

Timothy Heinle

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Evidence in AND and TPR Proceedings

For District Court Judges

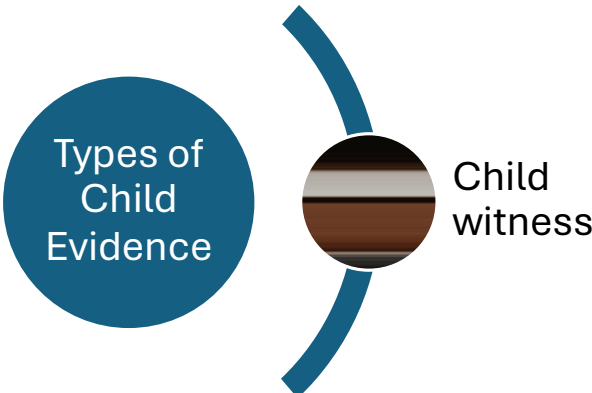


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Values, Not Just Rules

- Avoid unreliable evidence
 - E.g., personal knowledge, hearsay, opinion, competency
- Minimize prejudicial distractions
 - E.g., relevance
- Promote social policies
 - E.g., privilege
- Ensure fairness
 - E.g., predictability and notice





Types of
Child
Evidence

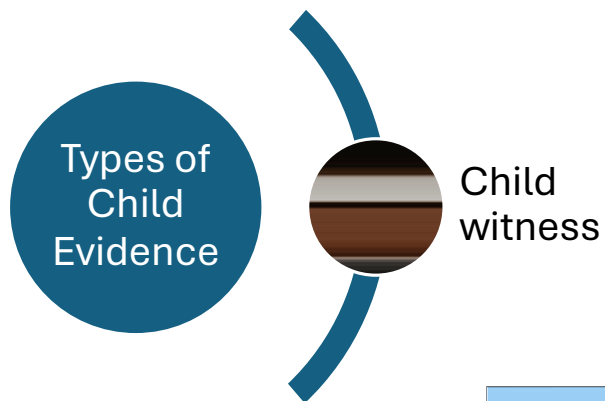
Child
witness

What is the legal standard for a child to testify?

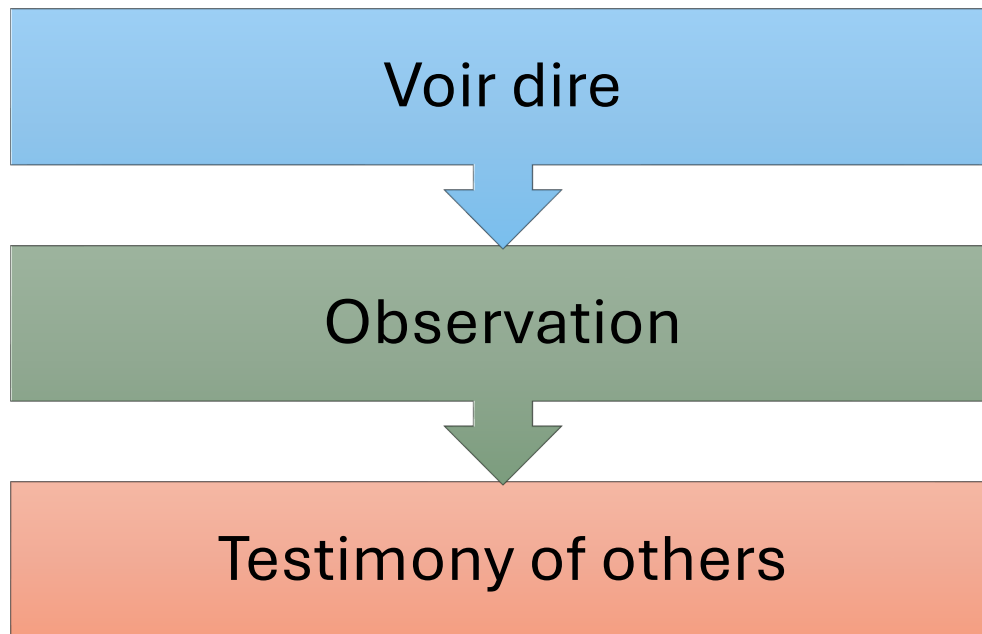
Rule 601. General rule of competency; disqualification of witness.

(a) General rule. – Every person is competent to be a witness except as otherwise provided in these rules.

(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.



How do you determine if the child is competent to testify?



Offers of Proof



Erroneous rulings,
substantial rights, +
offers of proof (R. 103(a))



Specific forecast of
would-be evidence



On the record



Request to make offer of
proof must be granted.
In re A.H., 250 N.C. App. 546 (2016).

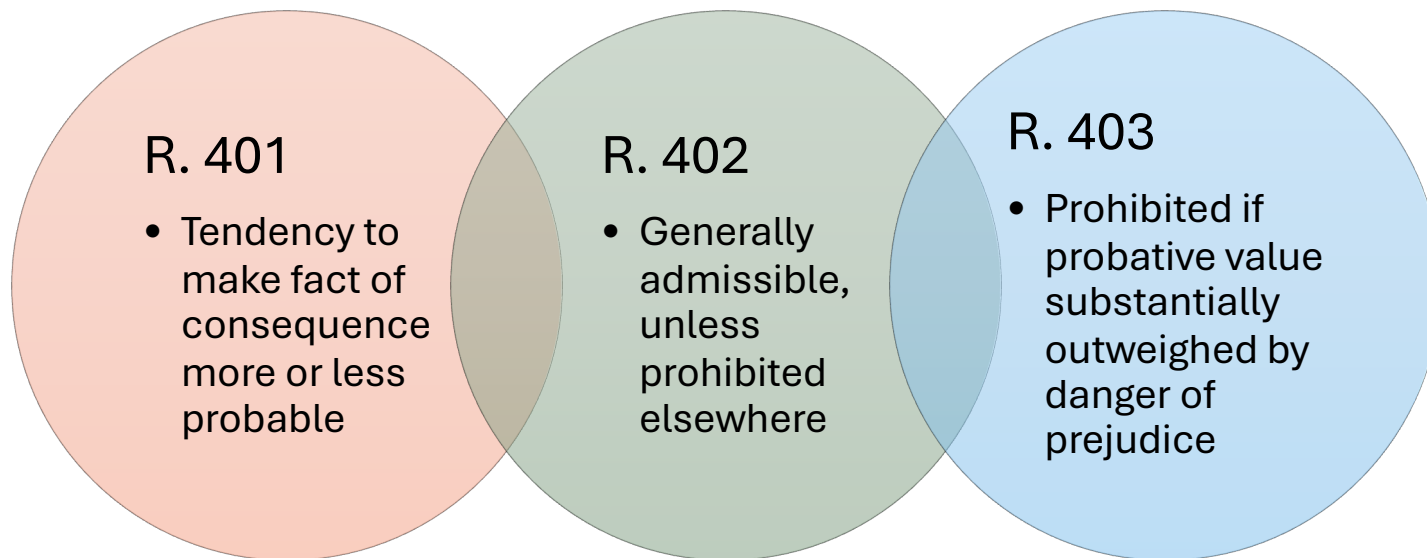


Eliciting witness testimony
preferred/most complete.
State v. Martin, 241 N.C. App. 602 (2015).

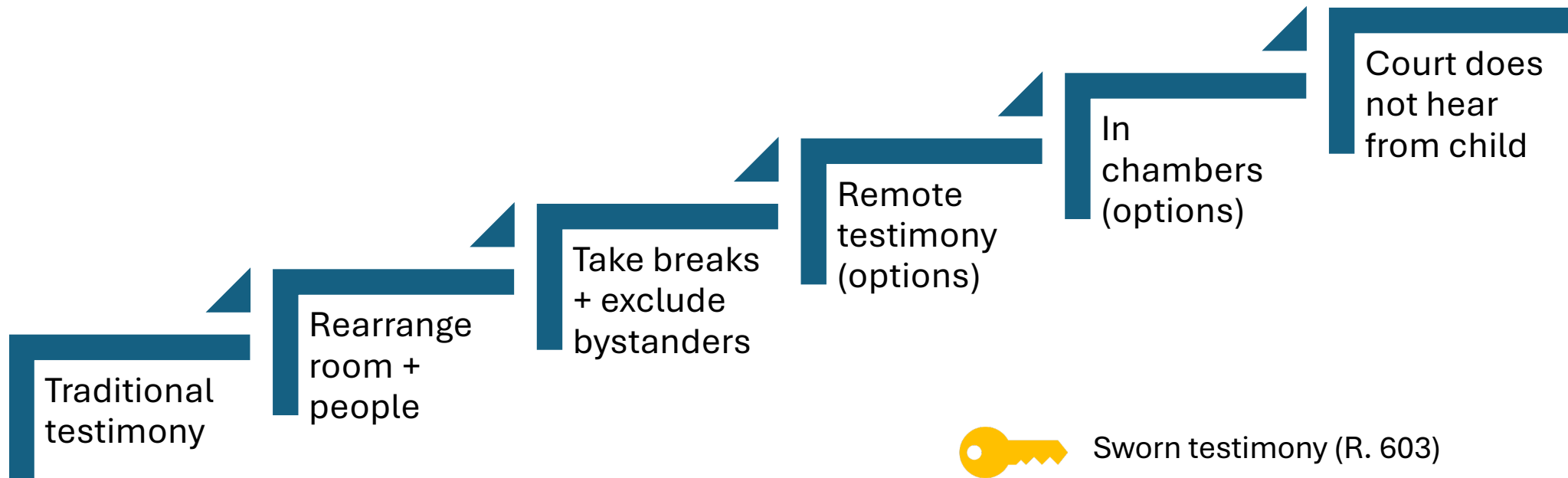


Objections (and complaints)

Relevance!



Alternative Arrangements



Sworn testimony (R. 603)



On the record

For the Truth

Out-of-court statement

+ Offered to prove the truth of what was said

The value of the evidence depends on the credibility of the out-of-court declarant.

Testing declarant's credibility:

- i. Subject to cross-examination
- ii. Statements satisfies hearsay exception

Not for the Truth

Out-of-court statement

+ Offered for reasons other than the truth

The value of the evidence usually depends on the credibility of the in-court witness.

Tested by being subject to cross-examination.

"The father's drug counselor told dad that as part of his case plan, he must submit to screens."



Social
Worker



Social Worker Smith,
please read the
details of every CPS
report on Jonny's
family since 1997.

- Purpose: show misconduct occurred or explain investigative steps?
- Statements must be limited in detail due to potential for prejudice.

The “Explains Conduct” Non-Hearsay Purpose



October 13, 2009 [Jeff Welty](#)

Print

Most readers of this blog know that hearsay evidence, meaning an out-of-court statement “offered in evidence to prove the truth of the matter asserted,” N.C. R. Evid. 801(c), is presumptively inadmissible. Sometimes the proponent of hearsay evidence can introduce the evidence under one of the exceptions in Rules 803 and 804. But equally often, the proponent of what appears to be hearsay evidence will attempt to introduce it for a non-hearsay purpose, i.e., for a purpose other than to establish the truth of the matter asserted.

Here’s an example. Dan Defendant is charged with PWISD cocaine. Ollie Officer is on the stand, and Pat Prosecutor asks, “how did Dan first come to your attention?” Ollie begins to say that Winnie Witness, who lived near Dan, contacted Ollie and told him that Dan was selling drugs. Dan’s lawyer objects on hearsay grounds, and



HEARSAY EXCEPTIONS

CATEGORY 1A: DECLARANT AVAILABILITY IRRELEVANT

Inference of reliability and sincerity

Rule 803



Business Records Exception

- Is it a (i) business (ii) record?
- Prepared in ordinary course of business?
- At/near the time of the event?
- Made by (or using info from) someone w/ knowledge?
- With a duty to the business to report accurately?
- Sworn to by records custodian/another qualified person by
 - testimony, or
 - affidavit with notice to parties?

Rule 803(6)



Reconceptualizing

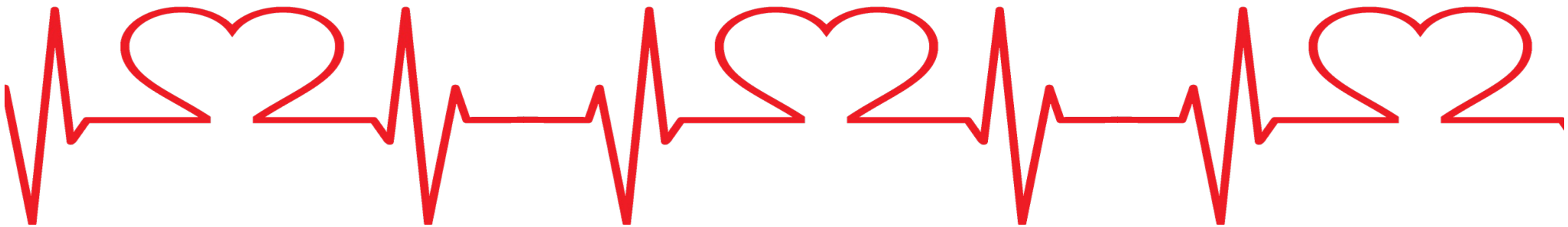
Business Records Exception

- Hearsay? (Out of court; offered for truth)
 - Are the records competent to testify? (Elements)
 - Can the records say *that*? (Admissibility of testimony)
- Like a witness allowed to testify, but subject to limits.

MEDICAL DIAGNOSIS OR TREATMENT EXCEPTION

Rule 803(4)

- Did the declarant understand the statement would lead to medical d/t?
- Was the statement reasonably pertinent to medical d/t?



Admissible?

What if the...

1. Examination was in preparation for litigation? If only for litigation, no.
2. Declarant was not the injured or sick person? Yes, if same motivation to tell the truth exists.
In re J.M., 255 N.C. App. 483 (2017) (child's parent)
3. Listener was not a medical professional? Yes, if truly for diagnosis and treatment.

Dr. Williams, what did Jonny say that night at the emergency room?

He said, "My arm hurts."

And later, "Dad has a bad temper."



CIRCUMSTANCES INDICATE A YOUNG DECLARANT'S MOTIVE.



Purpose of Examination

- Explained to child
- In age-appropriate manner



The Truth

- Importance of being truthful
- Demonstrated ability to differentiate truth & lies



The Interview

- Medical or non-medical interviewer
- Leading nature of questions



The Interview Setting

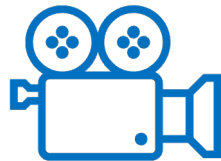
- Medical?
- Child friendly?
- Private?



Time Between Incident and Exam



VIDEO- RECORDED EXAMS



To be admissible, must:

- ✓ Satisfy medical d/t exceptions (understanding and pertinence), and
- ✓ Be authenticated by
 - a witness who was present, or, if unavailable,
 - proof of recording circumstances.

Authenticating digital communications

Proponent must show evidence is what proponent says it is.

- Testimony of a knowledgeable witness, or...
- Circumstantial factors (e.g., distinctive characteristics) that show the purported author wrote the statement.

Rule 901

Authentication of Digital Communications Chart

April 24, 2025 [Daniel Spiegel](#)

Print

A common evidence question that arises is how to properly authenticate digital communications. We have written on the topic in several blogs: [How Can a Party Show Authorship of a Social Media Post or Other Electronic Communication?](#), [Authenticating Photographs Obtained from Social Media Platforms](#), [Business Records: Posts, Chats, and Texts](#), [New Guidance on Authenticating Social Media](#), [Admissibility of Electronic Writings: Emails, Text Messages, and Social Networking Posts](#), and more.

Last year, I created a [chart](#) to highlight the ingredients of authentication our appellate courts found to be adequate or inadequate as a foundation for surveillance video (*also see the accompanying blog, [Surveillance Video- When It Comes In and When It Doesn't](#)*). I've received positive feedback on the chart and practitioners have asked for more evidence content in this format. For a second installment, I chose digital communications.

ONE OF THESE THINGS IS (NOT QUITE) LIKE THE OTHER

803(1), Present Sense Impressions

A statement describing or explaining an event or condition made while the declarant was perceiving it, or immediately thereafter.

803(2), Excited Utterances

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Ex: Child's statement, "I saw mom whip and hit my brother," came 16 hours after incident (after which child saw brother receive CPR before going to hospital where he died).
In re J.S.B., 183 N.C. App. 192 (2007) (TPR)

EXCITED UTTERANCES AND CHILDREN

Young, 233 N.C. App. 207 (2014)
(overturned on other grounds)

- 2 1/2-year-old child at daycare, 6 days after mother was killed.
- Playing with dolls. Spoke without prompting.
- Mommy had "boo-boos" and "red stuff all over."



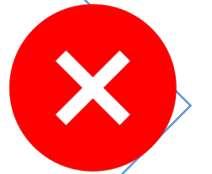
McLaughlin, 246 N.C.
App. 306 (2016)

- Statement made 10 days after Dad's sexual abuse, after custody exchanged.
- Child came home frantic and shaking.
- "You got to call the police right now." What's wrong? "It's [Dad]."



Blankenship, 259 N.C.
App. 102 (2018)

- Dad sexually abused Child early one morning.
- Child was "normal" and "happy" when grandparents picked her up soon after.
- Child spontaneously told grandparents Dad sexually abused her.





HEARSAY EXCEPTIONS CATEGORY 1B: DECLARANT AVAILABILITY IRRELEVANT

Fairness dictates admissibility

Rule 801(d)

Admission of “Party-Opponent”

- Statement must be:
 - Declared or endorsed (can be done verbally, non-verbally, or by omission where one would expect a response)
 - By a party-opponent (remember, a juvenile is not an opponent)
 - Offered against that party
- Declarant availability irrelevant (because basis for admission is fairness)



HEARSAY EXCEPTIONS CATEGORY 2: DECLARANT MUST BE UNAVAILABLE

Really important stuff

Rule 804

Unavailable means the declarant is

- I. privileged from testifying,
- II. refusing to testify despite a court order to do so,
- III. claiming, under oath, a lack of memory about the statement,
- IV. unable to testify because of a physical or mental illness, or death, or is
- V. absent and reasonable means to procure the declarant have been unsuccessful.

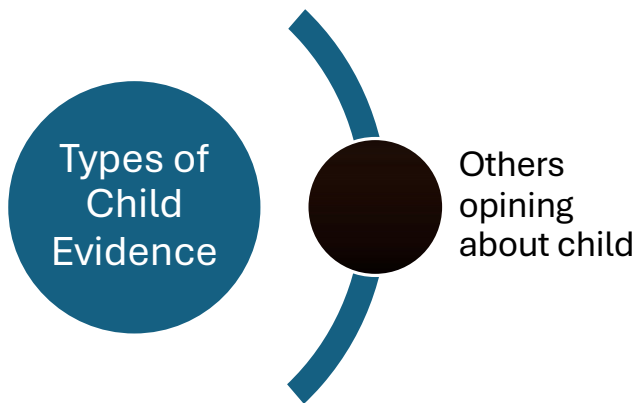
Rule 804(a)

RESIDUAL HEARSAY



Rules 803(24) + 804(b)(5)

- Not a catchall. Allows *some* otherwise inadmissible hearsay with "equivalent circumstantial guarantees of trustworthiness"
- Court must also determine:
 - Admission serves Rules and justice
 - Written notice of intention and particulars given, sufficient to provide party with "fair opportunity" to prepare
 - Offered to prove material facts
 - More probative than other reasonably available evidence (declarant likely needs to be unavailable)



Fact Testimony

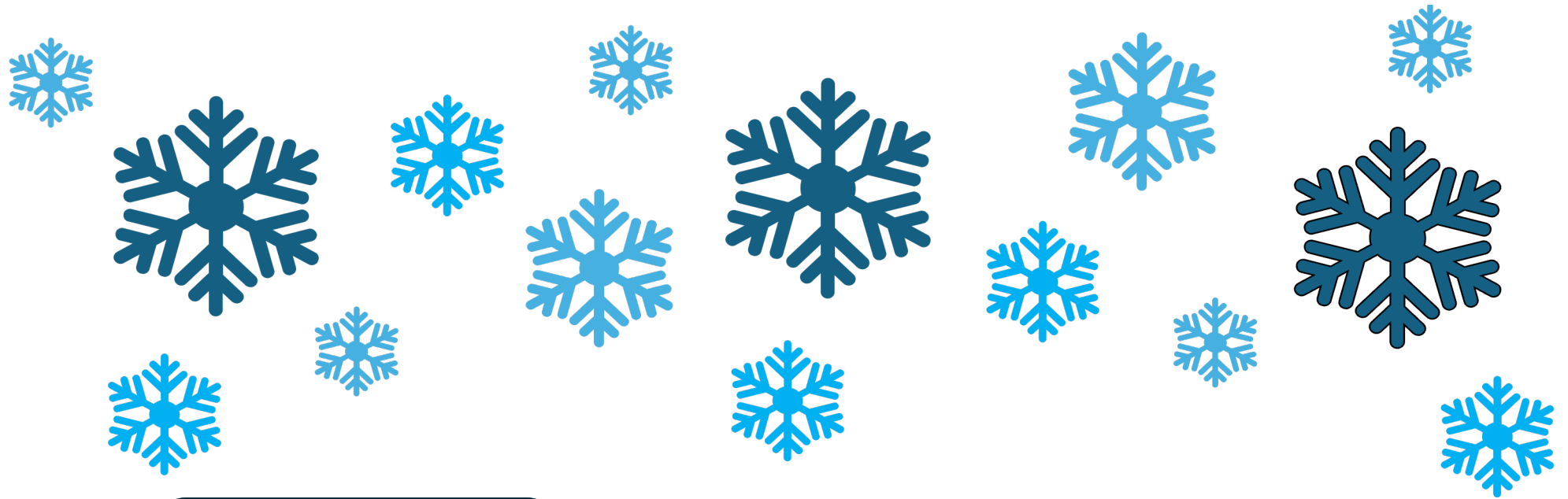


Lay witness opinion is generally inadmissible, except where “rationally based on the perception of the witness.”

N.C. Rule of Evid., R. 701

Opinion Testimony





The juvenile was left
on the porch. It was
cold outside that day.

It was cold enough
to cause **frostbite**.

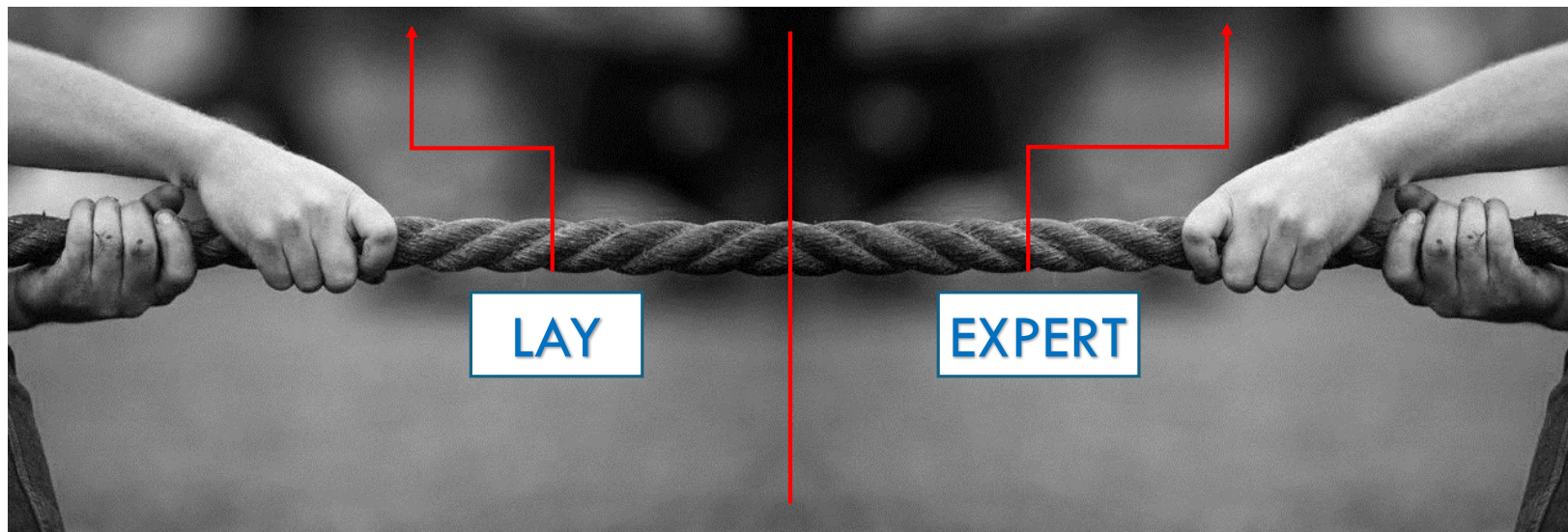


Social Worker

...based on the perception of the witness?

“Instantaneous conclusions of the mind [] derived from observation of a variety of facts presented to the senses at [] the same time.”

Requires scientific, technical, or other special knowledge.



Respondent showed up at
the daycare “drunk.”

See, e.g., *State v. Dills*, 204 N.C. 33
(1933)

“Alcohol causes processing
delays, rendering someone
unable to respond quickly.”