ORIENTATION FOR NEW SUPERIOR COURT JUDGES
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EVIDENCE: A JUDGE'S PERSPECTIVE[1]

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[1] Primary resources: *Brandis & Broun on North Carolina Evidence*, Sixth Edition, by Kenneth S. Broun (2004); *North Carolina Evidentiary Foundations*, Second Edition, by Mostellar, Beskind, Eagles, Ross, and Imwinkelreid (2006); *North Carolina Evidence 2010 Courtroom Manual*, by Blakey, Loven, and Weissenberger (2010); and *North Carolina Superior Court Judges' Benchbook*, UNC School of Government (2014).

I. WHEN DO THE EVIDENCE RULES APPLY?

Rule 101. Scope. These rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101.

Rule 1101. Applicability of rules.

(a) Proceedings generally. – Except as otherwise provided in subdivision (b) or by statute, these rules apply to all actions and proceedings in the courts of this State.

(b) Rules inapplicable. – The rules other than those with respect to privileges do not apply in the following situations:

(1) Preliminary Questions of Fact. – The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a)

(2) Grand Jury. - Proceedings before grand juries.

(3) Miscellaneous Proceedings. – Proceedings for extradition or rendition; first appearances before district court judge or probable cause hearing in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt Proceedings. – Contempt proceedings in which the court is authorized by law to act summarily.

What's the evidence rule that tells us when the evidence rules apply?[2] Rule 101 says Rule 1101 controls.

Not many people have walk around knowledge of exactly when the rules apply. But it came up recently in a 2012 Court of Appeals case, *State v. Foster*.[3] In *Foster*, the Defendant argued that the prosecutor's trial outline constituted inadmissible hearsay and that the trial court erred in using it as a basis for its ruling denying his motion for DNA testing. The State, however, argued that the rules of evidence didn't apply to post-conviction motions for DNA testing under G.S. 15A-269 and that the outline should have been considered. Specifically, the State argued that a motion didn't constitute a "proceeding." The court disagreed, concluding that the hearing on the motion constituted a proceeding and that a motion for DNA testing didn't fall within any of the exceptions set out in Rule 1101(b). The court held that the outline should not have been admitted, but held its admission harmless in affirming the trial court.

[2] See Jessica Smith, *When Do The Evidence Rules Apply?*, UNC School of Government Blog (September 4, 2012), available at http://nccriminallaw.sog.unc.edy/?p=3853.
[3] NO. COA11-1227, 729 S.E. 2d 116; 2012 N.C. App. LEXIS 940.

II. MAKING YOUR RULINGS

Rule 102. Scope.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Rule 102 provides the foundation for justice and fairness. The purpose of Rule 102 is to establish the spirit within which the rules should be applied and construed. It grants the judge an implied flexibility to making certain evidentiary rulings.

You will regularly encounter situations not explicitly covered by the rules of evidence or by statutory provision; and not covered in any reported cases. It will be up to you to determine what is or isn't admissible in those circumstances.

In order to determine whether or not certain evidence is admissible, you should use Rules 401 through 414, which will provide you with the basic standards for admissibility.

Rule 401. Definition of "relevant evidence."

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. Relevant evidence generally admissible; irrelevant evidence inadmissible.

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.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In conjunction with Rule 402, Rule 401 represents the cornerstone of our evidentiary system. Rule 401 provides that in order for evidence to be admissible, it must meet the threshold of relevancy. Once relevancy is established, however, it may be excluded for the affirmative reasons in Rule 402. Relevant evidence is presumptively admissible. The proponent of evidence must establish its relevancy, and the opponent must seek to

establish its inadmissibility on one of the bases cited in Rule 402.

Determining whether evidence is relevant is not a question of law, but one of common sense and logic. The term "any tendency" in the Rule 401 indicates that the slightest tendency will suffice, which is a broad definition. This definition is tempered however, by Rule 403, which excludes relevant evidence which is remote, misleading, or unfairly prejudicial.

A. The exercise of discretion

Some of your evidentiary rulings will be based on a specific rule of evidence. But most of your rulings will be blended using Rules 102, 401, 402, and 403. Contained somewhere within these rules is the inherent power to enter your rulings.

During trials you will rule on many objections from both sides. Many of these will be snap judgments made by you in the heat of battle in order to keep the proceedings moving. Most of these objections require, at a minimum, that you find the evidence is relevant and has probative value. You have wide latitude in most of these rulings and will not be overturned unless you abuse your discretion. This does not mean that you have to be perfect, but you cannot be so far out of bounds that a party does not get a fair trial.

In the exercise of your discretion, remember that:

- You are in the best position to judge credibility and have a feel for the facts of a case.
- You should assure that the rules are properly construed to permit flexible approaches to the problems and issues that arise.
- You should do what is right under the circumstances, and do what a reasonable person would view as fair, just, and proper.
- You should be directed by circumspection; and must not be arbitrary or capricious.
- You should not gratify your own passions; or be partial, whimsical, vindictive, or idiosyncratic.
- You should give effect to the will of the law; and
- You should balance the facts and legal implications and determine what is fair and just.

There are statutes specifically requiring you to exercise your discretion. In most instances these are codifications of long-standing common law rules that lie within the discretion of the trial court.

The following statutes require you to exercise your discretion in determining whether you should:

- Grant a request by the jury for a review of certain testimony or other evidence;[4]
- Permit any party to introduce additional evidence at any time prior

[4] N.C. Gen. Stat. § 15A-1233(a).

to verdict;[5]
- Permit a jury view;[6]
- Permit the jury to take exhibits and writings to the jury room;[7]
- Allow the parties additional jury arguments if additional instructions are given to the jury which change permissible verdicts;[8] and,
- Appoint standby counsel for a defendant representing himself.[9]

Always be aware of statutes that state, **"The judge in <u>his</u> discretion," "A judge in <u>his</u> discretion," "The judge may in <u>his</u> discretion," and "is within the discretion of the judge."**

In exercising your discretion, you should expressly state on the record that you are granting or denying the request **"in your discretion."** No further explanation is required.

On appeal, whether or not you properly exercised your discretion in a case will normally turn upon whether the content and context of the request to the court is for some material evidence; and also upon the specific language used by the court in granting or denying the request. If the appellate court finds the trial court failed to exercise its discretion in denying the request, and that such denial resulted in prejudice, a new trial most likely will be granted.

You should memorize the following language: **In the exercise of my discretion, I am allowing/denying your request**. **<u>Do not</u> utter any other accompanying language.** Use this language even if you don't think it is necessary**.**

B. The abuse of discretion

In exercising your discretion, do not abuse it.

In North Carolina cases, the standard of review is almost always going to be either **abuse of discretion**, *de novo*, or plain error. Abuse of discretion is the standard of review by which most judges' evidentiary rulings are evaluated.

The standard of review is the measure of deference the appellate court will extend to the ruling of the trial court. When a court reviews an argument under an abuse of discretion standard of review, the appellate court gives the trial court's decision great deference. Under the de novo standard of review, the appellate court reviews an argument affording the trial court's decision considerably less deference.[10] And for a defendant to prevail on appeal

[5] G.S. 15A-1226(b).
[6] G.S. 15A-1229(a)(b).
[7] G.S. 15A-1233(b).
[8] G.S. 15A-1234(c).
[9] G.S. 15A-1243.
[10] See *Avoiding Controversy Over The Standard of Review*, prepared by Jane Allen, Assistant Appellate Defender, July 2006.

under plain error review, he has to show the error was so fundamental that it denied him a fair trial or had a probable impact on the jury's verdict.[11]

The range of allowable discretion seems to expand or contract depending on the case and the particular rule of evidence at issue. Your rulings in high-profile cases will more likely get closer appellate scrutiny.

The decision to admit evidence is within the sound discretion of the trial judge and will not be disturbed absent a showing of abuse.[12]

Abuse of discretion has been defined by our courts as a test, which requires the reviewing court to determine whether the decision of the trial court is **manifestly unsupported by reason or is so arbitrary that it cannot be the result of a reasoned decision**.[13]

You will be called upon to rule on many, many evidentiary matters. Make sure your decision is well reasoned and not arbitrary. Some of the most common evidentiary matters to resolve are:

- Preliminary questions (Rule 104)
- Remainder of or related writings or recorded statements (Rule 106).
- Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time (Rule 404).
- Admission of 404(b) evidence under Rule 403 after making findings of fact and conclusions of law.
- Methods of proving character (Rule 405) after Rule 403 balancing test.
- Habit evidence (Rule 406)
- Prior sexual behavior (Rule 412) after *in camera* hearing and Rule 403 balancing test.
- Competency to testify (Rule 601)
- Who may impeach (Rule 607)
- Witness interrogation (Rule 611)
- Witness interrogation by the Court (Rule 614)
- Sequestration of witnesses (Rule 615)
- Lay witness testimony (Rule 701)
- Expert witness testimony (Rules 702-705)
- Residual hearsay exception after making findings of fact and conclusions of law Rule 803(24) and 804(b)(5)

Again, remember to say, **"In the exercise of my discretion, I am allowing/denying your request to . . ."**

[11] *State v. Odom,* 307 N.C. 655, 660 (1993).
[12] *Duke Power Company v. Smith*, 54 N.C. App. 214, 216 (1981).
[13] *State v. Locklear*, 331 N.C. 239 (1992).

III. YOU ARE IN CONTROL[14]

Rule 611. Mode and order of interrogation and presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

The order of presentation of evidence and mode of witness examination rests in your discretion under Rule 611(a). You have the responsibility to control the interrogation of witnesses, the presentation of evidence, the scope of cross-examination, and the use of leading questions. Your goal is to afford both parties the opportunity to present their own evidence and to meet the evidence put forth by their opponent.

Rule 611(a) seeks to advance goals similar to those in Rules 102 and 403. You have the discretion whether and to what extent to allow re-direct and re-cross-examination, whether a witness can be recalled, and whether a party may re-open its case.

Normally the State (or plaintiff) has the burden of proof and goes first. The defendant does not have to put on evidence but may elect to. The defendant has the right to introduce evidence to impeach the State's (or plaintiff's) witnesses, to negate the State's (or plaintiff's) case, or to prove any relevant defense, contention, or claim. The State (or plaintiff) may offer rebuttal evidence and the defendant may offer surrebuttal evidence.

Beware of attorneys who may offer evidence in rebuttal, which is not actually rebuttal. They may offer evidence that is in fact cumulative of the case-in-chief, or try to introduce evidence of a new ground of liability.

As you can imagine, multiple plaintiffs and multiple defendants will complicate matters and necessitate alternating the presentation of evidence that deviate from the trial's normal flow. When faced with these convoluted situations, the sequence of presenting the evidence is left to your sound discretion. You must do what is necessary to produce a proper understanding of the issues.

[14] N.C.R. Evid. 611(a).

Occasionally attorneys request that a witness be examined during an opponent's case-in-chief. Or a party may request the opportunity to recall a witness for additional examination.[15] And at other times it is difficult to know just where a particular item of evidence fits into the sequence of the trial.

Be cautious if an attorney offers evidence that depends on some other evidence that the attorney assures will be "connected up" at a later time. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person charged with notice actually heard it. The relevancy of the spoken statement is conditioned on it having been heard by the person charged with notice.

Rule 104(b) allows you to admit this type of evidence under the principle called "conditional relevancy." Where evidence is conditionally relevant, its probative value depends upon not only satisfying the basic requirement of relevancy, but also upon establishing the existence of some other fact. In other words, one item of evidence is relevant only if another item of evidence is established.

But what if the person charged with notice never testifies? Be prepared for the problems that may arise if you admit this type of evidence and the attorney does not connected it later as he or she promised.

You may have to strike the questionable evidence and give a curative instruction. The attorney who offered the evidence should probably be allowed to make an offer of proof. Do not be surprised (and be prepared) if opposing counsel moves for mistrial.

Attorneys may ask to examine witnesses out of turn, and out of sequence. Typically, the attorney wants to examine the witness about his or her lack of qualifications, personal knowledge, or competency; or about the lack of foundation as to the authenticity or identification of an exhibit.

If you allow the attorney's request, you should conduct a *voir dire* and permit the other attorney to cross-examination the witness if you deem it necessary. If you exclude some or all of the witness's testimony, you have prevented the jury from exposure to inadmissible evidence and streamlined the proceedings. The witness will either testify or be released from subpoena.

So the entire matter of the order of presentation of evidence and the mode of witness examination rests within your discretion. Abuse of discretion will be found only if the opportunity to present evidence, impeach witnesses, support the

[15] G.S. 15A-1226(b).

credibility of impeached witnesses, or refute new points raised by the opponent is completely denied.[16]

IV. WHEN TO SEQUESTER WITNESSES[17]

Rule 615. Exclusion of witnesses.

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) a person whose presence is determined by the court to be in the interest of justice.

G.S. § 15A-1225. Exclusion of witnesses.

Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, except when a minor child is called as a witness the parent or guardian may be present while the child is testifying even though his parent or guardian is to be called subsequently.

When a witness is sequestered, the witness is excluded from the courtroom so that he or she cannot hear the testimony of other witnesses. The goal of sequestration is to discourage and expose fabrication, inaccuracy, and collusion. First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses; and second, it aids in detecting testimony that is less than candid.

Rule 615 states, "the court may order," and "determined by the court to be in the interest of justice." 15A-1225 states, "the judge may order." It is therefore within your sound discretion to sequester all, or some of the witnesses.

The general practice should be to sequester witnesses on request of either party unless some reason exists not to. And you have the power to exclude only some witnesses in the exercise of your discretion.

Your sequestration order should prohibit the witnesses from communicating with each other outside the courtroom. You should also order them not to read a transcript of the trial testimony of any other witness.

If a witness has not completed his or her testimony when you take a recess, be sure to instruct the witness not to discuss the testimony with anyone during the recess, except maybe his or her attorney.

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[16] *North Carolina Evidentiaty Foundations*, by Mostellar, Beskind, Eagles, Ross, and Imwinklereid (2006).
[17] See *Sequestration of Witnesses*, North Carolina Superior Court Judges' Benchbook, by Jessica Smith, UNC School of Government (December 2011).

You should indicate in the record what witnesses are to be sequestered and whether they are to be excluded from presentation of all evidence, or only during certain testimony. You should also indicate whether they are allowed to remain in the courtroom after testifying.

The order should explicitly state whether to limit contact among witnesses while sequestered. You must make sure that accommodations are provided to protect the integrity of your ruling. Separate rooms may be required. You'll likely need a bailiff, or someone from each side of the case to serve as a court liaison to carry out your order. The liaison must communicate with the witnesses about when they will testify, and the times of lunch and adjournment. In my opinion, a bailiff is best suited for this role.

Remember, the more explicit your sequestration order, the easier to deal with violations of your order. If you are confronted with a witness who violates your sequestration order, you might consider the following remedial measures:

- Exclude the testimony of the witness (you have the inherent authority in civil cases--be careful in criminal cases, however, not to violate the defendant's constitutional right to present a defense).
- Find the witness in contempt; or
- Instruct the jury to evaluate the credibility of the witness in light of his or her transgression.

V. HANDLING OBJECTIONABLE EVIDENCE

A. Pretrial Motions *in limine*

If an attorney anticipates that certain objectionable evidence may arise at trial, he or she may raise an objection by a pretrial **motion *in limine***. The attorney seeks to exclude anticipated prejudicial evidence before it is actually offered at trial in front of the jury. Consequently, your ruling will likely have an affect on the attorney's trial strategy.

The motion is usually an oral motion made before jury selection. It is in your discretion to rule on the motion before or during trial. My practice is to hear only those motions that might affect jury selection so as to not impose on the jury's time. All others I reserve until such time as the evidence is offered at trial.

During the presentation of the evidence the attorney who made the motion should object again and request that a *voir dire* be conducted. At the hearing, the evidence will be more fully developed and you will be in a better position to hear further legal arguments and make your ruling. You should announce it clearly and precisely and give the reasons for your decision in the record. Do not be afraid to

reconsider your preliminary rulings. Your evaluation of the motion might be different after hearing the evidence during trial.

B. Trial objections

After the jury has been selected, it is a good idea to give the *Remarks to Jurors After Jury Impaneled*[18] in your introductory remarks. This instruction explains the procedures that will unfold regarding sustaining or overruling objections, rulings on motions to strike, and resolving questions of law outside their presence.

When attorneys believe a question is improper, they of course object. Some of the most common **trial objections** are to questions that may be leading, too broad, compound, repetitive, or argumentative. Or the questions may call for a narrative answer, speculation, hearsay, or facts not in evidence. Some are simply unintelligible.

When objections arise, allow the attorneys to use simple references to the generic evidentiary doctrine they claim the opposing attorney is violating, such as "leading," "foundation," or "hearsay." The attorneys are only required to clearly present the alleged error to you.[19]

Do not tolerate **speaking objections**. Speaking objections are designed as arguments to the jury rather than briefly stating the legal ground for the objection. Attorneys may try to speak a complete thought in an effort to provide additional information to the jury, to aggravate opposing counsel, or to give additional information to the judge. Usually, it will be all of the above, at the same time.

It might be necessary to instruct the attorneys outside the presence of the jury regarding speaking objections. My advice is to first conduct a **bench**

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[18] See excerpts from North Carolina Pattern Jury Instructions (N.C.P.I.) – Criminal 100.25: *Precautionary Instructions to Jurors (To Be Given After Jury Is Impaneled)*; and Civil *Remarks To Jurors After Jury Impaneled*, North Carolina Superior Court Judges' Benchbook:

It is the right of the attorneys to object when testimony or other evidence is offered that the attorney believes is not admissible. When the court sustains an objection to a question, the jurors must disregard the question and the answer, if one has been given, and draw no inference from the question or answer or speculate as to what the witness would have said if permitted to answer. When the court overrules an objection to any evidence, you must not give such evidence any more weight than if the objection had not been made.

If the court grants a motion to strike all or part of the answer of a witness to a question, you must disregard and not consider the evidence that has been stricken.

During the course of the trial, it may be that questions of law will arise that need to be considered by the court out of the presence of the jury. When this happens, I may ask you to go to the jury room for a few minutes. You should not worry or speculate about what takes place in the courtroom during your absence – we will merely be considering questions of law that have to be heard outside of the presence of the jury. All of the competent evidence in the case will be presented while you are present in the courtroom.

18 N.C.R.Evid. 103(a)(1).

conference and instruct the attorneys what you intend to allow. If either attorney wants to be heard further, excuse the jury from the courtroom and allow him or her to argue. Then enter your ruling on the record.

When conducting bench conferences, you might want to consider a few practical tips:

- If full recordation has been allowed in non-capital or civil cases, exclude the bench conferences from the recordation order unless a need is shown for recording a particular dialogue at the bench.
- Since full recordation of all bench conferences is required in capital cases (and the defendant is required to be present at the conference), suggest ruling on your own motion that there will be no bench conferences during trial (after the first few days of trial, you will find there are few requests by either side for evidentiary hearings, which will obviate the need to repeatedly excuse the jury).

Remember, in order for an attorney's objection to be preserved for review on appeal, you must rule on the objection. All you have to say is "sustained," or "overruled." You owe no explanation (but may give one if you prefer). Do not get lazy and fail to state your ruling. The attorneys deserve a complete record.

1. Offer of proof

> **Rule 103. Rulings on evidence.**
>
> **(a)(2) Offer of proof. - In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.**

If you sustain an objection at trial, you most likely will cut off a line of testimony the attorney deems relevant and important to proving his or her case. If you exclude evidence, don't be surprised if the attorney approaches the bench and requests permission to make an **offer of proof**. If requested, you should immediately excuse the jury from the courtroom.

The attorney should be allowed to make part of the record the testimony the witness would have given. Make certain the court reporter records the offer. The witness should be allowed to testify as if you had not sustained the objection. The proponent is required to make known to the court by offer the substance of the evidence.[20]

If you realize during the offer the testimony of the witness will be lengthy, you may want to conduct the offer at a later time so as to not waste the jury's time. It may be more efficient to conduct the offer during a recess, or after you excuse the jury for the day.

[20] N.C.R.Evid. 103(a)(2); N.C.R. Civ. P. 43(c) is made applicable to criminal cases by G.S. 15A-1446(a).

Be sure to consider the practical consequences of delaying the offer of proof, however. If the witness is an expert, delaying the offer may result in additional expense. The witness may have a scheduling conflict, or a flight to catch. Or, the witness may become upset about having to wait to testify.

Do not be afraid to reconsider or change your ruling after hearing the testimony of the witness during the offer. You may not have realized where the attorney was going with the witness when you sustained the objection.

The offer of proof is essential if the case is to be appealed. If the attorney is not allowed to conduct the offer of proof, he or she might lose the right to raise the issue.

Be sure that your reasoning is fully explained and included in the record. The appellate court will be in a better position to evaluate the effect of your ruling and determine whether or not you committed prejudicial error.

Remind the attorney that he or she must renew on the record at trial any offer of proof (or any pretrial objection) in order to preserve error.

2. Motion to strike and curative Instructions

Occasionally, in response to a proper question, a witness might give an improper answer, might answer too fast for an objection, or give an answer that seems proper at first, but is determined later to be improper. In such a situation, if you sustain the attorney's objection he or she might make a **motion to strike** the improper answer.

If you grant the motion to strike and the attorney requests, you should immediately give a **curative instruction** informing the jury that the answer by the witness was improper or irrelevant and instruct them to disregard and not consider it.

As a practical consideration, you should be sure the attorney does in fact want you to give the instruction. Giving a curative instruction sometimes calls more heightened attention to the improper answer. The attorney may prefer to let the matter go instead.

If you sustain an objection and the attorney does not request a curative instruction, you should consider whether to give the instruction on your own motion. If you deem it necessary under plain error, or to fully inform the jury, you should, in your discretion, give an instruction.

3. Limiting Instructions

Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but not admissible as to another party of for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

During your trials you will undoubtedly admit evidence objected to by an attorney who believes the evidence is inadmissible. In turn, the attorney may request you to instruct the jury to consider the evidence only for a specific purpose. This is called a **limiting instruction (or admonition)** and is authorized by Rule 105.

The rule contemplates that you give such an instruction upon request. A limiting instruction is often used as a second line of defense after an attorney has unsuccessfully attempted to exclude evidence under Rule 403, which balances probative value against such adverse influences as unfair prejudice.

It is within your sound discretion to determine when and whether to give the instruction. You can do so immediately upon the admission of the purportedly objectionable evidence, or give it later in your final instructions to the jury. In my opinion, the better practice is to give the instruction when requested.

If the attorney fails to request the instruction, he or she cannot complain later upon appeal.

a. Commonly used limiting instructions

Some of the most commonly used limiting (or informational) instructions in criminal and civil cases appear below. It is a good idea to have these readily available and accessible upon short notice. You should have them in a prominent position in your trial notebook, or bookmarked on your computer.

They can all be found in the North Carolina Pattern Jury Instructions at the following sections:

<u>Criminal</u>

- 100.30: Making Notes
- 100.31: Admonition to Jurors at Recess
- 105.40: Evidence of Similar Acts or Crimes (404(b))
- 104.50: Photographs, Diagrams, Maps, Models
- 104.96: Limitation on Expert Opinion Testimony.
- 105.20: Impeachment or Corroboration by Prior Statement.
- 105.35: Impeachment of a Witness - Proof of Crime (Rule 609)

- 105.40: Impeachment of Defendant - Proof of Crime (Rule 609)

Civil

- 100.70: Taking of Notes by Jurors
- 100.20: Recesses
- 100.21: Recesses
- 101.32: Evidence - Limitation as to Parties (Rule 105)
- 101.33: Limitation as to Purpose (Rule 105)
- 101.36: Impeachment of a Party or Witness (Rule 609)
- 101.40: Illustrative and Substantive Evidence.
- 101.41: Stipulations.
- 101.43: Deposition Evidence.

VI. MAKE A RECORD OF YOUR REASONING

At times, you need to explain your reasoning. You should make definite what you have decided in order to allow for meaningful appellate review.[21]

As you try more cases you will develop your own philosophy about how you enter rulings. It is important to listen carefully to the testimony of the witnesses and the arguments of the attorneys.

Take good notes. When appropriate you should consider ordering the parties to submit proposed findings of fact and conclusions of law, citing the relevant rules, statutes, and case law. Compare your notes to their submissions in arriving at the final order for the record. Remember, the attorneys are helping you draft your order.

The following are some common examples of when it is important to make a record:

A. Rule 403 evidence

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[21] *Greensboro Masonic Temple v. McMillan*, 142 N.C. App. 379, 382 (2001); *Hill v. Lassiter*, 135 N.C. App. 515 (1999); *Mashburn v. First Investors Corp.*, 102 N.C. App. 560 (1991).

You may exclude logically relevant evidence if, in your judgment, the dangers of the evidence outweighs its probative value. The underlying premise of the rule is that certain relevant evidence should not be admitted to the jury where the admission would result in an adverse effect upon the fact finding process.

You must initially determine the probative value of the evidence offered. You must consider how clear the evidence is, how strong the logical link is between the evidence and the fact it is offered to prove, and how positive the witness is.

If you deem the evidence probative, you must then consider whether the probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. If the risks substantially outweigh the probative value, you should exclude the evidence. If not, the evidence should be admitted.

There is no precise definition of the term "substantial," but it seems clear that, at least symbolically, the rule favors a presumption of admissibility by mandating that the negative attribute of the evidence must substantially outweigh its probative value before exclusion is justified.

You should consider giving a limiting instruction pursuant to Rule 105 if you deem it necessary to diminish the danger of prejudice, confusion, or inefficiency.

A *voir dire* is not required as part of the Rule 403 balancing test, but should be done if requested so as to create a record on appeal.[22] Whether you admit or exclude the evidence, it is the better practice to make a record of your findings. At a minimum, be sure to state on the record that you "engaged in the Rule 403 balancing test," and say "In the exercise of my discretion I am allowing/denying…"

B. Rule 404(b) evidence

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(b) 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. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.

[22] *State v. Hope*, 189 N.C. App. 309, 316 (2008).

As you know, in criminal trials the district attorney cannot use proof of other crimes or wrongs by the defendant to prove that the defendant is a law-breaking, immoral person of bad character.[23]

But the DA may introduce evidence of other crimes (charged or not) or wrongs for other purposes if the evidence is logically relevant to a fact in issue, and the probative value of the evidence is not substantially outweighed by its prejudicial effect. In other words, such evidence may be admitted unless the only probative value of the evidence is to show that the defendant had the disposition or the propensity to commit the charged offense.

In order for 404(b) evidence to be relevant:

(1) There must be sufficient evidence that the defendant committed the other act in question;
(2) It must not be used to prove the character of the person (used to show disposition or propensity);
(3) It must be sufficiently similar to the act in question; and
(4) It must not be too remote.

If you determine the evidence is offered for a proper purpose (proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident), you must then engage in a Rule 403 balancing of probative value against the danger of undue prejudice, confusion, etc., or the "balancing test."

The ultimate test for admissibility of 404(b) evidence is whether the incidents are sufficiently similar and not so remote in time as to be more probative than prejudicial under Rule 403.[24]

You should enter the reasons for your ruling in the record. Be sure to go through your 404(b) analysis (defendant did it, purpose other than propensity, similarity, and not too remote), and say, at a minimum, that you "engaged in the Rule 403 balancing test."

Remember, when you make findings of fact and conclusions of law supporting admission of 404(b) evidence, the appellate court looks to whether the evidence supports your findings and whether the findings support your conclusions. The court reviews *de novo* the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). If the court determines the evidence is covered under Rule 404(b), the court then reviews your Rule 403 determination for abuse of discretion.[25]

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[23] N.C.R.Evid. 404(a).
[24] *State v. Boyd*, 321 N.C. 574, 577 (1088).
[25] *State v. Beckelheimer*, 366 N.C. 127, 726 S.E. 2d 156, 159 (2012).

You should also consider a limiting instruction to the jury to guard against the possibility of unfair prejudice. Instruct the jury to consider the evidence only for the purposes allowed by Rule 404(b).[26]

C. Competency of a child witness

Rule 601. General rule of competency; disqualification of witness.

(b) Disqualification of witness in general. A person is disqualified to testify as a witness when the court determines that the person is (1) incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her, or (2) incapable of understanding the duty of a witness to tell the truth.

The general rule is that every person is competent to be a witness unless the trial court determines that the person is disqualified under the evidence rules. This standard sometimes is stated as requiring that the witness "understands the obligations of an oath or affirmation and has sufficient intelligence to give evidence."[27] The witness is only required to have some ability to communicate and some understanding of the duty to tell the truth. There is no fixed age limit below which a witness is incompetent to testify.

If an attorney challenges the competency of a child witness, you have a preliminary obligation to make a competency determination. You should conduct a *voir dire* examination. You may not accept a stipulation as to competency.[28] You may also want to hear testimony from parents, teachers, and others.[29]

Pay close attention and observe the child during the hearing. After the attorneys have concluded their examinations you should conduct your own. Your inquiry must be sufficient to allow you to determine whether the witness meets the standard for competency.[30]

You are not required to make formal findings as to competency,[31] but it is highly advised. Many judges use the sample *voir dire* questions composed by Bob Farb regarding competency of a child witness.[32] After the hearing you

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[26] See N.C.P.I. – Criminal 105.40: *Evidence of Similar Acts or Crimes*
[27] *State v. Higginbottom*, 312 N.C. 760, 765, (1985).
[28] *State v. Fearing*, 315 N.C. 167, 172-74 (1985).
[29] *State v. Roberts*, 18 N.C. App. 388, 391 (1973).
[30] *State v. Pugh*, 138 N.C. App. 60, 66 (2000).
[31] *State v. Rael*, 321 N.C. 528, 533 (1988).
[32] Sample *voir dire* adapted from *Robert L. Farb, North Carolina Prosecutor's Trial Manual* 456-57 (UNC-CH School of Government, 4th ed. Jan. 2007):

- What is your name?
- How old are you?
- When is your birthday?

should make conclusions as to whether or not the child is alert, is intelligent, has the capacity to observe, remember, and relate; and is fully aware of the necessity to tell the truth.

If at the end of the presentation of the evidence you decide the child witness is incompetent, you sustain the defendant's objection, disqualify the child from testifying, and direct him or her to leave the stand. If you rule the child competent to testify, you overrule the objection, and the child takes the normal oath and testifies. The competency determination is entrusted to the trial judge and will be reversed on appeal only upon a showing of abuse of discretion.

Let's assume for this manuscript that after a hearing you find a child witness incompetent to testify in his own child abuse case because of his young age (3½ years). Notwithstanding, the District Attorney calls to the stand the child's preschool teacher. He seeks to introduce the child's statements to her identifying the defendant as the perpetrator in response to her concerns about potential child abuse.

Defendant objects, argues the statements are "testimonial," and thus inadmissible under Crawford[33] without a showing of unavailability, and a prior opportunity to cross-examine.

The prosecution argues the child's statements are not testimonial, and thus do not implicate the Confrontation Clause. The DA also argues the out-of-court statements are admissible under the residual exceptions to the hearsay rule.

Do the child's out-of-court statements to his teacher qualify as testimonial statements under *Crawford*? Will the defendant's confrontation clause rights be violated if the out-of-court statements are admitted?

- Do you have any brothers or sisters?
- What are their names?
- Do you go to school?
- What school do you go to?
- What grade are you in?
- Who is you teacher?
- Where do you live?
- Do you know the difference between right or wrong?
- Do you know what a lie is?
- Is it right or wrong to tell a lie?
- What happens if you tell a lie?
- Do you know what a promise is?
- What happens if you break a promise?
- Do you know what it means to tell the truth?
- Do you promise to tell the truth today about what happened between you and [defendant's name]?

[33] *Crawford v. Washington*, 541 U.S. 36 (2004).

In October 2014, the United States Supreme Court granted certiorari in *Ohio v. Clark*,[34] a case in which the Court will decide these questions. It is the first *Crawford* case involving child abuse.[35]

In *Crawford* and later cases, the United States Supreme Court has expressly left open whether the Confrontation Clause applies at all to statements to non-law enforcement personnel. It has yet to decide under what circumstances statements are testimonial when made to people other than the police or their agents.

In *Clark*, the Ohio Supreme Court held that the child's statements were testimonial and that the trial court violated the defendant's Confrontation Clause rights when it admitted the child's out-of-court statements, after finding the child incompetent to testify.

Clark's main focus is on the confrontation issue. Little attention is given to the evidence rules, and specifically which hearsay exception allowed for admission of the child's statements. Remember, the *Crawford* rule, by its terms, applies only to testimonial evidence. Non-testimonial evidence falls outside of the confrontation clause and need only satisfy the rules of evidence for admissibility.

In child abuse cases, the most commonly applicable hearsay exceptions are the excited utterance exception, the statement for purpose of medical examination and treatment exception, and the residual exceptions. It is not clear from the Ohio Supreme Court opinion which hearsay exception was utilized. It does not appear that a foundation was laid for admission under the excited utterance or medical examination and treatment exceptions. Logical deduction would suggest the court allowed the testimony under the residual exceptions.

Thus, the issue to be considered is as follows: If the child was incompetent to testify, should his statements have been admitted under the residual exceptions? Hopefully, the Supreme Court will provide guidance.

If you are confronted with a similar scenario in North Carolina, what analysis should you use in determining admissibility of an incompetent child's testimony under the residual exceptions to the hearsay rule.

Admissibility of such evidence under the residual exceptions is explored below.

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[34] 999 N.E. 2d 592 (Ohio 2013), *cert. granted* _____ U.S. _____, 135 S. Ct. 43 (2014).

[35] See Jessica Smith, *Competency and the Residual Hearsay Exception*, UNC School of Government Blog (January 6, 2015), available at http://nccriminal law.sog.unc.edu/competency-and-the-residual-hearsay-exception/

D. Residual exceptions to the hearsay rule[36]

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(24) Other Exceptions. – A statement not specifically covered by any of the forgoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

Rule 804. Hearsay exceptions; declarant unavailable.

(b)(5) Other Exceptions. – A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts ; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

As you know, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." The evidence rules provide that hearsay is inadmissible except as provided by statute or the rules themselves, or under an exception to the rule.

Even if an out-of-court statement does not fall within a specific hearsay exception, it still may be admissible under the residual hearsay exceptions, called "catch all exceptions."

The first exception is found in Rule 803(24), for which unavailability is immaterial.

And the second is found in Rule 804(b)(5), which requires unavailability.

[36] See *Criminal Evidence: Hearsay,* in the North Carolina Superior Court Judges' Benchbook, by Jessica Smith, UNC School of Government (October 2013).

In North Carolina, before admitting proffered hearsay evidence pursuant to the residual exceptions, the trial judge has to engage in a six-step inquiry and determine that:

(1) Proper written notice was given to the adverse party;
(2) The hearsay statement is not specifically covered by any other hearsay exception;
(3) The proffered statement possesses circumstantial guarantees of trustworthiness, specifically:
    a. Whether the declarant had personal knowledge of the underlying events,
    b. Whether the declarant is motivated to speak the truth or otherwise,
    c. Whether the declarant has ever recanted the statement, and
    d. The practical availability of the declarant at trial for meaningful cross-examination.
(4) The proffered evidence is offered as evidence of a material fact;
(5) The proffered evidence is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, specifically:
    a. Were the proponent's efforts to procure more probative evidence diligent?
    b. Is the statement more probative on the point than other evidence that the proponent could reasonably procure?
(6) The proffered evidence will best serve the general purposes of the rules of evidence and the interests of justice.

If you admit this type of hearsay evidence, you must make findings of fact and conclusions of law under (3) and (5) above. You are not required to make findings of fact in determining (1), (2), and (6), but you must at least include a statement in the record of your conclusions as to those elements in the six-step test. Failure to adhere to these requirements is error.

VII. SUPPLEMENT

Always reserve the right to supplement the record when pronouncing your rulings. It is not a bad idea to take notes during all evidentiary hearings conducted during trial. You may want to add something to the record later after reviewing your notes.

VIII. PLAIN ERROR

And always be vigilant when listening to the evidence. Take appropriate action when circumstances arise unexpectedly, without any apparent reason, to prevent plain error from occurring. Plain error arises when "the error is so basic, so prejudicial, so lacking in its elements that justice cannot have been done." You are required to be faithful to the law and maintain professional competence in it.

Even in the absence of a request from an attorney, never shirk from your responsibility to instruct the jury *ex mero motu* that they should disregard and not consider the incompetent or inadmissible evidence.

IX. OBSERVATIONS

Outside of those occasions when you are required to give your reasoning on the record, I believe you need only five words in your judicial vocabulary: "allowed," "denied," "sustained," "overruled," and "next." If you succumb to temptation, the more you exceed this minimum, the more you run the risk of talking yourself right out of a job.

Always be mindful that you are not the only important one in the courtroom. You work with some very dedicated public servants. Most have families, as well as interests outside of court. Do not over impose upon their schedules.

You would be wise to observe a consistent schedule each day for recesses, lunch, and adjournment so the personnel know what to expect. Court is always unpredictable, however. If you do go off schedule, consult with them before making a decision.

Allow the attorneys appearing in front of you to try their cases. They are under immense pressure to represent their clients with zeal.

And be aware that all who come to the courthouse know there will be a decision in every case. Your decision will not be a surprise. If you deliver it in a fair and courteous way, justice will be well served.

KEY REFERENCES FOR SUPERIOR COURT JUDGES

1. North Carolina Rules of Civil Procedure (N.C.G.S. § 1A-1, Rule 1 through 84)

2. Criminal Procedure Act (G.S. 15A-1 through 15A-2012)

3. North Carolina Rules of Evidence (G.S. 8C-1, Rules 101 through 1102)

4. General Rules of Practice for the Superior and District Courts (Rules of Practice)

5. North Carolina Code of Judicial Conduct (Canons 1 through 7)

6. Revised Rules of Professional Conduct of the North Carolina State Bar (Chapter 2 of the Rules and Regulations of the North Carolina State Bar)

7. NC Superior Court Judges page (www.sog.unc.edu/faculty/smithjess/)
   a. Materials from Past Schools & Conferences
   b. North Carolina Superior Court Judges' Benchbook
   c. Criminal Case Compendium
   d. Legislation
   e. Justice Reinvestment Resources
   f. Expunction & Related Relief
   g. SOG Criminal Law Page
   h. Criminal Law Blog
   i. Web Links & Reference Materials
   j. Jessie Smith on Twitter

8. The North Carolina Superior Court Judges' Pattern Jury Instructions (on your computer)
   a. Research Assistant
   b. Criminal Instructions
   c. Civil Instructions
   d. Motor Vehicle Instructions

TRIAL TIPS FOR ATTORNEYS

- Ask simple questions in jury selection.
- Do not drag your questioning out.
- When you begin jury selection, tell the prospective jurors how long you estimate the trial will last to see if any juror has a conflict with the length of trial.
- When excusing a juror from the panel, always call their last name and what designated seat they are in.
- In civil cases, prepare a one-paragraph description of the case (e.g., this case arises out of a motor vehicle collision, which occurred on July 28, 2011, at the intersection of Elm and Market Streets. Plaintiff seeks to recover money damages resulting from the collision, which Plaintiff contends was caused by the negligence of Defendant. Defendant contends the collision was caused by the negligence of Plaintiff, which bars any recovery by Plaintiff).
- Stipulate to as many facts as possible (including expert testimony).
- Submit all witness lists prior to jury selection to the Court, court reporter, and clerk.
- Submit a copy of expert witness reports to the court reporter to insure accuracy in spelling of technical, medical, or scientific terms.
- Submit case citations to opposing counsel, court reporter, and Court at the time of citation.
- If a trial notebook is submitted to the Court, submit one to the court reporter for ease of reference.
- Speak distinctly and loud enough that all parties and jurors can hear.
- Do not speak out of turn or at the same time as another attorney.
- Have all witnesses spell their full names.
- Make sure the witness speaks loudly enough so that the juror farthest away can hear the testimony.

- Make sure the witness answers the question with an affirmative answer. Otherwise, the court reporter will report, “witness shakes head,” or “witness nods head,” which is not sufficient for the record.

- Allow a witness to explain their answer, if they wish to do so.

- Do not ask the court reporter to repeat a question--that is the Court’s function.

- Have all exhibits marked before trial.

- Make sure the judge sees each exhibit before showing it to a witness to identify.

- Make at least 13-18 copies of any exhibit to be published to the jury (including pictures, unless unique or to be shown by video or PowerPoint).

- Be sure all audio or video equipment works properly. Have backup equipment, if necessary.

- Submit proposed jury instructions to the court for consideration as soon as possible.

- Submit written requests for criminal verdicts (e.g. lesser included offenses) to the district attorney and Court; and written requests for civil issues to opposing counsel and Court as soon as possible

- Before you begin a legal argument, present the judge with a copy of your brief and/or authority. Do not make the judge thumb through the file to find it.

- Let bailiffs know if you need to use a podium.

- Have no gaps of time between witnesses who testify.