RELEVANCY AND ITS LIMITS:

ARTICLE FOUR OF THE NORTH CAROLINA EVIDENCE CODE

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I. INTRODUCTION AND OVERVIEW

A. THE CORE RULES ON RELEVANCY.

Rule 401 of the N.C. Rules of Evidence provides:

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

Rule 402 of the N.C. Rules of Evidence provides:

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

B. RELEVANCY OF BACKGROUND AND CONTEXT EVIDENCE.

The definition of relevant evidence is purposely broad and elastic to accommodate the myriad of factual situations in which the questions of admissibility arise. *State v. Perry,* 298 N.C. 502, 510 (1979) (stating that the test is necessarily "elastic" and requires the court to consider the offered evidence in light of other admissible evidence). Background and context evidence is generally held relevant and admissible, although it might be inadmissible for other purposes. Background evidence is "universally offered and admitted as an aid to understanding." *Santora, McKay & Ranieri v. Franklin,* 79 N.C. App. 585, 589 (1986). That is true although such background evidence may include evidence of crimes and bad acts by defendant. Rule 404(b) provides that although evidence of "other crimes, wrongs, or acts" is not admissible to prove the character of a defendant in order to show that he acted in conformity therewith, such evidence is admissible if offered for a proper purpose unless the court determines pursuant to Rule 403 that its probative value is substantially outweighed by its prejudicial effect. Evidence offered for background and context purposes is offered for a proper purpose within the meaning of Rule 404(b). Thus, *e.g.*, in *State v. Holadia and Cooper,* 149 N.C. App. 248 (2002), evidence of defendant Holadia's prior drug activity with a robbery victim was admissible to establish the "immediate context and circumstances of the crime." In *State v. Robertson,* 149 N.C. App. 563 (2002), a rape victim had given $500 to one Nicole to buy the drug Ecstasy. When Nicole did not return with the drugs, the victim began looking for her in the apartment complex. Defendant told the victim he was the main Ecstasy dealer in the apartment complex and knew all the places that Nicole could be found.

Defendant then attempted to rape the victim. The trial court did not err in admitting the evidence of dealing in Ecstasy in defendant's rape trial because the trial court did not admit the testimony to show defendant's character or propensity to commit drug crimes, but for the permissible purpose of establishing the "context which incidentally involved illegal drugs." Likewise, in *State v. Agee,* evidence of defendant's possession of marijuana was admissible in his trial for possession of LSD because it "gave rise to a chain of events or circumstances" which only incidentally established the commission of a prior bad act. 326 N.C. 542, 546-48 (1990).

C. PRESUMPTION OF ADMISSIBILITY.

The general grant of admissibility found in Rule 402 is often cited as authority for the broad statement that in criminal prosecutions, every circumstance that casts any light on the alleged crime is admissible. *See, e.g., State v. Hamilton,* 264 N.C. 277 (1965). The admission of all relevant evidence is limited, however, for policy reasons, because of concerns with trustworthiness, in order to protect the rights of defendants, and in order to protect the integrity of the fact-finding process. See Part II. below for a discussion of those limitations.

D. PROCEDURE FOR DETERMINING RELEVANCY.

The question of relevancy is a preliminary question for the court under Evidence Rule 104(a). The court makes its determination at a hearing outside the presence of the jury, and is not bound by the rules of evidence except for those relating to privileges. When evidence is relevant only if some other preliminary fact which also requires proof exists, Rule 104(b) provides that the court is to admit the evidence upon, or subject to, the introduction of sufficient evidence to allow the jury to find that the preliminary fact exists. This principle is called "conditional relevancy**."** Whether the trial court admits the evidence upon the assurance of counsel that its relevance will become apparent, or interrupts the examination of one witness to allow counsel to call another witness to demonstrate the relevance of the questioned evidence, is a matter in the discretion of the court. Rule 611(a). In making the decision, the court should consider the likelihood of overcoming the resulting prejudice if the questioned evidence is not thereafter tied-in or supported, and must be stricken. If an instruction to disregard the evidence is not likely to be effective under the circumstances, the trial court may consider allowing the offering party to call witnesses out of order, or allowing the party to make an offer of proof in the absence of the jury.

E. MAKING THE RELEVANCY DECISION.

When deciding whether evidence is relevant, the court must consider all the circumstances, such as the claims and defenses raised by the pleadings, the prejudicial nature of the tendered evidence, whether the tendered evidence will create other distracting ancillary issues for the jury, and the timing of the offer.

When the evidence is offered is important. Evidence which might be irrelevant on direct examination may be admissible on re-direct examination because of matters raised by the examiner on cross-examination, or may be admissible in rebuttal, although not admissible on the case in chief. Thus, the "door is opened" to otherwise inadmissible evidence. *State v. Albert,* 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)(holding that where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially); *State v. McKinnon,* 328 N.C. 668, 403 S.E.2d 474 (1991)(when defendant solicited evidence during cross-examination of a State's witness, the State was allowed to offer otherwise inadmissible evidence in rebuttal).

F. STANDARD OF REVIEW.

The ruling of the court as to the relevancy of an item of evidence is not discretionary in the true sense, *Sherrod v. Nash Gen. Hosp.,* 126 N.C. App. 755 (1997), but is entitled to great deference. *State v. Wallace,* 104 N.C. App. 498 (1991)(while not discretionary, relevancy rulings are given "great deference" on appeal).

G. RECURRING RELEVANCY ISSUES.

Certain relevancy issues tend to recur, particularly in criminal cases. In addition to the cases cited throughout this manuscript, see the following cases for examples of the treatment of recurring relevancy questions by our appellate courts.

1. EVIDENCE OF ANOTHER'S GUILT.

To be both relevant and admissible, evidence tending to show that someone other than the defendant committed the crime for which defendant is being tried, must (a) point directly to the guilt of a specific person and (b) must be inconsistent with the defendant's guilt. *State v. McNeill,* 326 N. C. 712, 721 (1990); *State v. Hester,* 343 N.C. 266, 271 (1996); *State v. Floyd,* 143 N.C. App. 128 (2001)(trial court did not err in excluding testimony offered by defendant that his girlfriend's two sons were hostile to his deceased wife, and that they were not in school on the day of the murder, as the evidence does no more than "arouse suspicion"); *State v. May,* 354 N.C. 172, 176-77 (2001) (trial court did not err in murder prosecution in excluding evidence offered by defendant tending to show that another person (Godfrey) had an argument with the victim days before the murder, that Godfrey had been committed to Broughton Hospital because he was hearing voices telling him to kill people, that Godfrey told his doctor at Broughton that he was having hallucinations telling him to kill people, and that Godfrey had a history of violent

conduct; while Godfrey might have been a suspect, the excluded evidence was not inconsistent with the defendant's guilt). *Accord, State v. Allen,* 80 N.C. App. 549 (1986)(in robbery trial, evidence that someone resembling defendant had robbed another fast food restaurant two months after the robbery in question, was inadmissible because it did not point directly to another person's guilt of the crime charged.)

2. FLIGHT.

State v. McDougald, 336 N.C. 451 (1994) (evidence of jail escape relevant to show consciousness of guilt); *State v. King,* 343 N.C. 29 (1996)(evidence of car chase relevant as evidence of flight); *State v. Williamson,* 122 N.C. App. 229 (1996)(jury could consider evidence of defendant's failure to appear in determining guilt).

3. PHOTOGRAPHS

State v. Brown, 335 N.C. 477 (1994)(photos of numerous gunshot wounds relevant to show cause of death, premeditation and deliberation). For cases holding that admission of photographs was error, see *State v. Foust,* 258 N.C. 453 (1963)(reversed in part because use of ten gory photos was excessive, particularly in light of detailed testimony about each photograph) and *State v. Hennis,* 323 N.C. 279 (1988)(reversed when State used 35 photographs of murder scene and autopsies, projecting slides of photos on wall above defendant's head). For a detailed list of cases, see 2 Brandis & Broun on N.C. Evidence, 5th ed., p. 201, n. 151.

4. THREATS TO KILL MURDER VICTIM

State v. Groves, 324 N.C. 360 (1989)(evidence that defendant made threats against victim or group of which victim was a member, some two weeks before victim's murder, admissible to show premeditation and deliberation, and to negate self-defense).

5. PORNOGRAPHIC MATERIALS IN SEX OFFENSE TRIAL

State v. Rael, 321 N.C. 528 (1988)(videotape and magazines admissible to corroborate child victim's testimony that defendant had shown him the materials); *State v. Creech,* 128 N.C. App. 592 (1998)(in defendant's trial for indecent liberties and crime against nature, photos of male models and men in underwear were admissible to corroborate testimony of the minor victims); *State v. Williams,* 318 N.C. 624, 632 (1986)(evidence that defendant took his daughter to X-rated movie admitted to show his intent, preparation and plan to have sexual intercourse with her); but see *State v. Smith,* ___ N.C. App. ___ (3 September 2002)(pornographic videos and

magazines not admissible where no evidence that defendant had viewed the materials with victim or asked her to look at pornographic materials).

6. BENEFITS FROM COLLATERAL SOURCES.

In civil trials, evidence of benefits received by plaintiff from collateral sources is generally not admissible. It is not relevant and not competent. *Cates v. Wilson,* 83 N.C. App. 448, 452 (1986). Thus, evidence of the following collateral benefits is not admissible:

a. GRATUITOUS SERVICES AND PAYMENTS BY FAMILY MEMBERS. *Young v. R. R.*, 266 N.C. 458 (1966).

b. WORKERS' COMPENSATION BENEFITS. *Spivey v. Wilcox Company,* 264 N.C. 387 (1965).

c. MEDICAL EXPENSES PAID BY EMPLOYER'S HOSPITAL INSURANCE. *Young v. R. R.*, 266 N.C. 458 (1966).

d. SICK LEAVE PAY. *Fisher v. Thompson,* 50 N.C. App. 724 (1981).

e. MEDICAID BENEFITS. *Cates v. Wilson,* 83 N.C. App. at 454 (1986).

II. LIMITATIONS ON RELEVANCY

As a general rule, relevant evidence is admissible, unless excluded because of (A) policy reasons, (B) concerns with trustworthiness, (C) the necessity of protecting a defendant's constitutional rights, (D) judicial economy; (E) the necessity of protecting the integrity of the judicial process, (F) because the probative value of the evidence is outweighed by its prejudicial nature, or (G) is presumptively more prejudicial than probative.

A. POLICY REASONS

The policy reasons that require exclusion of otherwise admissible evidence include: (1) privileges; (2) conclusive presumptions; (3) subsequent remediable measures (Rule 407); (4) compromise negotiations (Rule 408); (5) payment of medical expenses (Rule 409); and (6) pleas and plea discussions (Rule 410).

1. PRIVILEGES.

Although otherwise relevant, both statutes and case law establish instances in which a witness may not testify because his or her testimony is privileged. Thus, although the testimony might be crucial in establishing the truth of a matter, the policy reasons which gave rise to the privilege support the exclusion. For example, a defendant's admission that he committed a crime is obviously relevant, but if that admission was made

in violation of the defendant's privilege against self-incrimination, the evidence is not admissible. Likewise, a defendant's statements to his or her attorney, his doctor, psychiatrist, and so on, may give rise to a privilege. In some instances, the court has the authority to require that the information be divulged in the interests of justice Examples of commonly-asserted privileges include:

a. PSYCHOLOGIST AND CLIENT. G. S. 8-53.3 provides the court may order disclosure when necessary to a proper administration of justice. However, G.S. 8-53.6 limits disclosure in marital actions where a psychologist counseled either or both parties. A psychologist is not competent to testify as to information acquired while engaged in marital counseling. The privilege does not excuse a psychologist from reporting child abuse or the need of a disabled adult for protective services.

b. CLERGYMAN AND CONFIDENTIAL COMMUNICANT. G. S. 8-53.2. A 1967 amendment took right of court to require disclosure. For the statute to apply, the communicant must have been seeking the counsel of his minister, and must have made the statements in a confidential manner. *State v. Andrews,* 131 N.C. App. 370, 507 S.E.2d 305 (1998). Thus, where defendant had conversations with non-ordained minister who did not hold church office, those conversations were held not to be privileged. *State v. Barber,* 317 N.C. 502 (1986).

Statute provides for express waiver in open court. While there are no cases on implied waiver, it would likely apply as in other cases.

c. SCHOOL COUNSELOR AND STUDENT. G. S. 8-53.4. Certified school counselor is not competent to testify as to information acquired while counseling student, unless student waives privilege, or the trial court compels disclosure if necessary to a proper administration of justice.

d. MARITAL AND FAMILY THERAPISTS. G. S. 8-53.5 Court may order disclosure when necessary to proper administration of justice except as limited by provisions of G. S. 8-53.6 in case of certain marital actions under Chapter 50.

e. SOCIAL WORKER AND CLIENT. G. S. 8-53.7 Disclosure may be ordered by court when necessary to a proper administration of justice, unless forbidden by G.S. 8-53.6 (marital counseling) or other statute.

f. PHYSICIAN AND PATIENT. G. S. 8-53. Court may order disclosure at or before trial for proper administration of justice). Thus, a court properly compelled employees of a mental health center to disclose otherwise privileged medical information as part of investigation of a homicide. *In re Mental Health Center,* 42 N.C. App. 292 (1979).

See G. S. 8-53.1, dealing with automatic waiver of the privilege in juvenile cases involving abuse or neglect. *State v. Efird,* 309 N.C. 802 (1983).

The patient may waive the privilege expressly, by failing to object, or by opening the door by testifying or by examining the doctor on the subject. *Cappo v. Lynch,* 253 N.C. 18 (1960).

The privilege does not apply to a court-appointed physician authorized to determine a defendant's capacity to stand trial (*State v. Williams,* 350 N.C. 1 (1999)).

g. COUNSELOR LICENSED PURSUANT TO CHAPTER 90 OF GS. G.S. 8-53.8 (court may compel disclosure if necessary for a proper administration of justice, and not otherwise prohibited).

h. OPTOMETRIST AND PATIENT. G. S. 8-53.9 (court may compel disclosure if necessary for a proper administration of justice, and not otherwise prohibited).

i. LAW ENFORCEMENT PERSONNEL AND PEER SUPPORT GROUP COUNSELOR. G. S. 8-63.10 Court may compel disclosure if necessary for a proper administration of justice, subject to the bar of G. S. 8-53.6 in certain marital actions.

j. JOURNALIST QUALIFIED PRIVILEGE. G. S. 8-53.11 Court may order disclosure only after notice and opportunity to be heard for journalist, and court must make clear and specific findings as to necessity of testimony as set out in statute.

k. AGENTS OF RAPE CRISIS CENTERS AND DOMESTIC VIOLENCE PROGRAMS. G. S. 8-53.12 Court may require disclosure in some instances, as set out in statute.

l. HUSBAND AND WIFE. Confidential communications are protected: G. S. 8-57(c) (criminal cases); 8-56 (civil cases). See *State v. Freeman,* 302 N.C. 591 (1981)(question is whether the communication induced by marital relationship and prompted by affection, confidence and loyalty engendered by such relationship).

Privilege may be claimed at pretrial discovery stage. *Wright v. Wright,* 281 N.C. 159 (1972) (interrogatories). Only compulsory testimony prohibited.

m. ATTORNEY AND CLIENT. Communications between a client seeking legal advice from a licensed attorney are privileged insofar as they relate to the matter about which the attorney was consulted or employed. *State v. Tate,* 294 N.C. 189 (1978). Communications about future violations of law are not protected. *State v. Murvin,* 304 N.C. 523 (1981).

The client may expressly waive the privilege, or may impliedly waive privilege by failing to object, opening the door by eliciting testimony about an attorney/client communication, or by attacking the attorney's integrity or competency as, for example, in an motion for appropriate relief. See G.S. 15A-1415(e).

n. DOMESTIC ACTIONS. G. S. 8-53.6 provides that in alimony and divorce actions, if either or both parties have obtained marital counseling from a licensed (1) physician; (2) psychologist; (3) psychological associate; (4) clinical social worker; or, (5) marriage and family therapist; those named professionals are not competent to testify concerning information obtained during the counseling.

o. ACCOUNTANT/CLIENT. This privilege is not recognized in North Carolina. *See State v. Agnew,* 294 N.C. 382 (1978).

2. CONCLUSIVE PRESUMPTIONS.

A presumption is deemed "conclusive" where if a basic fact is proven, then another elemental fact is conclusively deemed to exist, and evidence to the contrary will not be received. For example, G. S. 143-129.1 states that it is "conclusively presumed" to be written into bail bonds. That presumption, being conclusive, may not be rebutted by evidence to the contrary, and such evidence would be irrelevant. Where a presumption is mandatory, however, evidence may be offered to rebut the presumed fact. Where rebutting evidence is offered, the mandatory presumption disappears and only a permissive inference is left, which may be accepted or rejected by the jury. Thus, *e.g.,* in a prosecution for murder, proof that the defendant killed the victim by the intentional use of a deadly weapon raises the mandatory presumption that such killing was done with malice and was unlawful. Defendant then has the burden of going forward with or producing some evidence of a lawful reason for the killing or an absence of malice (such as self-defense or heat of passion). If defendant offers no such evidence, then the jury must be instructed that defendant

must be convicted of murder in the second degree. *State v. Reynolds,* 307 N.C. 184 (1982).

3. SUBSEQUENT REMEDIAL MEASURES. RULE 407.

Evidence of remedial measures taken after an event is not admissible to prove negligence or culpable conduct. The rule is grounded in the public policy to encourage, or at least not to discourage, safety measures taken after an accident. However, evidence of such measures is admissible for other purposes, such as proof of ownership, control, or the feasibility of precautionary measures IF CONTROVERTED, or for impeachment purposes. The court must be careful that such evidence is admitted, if at all, for a proper purpose, and that its probative value outweighs its prejudicial value.

4. COMPROMISE NEGOTIATIONS. RULE 408.

Public policy favors the compromise and settlement of disputes. This rule furthers that policy by providing that evidence of offers to compromise claims is not admissible for the purpose of showing the invalidity or validity of the underlying claim. Evidence of conduct or statements during negotiations is not admissible, unless it is otherwise discoverable. Finally, evidence of an offer to compromise may be admitted when offered for a proper purpose, such as "proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

a. PROPER PURPOSE.

In *Marina Food Assocs. v. Marina Restaurant, Inc.*, 100 N.C. App. 82 (1990), defendants offered $150,000 to plaintiff to terminate the lease, which was a condition of the sale of the restaurant property. Held, admission of the offer into evidence was relevant and did not violate Rule 408 because the offer was evidence of the value of the lease, and therefore admissible on the issue of damages. Likewise, in *Renner v. Hawk,* 125 N.C. App. 483 (1997), evidence of statements during settlements properly offered to show that a lawsuit was brought for an improper purpose. *Renner* at p. 493.

b. EXISTING DISPUTE.

Obviously, the rule does not apply where there is no existing dispute at the time the offer is made. *Marinara Food Assocs. v. Marina Restaurant, Inc*., 100 N.C. App. 82 (1990).

c. STATEMENTS DURING SETTLEMENT NEGOTIATIONS.

Nor does the rule prevent the admission of evidence otherwise discoverable merely because it was divulged during settlement negotiations. *Renner v. Hawk,* 125 N.C. App. 483 (1997).

d. SETTLEMENT WITH THIRD PARTY.

Evidence that plaintiffs had filed separate action against a different defendant, and that suit had been dismissed, was not admissible in suit against defendant because it was not relevant under Rule 402 and violated the policy against settlement of disputes inherent in Rule 408. *Cates v. Wilson,* 83 N.C. App. 448, 458 (1986), *modified,* 321 N.C. 1 (1987).

5. PAYMENT OF MEDICAL EXPENSES. RULE 409.

Evidence of offer to pay or payment for medical or other expenses occasioned by an injury is not admissible to prove liability. This is another rule based on public policy of not preventing assistance to an injured person.

a. OTHER EXPENSES.

NC Rule 409 speaks of medical and "other" expenses, in contrast to its Federal counterpart which excludes evidence of medical and "similar" expenses. The NC amendment was intended to include lost wages and property damage, according to the Commentary. "Occasioned by an injury" includes property damage as well as personal injury.

b. OTHER PURPOSES.

Although payment is not admissible to prove liability, evidence of payment or offer to pay may be admissible for other valid purposes as in the companion Rules 407 and 408.

c. RENDERING AID.

Although rendering aid to an injured person is not explicitly covered by the Rule, pre-Rule NC law provided that aid to an injured person was not an admission of liability. *Gosnell v. Ramsey,* 266 N.C. 537 (1966) (statement by defendant that he would borrow the money and pay the victim's hospital bill not admissible). That law is unchanged by the Rule.

6. PLEAS AND PLEA DISCUSSIONS. RULE 410 & GS 15A-1025.

With one fairly narrow exception, evidence of the following actions is not admissible in either civil or criminal cases, for or against the defendant:

a. WITHDRAWN PLEA OF GUILTY.
b. PLEA OF NO CONTEST.
c. STATEMENT DURING SENTENCING PROCEEDING in either Superior or District Court regarding a withdrawn plea of guilty or no contest.
d. STATEMENT MADE DURING PLEA NEGOTIATIONS with prosecutor by defendant or his counsel which do not result in a guilty plea, or where guilty plea later withdrawn.

Thus, in *State v. Wooten,* 86 N.C. App. 481 (1987), evidence of plea negotiations was held to be inadmissible. Contrast *State v. Flowers,* 347 N.C. 1 (1997), in which defendant wrote prosecutor, admitted guilt, asked that others not be prosecuted, and mentioned possible plea bargain; held, not excluded by the rule. *See also State v. Bostic,* 121 N.C. App. 90 (1995)(Where defendant told fellow prisoner he would "take a plea bargain and walk," defendant's statement should have been admitted.).

EXCEPTION: Where defendant introduces evidence of statement made in the course of plea (discussions), and fairness requires that statement of defendant ought to be considered simultaneously with introduced statement.

B. TRUSTWORTHINESS OF THE EVIDENCE.

Otherwise relevant evidence may be excluded if it is not reasonably reliable. Thus, hearsay evidence is not admissible unless it falls within exceptions set out in Article 8 of the Evidence Rules or in other statutes. The topic of hearsay evidence is beyond the scope of this paper. Relevant evidence may also be excluded by the "best evidence" rule.

1. BEST EVIDENCE RULE, GENERALLY.

Evidence Rule 1002 provides that an "original writing, recording, or photograph" is required to prove its content, except as otherwise provided in the Evidence Rules or by statute. Normally, a duplicate is admissible unless its authenticity is in genuine doubt.

2. WHEN ORIGINAL NOT NECESSARY.

Rule 1004 provides that an original is not required if the original is lost (unless the proponent lost or destroyed it in bad faith), cannot be obtained,

was in the control of a party against whom offered and the party does not produce it at the hearing, or is not "closely related to a controlling issue." For an exhaustive treatment of the rule and applicable case law, see Chapter 10 of Brandis & Broun on N.C. Evidence (5th ed.), pp. 208 ff.

C. PROTECTION OF RIGHTS.

In furtherance of rights guaranteed by the Constitutions of NC and the United States, otherwise relevant evidence may be excluded if it was obtained by violations of the right to be protected from unlawful searches and seizures, from confessions obtained in violation of the right to remain silent, and from evidence which violates a defendant's right to confront the witnesses against him.

D. JUDICIAL ECONOMY. Rule 403.

The trial court has the discretion under Rule 403 to further judicial economy by excluding evidence that would result in undue delay, waste of the court's time, or the needless presentation of cumulative evidence.

1. NUMBER OF WITNESSES.

The trial court has discretion to limit the number of witnesses. For example, in *Ange v. Ange,* 54 N.C. App. 686 (1981), the plaintiff was limited to five witnesses on the question of mental capacity. The decision of the court to exclude an additional thirteen witnesses was upheld. In *State v. Webster,* 111 N.C. App. 72 (1993), the trial court properly exercised its discretion in limiting defendant to eight character witnesses.

E. INTEGRITY OF PROCESS. Rule 403.

In an effort to protect the integrity of the fact-finding process, the court may exclude otherwise relevant evidence if its admission would tend to confuse the issues or mislead the jury. *See State v. Knox,* 78 N.C. App. 493 (1985). In *Knox,* a Professor of Psychology at UNCC who had not interviewed the victim in this criminal case, proposed to testify about "memory variables" and "unconscious transference" affecting eyewitness identification. Held, the court did not abuse its discretion in excluding the evidence under Rule 403. Even relevant evidence may be excluded if its admission will confuse or mislead the jury. The decision is discretionary, reversible only for abuse of discretion. *State v. Cotton,* 318 N.C. 663 (1987). If the court erroneously fails to exercise its discretion, however, and rules as a matter of law, the aggrieved party is entitled to reconsideration. *Id.*

Since the introduction of character evidence is fraught with peril, in that the jury may make a decision based upon unpalatable aspects of a litigant's character rather than the merits of his case, character evidence is closely regulated by Rule 404, discussed below in detail.

F. PREJUDICIAL NATURE OF EVIDENCE.

If the probative value of otherwise relevant evidence is substantially outweighed by the danger of unfair prejudice, the court may exclude the evidence pursuant to Rule 403. "Substantially" is an elastic concept, so that the court has broad discretion in this area, and its decision is reversible only for abuse of discretion.

1. UNFAIR PREJUDICE.

Evidence which will benefit the State will necessarily prejudice the defendant. The question is whether the prejudice is unfair. *State v. Mercer,* 317 N.C. 87 (1986). Unfair prejudice has been described as an undue tendency to suggest decision on an improper basis, such as an appeal to the emotions and prejudices of the jury. *See State v. DeLeonardo,* 315 N.C. 762 (1986).

2. FACTORS IN EXERCISING DISCRETION.

In exercising its discretion, the court may consider whether there are alternatives to admission of the controversial evidence. The court must first consider whether the evidence in question is likely to appeal to the jury's emotions rather than the jury's intellect. Second, is the evidence of such nature that the jury is likely to assign it excess weight? Third, consider whether a limiting instruction will be likely to clarify and limit the use of the evidence by the jury, and will reduce chance of confusion or unfair prejudice to an acceptable level. Finally, is there other admissible evidence that would prove the fact in controversy?

G. PRESUMPTIVELY PREJUDICIAL EVIDENCE. There are some types of evidence that are presumptively more prejudicial than probative. In addition to those discussed above, such as offers to settle, remedial measures taken after an event, and the payment of medical and other expenses, the Rules normally require exclusion of evidence relating to the existence of liability insurance (Rule 411) and evidence of a victim's prior sexual history (Rule 412).

1. EXISTENCE OF LIABILITY INSURANCE.

Rule 411 provides that whether or not a person was insured may not be used as evidence that the person acted negligently or wrongfully. As the Commentary points out, there is at best a very slight connection between the presence of liability insurance and any inference of fault. Evidence about the existence of insurance coverage might very well mislead or unduly influence a jury verdict and is generally excluded. *Braddy v. Nationwide Mut. Liab. Ins. Co.*, 122 N.C. App. 402 (1996)(jury is to focus on the facts and not the existence of liability insurance).

a. WHEN EVIDENCE OF INSURANCE ADMISSIBLE.

The rule does not require the exclusion of evidence of insurance when offered for a proper purpose, "such as proof of agency, ownership, or control, or bias or prejudice of a witness." *Warren v. Jackson,* 125 N.C. App. 96 (1997). The listing of permissible purposes is not exhaustive. *Johnson v. Skinner,* 99 N.C. App. 1 (1990). In *Johnson v. Skinner,* plaintiff was allowed to admit evidence of liability insurance to show defendant's motive for using dealer tags after his own insurance coverage had expired, to show notice to Toyota that defendant's insurance coverage had expired, and to allow jury to assess foreseeability of an accident where a person whose insurance coverage had expired was allowed to use dealer tags on his vehicle.

2. VICTIM'S PRIOR SEXUAL BEHAVIOR. Rape Shield Law – Rule 412.

Rule 412 provides, in summary, that the prior sexual behavior of the complainant in defendant's trial for commission of a sex offense is irrelevant unless (a) the behavior was between the complainant and the defendant; (b) the evidence of specific instances of sexual behavior is offered to show the acts charged were not committed by the defendant; or (c) evidence tends to show that the victim consented (or appeared to consent) to the sexual acts in question; or (d) is evidence used as the basis of expert testimony that the complainant fantasized or invented the acts charged. *State v. Alverson,* 91 N.C. App. 577 (1988).

a. PROCEDURE.

The party seeking to introduce evidence about a victim's prior sexual behavior must first apply to the court for a determination of the admissibility of the evidence. The application may be prior to trial pursuant to G. S. 15A-952, or at the time the evidence is offered. The court is to conduct an in camera hearing and determine the question. If the evidence is relevant, the court is to enter an order allowing its admission and setting out "the nature of the questions which will be permitted." Rule 412(d).

The court can close the hearing to the public. *State v. McNeil,* 99 N.C. App. 235 (1990).

Where the proponent of the evidence did not request a hearing, the court could, pursuant to the Rule, exclude the questions asked . *State v. Fenn,* 94 N.C. App. 127 (1989).

b. EXAMPLES OF INADMISSIBLE EVIDENCE.

The virginity of the victim is not a proper subject of inquiry under the Rule. *State v. Autry,* 321 N.C. 392 (1988). Evidence that victim was a prostitute not admissible, as prostitutes may be sexual assault victims. *State v. Fletcher,* 125 N.C. App. 505 (1997). Child's prior knowledge of sexual matters not admissible under the Rule. *State v. Bass,* 121 N.C. App. 306 (1996). Prior sexual abuse of victim more than two years before incident in question excluded as irrelevant and possibly confusing to jury. *State v. Holden,* 106 N.C. App. 244 (1992). Evidence than victim traded sex for crack cocaine on one occasion not enough to show a pattern. *State v. Ginyard,* 122 N.C. App. 25 (1996).

c. EXAMPLES OF ADMISSIBLE EVIDENCE.

Defendant could offer evidence to show previous acts of bondage between him and complainant, sexual acts on a leather couch and on a piano stool, and the watching of pornographic movies, as the evidence went to the defense of consent. *State v. Jenkins,* 115 N.C. App. 520 (1994). Evidence of prior sexual acts between complainant and defendant on trial for her rape were admissible, because prior consent from complainant is relevant to complainant's subsequent consent to that defendant; however, "testimony that complainant consented to sexual relations with two men not on trial during a different encounter than that with defendant is not evidence that she consented to sexual relations with defendant. *State v. Ginyard,* 122 N.C. App. 25, 31-32 (1996).

III. CHARACTER EVIDENCE.

A. GENERALLY—CHARACTER v. HABIT.

Rule 405 sets out the methods of proving character, provided character evidence is admissible under Rule 404, while Rule 406 deals with evidence of the habits of a person and the routine practices of a business or other organization. The distinction between character and habit is important, since the admission of character evidence is strictly regulated by Rule 404, while habit evidence is more freely admitted pursuant to Rule 406. While character may deal with a person's propensity to act in a certain way, habit may best be said to describe how a person acts in response to a certain repetitive situation. For example, a person may testify that he always deposits all rent payments on the day he receives them in order to prove the date of his receipt of certain funds. Evidence of a character trait might be that a person is considered to be an law-abiding person. The line between the two may seem blurred on occasion. Rule 406 is actually more a rule of admissibility, rather than a limitation on the admission of relevant evidence as are the other rules in Article 4.

B. CHARACTER EVIDENCE GENERALLY. RULE 404(a).

To avoid having the jury give too much weight to undesirable character traits of a litigant, Rule 404 (a) provides:

> (a) Character evidence generally.--Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
> (1) Character of accused. -- Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
> (2) Character of victim.-- Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
> (3) Character of witness.-- Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

1. CHARACTER OF ACCUSED.

Although as a general rule character evidence is not admissible as circumstantial evidence of a person's conduct on a particular occasion, Rule 404 (a)(1) allows a defendant to introduce evidence of a "pertinent trait of his character;" if he does so, the State may introduce rebuttal evidence.

a. "PERTINENT" IS EQUIVALENT TO "RELEVANT."

Thus, defendant may not merely offer evidence of "good character," but must offer evidence of some character trait that is relevant to an issue in the case on trial. *State v. Squire,* 321 N.C. 541 (1988). "For example, if one were charged with a crime of violence, character for peaceableness would be pertinent; and if charged with embezzlement, honesty would be pertinent." *State v. Sexton,* 336 N.C. 321, 359-360 (1994). That a defendant is "law-abiding" is almost always pertinent. *Id.* Evidence that defendant lacked several mental problems was not pertinent to the commission of a sexual assault. *State v. Wagoner,* 131 N.C. App. 285 (1998). Nor was defendant's good military record relevant to his guilt or innocence in a rape case. *State v. Mustafa,* 113 N.C. App. 240 (1994).

b. STATE'S EVIDENCE.

When defendant introduces character evidence, the State may then introduce rebuttal evidence, but not otherwise. *State v. Quick,* 329 N.C. 1 (1991).

c. JURY INSTRUCTION.

Defendant is entitled to an jury instruction on character trait as substantive evidence of his innocence, provided defendant satisfies a four-part test: (1) the evidence must be of a character trait (*e. g.*, law-abiding) rather than evidence of a fact (*e.g.*, no criminal convictions); (2) evidence must be in proper form as required by Rule 405; (3) trait must be relevant in the context of crime charged; and (4) defendant must instruct such an instruction. *State v. Moreno,* 98 N.C. App. 642 (1990).

2. CHARACTER OF VICTIM.

Rule 404 (a)(2) sets out two instances when the character of a victim may be introduced: first, when an accused introduces evidence of a pertinent trait of the victim, or the State offers such evidence in rebuttal; and second, by the State in a homicide case to rebut evidence that the victim was the first aggressor.

a. TRAIT MUST BE "PERTINENT."

Evidence that a victim was reputed to be a homosexual was not a pertinent character trait within the meaning of Rule 404(a)(2) where the defendant in a homicide case claimed the killing was in response to the victim's threatened sexual assault on him. *State v. Laws,* 345 N.C. 585 (1997)("a victim's homosexuality has no more tendency to prove that he would be likely to sexually assault a male than would a victim's heterosexuality show that he would be likely to sexually assault a female). *Accord, see State v. Hodgin,* 210 N.C. 371, 376-77 (1936) and *State v. Lovin,* 339 N.C. 695, 706 (1995). In a homicide case where the defense was accident, evidence of the deceased's violent character was not pertinent. *State v. Goodson,* 341 N.C. 619 (1995). Likewise, where the defendant did not know the deceased prior to the fight, evidence of specific instances of victim's violent character was irrelevant on the questions of the reasonableness of defendant's apprehension of bodily harm and his right to use force under the circumstances. *State v. Ray,* 125 N.C. App. 721 (1997).

b. FIRST AGGRESSOR RULE.

If a defendant offers evidence that the victim was the first aggressor in the confrontation which led to his death, the State may then offer evidence of the victim's peacefulness. *State v. Faison,* 330 N.C. 347 (1991).

3. CHARACTER OF WITNESS

Rule 404(a)(3) provides that the credibility of a witness may be attacked, as set out in Rules 607, 608, and 609.

a. ANY PARTY MAY IMPEACH A WITNESS.

This rule changes the pre-Rule NC position that a party vouches for a witness by calling him to the stand. Any party may now impeach a witness. *State v. Covington,* 315 N.C. 352 (1986). Rule 607.

b. HOW CREDIBILITY OF A WITNESS MAY BE ATTACKED.

The credibility of a witness may be attacked or supported by either reputation or opinion evidence pursuant to Rule 405(a), with two limitations: (1) the evidence may refer only to evidence of a witness' character for truthfulness or untruthfulness; (2) evidence of truthful character is admissible only when a witness' character for truthfulness has been attacked. Rule 608. *State v. Hewett,* 93 N.C. App. 1 (1989).

Rule 608(b) allows a witness to be cross-examined about specific acts of misconduct (other than convictions, which are covered by Rule 609) for the purpose of attacking or supporting the witness' credibility. This modifies prior procedure. *See State v. Dixon*, 77 N.C. App. 27 (1985). There is a four-part test for admissibility:

(i) the purpose is to enhance or impeach credibility;
(ii) the conduct is probative of credibility, and not too remote;
(iii) the conduct did not result in a conviction; and
(iv) the inquiry is made during cross-examination.

State v. Morgan, 315 N.C. 626, 634 (1986). Before allowing the inquiry, the trial judge "must determine, in his discretion, pursuant to Rule 403, that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury, and that the questioning will not harass or unduly embarrass the witness. Even if the trial judge allows the inquiry on cross-examination, extrinsic evidence of the conduct is not admissible. N.C.G.S. s. 8C-1, Rule 608(b) and Commentary." *Id.* (Emphasis added).

Morgan also gives us an indication of the types of conduct which are indicative of a witness' credibility: "use of false identity,

making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to deceive or defraud others. 3 D. Louisell & C. Mueller, Federal Evidence s. 305 (1979)(footnotes omitted)." 315 N.C. at 635. Types of conduct not indicative of credibility include sexual relationships or proclivities, bearing illegitimate children, the use of drugs or alcohol, violence against other persons, crimes of force or intimidation, and crimes based on malum prohibitum. *Id.*

c. IMPEACHMENT OF WITNESS BY PROOF OF CRIMINAL CONVICTION.

A witness may be impeached by evidence that the witness has an unpardoned conviction of a felony, or a Class A1, Class 1, or Class 2, misdemeanor. Rule 609. However, evidence of a 10+-year-old conviction is not admissible unless: (1) the proponent of the evidence has given prior notice of an intent to use it; and (2) the court finds, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. *State v. Artis,* 325 N.C. 278 (1989)(17- and 27-year-old convictions improperly admitted in evidence without some facts or circumstances indicating some probative value). The court must make findings to support its determination that the probative value of 10+-year-old offenses outweighed their prejudicial effect. *State v. Farris,* 93 N.C. App. 757 (1989)(failure to make findings resulted in new trial); *State v. Porter,* 326 N.C. 489 (1990)(court must comply with rule before allowing cross-examination about convictions more than 10 years old). Mere conclusory findings do not suffice. *State v. Hensley,* 77 N.C. App. 192 (1985). However, defendant can open the door to cross-examination about 10+-year-old offenses by denying his commission of offenses during the relevant period. *State v. Blankenship,* 89 N.C. App. 465 (1988); *State v. Chandler,* 100 N.C. App. 706 (1990)(after court granted defendant's motion to exclude evidence of marijuana conviction more than 10 years old, defendant testified in answer to his counsel's question that his convictions during the past 10 years were the only convictions he had; State then allowed to cross-examine to show old conviction).

The pendency of an appeal does not render evidence of a conviction inadmissible, but evidence that an appeal is pending may be admitted. In a criminal case, a witness other than the accused may be impeached by a juvenile adjudication which would be admissible to attack the credibility of an adult and the court is satisfied that admission of the evidence is necessary for a fair determination of the issue of guilt or innocence.

i. CONVICTION.

In addition to entry of judgment by the court following a jury verdict or plea of guilty by a defendant, a conviction includes an adjudication of guilt following a no contest plea (*State v. Petty,* 100 N.C. App. 465 (1990)) and includes a prayer for judgment continued (*State v. Sidberry,* 337 N.C. 779 (1994), but does not include a PJC on payment of costs. *State v. Lynch,* 337 N.C. 415 (1994). Simply being charged with a crime is not included. *State v. Jones,* 329 N.C. 254 (1991).

ii. EXTENT OF INQUIRY.

The prosecutor may only inquire into prior convictions to this extent:

(1) Name of the crime;
(2) Time and place of conviction;
(3) Punishment for the crime.

See State v. Perkins, 345 N.C. 254, 481 S.E.2d 25 (1997); *State v. Lynch,* 334 N.C. 402, 432 S.E.2d 349 (1993). However, the prosecutor may provide a witness who denies certain prior convictions with enough detail to "jog" his or her memory. *State v. White*, 349 N.C. 535, 508 S.E.2d 253 (1998). Normally, the prosecutor may not cross-examine defendant as to a prior conviction by asking about the date of arrest. *State v. Von Cunningham,* 97 N.C. App. 631, 389 S.E.2d 286 (1990)(error held not to be prejudicial).

C. EVIDENCE OF OTHER CRIMES, WRONGS, OR ACTS – RULE 404(b).

Most–cited and litigated section of the evidence code is probably 404(b) which details situations in which evidence of character may be admissible for a limited purpose <u>other</u> than to show conformity on a particular occasion. Rule 404(b) provides:

> Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

1. RULE OF INCLUSION.

It is often stated that Rule 404(b) is a rule of *inclusion* of relevant evidence of other crimes, wrongs, or acts of a defendant. Such evidence should be *excluded*, however, if the only probative value of the evidence is to show defendant's propensity or disposition to commit an offense of the nature of the charged offense. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990). The listing of other purposes in the Rule is not an exhaustive listing, State *v. Blackwell*, 133 N.C. App. 31, 514 S.E.2d 116 (1999), so evidence which cannot be placed in one of the enumerated categories may yet be admissible. Nor is an adjudication of guilt a prerequisite for admission of bad acts evidence under this rule. *State v. Weldon*, 314 N.C. 401, 333 S.E.2d 701 (1983).

"Even though evidence presented may tend to show that defendant may have committed other crimes or 'bad acts,' or that the defendant had a propensity to commit those acts, it will be admissible if it is relevant for some other purpose." *State v. Bynum*, 111 N.C. App. 845, 848, 433 S.E.2d 778, 780, *disc. review denied*, 335 N.C. 239, 439 S.E.2d 153 (1993).

2. PROCEDURE.

Bynum sets out a three-part procedure for the trial court to follow in determining admissibility of evidence offered under Rule 404(b):

> First, is the evidence of the type, and being offered for a proper purpose under Rule 404(b)? (*See State v. Cummings,* 326 N.C. 298 (1990));
>
> Second, is the evidence relevant to the charges being tried?
>
> Third, is the probative value of the evidence SUBSTANTIALLY outweighed by its prejudicial effect? (*See State v. Morgan,* 315 N.C. 626 (1986)). Generally, all such evidence will be prejudicial to the defendant's position. However, as Rule 404(b) is a rule of inclusion, such evidence is nevertheless admissible unless the Court determines that its prejudicial effect substantially outweighs its legitimate probative value.

Because it is not always clear under which rule the questioned evidence is offered, *Morgan* makes it clear that "the better practice is for the proponent of the evidence, out of the presence of the jury, to inform the court of the rule under which he is proceeding and to obtain a ruling on its admissibility prior to offering it." 315 N. C. at 640. The task of the appellate court "is complicated [when] there is nothing in the record

indicating under which rule the prosecutor was proceeding or under which rule the trial court overruled the objection." 315 N.C. at 633.

The overriding consideration is that the rule of inclusion is "constrained by the requirements of similarity and temporal proximity." *State v. Lloyd,* 354 N.C. 76, 88 (2001). See the Order attached to this manuscript as Appendix A, entered by Judge W. Erwin Spainhour in the case of *State v. Darrell Love* (Rowan County File Numbers 99-CRS-10359 and 10406) for an example of the court's consideration of the similarity and temporal proximity factors in performing a Rule 404(b) and Rule 403 analysis. *State v. Love* has now been affirmed by the COA, and the opinion is summarized below.

Numerous cases have discussed the "temporality" requirement in the context of a prosecution for second-degree murder based on the operation of an automobile under the influence. The State often uses prior motor vehicle violations to prove malice. In *State v. McAllister,* 138 N.C. App. 252 (2000), a 7-year-old DWI conviction was properly used to prove malice. In *State v. Rich,* 351 N.C. 386, 399 (2000), the Court allowed use of driving convictions 9 years old. In *State v. Grice,* 131 N.C. App. 48 (1998), the convictions were more than 10 years old. Finally, in *State v. Miller,* 142 N.C. App. 435 (2001), the COA approved the use of driving offenses – C & R and DWI – between 13 and 16 years prior to the date of offense, to prove malice in a prosecution for second degree murder.

3. DISCRETION OF COURT.

Ultimately, whether to admit evidence of other bad acts or crimes is a matter left to the "sound discretion" of the trial court, and will be reviewed on appeal only to determine if the trial court abused its discretion. In performing that review, the appellate courts often review whether the trial court gave a proper limiting instruction to the jury. The jury is, of course, presumed to follow the court's instructions. *State v. Rouse*, 339 N.C. 59, 92 (1994). It is not error, however, for the court to fail to give a limiting instruction pursuant to Rule 105 in the absence of a request that it do so.

4. MOTIONS IN LIMINE.

The defendant will often file a motion *in limine* prior to trial in an effort to suppress testimony of the underlying facts of his previous convictions. While it is usually preferable for the trial court to hear the motion before trial, the court may, in an appropriate case, defer its ruling on the motion. *See, e.g., State v. Holman*, 353 N.C. 174, 185 (2000) ("trial court . . . deferred its ruling on the motion until sufficient information was presented to allow the trial court to make a proper and informed decision").

5. 404(b) NOT A DISCOVERY STATUTE.

Our Supreme Court has made it clear that Rule 404(b) deals with the admissibility of evidence, and is not a discovery statute. *State v. Payne,* 337 N.C. 505, 516 (1994). In *State v. Ocasio,* 344 N.C. 568 (1996), defendant Ocasio moved prior to trial that the State disclose evidence of prior crimes and/or bad acts it intended to offer against him. The trial court's denial of the motion was upheld on appeal. 344 N.C. at 576. Defendant may, of course, obtain from the State prior to trial such information as the substance of any of his oral statements in the possession of the State. G. S. 15A-903.

6. RECENT APPELLATE DECISIONS.

Recent cases decided by the appellate courts demonstrate the admissibility of Rule 404(b) evidence in appropriate cases. It appears that district attorneys are increasingly active – and imaginative – in seeking the admission of bad acts evidence.

In an effort to better inform the reader's personal research, the cases summarized below have been given brief capitalized headings identifying the purpose for which the 404(b) evidence was allowed (or not allowed), and highlighting cases with a significant similarity or remoteness analysis and discussion.

INTENT – KNOWLEDGE – PLAN.

a. *State v. Woolridge*, 147 N.C. App. 685, ___ S.E.2d ____ (2001).

This case involved a Wake County heroin prosecution. At defendant Woolridge's trial for trafficking in heroin and related charges, the State proffered evidence of defendant's arrest in Durham for possession of heroin. The "charges in Durham County involved the same controlled substance, the same co-defendant, and occurred less than one month prior to defendant's arrest on the Wake County criminal charges in the present action." The State argued that, although the charges in Durham County were ultimately dismissed, the evidence showed intent, knowledge, and a plan on the part of the defendant.

After holding a Rule 404(b) hearing at which defendant testified, the court found that the evidence of the Durham County arrest was relevant, and tended to show defendant's intent, his knowledge of controlled substances, and a common plan or scheme to traffic heroin and other controlled substances. The court further found

that its relevance outweighed any prejudicial effect of the evidence, and concluded that it was admissible.

Without lengthy discussion, the Court of Appeals recited the general rule, and held that the trial court properly heard the matter, made findings of fact that supported its conclusions of law, gave a limiting instruction to the jury, and did not abuse its discretion in admitting the evidence.

IDENTITY – 6-YEAR-OLD INCIDENT ADMISSIBLE.

b. *State v. Barkley*, 144 N.C. App. 514 (3 July 2001).

A victim was unable to identify her attacker in this rape prosecution from Mecklenburg County. DNA evidence linked the defendant to her kidnapping and rape. During defendant's trial, the State proffered the testimony of another woman, Ms. Ferguson, who testified at a voir dire hearing that defendant raped her about six years earlier. Court records indicated that defendant pled guilty to second-degree rape in the earlier incident with Ferguson. Defendant testified on voir dire that he pled guilty only to avoid the chance of conviction of first-degree rape.

The State contended that evidence of the earlier rape was relevant to show "the identity of the perpetrator and to show evidence of a common plan or scheme." The trial court ruled that evidence of the earlier rape was admissible at trial and denied defendant's motion to continue on the grounds that he was not given notice of the State's intent to present evidence of the Ferguson incident. Defendant did not offer evidence, and was convicted of both kidnapping and rape of the victim.

Affirming the ruling of the trial court, the Court of Appeals concluded that the similarities between the rapes of Ferguson and McClendon support a reasonable inference that the crimes were committed by the same person. Both victims were young black females accosted in Charlotte in the early morning hours. In both cases, the victims were grabbed from behind by the mouth and the assailant held a sharp object to their throats while directing them to a dark secluded area. In addition defendant disrobed both victims and forced them to have vaginal and anal sex. *Barkley* at 522.

The appellate court also pointed out that the similarities need not "rise to the level of the unique and bizarre," but must support a reasonable inference that the same person committed both the earlier and later acts. Further, the 6-year lapse in time did not

trouble the Court, because defendant had spent much of that period in custody for the earlier rape, and had only been released three and one-half months prior to this incident. (Thus, it appears that the time in custody may be "deducted" from the time between the incidents in considering their temporal relationship.)

Although defendant Barkley did not know Ferguson would be testifying at his trial, the State had notified him of hearsay statements made by defendant that were to be offered by a non-law enforcement officer pursuant to Rule 404(b). Therefore, the trial court did not abuse its discretion in denying defendant's motion to continue the case. "[T] he State is not required to disclose the name of the witness testifying to the statement or the circumstances surrounding the oral statement. *State v. Strickland*, 346 N.C. 443, 488 S.E.2d 194 (1997), *cert. denied*, 522 U.S. 1078, 139 L.Ed.2d 757 (1988)."

INTENT – KNOWLEDGE. LIMITING INSTRUCTION GIVEN.

c. *State v. Wilkerson*, ___ N.C. App. ___ (5 February 2002).

Wilkerson was convicted by a jury of PWISD cocaine and trafficking in cocaine. Eunice Tolar, acting for the Eden Police Department, purchased cocaine from Wilkerson at his residence on 25 January 1995. On the following day, a search warrant was executed at defendant's residence. A test tube containing cocaine was found in defendant's pocket, cocaine was found in the commode and a crack pipe in a bedroom. Officer Pyrtle, who assisted in the search, testified that he also searched the same residence pursuant to a search warrant on 15 June 1994. Pyrtle testified that on the earlier occasion, he found defendant Wilkerson in the kitchen, and cocaine in a test tube in the kitchen trash can. Pyrtle also read a statement made by defendant on the day of the 1994 search in which defendant acknowledged cooking powder cocaine into crack, but said he did so for his own use. An undercover SBI agent testified that on 11 October 1994 and on 12 October 1994 she purchased crack cocaine from the defendant at his residence. After the officers testified, a deputy clerk of court testified that defendant had previous convictions for (1) possession of cocaine on 15 June 1994, (2) possession with intent to sell or deliver cocaine on 11 October 1994, and (3) sale and delivery of cocaine on 11 October 1994. Defendant offered no evidence.

On appeal, defendant challenged the admissibility of the prior bad acts in 1994. The Court of Appeals reasoned that since intent and knowledge are elements of the offenses for which defendant was

tried, the State could properly offer evidence which tended to show the requisite mental intent or state, even though such evidence disclosed the commission of another offense. The trial court properly instructed the jury that defendant's statement from 15 June 1994, and the sales in October 1994, could be considered only as evidence of intent and knowledge. The trial court also considered and weighed the prejudicial effect of the evidence against its probative value.

"We conclude that the other crimes were sufficiently similar: (1) all occurred at 133 Roosevelt Street, (2) defendant was present, (3) all involved cocaine, and (4) the prior convictions occurred within a year of the present offenses. We also conclude that the testimony of the underlying facts and circumstances leading to defendant's prior convictions was relevant to show intent to sell and knowing possession of cocaine."

The Court also discussed – and approved -- the admission of evidence of both the underlying facts and circumstances of the earlier incidents, and evidence that defendant had been convicted of the bad act. Note that the trial court in *Wilkerson* carefully performed the balancing test required by Rule 403, and also instructed the jury pursuant to Rule 105 as to the purposes for which the bad acts evidence could be considered.

In dissent, Judge Wynn was concerned about the admission of evidence of defendant's previous convictions, and would find such evidence "inherently prejudicial."

COMMON PLAN OR SCHEME – EVIDENCE OF 1986 SEX OFFENSES ADMISSIBLE.

d. *State v. Patterson,* 149 N.C. App. 354 (2002).

Mark Patterson was convicted of kidnapping and various sex-related offenses with minor children. On appeal, defendant objected to the admission of evidence of defendant's bad acts and convictions of contributing to delinquency of minors in 1986 in Maryland. In the NC case, evidence tended to show that defendant met the victims at a skating rink, invited them to his home for parties involving alcohol and drugs, took photos of the victims in various stages of undress, and attempted to engage in sex with at least one of the minors. In the Maryland incidents, evidence tended to show that defendant met minor girls at a skating rink; invited them to parties at his home where they were given liquor, marijuana, and caffeine pills; took photos of them during strip

poker games, and kept a log of his conquests, listing the ages of the girls and the type of sex he had with them. Understandably, the Court of Appeals held that the acts were sufficiently similar. Further, the Court found that the lapse of time was no bar to their admission. Where there are similar acts over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan. The trial court did not abuse its discretion in finding evidence of a common scheme or plan more probative than prejudicial under the balancing test of Rule 403.

MOTIVE - CONTEXT AND CIRCUMSTANCES.

e. *State v. Holadia and Cooper,* 149 N.C. App. 248 (2002).

Defendants appealed convictions of armed robbery with a dangerous weapon and AWDW, ISI. The State's evidence tended to show that defendants entered a trailer with guns drawn on 14 June 1999 and abused and robbed the occupants. One of the occupants, Eddie Spencer, testified that defendant Holadia kicked and pistol-whipped him, and that Holadia said to him "why did you bring that undercover to my house," referring to a previous drug deal. On appeal, Holadia complained that such evidence was admitted in violation of Rule 404(b) and Rule 403. The State argued, and the Court of Appeals agreed, that the questioned testimony was relevant to show both motive and the "immediate context and circumstances" of the crime. When evidence leading up to a crime is a part of the scenario that helps explain the setting, there is no error in permitting the jury to view the criminal episode in the context in which it happened.

IDENTITY.

f. *State v. Hamilton*, ___ N.C. App. ____ (4 June 2002). Identity was also at issue in this murder prosecution. Defendant called his former girl friend as a witness. On cross-examination, she testified that defendant had assaulted her with a butcher knife about two years earlier. Although defendant did not properly object to the introduction of the evidence, the Court of Appeals opined that it was admissible under Rule 404 (b):

> Here, the risk of undue prejudice does not outweigh the probative value of the evidence, see N.C.R. Evid. 403, because of the similarity and temporal proximity of the incidents. Knives were used in both assaults. Defendant said he collected knives, and that the fourth knife in his collection was the one used to assault [his girl-friend]. One

> of the remaining knives in defendant's collection was consistent with the wounds suffered by the victim in this case. [The girl-friend] testified that defendant cut her six times; the victim here was stabbed seven times. The time period between the two assaults is two years. (Citation omitted). Accordingly, the probative value of the evidence introduced in this case was not merely to show propensity. We therefore overrule this assignment of error.

COMMON PLAN OR SCHEME – SEX OFFENSES.

g. *State v. Brothers,* ___ N.C. App. ___ (18 June 2002).

Defendant was prosecuted for sex offenses against his six-year-old step-daughter. Evidence was introduced by the victim's then twelve-year-old sister of similar sexual actions against her by defendant. "[T]he trial court admitted evidence of the prior acts on the grounds that it showed identity, a pattern of opportunity, and a common plan or scheme to commit sexual offenses against the victim and her sister, S.S. Defendant was the stepfather to both girls, and stayed at home while his wife, the girls' mother, was at work. Both girls were under the age of thirteen at the time of the sexual abuse and the incidents with respect to both girls occurred when they were alone with him. Both girls testified that defendant exposed and fondled himself in their presence, touched their genitalia on repeated occasions, and masturbated in their presence. The trial court did not err in permitting the testimony of S. S. pursuant to Rule 404(b) to show identity, a pattern of opportunity, and a common plan or scheme to commit sexual abuses against his stepdaughters."

MOTIVE, PLAN AND PREPARATION.

h. *State v. Parker,* 354 N.C. 268 (2001).

Defendant Parker was indicted for kidnapping and murdering 86-year-old Alice Covington on Tuesday, 12 May 1998. Parker was a home health-care worker for a friend of Covington, who was a resident at a Retirement Village in Raleigh. Parker had been convicted on 7 August 1995 to 16 felony counts of obtaining property by false pretenses from an 85-year-old lady for whom Parker provided care. Parker was on probation as a result, ordered to pay restitution in the total amount of $44,000 at the rate of $920.43 per month. By April 1, 1998, defendant Parker was in arrears more than $4,000 in restitution payments, and had expressed concern about how she would be able to make her

payments. On 30 April 1998, Parker cashed a $2,500 check signed by the victim, and paid $2,000 on her ordered restitution. On 8 May 1998, defendant attempted to cash a $600 check at the drive-through window of a bank but did not have sufficient funds in her account. When the bank refused to cash her check, she created such a disturbance that the police were called. On 12 May 1998, defendant was seen struggling with the victim at a parking lot. Later that same afternoon, defendant withdrew $2,500 from the victim's bank account, using victim's withdrawal slip and driver's license. The teller saw victim in the car, but the victim was not moving and appeared to be asleep. Defendant drowned the victim on 12 May 1998.

Defendant Parker was sentenced to death following her conviction of first-degree murder. On appeal, she argued that the trial court erred in allowing evidence of her 1995 convictions of obtaining property by false pretenses and the 8 May 1998 bank incident. Held, the earlier convictions were based on defendant's forgery of checks of an elderly woman for whom she was providing care. As a result, she was placed on probation and ordered to make substantial restitution payments. Thus, the earlier convictions show a similar *modus operandi,* and are relevant as proof of motive, plan, and preparation. Further, evidence of the convictions and resulting probation are evidence of defendant's urgent need for money to make required payments of restitution and thus provide a motive for the kidnapping and murder of victim. Likewise, the bank incident, only a few days before the murder, shows defendant's frustration and need for money, and provide a motive for the murder of Ms. Covington.

PRIOR ROBBERIES DISSIMILAR – INADMISSIBLE.

i. *State v. Al-Bayyinah,* 356 N.C. 150 (2002)

Admission of dissimilar prior incidents resulted in a new trial for a convicted robber and murderer in this case. Defendant was convicted of the robbery and murder of a victim on 6 March 1998. The trial court allowed the State to introduce evidence of earlier robberies of another victim allegedly committed by defendant on 20 and 22 January 1998. The Supreme Court found that the two earlier incidents were dissimilar to each other and to the March robbery and murder. The Court was also troubled by the one-photo suggestive lineup used to identify defendant as the perpetrator of the January robberies.

IDENTITY – COMMON PLAN OR SCHEME – INTENT
MODUS OPERANDI

j. *State v. Darrell Love* -- N.C. App. – (3 September 2002).

During defendant Love's trial for first degree sexual offense and first degree kidnapping of a six-year-old female child, the court allowed evidence that some 20 years earlier defendant had engaged in sexual acts with the present victim's mother, who was then nine years of age. The mother testified that defendant told her not to tell anyone about the occurrences and that she was scared. In the instant case, the victim testified that defendant told her not to tell her mother what happened. The trial court allowed the evidence to show proof of identity, a common plan or scheme, modus operandi, and intent. Here, the two incidents, although 20 years apart, were "strikingly similar." In both instances, the defendant made the children sit on his face and licked their genitalia. Both were related to him. The trial court made findings of similarity. Further, the trial court determined that the probative value of the evidence outweighed its prejudicial effect, and there is no evidence in the record reflecting an abuse of discretion on the part of the trial court. No error. (See Appendix A for Order entered by the trial court in this case.)

(1) ABSENCE OF MISTAKE – COMMON PLAN OR SCHEME
"UNNATURAL ATTRACTION" TO YOUNG GIRLS.
(2) PORNOGRAPHY NOT ADMISSIBLE IN THIS CASE.

k. *State v. Frankie Ray Smith* -- N.C. App. – (3 September 2002)

In a prosecution for sexual offenses, defendant was accused of fondling his 12-year-old stepdaughter and digitally penetrating her. Defendant complained on appeal that the trial court allowed testimony concerning defendant's possession of pornographic magazines and videos at home and at work. He argued that the evidence was not relevant to his prosecution, and was more prejudicial than probative, in any event. Held, that the defendant's mere possession of pornographic material "without any evidence that defendant had asked the victim to look at pornographic materials other than the victim's mere speculation, was not relevant" to issues in this case. However, it does not rise to the level of prejudicial error due to other evidence against the defendant.

Further, the trial court did not err in allowing the testimony of another witness, Jennifer Maquis, that she had two sexual

encounters with the defendant when she was 15-years-old and babysitting for him. On the first occasion, Jennifer testified that the defendant performed oral sex on her without her consent. On the second occasion, that defendant had sexual intercourse with her without her consent, but that she did not fight the defendant. She did not report either incident to the authorities. After a voir dire, the trial court concluded that the testimony was relevant under Rule 404(b) to show absence of mistake, a common plan or scheme, and the defendant's "unnatural attraction to young girls." The trial court gave a proper limiting instruction to the jury. Held, despite some factual distinctions which go to the weight of the testimony, defendant's conduct with the two women was "sufficiently similar and proximate in time" to be admissible under Rule 404(b).

D. METHODS OF PROVING CHARACTER. RULE 405

Rule 405 provides:

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

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

1. GENERALLY.

Reputation of a person's character among his associates or in the community is admissible as an exception to the hearsay rule. Rule 803 (21). "Character" is made up of the "peculiar qualities impressed by nature and habit on the person, which distinguish him from others," *Bottoms v. Kent,* 48 N.C. 154 (1855), while "reputation" is "held by an appreciable group of people who have had an adequate basis upon which to form their opinion." *State v. McEachern,* 283 N.C. 57 (1983).

A foundation must be laid before a witness can testify about another witness' reputation. The testifying witness must show that he or she was familiar with an "appreciable group" of people who had an adequate basis upon which to form their opinion of a person's reputation for truthfulness in the community. *State v. Sidden,* 315 N.C. 539 (1986). However, a witness can give an opinion based on the witness' personal knowledge.

State v. Morrison, 84 N.C. App. 41, 48 (1987). A witness can testify that the witness has not heard anything bad about defendant. *State v. Martin,* 322 N.C. 229 (1988).

3. PROOF OF SPECIFIC ACTS.

Specific acts are admissible only on cross-examination of the witness. *State v. Darden,* 323 N.C. 356 (1988). Extrinsic evidence is not admissible to prove specific instances of prior conduct. *State v. Morgan,* 315 N.C. 626 (1986).

3. PROOF OF DEFENDANT'S CHARACTER

State may not offer evidence of defendant's character unless defendant has offered evidence and put character in issue. *State v. Taylor,* 117 N.C. App. 644 (1995). Defense counsel may ask a character witness only about the defendant's reputation or the witness' opinion, unless a specific trait is an element of a charge or defense. The defendant's lack of criminal history is not evidence of character. *State v. Bogle,* 324 N.C. 190 (1989).

On CROSS-EXAMINATION, however, the district attorney can ask defendant's character witness about specific instances of prior conduct, if relevant to the trait at issue, and the prosecutor has a good faith basis for the inquiry. *State v. Warren,* 327 N.C. 364 (1990). Rule 405(a). For example, where the defendant's testimony shows character trait for peacefulness, the district attorney could then cross-examine the defendant about prior assault convictions. *State v. Garner,* 330 N.C. 273 (1991). Likewise, the district attorney may cross-examine a character witness for defendant about defendant's prior convictions and misconduct, but not about charges or arrests. *State v. Martin,* 322 N. C. 229 (1988). The State may rebut defendant's character witness through the testimony of another character witness. Rule 404 (a)(1).

4. PROOF OF VICTIM'S CHARACTER

The defendant may offer evidence of a pertinent trait of victim's character, but on direct examination of the witness may ask only about the reputation of the victim or the witness' opinion, not about specific instances of prior conduct. *State v. Hewett,* 93 N.C. App. 1 (1989); *State v. Corn,* 307 N.C. 79 (1982)(could prove victim aggressor by introducing evidence of victim's reputation for violence, but could not introduce evidence of victim's prior convictions). However, where defendant defended a murder charge on the theory of accident, defendant could not offer evidence of victim's reputation for violence, since such evidence was not relevant. *State v. Goodson,* 341 N. C. 619(1995).

Where the defendant claims the victim was the aggressor, the State may offer evidence of the victim's peaceful character. *State v. Temples,* 74 N.C. App. 106 (1985).

IV. HABIT EVIDENCE - RULE 406

A. THE RULE.

Rule 406 provides:

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

B. GENERALLY.

The use of habit evidence establishes a permissible but NOT mandatory inference that the person acted in the usual way on the date in question. Thus, the finder of fact would not be required to find that the person acted in that manner on the date in question. The inquiry would seem to be whether the person had acted in that fashion on enough prior occasions to make the action in question rise to the level of a habit. The fact that person had done so only two or three times in past would not seem to rise to the level of "habit." See *State v. Chavis,* 141 N.C. App. 553 (2000)(trial court did not abuse its discretion in excluding evidence of an incident that occurred two years prior to the incident for which defendant was on trial, the trial court concluding that the two events did not constitute a habit within the meaning of Rule 406).

C. STANDARDS FOR ADMISSIONS.

In *Crawford v. Fayez,* 112 N.C. App. 328, 335 (1993), the Court of Appeals set out the procedures to be followed by the trial court in determining whether evidence of "habit" might be introduced. The Court held first that habit might be proven by specific instances of conduct. Second, however, the instances of conduct must be "sufficiently numerous to outweigh the danger, if any, of prejudice and confusion." In making a determination as to the sufficiency of the evidence, the trial court is to consider the "adequacy of sampling and uniformity of response, or the ratio of reactions to situations." No bright-line rule for admission can be formulated; the question must be decided on a case-by-case basis, and the trial court's rulings "will not be disturbed absent an abuse of discretion."

In *Crawford,* the question was whether the defendant physician had fully advised the plaintiffs of the risk associated with the steroid Medrol, including the risk of weakness and brittleness of the bones and joints. In addition to the testimony of

defendant, defendant offered the testimony of five of the 26 patients he had treated with Medrol. All five testified that he fully advised them of the risks of the drug. Held, "[i]n light of the similarity, number, and regularity of these instances of conduct, we find no abuse of discretion by the trial court in admitting the testimony of defendant's former patients." 112 N.C. App. at 336.

D. EXAMPLES

1. HABIT OF KEEPING MONEY.

Held, decedent's sister could testify about decedent's habit of keeping $20 to $40 on her person. *State v. Palmer,* 334 N.C. 104 (1993).

2. HABIT OF DRUG USE AND DRIVING.

In order to prove willful and wanton conduct, witness could testify about civil plaintiff's prior course of conduct involving alcohol, marijuana, and automobiles to show plaintiff's habit in that regard. *Anderson v. Austin,* 115 N.C. App. 134 (1994).

3. HABIT OF CLOSING WINDOWS.

A rest home employee was allowed to testify about her habit of keeping the home's screens and windows closed. *State v. Simpson,* 299 N.C. 335 (1980).

DISCUSSION PROBLEM
(This problem is based on one prepared by the IOG and distributed at an earlier seminar)

FACTS:

You are trying a case in which defendant is charged with assault with a deadly weapon, inflicting serious injury. The testimony tends to show that defendant and the victim were having a heated argument over a lady each considered his steady girl. The argument took place in the front yard of defendant's home. Defendant does not deny that he shot the victim, but claims the shooting was in self-defense. During the State's case in chief, the district attorney seeks to offer the following evidence. Is each item admissible?

1. Defendant's next-door neighbor is expected to testify that defendant has a real problem with people, especially neighborhood kids, cutting across the corner of his property on their way to the nearby mall. Specifically, that about a month before the present incident, defendant waved his gun in the air while screaming at two persons who were cutting across his property. Further, on several occasions during the past year, defendant has actually fired the gun into the air when he was upset over people taking the short cut.

2. A friend of defendant offers to testify that defendant is constantly shooting at things with his gun. During the past year, the friend has seen defendant shoot at a barking dog, a window in an old abandoned building, crows on power lines, and at defendant's own motorcycle.

3. The district attorney calls a witness who is prepared to testify that three years prior to this incident, defendant walked towards him carrying a knife and threatened to stab him if he did not get off his property pronto.

4. The victim in the present case is prepared to testify that defendant actually fired shots at him on an earlier occasion.

5. A certified copy of a criminal judgment in which defendant was convicted of assault with a deadly weapon five years ago.

6. A certified copy of a criminal judgment in which defendant was convicted of assault with a deadly weapon, inflicting serious injury, twelve years earlier.

DO YOU NEED MORE FACTS IN ORDER TO ANSWER ANY OF THESE QUESTIONS?

WOULD IT MAKE ANY DIFFERENCE TO ANY QUESTIONS IF DEFENDANT WAS NOT ARGUING SELF-DEFENSE, BUT INSTEAD DENIED THAT HE SHOT AT THE VICTIM?

SUGGESTIONS:

TESTIMONY OF NEIGHBOR: Does the fact that defendant shot at people months before this incident make it more likely that he was not acting in self-defense on this occasion? Probably not. In *State v. Irby*, 113 N.C. App. 427, 439 S.E.2d 226 (1994), defendant Irby shot at two other persons prior to this incident, in which he was charged in the shooting deaths of two people. The Court held in part that the fact he had shot at people before had no tendency to show that on this particular occasion he did not act in self-defense. See also *State v. Morgan*, 315 N.C. 626 (1986).

TESTIMONY OF FRIEND: Since self-defense is an issue, it is hard to see any valid Rule 404(b) purpose. You cannot use Rule 404(b) to offer evidence of the violent character of a defendant for the SOLE PURPOSE of showing that the defendant acted in accordance with that violent character on the occasion in question. In State v. Mills, 83 N.C. App. 606 (1986), the COA held that evidence that defendant had shot "an alarm clock, his motorcycle, a windowpane, wall, floor, bathroom mirror, antenna and meter box in a mobile home, into a garden to scare chickens, and through trees in the direction of a neighbor's house" was not admissible against defendant Mills who was charged with a shooting death.

TESTIMONY OF VICTIM: State v. Morgan indicates that the evidence might be admissible under Rule 404(b) in a case where self-defense was pled, IF the prior acts were relatively recent and committed against the same victim. Compare State v. Mills, 83 N.C. App. 606(1986) where defendant was charged in the shooting death of a friend. The COA refused to allow evidence that three years earlier the defendant had pointed a gun at the victim and told him to hush. The earlier incident was too remote and did not show that defendant had the intent to murder the victim on the occasion being tried. It probably doesn't matter whether defendant pointed a knife or shot a gun at the victim, except that if he had use the same weapon on both occasions that would give the State a better similarity argument, but allow the defendant to argue undue prejudice.

PRIOR CONVICTIONS: As a general rule, the "bare record" of the convictions is not admissible under Rule 404(b). The State will need to lay a foundation, if it can, of the underlying facts and circumstances which gave rise to the convictions. Those facts and circumstances will, of course, have to pass the usual 404(b) tests of similarity, relevance, and lack of undue prejudice. The twelve-year-old conviction may be too remote in any event to be probative. However, the courts have edged towards more and more remote events where they bear on a solid 404(b) purpose. See, for example, State v. Wilson, 106 N.C. App. 342 (1992), where the COA allowed evidence that defendant had been convicted to armed robbery thirteen-and-one-half years before trial as evidence of motive.

IF SELF-DEFENSE WERE NOT AT ISSUE, the 404(b) analysis would be different. For example, if the <u>identity</u> of the shooter was at issue, evidence about defendant's propensity to shoot at people on his property, and so on, would be much more likely to be relevant.

SUPPOSE THE DEFENDANT TESTIFIES. ON CROSS-EXAMINATION, MAY HE BE ASKED:

1. Didn't you wave your gun in the air and yell at some people walking through your yard about a month before this incident?

2. Didn't you shoot at this man [the victim] one time in the past?

3. Weren't you convicted in this very courtroom of assault with a deadly weapon about five years ago, and convicted of assault with a deadly weapon, inflicting serious injury, about twelve years ago? (If so, can the district attorney then question the defendant about the facts underlying the convictions?)

4. Haven't you physically assaulted [been convicted of physically assaulting] your wife on at least two occasions during the past ten years?

5. Weren't you charged two years ago with obtaining property by false pretenses? Suppose defendant answers: that charge was dropped. Can the district attorney explore the specific facts underlying the false pretense charge?

NOTE THAT WHEN WE ANALYZE CROSS-EXAMINATION QUESTIONS, WE ARE FOCUSING ON RULES 608 AND 609 --- NOT RULE 404(b).

1. Rule 608 only allows questions about specific instances of misconduct if they are probative of the witness' character for truthfulness or untruthfulness.

Same as one. HOWEVER, if defendant opens the door on direct examination by testifying that he has never acted in this manner or that he was always friendly and waved to people cutting across his yard, etc., THEN he is fair game for impeachment in this way.

The five-year-old conviction may be asked about, but the 12-year-old conviction is not admissible under Rule 609 UNLESS the Court determines "in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Rule 609(b) requires advance notice to the defendant. Usually, a conviction more than 10 years old must relate to the credibility of defendant in order to outweigh prejudicial effect. See State v. Carter, 326 N.C. 243 (1990). Normally, district attorney may not ask about underlying facts, but can ask about time and place of conviction and sentence imposed. State v. Lynch, 334 N.C. 402 (1993).

The prior assaults, if any, on the wife, are not relevant to this case nor are they probative of truthfulness under Rule 608. Can ask about convictions.

District attorney may ask about specific instances of misconduct involving untruthfulness under Rule 608. Usually bound by defendant's answer.

Regarding the discussion problems, I think structuring 2 or 3 to hit on the main topics addressed in the text is good idea. Perhaps one exploring the various limitations on relevant evidence. One on character, including 404(a) and (b). A third on habit.