Evidence Issues in Traffic and Implied Consent Cases

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Special Topics Seminar
Evidence
District Court Judges
April 2010

Objectives

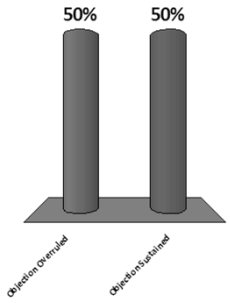
- Apply rules of evidence to evidentiary objections that frequently arise in traffic and implied-consent cases
- Review special statutory rules as well as the following general rules:
  - Relevancy and its limits, Rules 401, 402, and 403
  - Opinion and expert testimony, Rules 602, 701, 702
  - Judicial Notice, Rule 201

Relevancy

- A defendant charged with impaired driving objects to testimony from an SBI lab analyst that THC, a metabolite of marijuana, appeared in the defendant's blood sample. The defendant argues that this metabolite can be present in blood as much as two days after smoking marijuana.
- The officer who stopped the defendant reported no odor of marijuana in the car and the defendant did not admit to smoking marijuana immediately before or during driving.
- The arresting officer's report stating that the defendant's pupils were small, "like pinpoints," and that the defendant moved very slowly in response to the officer's request for his license and registration. The officer found a cigar blunt in a search incident to arrest.

How do you rule?

1. Objection Overruled
2. Objection Sustained



Relevancy and Its Limits

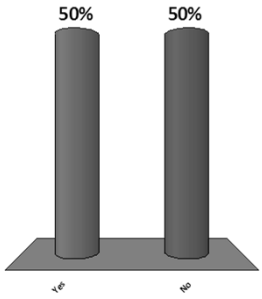
- Rule 401: Relevant evidence
- Rule 402: Relevant evidence generally admissible
- Rule 403: Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time

Relevancy

- Delta Dawn was charged with impaired driving in 2000. Her BAC was .25. Following her release, she returned to her residence in Kentucky. She did not address the DWI charge until 2009 when she attempted to renew her Kentucky driver's license.
- The arresting officer/chemical analyst's notes regarding Dawn's case were destroyed in 2006, pursuant to department policy.
- Dawn moves to suppress the breath test results on the basis that the officer failed to delay the testing for 30 minutes after she called a friend to witness the test.
- The officer/analyst testifies that, while he has no independent recollection of Dawn's case, he has administered more than 500 breath tests and that among the customary and required procedures is affording a defendant a 30 minute delay so that someone may witness the test. He testifies that he always complies with this procedure.
- Dawn objects.

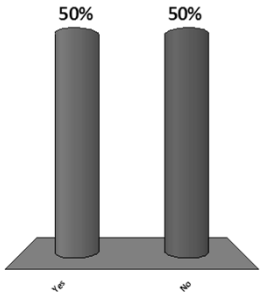
Do you allow the officer/analyst to testify about his customary practice?

1. Yes
2. No



Do you allow the State to admit the breath test results?

1. Yes
2. No



Relevancy

- Rule 406: Habit; Routine Practice

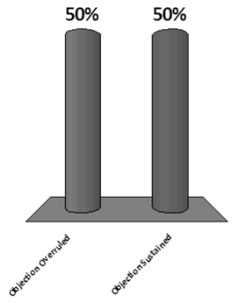
  Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.
- *State v. Tappe*, 139 N.C. App. 33 (2000) (finding, in case where trial occurred 10 years after offense, that officer's testimony about procedures he routinely used to administer breath test provided basis for a reasonable inference by trier of fact that officer conducted a valid simulator test before administering defendant's test).

Opinion Testimony

- Sue Small is charged with DWI. At trial, Officer Jones testifies that she stopped Small's car after seeing it weave from one side of the road to the other and almost run into a bridge railing.
- Small was wobbly and unsteady on her feet. The pupils of her eyes were contracted and there was a white substance on her lips. She performed poorly on FSTs.
- Small told Jones that she was not diabetic and did not have any physical limitations.
- Jones has five years' experience. She is not DRE certified.
- Jones testified that, in her opinion, Small was impaired.
- The prosecutor asks: Did you form an opinion as to the cause of Small's impairment?
- Small objects.

How do you rule?

1. Objection Overruled
2. Objection Sustained



Lay Witness Testimony re Impairment

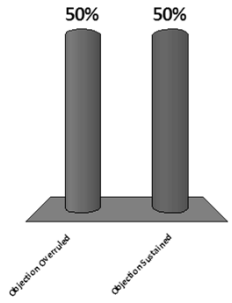
- Rule 701: If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.
- A lay witness who has personally observed a person may give his opinion as to whether that person was under the influence of intoxicants
- A lay witness may state his opinion as to whether a person is under the influence of drugs when he has observed the person and such testimony is relevant to the issue being tried.
- State v. Lindley, 286 N.C. 255 (1974) (concluding that officer was better qualified than jury to draw inferences and conclusions from his observations and finding proper the admission of opinion testimony that defendant was impaired by drugs).

Opinion Testimony

- Bonni Bell is charged with impaired driving based upon an incident in which she crashed her car into a telephone pole.
- At trial, the prosecutor calls Officer Davis to the stand. Davis interviewed Bell at the police station after her arrest.
- State: Did you form an opinion as to whether the defendant was impaired?
- Davis: Yes, I did.
- State: What was that opinion?
- Davis: Based on witness statements, the damage of the cars, and what Officer Travis told me, I formed the opinion that . . .
- Bell: Objection. The officer is preparing to give an opinion based on nothing more than hearsay and conjecture.

How do you rule?

1. Objection Overruled
2. Objection Sustained



Rule 602, Personal Knowledge

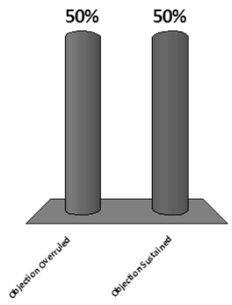
- Rule 602. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.
- *State v. Cook*, 193 N.C. App. 179 (2008) (holding inadmissible officer's opinion that defendant was impaired at time of wreck where opinion was not based on personal knowledge but instead upon written statements of witnesses, the damage to the cars involved, and what another officer told him)

Opinion Testimony

- Tom Turner is charged with misdemeanor death by vehicle. At trial, the state calls Gail Goody, age 21, to the stand.
- Goody testified that she saw the accident from a parking lot across the street. The prosecutor asked her if she formed an opinion about how fast Turner was traveling.
- Turner objects.

How do you rule?

1. Objection Overruled
2. Objection Sustained



Rule 701: Opinion Testimony of Lay Witnesses

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Lay Opinion

- *Insurance Co. v. Chantos*, 298 N.C. 246 (1979) (explaining that "a person of ordinary intelligence and experience is competent to state his opinion as to the speed of a vehicle when he has had a reasonable opportunity to observe the vehicle and judge its speed")
- *Blackwell v. Hatley*, ___ N.C. App. ___ (February 2, 2010) (holding admissible testimony from lay witnesses who saw accident from across the street and estimated defendant's speed)

Testimony by experts

- Rule 702(a): If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

State v. Goode, 341 N.C. 513 (1995): Three-part test

1. Is expert's proffered method of proof sufficiently reliable?
   - First look to precedent for guidance in determining whether method is reliable
   - If no precedent, then look to other indications of reliability, including
     - Expert's use of established techniques
     - Expert's professional background
     - Use of visual aids before jury so that jury is not asked to sacrifice its independence by accepting science on faith
     - Independent research conducted by expert

State v. Goode, 341 N.C. 513 (1995): Three-part test

2. Is the witness qualified as an expert?
   - Witness may qualify as expert by knowledge, skill, experience, training, or education
   - Sufficient that expert because of expertise is in a better position to have an opinion than is trier of fact
   - No distinction between formal academic training and practical experience

State v. Goode, 341 N.C. 513 (1995): Three-part test

3. Is the expert's testimony relevant?
   - Apply Rule 401 standard
   - Relevant evidence is evidence having any tendency to make the existence of any fact of consequence to the determination more or less probable than it would be without the evidence. Rule 401.

State v. Goode, 341 N.C. 513 (1995): Three-part test

1. Is expert's proffered method of proof sufficiently reliable?
2. Is the witness qualified as an expert?
3. Is the expert's testimony relevant?

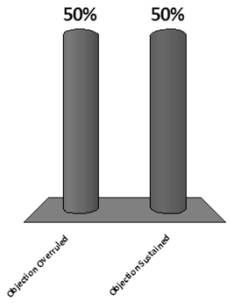
Once 3-part test is satisfied, any lingering questions go to weight, not admissibility

Expert Testimony

- Karen Kane is charged with impaired driving based upon an incident in which she ran off the road and into a field, flipping her car.
- She was injured and was taken to the hospital.
- A blood sample collected 3 hours after the accident revealed an alcohol concentration of 0.06.
- The State calls Paul Glover, a research scientist and training specialist in forensic testing for the FTA branch of DHHS, to testify as to his opinion of Kane's AC at the time of the crash.
- Glover testifies that he formed an opinion about Kane's alcohol concentration using a retrograde extrapolation model, using average alcohol elimination rates.
- Kane objects.

How do you rule?

1. Objection Overruled
2. Objection Sustained



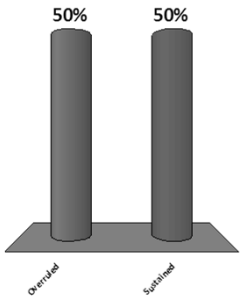
1. Is expert's proffered method of proof sufficiently reliable?
   - Precedent?
   - *State v. Teate*, 180 N.C. App. 601 (2006); *State v. Taylor*, 165 N.C. app. 750 (2004); *State v. Catoe*, 78 N.C. App. 167 (1985).
2. Is the witness qualified as an expert?
3. Is the expert's testimony relevant?

HGN

- Cam Cruise is charged with impaired driving.
- At trial, Officer Lewis testifies that he conducted a Horizontal Gaze Nystagmus ("HGN") test at the scene of the stop.
- He states that he had taken a forty-hour training course in administering the HGN test and in interpreting its results.
- He states that he learned the following procedures in his training: "First, I ask the subject to cover one eye and use the other eye to follow the pen as I move it at eye level in his field of vision. I watch his eye for nystagmus – that's a jerking of the eyeball. The person can't control it. If the person's eyeball starts jumping before the pen is at a 45 degree angle, then that's evidence the person is impaired. And depending upon what level that nystagmus kicks in at, I can estimate the level of alcohol in the person's blood."
- Cruise objects to any further testimony from Officer Lewis regarding the results of the HGN test.

How do you rule on the objection?

1. Overruled
2. Sustained



HGN

- *State v. Helms*, 348 N.C. 578 (1998)
  - (error to permit officer with 40 hours of training in HGN to testify that nystagmus was associated with intoxication and that defendant demonstrated nystagmus in HGN test where state failed to proffer evidence that test was reliable)

HGN

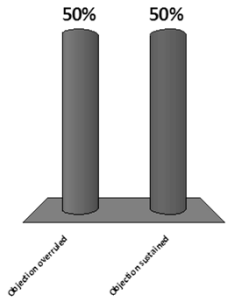
- S.L. 2006-253
- Rule 702 (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:
  (1) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.
- *State v. Smart*, 674 S.E.2d 684 (N.C. App. 2009) (holding that Rule 702(a1)(1) obviates need for State to prove that the HGN testing method is sufficiently reliable; trial court did not err in admitting testimony from officer who testified as to her skill, experience and training)

DRE testimony

- Adam Apple was arrested for DWI. The arresting officer called a Drug Recognition Expert to evaluate Apple after a breath alcohol test revealed a concentration of 0.00. The arresting officer called the DRE because Apple showed signs of intoxication and impairment.
- DRE testifies regarding her training and certification.
- DRE testifies that she used a 12-step protocol to evaluate Apple's condition.
- Prosecutor asks DRE: Did you form an opinion regarding whether Apple was impaired and the substance that impaired him?
- Apple objects to the testimony of the DRE on the basis that method of proof is not reliable and that DRE is not qualified as an expert.

Your ruling?

1. Objection overruled
2. Objection sustained



DRE

Rule 702 (a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

. . .

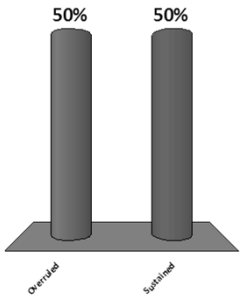
(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

Expert Testimony

- The State calls Trooper Brown as a witness in Turner's trial.
- Brown did not see the crash.
- Brown is a 20-year veteran of the highway patrol and is trained as a crash reconstructionist.
- He has investigated more than 100 crashes.
- In this case, Brown investigated the scene, took measurements, and considered the weight of the vehicles involved. Based on this study, Brown formed an opinion as to how fast Turner was driving.
- Turner objects to this testimony on the basis that Brown did not see the accident.

How do you rule on the objection?

1. Overruled
2. Sustained



Rule 702: Testimony by experts

- (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.
- *Shaw v. Sylvester*, 253 N.C. 176 (1960) (holding that a witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved but that he cannot give an opinion as to its speed)

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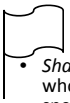


- *Shaw v. Sylvester*, 253 N.C. 176 (1960) (prohibiting a person who investigates a wreck from giving an opinion as to the speed of the vehicle involved on the basis that the jury is "just as well qualified as the witness to determine what inferences the facts will permit or require

Rule 702(i)

- Effective for offenses committed December 1, 2006 or later
- A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of the investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving.

Specific Statutory Provisions: Rule 702(a1)

Rule 702. Testimony by experts.

. . .

(a1) A witness, qualified under subsection (a) of this section and with proper foundation, may give expert testimony solely on the issue of impairment and not on the issue of specific alcohol concentration level relating to the following:

. . .

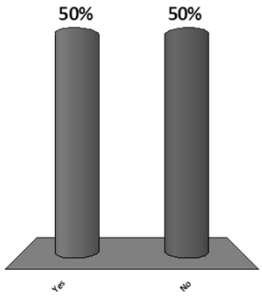
(2) Whether a person was under the influence of one or more impairing substances, and the category of such impairing substance or substances. A witness who has received training and holds a current certification as a Drug Recognition Expert, issued by the State Department of Health and Human Services, shall be qualified to give the testimony under this subdivision.

Specific Statutory Provisions: G.S. 8-50.2

- At Dan Driver's trial on charges of speeding in excess of 80 mph, the police officer who observed him testified that he thought Dan was speeding "at least 10 miles per hour over the speed limit, which was 55."
- The officer testified that his radar instrument registered results of 82 in a 55 mph zone.
- Dan's lawyer argues at the conclusion of the evidence that this testimony fails to establish misdemeanor speeding in violation of GS 20-141(j1).
  - Instead, he states that the evidence proves only that Dan exceeded the posted speed limit, an infraction.

Is the evidence sufficient to establish speeding more than 80 mph?

1. Yes
2. No



Specific Statutory Provisions: G.S. 8-50.2

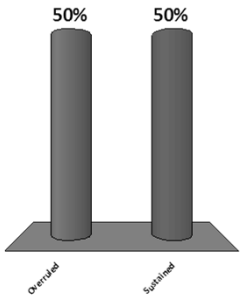
- G.S. 8-50.2 provides that the results of the use of "radio microwave, laser, or other speed-measuring instruments" are
  - admissible as evidence of the speed of an object
  - "for the purpose of corroborating the opinion of a person as to the speed of an object based on the visual observation of the object by such person."
- State v. Jenkins, 80 N.C. App. 491, 342 S.E.2d 550 (1986),
  - Granting defendant a new trial based upon the trial court's intimation, in response to a question from the jury, that defendant could be convicted solely upon the radar measurement of his speed.
  - Explaining that "[t]he General Assembly has provided that the speed of a vehicle may not be proved by the results of radar measurement alone and that such evidence may be used only to corroborate the opinion of a witness as to speed, which opinion is based upon actual observation."

Specific Statutory Provisions: G.S. 20-16.3

- Carol Cruise files a motion to suppress evidence in a DWI case on the bases that the officer lacked reasonable suspicion to stop her car and lacked probable cause to arrest her for impaired driving.
- Officer Brown testifies at a hearing on the motion to suppress that he stopped Cruise after he saw her driving 20 mph under the speed limit at 2 a.m., without her headlights on, in the vicinity of several bars.
- When he approached the car to speak to Cruise, he smelled a strong odor of alcohol coming from her car and saw that her eyes were red and glassy. He asked her step out of the car. Cruise was wearing high heeled boots and appeared unsteady on her feet. Officer Brown asked her if she had balance problems. She said she did.
- Officer Brown testifies he then asked Cruise to submit to an alcohol screening test using an approved device, the ALCO-SENSOR.
- The prosecutor then asks: "What were the results of the ALCO-SENSOR test?"
- Cruise's attorney objects on the basis that those results are inadmissible.

How do you rule?

1. Overruled
2. Sustained



Specific Statutory Provisions: G.S. 20-16.3

(d) Use of Screening Test Results or Refusal by Officer. -- The fact that a driver showed a positive or negative result on an alcohol screening test, but not the actual alcohol concentration result, or a driver's refusal to submit may be used by a law-enforcement officer, is admissible in a court, or may also be used by an administrative agency in determining if there are reasonable grounds for believing

(1) That the driver has committed an implied-consent offense under G.S. 20-16.2; and

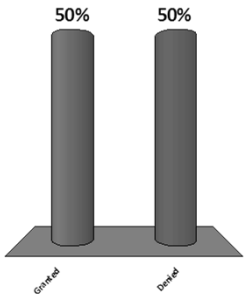
(2) That the driver had consumed alcohol and that the driver had in his or her body previously consumed alcohol, but not to prove a particular alcohol concentration. Negative results on the alcohol screening test may be used in factually appropriate cases by the officer, a court, or an administrative agency in determining whether a person's alleged impairment is caused by an impairing substance other than alcohol.

Specific Statutory Provisions: G.S. 20-16.3

- You sustain the objection and ask the prosecutor to re-phrase the question.
- The prosecutor asks Officer Brown whether the ALCO-SENSOR registered the presence of alcohol.
- Officer Brown testifies, "Yes, sir. It confirmed that she was over the legal limit."
- The defendant moves to strike Officer Brown's testimony.

How do you rule on the motion to strike?

1. Granted
2. Denied

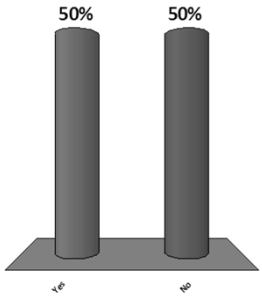


Duplicate, sequential breath samples

- Van Driver was arrested for DWI on 12/1/2009 and taken to the police station for a breath test.
- The chemical analyst read Driver his implied consent rights, observed him for 15 minutes, verified the accuracy of the instrument, and asked Driver to blow into the mouthpiece.
- Driver's breath test, at 3:00 a.m. revealed an AC of .15.
- Driver blew again, but provided an insufficient sample, complaining that his asthma prevented him from blowing harder
- Driver blew a third time, again providing an insufficient sample.
- The fourth sample, taken at 3:10 a.m. revealed an AC of .13.
- Driver objects to the introduction of the chemical analysis on the basis that G.S. 20-139.1(b3) requires "the testing of at least duplicate sequential breath samples" and provides that "[t]he results of the chemical analysis of all breath samples are admissible if the test results from any two consecutively collected breath samples do not differ from each other by an alcohol concentration greater than 0.02."

Is the 0.13 test result admissible?

1. Yes
2. No



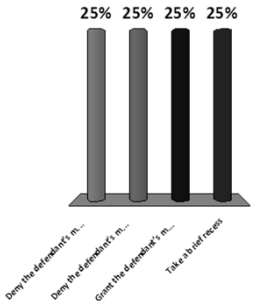
- State v. White, 84 N.C. App. 111 (1987)
  - Breath tests separated by two insufficient breath samples were "consecutively administered tests"
  - To hold otherwise would allow a D to thwart the testing process
  - Tests were 11 minutes apart
- State v. Shockley, N.C. App. (December 2009)
  - Shockley's blows were separated by an insufficient sample, after which chemical analyst restarted process
  - Shockley argued White did not apply b/c when chemical analyst indicated intention to start over, that nullified results of the previous testing period
  - 18 minutes between tests
  - Court found no error in admission of results
- G.S. 20-139.1(b3) now requires "the testing of at least duplicate sequential breath samples."

Judicial Notice

- At the conclusion of a trial in Guilford County District Court for driving while impaired, the defendant's lawyer moves to dismiss the case on the basis that the State failed to establish that area of the road where the driving occurred was located in Guilford County.
- When you ask defense counsel to specify the basis for the motion, he states that it is a motion to dismiss for improper venue.
- You turn to the DA, who states: Everyone knows this stretch of road is in Guilford, not Alamance. It's a good 2 miles inside the county line. Besides, the defendant was required to raise this issue pretrial.
- What do you do next?

What do you do?

1. Deny the defendant's motion as untimely
2. Deny the defendant's motion because you personally have seen the "Guilford County" sign preceding this stretch of road
3. Grant the defendant's motion
4. Take a brief recess



Did motion have to be raised pretrial?

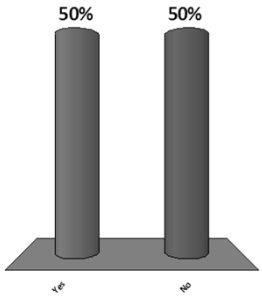
- GS 15A-953.
  - In misdemeanor prosecutions in the district court motions should ordinarily be made upon arraignment or during the course of trial
- G.S. 20-38.6
  - Defendant may move to suppress evidence or dismiss charges only prior to trial
    - Exception for motions to dismiss for insufficient evidence and motions based on facts not previously known
- May State introduce additional evidence?
  - GS 15A-1226(b): Judge has discretion to permit any party to introduce additional evidence at any time prior to verdict
  - What's the rule on venue?
    - Venue for pretrial and trial proceedings in district court of cases within the original jurisdiction of the district court lies in the county where the charged offense occurred. G.S. 15A-131.

Judicial Notice

- You have access to the internet on your bench. In the presence of the parties, you have verified through mapquest.com that the portion of the road on which the defendant was driving is within Guilford county.

May you take judicial notice of the business's location in Guilford County based upon the mapquest information?

1. Yes
2. No



Judicial Notice: Rule 201

- Rule 201. Judicial notice of adjudicative facts.

  (a) Scope of rule. – This rule governs only judicial notice of adjudicative facts.

  (b) Kinds of facts. – A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

  (c) When discretionary. – A court may take judicial notice, whether requested or not.

  (d) When mandatory. – A court shall take judicial notice if requested by a party and supplied with the necessary information.

  (e) Opportunity to be heard. – In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

  (f) Time of taking notice. – Judicial notice may be taken at any stage of the proceeding.

  . . .

Judicial Notice

- Matters concerning the boundaries of municipalities, counties and other subdivisions are among those that may properly be the subject of judicial notice.
- *See* Kenneth Broun, BRANDIS AND BROUN ON NORTH CAROLINA EVIDENCE, Ch. 2, § 26 at 106-07 (6th ed. 2004) (citing *State v. Southern Ry.*, 141 N.C. 846 (1906) (county lines); *Watson v. Western Union*, 178 N.C. 471 (1919) (State Line); *State v. Davis*, 20 N.C. App. 252 (1973) (place one mile from Asheboro was in Randolph County); Annot. 86 A.L.R.3d 484 (judicial notice of location of street address within particular political subdivision)).

Judicial Notice

- United States v. Brown, 636 F. Supp.2d 1116, 1124 n.1 (D. Nev. 2009) ("Courts have generally taken judicial notice of facts gleaned from internet mapping tools such as Google Maps or Mapquest.")
- United States v. Williams, 476 F. Supp.2d 1368, 1378 n.6 (M.D. Fla. 2007) ("A Court may take judicial notice of the driving distance between two points located in the record using mapping services whose accuracy cannot reasonably be questioned.")
- *But see* Commonwealth v. Brown, 839 A.2d 433, 436-37 (Pa. Super. 2003) (holding that trial court abused its discretion in taking judicial notice of a Mapquest distance determination to determine distance between the school and the scene of the crime to invoke a two-year mandatory minimum sentence)