



Introducing Documents At Adjudicatory Hearings

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G.S. 7B-804

- ▶ “Where the juvenile is alleged to be abused, neglected, or dependent, the rules of evidence in civil cases shall apply.”

NC Rule of Evidence 1101

- ▶ “Except as otherwise provided...or by statute, these rules [of evidence] apply to all actions and proceedings in the courts of this State.”

Scope of Admissible Evidence

- ▶ N.C. Gen. Stat. §§ 7B-802, 805, and 807(a) limit the matters to be considered, proved, and adjudicated to those conditions alleged in the juvenile petition.

In re D.C., 183 N.C. App. 344, 346, 644 S.E.2d 640, 641 (2007)

§ 7B805. Quantum of proof in adjudicatory hearing

- ▶ The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence.

Categories of Evidence

▶ **Demonstrative Evidence**

- ▶ Evidence that shows what something looks like (a neighborhood) or how something was done (an assault, a sobriety test). This can also include an attorney or witness demo.

▶ **Documentary Evidence**

- ▶ Paper documents, Phone records, Medical Records, Employment records.

▶ **Physical Evidence**

- ▶ Physical objects of evidentiary value.

Laying the Foundation

For physical or documentary evidence, proponent must establish:

- ▶ **1) Identity** - Can the witness identify it? (Rule 901)
 - ▶ Requirement of an “original” or acceptable “duplicate,” (Rules 1001-1003)
- ▶ **2) Authentication** – Is the item what you say it is (Rule 901) or is item self-authenticating (Rule 902)?
- ▶ **3) Relevance** - Does it make a consequential fact more or less probable? (Rules 401, 402, 403)
- ▶ **4) Chain of Custody** – Has it changed or been altered since it was collected? (Custody requirements may be relaxed with some documentary evidence, e.g., medical records).

Relevance:

Does it Move the Ball?



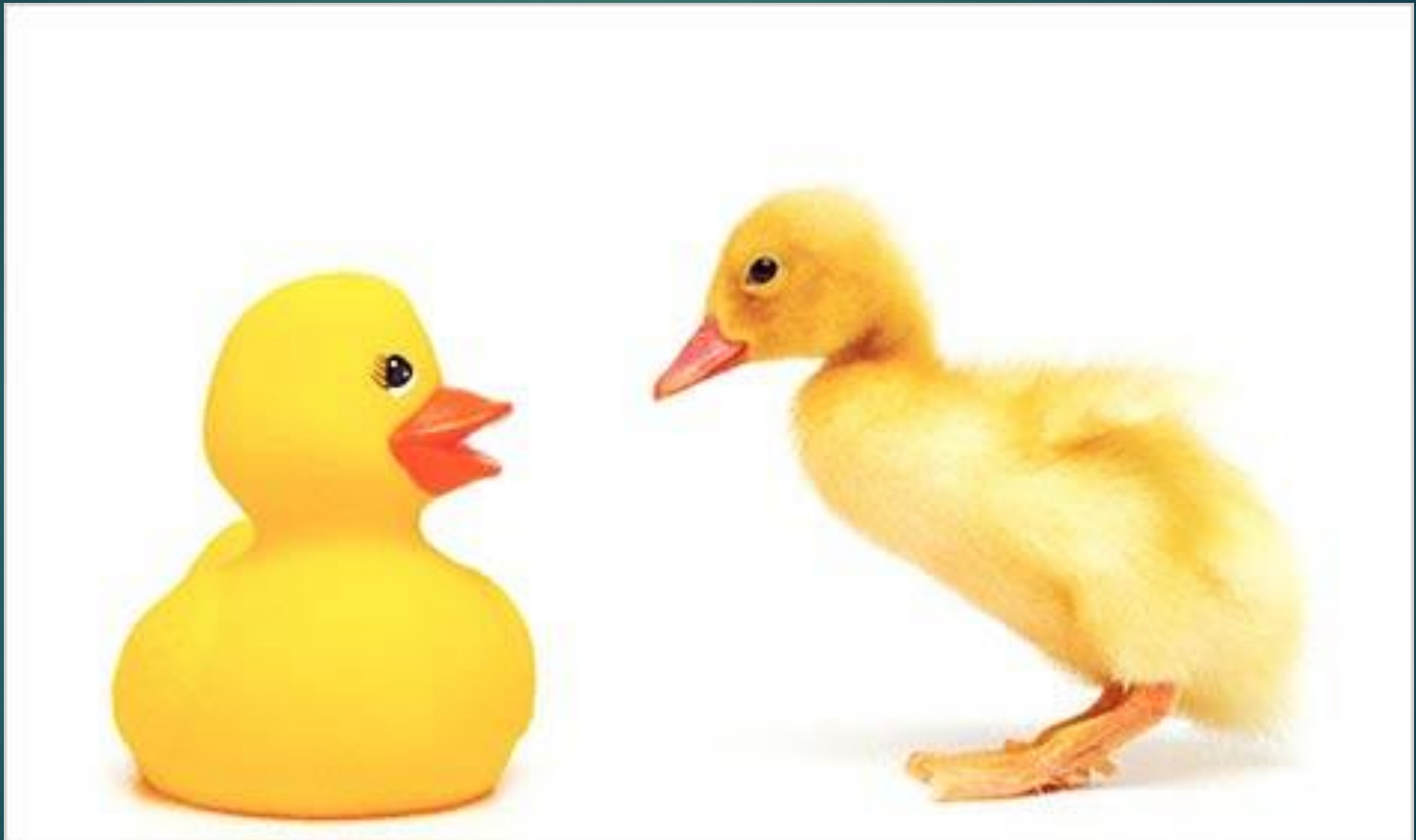
Identification and Authentication

- ▶ Often used interchangeably in Rule 901
- ▶ **Identification** – How can the witness identify it?
 - ▶ Markings on object, individual characteristics of the item, serial number
 - ▶ Witness is record custodian, or created the item herself
- ▶ **Authentication** – How does the evidence “connect to the relevant facts of the case”?
 - ▶ Linked to a relevant person, place, time, event?
 - ▶ **Authentication is a “special aspect of relevancy”**
 - ▶ G.S. 8C-901, Official Commentary

RULE 901 – Requirement of Authentication or Identification

- ▶ Must present “evidence sufficient to support a [rational] finding that the matter in question is what its proponent claims.”
 - ▶ Intentionally broad language – threshold standard
 - ▶ Rule 901 details many different ways to authenticate
 - ▶ Even if ‘authenticated’ and admitted, the jury need not believe the authenticating witness’ testimony, or even believe that the admitted evidence is actually what it the witness says it is. Fact finder does not have to rely on evidence just because the judge admitted it.
 - ▶ *State v. DeJesus*, 265 N.C. App. 279 (2019)

Just because it's admissible
doesn't mean it's persuasive.



The Fact Finder Decides

- ▶ Doubts about authentication generally go to the weight, not the admissibility, of the evidence.

- ▶ Jeffrey Welty, *Digital Evidence*, UNC SOG, p. 157

Admission is only the entry ticket



You must still win the
dance contest



Types of Evidence to Introduce

- ▶ Phone records (often in the phone itself), Text messages, Social Media posts
- ▶ Business records - Rule 803(6) hearsay exception - including Medical records.
- ▶ Photographs
- ▶ Video
- ▶ Voice recordings
- ▶ Diagrams

Confrontation Rights? Due Process?

- ▶ 6th Amendment Confrontation Clause does not apply to TPR and AND cases, since they are not criminal or delinquency proceedings.
- ▶ BUT the Due Process Clause of the 14th Amendment does afford a respondent the right to a fair proceeding, and hence the right to test the evidence presented against him/her through cross-examination.
- ▶ Evidence underlying an adjudication should be reliable.

Business Records – Implicit Motivation to Tell the Truth

- ▶ Premise that the “business environment encourages the making of accurate records by those with a duty to the enterprise”.
 - ▶ BRANDIS & BROUN § 225, at 911 n.481

What counts as a business?

Business

Institution

Association

Profession

Occupation

“And calling of every kind,

Whether or not conducted for profit”

What is a Business Record?

- ▶ A memorandum, report, record, or data compilation,
- ▶ in any form,
- ▶ of acts, events, conditions, opinions, or diagnoses,
- ▶ made at or near the time by,
- ▶ or from information transmitted by,
- ▶ a person with knowledge.

N.C. Gen. Stat. § 8C-1, R. 803

Who can make a business record?

- ▶ Someone with a **business duty** to the organization
 - ▶ Incentive to make accurate records for the benefit of the business
- ▶ **At or near the time** of the event described
 - ▶ Fresh information
- ▶ By someone with **knowledge**
- ▶ **Or** based on **information transmitted** by someone with knowledge
 - ▶ Sufficient basis of knowledge to make the record reliable

What makes a record a business record?

- ▶ Made in the regular course of business
 - ▶ And not for a particular litigation purpose
- ▶ Where the regular practice of the business is to keep such records
 - ▶ Premise that accurate records are essential to the proper functioning of a business enterprise, so people with a duty to the business will strive to be accurate.

Who can testify to authenticate business records?

- ▶ The person who made the record;
- ▶ A **custodian** of the business's records; or
- ▶ A person **familiar** with the **circumstances** of the creation of the particular record, and the **standard procedures** of the business when making and keeping records.



The Dusty Box: Introducing the DSS File?

Records Within DSS Records

- ▶ Authentication is required for **both** the DSS record and for the records of external organizations contained in the DSS record.

What about
opinions in
business
records?

803(6) Explicitly includes
opinions and diagnoses
in the business record
exception

BUT opinions must be
otherwise admissible as
lay or expert opinion
testimony

Criteria for Evaluating Opinions in Business Records

- ▶ How **complex** is the opinion?
- ▶ How **subjective** is the opinion?
 - ▶ Due Process may require that a respondent have an opportunity to cross-examine an opinion witness directly
 - ▶ Is the opinion based upon **sufficient facts**?
 - ▶ Is the opinion the result of **reliable analytical principles and methods**?
 - ▶ Did the witness **apply** those principles and methods **reliably** to the facts of the case?
- ▶ How **central** is the opinion to the outcome of the case?

Official ('Public') Records

- ▶ Rule 803(8)
- ▶ Foundational requirements are similar to business records exception
- ▶ Significant overlap as a result
- ▶ Most records admissible under public records exception will be admissible as business records as well in adjudicatory hearings

Do you always need an authenticating witness?

- ▶ Rule 803(6) allows for authentication of records “by affidavit or by document under seal under Rule 902 of the Rules of Evidence made by the custodian or witness”.
- ▶ BUT:
 - ▶ Only applies to records of “**nonparties**” to the proceedings
 - ▶ Only applies when the introducing party gives “**advance notice**” to all other parties of intent to offer the evidence with authentication by affidavit”.
- ▶ But note: TPR orders and permanency planning orders cannot be based only on written reports, prior orders and arguments of counsel. Some oral testimony is required.
 - ▶ *See In re N.B.*, 195 N.C. App. 113, 118 (2009).

“Self-Authenticating” Documents (Rule 902)

- ▶ A copy of:
 - ▶ An **official record**;
 - ▶ **Report** or entry therein, or;
 - ▶ A document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form;
 - ▶ **Certified as correct by the custodian** or other person authorized to make the certification
- ▶ “Extrinsic evidence of authenticity” is not required for admissibility
 - ▶ *State v. Watson*, 179 N.C. App. 228, 634 S.E.2d 231 (2006)

The Special Case of Medical Records

- ▶ N.C.G.S. §§ 1A-1 Rule 45(c)(2) and 8-44.1 provide a method to subpoena medical records and introduce them into evidence without in-person authentication.
- ▶ The custodian delivers certified copies of the records requested to the judge's chambers in response to subpoena.
- ▶ The records must be accompanied by a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business.
 - ▶ *See In re J.B.*, 172 N.C. App. 1, 17-18 (2005).
- ▶ BUT opposing party may object to specific information contained in the medical records.

Hearsay within Business or Official Records – Treatment

- ▶ Did the declarant make statements understanding they would lead to medical diagnosis or treatment?
- ▶ Were the statements reasonably pertinent to diagnosis or treatment?
 - ▶ *State v. Hinnant*, 351 N.C. 277 (2000).



Must a judge find that
authenticated business records
are reliable?

- ▶ Records may be excluded if
“the **source of information** or
the **method or circumstances**
of **preparation** indicate lack of
trustworthiness”

N.C. Gen. Stat. § 8C-1, R. 803

Objecting to business records?

- ▶ Objection can be made before trial by motion *in limine*, or at trial by oral objection.
- ▶ If an item of information in a larger document is not admissible, objecting party should **specify** the particular piece of evidence, and the **grounds for exclusion**.
- ▶ Some portions of otherwise admissible records may not be reliable or admissible
 - ▶ *State v. Galloway*, 145 N.C. App. 555, 565-66 (2001), citing *Donavant v. Hudspeth*, 318 N.C. 1, 7 (1986).

Objectionable Material within Business Records

- ▶ “The court should exclude from jury consideration matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay.”
 - ▶ *State v. Elder*, 278 N.C. App. 493, 511-12 (2021), citing *State v. Tyler*, 346 N.C. 187, 204 (1997).



Go for it! You are among friends.

Business Records How To

- ▶ 1) Mark documents for identification
- ▶ 2) Show documents to opposing counsel
- ▶ 3) Approach witness
- ▶ 4) Show documents to witness
- ▶ 5) Ask witness to identify the documents
- ▶ 6) Ask how the records are made, i.e. in the ordinary course of business by someone with a business duty to record such info
- ▶ 7) Storage of the documents, where the documents are retrieved from
- ▶ 8) Whether it is a regular part of business to keep and maintain this type of record
- ▶ 9) Whether documents of this type would be kept under the witness's custody or control – any changes since the records were made?
- ▶ 10) Move for admission of the documents

Admissible or not?

- ▶ Witness is the president and owner of a company that collects hair and urine specimens from subjects, sends them to a third-party lab, and evaluates reports subsequently generated by the lab.
- ▶ Witness is the custodian of the drug testing company's records and is familiar with collection of samples, quality control procedures, and chain of custody when samples are sent to external lab for testing.
- ▶ DSS wants to admit the external lab drug screen reports.
 - ▶ *In re K.H.*, 281 N.C. App. 259 (2022)

ED Nurse – ED Records

- ▶ Witness is a staff nurse in an emergency department.
- ▶ She testifies that she is familiar with medical recordkeeping procedures at the relevant time;
- ▶ That she is familiar with the patient's medical records;
- ▶ That she provided care to patient during a portion of her stay at the ED; and that the medical records were created and maintained contemporaneously with her care.
- ▶ A nurse's note in the records states that patient had been "robbed and raped".
 - ▶ *State v. Elder*, 278 N.C. App. 493 (2021).

ED Blood Alcohol Report

- ▶ Witness is an ED nurse testifying that she:
 - ▶ Was present when blood sample was taken from patient;
 - ▶ Saw the sample being taken to the hospital laboratory;
 - ▶ Retrieved the test results when they were ready;
 - ▶ Returned the report to the patient's bedside for review by a doctor.
- ▶ Both the doctor and nurse testified the alcohol test was part of routine treatment for patients such as the defendant.
 - ▶ State v. Miller, 80 N.C. App. 425, 429 (1986)

DSS Social Worker – Drug Test

- ▶ DSS Social worker testifies:
 - ▶ She collected all but one of the samples analyzed for drugs;
 - ▶ She sealed and shipped the samples to the lab for testing;
 - ▶ She relied on the subsequent lab reports in the ordinary course of her business, and;
 - ▶ The drug testing reports were collected as part of the petitioner's record in the DSS case.
 - ▶ *In re S.D.J.*, 192 N.C. App. 478 (2008).

How about DSS reports?

- ▶ DSS social workers testify:
 - ▶ They did not have first-hand knowledge of all information in DSS report
 - ▶ Did not work on case until after petition was filed
 - ▶ Familiarized themselves with records
 - ▶ Records were made in regular course of business
 - ▶ Contemporaneously with events recorded
 - ▶ *In re Smith*, 56 N.C. App 142, 148 (1982).

DSS Report – DSS Social Worker

- ▶ DSS social worker reads from DSS case file and reports to detail respondent's mental health evaluations, treatment, and compliance with court requirements;
- ▶ Testifies she had reviewed the DSS report and was familiar with the case file;
- ▶ That she had kept and maintained the file since her employment with DSS;
- ▶ And that the file was maintained in the “regular, ordinary course” of DSS business.
 - ▶ *In re C.R.B.*, 245 N.C. App. 65 (2016)

Medical Examiner - TPR

- ▶ County medical examiner testifies at TPR hearing using investigation and autopsy reports to detail injuries observed on a child's body and the cause of death.
- ▶ CME did not personally examine child's body and did not author the reports.
- ▶ Testifies he had reviewed the reports, which were prepared by a fellow pathologist who had since moved out of state.
- ▶ Respondent objects to reports as inadmissible hearsay and opinion.
 - ▶ *In re J.S.B.*, 183 N.C. App. 192, 197 (2007)

E.D. Dr. / Surgeon

- ▶ E.D. discharge summary states rape victim had a “psychiatric history including anti-social behavior, substance abuse, substance addiction, [and] uncooperativeness” and was “well-known to [a local psychiatric facility] for previous psychiatric history.”
- ▶ Dr. who wrote summary is an Emergency Medicine and Critical Care specialist.
- ▶ Dr. testifies he had no personal knowledge of victim’s prior psychiatric treatment and condition, and that his note was based on hospital records and interview with patient’s mother.
- ▶ Defendants argue note should be admitted as part of a business record.
 - ▶ *State v. Galloway*, 145 N.C. App. 555, 565-66 (2001)

Use Often!

Blakey / Loven / Weissenberger

NORTH CAROLINA EVIDENCE

2022 Courtroom Manual

*Including Complete Coverage of the
North Carolina Rules of Evidence,
North Carolina Witness Privileges,
and Related Statutes*

*With publication of this manual, all prior editions
are obsolete and should be discarded.*



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Thanks – please feel free to contact me with questions!