

II. EVIDENCE - HOW TO LAY THE FOUNDATION

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.A. Legislative Changes Affecting Evidence

The recently ended session of the General Assembly considered only a few bills related to evidence, and enacted only one, the so-called “Dale Earnhart” rule. Codified as N.C.G.S. §130A-389.1 the new law became effective December 1, 2005. The new statute limits access to autopsy reports and photographs. While “any person” may inspect them during reasonable times, the custodian of these records may provide copies only to designated public officials, identified in subsection (b). Others, identified in subsection (c), may obtain copies but may not disclose them to the public, in general. There are classes of entities who can obtain copies, including the personal representative of the estate, or a physician licensed in North Carolina who uses the copies to confer with attorneys or others having a bona fide professional need to use or understand forensic science.

The existing statute, N.C.G.S. §130A-389(d) provided that these records were not public record. The new statute seems to try to balance the needs of the public to “know” (i.e., the press) by allowing inspection, with privacy rights of the decedent and survivors.

A lawyer representing the estate of a decedent in a wrongful death action should be able to obtain copies for use in conferring with experts and in trial. An appropriate authorization or release, signed by the personal representative, should be used to obtain the copies. Subsection (c)(3), which allows licensed physicians to obtain copies, raises

the question whether an expert retained by the defense could obtain copies without the consent of the personal representative.

B. Definition of Evidence

Professor Wigmore provided this definition:

Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic, on which the determination of the tribunal is to be asked.

Wigmore, *Treatise* §1(c) (P. Tillers rev., 1983). This definition tends to limit “evidence” by excluding matters that function as argument, persuasion, and logic from the definition and may therefore be unsatisfactory.

There are problems with trying to link the definition of “evidence” to matters that are or can be apprehended by the senses - eyesight, hearing, and so on. But isn't most “evidence” produced in a trial at least somewhat removed from sensory perception? Almost all evidence is presented by witnesses who testify about what they may have perceived. Anyone who has seen the Kurasawa movie *Rashomon* can understand the difficulty with linking “evidence” to sensory perception.

For our purposes, we'll keep it simple. “Evidence” is anything proffered for the purpose of persuading the trier of fact that a proposition is worthy of belief.

C. Evidence Checklist

There are now computer programs available which allow lawyers to cross match the facts necessary to be proven with issues, witnesses, exhibits or other evidence. These

programs can generate a chart, putting it all together.

Even without the use of such a program, the trial lawyer should carefully think about these things and make a list of what must be proven in order to establish the case. Then, the list should be expanded to include the known evidence that can be used to prove the facts, and the witnesses who will give the necessary testimony. Then, consider the tangible evidence, substantive and illustrative, to be used, matched with the appropriate witness or witnesses.

When you put together your trial notebook, prepare a “cover sheet” for each intended witness. That cover sheet should contain essential information about the witness (name, address, whether and when subpoenaed), the general purpose for which the witness will be called (liability, damages, other), and the type of witness (eyewitness, expert, investigating officer, link in the chain, etc.). Include a brief statement of what you intend to prove with the witness (e.g., departure from standard of care, defendant speeding). Finally, make a note on the cover sheet of the three or four key questions to be asked of the witness.

Using your chart of witnesses, facts and exhibits, make a note of statutes, rules or cases which support the admission of the evidence. Prepare the necessary legal memoranda to present to the court if a problem arises.

Check any evidence which you intend to offer to make sure there is no requirement that special notice be given to the opposing party of your intent to use it. This would include out of court assertions of a witness who is unavailable for trial or out of court experiments. Sufficiently in advance of the trial to comply with the Rules of

Practice, make sure opposing counsel has been given a copy of, or has been afforded an opportunity to see, all exhibits.

D. Primary Source Listing

“Real” evidence is the production of the thing itself for inspection, rather than a depiction or description by a witness. *State v. Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977). Examples include the murder weapon, the contract, the product, and so on. Real evidence is substantive if the testimony demonstrates that the object is, indeed, the object involved in the incident and that the condition of the object is substantially unchanged since the relevant time. *McCormick on Evidence 2d*, §212.

Rule 1001(1) defines “writings” and “recordings” and Rule 1001(3) defines “original” writings and recordings. Rule 1002 requires production of the original to prove its content “except as otherwise provided in these rules or by statute.” This is the “best evidence” rule and it generally mandates production of the “real thing.” This rule excludes evidence offered to prove the contents of a document IF the original is available. *United States Leasing Corp. V. Everett, Creech, Hancock & Herzig*, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

E. Secondary Sources of Evidence

The exceptions to the “best evidence” rule are found in Rules 1003 and 1004.

Rule 1003 allows the admission of duplicates unless (1) there is a genuine question of authenticity of the original or (2) it would be unfair under the existing circumstances to admit the duplicate in lieu of the original.

Rule 1004 deals with the admissibility of “other evidence” of the contents of a document. Other evidence is admitted if the original has been lost or destroyed, cannot be obtained, is in the possession of the adverse party and not produced at trial after notice that its contents would be a subject of proof, or the document is not closely related to a controlling issue.

In *Shields v. Nationwide Mut. Ins. Co.*, 61 N.C. App. 365, 301 S.E. 439 (1983) a fire loss claim resulting from the arson of a building, a photocopy of an unexecuted promissory note was introduced over defendant’s objection that it was “incompetent to prove that plaintiff had bound himself by a written agreement to pay” the sum stated in the note for the property in question and the admission of the document was prejudicial (defendant’s theory was that the transaction was part of a civil conspiracy to defraud). Both plaintiff and the grantor testified without objection that the original document had been executed. The court allowed the document into evidence as corroborative, and the appellate court affirmed, also refusing to address whether the document was the “best evidence,” since both parties to the note acknowledged its existence and terms.

Shields was tried prior to the effective date of the Evidence Code. The promissory note in question was not truly a duplicate, because it wasn’t executed. There was testimony that the original had been lost or destroyed (at least that it couldn’t be found). Prior to 1983, there was no requirement that defendant give notice to plaintiff of its intention to place the contents of the note into evidence. Ultimately, the court ruled that it didn’t matter that the unexecuted copy was not the “best evidence,” because both the “lender” and “borrower” had testified to its contents and it was merely corroborative.

A copy of a public record, so long as it is certified as correct per Rule 902 or authenticated as correct by the testimony of a witness who has compared it with the original, is admissible in lieu of the original. Rule 1005.

Rule 1006 provides that 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 must be available to all parties at a reasonable time and place for examination or copying. The summary must fairly represent the underlying document. *Coman v. Thomas Mfg. Co.*, 105 N.C. App. 88, 411 S.E.2d 626, cert. denied, 331 N.C. 284, 417 S.E.2d 249 (1992).

Finally, if an original document is not available, its contents can be proved by the testimony of the party against whom it is offered. Rule 1007. If the adverse party admits a copy is correct, there is no further need to authenticate it or to offer up the original. See, *Shields v. Nationwide*, *supra*, where defendant stipulated in a pre-trial order that the exhibit (a copy of an unexecuted promissory note) was genuine and could be admitted into evidence without further proof or authentication.

N.C.G.S. §8-44.1 allows admission of copies of hospital medical records if they are produced in compliance with Rule 45(c)(2), Rules of Civil Procedure. The records must have been subpoenaed and must be sent to the court by certified mail along with a certificate or affidavit of authenticity signed by the records custodian. This avoids the necessity of a court appearance for the sole purpose of authenticating the records.

F. Credibility of Source

A witness must be competent to testify to a matter.

Competence in this context has to do with the witness's personal knowledge of the matter about which he/she is called. Rule 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling him." Previously, a party was not allowed to impeach its own witness, as a general rule. A witness's credibility may be challenged on several grounds:

Insufficient personal knowledge: *State v. Locklear*, 121 N.C. App. 355, 465 S.E.2d 61 (1996)

Character and reputation: Rules 405(a) and 608 place limitations on the use of a witness's character or reputation as impeachment. The impeaching evidence must relate to the witness's character for truthfulness or lack of it. Specific instances of misconduct, other than conviction of a crime as provided in Rule 609 (below) may not be proved by extrinsic evidence. *State v. Johnson*, 161 N.C. App. 504, 588 S.E.2d 488 (2003). Inquiries concerning prior criminal acts or specific acts of misconduct must be limited to conduct bearing upon or relevant to the witness's propensity for truthfulness or untruthfulness. *State v. Bailey*, 80 N.C. App. 678, 343 S.E.2d 434, pet. for cert. improvidently allowed, 318 N.C. 652, 350 S.E.2d 94 (1986). The fact that a witness has a history of violence against

others has no bearing on the witness's truthfulness. *State v. Holston*, 134 N.C. App. 599, 518 S.E.2d 216 (1999).

However, a witness may open the door to inquiry about prior misconduct if, on direct, he/she offers some kinds of self-serving testimony, as when a defendant accused of murdering his wife testified that he was a caring, loving husband and father who unintentionally struck his wife with a screwdriver the State was allowed to cross-examine concerning specific acts of violence against the wife. *State v. Syriani*, 333 N.C. 350, 428 S.E.2d 118, cert. denied, 510 U.S. 948 (1993).

Criminal conviction: Rule 609 allows evidence that a witness has been convicted of a felony or Class A1, 1 or 2 misdemeanor IF elicited from the witness or established by a public record during cross-examination or thereafter. However, the conviction must have occurred within the last 10 years (unless the court determines that the probative value outweighs the prejudicial effect).

For purposes of impeachment, a "no contest" plea can be admitted, if the plea is entered to a felony or appropriate misdemeanor. *State v. Petty*, 100 N.C. App. 465, 397 S.E.2d 337 (1990).

Religious beliefs or opinions: Rule 610 prevents the use of matters of religion to show that, by reason of those

beliefs, the witness's credibility is enhanced or impaired.

However, this evidence may be used to show interest or bias.

Prior statements: Rule 613 permits the cross-examiner to refuse to show a witness a prior inconsistent statement while examining. He/She is required to give a copy to opposing counsel.

G. Illustrative and Demonstrative Evidence

Demonstrative evidence can be substantive or illustrative. It is the imparted “directly to the senses without the intervention of witness’ testimony.” *Kabase v. State*, 244 Ala. 182, 12 So.2d 758 (1943). It is tangible, and it is usually tendered for the purpose of making other evidence (testimony) more comprehensible to the trier of fact.

Remember that objects placed in evidence for illustrative rather than substantive purposes, are subject to some limitations. The opposing party is entitled to a limiting instruction. *State v. Strickland*, 276 N.C. 253, 173 S.E.2d 129 (1970). Because illustrative evidence is not evidence of the fact it depicts, it cannot supply the elements of proof needed to overcome a motion for directed verdict. It cannot be used in closing argument beyond the extent to which it was described by the witness who authenticated it. *State v. Woods*, 56 N.C. App. 193, 287 S.E.2d 431 (1982).

N.C.G.S. §8-97 makes photographs, videotapes, motion pictures, x-rays, and other photographic representations admissible as substantive evidence. Formerly, such depictions were admissible only as “illustrative” of the testimony of a witness (and they may still be admitted for that limited purpose). These objects are “real” evidence.

Exhibits, properly used, have great persuasive power. The purpose of demonstrative evidence is to teach and persuade the trier of fact. The effective use of demonstrative evidence captures the attention of jurors in a way oral testimony cannot. It is communication.

The opportunities for use of demonstrative evidence are limited only by the imagination. When considering what exhibits to use at trial, counsel should consider what parts of the case will be more credible if corroborated or illustrated with an exhibit and what parts of the case are more difficult to comprehend if not visualized? Can an exhibit be used to evoke emotion? Remember, an exhibit is not inadmissible simply because it may be gruesome. *State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979). On the other hand, if the prejudicial effect of the exhibit outweighs its probative value, it may be inadmissible. Rule 403, Rules of Evidence.

Here are some obvious “tips” on the use of demonstrative evidence which might still be overlooked:

- Keep it simple. If it takes more than two minutes to explain the exhibit to your colleagues, it is too complicated to be effective.
- Be organized. Have everything at hand and avoid scrambling at the last minute looking for a chart.
- Size matters. If the exhibit is too small, it cannot be clearly seen and is useless.
- Know how you intend to publish the exhibit to the fact finder. If the exhibit is too small to be seen by all jurors at once, consider making individual copies for each of them. If the exhibit is large, have the witness who is using it come off the witness stand to show it to the jury.
- Make sure any necessary equipment will be available. Does the courtroom have an easel? Is there a television and VCR or DVD player available? If so, how large is the TV screen. If computers are being used, make sure monitors are

available throughout the courtroom.

- Match the exhibit with the appropriate witness. Make sure the witness is familiar with the exhibit, and how it will be used, before the examination. Nothing could hurt worse than having a witness look at a photograph of an accident scene and say it doesn't look like the scene in your case.
- Have a "Plan B." If you are using something like a Power Point presentation, have a back up plan in case there is a glitch. For any exhibit, think about what you will do if the court does not admit it. Avoid the appearance of confusion.
- Use the exhibit in the proper and most effective time in the trial.
- Premark exhibits.
- Make all the copies of the exhibit you will need. You must give opposing counsel and the court a copy, and perhaps a copy for each juror.
- Try to get as much of the foundation as possible stipulated in the pre-trial order or otherwise.
- Anticipate objections and be ready to respond.

Remember to lay the proper foundation for the admission of the exhibit. Before offering

it, the testimony should establish that the witness has first hand knowledge that the exhibit is what it purports to be (Rule 602); that the exhibit is relevant (Rule 402); and that it is authentic.

Let's take a look at some of the most frequently used types of demonstrative evidence:

Anatomic Charts and Dolls: The witness must be able to say that the chart/doll is anatomically correct and depicts a part of the body and that the witness is familiar with the particular anatomy (explaining the basis for the familiarity). The exhibit should be admitted unless it's probative value is substantially outweighed by unfair prejudice, there

is danger of confusion or misleading the jury, or it's probative value is outweighed by the danger that it will cause undue delay, waste of time, or is cumulative. See, *State v. Watkins*, 318 N.C. 498, 349 S.E.2d 564 (1986).

Medical Illustrations: Same as above.

Medical Models: The witness should say that the model will aid him/her in explaining his/her testimony to the jury, that the witness is familiar with the object (explaining the basis for the familiarity), that in the witness's opinion the model is a good model of the object depicted (it helps if the model is an exact replica, except for size). It should be admitted unless it's probative value is substantially outweighed by unfair prejudice, there is danger of confusion or misleading the jury, or it's probative value is outweighed by the danger that it will cause undue delay, waste of time, or is cumulative. Other objections might include the argument that the disparity in size between the model and the actual body part is so great that it distorts the evidence and reduces its probative value.

Blackboards and Newsprint Pads: Typically, this would involve a drawing, perhaps of an intersection or accident scene, or it may depict an area, object or notation. The witness must be familiar with whatever is being put on the board, explaining the basis for the familiarity. The witness should testify that the drawing is accurate (except perhaps as to scale). The reasons for excluding the drawing are the same as those listed above. Typically, in motor vehicle cases, the drawing is prepared by the investigating officer and there is frank acknowledgment that it is not to scale, but is nevertheless an accurate depiction.

Business Records: The witness should be the record custodian or some other person with knowledge of the business's filing or storage system. The witness must say that the records were prepared in the ordinary course of business and that the record was made at or about the time of the event recorded. In the regular course of business a person with knowledge made the record or was furnished with the information for the record. It was the regular practice of the business to make the record (i.e., it was not prepared for litigation).

Note that there are statutes which eliminate the need for extrinsic evidence for authentication if the records are produced in court accompanied by a certificate or affidavit (e.g., hospital records - N.C.G.S. §8-44.1).

Many public records are "self authenticating" and Rule 902 eliminates the need for extrinsic evidence to authenticate them.

Computer Graphics and Animation: These are treated like drawings and models, but are usually illustrative rather than substantive. The witness must be familiar with the object or area depicted and the source and accuracy of the input data. The witness must also opine that the graphic or animation is an accurate depiction. It should be admitted unless it falls within the above usual grounds for exclusion.

In the event there is no pre-trial stipulation to the exhibit's genuineness and authenticity, it is a good idea to have ready a memorandum setting out the nature of the exhibit, the procedure used in preparing it, the background or input data, and the name and credentials of the expert who created it.

Courts are becoming more familiar with computer generated graphics, such as

“Power Point” presentations, and are increasingly willing to allow their use. Be aware, however, that some judges remain suspicious of computer generated exhibits and others will allow Power Point presentations only if both sides utilize them.

The most effective attack on computer generated animations is to attack the input data. The user must be certain that sufficient attention is given to verification of the data given to the operator and used to generate the exhibit.

Day in the Life Videos: These videos are usually admitted for illustrative purposes. For that reason, the witness must testify that he/she is familiar with the scenes depicted in the video, explaining the basis for that familiarity and that the video is a “fair,” “accurate,” “true,” or “good” portrayal of the person or events depicted. These videos have gained wide acceptance with the courts and will be admitted unless the adversary can show that there is substantial unfair prejudice which outweighs the probative or illustrative value of the video. To avoid the risk of unfair prejudice, the video should not be a blatant appeal for sympathy and should avoid such things as close-ups showing grimaces, painful groans or screams on the sound track. See, *Thomas v. C.G. Tate Const. Co., Inc.*, 465 F. Supp. 566 (D.S.C. 1979), *Foster v. Crawford Shipping Co., Ltd.*, 496 F.2d 788 (3rd Cir. 1974), *Campbell v. Pitt Co. Mem. Hospital, Inc.*, 84 N.C. App. 314, 352 S.E.2d 902 (1987).

Demonstrations and Experiments: The witness conducting the demonstration or experiment should be qualified in the field of the subject of the demonstration or experiment. *Otey v. Holt*, 47 N.C. 70 (1854). All of the necessary facts concerning the conditions or occurrences in question should already be in evidence (or at least will be

introduced later with the court's permission). The principle involved must have received general scientific acceptance in the appropriate field. The proposed demonstration or experiment must be calculated to aid the jury in understanding, simplifying, or clarifying evidence or issues. The evidence must be supplemental to, and not cumulative of, the testimony of other witnesses. It must be relevant and material. The conditions under which it is undertaken must be substantially similar to those existing at the time in issue. The witness must explain any dissimilarities. Dissimilarities affect the weight to be given to the evidence, not its admissibility, generally. *Addison v. Moss*, 122 N.C. App. 569, 471 S.E.2d 89 (1996); *State v. Carter*, 282 N.C. 297, 192 S.E.2d 279 (1972).

H. Hearsay and the Law of Evidence

What is Hearsay?

The importance of hearsay in our jurisprudence has its roots in the role of cross-examination in the American trial. Many commentators have noted that a common law trial is distinguished from that in other systems by the existence and use of cross-examination to test the evidence. A party adversary has the right to cross-examine the evidence offered against him/her. It follows that if the evidence cannot be cross-examined and put to the test, perhaps it should not be admissible.

However, an absolute rule excluding evidence which cannot be cross-examined is not always a practical approach. Thus, over the hundreds of years in which our law has developed, the rule against the admission of evidence which cannot be cross-examined has been modified and refined. Concern about how to determine whether evidence which cannot be cross-examined may nevertheless be admitted led to the development of the

rule against the admission of hearsay

The late Irving Younger maintained that the rule is really not against the admission of hearsay. He argued that hearsay is admissible, as a practical matter, because of the many exceptions found in the common law.

1. Definitions

Rule 801(c) defines hearsay as “. . . 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.”

Many out of court utterances are hearsay, many are not. Too often, lawyers and trial judges fail to grasp the distinction, resulting in confusion and, sometimes, error. It does not follow that an out of court utterance is barred simply because “you can’t testify as to what someone else told you.” To constitute hearsay, an out of court utterance must:

- a. be an assertion
- b. offered to prove its truth.

Frequently, non-hearsay utterances are targets of hearsay objections. Counsel offering the utterance must be prepared to apprise the trial judge that the out of court utterance is offered for a reason other than the truth of the statement itself, and that it is admissible for that purpose. *Hall v. Coplton*, 85 N.C. App. 505, 355 S.E.2d 195 (1987).

Rule 801(d) excludes from the above definition of hearsay a statement

. . . 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 of 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 co-conspirator of such party during the course and in the furtherance of the conspiracy.

Thus, admissions by a party are excluded from the definition of hearsay.

Take, for example, the following statement (borrowed from the Irving Younger evidence videos): The witness says “I talked to John on the telephone and he told me it was raining yesterday in Atlanta.”

To render an out of court statement inadmissible as hearsay, the statement must meet two requirements. It must be made “out of court,” meaning anything other than what this witness says from this witness chair in front of this jury, right now. Anything not meeting these requirements is a statement or utterance made “out of court.” The next requirement has to do with the relevance of the statement. If it is offered to prove anything other than the truth of the statement itself, it is not inadmissible hearsay.

Using the above example, the witness is clearly recounting an out of court utterance by “John” that it was raining yesterday in Atlanta. If the statement is offered to prove that it was, indeed, raining yesterday in Atlanta, it is hearsay and is inadmissible. If, however, it is offered as proof that John was in Atlanta, then it is not hearsay and is admissible.

In *State v. Moore*, 162 N.C. App. 268, 592 S.E.2d 562 (2004) police officers were allowed to testify that they went to defendant’s residence to talk to defendant after arresting a person in possession of crack cocaine who had just left the residence and who told them she had been visiting her cousin. This was offered to explain the action of the officers in going to the residence (which resulted in the arrest of defendant), not for the truth of the assertion that the individual had been visiting her cousin.

2. Oral Assertions

The most common form of hearsay is an out of court oral assertion or statement. If the witness relates what he/she has heard someone say, and if this testimony is offered to prove that what the witness heard was a true statement, the testimony is hearsay and inadmissible. But what about recounting what the witness has stated either by a recording or in a computer record? *United States v. Escobar*, 674 F.2d 469 (5th Cir. 1982) was a drug prosecution. A police officer wanted to testify that he learned through a computer check that the defendant was a suspected narcotics dealer. The trial court allowed the testimony, but the appellate court reversed, finding the information to be hearsay. The computer couldn't be hauled into court and cross-examined.

Although admissions of a party are technically excluded from the rule against admission of hearsay, hearsay problems can still arise from oral out of court assertions which may, or may not, be admissions. Take, for example, assertions by an agent or employer.

“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.”

Hubbard v. Railroad, 203 N.C. 675, 166 S.E. 802 (1932). What of the case where an

agent has no inherent authority from the principal to make the statement at issue?

Suppose, in a wrongful death trial arising over a railroad crossing accident the investigating officer, who did not witness the collision, asks the engineer what happened, and the engineer says “I wasn't paying attention.” Assume further that, since the

accident, the engineer is no longer employed by the railroad and is unavailable for trial. There are no living eye witnesses. Can the officer testify about what the absent engineer told him? Obviously, plaintiff wants the jury to hear this admission. Just as obviously, the defendant railroad wants the statement excluded. Prior to the codification of our evidence rules in the 1980's, this out of court admission by the engineer (who, for purposes of our example is not a party to the law suit) was inadmissible. *Sutherland v. Railroad*, 106 N.C. 100, 11 S.E. 189 (1890). Historically, the courts have viewed this kind of situation as inequitable, which led to such common law exceptions to the hearsay rule as *res gestae* or “excited utterances” exceptions. I believe our current Rule 801(d)(D) clarifies this situation.

In *Kilgo v. Wal-Mart Stores, Inc.*, 138 N.C. App. 644, 531 S.E.2d 883 (2000) the court held that the admission of an “un-redacted” report, after a redacted report had already been offered into evidence, and comments thereon made by defendant’s store manager, was proper because the manager was the defendant’s agent at the time he entered his comments on the incident report and the entry concerned a matter within the scope of his agency.

3. Written Assertions

Written out of court assertions are also commonly encountered at trial. If a witness relates what he/she has read, and if this testimony is offered to prove that what the witness read is true, the testimony is hearsay. But nearly every writing offered as evidence at trial was prepared out of court but is usually admitted, if relevant, as long as it fits within one of the many exceptions to the hearsay rule.

4. Non-verbal Conduct

Assertive non-verbal conduct may be hearsay when it is used as a substitute for words to express a fact or opinion. *State v. Satterfield*, 316 N.C. 55, 340 S.E.2d 52 (1986). To be inadmissible hearsay, the conduct in question must be intended by the declarant as an assertion. The most obvious example is a nod of the head in place of a verbal affirmative response.

In one murder case, *Stevenson v. Commonwealth*, 218 Va. 462, 237 S.E.2d 779 (1977), the prosecutor introduced evidence that three days after the crime, a police officer asked defendant's wife to give him the clothing defendant wore on the day of the murder. She gave him a shirt with incriminating blood stains. The court, reversing the conviction, explained

Non-verbal conduct of a person intended by him as an assertion and offered in evidence to prove the truth of the matter asserted falls within the ban on hearsay evidence This type of conduct has the same infirmities of the more familiar form of hearsay and should likewise be excluded.

In the present case, the act by Mrs. Stevenson came in response to the question of the officer as to what the defendant was wearing when he returned home from Ashland as well as the officer's request to obtain that clothing. Thus, the conduct of Mrs. Stevenson was intended as a non-verbal assertion for the purpose of showing that the shirt not only belonged to Stevenson but was in fact worn by him on the day of the crime Accordingly, the officer's testimony was inadmissible as violative of the hearsay rule.

237 S.E.2d at 781-782.

Movies or video tapes may be hearsay if they depict assertive conduct and are offered to prove the truth of that which is asserted. For example, a "day in the life" video, when offered to prove what the injured party can or cannot do is hearsay. It is

admissible, however, when it “illustrates” the testimony of a witness (more on demonstrative or illustrative evidence later). See, *Grimes v. Ins. Co.*, 73 F.R.D. 607 (D. Alaska 1977) in which the court explained

. . . a film offered by the plaintiff showing the plaintiff performing tasks to exhibit his disability is like a witness testifying about assertive conduct. A witness’s testimony about observed assertive conduct when used to prove the truth of the assertion would be hearsay, and similarly a film showing assertive conduct would be hearsay.

Id. At 611.

What Isn’t Hearsay?

1. Assertion Offered to Prove Something Other Than Its Truth

We have already discussed John’s out of court statement about yesterday’s precipitation in Atlanta. If an out of court assertion is offered for any reason other than to prove its truth, it is not hearsay, even if it is “what somebody else told” the witness.

A statement with direct legal significance, regardless of its truth, is not hearsay. For example, a statement constituting a threat, fraud, misrepresentation, or defamation has direct legal significance and will be admissible.

2. “Non” Assertions

If an out of court statement is not an “assertion,” it is not hearsay. Rule 801(a) requires the statement to be intended by the speaker as an assertion. Most “non” assertions qualify as circumstantial evidence. In a Federal bookmaking prosecution, the prosecutor offered testimony from officers that, while on defendant’s premises in the execution of a search warrant, they answered the telephone numerous times and that unknown callers gave them directions for placing bets. The court held this testimony

described non-assertive utterances that were relevant and admissible as circumstantial evidence that the premises were being used for gambling purposes. *U. S. v. Zenni*, 492 F. Supp. 464 (E.D. Kentucky 1980).

The circumstances surrounding the out of court statement may determine whether it is assertive or non-assertive. If a sign reads “DANGER, LIVE WIRE,” it is hearsay if it is offered to prove that the wire is live or that it is dangerous. However, it might be circumstantial evidence to prove warning or notice to someone who was electrocuted by contact with the wire, and relevant on issues of contributory negligence.

3. Impeachment

Out of court statements, otherwise constituting inadmissible hearsay, may be used to impeach a party. The statements may not be admitted for substantive purposes, but for impeachment only. *State v. Martinez*, 149 N.C. App 553, 561 S.E.2d 528 (2002).

Circumstantial Evidence

1. Knowledge at the Time

An out of court statement may imply the declarant’s knowledge or lack of knowledge at the time the statement was made.

Gibbs v. State Farm Mut. Ins. Co., 544 F2d 423 (9th Cir. 1976) was a claim against the insurer for bad faith in failing to settle a claim against the insured. The insured sent letters to the lawyer for his carrier expressing his opinion that the claimants would be happy to accept a settlement within policy limits. The court ruled that these letters were not hearsay because they were offered to show what information the carrier had in its possession when it failed to settle the claims, not to prove the truth of the

assertions found in the letters.

In *Sears v. Southern Pacific Co.*, 313 F.2d 498 (9th Cir. 1963), an FELA case, a union representative sent a letter to the railroad, prior to the accident in question, complaining of a hazardous condition. The letter was admissible to show the defendant railroad's knowledge of the very condition causing the injury, regardless of the truth of the assertions in the letter.

Product liability cases often involve questions of admissibility of warnings and labels. Defendants want to introduce evidence of warnings as circumstantial evidence that the user of the product had notice of a particular hazard. *Koury v. Follo*, 272 N.C. 366, 158 S.E.2d 548 (1968) was a medical malpractice case alleging that the defendant physician negligently prescribed a drug called "Strep-Combiotic" for a child. The court approved admission of the label which read "NOT FOR PEDIATRIC USE" in red capital letters.

The Hearsay Rule does not apply where the purpose of offering the extra-judicial statement is not to prove the truth of the statement, but merely to prove the fact that it was made and that the circumstances under which it was made were such as should reasonably have made it known to the litigant The display of a red flag bearing the word, "DANGER," a shouted warning by a person other than the witness testifying thereto, may be shown, not to prove the fact of danger, but to prove the giving of a warning which the person in question should have seen or heard and taken into account. For this purpose, the label on the bottle of Strep-Combiotic was properly admitted in evidence. It is not proff that the drug was unsafe for use upon a child it is evidence of a warning which the physician disregards at his peril, and his disregard of it is relevant upon the issue of his use of reasonable care, where other evidence shows the drug is, in fact, dangerous to a child.

158 S.E.2d at 556, 557.

2. Motive

A person's motive for acting in a certain way may be shown by statements made to him/her. In *State v. Swift*, 290 N.C. 383, 226 S.E.2d 652 (1976), an out of court statement made to defendant prior to commission of a crime was introduced to show defendant had a motive to commit murder. The evidence was allowed:

The law permits declarations of one person to be admitted into evidence for the purpose of showing that another has knowledge or notice of the declared facts and to demonstrate his particular state of mind. Such declarations are also admissible as circumstantial evidence of the existence of a particular emotion which would naturally result from hearing the words or otherwise help to explain subsequent conduct.

226 S.E.2d at 661.

3. State of Mind

a. Present Intent

Rule 803(3) creates an exception for out of court statements tending to show the declarant's "then existing state of mind, emotion, sensation, or physical condition . . ." There are a lot of cases in which a crime victim's pre-crime statement that he/she was afraid of the defendant have been admitted. See, e.g., *State v. Valentine*, 357 N.C. 512, 591 S.E.2d 846 (2003) (victim's description to friends of a confrontation with defendant and was afraid of defendant). A rape victim's statement in a hospital trauma room that she was afraid of defendant was admissible on the issue of whether sexual intercourse had been committed against her will. *State v. Locklear*, 320 N.C. 754, 360 S.E.2d 682 (1987).

The out of court statement must have relevance to an issue in the case, and must have been made at a time near the event in question. In *State v. Blackstock*, 165 N.C. App. 50, 598 S.E.2d 412 (2004), cert. denied, – N.C. –, 610 S.E.2d 208 (2005),

statements by a robbery victim to his family, made several days after the robbery, were inadmissible to show his then-existing state of mind during the robbery.

b. Past Intent

This is somewhat similar to cases involving questions of motive. An out of court statement may imply not only the declarant's then existing state of mind, but his past intent as well. In *Krimlofski v. U.S.*, 190 F. Supp 734 (N.D. Iowa 1961), at issue was whether the named beneficiaries of a life insurance policy were co-beneficiaries or primary and contingent beneficiaries. The court held that various statements made by the insured during a period of six or seven years after the policy was issued, to the effect that his wife was sole beneficiary, were admissible as circumstantial evidence of what his intent had been when he completed an application form for renewal of the policy. His assertion that he named his wife beneficiary would be excluded as hearsay if offered as proof that he did, in fact, so designate her. But it was not hearsay if offered as circumstantial evidence from which the trier of fact might infer that the insured intended to do so at the time he ambiguously completed the beneficiary designation form.

Of course, had there been no such ambiguity the intent of the insured would be irrelevant and the statements would have been inadmissible for any purpose. See, *Littlefield v. Littlefield*, 194 F.2d 695 (10th Cir. 1952).

Separate Objections

1. Rule 602

Although not technically within the purview of this manuscript section, Rule 602 is nevertheless relevant on the use of a hearsay objection as both a sword and a shield,

because the rule excludes a statement of fact by a non-expert witness who lacks personal knowledge of the fact. If potentially damaging hearsay is about to be introduced, and it appears to fit neatly within one or more of the exceptions to the hearsay rule, an objection may properly be based on Rule 602 rather than objecting to the evidence as hearsay.

2. Sixth Amendment

In criminal cases the exclusion of hearsay, when invoked by defendant, is supported by a separate exclusion based on the confrontation clause of the Sixth Amendment to the U.S. Constitution, which creates, in all criminal prosecutions, the defendant's constitutional right to confront the witnesses against him. See, however, *Ohio v. Roberts*, 448 U.S. 56 (1980), in which the Supreme Court held that evidence coming within one of the statutory exceptions to the hearsay rule has "sufficient indicia of reliability" and is admissible despite the loss of the right of confrontation.

Notable Exceptions to the Hearsay Rule

Rule 803 of the Rules of Evidence lists 23 exceptions to the hearsay rule. Rule 804(b) lists a few others. No effort will be made here to discuss them all. Such exceptions as ancient documents, market reports and so on are not encountered frequently. The exceptions enumerated in Rule 803 apply whether or not the declarant is available at trial to testify.

a. Rule 803(1) - Present Sense Impression

This is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter."

Trustworthiness is implicit in the timing of the statement, the assumption being that there

is insufficient time in which to forget or concoct a prevarication. *State v. Pickens*, 346 N.C. 628, 488 S.E.2d 162 (1997). It differs from an excited utterance in that it has nothing to do with the manner in which the statement is made and it is somewhat more circumscribed.

The key in determining whether a statement fits within this exception is the closeness in time between the event or condition and the declarant's statement. Typically, this requires the statement to be made either during the event, or immediately thereafter, although there is no hard and fast rule about what constitutes "immediately." *State v. Clark*, 128 N.C. App. 722, 496 S.E.2d 604 (1998). Nine days' delay has been held to be too long after the event, *State v. Maness*, 321 N.C. 454, 364 S.E.2d 349 (1988), and even the same day, in some circumstances, can be too long. *State v. Smith*, 152 N.C. App. 29, 566 S.E.2d 793 (2002), cert. denied, 356 N.C. 311, 571 S.E.2d 208 (2002), in which a murder victim's statement to a relative made the same day defendant returned stolen items to the victim and threatened him, but made after a police officer had stayed with the murder victim all afternoon was deemed not made immediately after the event and were not admissible. The Official Comment to the Rule recognizes that "in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable."

This exception to the hearsay rule has its genesis in *Houston Oxygen Co. v. Davis*, 139 Tex. 1, 161 S.W.2d 474 (1942), an automobile accident case. A few moments before the wreck, the care in which plaintiff was a passenger passed a car driven by a Mrs. Cooper. Defendant offered testimony that, as plaintiff's car passed her, Mrs. Cooper said

“they must be drunk; we’ll find them somewhere up the road wrecked if they keep that up.” This occurred some five miles from the accident scene. The trial court excluded the statement, but the appellate court reversed a judgment for plaintiff based on the exclusion of the statement, holding that Mrs. Cooper’s statement was a present sense impression and had such exceptional reliability as to warrant an exception to the hearsay rule.

In my view, this is a bad result. First, Mrs. Cooper’s assertion wasn’t hearsay, as it wasn’t offered to prove its truth (that “they” were drunk). Second, the assertion that “they must be drunk” was excludable under Rule 602 since it was not something within her personal knowledge. Finally, the assertion that “we’ll find them somewhere up the road wrecked” is not a statement of fact, but one of opinion by a witness who was not qualified as an expert, and should have been excluded for that reason.

Anyway, if there is a lapse of time and you don’t want the testimony to come in, object on the grounds that it is not a present sense impression because of the lapse in time. On the other hand, if you want the statement in evidence, argue that the lapse was only “slight” and that the trustworthiness of the assertion is not impaired.

b. Rule 803(2) - Excited Utterances

This is 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.” Professor Younger says it is easy to determine what an excited utterance is - it always begins with “My God” and ends with an exclamation mark.

Remember the utterance must be caused by, and must relate to, a “startling” event. It need not be made contemporaneously with the event. *State v. Maness, supra.*

In *U.S. v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), the court said:

The lapse of time between the startling event and the out of court statement although relevant is not dispositive in the application of Rule 803(2) Nor is it controlling that [declarant's] statement was made in response to an inquiry Rather, these are factors which the trial court must weigh in determining whether the offered testimony is within the 803(2) exception. Other factors to consider include the age of the declarant, the characteristics of the event and the subject matter of the statements. In order to find that 803(2) applies, it must appear that the declarant's condition at the time was such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation.

Id. At 885-6. The common law of North Carolina never articulated a precise rule determining an exception such as this, but the cases tended to lump excited utterances generally under the topic of *res gestae* and some lawyers and judges still use that term. See, *State v. Smith*, 225 N.C. 78, 33 S.E.2d 472 (1945) (“Lord have mercy, Ernie has set the house on fire!”)

Federal courts sometimes seem to get around the Rule 602 objection by holding that a declarant's personal knowledge may be inferred from the excited utterance. Other jurisdictions adopting this rule tend to follow suit. For example in *State v. Lenarchik*, 74 Wis.2d 425, 247 N.W.2d 80 (), Joseph Lenarchik was charged with murdering Ivory Williams with a bayonet, and this court stated:

Nolte was . . . allowed to testify that, shortly after the stabbing, a person known as Popeye stated, “Joe really fucked Williams up bad.” This evidence was objected to on the ground that there was no evidence to show that the witness Popeye actually witnessed the event to which his declaration related.

The declaration was admitted as a *res gestae* statement

It is reasoned that the inference that the declarant saw the event should be permitted from the utterance itself and from the circumstances in which it

was given. The rationale of the excited utterance exception is that the utterance stems from the non-rational, and thus objectively truthful, process of the person at the event. Accordingly, it belies the rationale of the exception to conclude that the declarant made the excited utterance on the basis of an event of which he had no knowledge.

Whether an excited utterance is admissible in evidence rests upon the sound discretion of the trial court. . . . Under the facts of this record, we cannot conclude that the trial judge abused his discretion in admitting the utterance of Popeye.

247 N.W.2d at 93. Of course, under Rule 803(2) if the statement qualifies as an excited utterance, the trial judge has little, if any, discretion to exclude it just because it appears no more trustworthy, or even less trustworthy, than hearsay in general.

c. Rule 803(3) - Then Existing Condition

Exception from exclusion is “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.”

There is no requirement that the declarant’s statement must be closely related in time to an intended future act. *State v. Taylor*, 332 N.C. 372, 420 S.E.2d 414 (1992).

Still, it seems that some proximity seems to be required. See, *State v. Blackstock*, *supra*.

It is probably safe to say that, prior to Rule 803(3), North Carolina was among those states that limited this exception to cases in which the declarant was unavailable for trial. In *State v. Vestal*, 278 N.C. 561, 180 S.E.2d 755 (1971), the wife of murder victim Pennisi testified that her husband told her, shortly before his death, that he planned to go on a business trip with defendant to Wilmington, Delaware. The court allowed this

testimony, explaining:

The sound basis for its admission . . . the exception to the hearsay rule permitting the admission of declarations of a decedent to show his intention, when the intention is relevant *per se* and the declaration is not so unreasonably remote in time as to suggest the possibility of a change of mind.

180 S.E.2d at 772.

Be aware that it is the declarant's state of mind that governs. In *State v. Allen*, *127 N.C. App. 182, 488 S.E.2d 294 (1997)*, defendant contended the trial court erred by allowing a witness to testify regarding an alleged threat by defendant made to the witness's mother over the telephone. At trial, the following exchange took place:

Q: Who have you been receiving those threats from?

A: From what my mother said, it was [defendant].

Defense attorney: Objection

Court: Overruled

Q: And what did your mother tell you was the threat she received from [defendant] and what was the nature?

Defense attorney: Objection

Court: Overruled

A: That if I did come to court that I was gone.

The jury was instructed to consider this testimony "in evaluating the witness's credibility and her state of mind as she testifies here before you today."

The Court of Appeals reversed the conviction, holding this testimony was not admissible under Rule 803(3), which permits hearsay testimony to show the state of mind

of the declarant, not the witness who testifies concerning the statement.

d. Rule 803(4) - Medical Diagnosis and Treatment

“Statements made for the purposes of medical diagnosis or treatment in 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 are reasonably pertinent to diagnosis or treatment.”

Reference should be made here to Rule 805, which states: “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.” I believe this reference is important given the high degree of medical specialization and referrals between treating and consulting physicians.

It is a rule of long standing in North Carolina that the opinion of one expert cannot be based on that of another expert. See, *Ingram v. McCuiston*, 261 N.C. 392, 134 S.E.2d 705 (1964). Of course, there were exceptions to that rule. In *Potts v. Howser*, 274 N.C. 49, 161 S.E.2d 737 (1968) it was proper to allow medical expert to give his opinion as to what was shown by a radiologist’s report and the accompanying x-rays, which were not in evidence. In *State v. DeGregory*, 285 N.C. 122, 203 S.E.2d 794 (1974) the court found no error in allowing a witness to base his opinion in part on the hospital record, apparently holding that an expert may detail the facts upon which his opinion is based, even though based entirely on knowledge gained from inadmissible sources.

Rule 803(4) does not restrict the out of court statement to one of the patient. Information in medical records obtained from third persons is admissible, as long as it is

found within the medical records. Medical records are admitted under this rule, or under N.C.G.S. §8-44.1 and the common law business entry exception may contain such hearsay statements.

Be careful. If a medical record contains an assertion that was not made for the purpose of medical diagnosis or treatment, it does not qualify for this exception to the hearsay rule, even though it may, in fact, aid a physician in diagnosing or treating the patient's condition. In *U.S. v. Narciso*, 446 F. Supp. 252 (E.D. Mich. 1977), a prosecution of two nurses for poisoning patients, one of the patients, dead at the time of trial, suffered respiratory arrest. As part of his emergency treatment a breathing tube was inserted through his mouth into his lungs. About two hours later, when the patient appeared to be comfortable but could not talk due to intubation, his treating physician asked him whether he had been given an injection and, if so, by whom. In response, he wrote the letters "PIA" on a note. The court, excluding the note as hearsay, explained:

The government argues that these questions were asked of Mr. McCrery for purposes of medical diagnosis and treatment and this argument is certainly supported by the testimony of Dr. Goodenday who indicated that her motivation for questioning McCrery subsequent to his recovery from the arrest was to discover (1) if any medication had been administered to him and (2) if so, who did it. Dr. Goodenday indicated that it would be necessary to find out who administered the medication to find out what it was and thus what further medical treatment would be required.

Yet, while the doctor's motive was further diagnosis, the underlying assumption of the rule requires the court to inquire as to the declarant's motivation for giving the information. If his motive is to disclose the information to aid in his own diagnosis and treatment, this, it is assumed, guarantees the statement's trustworthiness. However, if the declarant makes the statement while under the impression that he is being asked to indicate "who was responsible" for what happened, his response may very well be accusatory in nature and any inherent reliability of such a statement is thereby destroyed. In this instance it is not clear that Dr.

Goodenday communicated to McCrery that she wanted to know who had administered the injection to find out what the medication was. Once he indicated that he had indeed been given an injection, she merely asked him who gave it to him. Dr. Goodenday herself admitted that the possibility of someone deliberately injecting a muscle relaxant was being considered by the staff. Moreover, the McCrery arrest was one of the last of a series of arrests which began on July 18 and the record discloses that rumors of these arrests and the possibility that they were deliberately induced were prevalent among both the staff and patients.

Based on the entirety of this record this court is not convinced that McCrery's response to Dr. Goodenday's question was motivated solely by a desire to assist her in later diagnosis and treatment. Absent such assurance the government may not rely on the hearsay exception in FRE 803(4).

446 F. Supp. at 289.

What about an assertion made by a party to a physician who is consulted solely for the purpose of litigation and who was in no way a treating physician? Under the rationale for this exception, such an assertion would not have the presumed safeguards or trustworthiness. However, it is still an assertion made for the purpose of medical diagnosis, but not treatment. The Advisory Committee's note to Federal Rule 803(4) makes it clear such an assertion is within the exception. The North Carolina Commentary to the rules says:

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.

Statements made to a physician in preparation for trial lack the inherent reliability of those made for diagnosis or treatment and, as they are less reliable, they are inadmissible hearsay. *Williams v. Williams, 91 N.C. App. 469, 372 S.E.2d 310 (1988)*. The recipient of the assertion need not be a treating physician, so long as the purpose of

the declarant's statement is to obtain medical treatment for himself. *Donavant v. Hudspeth*, 318 N.C. 1, 347 S.E.2d 797 (1986).

e. Rule 803(5) - Recorded Recollection

The "past recollection recorded" exception has long been a part of North Carolina's common law. Prior to enactment of the rule, practice generally allowed the admission of the writing, upon authentication. Under this rule, however, the writing may be read into evidence, but not received as an exhibit.

The record need not have been made by the witness. It is sufficient if he/she adopted the record and testifies that it accurately reflects the facts. See, *U.S. v. Williams*, 571 F.2d 344 (6th Cir. 1978).

Remember that the *sine qua non* for introduction of such a writing is insufficient present recollection on the part of the witness. The recollection must have been recorded when it was fresh in the witness's memory.

f. Rule 803(6) and (7) - Records of Regularly Conducted Activity

An entry in a business record is an exception to the hearsay rule if it is made as a regular practice of, and kept in the course of, a regularly conducted business activity.

"Business" is broadly defined to include an "institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

The record must have been made at or about the time of the event it reports. It must be part of a regular business practice.

The record must be authenticated by the custodian or "other qualified witness" before it can be introduced.

Occasionally, like Sherlock Holmes's dog that didn't bark, it is the *absence* of an entry, where it would ordinarily be expected to exist, that is significant. This is covered by Rule 803(7). This is circumstantial evidence to prove the non-existence or non-occurrence of a matter. It is pure negative evidence.

There is no requirement for authentication in order to prove the absence of an entry in a business record. The reason for this difference from the requirements of Rule 803(6) is not clear and there is no comment on it in the commentary to the rules. Both rules 803(6) and (7) allow the trial judge, on an *ad hoc* basis to exclude hearsay that would otherwise qualify for these exceptions if the circumstances suggest a lack of trustworthiness.

g. Rule 803(8) - Public Records and Reports

This rule covers just about any public document, not privileged, generated by any public office or agency. In many respects, public records are business records and there is considerable overlap with the exceptions in Rules 803(6) and (7). One significant difference is that Rule 803(8) does not require that entries be made at or near the time that a recorded act, condition, or event occurred.

Police "crash" reports are generally admissible either as public records or business entries. However, those portions of the report which reflect the opinions of or assumptions by the investigating officer are not admissible. *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 365 S.E.2d 198, cert. denied 322 N.C. 610, 370 S.E.2d 257 (1988); *State v. Williams*, 90 N.C. App. 615, 369 S.E.2d 832, cert. denied, 323 N.C. 369, 373 S.E.2d 555 (1988). An officer may testify concerning statements made by those involved in an

accident, even if the declarant is deceased. *Keith v. Polier*, 109 N.C. App. 94, 425 S.E.2d 723 (1993).

Although the North Carolina rule and the Federal rule refer to factual findings in investigative reports, federal case law has generally allowed opinions within the exception. “. . . [T]he prevailing view is that all evaluative conclusions and opinions are within the scope of FRE 803(8)(C).” *Walker v. Fairchild Industries, Inc.*, 554 F. Supp. 650, 654 (D. Nev. 1982).

Of course, entries in public records in general and investigative reports in particular may be excluded for reasons other than hearsay. An example of this can be found in one of the more notorious North Carolina cases, *U.S. v. MacDonald*, 688 F.2d 224 (4th Cir. 1982) in which Green Beret physician Jeffrey MacDonald was charged with the murder of his wife and children. One of the investigating officers, Col. Rock, issued a report finding no probable cause for prosecuting MacDonald. At trial, the defense sought to introduce the report, and Col. Rock’s conclusions, but the trial court’s exclusion of the report was affirmed on appeal despite the hearsay exception. The court was at pains to point out that Rule 803 does not mandate admission, it only allows reception of qualifying evidence. The trial court could have admitted the report, but was not compelled to do so.

As with business records, evidence that a particular matter is missing from a public record, where that matter would ordinarily be recorded if it existed or occurred, may be offered to prove the non-existence or non-occurrence of the matter. This is covered by Rule 803(9). Technically, absence of an entry in a public record or in a

business record does not come within the definition of hearsay in Rule 801(c), but Congress and the General Assembly chose to call it an exception to the hearsay rule.

h. Rule 803(18) - Learned Treatises

The commentary to this Rule emphasizes a clear intent for this exception to authorize admission of learned treatises as substantive evidence. Once an expert witness, not necessarily the testifying witness, has agreed that the work in question is reliable authority, it may be read into evidence. Previously, N.C.G.S. §8-40.1, which was modeled on Federal Rule 803(18), codified the learned treatise exception. The North Carolina commentary to the rule emphasizes the clear intent of this exception to authorize admission of such statements as substantive evidence. If the expert has *relied* on the treatise in forming his/her opinions, or if the treatise is called to his/her attention on cross-examination, statements found in published “treatises, periodicals, or pamphlets” established as reliable authority by expert testimony (which can be any expert in the case concerning the issue at hand) then, if the statement is admitted it may be read into evidence. It may not be received as an exhibit.

The prohibition against reception of the treatise into evidence means a “blow up” or reproduction of the treatise may not be shown to the jury. In *Ferguson v. Williams, et al.*, 101 N.C. App. 265, 399 S.E.2d 389 (1991), a pharmacy malpractice case, plaintiff sought to show the jury exhibits of blown-up excerpts from the *Physician’s Desk Reference* concerning the contra-indications of Percodan and Indocin. These exhibits were excluded, and the exclusion was affirmed as “[s]tatements from learned treatises, . . . if admitted, may be read into evidence but may not be received as exhibits.”

The North Carolina commentary states in part that 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.” There are suggestions elsewhere, however, particularly 1 H. Brandis, *Brandis on North Carolina Evidence* §136 (3d ed. 1988), that the reliable authority used in cross-examination of experts must be established by a method permitted in the rule. If this is the case, then the expert under cross must testify that the portions of the treatise relied upon are authoritative before he/she may be cross-examined using the treatise. This question was presented on appeal in *Rowan County Bd. of Education v. U.S. Gypsum Company*, 103 N.C. App. 288, 407 S.E.2d 860 (1991), but the objections at trial were predicated on other grounds and this ground could not be raised for the first time on appeal. The Court dodged the issue.

Previously, in *Whisenhunt v. Zammit*, 86 N.C. App. 425, 358 S.E.2d 114 (1987) plaintiff tried to have her expert read into evidence package inserts accompanying prescription antibiotics, contending that the inserts were learned treatises. To comply with the rule, the court said, plaintiff must show that the inserts were relied upon by the expert and that the inserts were reliable authority. There was no evidence that the witness relied on the inserts and, therefore, plaintiff failed to comply with the rule.

A word of warning: the court will have considerable discretion in deciding whether a publication is sufficiently authoritative to qualify for this exception. In *Zimmer v. State*, 206 Kan. 304, 477 P.2d 971 (1970) the court said:

Mere publication does not *ipso facto* render a work admissible as independent substantive evidence. Such a work becomes admissible when

a proper foundation has been laid - establishment of its reliability either by means of judicial notice being taken or the attestation of an expert witness. Necessarily, to mitigate objections to this type of evidence which might justifiably be lodged in particular circumstances, considerable judicial discretion is in order in determining what works are, and what works are not, for one reason or another, sufficiently worthy of trust to be considered as substantive evidence We hold the determination of reliability requisite to admission into evidence of learned treatises rests in the sound discretion of the trial court.

477 P.2d at 977.

Governmental agencies having safety responsibilities often publish guidelines or recommendations that serve the same purpose as safety codes, and may be excepted to the hearsay rule as such. See, *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975), a suit arising out of the collision of two aircraft at an uncontrolled airport. The court, affirming judgment for plaintiff, approved admission of advisory materials issued by the FAA, after witnesses had testified that the landing procedures recommended in the circulars were generally followed by aviators. *Darling v. Charleston Community Mem. Hosp.*, 33 Ill.2d 326, 211 N.E.2d 253 (1965) approved admission of hospital regulations adopted by the State Department of Public Health, the Standards for Hospital Accreditation of the American Hospital Association, and defendant's own by-laws, to assist the jury in deciding what was feasible for defendant to do and what defendant knew or should have known.

Industry or trade association promulgated safety standards are often admitted under this exception. See, *Ellis & Sons Ironworks, Inc.*, 609 F.2d 820 (5th Cir. 1980) in which it was error to exclude plaintiff's offer to quote from the American Standard Safety Code for Power Presses, published by the American Standard Association in 1960,

after it had been established as reliable by an expert witness.

i. Rule 803(24), Rule 804(b)(5) - “Other Exceptions” Exception

This rule provides that other hearsay assertions, not within any of the classified exceptions to the hearsay rule, may still be excepted from application of the rule in certain circumstances if the assertion is trustworthy. The trial judge has substantial discretion in deciding whether sufficient circumstantial guarantees of trustworthiness are present.

In exercising this discretion, the court must undertake a six-step analysis; specifically, the court must determine the following: (1) that proper notice was given of the intent to offer hearsay evidence under either of these rules; (2) that the hearsay evidence was not specifically covered by any of the other hearsay exceptions; (3) that the hearsay evidence possesses certain circumstantial guarantees of trustworthiness; (4) that the evidence is material to the case; (5) that the evidence is more probative on an issue than any other evidence procurable through reasonable efforts; and (6) that admission of the evidence will best serve the interests of justice. *State v. Agubata*, 92 N.C. App. 651, 375 S.E.2d 702 (1989). In making this inquiry, the court must make specific findings for each step, unless the evidence fails to meet one of the steps. *State v. Harris*, 139 N.C. App. 153, 532 S.E.2d 850 (2000).

The proponent of the evidence must give notice, in writing, to his/her adversary. *State v. Castor*, 150 N.C. App. 17, 562 S.E.2d 574 (2002).

Rule 804(b)(5) is a verbatim copy of Rule 803(24), except that it requires the declarant to be unavailable before the hearsay can be admitted under the rule.

Rule 804 addresses admissibility of hearsay when the witness is unavailable for the hearing. A witness is “unavailable” if he/she has been excused by the court; persists in refusing to testify despite a court order to do so; testifies to a lack of memory; is unable to be present or testify because of death or then existing illness or infirmity; or is absent from the jurisdiction and the absence was not procured by the proponent of the evidence.

Rule 804(b) contains those exceptions to the hearsay rule which apply when the declarant is unavailable.

j. Former Testimony

If the witness has testified previously his/her previous testimony may be excepted if the witness is unavailable and certain other requirements are met.

Of interest, testimony from a criminal trial can be excluded from use in a civil trial. The parties are necessarily different - the state in a criminal proceeding and individuals in civil proceedings. Thus, in *Hinnant v. Holland*, 92 N.C. App. 142, 374 S.E.2d 152 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 792 (1989), the plaintiff was decedent’s father, who was not a party to the criminal action against defendant. He had no opportunity at the criminal trial to cross-examine the proposed witness and even though the prosecution may have had a similar motive to develop testimony, he was not a predecessor in interest to decedent’s estate and the exclusion of the former testimony was affirmed.

k. Belief of Impending Death

Rule 804(b)(2) is codification of the common law dying declaration exception to

the hearsay rule. It is the belief of the declarant that he/she is going to die, rather than the actual chances of impending death, that is determinative. In *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981) the court said:

The party seeking admission of the out of court statement need not show that the declarant stated he had given up all hope of living or considered himself to be in the throes of death. All that must be shown is that the declarant believes he is going to die.

Note that N.C.G.S. §8-51.1 (which has not been repealed despite enactment of Rule 804(b)(2)) requires the declarant to actually die from the causes or circumstances on which he commented. Under this rule, unavailability may be for reasons other than death.

1. Statement Against Interest

It is almost universal that an out of court assertion against the declarant's pecuniary, proprietary, or penal interest is an exception to the hearsay rule. It is not expected that people will make statements intending to harm themselves when they can refrain from so doing. Accordingly, such assertions are clothed with a patina of trustworthiness. This exception applies to non-party witnesses. Such a statement by a party is an admission, and admissible on that basis.

Indirect Exceptions

Expert witnesses rely on various types of hearsay in forming opinions.. The hearsay may be contained in a learned treatise, for example. If an expert relies on hearsay, the hearsay must be of a kind customarily relied on by experts in the particular field. It is admissible to explain the basis for the expert's opinion.

Rule 703 provides:

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.

I. Presumptions

A presumption is an assumption of fact resulting from a rule which requires that fact to be assumed or inferred from the establishment of another fact. A presumption stipulates that if one fact (or the commission of an act) can be demonstrated, then another may or must be inferred from it. A presumption can be denoted by the formula *if A, then B*. There are few features of the law more fundamental than legal presumptions, and they appear virtually everywhere in law. Some are widely recognized (the presumption of innocence), others not so well known (the business judgment rule, which is a presumption of care favoring corporate officers and directors accused of negligence).

I note at the outset that Rule 301 does not apply to “conclusive presumptions,” which are “merely statements of substantive law and have nothing to do with the law of evidence.” *Brandis, supra at §215*. The rule has to do with shifting the burden of going forward with evidence (NOT the burden of proof) to rebut any presumption created by evidence in the case.

Most presumptions are rebuttable. Some are based on policy, designed to intentionally tip the scale in favor of one whose burden of proof may be so difficult to discharge that a culpable party would otherwise almost always escape the consequences of wrongdoing. Most, however, simply reflect a sense of probability lodged in common experience.

“Mandatory” presumptions are those in which the presumed fact (B) must be found when the basic fact (A) has been established, unless there is sufficient evidence of the non-existence of the presumed fact to overcome the presumption. An example is found in N.C.G.S. §8-58.1 which provides that once an injured plaintiff has introduced evidence of the amount of the medical expenses, there is a rebuttable presumption that the charges are reasonable, and the plaintiff’s burden of proof is thereby met. See, *Jacobsen v. McMillan*, 124 N.C. App. 128, 476 S.E.2d 368 (1996).

“Permissive” presumptions are those which arise when establishment of the basic fact (A) permits, but does not compel, a finding of the presumed fact (B). Thus, the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed or was following too closely. *Huggins v. Kye*, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

J. Privileges

Rule 501 simply states that “[e]xcept 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.”

We look both to the common law and to statutory law to ascertain these privileges. Statutorily created privileges are found at N.C.G.S. §§8-53 through 8-53.5.

1. Attorney-Client

When the Evidence Code was enacted in 1983, North Carolina chose not to codify the common law attorney-client privilege and so common law continues to govern the privilege. This has been called the “oldest of the privileges for confidential

communications known to the common law.” *Upjohn v. United States*, 449 U.S. 383, 389 (1981). This privilege exists in furtherance of public policy to encourage full and frank communication between the lawyer and the client. *Evans v. U.S.A.A.*, 142 N.C. App. 18, 541 S.E.2d 782 (2001), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001).

The privilege is that of the client, not the attorney.

The privilege is not absolute. If it appears that the interests of justice would be “frustrated” by the exercise of the privilege, the trial court can require disclosure. *Cohen v. Jenkintown*, 238 Pa. Super 456, 357 A.2d 689 (1976). While there are no specific North Carolina cases similar to *Cohen*, Rule 1.6(d)(3) of the Rules of Professional Conduct allows a lawyer to disclose confidential information “when permitted under the Rules of Professional Conduct or required by law or court order.” The rule contains other exceptions to the privilege, including an exception allowing disclosure to prevent the use of the privilege to assist in the commission of a crime or other fraudulent practice. A lawyer may also disclose confidential information to the personal representative of the estate of a deceased client. RPC 206.

2. Physician-Patient

N.C.G.S. §8-53 codifies this privilege. Again, there is a public policy favoring frankness. *Yow v. Pittman*, 241 N.C. 69, 84 S.E.2d 297 (1954). The communication, in order to qualify for the privilege, must be necessary to enable the physician to diagnose and treat the patient’s condition. The patient, or the patient’s personal representative or next of kin, may authorize disclosure of the information, and, in the interests of justice, the court or Industrial Commission may order disclosure.

The physician-patient relationship must have existed at the time of the communication. *State v. Mayhand*, 298 N.C. 418, 259 S.E.2d 231 (1979).

Again, the privilege is that of the patient. *State v. Bryant*, 5 N.C. App. 21, 167 S.E.2d 841 (1969). The patient may waive the privilege, and an implied waiver occurs where: (1) the patient fails to object to testimony on the privileged matter; (2) the patient calls the physician as a witness and examines him/her regarding the patient's medical condition; (3) the patient testifies to the communication between him/herself and the physician; or (4) a patient, by bringing an action, counterclaim, or defense directly places his/her medical condition at issue. *Mims v. Wright*, 157 N.C. App. 339, 578 S.E.2d 606 (2003).

It should be noted that in *Prince v. Duke University*, 326 N.C. 787, 392 S.E.2d 388 (1990), the defendant hospital failed to include the name of the neuropathologist who performed the autopsy on decedent failed to include his name on expert witness disclosure, believing it was not necessary as he was a "treating physician." Plaintiff claimed surprise and prejudice when the hospital was allowed to call the pathologist to testify at trial. On appeal, a new trial was awarded. The court reasoned that the witness, Dr. Vogel, was not a treating physician, as he had never seen the patient alive. The hospital should have identified him as an expert to allow plaintiff the opportunity to depose him.

3. Clergyman and Communicant

Also known as the "Priest and Penitent" privilege, this privilege is found in N.C.G.S. §8-53.2.

It is important to remember that, in order for a communication to be privileged under this statute, it must have been made in the context of the declarant seeking spiritual counsel and advice relating to, and growing out of, the information so imparted. It must have been a confidential communication, not mere casual or general conversation with one's pastor. *State v. West*, 317 N.C. 219, 345 S.E.2d 186 (1986).

While the privilege may be waived by the declarant in open court, once the privilege is invoked the clergyperson cannot be compelled to disclose the communication. *State v. Barber*, 317 N.C. 502, 346 S.E.2d 441 (1986).

So-called "lay" ministers are not embraced by this statute. If the witness is not an ordained or licensed minister of any church, holds no church office, but occasionally preaches from the pulpit, there is no privilege. *State v. Barber, supra*.

4. Psychologist and Patient or Client

This is another privilege created by statute, N.C.G.S. §8-53.3. The witness must be a licensed psychologist or licensed psychological associate, or an employee of the same. The communication must have been made in the context of treatment or therapy.

This, too, is a qualified privilege and the court may compel disclosure of the communication in order that the truth be known and justice done. *Flora v. Hamilton*, 81 F.R.D. 576 (M.D.N.C. 1978).

By its terms, the statute does not apply to prevent disclosure of information related to child abuse or the need for adult protective services.

5. School Counselors

N.C.G.S. §8-53.4 protects communications to a person “certified by the State Department of Public Instruction” and appointed a school counselor by a public school system or by the head of a private school, if the communication was made to enable the counselor to render counseling services. Again, the court may compel disclosure if necessary to the administration of justice.

6. Marital and Family Counselors

This privilege is created by N.C.G.S. §8-53.5. The counselor must be licensed and the communication must be necessary to enable the person to render counseling services. It is an almost verbatim rehash of N.C.G.S. §8-53.4.

N.C.G.S. §8-53.6 provides that, in an action pursuant to N.C.G.S. §§50-1, 50-6, 50-7, 50-16.2A, and 50-16.3A, if either or both parties have sought or obtained marital counseling from an authorized provider, the counselor is not competent to testify concerning information obtained in counseling.

7. Social Workers

Licensed Social Workers in private practice provide counseling services. Communications to them in this context are privileged pursuant to N.C.G.S. §8-53.7. Where necessary for the proper administration of justice, the court may compel disclosure.

N.C.G.S. §8-53.8 likewise applies to other counselors licensed pursuant to Chapter 90, Article 24 of the General Statutes.

8. Reporters

Unlike federal law, North Carolina now recognizes a qualified privilege in favor

of journalists to protect their sources. N.C.G.S. §8-53.11 defines a journalist and a news medium. The information in question must have been obtained or prepared while the witness was acting in the capacity of a journalist.

In order to overcome the privilege, one seeking to compel disclosure must establish by the greater weight of the evidence that the testimony or production sought: (1) is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought; (2) cannot be obtained from alternate sources; and (3) is essential to the maintenance of a claim or defense of the person on whose behalf disclosure is sought.

The court can order disclosure only after notice to the journalist and a hearing, and the order compelling disclosure must include clear and specific findings as to the showing made by the person seeking disclosure.

9. Husband and Wife

N.C.G.S. §8-56 provides that a spouse is competent to testify against his/her spouse in a civil action, but may not be compelled to do so. The common law rendered one spouse incompetent to testify against the other spouse. *Hicks v. Hicks*, 275 N.C. 370, 167 S.E.2d 761 (1969). The communication must be made “during the marriage.” *Whitford v. North State Life Ins. Co.*, 163 N.C. 223, 79 S.E. 501 (1913).

The privilege is held by the non-witness spouse, who may invoke the privilege to prevent the other spouse from testifying. *Scott v. Kiker*, 59 N.C. App. 458, 297 S.E.2d 142 (1982).

In criminal actions, N.C.G.S. §8-57 governs. As in N.C.G.S. §8-56, one spouse is

competent to testify against the other, but cannot be compelled to do so. Here, the failure of a defendant to call his/her spouse as a witness cannot be used against him/her.

N.C.G.S. §8-57(b) allows the nonparty spouse to be compelled to testify in prosecutions for bigamy or criminal cohabitation, assaulting or communicating a threat to the non-defendant spouse, trespass on the non-defendant spouse's property when the couple are living apart, abandonment or failure to provide support, or in any prosecution for a criminal offense against a minor child of either spouse.

N.C.G.S. §8-57(c) provides that no husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

K. Scope of Examination

Rule 611 of the Rules of Evidence, and Rule 43 of the Rules of Civil Procedure govern the presentation of evidence and the scope of examination of witnesses.

Rule 611(b) provides that “[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” This rule rejects the more restrictive approach of the federal rules and, according to the commentary to the North Carolina Rules, “adopts the current North Carolina wide-open cross-examination rule.” Substantive cross-examination is not limited or confined to the subject matter of direct testimony plus impeachment. It may extend to any matter relevant to any issue in the case. *State v. Freeman*, 319 N.C. 609, 356 S.E.2d 765 (1987). However, the scope of cross-examination is always subject to appropriate control by the court. *State v. Allen*, 90 N.C. App. 15, 367 S.E.2d 684 (1988). Rule 611(a) describes the court's control function so as to (1) make the questioning and presentation effective for the ascertainment of the

truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

On direct examination, counsel is ordinarily not allowed to ask “leading questions.” On cross-examination, however, both Rule 611(c), Rules of Evidence, and Rule 43(b), Rules of Civil Procedure, allow leading questions. Leading questions may be used to examine a hostile witness, an adverse party, or a witness “identified with an adverse party,” apparently including an agent or employee of an adverse party; an officer or director or employee of a corporation, partnership, or association which is an adverse party; an agent or employee of a governmental entity that is an adverse party.

Direct examination is questioning by the lawyer who calls the witness to the stand to testify.

A “leading question” is one which suggests the answer to the question or attempts to put words in the witness’s mouth. Questions that call for a “yes” or “no” answer are not necessarily leading. A question like “You told the officer you were speeding, didn’t you?” is leading. Most courts will allow a question like “Did you ever tell the officer you were speeding?” Both questions can be answered with a “yes” or “no,” but on direct examination the questioner will not be allowed to ask the first question.

What the careful examiner should avoid is asking questions that form a pattern that “leads” the witness through his/her testimony or reduces the witness to adopting descriptions provided by the lawyer.

Leading is often a matter of degree. Most of the time if an objection is sustained to a leading question, it can easily be rephrased to make it unobjectionable.

Q: When you saw the defendant, was he drunk?

Counsel: Objection, leading.

Court: Sustained.

Q: What was defendant's condition when you first saw him?

A: He was falling-down drunk.

There are times when leading is permitted on direct examination. Some leading is allowed when the subject matter of the examination is of an embarrassing nature. *State v. Dalton*, 96 N.C. App. 65, 384 S.E.2d 573 (1989). Leading questions may be asked to refresh a witness's recollection. *State v. Lesane*, 137 N.C. App. 234, 538 S.E.2d 37 (2000). Leading questions are appropriate in dealing with matters of background, or to direct a witness's attention to a particular time and place, or to a particular aspect of a situation. *State v. Smith*, 135 N.C. App. 649, 522 S.E.2d 321 (1999). In *State v. Greene*, 285 N.C. 482, 206 S.E.2d 229 (1974) Justice Branch listed a number of circumstances in which a lawyer may ask leading questions of his/her own witness on direct examination.

If the court determines that a witness is "hostile," the examiner may ask the witness leading questions. When is a witness "hostile?"

A witness who is merely unfriendly, or who may favor the adverse party, is not necessarily "hostile." According to Rule 43, RCP, a "hostile" witness is one who is "unwilling and hostile." This language seems to require that the witness be both unwilling and hostile. Hostility must be inferred from the witness's demeanor, his/her voice inflection, and the degree of contentiousness exhibited on the witness stand. See, *Holmboe v. Cook*, 288 Minn. 222, 179 N.W.2d 276 (1970) the court observed that the

witness was “sarcastic and answered the questions with wisecracks” and was hostile. *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977) was a custody case in which the Court of Appeals defined a “hostile” witness as “one whose sympathies lie with the opponent’s cause.” The witness in question was the new husband of the ex-wife and plaintiff-father wanted to ask leading questions regarding corporal punishment of the child by the stepfather. It was error to deny plaintiff’s request to ask the stepfather leading questions, but the error was not prejudicial. If a witness appears to be overtly unfriendly to the party calling him/her, the court may allow leading questions on direct, and may limit leading questions on cross-examination. *State v. Hosey*, 318 N.C. 330, 348 S.E.2d 805 (1986).

On the other end of the spectrum are questions that call for narrative answers. These questions call for the witness to recount a story without responding to specific questions, thereby depriving the opponent of the opportunity to interpose objections before the witness says something that should be inadmissible. Sometimes, these narrative answers are rambling affairs that waste time. Unlike leading questions, there is no rule of evidence or procedure directly addressing questions calling for a narrative. Rule 611(a), NCRE, requires the court to exercise “reasonable control over the mode . . . of interrogating witnesses.” In *Shields v. Nationwide*, *supra*, the court held that “[a]lthough it is customary to ask specific questions, *inter alia*, to give opposing counsel an opportunity to object . . . the conduct of the examination is largely in the control of the trial judge . . . and we will not interfere with the exercise of the trial judge’s duty to control the conduct and course of a trial absent a showing of manifest abuse.” 61 N.C.

App. at 376.

L. “Real Life” Case Issues

Some of the most frequently occurring problems at trial arise out of the authentication of documents for admission, and dealing with the police “crash reports” following a motor vehicle collision.

Police “crash reports” present peculiar problems which must be anticipated. Certain portions of the reports are admissible, as either business or public records. However, those portions which contain opinions of, or conclusions by, the investigating officer may not be admissible. There are also issues of relevance.

Any conclusion of fault is not likely to be admissible. Likewise, the fact that as a result of the investigation the officer charged one of the involved drivers with a violation of the traffic laws is not relevant. Since the officer did not (usually) see the vehicles in motion prior to the collision, opinions of speed are inadmissible.

Remember, however, that the officer probably talked to the involved drivers. If the speed of one driver prior to or at impact was recorded on the report based on the statement of the particular driver, the officer can relate that the driver told him/her how fast he/she was going at the time. It may be an admission against interest. It may be admissible as a “present sense impression.”

Certainly, if the defendant has entered a guilty plea, no contest plea, or paid off a ticket (admitting responsibility), that fact is admissible as an admission. To get it into evidence, a certified copy of the plea information from the Clerk’s office should be obtained. The Clerk’s certification makes the document self-authenticating.

If a document or record is not self-authenticating, it must be authenticated by the testimony of a witness, preferably the record custodian, as described above under the section on “Business Records.”

If a photograph or video portrayal qualifies as substantive evidence, don’t limit yourself by introducing it for illustrative purposes.

Finally, be careful with hospital or other medical records. Many of these records include references to insurance or health benefit coverages subject to the collateral source rule. In these days of Medicare and Medicaid liens, and ERISA reimbursement schemes, it is even more important that such references are not published to the jury. Jurors will almost automatically begin to deduct what they perceive to be outside payments. If this happens, not only may the plaintiff be deprived of any benefit provided by the collateral source rule, but also may suffer a double “whammy” if medical payments have to be repaid out any recovery.

Introduction of medical bills may present problems. Recall that an injured plaintiff may testify as to the amount of the bills incurred. However, he/she cannot testify that the bills were incurred as a proximate result of the injuries suffered in the accident or incident. This requires the medical witnesses to testify that the treatment rendered was for injuries proximately resulting from the subject incident, after which the plaintiff may testify as to the amount of the bills.

Take note that most of the cases cited in this manuscript are criminal cases. There are probably more evidentiary issues in criminal cases than the civil arena. Although there are plenty of criminal cases excluding evidence, there is a tendency on the part of

courts to give the State the benefit of some doubt, lest a bad guy go free. For that reason, if you are looking for a case admitting evidence you think may be contested, you are likely to find that a criminal case that will help.