption is often misused. The first sentence of the rule makes it clear that the General Assembly and the courts retain power to create presumptions having an effect different from that provided for in this rule. Nonetheless, a presumption created by a prior statute or judicial decision should be construed to come within the scope of this rule unless it is clear that the presumption was not intended to be a "mandatory presumption".

Under Rule 301, the presumption satisfies the burden of producing evidence of the presumed fact. Evidence sufficient to prove the basic fact is sufficient proof of the presumed fact to survive a directed verdict at the end of the proponent's case-in-chief. This is in accord with North Carolina practice.

The general rule in North Carolina is in accord with Rule 301 in that a presumption does not shift the burden of proof. Id. § 218, at 179. However, with respect to some presumptions in North Carolina, the opponent has the burden of persuading the jury, by a preponderance of the evidence or otherwise, that the presumed fact does not exist. Id. If by statute or judicial decision a particular presumption shifts the burden of proof, Rule 301 does not apply.

Proof of the basic fact not only discharges the proponent's burden of producing evidence of the presumed fact but also places upon the opponent the burden of producing evidence that the presumed fact does not exist. If the opponent does not introduce any evidence, or the evidence is not sufficient to permit reasonable minds to conclude that the presumed fact does not exist, the proponent is entitled to a peremptory instruction that the presumed fact shall be deemed proved. This is in accord with North Carolina practice. Id. § 222, at 189.

If the opponent introduces evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist, no peremptory instruction should be given. Rather, the court must instruct the jury that it may, but is not required to,

infer the existence of the presumed fact from proof of the basic fact.

Of course, the opponent may avoid the effect of a presumption by proving that the basic fact does not exist.

"Rule 302. Applicability of State 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.

COMMENTARY

This rule differs from Fed. R. Evid. 302 in that "federal law" has been substituted for "state law." The Comment to Rule 302 of the Uniform Rules of Evidence (1974) explains the purpose of the change:

> "Parallel jurisdiction in state and federal courts exists in many instances. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied."

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 401. The Advisory Committee's Note states:

> "Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the

probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called 'conditional' relevancy. Morgan, Basic Problems of Evidence 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, 29 Calif.L.Rev. 689, 696, n. 15 (1941), in Selected Writings on Evidence and Trial 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a 'tendency to make the existence' of the fact to be proved 'more probable or less probable.' Compare Uniform Rule 1(2) which states the crux of relevancy as 'a tendency in reason,' thus perhaps emphasizing unduly the logical process and ignoring the need

to draw upon experience or science to validate the general principle upon which relevancy in a particular situtation depends.

The standard of probability under the rule is 'more . . . probable than it would be without the evidence.' Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, 'A brick is not a wall,' or, as Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 576 (1956), quotes Professor McBaine, '. . . [I]t is not to be supposed that every witness can make a home run.' Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase 'fact that is of consequence to the determination of the action' to describe the kind of fact to which proof may properly be directed. The language is that of California Evidence Code § 210; it has the advantage of avoiding the loosely used and ambiguous word 'material'. *** The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requirees that the evidence relate to a 'material' fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission."

While North Carolina courts have used slightly different definitions of relevant evidence, the rule is unlikely to alter significantly North Carolina practice. See Brandis

on North Carolina Evidence § 78 (1982). Although the rule speaks in terms of relevancy, the definition includes what is often referred to in our courts as materiality. Id. § 77.

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 402 except that the phrases "by the Constitution of North Carolina" and "by Act of the General Assembly" were added and the phrase "by other rules prescribed by the Supreme Court pursuant to statutory authority" was deleted. The Advisory Committee's Note states:

> "The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are 'a presupposition involved in the very conception of a rational system of evidence.' Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. ***
>
> Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil . . . Procedure . . ., by Act of Congress, or by constitutional considerations.
>
> Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, . . . Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and

identification; and Article X restricts the manner of proving the contents of writings and recordings.

> The Rules of Civil . . . Procedure in some instances require the exclusion of relevant evidence. For example, . . . the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions.
>
> * * * * *
>
> The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); incriminating statement elicited from an accused in violation of right to counsel, Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)."

Rule 402 is consistent with North Carolina practice.

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 403. The Advisory Committee's Note states:

> "The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme.

> Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. *** The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been forumlated.
>
> Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.
>
> The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually 'coupled with the danger of prejudice and confusion of issues'. *** While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. *** Moreover, the impact of a rule excluding evidence onthe ground of surprise would be difficult to estimate."

The rule is substantially in accord with North Carolina practice. See Brandis on North Carolina Evidence § 77 et seq. (1982). In North Carolina, unfair surprise appears to be a ground for exclusion of evidence. Id. § 77, p. 287. However, as the Advisory Committee states, the rule does not enumerate surprise as a ground for exclusion. Nonetheless, surprise may be covered by unfair prejudice, confusion of issues, or undue delay. See Wright and Graham, Federal Practice and Procedure: Evidence § 5218, at 298.

The Advisory Committee's Note states that:

> "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 and Advisory Committee's Note thereunder. The availability of other means of

proof may also be an appropriate factor."

"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 or accident.

COMMENTARY

This rule is identical to Fed. Evid. Rule 404.

Subdivision (a) deals with the basic question whether character evidence should be admitted. The Advisory Committee's Note states:

> "Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.
>
> Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as 'character in issue.' Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as 'circumstantial.' Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof."

The rule is consistent with North Carolina practice in that character evidence is generally not admissible as circumstantial evidence of conduct.

Subdivision (a)(1) creates an exception which permits an accused to introduce pertinent evidence of good character, in which event the prosecution may rebut with evidence of bad character. The exception is consistent with North Carolina practice except that subdivision (a)(1) speaks in terms of a "pertinent trait of his character". This limits the exception to relevant character traits, whereas North Carolina practice permits use of evidence of general character. Professor Brandis states that:

> "The North Carolina rule on this subject is unique, and appears to have had its origin in a misinterpretation of the earlier opinions.
>
> In a majority of jurisdictions, character evidence must be confined to the particular trait of character involved in the conduct which is being investigated: In the case of a witness, his character for truth and veracity; of a defendant charged with a crime of violence, his peaceable or violent character; of an alleged embezzler, his honesty and integrity, etc.; a few courts will also admit evidence of general moral character, and this view was adopted by the North Carolina Court at an early date. For at least eighty years it was permissible to prove either the general character or the specific relevant trait of character of the person in question. When, during this period, the Court stated that only 'general character' could be shown, it meant that the only method of proving character was by general reputation, as distinguished from 'particular facts and the opinion of witnesses.' In State v. Hairston the principle of the earlier cases seems to have been misunderstood, and the rule was stated: 'A party introducing a witness as to character can only prove the general character of the person asked about. The witness, of his own motion, may say in what respect it is good or bad.'***
>
> When the witness is asked whether he knows the general 'reputation' or 'reputation and character' of the subject, if he answers 'No' he should be stood aside; but if he answers 'Yes' it seems that he need not confine his testimony to that reputation, but may testify to reputation for some specific trait of character. This may be highly relevant, as when witness character is at stake and the answer deals with reputation for veracity. However, it may deal with reputation for liquor-selling, or horse trading, or domestic cruelty, even though the trait is wholly irrelevant to any issue in the case.

> The Court recently reviewed the history of the rule, but did not change it. It explicitly held that it is proper for counsel to prepare his witness by explaining the rule and that this does not render the specific trait evidence inadmissible unless, at counsel's suggestion, it is false. To this writer this is convincing proof that the rule should be scrapped. When counsel ascertains in advance a trait which the witness will specify, his question to elicit it should surely not merely be allowed, but be required to deal with that trait. In such case, objection may be made to the question and relevance rationally appraised. As it is, the question is foolproof and there is no opportunity to object until the specific trait evidence is actually given and the damage is done." Brandis on North Carolina Evidence §114 (1982) (footnotes omitted):

Brandis also notes that:

> "At best the present rule requires use of an ambiguous and misleading formula in examining character witnesses. At worst it has positively undesirable consequences. It opens the door to evidence of character traits which are irrelevant and prejudicial, and permits the prosecution, under the guise of impeaching the defendant as a witness, to prove traits having no relation to veracity but which are relevant on the issue of guilt, thus evading the rule (see § 104) prohibiting the State from attacking the defendant's character unless he first puts it in issue. These consequences would be avoided, and logic and symmetry restored, by confining the inquiry to traits relevant for the particular purpose and holding the witness to responsive answers." Id. at 114, n. 91.

Subdivision (a)(2) creates an exception to permit an accused to introduce pertinent evidence of the character of the victim and to permit the prosecution to introduce similar evidence in rebuttal of the character evidence. The subdivision extends the exception recognized in North Carolina homicide and assault and battery cases to include all criminal cases. See Brandis on North Carolina Evidence § 106 (1982).

North Carolina practice permits evidence of the character of the victim tending to show that the defendant had a reasonable apprehension of death or bodily harm. Id. Such evidence when introduced to show the reasonable apprehension of death or bodily harm to the accused, rather than to prove that the victim acted in conformity with his character trait on a particular occasion,

would not be within the ban created by subdivision (a).

North Carolina practice also permits evidence of the character of the victim tending to show that the victim was the first aggressor. Unlike rule 404, current North Carolina practice permits such evidence to be introduced only if the State's evidence is wholly circumstantial or the nature of the transaction is in doubt.

Subdivision (a)(2) permits proof of any pertinent trait of the victim. North Carolina practice has confined the evidence to character for violence. Id.

Subdivision (a)(2) is consistent with North Carolina practice in that evidence of the character of the victim for peace and quiet would be admissible to rebut evidence of the deceased's character for violence and evidence of the victim's good general character would not. Id. at 397.

The second part of subdivision (a)(2) permits introduction of "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." In North Carolina the prosecution may offer evidence of the deceased's character for peace and quiet only if the defendant has introduced evidence of the deceased's character for violence. See Nance v. Fike, 244 N. C. 368, 372 (1956). Thus in North Carolina the accused can apparently claim self-defense without opening the door to character evidence relating to the victim. Subdivision (a)(2) would alter this practice and permit the prosecution to offer evidence of the peacefulness of the victim to rebut any evidence that the victim was the first aggressor.

The North Carolina exception, unlike the rule, applies to cases of civil assault and battery. See Brandis on North Carolina Evidence §106, at 393 (1982). The Advisory Committee's Note states:

> "The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e., evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character.*** The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission ***:
>
> 'Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happended on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man

> because of their respective characters despite what the evidence in the case shows actually happened.'"

Subdivision (a)(3) creates an exception to the general rule and permits the introduction of evidence of the character of a witness, as provided in Rules 607, 608, and 609, to prove that he acted in conformity therewith on a particular occasion.

Subdivision (b) permits the introduction of specific "crimes, wrongs, or acts" for a purpose other than to prove the conduct of a person. The Advisory Committee's Note states:

> "Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rules does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweights the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."

The list in the last sentence of subdivision (b) is nonexclusive and the fact that evidence cannot be brought within a category does not mean that the evidence is inadmissible.

Subdivision (b) is consistent with North Carolina practice.

Relevance of the complainant's past behavior in a rape or sex offense case is governed by Rule 412.

"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.

(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.

COMMENTARY

This rule is identical to Fed. R. Evid. 405 except for the addition of the last sentence to subdivision (a).

The Advisory Committee's Note states:

> "The rule deals only with allowable methods of proving character, not with admissibility of character evidence, which is covered by Rule 404.
>
> Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue."

With respect to specific instances of conduct and reputation, this treatment is consistent with North Carolina practice. See Brandis on North Carolina Evidence §110 (1982).

With respect to opinion evidence, the Advisory Committee's Note states:

> "In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore §1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contasted with 'the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'.'

> It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate.*** No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion."

In permitting opinion evidence as a means of proving character, the rule departs from current North Carolina practice. The general practice in this State is to frame questions in terms of reputation. However, if the witness is questioned concerning the "general character" or the "reputation and character" of another person, it is understood that the real subject of inquiry is reputation. State v. King, 224 N.C. 329 (1944); State v. Hicks, 200 N.C. 539 (1933); State v. Cathey, 170 N.C. 794 (1916). Professor Brandis points out that:

> "If as, e.g., in the initial question in State v. Cathey ... 'reputation' is entirely omitted from the question, or if the question refers, as in State v. Hicks ... to 'reputation and character,' the judge and counsel may know that the witness should confine himself to reputation, but, in the absence of further enlightenment, it seems most doubtful that the witness is so legally learned. Therefore, the practical result may well be to admit opinion evidence while giving lip service to the prohibition against it. Since, additionally, as a practical matter, many witnesses will in fact give opinion in answering a question ostensibly calling only for reputation, it seems to the author of this edition that it would be much more realistic for the Court to scrap the present stated rule and frankly admit either opinion or reputation testimony." Stansbury's North Carolina Evidence (Brandis ed.) §110, at 338, n. 99.

Since Fed. R. Evid. 405 opens up the possibility of proving character by means of expert witnesses, the last sentence was added to subdivision (a) to prohibit expert testimony on character.

The second sentence of subdivision (a) permits inquiry

on cross-examination into relevant specific instances of conduct. The Advisory Committee's Note states:

> "According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question.*** The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony."

Under current North Carolina practice, inquiry into specific instances of conduct on cross-examination is available only on the cross-examination of the person whose character is in question. Brandis on North Carolina Evidence §§111, 115 (1982). It is not permissible in North Carolina to ask a character witness whether he has heard of the person in question having committed a particular act. Id. §115. However, to some extent the North Carolina rule may be circumvented by cross-examination as to specific traits. Id.

Also, the Advisory Committee's Note states:

> "The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, i.e., be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701."

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 406.

The Advisory Committee's Note states:

> "An oft-quoted paragraph, McCormick §162, p. 340, describes habit in terms effectively contrasting it with character.
>
> 'Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.'
>
> Equivalent behavior on the part of a group is designated 'routine practice of an organization' in the rule. Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick §162, p. 341:
>
> 'Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the

habit of doing it.'

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to difference of opinion. Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964). While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate 'habits' is generally excluded when offered as proof of drunkenness in accident cases, Annot., 46 A.L.R.2d 103, and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., 66 A.L.R.2d 806. In Levin v. United States, 119 U.S.App. D.C. 156, 338 F.2d 265 (1964), testimony as to the religious 'habits' of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded:

> 'It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of "invariable regularity." (1 Wigmore 520.) Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value.' Id. at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, 6 Kan.L.Rev. 38-41 (1957). Nor are they inconsistent with such cases as Whittemore v. Lockheed Aircraft Corp., 65 Cal.App.2d 737, 151 P.2d 670 (1944), upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

> A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 404, 449 (1957). This requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. *** The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases."

Rule 406 is consistent with North Carolina practice. See Brandis on North Carolina Evidence § 95 (1982).

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 407 except that the phrase "those issues are" has been inserted to clarify what must be controverted.

The Adivsory Committee's Note states:

> "The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that 'because the world gets wiser as it gets older, therefore it was foolish before'. Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R.N.S.

261, 263 (1869). Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rule is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutgers L.Rev. 574, 590 (1956).

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., 64 A.L.R.2d 1296. Two recent federal cases are illustrative. Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And Powers v. J. B. Michael & Co., 329 F.2d 674 (6th Cir. 1964), an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403."

The increasing tendency of federal courts is to hold that Rule 407 is not applicable to product liability cases. North Carolina courts have applied the rule

excluding evidence of subsequent remedial measures in product liability cases. See Jenkins v. Helgren, 26 N.C. App. 653 (1975). It is the intent of the Committee that the rule should apply to all types of actions.

Rule 407 is consistent with North Carolina practice. See Brandis on North Carolina Evidence § 180 (1982).

"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, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

COMMENTARY

This rule is identical to Fed. R. Evid. 408 except that the words "evidence of" were added to the second sentence. The addition is for the purpose of clarification and is not intended as a material change. The Advisory Committee's Note states:

> "As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of

position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromise when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person."

North Carolina practice is consistent with Rule 408 in that an offer of compromise, as such, is not admissible to prove liability for or invalidity of a claim or its amount. See Brandis on North Carolina Evidence § 180 (1982). The same rule applies to an offer to settle, or the actual settlement of, a third person's claim arising out of the transaction in litigation. Id. at 56. The words "the claim" in the first sentence should be interpreted to include the claim that is the subject of the lawsuit and any other claim arising out of the same occurence.

The Advisory Committee's Note states:

> "The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount."

The phrase "which was disputed" should be interpreted consistently with North Carolina decisional law concerning what constitutes a dispute. See Wilson County Board of Education v. Lamm, 276 N.C. 487 (1970).

With respect to the second sentence of the rule, the Advisory Committee's Note states:

> "The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be 'without prejudice,' or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540-541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even

among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself."

Thus Rule 408 changes the current North Carolina practice that allows a "distinct admission of an independent fact" made during compromise negotiations to be received in evidence. See Brandis on North Carolina Evidence § 180, at 56-57 (1982).

Policy reasons for the compromise rule do not apply to evidence discoverable outside of settlement negotiations. Thus the third sentence of Rule 408 states that evidence otherwise discoverable need not be excluded merely because it is presented in compromise discussions. There is not any North Carolina case law on this point.

The Advisory Committee's Note states that:

> "The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, contra, Fenberg v. Rosenthal, 348 Ill.App. 510, 109 N.E.2d 402 (1952)., and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to 'buy off' the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick, § 251, p. 542."

The final sentence of the rule is consistent with North Carolina practice in that an offer for a purpose other than to prove the validity or invalidity of the claim or its amount is not within the rule. See Brandis on North Carolina Evidence § 180, at 55, 56 (1982).

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 409, except that the phrase "other expenses" has been substituted for the phrase "similar expenses."

The Advisory Committee's Note states:

> "The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., 20 A.L.R.2d 291, 293:
>
> '[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.'"

Under current North Carolina law, rendering aid to an injured person or promising to render aid is not an admission of fault. Brandis on North Carolina Evidence § 180, at 58 (1982). Rule 409 is intended to cover rendering aid as well as furnishing or offering or promising to pay medical, hospital or other expenses.

Unlike the federal rule, which applies to "medical, hospital, or similar expenses," this rule applies to "medical, hospital, or other expenses." The phrase "other expenses" is intended to include, but is not limited to, lost wages and damage to property. The phrase "occasioned by an injury" is intended to include a property injury as well as a personal injury. The rule's coverage of nonmedical expenses occasioned by either a personal or property injury is an expansion of the current North Carolina rule. See Id.

Rule 409 is consistent with North Carolina practice in that evidence inadmissible under the rule to prove liability may be admissible for another purpose. See Id. § 180, at 58-59 (1982). The rule is also consistent with North Carolina practice in that it does not bar evidence of conduct and statements outside of the simple act of furnishing or offering to pay medical expenses. As the Advisory Committee's Note states:

> "Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This

difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature."

"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 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 which was later withdrawn;

(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 which was later withdrawn;

(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.

COMMENTARY

This rule is identical to Fed. R. Evid. 410, except as noted below.

The Advisory Committee's Note states:

> "Withdrawn pleas of guilty were held inadmissible in federal prosecutions in Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in People v. Spitaleri, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in Kercheval, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., 86 A.L.R.2d 326."

The second paragraph of Fed. R. Evid. 410 reads: "A plea of nolo contendere". Unlike the federal rule, this rule precludes evidence of a no contest plea only if it was later withdrawn. Thus evidence of a no contest plea can be admitted in a different criminal or civil proceeding against the defendant who made the plea.

The third paragraph differs from Fed. R. Evid. 410 by making a reference to Article 58 of General Statutes Chapter 15A, which specifies the procedure relating to guilty pleas in superior court. The third paragraph also refers to comparable procedures in district court, although no statutory scheme regulates plea negotiations in district court. See Official Commentary to G.S. Ch. 15A, Art. 58.

Prior to the 1979 amendments to Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6), it was questionable whether an otherwise voluntary admission to law enforcement officials was rendered inadmissible merely because it was made in

hope of obtaining leniency by a plea. The Notes of the Advisory Committee on the amendment to Fed. R. Crim. P. 11(e)(6) state that the rule:

> "makes inadmissible statements made 'in the course of any proceedings under this rule regarding' either a plea of guilty later withdrawn or a plea of no contest later withdrawn and also statements 'made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.' It is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process . . . without attempting to deal with confrontations between suspects and law enforcements agents, which involve problems of quite different dimensions . . .. This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases . . . must be resolved by that body of law dealing with police interrogations."

If there has been a plea of guilty later withdrawn or a plea of no contest later withdrawn, the third paragraph of Rule 410 makes inadmissible statements made in the course of any proceedings relating to guilty pleas in the superior or district courts. This includes, for example, admissions by the defendant when he makes his plea in court and also admissions made to provide the factual basis for the plea. However, the rule is not limited to statements made in court. If the court were to defer its decision on a plea agreement pending examination of the presentence report, statements made to the probation officer in connection with the preparation of that report would come within the third paragraph. See Notes of Advisory Committee on the Amendment to Fed. R. Crim. P. 11(e)(6).

The last sentence of Rule 410 provides an exception to the general rule of nonadmissibility of the described statements. Such a statement is admissible "in any proceedings 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."

> ". . . when evidence of statements made in the

course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not 'against' the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language . . . follows closely that in Fed. R. Evid. 106, as the considerations involved are very similar." Id.

Unlike the federal rule, Rule 410 does not contain an exception permitting a statement made by the defendant under oath, on the record, and in the presence of counsel to be introduced in a criminal proceeding for perjury or false statement.

North Carolina practice in this area is governed by G.S. 15A-1025, which should be amended to conform to Rule 410. G.S. 15A-1025 currently provides:

> "The fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action."

Unlike G.S. 15A-1025, Rule 410 does not provide that the described evidence is inadmissible "in favor of" the defendant.

As the Advisory Committee Note to Fed. R. Crim. P. 11(e)(6) states:

> "This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor. Specifically, no disapproval is intended of such decisions as United States v. Verdoom, 528 F.2d 103 (8th Cir. 1976), holding that the trial judge properly refused to permit the defendants to put into evidence at their trial the fact the prosecution had attempted to plea bargain with them, as 'meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence'."

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 411. The Advisory Committee's Note states:

> "The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick § 168; Annot., 4 A.L.R.2d 761. The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.
>
> The second sentence points out the limits of the rule, using well established illustrations. Id."

Rule 411 is consistent with North Carolina practice in barring evidence of insurance unless offered for a purpose other than to prove negligence. See Brandis on North Carolina Evidence § 88 (1982).

"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) 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 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) No evidence of sexual behavior shall be introduced at any time during the trial of a charge of rape or any lesser included offense thereof or a sex offense or any lesser included offense thereof, nor shall any reference to any such behavior be made in

the presence of the jury, unless and until the court has determined that such behavior is relevant under subsection (b). 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 re-submitted in open court.

COMMENTARY

This rule differs substantially from Fed. R. Evid. 412. Except as noted below, the rule is the same as the current shield law, G.S. 8-58.6.

Subdivision (c), which is derived from the federal rule, was added to the current shield law to make it clear that sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

The next to the last sentence of subdivision (d), which is derived from the federal rule, was added to the shield law to address the issue of conditional relevancy. The sentence provides that, notwithstanding Rule 104(b), if the relevancy of the evidence depends upon the fulfillment of a condition of fact, the court will hear evidence in the in camera proceeding and decide whether the condition of fact is fulfilled. The court should decide whether the defendant has presented sufficient evidence for a reasonable jury to find the proposition asserted to be true. If so, the defendant's evidence should be admitted. If not, the evidence should be excluded. See S. Saltzburg and K. Redden, Federal Rules of Evidence Manual, at 221 - 27 (3d ed. 1982). Evidence should not be admitted on behalf of the defendant subject to connecting-up. The court should make sure, before any evidence of prior sexual activity is admitted, that the conditional relevance analysis has been satisfied. Id. at 90.

"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 the law of this State.

COMMENTARY

This rule differs from Fed. R. Evid. 501. After reviewing the rules on privilege proposed by the Supreme Court, Congress rejected the proposal and substituted a rule that applies the common law of privileges in federal civil and criminal cases. In civil actions in which state law supplies the rule of decision, the state law on privileges applies.

The Uniform Rules of Evidence (1974) adopted the federal draft and several states have modeled their privilege laws on the federal draft. However, there is not a great deal of uniformity among the federal courts and various states with respect to privileges. Adoption of the federal draft would modify and delete privileges currently recognized in North Carolina and add other privileges currently not recognized in North Carolina.

Because of the extensive effort needed to clarify this confused area, the Committee decided not to draft new rules of privilege at this time but to continue the present statutory and common law system. See generally Brandis on North Carolina Evidence § 54 et seq. (1982).

"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. 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.

COMMENTARY

Subdivision (a) is identical to the first sentence of Fed. R. Evid. 601. The second sentence of Fed. R. Evid. 601 concerns the application of state law in diversity cases and was omitted. Fed. R. Evid. 601 does not contain subdivision (b) on disqualification of a witness.

This rule eliminates all grounds of incompetency not

specifically recognized in subdivision (b) or the succeeding rules in this Article.

The so-called Dead Man's Act, G.S. 8-51, which deals with the incompetency of an interested person when the other party to the transaction has since died or become insane, should be repealed upon adoption of this rule. Professor Brandis' view is that:

> "[T]he statute has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel. The situation calls for more than legislative tinkering. What is needed is repeal of the statute." Brandis on North Carolina Evidence § 66, at 258, n. 62 (1982).

At common law husband and wife were incompetent to testify in an action to which either was a party. However, by statute, each spouse has been competent to testify for or against the other in all civil actions and proceedings, with two rigidly defined exceptions. One exception makes one spouse incompetent to testify "for or against the other . . . in any action or proceeding for or on account of criminal conversation . . .." G.S. 8-56. With respect to this exception Professor Brandis states:

> "It is hard to find a purpose except one based on notions of delicacy, and even this is frustrated by permitting the plaintiff husband to testify to his wife's improper relations with the defendant. Danger of collusion would seem to be no greater than in any other case, and the interest of the state in the marriage relation, which only doubtfully justifies extreme measures to prevent collusion in divorce litigation, is no excuse for a rule of incompetency in criminal conversation actions." Brandis on North Carolina Evidence § 58, at 232, n. 28 (1982).

The other exception bars a spouse from testifying "for or against the other in any action or proceeding in consequence of adultery." G.S. 8-56. This exception is supplemented by G.S. 50-10 which provides that in divorce actions "neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact." With respect to this exception, Professor Brandis notes that if the original purpose was to prevent collusion in divorce actions, "[I]t would seem that the prohibition should have been repealed when a relatively short period of separation was made a ground for divorce." Brandis on North Carolina Evidence § 58, at 230, n. 20 (1982).

At common law the spouse of a criminal defendant was incompetent to testify. This incompetence was removed by G.S. 8-57 so far as testifying for the defendant is concerned. With respect to testimony against the other spouse, G.S. 8-57 left in force the common law rule of incompetence. In State v. Freeman, 302 N.C. 591 (1981), the court removed the incompetence to testify against the other spouse (except to the extent that it preserved the privilege against disclosure of confidential communications).

Upon adoption of Rule 601, G.S. 8-56, 8-57, and 50-10 should be rewritten to make it clear that a husband or wife are competent to testify. The privilege against disclosure of confidential communications should be retained.

Subdivision (b) establishes a minimum standard for competency of a witness and is consistent with North Carolina practice. See Brandis on North Carolina Evidence § 55 (1982).

"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.

COMMENTARY

This rule, which is identical to Fed. R. Evid. 602, restates the traditional common-law rule in North Carolina barring a witness from testifying to a fact of which he has no direct personal knowledge. See Robbins v. C. W. Myers Trading Post, Inc., 251 N.C. 663 (1960). A witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe and must have actually observed the facts. The Advisory Committee's Note states that:

> "These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. *** It will be observed that the rule is in fact a specialized application of the provisions of Rule

104(b) on conditional relevancy."

Preliminary determination of personal knowledge need not be explicit but may be implied from the witness's testimony.

Rule 602 applies to hearsay statements admitted under the hearsay exception rules in that admissibility of a hearsay statement is predicated on the foundation requirement of the witness' personal knowledge of the making of the statement itself. However, it is not intended that firsthand knowledge be required where a hearsay exception necessarily embraces secondhand knowledge (e.g. Rules 803(8)(C) and 803(23)).

Rule 602 is subject to Rule 703 relating to 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 603 and is in accord with North Carolina practice. The Advisory Committee's Note states that:

> "The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required."

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 604. There are no North Carolina cases on this point.

"Rule 605. Competency of Judge as Witnes .

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.

COMMENTARY

This rule, which is identical to Fed. R. Evid. 605, prevents a judge from testifying in a trial over which he is presiding. The Advisory Committee's Note states that:

> "The rule provides for an 'automatic objection'. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector."

G.S. 15A-1223 requires a judge in a criminal case to disqualify himself if he is a witness in the case upon motion of the State or the defendant. Upon adoption of Rule 605, a conforming amendment should be made to G.S. 15A-1223 to remove the requirement for a motion to disqualify.

The question of whether a judge may testify in civil proceedings over which he is presiding does not appear to have arisen in North Carolina. See Brandis on North Carolina Evidence §53, at 198 (1982).

"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 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 606.

Subdivision (a) provides that a juror may not testify as a witness in the trial in which he is sitting as a juror. There are no North Carolina cases on this point.

The Advisory Committee's Note to subdivision (a) states:

> "The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however, in this instance so involved as to call for departure from ususal principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605."

Subdivision (b) concerns an inquiry into the validity of a verdict or indictment. The Advisory Committee's Note states:

> "Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the

evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. McDonald v. Pless, 238 U.S. 264 (1915). On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. *** The authorities are in virtually complete accord in excluding the evidence. *** As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. *** However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. Mattox v. United States, 146 U.S. 140, . . . (1892). Under the federal decisions the central focus has been upon insulation in the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, Hyde v. United States, 225 U.S. 347, 382 (1912); a quotient verdict, McDonald v. Pless, 238 U.S. 264, (1915); speculation as to insurance coverage, Holden v. Porter, 405 F.2d 878 (10th Cir. 1969), Farmers Coop. Elev. Ass'n v. Strand, 382 F.2d 224, 230 (8th Cir. 1967), cert. denied, 389 U.S. 1014; misinterpretation of instructions, Farmers Coop. Elev. Ass'n v. Strand, supra; mistake in returning verdict, United States v. Chereton, 309 F.2d 197 (6th Cir. 1962); interpretation of guilty plea by one defendant as implicating others, United States v. Crosby, 294 F.2d 928, 949 (2d Cir. 1961). The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized

> as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, Mattox v. United States, 146 U.S. 140 (1892). See also Parker v. Gladden, 385 U.S. 363 (1966)."

The exclusion is intended to encompass testimony about mental processes and testimony about any matter or statement occurring during the deliberations, except that testimony of either of these two types can be admitted if it relates to extraneous prejudicial information or improper outside influence.

The general rule in North Carolina has been that a juror's testimony or affidavit will not be received to impeach the verdict of the jury. Brandis on North Carolina Evidence §65 (1982). The North Carolina rule, unlike Rule 606, does not apply to attempts to support a verdict. Id. An express, though limited exception to the anti-impeachment rule is provided in G.S. 15A-1240, which should be amended to conform to Rule 606.

Also, the Advisory Committee's Note states:

> "This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity."

"Rule 607. Who May Impeach.

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

COMMENTARY

This rule is identical to Fed. R. Evid. 607. The rule abandons the traditional common law rule that a party "vouches" for a witness by calling him and, therefore, may not impeach his own witness. The traditional rule has been the subject of numerous exceptions. See N.C. Civ. Pro. Rule 43(b); Brandis on North Carolina Evidence §40 (1982). The substantial inroads into the old rule made by statutes and decisions are evidence of doubts as to its basic soundness and workability. As the Advisory Committee's Note states:

> "The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary."

The impeaching proof must be relevant within the meaning of Rule 401 and Rule 403 and must in fact be impeaching. See Ordover, Surprise! That Damaging Turncoat Witness Is Still With Us, 5 Hofstra L.Rev. 65, 70 (1976).

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 608, except for the addition of the phrase "as provided in Rule 405(a)" to subdivision (a).

Subdivision (a) allows the credibility of a witness to be attacked or supported by evidence in the form of reputation or opinion. Admitting opinion evidence to prove character is a change in North Carolina practice. See Commentary to Rule 405. The reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible.

The first limitation in subdivision (a) is that the evidence may refer only to character for truthfulness or untruthfulness. The rule in North Carolina has been that, except on cross-examination, evidence of a specific trait of character of a wintess is not admissible. The North Carolina rule is unique, and appears to have had its origin in a misinterpretation of the earlier opinions. Brandis on North Carolina Evidence §114 (1982).

The second limitation in subdivision (a) is that the character of the witness for truthfulness must have been attacked "by opinion or reputation evidence or otherwise." In North Carolina the necessity for impeachment as a prerequisite to corroboration has been more theoretical than real. Id. §50. Adoption of this rule strengthens the limitation. The Advisory Committee's Note states that:

> "Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence of misconduct, including conviction of crime and of corruption also fall within this category. Evidence of bias or interest does not. McCormick §49; 4 Wigmore §§1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend upon the circumstances. McCormick §49. Cf. 4 Wigmore §§ 1108, 1109."

As to the use of specific instances on direct by an opinion witness, see the Commentary to Rule 405, supra.

Subdivision (b) generally bars evidence of specific instances of conduct of a witness for the purpose of

attacking or supporting his credibility. However, there are two exceptions.

Conviction of a crime as a technique of impeachment is treated in detail in Rule 609 and is merely recognized in this rule as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

The second exception allows particular instances of conduct, though not the subject of criminal conviction, to be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Current North Carolina practice allows only inquiry concerning the specific acts of the principal witness himself. Brandis on North Carolina Evidence §§ 111, 115 (1982). The Advisory Committee's Note states that:

> "Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that the probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarassment."

The last sentence of Rule 608 constitutes a rejection of the doctrine of such cases as State v. Foster, 284 N.C. 259 (1973), that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. As the Advisory Committee's Note states:

> "While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality. In Griffin v.

California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); McCormick § 131; 8 Wigmore § 2276 (McNaughton Rev. 1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy."

See Brandis on North Carolina Evidence §111, at 409, n. 28 (1982).

"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 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 renders evidence of a conviction inadmissible.

COMMENTARY

Subdivision (a) differs from Fed. R. Evid. 609(a), which permits, for purposes of attacking the credibility of a witness, evidence of conviction of a felony or a crime that involves dishonesty or false statement. The current practice in North Carolina is that any sort of criminal offense may be the subject of inquiry for the purpose of attacking credibility.

Subdivision (a) provides that evidence of a crime punishable by more than 60 days confinement shall be admissible. This is the standard used in the Fair Sentencing Act in defining an aggravating factor. See G.S. 15A-1340.4(a)(1)(o). This includes convictions occurring in other states, the District of Columbia, and the United States even though the crime for which the defendant was convicted would not have been a crime if committed in this state.

Under current North Carolina practice a witness' denial of a prior conviction "may not be contradicted by introducing the record of his conviction or otherwise proving by other witnesses that he was, in fact, convicted." However, this prohibition has often been circumvented. Brandis on North Carolina Evidence §112, at 414 (1982). Subdivision (a) allows the record of the

conviction to be introduced.

Subdivision (b) is identical to Fed. R. Evid. 609 (b) and departs from the common law in North Carolina in providing a time limit on the use of prior convictions. Generally, evidence of a prior conviction is not admissible under subdivision (b) if more than 10 years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date. Evidence of such a conviction is admissible, however, if the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. A party must give written notice if he intends to use a conviction falling outside the 10-year period.

Subdivision (c) differs from Fed. R. Evid. 609(c) and provides an absolute prohibition of evidence of a conviction that has been pardoned. Current North Carolina practice does not prohibit evidence of such convictions.

Subdivision (d) is identical to Fed. R. Evid. 609(d) and provides that evidence of a juvenile adjudication is generally inadmissible. However, the court in a criminal case may "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." This is intended to satisfy the requirement of Davis v. Alaska, 415 U.S. 308 (1974). G.S. 7A-677, which provides that the defendant or another witness in a criminal case may be ordered to testify with respect to whether he was adjudicated delinquent, should be amended to conform to this subdivision. Conforming amendments also should be made to G.S. 15-223(b), G.S. 90-96, and G.S. 90-113.14.

Subdivision (e) differs from Fed. R. Evid. 609(e) and current North Carolina practice by providing that the pendency of an appeal from a conviction renders evidence of the conviction inadmissible. See Brandis on North Carolina Evidence §112, at 411 (1982).

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 610 except for the proviso that explicitly states that evidence of religious beliefs or opinions may be admitted to show interest or bias. The rule clarifies unsettled law in North Carolina concerning whether, for impeachment purposes, a witness may be cross-examined as to his religious beliefs. See Brandis on North Carolina Evidence § 55, at 205 (1982). Evidence probative of something other than veracity is not prohibited by the rule.

"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.

COMMENTARY

This rule, except for subdivision (b), is identical to Fed. R. Evid. 611.

The rule sets forth the objectives the court should seek to obtain rather than spelling out detailed rules. Specific statutes relating to the mode and order of interrogating witnesses and presenting evidence, e.g., G.S. 15A-1226 dealing with when rebuttal evidence may be presented, will not be overridden by the general guidelines set by this rule.

The Advisory Committee's Note says that:

"Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick §5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, the use of demonstrative evidence, McCormick § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b).

Item (3) calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick § 42. In Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931), the Court pointed out that, while the trial judge should protect the witness from questions which 'go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate,' this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule."

Subdivision (b) deals with the scope of cross-examination. "In North Carolina the substantive cross-examination is not confined to the subject matter of direct testimony plus impeachment, but may extend to any matter relevant to the issues." Brandis on North Carolina Evidence §35, at 143 (1982). Subdivision (b) rejects the more restricted approach to cross-examination found in Fed. R. Evid. 611(b) and adopts the current North Carolina wide-open cross-examination rule.

Subdivision (c) continues the traditional view that the suggestive powers of the leading question are as general propositions undesirable. Within this tradition numerous exceptions have achieved recognition: The witness who is hostile, unwilling or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778; State v. Greene, 285 N.C. 482 (1974). As the Advisory Committee's Note points out: "The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command."

The Note states that:

> "The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of redirect) or of an insured defendant who proves to be friendly to the plaintiff."

The last sentence of subdivision (c) deals with categories of witnesses automatically regarded and treated as hostile. N.C. Civ. Pro. Rule 43(b) permits leading questions to "an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a private corporation or of a partnership or association which is an adverse party, or an officer, agent or employee of a state, county or municipal government or agency thereof which is an adverse party." The phrase of the rule "witness identified with" an adverse party is designed to enlarge the category of witnesses who may safely be regarded as hostile without further demonstration. Upon adoption of this rule, N.C. Civ. Pro. Rule 43(b) should be repealed. N.C. Civ. Pro. Rule 30 should be amended to state that depositions are subject to the North Carolina Rules of Evidence.

"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 the writing or object 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 matters not related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any portions not so related, 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.

COMMENTARY

This rule is identical to Rule 612 of the Uniform Rules of Evidence. The rule is a reorganization of Fed. R. Evid. 612 and

differs substantively from the federal rule in four ways. The rule omits a reference to the Jencks Act. Also, the rule states explicitly that it applies to trials, hearings and depositions and that it applies to objects as well as writings. The rule explicitly provides for inspection of the writing or object if production of the object or writing at the trial is impracticable.

If the writing is used by the witness while testifying to refresh his memory, the adverse party is entitled to production. If the writing is used before testifying for the purpose of testifying, disclosure is in the discretion of the court. Requiring disclosure of writings used before testifying is a change in North Carolina practice. See, e.g., State v. Cross, 293 N.C. 296 (1977).

As the Advisory Committee's Note points out:

> "The purpose of the phrase 'for the purpose of testifying' is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness."

Exculpatory writings are available to criminal defendants irrespective of Rule 612. See Brady v. Maryland, 373 U.S. 83 (1963); State v. Hardy, 293 N.C. 105 (1977).

"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.

COMMENTARY

This rule is identical to subdivision (a) of Fed. R. Evid. 613. There are no North Carolina cases on the subject matter of subdivision (a).

The Advisory Committee's Note states:

> "The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by

statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment to cross-examination. *** Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily."

The federal rule includes a subdivision (b) barring evidence of a prior inconsistent statement unless the witness has been given an opportunity to explain or deny it. Since subdivision (b) is omitted, foundation requirements for admitting inconsistent statements will be governed by case law. See Brandis on North Carolina Evidence §48 (1982).

"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.

(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.

COMMENTARY

Subdivisions (a) and (b) of this rule are identical to Fed. R. Evid. 614(a) and (b).

Subdivision (a) authorizes the court to call witnesses and is consistent with North Carolina practice. See Brandis on North Carolina Evidence §37 (1982).

Subdivision (b) authorizes the court to examine witnesses, whether called by itself or by a party, and is consistent with North Carolina practice. Id.

It is anticipated that the court will exercise its authority to call or interrogate a witness only in extraordinary circumstances.

The court may not in calling or interrogating a witness do so in a manner as to suggest an opinion as to the weight of the evidence or the credibility of the witness in violation of G.S. 15A-1222 or G.S. 1A-1, Rule 51(a). Id.

Subdivision (c) differs from Fed. R. Evid. 614(c) by providing for an automatic objection to the calling or interrogation of witnesses by the court. Subdivision (c) is consistent with N. C. Civ. Pro. Rule 46(a)(3) which provides that no objections are necessary with respect to questions propounded to a witness by the court.

"Rule 615. Exclusion of Witnesses.

At the request of a party the court shall 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 615 except that the phrase "a person whose presence is determined by the court to be in the interest of justice" has been added as a fourth exception.

In North Carolina the usual practice has been to separate witnesses and send them out of the hearing of the court when

requested, but this has been discretionary with the trial judge and not a matter of right." See Brandis on North Carolina Evidence § 20 (1982). G.S. 15A-1225, which codifies this practice, should be amended to conform to Rule 615.

The Advisory Committee's Note states:

> "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.
>
> Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. *** Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. *** (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n. 4"

A government investigative agent would be within the second exception. See S. Rept. No. 93-1277, 93d Cong., 2d Sess. (1974).

A fourth exception to Rule 615 was added to provide that the rule does not authorize the exclusion of a person whose presence is determined by the court to be in the interest of justice. For example, when a minor child is testifying the court may determine that it is in the interest of justice for the parent or guardian to be present even though the parent or guardian is to be called subsequently. When this exception is relied upon the court should state the reasons supporting its

determination that the presence of the person is 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 701.

Limitation (a) retains the traditional requirement that lay opinion be based on firsthand knowledge or observation. See Brandis on North Carolina Evidence §122, at 468 (1982).

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. This is a different test from the more traditional "collective facts exception" which allows lay opinions or inferences only where a shorthand expression is "necessary" because articulation of more primary components is impossible or highly impracticable. P. Rothstein, Rules of Evidence for United States Courts and Magistrates, at 257 (1980). See Brandis on North Carolina Evidence §125, at 474-76 (1982). Nothing in the rule would bar evidence that is commonly referred to as a "shorthand statement of fact." Id. at 476.

As the Advisory Committee's Note points out:

> "[N]ecessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. *** If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little

more than choosing up sides, exclusion for lack of helpfulness is called for by the rule."

"Rule 702. Testimony by Experts.

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 or otherwise.

COMMENTARY

The rule is identical to Fed. R. Evid. 702.

The rule is identical to G.S. 8-58.13, which should be repealed when Rule 702 becomes effective, except for the words "or otherwise" at the end of Rule 702. The rule is consistent with North Carolina practice. Brandis on North Carolina Evidence § 134, at 520, n. 25 (1982). The Advisory Committee's Note states that:

> "The rule . . . recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference . . .."

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

COMMENTARY

This rule is identical to Fed. R. Evid. 703.

Under the rule, facts or data upon which an expert bases an opinion may be derived from three possible sources. The first is the personal observation of the witness. The second source is presentation at trial by a hypothetical question or by having the expert attend the trial and hear the testimony establishing the facts. The third source consists of presentation of data to the expert outside of court. See Comment, Expert Medical Testimony: Differences Between the North Carolina Rules and the Federal Rules of Evidence 12 W.F.L.R 833, 837 (1976).

In State v. Wade, 296 N.C. 454 (1978), the Court stated that a "physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence." Although the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field" rather than that they be "inherently reliable," the thrust of State v. Wade is consistent with the rule. See W. Blakey, Examination of Expert Witnesses in North Carolina, 61 N.C.L.Rev. 1, 20-32 (1982).

The rule provides that the facts or data need not be admissible in evidence if of a type reasonably relied upon by experts in the particular field. In State v. Wade the Court stated that: "If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion." Thus an expert may testify as to the facts upon which his opinion is based, even though the facts would not be admissible as substantive 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 704.

The rule would abrogate the doctrine that excludes evidence in the form of an opinion if it purports to resolve the "ultimate issue" to be decided by the trier of fact.

In State v. Wilkerson, 295 N.C. 559 (1978), the Court held that admissibility of expert opinion depends not on whether it would invade the jury's province, but rather on "whether the witness . . . is in a better position to have an opinion . . . than is the trier of fact." Professor Brandis states that: "It is hoped

that a comparable reexamination of the rule as applied to lay testimony will be forthcoming. The rule has been condemned by thoughtful commentators, and judicial expressions of doubt are not wanting." Brandis on North Carolina Evidence §126, at 480-81 (1982) (footnotes omitted).

The Advisory Committee's Note states:

> "The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, 'Did T have capacity to make a will?' would be excluded, while the question, 'Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed. McCormick §12."

"Rule 705. Disclosure of Facts or Data Underlying Expert Opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 705 except for the last sentence which is identical to G.S. 8-58.12, which should be repealed upon enactment of this rule. G.S. 8-58.12 provides that hypothetical questions may no longer be required, though it does not prohibit their voluntary use.

Prior to 1982, when the facts upon which an opinion was based

were within the expert's own knowledge, the court had discretion to permit the expert to give his opinion first and leave the facts to be brought out by cross-examination. Brandis on North Carolina Evidence §136 (1982). Facts not within the personal knowledge of the expert had to be incorporated into a hypothetical question and thus disclosed prior to the opinion. Id. The 1981 legislation eliminated the requirement of the hypothetical question and allowed the expert to give his opinion without prior disclosure of the underlying facts unless an adverse party requests otherwise. G.S. 8-58.14. Upon the request of an adverse party, the judge must require the expert to disclose the underlying facts on direct examination or voir dire before stating the opinion.

The voir dire procedure results in duplication of testimony and needless consumption of time. Accordingly, the first sentence of Rule 705 leaves it to the court, rather than opposing counsel, to determine whether to require prior disclosure of the underlying facts.

The second sentence of Rule 705 gives the opposing side the right to require disclosure of the underlying facts or data on cross-examination. The cross-examiner is under no compulsion to bring out any facts or data except those unfavorable to the opinion. N.C. Civ. Pro. Rule 26(b)(4) provides for substantial discovery of the facts underlying the opinion prior to trial.

Under Rule 611, the court exercises control over the mode and order of interrogating witnesses and presenting evidence. The court may allow the opposing party to cross-examine concerning the factual basis of the opinion immediately after the opinion is given rather than at a later point in the trial.

This rule eliminates the requirement that the basis of an expert opinion must be stated. However, the requirement that there must be a basis for the expert opinion would not be abolished. See W. Blakey, Examination of Expert Witnesses in North Carolina, 61 N.C.L.Rev. 1, 9 (1982).

"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.

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

COMMENTARY

This rule is identical to Fed. R. Evid. 706 except that "for the taking of property" has been inserted in subdivision (b) in lieu of "under the Fifth Amendment".

A trial judge has the discretion to call an expert witness. State v. Horne, 171 N.C. 787 (1916). This rule provides the

procedure for calling such a witness.

Subdivision (b) provides the method of compensating experts called by the court but does not require an additional appropriation.

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 801, except for subdivision (d) which is discussed below.

Subdivision (a) defines "statement" for purposes of the hearsay rule. The Advisory Committee's Note states:

> "The definition of 'statement' assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.
>
> It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of 'statement'. Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. *** Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. *** Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter

asserted, also excluded from th definition of hearsay by the language of subdivision (c)."

Subdivision (a) differs from current North Carolina law by excluding from the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. Some North Carolina cases have barred evidence of conduct even though the conduct was nonassertive. In other cases, comparable evidence has been admitted, either as nonhearsay or without noticing its possible hearsay nature. Brandis on North Carolina Evidence § 142 (1982).

With respect to subdivision (a), the Advisory Committee's Note also states:

> "When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact."

Subdivision (b), which defines declarant as a person who makes a statement, is consistent with North Carolina practice.

Subdivision (c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. The Advisory Committee's Note states:

> "The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 Wigmore § 1361, 6 id. §1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *** The effect is to exclude from hearsay the entire category of 'verbal acts' and 'verbal parts of an act,' in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.
>
> The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

> Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying."

This definition of hearsay is consistent with the definitions used by North Carolina courts. See Brandis on North Carolina Evidence § 138 (1982). With respect to the definition of hearsay excluding "verbal acts" from the hearsay ban, see Brandis, § 141.

Subdivision (d)(1) of Fed. R. Evid. 801 departs markedly from the common law in North Carolina by excluding from the hearsay ban several statements that come within the common law definition of hearsay. Accordingly, the language of Fed. R. Evid. 801(d), which provides that in certain circumstances prior inconsistent statements, prior consistent statements, and out-of-court identifications are not hearsay, was deleted. See Brandis on North Carolina Evidence § 46 (prior inconsistent statements), §§ 51 and 52 (prior consistent statements); State v. Neville, 175 N.C. 751 (1918) (identification).

Subdivision (d)(2) of Fed. R. Evid. 801 excludes certain admissions of a party-opponent from the hearsay ban by stating that such statements are not hearsay. Subdivision (d) of Rule 801 achieves the same result in a manner consistent with current North Carolina practice by providing that such a statement may be admitted as an exception to the hearsay rule.

Subdivision (d) specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against the party.

With respect to category (A), the Advisory Committee's Note states:

> "A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to representative affairs."

This is in accord with North Carolina practice. See Brandis on North Carolina Evidence § 167 (1982).

With respect to category (B), the Advisory Committee's Note states:

> "Under established principles an admission may be

made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: 'X is a reliable person and knows what he is talking about.' See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that 'anything you say may be used against you'; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases."

Admission of a statement of which a party has adopted is in accord with North Carolina practice. See Brandis on North Carolina Evidence § 179 (1982).

With respect to category (C), the Advisory Committee's Note states:

"No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statments to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statement to his principal does not speak for him, Morgan, Basic Problems of Evidence 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. See also McCormick § 78, pp. 159-161."

North Carolina courts currently admit statements when an agent is, in fact, authorized to speak for the principal. Brandis on North Carolina Evidence § 169, at 15 (1982). However, it is unclear whether such statements are admissible when the statement was made only to the principal. Id. at 17. The rule would clarify North Carolina law by encompassing statements by an agent to the principal or to a third party.

With respect to category (D), the Advisory Committee's Note states:

> "The tradition has been to test the admissibility of statement by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusive of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment."

In Hubbard v. R.R., 203 N.C. 675 (1932), the Court states:

> "What an agent or employee says relative to an act presently being done by him within the scope of his agency or employment is admissible . . . against the principal or employer, but what he says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as against the principal or employer."

The North Carolina rule has been the subject of several dissenting opinions and has been criticized by Professor Brandis. See Branch v. Dempsey, 265 N.C. 733 (1965) (Sharp, J., dissenting); Pearce v. Telephone Co., 299 N.C. 64 (1980) (Copeland, Carlton and Exum, J.J., dissenting); Brandis on North Carolina Evidence § 169 (1982). Rule 801(d)(D) would change North Carolina practice and make admissible any statements related to a matter within the scope of the agency or employment. The only additional requirement is that the statement be made during the existence of the relationship.

With respect to category (E), the Advisory Committee's Note states:

> "The limitation upon the admissibility of statement of co-conspirators to those made

'during the course and in furtherance of the conspiracy' is in the accpeted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. *** The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949); Wong Sun v. United States, 371 U.S. 471, 490, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)."

Rule 801(d)(E) is in accord with North Carolina practice. See Brandis on North Carolina Evidence § 173 (1982).

"Rule 802. Hearsay Rule.

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

COMMENTARY

This rule is identical to Fed. R. Evid. 802 except that the phrase "by statute or by these rules" is used in lieu of the phrase "by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Rule 802 provides for the standard exclusion of hearsay evidence; hearsay is simply inadmissible unless an exception is applicable. This is in accord with North Carolina practice. Unless an exception to the hearsay rule is provided in these rules, the courts are not free to create new hearsay exceptions by adjudication. Rules 803(24) and 804(b)(5) allow for the admission of evidence in particular cases, but not for more general policy formulation.

"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 including 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 made 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 sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (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

enforcement 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 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 803, except as noted below. The Advisory Committee's Note states:

> "The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.
>
> The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the tiral even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a

relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this Rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602."

As the Advisory Committee's Note indicates, the exceptions are phrased in terms of nonapplication of the hearsay rule. Evidence that is otherwise inadmissible may be stricken from a writing.

Exception (1) concerns present sense impressions and Exception (2) concerns excited utterances. The Advisory Committee's Note states:

"In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negative the likelihod of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement.***

The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore §1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

With respect to the time element, Exception (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception (2) the standard of measurement is the duration of the state of excitement. 'How long can excitement prevail? Obviously there are no pat answers and the character of the transaction

or event will largely determine t significance of the time factor.'"

North Carolina courts have recognized a hearsay exception for spontaneous utterances that is substantially the same as Exception (2). See Brandis on North Carolina Evidence §164 (1982). Exception (2) would clarify discordant rulings in this area, particularly as to the element of time. Id. at 650. Exception (1) would be a new exception to the hearsay rule in North Carolina. Id. at 653.

Exception (3) concerns statements of the declarant's then existing mental, emotional or physical condition. The Advisory Committee's Note states:

> "The exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."

Exception (3) is similar to the corresponding North Carolina exception to the hearsay rule. See Brandis on North Carolina Evidence §161 (1982). However, the North Carolina exception differs from Exception (3) in that in North Carolina declarations that are made in a criminal case after the commission of the crime are generally not included within the exception for fear that admissibility would permit the defendant to create evidence for himself. Id. at 636.

The exception should be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the conduct of another person. This construction is consistent with State v. Vestal, 278 N.C. 561, 589 (1971).

In North Carolina, when the issue is one of undue influence or fraud with respect to the execution of a will, the declarations of a testator are admitted only as corroborative evidence and are not alone sufficient to establish the previous conduct of another person by means of which the alleged fraud was perpetrated or the undue influence exerted. Brandis on North Carolina Evidence §163, at 647-48. Exception (3) would change this result and permit such declarations to be admitted as substantive proof.

Exception (4) concerns statements made for purposes of medical diagnosis and treatment. The Advisory Committee's Note states:

> "Even those few jurisdictions which have shied away from generally admitting statements of

present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful.*** The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend.*** Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included."

Under current North Carolina practice, statements of past condition made by a patient to a treating physician or psychiatrist, when relevant to diagnosis or treatment and therefore inherently reliable, are admissible to show the basis for the expert's opinion. Brandis on North Carolina Evidence §161, at 635 (1982). In some instances, a statement to a nontreating physician is currently admissible. State v. Franks, 300 N.C. 1 (1980). Professor Brandis states that when qualifying as basis for the expert's opinion statements of past condition "should be (though, as yet, they are not) admissible as substantive evidence as an exception to the hearsay rule." Brandis, supra, at 636.

Exception (5) concerns past recollection recorded, which is currently admissible in North Carolina. See Brandis on North Carolina Evidence §33 (1982).

The phrase "or adopted by a witness" was added by Congress to make it clear that statements adopted by a witness would come within the Rule. The language chosen by Congress may be read to suggest that the statement does not qualify for admission unless the witness made the recordation himself or actually adopted the recordation of another. The exception should be construed so as not to require that the recordation of another be actually adopted by the witness. Thus the statement may be one that was made by the witness, one that was adopted by the witness, or one that was made by the witness and recorded by another. This construction would be in accord with North Carolina practice which permits use of the recorded statement if the witness is able to testify that he saw it at a time when the facts were fresh in his memory, and that it actually represented his recollection at the time. See Brandis, supra, at 127.

To prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined, the last

sentence of Exception (5) provides that th memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party. Current North Carolina practice apparently permits the writing itself, or a reading thereof by the authenticating witness, to be admitted. Brandis, supra, at 126, n. 75.

Exception (6) concerns records of regularly conducted activity. The exception is derived from the traditional business records exception. The exception is limited to business records, but business is defined to include the records of institutions and associations like schools, churches and hospitals. This appears to be a slight expansion of the current North Carolina business records exception. See Brandis, supra, §155.

The exception is consistent with North Carolina practice in that the person making the record is not required to have personal knowledge of the tranactions entered. See Brandis, supra, §155, at 617. However, it must be shown that the record was actually based (or it was the regular practice of the activity to base the record) upon a person with knowledge acting pursuant to a regularly conducted activity.

The exception specifically includes both diagnoses and opinions, in addition to acts, events and conditions, as proper subjects of admissible entries. See State v. DeGregory, 285 N.C. 122 (1977).

In addition, the Advisory Committee's Note states that:

> "Problems of the motivation of the informant have been a source of difficulty and disagreement.
>
> * * * * *
>
> The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if 'the sources of information or other circumstances indicate lack of trustworthiness.'"

Apparently, there are no North Carolina cases on this point.

The rule is in accord with North Carolina practice in that it includes computer storage. Brandis, supra, §155, at 619.

Exception (7) concerns the absence of an entry in the records of regularly conducted activity. As the Advisory Committee's Note states: "Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence." There are no North Carolina cases on this point although the exception is a logical extension of the business records exception.

Exception (8) differs from Fed. R. Evid. 803(8) in that the word "State" is used in lieu of the word "government".

Part (A) of the exception is for records, reports, statements or data compilations setting forth the activities of the public office or agency. Part (A) is in accord with North Carolina practice. See Prandis on North Carolina Evidence §153 (1982).

Part (B) covers matters observed pursuant to duty imposed by law when there is also a duty to report. Part (B) is in general accord with North Carolina practice. Id. In criminal cases, Part (B) does not cover matters observed by police officers and other law enforcement personnel. Note that the right to confrontation may exclude evidence in criminal cases even if the matter is not one observed by law enforcement personnel.

Part (C) covers factual findings resulting from an investigation made pursuant to legal authority. The term "factual findings" is not intended to preclude the introduction of evaluative reports containing conclusions or opinions. Apparently North Carolina courts currently exclude statements in reports that only amount to an expression of opinion. Id. at 609.

The Advisory Committee's Note states:

> "Factors which may be of assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation . . .; (2) the special skill or experience of the official . . .; (3) whether a hearing was held and the level at which conducted; (4) possible motivation problems suggested by Palmer v. Hoffman, 318 U.S. 109 . . . (1943). Others no doubt could be added.
>
> The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluative reports under item (C) is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case."

The phrase "unless the sources of information or other circumstances indicate lack of trustworthiness" applies to all three parts of the exception.

Public records and reports that are not admissible under Exception (8) are not admissible as business records under Exception (6).

Exception (9) excludes from the hearsay ban records of vital statistics and is similar to G.S. 130-49 and G.S. 130-66.

One purpose of the exception is to admit a death certificate to prove that a death occurred. G.S. 130-66 also provides that a death certificate is prima facie evidence of the cause of death. However, in State v. Watson, 281 N.C. 221 (1972), the Court held that the admission of the "hearsay and conclusory statement" of the cause of death in the victim's death certificate violated the right to confrontation. Exception (9) is not intended to permit the use of statements of the cause of death in a death certificate against a defendant in a criminal case.

Exception (10) concerns the absence of a public record or entry. The Advisory Committee's Note states:

> "The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception (7) with respect to regularly conducted activities, is here extended to public records of the kind metioned in Exceptions (8) and (9). 5 Wigmore §1633(6), p. 519. Some harmless duplication no doubt exists with Exception (7).***
>
> The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g., People v. Love, 310 Ill. 558, 142 N.E.204 (1923), certificate of secretary of state admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded."

Exception (10) is similar to G.S. 1A-1, Civ. Pro. Rules 44(b) and 44(c). See also Brandis on North Carolina Evidence §153, at 610 (1982).

Exception (11) concerns records of religious organizations. The Advisory Committee's Note states:

> "Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore §1523, p. 371, and Exception (6) would be applicable. However, both the business record doctrine and Exception (6) require that the person furnishing the

information be one in the business or activity. The result is such decisions as Daily v. Grand Lodge, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be furnished on occasions of this kind, the rule contains no requirement that the information be in the course of the activity."

Currently in North Carolina records of activities of religious organizations are admissible to the extent of the business records exception to the hearsay rule. See Brandis on North Carolina Evidence §155 (1982).

Exception (12) concerns marriage, baptismal, and similar certificates. The Advisory Committee's Note states:

"The principle of proof by certification is recognized as to public officials in Exceptions (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore §1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears."

Under current North Carolina practice, these items are admissible only to the extent they are part of a public record.

Exception (13) concerns family records.

The North Carolina exception for family records is more restrictive in that statements of family history and pedigree are

admissible only if the declarant (1) is unavailable; (2) made the statement before the beginning of the controversy; and (3) bore a relationship to the family such that he was likely to have known the truth. Brandis on North Carolina Evidence §149 (1982).

Exception (14) concerns records of documents affecting an interest in property. The Advisory Committee's Note states:

> "The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of firsthand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§1647-1651."

Exception (14) is consistent with North Carolina practice. See G.S. 47-20 through 47-20.4; G.S. 47-14; and G.S. 47-17.

Exception (15) concerns statements in documents affecting an interest in property. The Advisory Committee's Note states:

> "Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one."

The extent to which recitals of fact in a deed or other dispositive documents are admissible in North Carolina is not entirely certain. Brandis on North Carolina Evidence §152 (1982). Adoption of Exception (15) would somewhat expand admissibility and clarify North Carolina law in this area.

Exception (16) concerns statements in ancient documents. The Advisory Committee's Note states:

> "Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore §2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. Id. §2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 id §1573, p. 429, referring to recitals in ancient deeds as a 'limited' hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick §298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy."

North Carolina courts currently recognize as exceptions to the hearsay rule recitals in deeds more than 30 years old. "The North Carolina cases have involved deeds, but it may be assumed that the rule extends here, as it does elsewhere, to other dispositive instruments such as wills and powers of attorney." Brandis on North Carolina Evidence §152, at 604 (1982). Exception (16) would expand the North Carolina exception to include statements in many types of documents more than 20 years old.

Exception (17) concerns market reports and commercial publications. The Advisory Committee's Note states:

> "Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore §1702, authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. Id. §§1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate."

North Carolina courts have admitted into evidence a variety of published compilations used or relied on by the public or particular professions. See Brandis on North Carolina Evidence §165 (1982).

Exception (18) concerns learned treatises. The Advisory Committee's Note states:

> "The writers have generally favored the admissibility of learned treatises . . ., but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake.*** Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts.*** The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if desired. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.
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> * * * * *
>
> The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness.*** Moreover, the rule avoids the unreality of admitting evidence fo the purpose of impeachment only, with an instruction to the jury not to consider it otherwise."

Exception (18) is substantially the same as G.S. 8-40.1. Although G.S. 8-40.1 was modeled after Exception (18), there has been some doubt whether the statements, once received, are substantive evidence or are merely for impeachment or corroboration. Brandis on North Carolina Evidence § 136, at 543

(1982). It is intended that Exception (18) authorize admission of such statements as substantive evidence.

The last sentence of G.S. 8-40.1 differs from Exception (18) by providing that the statements may not be received as exhibits "unless agreed to by counsel for the parties." The quoted language was viewed as superfluous since evidence excluded by this rule and other rules may be admitted upon stiputation by counsel for the parties.

Exception (19) concerns matters of personal and family history. The advisory Committee's Note states:

> "Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. *** As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. *** All seem to be susceptible to being the subject of well founded repute. The 'world' in which the reputation may exist may be family, associates, or community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated."

Under current North Carolina law only reputation among family members is admissible concerning matters of family history and pedigree, except for marriage which may be proved by both family and community reputation. Brandis on North Carolina Evidence § 149, at 599 (1982). Exception (19) would permit proof by reputation among family and associates, or in the community.

Exception (20) concerns reputation as to land boundaries or general history. The Advisory Committee's Note states:

> "The first portion of Exception (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, id., and is designed to facilitiate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered."

Exception (20) is in accord with North Carolina practice. See Brandis on North Carolina Evidence § 150 (1982).

Exception (21) concerns reputation as to character. The Advisory Committee's Note states:

> "Exception (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a)."

Exception (21) is consistent with North Carolina practice.

Exception (22) is reserved for future codification. Fed. R. Evid. 803(22) concerns use of a judgment of previous conviction to prove a fact essential to sustain the judgment. Under current North Carolina practice, the judgment or finding of a court generally cannot be used in another case as evidence of the fact found, except where the principle of res judicata is involved. Brandis on North Carolina Evidence § 143 (1982). By not adopting a hearsay exception for judgments of previous conviction, it is intended that North Carolina practice with respect to previous convictions remain the same.

Exception (23) concerns a judgment as proof of matters of personal, family or general history, or boundaries. The Advisory Committee's Note states:

> "A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. *** The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph (23) goes no further, not even including character."

A judgment admitted under this exception is some

evidence of the matter essential to the judgment, but is not a binding determination of the matter for purposes of the current proceeding.

Generally, a judgment cannot be used under current North Carolina practice to prove a fact essential to the judgment, except where the principle of res judicata is involved. Brandis on North Carolina Evidence § 143 (1982).

Exception (24) differs from Fed. R. Evid. 803(24) in that the last sentence of the federal rule does not require written notice. Also, Exception (24) requires the notice to be given sufficiently in advance of offering the statement while Fed. R. Evid. 803(24) requires the notice to be given sufficiently in advance of the trial or hearing.

This exception makes admissible a hearsay statement not specifically covered by any of the previous twenty-three exceptions if the statement has equivalent circumstantial guarantees of trustworthiness and the court makes the determinations required by the rule. This exception does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions.

Writing for the majority in State v. Vestal 278 N.C. 561, 589 (1971), Justice Lake stated that:

> "No branch of the law should be less firmly bound to a past century than the rules of evidence. The purpose of the rules of evidence is to assist the jury to arrive at the truth. Exceptions to the hearsay rule, evolved by the experience and wisdom of our predecessors for that purpose, should not be transformed by us into rigid molds precluding all testimony not capable of being squeezed neatly into one of them."

North Carolina courts have admited hearsay evidence in many instances on the ground that the evidence was part of the "res gestae". The res gestae formula has been frequently resorted to in cases that would seem to be more appropriately governed by independent hearsay rules. See Brandis on North Carolina Evidence § 158 (1982). The phrase res gestae "has been accountable for so much confusion that it had best be denied any place whatever in legal terminology." U.S. v. Matot, 146 F.2d. 197 (2d.Cir. 1944) (Learned Hand). Although evidence previously governed by the res gestae formula may now fall within the specific hearsay exceptions or the catch-all in Exception

24, the res gestae formula should not be relied on by the courts.

"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 under 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 F ily 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 804 except for the last sentence of Exception (3), which is discussed below.

Subdivision (a) defines unavailability. The Advisory Committee's Note states:

> "The definition of unavailablity implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).
>
> At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. *** However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform.***
>
> Five instances of unavailability are specified:
>
> (1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony).*** A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.
>
> (2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality.***
>
> (3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. If the claim is successful, the practical effect is to put the testimony beyond

> reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.
>
> (4) Death and infirmity find general recognition as grounds.***
>
> (5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement.***
>
> If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant."

Under North Carolina law the unavailability requirement varies with respect to particular hearsay requirements.

Under the hearsay exception for former testimony, North Carolina courts recognize grounds (1), (4), and (5). Brandis on North Carolina Evidence §145 (1982). Although grounds (2) and (3) are not explicitly accepted or rejected by existing North Carolina precedents, Professor Brandis asserts that they should be accepted when occasion arises. Id. at 575.

Under the hearsay exception for dying declarations, G.S. 8-51.1 requires that the declarant be dead.

Under the exception for statements against interest, apparently any legitimate reason for unavailability is sufficient. Brandis on North Carolina Evidence §147, at 589, n. 80 (1982).

With respect to statements of family history, it was said in the older cases that the declarant must be dead. However, Professor Brandis asserts that any legitimate reason for unavailability should be acceptable. Id. at 597.

The Advisory Committee's Note states:

> "If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant."

Exception (1) concerns former testimony.

In North Carolina, the "testimony must have been given at a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter to which the testimony is directed at the current trial." Brandis on North Carolina Evidence §145, at 575-76 (1982) (footnotes omitted). The Advisory Committee's Note states:

> "The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to 'substantial' identity. McCormick §233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing he matter in the latter terms is preferable. Id."

Also, the Advisory Committee's Note states:

> "Under the exception, the testimony may be offered (1) against the party against whom it was previously offered or (2) against the party by whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one by whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e., by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. *** A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. *** Allowable techniques for dealing with hostile, double-crossing, forgetful, and mentally deficient witnesses leave no substance

> to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice."

North Carolina practice currently permits testimony against the party against whom it was offered. Brandis on North Carolina Evidence §145, at 577 (1982). There are no North Carolina cases concerning testimony offered against the party by whom it was previously offered.

With respect to identity of the parties, the Advisory Committee's Note states:

> "As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. *** The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered."

North Carolina practice apparently departs from the privity requirement to the extent of allowing former testimony "if the party against whom it was admitted had not merely an opportunity for cross-examination but the same motive for cross-examination as the party against whom it is offered." Brandis on North Carolina Evidence §145, at 577 (1982). Exception (1) permits former testimony in civil cases if a predecessor in interest had an opportunity and similar motive to develop the testimony.

Under certain circumstances, Exception (1) permits a broader use of depositions than does N.C. Civ. Pro. Rule 32. See also G.S. 8-83.

Exception (2) differs from Fed. R. Evid. 804(b)(2) in that it omits the phrase "In a prosecution for homicide or in a civil action or proceeding".

The exception is similar to G.S. 8-51.1. Unlike Fed. R. Evid. 804(b)(2) which limits admissibility of dying declarations in criminal cases to homicide prosecution, Exception (2) and G.S. 8-51.1 permit dying declarations to be admitted in all types of criminal and civil actions and proceedings. Under G.S. 8-51.1 the declarant must have died from the causes or circumstances on which he commented. Upon adoption of Exception (2), G.S. 8-51.1 should be repealed.

Exception (3) concerns statements against interest and differs from Fed. R. Evid. 804(b)(3) as noted below. The Advisory Committee's Note states:

> "The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not made statements which are damaging to themselves unless satisfied for good reason that they are true. *** If the statement is that of a party, offered by his opponent, it comes in as an admission, *** and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents."

North Carolina cases have recognized declarations against pecuniary or proprietary interest as an exception to the hearsay rule. See Brandis on North Carolina Evidence §147 (1982). In State v. Haywood, 295 N.C. 709, the North Carolina Supreme Court abandoned the Court's previous approach that excluded from the exception declarations against penal interest.

The last sentence of Fed. R. Evid. 804(b)(3) provides that: "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Requiring corroborating circumstances to indicate clearly the trustworthiness of statements exculpating the accused while imposing no such requirement with respect to statements inplicating the accused raises serious constitutional questions. Accordingly, Exception (3) differs from Fed. R. Evid. 804(b)(3) in that it imposes the requirement of corroborating circumstances with respect to both exculpating and implicating statements.

In Haywood, the Court listed several very restrictive requirements that a declaration against penal interest must meet. The exception should not be construed to add requirements in addition to the requirement that "corrobarating circumstances clearly indicate the trustworthiness of the statement." As the Advisory Committee's Note states: "The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."

Declarations against penal interests are admissible in both criminal and civil cases. However, the requirement of corroborating circumstances applies only in criminal cases.

The exception does not purport to deal with questions of the right to confrontation.

Exception (4) concerns statements of personal or family history.

The common law requirement in North Carolina that a declaration

in this area must have been made before the beginning of the controversy was dropped in Fed. R. Evid. 804(b)(3), which is identical to this exception, as bearing more appropriately on weight than admissibility. See Brandis on North Carolina Evidence §149 (1982); Advisory Committee's Note. Unlike North Carolina law that requires that the declarant be dead, Rule 804 merely requires that the declarant be unavailable. See Brandis, supra.

The first part of the rule specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. Advisory Committee's Note.

The second part of the rule deals with declarations concerning the history of another person. North Carolina common law provides that the declarant is qualified if related by blood or marriage. Brandis, supra. In addition, and contrary to the common law in North Carolina, the declarant qualifies under the exception by virtue of intimate association with the family.

The Advisory Committee's Note states that: "The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal." There are no North Carolina cases on this point.

Exception (5) is identical to Rule 803(24) and differs from the federal rule. See commentary to Rule 803(24).

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 805. The Advisory Committee's Note states:

> "On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement

> independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurance. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick § 290, p. 611."

Rule 805 is consistent with North Carolina practice. See, e.g., State v. Connley, 295 N.C. 327 (1978).

"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 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 806 except that the phrase "or a statement defined in 801(d)(2)(C), (D), or (E)" has been omitted from the first sentence. Fed. R. Evid. 801 treats admissions by a party-opponent as statements that are not hearsay. Since Rule 801 treats such statements as exceptions to the hearsay rule, the above phrase is superfluous.

The Advisory Committee's Note states:

> "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require

consideration. These special aspe .s center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. ***

The principal difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a prior statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a susequent one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. ***

When the impeaching statement was made prior to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g., a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used, under these circumstance. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore § 1031. Deposition

> procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results."

In Hooper v. Moore, 48 N.C. 428 (1856), the court stated that in order to impeach the credibility of a declarant by showing an inconsistent statement made before the time when a deposition was taken, the declarant must be given an opportunity to explain. Professor Brandis is uncertain whether the requirement of an opportunity to explain bars proof of statements or conduct showing bias on the part of a hearsay declarant not present to testify; but in his view it should not. Brandis on North Carolina Evidence § 48, p. 183 (1982).

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination and is consistent with North Carolina practice. See N.C. Civ. Pro. Rule 32(c).

"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. Nonexpert 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 or 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 901 except that in example (10) the word "statute" is inserted in lieu of the phrase "Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority."

The Advisory Committee's Note states:

> "Subdivision (a). Authentication and identification represent a special aspect of relevancy. *** Thus a telephone conversation may

be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an 'attitude of agnosticism,' McCormick, Cases on Evidence 388, n. 4 (3rd ed. 1956), as one which 'departs sharply from men's customs in ordinary affairs,' and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, infra. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur."

Subdivision (a) is in accord with North Carolina practice.

With respect to subdivision (b), the Advisory Committee's Note states:

"The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice

communications and computer printouts. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis."

Example (1) is in accord with North Carolina practice.

The Advisory Committee's Note states:

Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick § 189. *** Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows."

Example (2) is in accord with North Carolina practice. See Brandis on North Carolina Evidence § 197 (1982).

Example (3) is comparison by the trier of fact or by expert witnesses with specimens that have been authenticated. In State v. LeDuc, 306 N.C. 62 (1982), the Court permitted handwriting comparisons by the jury unaided by lay or expert testimony. G.S. 8-40, which should be repealed upon enactment of this rule, requires that the exemplar used for comparison be "proved to the satisfaction of the judge to be genuine". However, the Advisory Committee's Note states:

"The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991-1994. In breaking

away, the English Common Law Procedure Act of 1854, 17 and 18 Vict., c. 125, §27, cautiously allowed expert or trier to use exemplars 'proved to the satisfaction of the judge to be genuine' for purposes of comparison. The language found its way into numerous statutes in this country, e.g., California Evidence Code §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury ... or by experts ... and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b).

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. ***

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him...; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. *** Language patterns may indicate authenticity or its opposite."

Example (4) is in accord with North Carolina practice. See generally Brandis, supra, §§ 195, 236.

The Advisory Committee's Note states:

Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf.

Example (2), supra."

Example (5) is in accord with North Carolina practice. See generally Brandis, supra, § 96.

The Advisory Committee's Note states:

> Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under Example (4), supra, or voice identification, under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact."

Part (A) of Example (6) is in accord with North Carolina practice. See Brandis, supra, § 96. Part (B) permits identity to be established by evidence that the call was made to a place of business and the conversation related to business reasonably transacted over the telephone. There are no North Carolina cases directly on this point.

The Advisory Committee's Note states:

> Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which

increasing use in the public recor· area may be expected."

Example (7) is in accord with North Carolina practice. See Brandis, supra, § 195.

The Advisory Committee's Note States

> Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.
>
> Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikeliness of a still viable fraud after the lapse of time. ***
>
> The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190."

Example (8) is in accord with North Carolina practice, except that the period of 30 years is reduced to 20 years. See Brandis, supra, § 196.

The Advisory Committee's Note states:

> Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer.... Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system."

Fxample (9) is in accord with North Carolina practice.

Example (10) makes clear that methods of authentication provided by the Rules of Civil Procedure or other statutes are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and for the authentication of depositions in Civil Procedure Rule 30(f).

"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.

COMMENTARY

This rule differs from Fed. R. Evid. 902 in that the phrase "or the Panama Canal Zone" has been deleted from paragraph (1). Paragraph (4) differs from the federal rule in that the phrase "any law of the United States or of this State" has been substituted in lieu of the phrase "of this Rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority." Paragraph (10) differs from the federal rule in that the phrase "any law of the United States or of this State" is used in lieu of the phrase "Act of Congress".

The Advisory Committee's Note states:

> "Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity."

Paragraph (1) provides that a document bearing the seal of an officer of the government and a signature purporting to be an attestation or execution does not require extrinsic evidence of authenticity as a condition precedent to admissibility. See Brandis on North Carolina Evidence §153, at 610 (1982). The Advisory Committee's Note states:

> "The acceptance of documents bearing a public seal and signature, most often encountered in

practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore §2161, p. 638...."

Paragraph (2) is derived from Federal Civil Procedure Rule 44. North Carolina Civil Procedure Rule 44, which is similar, should be amended to conform to Rule 902. Paragraph (2) applies to documents as well as public records. The Advisory Committee's Note states:

> "While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore §2167 ... the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10)."

Paragraph (3) is derived from Federal Civil Procedure Rule 44(a)(2), which was amended in 1966 to provide for greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records. North Carolina Civil Procedure Rule 44 should be amended to conform to Rule 902. Paragraph (3) applies to public documents rather than being limited to public records.

Paragraph (4) is confined to official records and reports, and documents authorized to be recorded or filed and actually recorded or filed. The Advisory Committee's Note states:

> "The common law and innumberable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). *** It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4)."

G.S. 1A-1, Rule 44, G.S. 8-34, G.S. 8-35, G.S. 8-18, G.S. 8-20, G.S. 47-31, and G.S. 47-34 should be amended to conform to Rule 902.

Paragraph (5) has the same effect as North Carolina Civil Procedure Rule 44(a), which should be amended to conform to Rule 902. The Advisory Committee's Note states:

> "Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect."

Paragraph (6) changes North Carolina practice by providing that printed materials purporting to be newspapers or periodicals are self-authenticating. The Advisory Committee's Note states:

> "The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150."

Paragraph (7) changes North Carolina practice by providing that inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin are self-authenticating. The Advisory Committee's Note states:

> "Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them."

Paragraph (8) extends the exception for acknowledged title documents to include other acknowledged documents. The Advisory Committee's Note states:

> "In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved."

Paragraph (9) provides that commercial paper, signatures thereon, and documents relating thereto are authenticated to the extent provided by general commercial law. The term "general commercial law" refers to the Uniform Commercial Code, except that federal commercial law will apply when federal commercial paper is involved. Pertinent provisions of the Uniform Commercial Code are G.S. 25-1-202, 25-3-307, and 25-3-510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10) provides for the authentication of any signature, document, or other matter declared by any federal or North Carolina statute 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 903.

The Advisory Committee's Note states:

> "The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g., wills in some states."

The requirement of proof by the attesting witness was abolished by G.S. 8-38, which should be repealed upon enactment of Rule 903. Rule 903 is not intended to affect the method and manner of proving instruments for registration.

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

(2) Photographs. 'Photographs' include 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.

COMMENTARY

This rule is identical to Fed. R. Evid. 1001 except that the word "sounds" has been added to paragraph (1) between "words" and "or numbers".

The Advisory Committee's Note states:

> "Paragraph (1). Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments."

Paragraph (1) clarifies North Carolina law by providing that the best evidence rule applies to recordings and photographs. See Brandis on North Carolina Evidence § 190 (1982).

With respect to Paragraph (3), the Advisory Committee's Note states:

> "In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout."

Paragraph (3) is substantially in accord with North Carolina practice. See Brandis, supra, § 190; G.S. 55-37.1 and G.S. 55A-27.1.

With respect to Paragraph (4), the Advisory Committee's Note states:

> "The definition describes 'copies' produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 1003, infra. Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents

are in controversy is a duplicate."

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 1002.

The rule is the familiar "best evidence rule" expanded to include explicitly writings, recordings, and photographs, as defined in Rule 1001(1) and (2), supra. See Brandis on North Carolina Evidence §190, at 100 (1982). However, the requirement for the original is overridden in many instances by other rules such as Rule 1003, which allows duplicates to be admitted.

The rule in North Carolina is consistent with Rule 1002 in that it requires the original of a writing only when its content is sought to be proved. Id.

The Advisory Committee's Note states:

> "Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by non-documentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. *** Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.
>
> The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party wishes to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events

which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. ***

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture fall in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g., automatic photograph of bank robber. *** The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original.

It should be noted, however, that Rule 703, supra, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule."

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 1003.

Rule 1003 departs from the common law in North Carolina and other jurisdictions by providing that a duplicate is admissible to the same extent as an original unless a genuine question as to the authenticity of the original is raised or it would be unfair to admit the duplicate in the particular case. Traditionally, in North Carolina no special showing has been necessary in order to require production of the original.

The Advisory Committee's Note states:

> "When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), supra, a 'duplicate' possesses this character. Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. Other reasons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party."

Courts should be liberal in permitting questions of genuineness to be raised. The court should examine the quality of the duplicate, the specificity and sincerity of the challenge, the importance of the evidence to the case, and the burdens of producing the original before determining whether a genuine question of authenticity is raised.

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 1 .

The Advisory Committee's Note states:

> "Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.
>
> The rule recognizes no 'degrees' of secondary evidence."

Paragraph (1) provides that loss or destruction of the original, unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. See McCormick §201. This paragraph is consistent with current North Carolina practice. See Brandis on North Carolina Evidence §192 (1982).

Paragraph (2) provides that when the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is a sufficient explanation of nonproduction. The Advisory Committee's Note states that: "Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick §202." Extreme expense and inconvenience in obtaining the document will not constitute unavailability.

Paragraph (3) is consistent with North Carolina practice in that secondary evidence of the contents of a writing is admissible if the opponent who is in possession of the original fails, after notice, to produce it at the trial. See Brandis on North Carolina Evidence §193 (1982). The Advisory Committee's Note states:

> "A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick §203."

Under the rule, notice may be given by the pleadings. There are no North Carolina cases on this point.

Paragraph (4) is consistent with North Carolina cases in that

production of the original is not required if the writing is only collaterally involved in the case. See Brandis on North Carolina Evidence §191 (1982). The Advisory Committee's Note states:

> "While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, Foster-Holcomb Investment Co. v. Little Rock Publishing Co., 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, Chicago City Ry. Co. v. Carroll, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick §200, p. 412, n. 1."

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 1005.

Admission of certified copies of registered instruments and official records are currently governed by G.S. 8-18, G.S. 8-34, and G.S. 1A-1, Rule 44.

The Advisory Committee's Note states:

> "Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence judicial decisions and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. McCormick §204; 4 Wigmore §§1215-1228. This blanket dispensation from producing or

> accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate quid pro quo for not applying the requirement of producing the original."

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 1006.

Where documents are so voluminous that it would be impracticable to produce and examine them in court, North Carolina Courts have allowed a qualified witness to testify to the results of his examination of the documents. Brandis on North Carolina Evidence §192 (1982).

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 1007.

This rule is consistent with North Carolina practice in that the original writing need not be produced where the opponent admits that the copy offered in evidence is correct. See Brandis on North Carolina Evidence §192, at 113 (1982). The rule clarifies North Carolina law by not allowing proof of contents by oral evidence of an oral admission. See Norcum v. Savage, 140 N.C. 472 (1906). The Advisory Committee's Note states:

> "While the parent case, Slatterie v. Pooley, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore §1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick §208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004, supra."

"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.

COMMENTARY

This rule is identical to Fed. R. Evid. 1008.

The Advisory Committee's note states:

> "Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, supra. Thus, the question whether the loss of the originals has been established, or of the

fulfillment of other conditions specified in Rule 1004, supra, is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, Authentication and Content of Writings, 10 Rutgers L. Rev. 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), supra."

Although there are no North Carolina cases directly on point, Rule 1008 follows the division of function between the court and the jury with respect to competency and conditional relevancy. See Brandis on North Carolina Evidence § 8 (1982).

"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 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 on probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and 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.

COMMENTARY

This rule resembles Fed. R. Evid. 1101 with appropriate modifications.

Subdivision (b)(1) restates, for convenience, the provisions of the second sentence of Rule 104(a), supra. See Advisory Committee's Note to that rule.

Current North Carolina practice with respect to voir dire, sentencing hearings, and probation revocation hearings is not meant to be changed by adoption of these rules.

"Rule 1102. Short Title.

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

Sec. 2. This act shall become effective July 1, 1984, and shall apply to actions and proceedings commenced after that date. This act shall also apply to further procedure in actions and proceedings then pending, except to the extent that application of the act would not be feasible or would work injustice, in which event former evidentiary principles apply.