# The Rules of Evidence - An Introduction

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**May 2015**

## I. Learning Objectives for this Session:

Following this session, participants will be able to:

1. Appreciate the underlying bases for evidence rules and the role the underlying bases plays in evidentiary rulings;
2. Properly and efficiently make evidentiary rulings;
3. Carefully exercise discretion in making evidentiary rulings;
4. Appreciate the role of the judge in the evidentiary process; and
5. Embrace the significance and importance of evidentiary rulings.

## II. Resources:

NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Ed.) (referred to herein as BENCHBOOK, at ) (available at http://benchbook.sog.unc.edu/)

Kenneth S. Broun, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 1-23 (referred to herein as Broun, at __)

Judge Catherine C. Eagles, "North Carolina Rule of Evidence 104: The Overlooked but Omnipresent Rule," (referred to herein as Eagles, at )(available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/EaglesEvidencePaper.pdf)

## III. The Rules of Evidence - Introduction

### A. Purposes for Evidence Rules

#### 1. General Purposes for Evidence Rules

Blackstone remarked that "experience will abundantly show, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of." 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 330 (Oxford, 1765-69). Fact-finding in the American court system is the job of the jury and the judge, in non-jury cases. Evidence principles affect what facts come before the factfinder and as a result regulate the proceeding. But prior to the codification of uniform evidence rules, a hodgepodge of principles were applied in somewhat random fashion leading commentators to refer to evidence law as in a "poor state" and in "shambles." To promote uniformity and fairness, an advisory committee worked for a decade before submitting a draft of what would become the Federal Rules of Evidence. On January 2, 1975, the Federal Rules of Evidence were signed into law. States, including North

Carolina, adopted most of the rules with some variation thereafter. *See State v. Bogle*, 324 N.C. 190, 202-03 (N.C. 1989) (quoting N.C.G.S. § 8C-1 noting that "uniformity of evidence rulings in the courts of this State and federal courts is one motivating factor in adopting these rules and should be a goal of our courts in construing those rules that are identical").

### B. Stated Purposes and Rule of Construction – Rule 102

#### 1. Overriding Purpose of Ascertaining Truth and Administering Justice

The purpose of the North Carolina Rules of Evidence, along with the manner of construction, is set forth in **Rule 102.** It provides that **"[t]hese 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."** Moreover, the North Carolina Supreme Court has stated that the rules of evidence "are meant to assure that the evidence a jury hears and considers is *reliable*." *State v. Lopez*, 363 N.C. 535, 541 (N.C. 2009) (emphasis added). In essence, the overriding purpose of the rules is to ascertain the truth and administer justice by assuring that the evidence that the factfinder considers is reliable. While this lofty purpose may seem indefinite, and at times erroneous, it is not only an important reminder of the significance of evidentiary rulings, but also a helpful fallback position for the trial judge faced with a difficult issue which the rules do not definitively resolve.

#### 2. Three Objectives of Construction

Similarly, Rule 102's description of the manner in which the rules should be construed aids the trial judge in applying the rules to indefinite situations. The rules are to be construed to accomplish three objectives: fairness (which anticipates reliability), elimination of unjustifiable expense and delay, and promotion of the growth and development of the law of evidence. A trial judge faced with a difficult evidentiary issue unresolved by application of the rules should construe the rules and render a decision, consistent with these objectives and with Rule 102's overriding purpose.

#### 3. Application

Decisions of the North Carolina appellate courts frequently cite Rule 102 as an underlying basis for affirming a trial court's evidentiary ruling. *See e.g.*, *State v. Lopez*, 363 N.C. 535, 541 (N.C. 2009); *State v. Bogle*, 324 N.C. 190, 202-03 (N.C. 1989); *State v. Smith*, 315 N.C. 76, 97 (N.C. 1985). The appellate court's analysis of Rule 102 as a decisional tool provides guidance for trial judges relying upon Rule 102 as a basis for ruling on difficult evidence issues. Two examples are set forth below.

In *State v. Valentine*, 357 N.C. 512 (2003), various statements of the deceased victim were introduced under the residual exception to the hearsay clause. In reviewing the trial judge's determination, the North Carolina Supreme Court noted that the trial

judge had failed to make the requisite findings of fact with regard to the trustworthiness of the hearsay statements. Because of the trial courts failure, the Court conducted its own review and concluded that the statements were admissible under the residual exception. The Court then added that "the North Carolina Rules of Evidence provide that the 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.'" 357 N.C. at 517. The admission of the victim's statements served the interests of justice by providing jurors with the necessary tools to ascertain the truth. *Id.*

*Valentine* demonstrates an appropriate use of Rule 102. After analyzing the evidence under the applicable hearsay rule, the Court fortified its decision by reference to the underlying purpose of the rule of evidence. Rule 102 does not form an independent basis for admissibility of evidence. It would be error, for example, for a trial judge to admit evidence on the basis that the evidence might help the jury find the truth. Similarly, the rule does not allow the judge to admit inadmissible evidence "in the interests of justice." Rather than creating an independent basis for admissibility, Rule 102 requires the judge to tip the scales in favor of truth and justice in the close or uncertain situation.

In *State v. Smith*, 315 N.C. 76 (N.C. 1985), the North Carolina Supreme Court reviewed a trial court's decision to admit hearsay under the Rule 803(24) residual hearsay exception, an exception which requires a finding that the interests of justice will be served by admission of the hearsay evidence. In discussing that aspect of the Rule 803(24) residual hearsay exception, the North Carolina Supreme Court quoted and relied upon Rule 102 to inform the interests of justice analysis. "After considering whether admission of the proffered evidence would best serve *these* purposes *and* the interests of justice, the trial judge must state [the] conclusion. . . . [T]he trial judge will necessarily undertake the serious consideration and careful determination contemplated by the drafters of the Evidence Code." *State v. Smith*, 315 N.C. 76, 96-97 (1985).

### C. Applicability of the Rules - General Applicability – Rules 101, 1101

The Rules of Evidence apply "[e]xcept as otherwise provided . . . to all actions and proceedings in the courts of this state." N.C.R. Evid. 1101. The rules do not apply to preliminary questions determined by the judge, N.C.R. Evid. 1101(b)(1); to proceedings before the Grand Jury, N.C.R. Evid. 1101(b)(2); to certain miscellaneous proceedings, N.C.R. Evid. 1101(b)(3);[1] or to summary contempt proceedings, N.C.R. Evid. 1101(b)(4). *See also* N.C. R. Evid. 101 (noting that rules "govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101").

The North Carolina Rules of Evidence are specifically inapplicable in sentencing hearings, including capital sentencing proceedings in North Carolina, *see State v. Carroll*,

[1] "These miscellaneous proceedings include – Proceedings for extradition or rendition; first appearance 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; proceedings with respect to release on bail or otherwise." N.C.R. Evid. 1101(b)(3).

356 N.C. 526, 547 (N.C. 2002); *State v. Davis*, 353 N.C. 1, 18 (N.C. 2000)(but noting that rules of evidence may be used as a "guideline to reliability and relevance"), and in probation and parole revocation hearings, but may be helpful in determining reliability and relevance. *State v. Bond*, 345 N.C. 1 (1996). In addition, even in those proceedings in which the rules do not apply, constitutional due process standards always apply and may impact evidentiary rulings. *See e.g.*, *Holmes v. South Carolina*, 547 U.S. 319 (2006)(due process right to present a defense); *Bearden v. Georgia*, 461 U.S. 660 (1983)(probation revocation determination must include inquiry into reasons for failure to pay fines or restitution); *Gardner v. Florida*, 430 U.S. 349 (1977) (confrontation at capital sentencing hearing); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process requirements in parole revocation proceeding). The requirements of due process are ascertained on a case-by-case basis. *See e.g.*, *State v. Lombardo*, 306 N.C. 594 (1982) (consideration of unconstitutionally seized evidence in probation revocation hearing).

As noted, a trial judge who is determining preliminary questions, including the admissibility of evidence, is not bound by the rules. Therefore, the judge may consider otherwise inadmissible evidence in determining the threshold question of witness qualifications, privilege, and admissibility of evidence. N.C. R. Evid. 104(a).

### D. Role of the Judge in the Evidentiary Process – "Governor" of Trial; "Gatekeeper" of Evidence

The United States Supreme Court has referred to the judge as "the governor of the trial." *Quercia v. United States*, 289 U.S. 466 (1933). As "governor," the trial judge plays the crucial goal of "gatekeeper" of the evidence at trial. It is the judge who must make preliminary decisions as to whether evidence is admissible, wholly or conditionally.

The judge's ruling on a preliminary question may require a factual determination, a legal determination, or both. As noted above, the judge is not bound by the rules of evidence in deciding preliminary questions, but is given leeway to consider all relevant and reliable information that may aid in the decision.

#### 1. Preliminary Questions of Admissibility – Rule 104(a)

Very often, the admissibility of evidence, both tangible and verbal, will depend upon a number of threshold factual determinations. Is the witness competent to testify? Was the conversation privileged? Is the statement offered for its truth or for some other purpose? Is the document genuine? Was the weapon the one found at the scene of the crime? In each instance the admissibility of evidence will depend upon factual or legal findings made by the trial judge. In making these determinations, the trial judge is not bound by the rules of evidence.

Rule 104(a) provides that **"[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions**

**of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges."** N.C. R. Evid. 104(a). Thus, Rule 104 requires the judge to determine if evidence is admissible. The rule must be read in conjunction with Rule 103, which requires counsel to raise objections to evidence either by motion or objection.

The trial judge's determination of admissibility is basic threshold admissibility. The judge does not, except in unique situations,[2] weigh the evidence or consider its probativeness.[3] Rather, the judge's factual and legal determinations, which should be clearly stated on the record, determine only whether the evidence should be admitted for consideration by the trier of fact.

The judge's particular gatekeeper function under Rule 104(a) applies in three situations: whether a particular witness is competent to testify, either in general, or as an expert; whether statements are protected by evidentiary privileges and thus, inadmissible; and whether evidence is generally admissible under the rules of evidence.

### a. Qualification of a Person to be a Witness

Preliminary questions concerning the qualifications of a person to be a witness may include issues about competence to testify generally. The rules of evidence presume competence, N.C.R. Evid. 601, and require only that a witness testify for personal knowledge, N.C.R. Evid. 602, and under oath or by affirmation, N.C.R. Evid. 603.[4]

#### i. Competence of a witness

In determining whether a witness is competent to testify, "the trial judge is not acting as the trier of fact, [but] is rather deciding a threshold question of law, which lies mainly, if not entirely, within the judge's discretion. . . . The trial court must make only sufficient inquiry as to satisfy itself that the witness is or is not competent to testify. The form and the manner of that inquiry rests in the discretion of the trial judge." *In re Will of Leonard*, 82 N.C. App. 646, 648 (1986).

The preliminary determination must be based on the judge's personal observation. As noted by the North Carolina Supreme Court in a case involving a child witness: "underlying our law governing competency is the assumption that a trial judge must rely on his personal observation of a child's demeanor and responses to inquiry at the competency hearing." A trial judge who does not personally examine or observe the

[2] For example, if a judge is determining admissibility under certain hearsay exceptions, the judge must evaluate trustworthiness and may disallow the evidence, despite the existence of a hearsay exception, when issues of trustworthiness are present. N.C.R. Evid. 803(6), (8); 804(b)(6).

[3] When the judge is asked to exclude otherwise relevant evidence under Rule 403, the judge does weigh the probativeness against the danger that the opponent claims; similarly, a judge must consider probativeness when admitting evidence under Rules 404(b), 608, and 609.

[4] Implicit in the witness' affirmation is the declaration that the witness understands the obligation to tell the truth. N.C.R. Evid. 602.

child cannot exercise informed discretion in determining competency. *State v. Deanes*, 323 N.C. 508, 522 (1988) (quoting *State v. Fearing*, 315 N.C. 167, 174 (1995)).

A recent case offers a good example of the types of facts that a trial judge might rely upon in ruling on a challenge to a witness' competence and how the judge can articulate the exercise of discretion. In *State v. Painter*, 173 N.C. App. 448 (2005), the defendant moved to strike the testimony of A.M., a witness. The court noted that it had observed the witness and the witnesses' responses to questions, "not only what is said but in the way that he said it." In great detail, the court explained:

> Both at voir dire and during the testimony of [A.M.] the court had the opportunity to observe him, both his demeanor and his manner in responding to questions. And I would note that although he appeared to be reluctant to respond to questions, particularly on, for one example but not intending to be exhaustive, I think he was, asked what if any nickname he might have for private parts. And he appeared at that time to the court to understand the question but really to be in some genuine embarrassment and unwilling to discuss it at that time.
>
> Both because of the youth of the witness, who the court finds to be eight years old and in the second grade, and the sensitive nature of the subject matter and his response to it, the court found that it would be appropriate to allow both the State and the defendant to ask leading questions of the defendant. And I did permit both the State -- certainly the State was given more leeway than would have been allowed with an adult witness. However, I think the same leeway was given to the defendant in terms of asking leading questions.
>
> And I will note that although [A.M.] responded certainly more emphatically and more directly to leading questions, which again, I think is not unexpected from an eight year old witness, I will note that on occasion he was unable to respond to leading questions. And the court would find that on those occasions typically A.M. indicated that either he didn't remember or did not know the answer to those questions . . . .
>
> . . . And that it would be the court's evaluation of that testimony that he was responding truthfully and was doing the best that he could.

**describes demeanor**

**makes specific reference**

**describes procedure**

**describes responses**

**analyzes responses**

**draws conclusion**

In denying the motion to strike the witness' testimony, the judge concluded that the witness was "capable of expressing himself so that he can be understood [and further found that the witness] is capable of understanding the duty to tell the truth as a witness pursuant to Rule 601." *State v. Painter*, 173 N.C. App. at 452.

#### ii. Qualifications of Expert Witness and Expert Opinion

The trial judge must also determine preliminary questions regarding the qualifications of a person to testify as an expert witness under Rule 104(a). The issue is whether the person has "sufficient knowledge, skill, experience, education, or training to testify" as an expert. N.C. R. Evid. 702(a).

Under North Carolina's revised Rule 702, the judge must also determine:

(1) whether scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
(2) whether the "testimony is based upon sufficient facts or data;"
(3) whether the "testimony is the product of reliable principles and methods," and
(4) whether "the witness has applied the principles and methods reliably to the facts of the case."

N.C.R. Evid. 702 (a) (1) – (3).

### b. Existence of a privilege

Rule 104 also provides that questions concerning the existence of a privilege are preliminary questions to be determined by the trial judge.

### c. Admissibility of evidence

The broadest category of preliminary questions is the "admissibility of evidence." N.C.R. Evid. 104(a). The trial judge must determine as a preliminary question, for example, whether an exhibit is authentic; whether evidence is relevant; whether an out of court statement is offered for some purpose other than the truth of the matter; whether the elements of a hearsay exception have been established; whether a document is the "original" under the best evidence rule; whether facts should be judicially noticed; whether impeachment evidence is collateral or non-collateral; whether a foundation has been laid for the introduction of reputation evidence; whether character evidence is offered for some purpose other than propensity; whether a specific act offered to impeach is one of untruthfulness; and dozens of other questions pertaining to the admissibility of evidence.

### 2. Conditional Admissibility – Rule 104(b)

Sometimes, evidence only becomes relevant, if other evidence exists. For example, a handwritten letter, asserted to be the defendant's confession, is relevant only if it can be established that the defendant wrote the letter. A prior act of assault is only relevant to establish the defendant's intent if defendant actually committed the prior assault. In these situations, if the judge acted as a strict gatekeeper, as under Rule 104(a) then the jury's role as trier of fact would be severely limited. Therefore, the rules treat these situations differently, providing in Rule 104(b) that **"[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."**

In situations of conditional admissibility, the judge determines first whether the foundation evidence is "sufficient to support a finding of fulfillment of the condition." N.C. R. Evid. 104 (b). If it is, then the judge admits the items subject to the introduction of the other evidence. If counsel fails to offer the other evidence, frequently referred to as "failing to connect it up," the court must strike the conditionally admitted evidence and instruct the jury to disregard it.

Rule 104(b) frequently applies to the introduction of evidence of other wrongs, crimes, or acts, under Rule 404(b) to establish motive, opportunity, plan, identity, absence of accident, or for some other legitimate purpose, other than propensity. North Carolina law requires consideration of both 104(a) and 104(b) preliminary questions for the proper introduction of this evidence. For example, the court must determine that the purpose for which the evidence is offered is proper given the issues in the case. The court must also determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice to the defendant. Both of these determinations are made under Rule 104(a).

Even after the court has made these preliminary findings, it is still necessary for the evidence of the other crimes, wrongs, and acts to be relevant and sufficiently connected to the defendant. Under North Carolina law, this is a Rule 104(b) determination. "The trial court is required to make an initial determination pursuant to Rule 104(b) of whether there is sufficient evidence that the defendant in fact committed the extrinsic act. The judge is not required to be convinced beyond a reasonable doubt, by clear and convincing evidence, or by a preponderance of the evidence, that defendant committed the extrinsic act. Rather, as a prerequisite to admitting the evidence, the trial court must find the evidence to be substantial." *State v. Williams,* 307 N.C. 452, 454, 298 S.E.2d 372, 374 (defining substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion"); *see also State v. Adam* , 220 N.C. App. 319, 322-23 (2012). If the court determines initially that the evidence is sufficient and allows admission, but the proponent fails to "connect the evidence," the trial court must instruct the jury to disregard the evidence.

### 3. Procedure for Determining Preliminary Questions – Rule 104(c)

Rule 104(c) establishes the procedure for determining preliminary questions. When the preliminary questions concern **the admissibility of a confession or "other motions to suppress evidence in criminal trials in Superior Court,"** the hearing on the preliminary question **"shall be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or, when an accused is a witness, if he so requests."** N.C.R. Evid. 104(c); *State v. Nackab*, 2013 N.C. App. 219 (2011). The rule has been interpreted to grant "inherent authority to conduct an evidentiary hearing outside the presence of the jury *sua sponte* to clarify questions to admissibility and to prevent undue delay in the proceedings." *State v. Brewington*, 170 N.C. App. 264, 280 (2005).

In evaluating whether the "interests of justice require" a jury-out hearing, trial judges should evaluate the "the potential for prejudice inherent in the evidence which will be produced by parties on the preliminary question." Eagles, at 14. While some confusion exists as to whether hearings on the admissibility of Rule 404(b) evidence must be held outside of the jury's presence, the better course of practice, if there is doubt, is to conduct the inquiry outside the presence of the jury. Eagles, at 13,

### 4. Effect of Preliminary Question Determinations – Rule 104(d) & (e)

Rule 104(d) provides that an accused who testifies concerning a preliminary matter does not "subject himself to cross-examination as to other issues in the case." This rule embodies the constitutional principle set forth in *Simmons v. United States*, 390 U.S. 377 (1968) that it is improper for the government to establish guilt at trial by using testimony given by the defendant in an effort to suppress illegally obtained evidence, but the rule does not address the subsequent use of testimony given by an accused at a hearing on a preliminary matter. *See e.g., Walder v. United States*, 347 U.S. 62 (1954). Courts frequently allow cross-examination on the issue of credibility, reasoning that by testifying at all, the defendant has placed his credibility in issue. *See e.g. United States v. Jaswal*, 47 F.3d 539 (2d Cir. 1995); *United States v. Grady*, 2005 WL 2739031 (M.D. N.C. Oct. 24, 2005).

A judge's determination of a preliminary question does not "limit the right of a party to introduce before the jury evidence relevant to weight or credibility." N.C.R. Evid. 104(e). As the North Carolina Supreme Court has aptly put it: "[a]dmissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge." *State v. Walker*, 266 N.C. 269, 273 (1966). *See e.g. State v. Hester*, 330 N.C. 547 (1992) (error to exclude evidence about police department's usual practice of recording confessions); *State v. Sanchez*, 328 N.C. 247 (1991) (error to exclude opinion evidence regarding defendant's understanding of *Miranda* warnings); *State v. Baldwin*, 125 N.C.App. 530 (1977) (evidence related to claim of coerced confession).

The often-repeated general rule in North Carolina, from *State v. Walker* is:

> If the judge determines the proffered testimony is admissible, the jury is recalled, the objection to the admission of the testimony is overruled, and the testimony is received in evidence for consideration by the jury. If admitted in evidence, it is for the jury to determine whether the statements referred to in the testimony of the witness were in fact made by the defendant and the weight, if any, to be given such statements if made. Hence, evidence as to the circumstances under which the statements attributed to defendant were made may be offered or elicited on cross-examination in the presence of the jury. *Admissibility is for determination by the judge unassisted by the jury. Credibility and weight are for determination by the jury unassisted by the judge.*

*State v. Walker*, 266 N.C. 269, 273 (1966) (emphasis added).

### 5. Limited Admissibility – Rule 105

The judge may also limit the application of evidence to particular issues or parties. Rule 105 provides for limited admissibility by providing that **"[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."** *But see State v. Stager*, 329 N.C. 278, 310 (1991) (holding that defense was not entitled to have issue trial judge's failure to give limiting instruction reviewed on appeal when counsel did not request or tender a limiting instruction at the time evidence was admitted).

### 6. Judicial Instructions as to Limited Use of Evidence

The rule provides that limiting instructions are only to be given "upon request." In some circumstances, counsel may have strategic reasons for not requesting a limiting instruction. In other situations, the appellate courts have noted that instructions should be given *sua sponte*.

The jury instruction should be clear as to the permissible and impermissible uses of the evidence. The instruction should be given in plain and concise terms. If possible, the judge should refer to a model jury instruction, rather than delivering one extemporaneously. If the issue is crucial, the judge should compose the instruction and review it before delivering it.

An example of a model, which can be modified for each situation, follows:

> **The_____ (party) has offered evidence of _____ (witness, document). You may only consider this evidence for the purpose of _____ (the permissible purpose). I instruct you that you may not consider this evidence for the purpose of _____ (impermissible purpose).**

Within the North Carolina Pattern Jury Instructions for Criminal Cases is a pattern instruction that may also be used to limit the jury's consideration of evidence admitted for a limited purpose. N.C.P.I – Criminal 104.15 provides:

> Evidence has been received tending to show that (state specific evidence). This evidence was received solely for the purpose of showing [state legitimate purposes for the use of the evidence].[5]
>
> If you believe this evidence you may consider it, but only for the limited purpose for which it was received. You may not consider it for any other purpose. [6]

Additionally, North Carolina Pattern Jury Instructions for Civil Cases may also provide a helpful guide for general use when no specific pattern instruction is available. N.C.P.I. – Civil 101.33 provides:

> (You must not consider this evidence (describe forbidden use of evidence). If you [(believe this evidence) (find that this evidence (describe what must be found for evidence to be relevant))], then you may consider this evidence for the purpose(s) of (describe permissible purpose). Except as it bears upon (specify permissible purpose), [this evidence] [(describe evidence)] may not be used by you in your determination of any fact in this case.

When evidence has been admitted for a limited purpose, the judge should also monitor counsel's use of and reference to the evidence to assure that the jury is not

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[5] The Pattern Instruction lists potential proper purposes for the admission of the evidence.

[6] The Pattern Instruction includes this footnote:

> Committee recommends that this instruction not be given in three instances in which proof of similar acts or crimes is generally admitted for substantive purposes: (1) where two crimes are so closely connected that neither can be adequately proved without the other; (2) where a similar sex offense is introduced either as general corroboration or to show the "unnatural" disposition of the defendant; (3) in a case involving the prosecution of a continuing offense. *See State v. McClain*, 240 N.C. 171 (1954). The Committee believes that in these instances the evidence of similar acts or crimes is introduced for such a broad purpose than any attempt to define and limit that purpose by an instruction such as this would be futile.

encouraged to use the evidence in an impermissible way. For example, if the court admits evidence against one party but not another, counsel should be prohibited from making a closing argument that urges the use of the evidence against the other party.

While Rule 105 allows a trial judge to admit evidence for a limited purpose, it does not require it. When, for example, an objection is made under Rule 403, the judge may consider the availability and effectiveness of Rule 105 admissibility and a contemporaneous limiting instruction in determining whether to exclude evidence under Rule 403.

### 7. Admission of Evidence –Admissibility vs. Weight

Although the rules of evidence do not generally address the applicable burden that rests upon the parties regarding the admission and exclusion of evidence, it is generally accepted that the proponent of evidence must establish admissibility of the evidence once admissibility has been challenged. When the general rule of evidence is a rule of inclusion, the party seeking to exclude the evidence must establish a basis for exclusion. Thus, for example, since all relevant evidence is admissible under Rule 402, a party relying upon Rule 403 as a basis for excluding relevant evidence, must establish the relevant grounds supporting exclusion under Rule 403. Conversely, if the general rule is a rule of exclusion, then the party claiming that the evidence should be admitted pursuant to an exception has the burden of establishing the requisite elements of the exception. Thus, for example, when evidence fits within the definition of hearsay under Rule 802, the evidence will be excluded unless the proponent establishes the existence of an exception under either Rule 803 or 804. In any of these scenarios, the court's decision to admit the evidence is merely a determination of threshold admissibility and does not affect the weight to be given to the evidence. As emphasized above, in Section 4, the matter of weight is left to the fact finder.

### 8. Other Gatekeeper Tools under Rules of Evidence

The Rules of Evidence incorporate various other tools for the trial judge, including the ability to take judicial notice of adjudicative facts under Rules 201. N.C. R. Evid. 201. Although the rule sets out limitations on the nature of judicially noticed facts, N.C.R. Evid. 201(b), the judge may take judicial notice whether requested or not. N.C. R. Evid. 201(c). A party is entitled to be heard as to the "propriety of taking judicial notice and the tenor of the matter noticed." N.C.R. Evid. 201(e). The judge must take judicial notice, however, when requested to do so by a party who supplies the necessary information. N.C.R. Evid. 201(d). In a criminal case in which judicial notice is taken, the trial court is required to instruct the jury that it "may, but is not required to, accept as conclusive any fact judicially noticed." N.C. R. Evid. 201(g).

An additional gatekeeper tool is found in Rule 611, which requires a trial court to "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." N.C. R. Evid. 611(a).

### E. Judicial Deference and Discretion Under the Rules of Evidence

#### 1. Reason for Deference; Review of Judicial Deference and Discretion

Trial judges enjoy great deference and broad discretion in making evidentiary rulings. When the application of a rule of evidence is not discretionary, a trial judge's ruling will be given great deference because the trial judge "is better situated to evaluate" the evidence. *State v. Blakney*, ___ N.C. App. ___, ___ 756 S.E.2d 844, 847 (2014). But when an evidentiary ruling requires the exercise of judicial discretion, the trial judge's decision will not be disturbed on appeal unless the ruling constitutes an abuse of discretion. This discretion is appropriate because the trial judge is in the best position to observe the demeanor of the witness, assess the impact of the evidence, and evaluate the overall effect of the evidence on the proceedings.

#### 2. Meaning of Abuse of Discretion

As Judge Friendly once observed, "[t]here are a half dozen different definitions of 'abuse of discretion,' ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes." Henry J. Friendly, INDISCRETION ABOUT DISCRETION, 31 Emory L.J. 747, 763 (1982). The standard results in most evidentiary decisions being affirmed and endorsed with repetitive, unhelpful phrases commending the sound use of judicial discretion. *See e.g.*, *State v. Peterson*, 361 N.C. 587, 607 (2003)( holding that " trial court did not act outside the bounds of reason in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.").

For those judges who have been reversed under the abuse of discretion standard, the concept seems amorphous. Reviewing courts often repeat phrases that offer little analysis of the trial judge's error. So, for example, an abuse of discretion occurs when a ruling is "manifestly unsupported by reason and could not have been the result of a reasoned decision" or when it is "patently arbitrary." *State v. Elliott*, 360 N.C. 400, 419 (2006)(quoting *State v. Hennis*, 323 N.C. 279, 285(1988)). Some courts have become so disenchanted with the phrase that they have replaced it with the phrase "exceeded its discretion," thus removing the negative implication that flows from the use of the word "abuse."

#### 3. Examples of Rules Requiring Exercise of Judicial Discretion

##### a. Exclusion of Relevance Evidence – Rule 403

A trial court's ruling on relevancy is not discretionary, because relevant evidence is admissible under Rule 402. But, Rule 403 provides that 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." N.C.R. Evid. 403. Therefore, the determination of whether to exclude evidence under Rule 403 is a matter of judicial discretion, subject to review under an abuse of discretion standard. *State v. Moctezuma*, 141 N.C. App. 90 (2000).

**b. Rule of Completeness – Rule 106**

When a portion of a writing or recorded statement is introduced, counsel may "require" that the court allow a contemporaneous admission of other portions under Rule 106's rule of completeness. N.C.R. Evid. 106. In this situation, the trial judge must exercise discretion to determine whether "any other part or any other writing or recorded statement ought *in fairness* be considered contemporaneously with it." *Id.* (emphasis added).

The party seeking to introduce evidence under the Rule of Completeness has the burden of contemporaneously seeking to introduce the evidence and of "demonstrating that the excluded parts are either explanatory or relevant." *See State v. Lloyd*, 354 N.C. 76 (2001). The party must show that the missing portion is needed "to explain the admitted portion, to place it into context, to ensure a fair and impartial understanding of the admitted portion, or to correct a misleading impression that might arise from excluding it." *See United States v. Rivera*, 61 F.3d 131, 135-36 (2nd Cir. 1995).

Thus, for example, if the state offers a defendant's written statement into evidence, but chooses to only offer the inculpatory parts of the statement, the defendant may require that the exculpatory parts of the same statement be admitted at the same time. The rule does not require the introduction of additional portions of the statements that are neither explanatory nor relevant, nor does it authorize the introduction of unrelated statements, statements made at different times or to different persons, or independent statements offered by the defendant. *See e.g., State v. Jackson*, 340 N.C. 301 (1995) (statement to a different person); *State v. Thompson*, 332 N.C. 204 (1992) (unrelated statements); *State v. Barnes*, 116 N.C. App. 311 (1994) (statement offered by defendant).

Rule 106 does not create a *per se* rule, but rather leaves the matter of admission to the trial judge. *See State v. Womble*, 343 N.C. 667, 668-69 (1996), *cert. denied*, 519 U.S. 1095 (1997), *but see United States v. Yevakpor*, 419 F.Supp.2d 242, 249-50, 252 (N.D.N.Y. 2006) (finding that the government cannot "make use of video segments that have been cherry-picked when the remainder of the recording has been erased or recorded-over subsequent to a defendant's arrest"). The trial court's decision under Rule 106 will not be reversed absent a showing of an abuse of discretion. *See State v. Hall*, 194 N.C. App. 42, 50-51 (2008).

### c. Other Evidence Rules Requiring Judicial Discretion

Without intending to be exhaustive, other evidence rules requiring the exercise of judicial discretion include:

(1) Satisfaction of conditional relevancy under Rule 104(b);
(2) Evidence to prove other crimes, wrongs, or acts under Rule 104(b);[7]
(3) Inquiry, on cross-examination, into specific instances of conduct for purposes of attacking or supporting a witness' credibility under Rule 608(b);
(4) Evidence of a criminal conviction offered to impeach, when more than 10 years has elapsed since the date of conviction or release under Rule 609(b);
(5) Evidence of juvenile adjudications offered to impeach witness other than the accused when specific findings are made under Rule 609(d);
(6) Use of leading questions on direct examination to develop testimony under Rule 611(a);
(7) Exclusion of witnesses during testimony under Rule 615;
(8) Appointment of experts under Rule 706;
(9) Exclusion of record of regularly conducted activity, under Rule 803(6) when "source of information or the method or circumstances of preparation indicate lack of trustworthiness;"
(10) Exclusion of public record, under Rule 803(8) when "sources of information or other circumstances indicate lack of trustworthiness."

## F. Warming Up the Cold Appellate Review

Trial judges benefit not only from the deference given by appellate courts to non-discretionary evidentiary rulings and the abuse of discretion standard applied to discretionary rulings, but also by the respect given by the appellate court to factual findings made by the judge in support of applying the applicable evidence rule. Thus, it is beneficial for a trial judge to articulate the underlying factual findings that support the ruling.

Great deference is given to the trial court's rulings, particularly when the based for rulings are clearly stated in the record of the proceedings. Thus, trial judge should carefully and thoroughly recite the factual findings and conclusions that lead to significant evidentiary rulings. When the trial court makes factual findings that are supported by competent evidence in the record, the appellate courts must consider the

[7] The procedure regarding the admission of evidence of other crimes, wrongs, or acts is highly particularized. The inclusion of this type of evidence on this list is meant to suggest *only* that judges may exercise discretion to *exclude* evidence under Rule 404(b) despite finding that a permissible purpose exists for the admission of the evidence.

facts conclusive on appeal. *State v. Wiggins*, 334 N.C. 18, 38 (1993). As such, the appellate court cannot substitute its judgment of the facts for the trial court's factual findings. But when the trial judge fails to make findings, the appellate court must exercise its own judgment in evaluating the facts, or remand for reconsideration. *See State v. Valentine*, 357 N.C. 512 (2003).

Thus, trial judges should aim to create a clear, cogent record of the underlying reasons and analytical bases for the evidentiary ruling. In addition to addressing the relevant rule of evidence, the parties' proof and argument, trial courts should remember to address the very important aspects of the decision that are not captured in the appellate record, including the tenor of the trial, the circumstances surrounding the offer of evidence, the demeanor of the witness, the existence or nonexistence of related evidence, and the overall posture of the case.

### G. Benefits of the Standard of Review

Trial courts benefit from an exacting preservation process that often stumps trial counsel, N.C. R. Evid. 103; trial courts also benefit from a standard of review on appeal that favors affirmance of the lower court ruling.

When counsel fails to preserve the issue of an evidentiary ruling in a criminal case by objecting and stating the reason for the objection (or by making an offer of proof when required), the evidentiary issue is generally waived on appeal. This means that even erroneous rulings by the trial judge will often be affirmed. Counsel may seek review on appeal of a waived issue, but that review, if any, will be governed by the heightened plain error standard.

In a recent decision by the North Carolina Supreme Court, the Court undertook to clarify "incomplete and inconsistent formulations" of the plain error rule that have been espoused by the appellate courts. *State v. Lawrence*, 365 N.C. 506, 508 (2012). The Court referred to the four-factor test, applied by federal courts, requiring that (1) an error, that is "a deviation from a legal rule;" (2) the error must be plain, meaning that the error must be clear or obvious; (3) the error must have affected a substantial right which means that it must have been prejudicial and affect the outcome of the trial; and (4) the rule is permissive, allowing the appellate court to reverse when it is satisfied that the error seriously affected the fairness, integrity, or public reputation of the proceeding. *Id.* at 515-16.