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Gregory A. Weeks
Superior Court Judge

# PART TWO—RULE 406 HABIT EVIDENCE

I. Habit Evidence—Another Rock, Another Hard Place.

A. North Carolina's Rule 406 is identical to the Federal Rule. See Commentary, N.C. Rules of Evidence, Rule 406.

B. The Doctrine:

> *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 an eyewitness, 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.*

1. The rule applies to "evidence of the **habit**" of a **person** or "evidence of **the routine practice** of an **organization**."

2. The rule provides that evidence of habit or routine practice 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.

3. The rule **does not require corroboration nor** does it require **an eyewitness** to the habit or routine practice before the evidence is admissible. Babcock & Wilson Construction Co. 98 N.C. App. 203, 390 S.E.2d 341 (1990), rev'd on other grounds on rehearing, 101 N.C. App. 564, 400 S.E.2d 735, cert. granted, 328 N.C. 569, 403 S.E.2d 506 (1991).

4. Most courts use the term "**habit**" to describe a natural person's routine practices and "**custom**" to describe the routine practices of business organizations or entities.

C. The Definition

1. The threshold question is "**what constitutes habit**," or "**routine practice**?

   a. **Habit** is generally considered to be a **specific**, **frequently repeated behavioral pattern**.

   b. There are no hard and fast rules regarding **how specific** and **how frequent** the behavior must be. There are no precise standards for measuring the sufficiency of the number of times (i.e., frequency) the

behavior must be repeated or the uniformity of the responses (i.e., specificity) necessary to constitute a behavioral pattern.

> "*The extent to which instances must be multiplied and behavior consistency maintained in order to rise to the status of habit inevitably gives rise to difference of opinion."* Lewan, Rationale of Habit Evidence, 16 Syracuse L.Rev. 39, 49 (1964).

2. Because the issue is a matter of opinion, much of what is offered as habit evidence is excluded because of the trial judges determination that the proponents showing resulted in a "failure to achieve the status of habit."

   a. For example, evidence of intemperate 'habits' is generally excluded when offered as proof of drunkenness in accident cases." Commentary, N.C.G.S. § 8C-1, Rule 806, citing Annot. 66 ALR2d 806.

   b. Attempts to introduce evidence that a criminal defendant has a "habit" of committing particular types of crimes are generally unsuccessful.

   c. "It is highly doubtful that any court would admit evidence of a series of burglaries by the defendant on a straight habit theory; crimes such as burglary require extensive **conscious**, **volitional** effort in both planning and execution." Courtroom Criminal Evidence, Imwinklereid.

   d. See also, Lau v. United States, 486 U.S. 1005 (1988.) Cert. denied, sub nom.; State v. Bailey, 117 Idaho 941, 792 P2d. 966 (App. 1990) (evidence of defendant's "moderate" drinking habits inadmissible in prosecution for driving under the influence.); United States v. Mascio, 774 U.S. F2d 219 (7th Cir. 1985) (even if defendant has committed the same type of crime several times, he or she cannot be said to have a 'habit' of committing that type of crime."

D. Habit Distinguished from Character

   1. Habit evidence has both **similarities** and **differences** with character evidence.

      a. **Similarities**

         1. Both may be used as **circumstantial proof of substantive conduct**.

         2. Both have **logical relevance** and,

         3. Both **pose legal relevance problems** under Rule 403. The probative danger of habit evidence is that the jury may be distracted from the

main issues in the case and get caught up in collateral disputes over whether the habits exists.

b. **Differences**—There are, however, significant differences between the two.

1. The **first** difference is that **either party** in both civil and criminal cases **may introduce habit evidence**, but character evidence is usually admissible only after a defendant opens the issue.

2. The **second** difference is that **habit evidence requires proof of a very specific, frequently repeated behavioral pattern** whereas character evidence deals with either general moral character or a relevant character trait.

a. As discussed above, habit has a narrow focus. Habit deals with a person's response to a particular type of situation while character evidence would allow a proponent to prove specific relevant character traits such as honesty or peacefulness.

b. The same kind of behavior on the part of a business, organization or group is called the "custom," or "routine practice of an organization" under the rule.

c. Consider the following example from Courtroom Criminal Evidence, supra. In a negligent vehicular homicide case the defendant may present evidence about his law-abiding character trait for being a good and careful driver. Detailed testimony about the routine manner in which he executes right-hand turns would be habit evidence.

3. A **third** difference is the method of proof. More about this in section III below.

II. Relevance of Habit Evidence

A. **Habit evidence** is considered to be **more probative** and **persuasive** to a jury than character evidence because of its nature. "The uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition." McCormick § 162, p. 340.

1. It is more likely that a person's conduct will conform to a specific habit rather than to generalized character.

2. Also, the more automatic or routine the habit becomes, the greater the probative value it arguably has. In some older cases it was held that, to be admissible as habit, a

behavioral pattern must be "semi-automatic." Simplex Inc. v. Diversified Energy Sys., Inc., 847 F2d 1290, 1293 U.S. 999 (7Th Cir. 1988).

3. Evidence of habit may include testimony about routine practice (and presumably habit,) both **prior to** and **after** the event involved in the case on trial. In Kilgo v. Wal-Mart Stores, Inc., d/b/a Sam's Wholesale Club, 138 N.C. App. 644; 531 S.E.2d 883; 2000 N.C. App LEXIS 791, an employee was permitted to testify about "routine practices" of the defendant which he observed **after** the plaintiff in the case at trial was injured.

   a. The Court of Appeals held that "[e]vidence of the acts or conduct of a defendant occurring subsequent to the time of the transaction in controversy, if not too remote, can constitute relevant evidence within the meaning of Rule 401," citing State v. Beatty, 64 N.C. App. 511, 515, 308 S.E.2d 65, 67, disc. review denied, 309 N.C. 823, 310 S.E.2d 354 (1983); 29 Am. Jur. 2d Evidence § 526 (1994).

   b. The court also cited the provisions of Rule 406; "evidence of 'routine practice of an organization…is relevant to prove…conduct was in conformity with…the routine practice." The witness in Kilgo testified about his observations over an 18 month period after the plaintiff's injury. The court ruled that this evidence was not too remote in time and allowed for "a reasonable inference that [the defendant] loaded the trailer [which plaintiff contended caused his injuries] as they had loaded the trailers observed by [the witness].

B. There is a split in the courts over whether so-called "habit" evidence should include both **voluntary** and **involuntary** activity or practices. Earlier cases tended to restrict the definition of habit to **relatively involuntary or automatic practices**, (some courts use the language "a reflex behavior".) See Levin v. United States 338 F.2d 265 (1965); United States v. Rangel-Arreola, 991 F2d 1519, 1523 (10 Cir.1993).

   1. Under the **psychological theory** of habit, only relatively automatic behavior would be defined as habit. The defendant in Levin, **supra**, presented an alibi defense to a larceny that occurred on the Jewish Sabbath. The appellate court upheld a trial judge's exclusion of defendant's evidence that he routinely remained at home on the Orthodox Jewish Sabbath holding that the "very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value.

   2. Under the **probability theory,** conduct that is relatively volitional would qualify. See Perrin v. Anderson, 784 F2d 1040, 1046 (10 Cir. 1986) (Evidence that the plaintiff "repeatedly acted with extreme aggression when dealing with uniformed police officers … [There was] an offer of proof of testimony from eight police officers concerning numerous different incidents").

C. The modern view is more expansive and extends the definition to relatively volitional conduct. Perrin, supra. An illustrative case is State v. Radziwil, 235 N.J. Super. 557, 563 A.2d 856 (1990). (In a prosecution for death by auto, the prosecutor was allowed to

present evidence that the defendant regularly became intoxicated every weekend at a particular bar.), aff'd, 121 N.J. 527, 582 A.2d 1003 (1990).

III. Methods of Proving Habit

A. There are **two generally recognized methods** of proving the existence of a habit: **specific instances** and **opinion**. There is also an emerging trend towards a third method of proving habit by proof of training.

B. In North Carolina courts, proof of habit is usually made by opinion evidence. The proponent has the burden of showing that the witness knows the person or organization well enough to have a reliable opinion of the habit of the person or the routine practices of the organization. Courtroom Criminal Evidence, supra.

1. The witness must be familiar with the person or business for a substantial time and must have observed numerous instances of the person's or business' relevant conduct in order to be qualified to express an opinion on the existence of a habit.

2. Normally, opinion habit evidence is presented by a single witness who is familiar with a large number of instances of the conduct of the person or business.

3. Habit can also be proven by the testimony of several witnesses. Each witness would testify to the instances of conduct observed; if the behavioral patter is specific enough and the instances are numerous enough, the trial judge would allow the jury to infer the existence of the habit. K. Broun, Brandis & Broun on North Carolina Evidence § 103m at 330 (4th Ed. 1993).

4. The third method of proving habit by proof of training to act in a specific fashion is best illustrated by using the example of a law enforcement officer who is going to testify to a radar gun. As part of the foundation, the officer would show the radar gun was in proper working order. The officer might testify that a part of his or her training involved the use of tuning forks to test the speed meter's operating condition. The training increases the probability that the officer following the training on the date in question.

IV. Uses of Habit Evidence

A. "Habit may be a consequential fact in the case, in the sense that habit can be an essential element of the foundation for an item of evidence." Courtroom Criminal Evidence, supra. Take, for example, a document offered under the business entry exception to the hearsay rule.

1. The proponent must show that the business routinely prepares that type of record as part of the foundation.

2. Proof of the existence of the routine or custom is an essential element of the foundation.

3. Habit can also be used as circumstantial evidence of conduct of a specific occasion. A Florida case, State v. Wadsworth, 210 So. 2d 4, is illustrative.

   a. The defendant in Wadsworth was charged with manslaughter by an intoxicated driver. Evidence was admitted that the defendant had a "habit" of buying miniature bottles of vodka two or three times each week.

   b. Wadsworth is in accord with the modern trend allowing relatively voluntary, repeated practices within the definition of habit if the practice is very specific. It has been said, "[p]erhaps State v. Wadsworth represents the outer limit of the admissibility of habit evidence." Courtroom Criminal Evidence, supra.

B. When habit is admissible as circumstantial evidence of conduct, the proponent may use it to supply either elements of evidentiary foundations or facts on the historical merits of the case.

1. One of the elements of an offer of scientific evidence is proof that an instrument was working properly. The lab technician may recall checking the instrument before performing the test and testify based upon that recollection

2. If the technician does not have independent recollection, the proponent may use evidence of habit (routine practice or custom) of checking the instrument prior to performing any tests. See State v. Tappe, 139 N.C. App. 33, 533 S.E.2d 262, 2000 N.C. App. LEXIS 801 (2000).

V. The Foundation

A. The **witness is familiar** with the **person** or **organization**.

B. The witness **has been familiar** with the person or business **long enough** to be familiar **with the way the person acts or business conducts its operation**.

C. **In the witness' opinion, the person or business has a habit, a specific behavioral pattern**.

D. The **witness has observed** the person or business **act in conformity** with the habit **on a number of occasions**.

VI. Determining Admissibility

A. The court has a duty "to make certain inquiries to determine the reliability and probative value of the proffered evidence," before admitting proof of habit by evidence of conduct.

Crawford v. Fayez, 112 N.C. App. 328, 435 S.E.2d 545 (1993), cert. denied, 335 N.C. 553, 441 S.E.2d 113 (1994).

B. Factors For the Court's Consideration on Admissibility.

1. **The number of instances involved in the witness' testimony**. See State v. Chavis, 141 N.C. App. 177, 540 S.E.2d 404, 2000 N.C. App. LEXIS 1403 (2000) (no error to exclude testimony about two incidents occurring over two year period as not being sufficient to constitute habit); State v. Fair, 354 N.C. 131, 552 S.E.2d 568, 2001 N.C. LEXIS 944 (2001), (occasional visits to adult video store do not constitute relevant evidence of habit.

2. **The time lapse between those instances and the relevant event** in the case. Chavis, supra

3. **How similar those instances are to the alleged event**. See Anderson v. Austin, 115 N.C. 134m 443 S.E.2d 737, cert. denied, 338 N.C. 514, 452 S.E.2d 806 (1994)

C. The general rule is that "[t]he person's or business' practices need not be invariable, but the ratio should so high that the practice is fairly uniform." The key criterion is most often the ratio of reactions to situations, "adequacy of sampling and uniformity of response." United States v. Newman, 982 F2d 665, 668 (1st Cir. 1992), cert. Den, 114 S. Ct. 59 (1993).

D. A witness does not have to have personal knowledge about what occurred on a particular occasion in order for the witness to testify about the routine practice of a business or organization, Babcock, supra.

E. Since the court has to determine the "reliability" and "probative value" of any proffered habit evidence, Rule 403 considerations also apply.

F. The trial judge has **wide discretion** in deciding on admissibility, the key factor being "the ratio of reactions to situations."

VII. Limiting Instructions on Habit Evidence

A. A limiting instruction might include the following:

*Evidence has been presented of the (name person or business, e.g., defendant's or plaintiff's) (specify habit, e.g., driving habits). You can infer that a person (or business') acts consistently with their (its) personal (business) habits. Therefore, you may consider evidence of the (name person or business, e.g., defendant's or plaintiff's) (specify habit, e.g., driving habits) in deciding (specify the purpose for which the habit evidence was admitted, e.g., how the defendant or plaintiff made his or her right hand turn on the occasion when his car collided with {other party}).*

B. As is true with limiting instructions generally, the instruction as to habit evidence should clearly "**restrict the evidence to its proper scope."** See N.C.G.S. § 8C-1, Rule 105.

C. Finally, remember that, under N.C.G.S.§8C-1, Rule 105, there is probably no duty to give an instruction absent a request.