EVIDENCE. RULES.

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INTRODUCTION

The purpose of this manuscript is to give a quick guide to the rules of evidence and some of the related family law cases applying those rules. At the end of the manuscript there is an additional statute added regarding hospital records. This is not an exhaustive study of all evidence cases in our state. If you need an exception or application not covered in these family law cases, step outside of our world and grab in others. By way of example, but not limitation, the criminal cases are replete with the duration of time that is permissible for a child to proclaim (mutter, make) excited utterances. The duration for children exceeds the permissible duration for adults. Those cases can be quite useful in custody actions. **Even though this presentation is focused predominantly on Evidence and Experts, the remainder of the rules of evidence still apply to the testimony of experts**.

Additionally, there is a SCRIPT to some of the rules. It is not the only way to handle the rule but it is included as a suggestion. This manuscript has been shepardized several times over the last eight years. I've revised it and amended different portions. If you have an older version you should replace it with this version. One kind soul thought it might be helpful, especially for newer litigators, to include the "SCRIPT" portion. So, I did. Hopefully you or someone you mentor will find it useful.

This manuscript is structured so that the Rule comes first. The case law comes next and the SCRIPT comes last. Sometimes there is a commentary for food for thought.

As always, typos are like my freckles. They are all mine.

I. GENERAL PRPOVISIONS

a. Rule 103. Rulings on evidence.

(a) *Effect of erroneous ruling.* – Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. – In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court.

(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.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) *Record of offer and ruling.* – The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) *Hearing of jury.* – In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Review of errors where justice requires.* – Notwithstanding the requirements of subdivision (a) of this rule, an appellate court may review errors affecting substantial rights if it determines, in the interest of justice, it is appropriate to do so. **HISTORY:** 1983, c. 701, s. 1; 2003-101, s. 1; 2006-264, s. 30.5

i. Mother failed to make an **offer of proof** pursuant to Rule 103(a)(2) regarding the substance of the excluded evidence contained in her medical records. As such, the appellate court was incapable of determining if the ruling was prejudicial, in a termination of parental rights case. In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

ii. The trial court's exclusion of tape recorded evidence based upon Rule 403 is not error where the defendant failed to make an **offer of proof** of the contents of the same for the record on appeal pursuant to Rule 103(a)(2). Buckingham v. Buckingham, 2003 N.C. App. LEXIS 1561 (August 5, 2003).

iii. A party believing the methodology used by an expert is not valid, or if valid improperly applied to the facts of the case has a **duty to object** during trial, otherwise the issue is waived on appeal. Franks v. Franks, 153 N.C. App. 793, 571 S.E.2d 276 (2002).

iv. A party cannot challenge evidence that was excluded on appeal, like the tax value of a parcel of real estate, if **no offer of proof** regarding that value was

made at the trial level. Powers v. Powers, 2005 N.C. App. LEXIS 1494 (August 2, 2005).

v. In an Alienation of Affection case, the defendant made general objections during trial and did not present the reason to exclude evidence to the trial court. On appeal, Defendant claimed evidence should have been excluded for relevancy, but offered no authority to support the same. Defendant failed to properly object pursuant to Rule 103(a)(1). Nunn v. Allen, 154 N.C. App. 523; 574 S.E.2d 35 (2002).

b. SCRIPT for Offer of Proof:

i. Questioning lawyer: "Did you order the code red?"
ii. Opposing Lawyer: "Objection." (Not sure why the objection was made…)
iii. Judge: "Sustained."
iv. Questioning lawyer: "Pursuant to Rule 103(a)(2) I would like to make an offer of proof. Would you like us to do that now or is there a better time?"
v. At this point, the judge may direct a time during the trial when you may make all offers of proof or may permit you to do so right then. If you are doing so right then, the judge may either stay or leave for the offer of proof.
vi. If the judge says wait for a later time, do not forget to do it. The judge has no obligation to remind you and probably will not do so. The reason being: you are essentially saying "Your Honor, you've made a mistake and I want the record to reflect the evidence you just wrongfully excluded." (DO NOT ACTUALLY SAY THAT TO THE JUDGE). Direct contempt is a real thing. Lawyers look bad in orange.
vii. Assume, for this example that the judge left. Questioning attorney: "did you order the code red?"
viii. Witness: "You're bleeping right I did."

c. SCRIPT for Objections:

i. Lawyer: Objection. It is more helpful to state the basis of the objection at the same time as the objection. However, if you just say objection, expect:
ii. Judge: Basis? (If they just overrule you, try to politely assert the reason here. If that happens you have also just learned this judge wants the basis upfront. Additionally, general objections do not help you on appeal. If you don't argue it at the trial level, you can't raise a genius reason on appeal for the first time).
iii. Lawyer: See all the rules below in this manuscript and pick the most applicable. Say something here. Silence will have you overruled. So will a blank, long stare. If you see an objection coming from a mile away, bring relevant rules and case law with you to hand up during the argument about this objection. **If you need this piece of evidence to carry your burden or win the case, prepare to defend its admissibility.** It helps the judge to have a reason to go with you. Make it easier on them to rule in your favor by getting prepared to defend objections well in advance of trial.

d. Rule 104. Preliminary questions.

(a) Questions of admissibility generally. – Preliminary 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.

(b) Relevancy conditioned on fact. – When 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.

(c) Hearing of jury. – Hearings on the admissibility of confessions or other motions to suppress evidence in criminal trials in Superior Court shall in all cases 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.

(d) Testimony by accused. – The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. – This rules does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. HISTORY: 1983, c. 701, s. 1.

i. When a party objects to testimony by an expert on the ground that they are using information/data/facts not typically relied upon by experts in that field, the trial court must make a Rule 104 determination regarding the admissibility of the evidence. **Hamilton v. Hamilton**, 93 N.C. App 639 (1989).

e. SCRIPT:

i. Who. Who are you? Who did you see? Who was involved? Who was present? Who are afraid of? Who are you caring for? Who took the picture? Who, who, who?

ii. What. What were you doing? What was he doing? What were the children doing? What does your business do? What did you use the funds for? What is this line item on your financial affidavit? What happened next? What happened then? What did he say? What did you say? What did the children say?

iii. When. **Timing is everything.** How often have we heard this? When were you married? When was Junior born? When did you move during the marriage to follow her career path? When did your mother die, leaving you that IRA? When was the last time he threatened you with bodily harm? When was the last time she texted you? When was the last time you smoked pot during a time you had the child? When was the last time you smoked pot on the same day you picked the child up to begin your custodial time? When did you take the picture?

iv. Where. Where were the children when she punched you in the face? Where are your bank accounts located? Where is the diamond ring? Where were you the

first time you had sex with plaintiff's wife? Where is the real estate located? Where are you living? Where do the children go to school? Where do you work?

v. How. How far is your work from the children's school? How far away are you looking to relocate the children from the other joint custodian? How is it that you built this business? How did you divide household responsibilities when she began the business? How did you manage to have three kids at three different schools participating in simultaneously held but three different activities?

vi. Why. Why do you want primary physical custody? Why shouldn't she have equal physical custody? Why did you develop this particular savings pattern during the marriage? Why do you think this asset is your separate property? Why are you contending that the difference in your separate estates justifies an unequal division of the marital and divisible property in your favor?

vii. Foundational questions that you learned in elementary school in analyzing any good story or telling any good story. That's what you are doing for the judge. You are telling him or her a story that needs a happy ending, as defined by your theme and theory of the case. You are laying all the groundwork for them to want to give your client relief. Or you aren't and your client loses.

f. Rule 105. Limited admissibility.

When 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. **HISTORY:** 1983, c. 701, s. 1.

SCRIPT:

First thoughts: If I am offering it, I rarely offer to limit the admissibility at the outset. Typically I offer a limitation to wiggle around an objection.

Lawyer 1: Objection – hearsay.

Lawyer 2: Your Honor we are offering this for the limited purpose of corroborating his testimony, or impeachment, or …. To illustrate the testimony…

g. Rule 106. Remainder of or related writings or recorded statements.

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him **at that time** to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. **HISTORY:** 1983, c. 701, s. 1. (Emphasis added by author of this manuscript).

i. Also called the Rule of Completeness.
ii. If the other side says that you can offer it in your case in chief in response to your objection, emphasize the emphasized part of the rule. It is a time when you can round the harsh edges of the other side's case against your client by offering the complete picture. This way you are preventing a prejudicial snippet from coloring hours of the judge's perspective by offering the context to that particular snippet.

SCRIPT:

Lawyer: Objection. Rule 106 requires, upon my objection, that the entire statement be offered into evidence, and not this one line. For your Honor to have the complete picture I ask that the entire document be admitted.

It's always fun controlling the other side's exhibits.

II. JUDICIAL NOTICE

a. Rule 201. Judicial Notice of Adjudicative Facts

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

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

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

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

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

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

(g) *Instructing jury*. – In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed. **HISTORY:** 1983, c. 701, s. 1.

ii. **It is not the trial court's job to do our job.** The wife argued on appeal, but not at trial, that the trial court should have established a value for the pension through Rule 201. The trial court is not required to use either the present discount method or fixed percentage method to arrive at the proper value of the pension plan and, in order to do the same, "take judicial notice of any number of respected actuarial source books," especially where neither party asks the trial court to do the same at trial. Albritton v. Albritton, 109 N.C. App. 36, 426 S.E. 2d 80 (1993).

iii. It is not error for the trial court to take **judicial notice** of findings of unfitness of Mom from a prior custody action between the parents in favor of the non-parent second cousin where the past circumstances or conduct which would impact the child, either in the present or future, is relevant. This is so regardless of whether the circumstances or conduct did not exist or were not engaged in at the time of the hearing. Additionally where a trial court is required to consider testimonial evidence which meets the test of relevancy, it must then consider a court determination that was based upon a preponderance of the evidence from a prior proceeding. Davis v. McMillian, 152 N.C. App. 52, 567 S.E. 2d 159 (2002).

iv. As the trial court is required to take **judicial notice** of certain facts only when a party requests and offers the necessary information pursuant to Rule 201(d). Otherwise it is within the trial court's discretion to do so, the trial court did not err in refusing to take judicial notice of mother's serious violations of prior court orders pertaining to custody and child support. The record failed to indicate where the father requested the trial court to take judicial notice of said information. Huang v. Huang, 202 N.C. App. LEXIS 2328 (August 6, 2002).

v. The trial court did not take **judicial notice** of defendant's calendars proffered in the custody case. Rather it determined, based on evidence presented by defendant and not objected to by plaintiff to prove the amount of time the defendant spent with children. Alston v. Alston, 2004 N.C. App. LEXIS 385 (March 16, 2004).

vi. The trial court may take judicial notice of previous orders to compel discovery in a Rule 37 sanctions hearing when deciding to strike husband's references to the prenuptial agreement and all pleadings, barring evidence of the same and entering a default judgment against him on issues of postseparation support and alimony. The trial court took judicial notice of the husband's failure to comply with the first two orders compelling discovery, the protective order and the husband's testimony that he refused his attorney's request to sign the interrogatories and that he was going to continue to refuse to sign the same until they reflected the existence of the prenuptial agreement. Leder v. Leder, 166 N.C. App. 498, 601 to r S.E. 2d 882 (2004).

vii. It is error for the trial court to take personal or judicial notice of the special bond that develops between infants and mothers and that placement with the father would negatively affect the child based on the age and gender of the child. The trial court cannot use Rule 201 to backdoor the "tender year presumption." Greer v. Greer, 175 N.C. App. 464, 624 S.E.2d 423 (2006). The tender year presumption was abolished by statute 1977. Trial court cannot resurrect the same under the guise of judicial notice. Further, the evidence did not reflect a particular bond that existed between mother and child but the court found the same based on personal experience. Id.

viii. The trial court may take judicial notice without giving the litigants advance notice of the same. While the better practice is for the trial court to give express notice of its intent to take judicial notice of matters contained in a juvenile file, it is not required. Moreover, in a bench trial, the trial court is presumed to have excluded any incompetent evidence. Therefore it was not error for the trial court to take judicial notice of the mother's boyfriend's criminal history of sexual abuse with the minor child and the mother's own charges for felony child abuse. In re DSA, 181 N.C. App. 715, 641 S.E.2d 18 (2007).

ix. The trial court may take judicial notice of the entire court files of earlier proceedings in the same cause. The petitioner asked and respondent acknowledged that the trial court could clearly take judicial notice of the entire record and reserve the right to be heard on specific intentions at a later point. That assignment of error regarding the same as without merit. In re GK, JK and JLD, 2007 N.C. App. LEXIS 1012 (May 15, 2007).

x. The trial court cannot take judicial notice, sua sponte, of murders, robberies, and other violent crimes in and around the premises of the motel where the defendant lived. The crime rate of an area is a matter of debate within the community and the court cannot take judicial notice of a disputed question of fact. Hinkle v. Hartsell, 131 N.C. App. 833, 509 S.E. 2d 455 (1998). The court could have

called its own witness in the form of a police officer to testify about the crime rate, rather than operate under Rule 201.

xi. The trial court may take judicial notice of the supporting spouse's expenses that were testified to in the postseparation support hearing during alimony hearing. In the absence of prior notice by the court of its intent to take judicial notice, the party is entitled to request a post decision hearing on the propriety of the same. Here, the dependent spouse's attorney did not object to the supporting spouse's testimony regarding his expenses. Harris v. Harris, 2005 N.C. App. LEXIS 1021 (2005).

xii. An alimony order was reversed because the court incorrectly held prior findings bound it, including unnecessary ones as to divorce and marital fault findings, under N.C. Gen. Stat. § 50-16.3A(b)(1) (2011), and judicial notice, under N.C. Gen. Stat. § 8C-1, N.C. R. Evid. 201 (2011), of statistics on the wife's profession's salaries to find earning capacity. The case was reversed and remanded because despite saying otherwise, the trial court was not actually "stuck" with all of the prior findings of fact. Khaja v. Husna, 777 S.E. 2d 781 (October 6, 2015).

b. SCRIPT

i. If you know at the outset of your hearing/trial date that there are previous affidavits, findings of fact or other items you would like the court to take judicial notice of, address it in pretrial conference.

ii. **For what it is worth:** There is no statutory limitation on when you can ask the court to take judicial notice of an issue, so long as the court is still receiving evidence. Although there are no cases on point, you could conceivably be limited to when it is your case in chief or on your rebuttal.

iii. An example of an effective use of judicial notice: in an equitable distribution trial where one spouse is arguing the value of a bank account is the value for division purposes for equitable distribution on a date earlier than the date of separation you can ask the court to take judicial notice of the date of separation found as a fact in the divorce decree.

III. PRESUMPTIONS IN CIVIL ACTIONS AND PROCEEDINGS

a. Rule 301. Presumptions in general in civil actions and proceedings.

In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision, or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact. **HISTORY:** 1983, c. 701, s. 1.

i. The burden is on the defendant where an order to show cause was issued requiring him to appear and show cause as to why he should not be held in contempt. Schumaker v. Schumaker, 137 N.C. App. 72, 527 S.E.2d 55 (2000).

ii. The burden is on the party claiming the interest in the pension plan to establish the value of the same as of the date of separation. Albritton v. Albritton, 109 N.C. App. 36, 426 S.E. 2d 90 (1993).

b. Rule 302. Applicability of federal law and civil actions and proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law. **HISTORY:** 1983, c. 701, s. 1.

IV. RELEVANCY AND ITS LIMITS

a. 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. **HISTORY:** 1983, c. 701, s. 1.

i. Credibility is a relevant matter in any case and a letter addressed by Respondent to WCHS (Wake County Human Services) beginning "Dear Satan" was properly admitted to impeach the Respondent's contention that he had only shown anger to WCHS one time. In re D.W., 2008 N.C. App. LEXIS 64 (January 15, 2008).

ii. Adultery is not relevant to issues pertaining to a Chapter 50B action. Duff v. Lineberger, 2005 N.C. App. LEXIS 1444. (August 2, 2005).

iii. Evidence that deceased husband changed his will, revoked the health care power of attorney that named wife as the power of attorney, and revoked his living will were relevant where they had the tendency to assist the trier of fact in determining the date of separation when all of these were done after wife said husband could only come home from the hospital if he deeded her the farm and he refused to do so. Perkins v. Perkins, 2002 N.C. App. LEXIS 2630 (December 31, 2002).

iv. New husband's income was not relevant at a trial enforcing a Connecticut Order which obligated the parties to pay for their children's college expenses and mandated that only the parties' income, assets, and liabilities would be considered in resolving the same. Helms v. Schultze, 161 N.C. App. 404, 588 S.E.2d 524 (2003).

v. The existence of a DSS investigation during a DVPO hearing is not relevant. The results may be, but the existence of an investigation without the results is not, where DSS is required to investigate any report of abuse, neglect or dependency. Burress v. Burress, 672 S.E. 2d 732, 2009 N.C. App. LEXIS 148 (February 17, 2009).

vi. Any past circumstance or conduct which could impact the present or the future of a child is relevant in a custody action, regardless that of the fact that the circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding. Defendant mother's participation in the murder of the father of the minor child at issue in the custody case was relevant pursuant to Rule 401. Speagle v. Seitz, 354 N.C. 525, 557 S.E.2d 83 (2001).

SCRIPT:

Lawyer: Objection. Relevance. (Be prepared to talk about how far off in left field this line of questioning is to the issue at hand). If you lose on this one, immediately jump to 403. Where the probative value is far outweighed by the prejudicial effect. Think, by way of example, of evidence of affairs during an equitable distribution trial.

b. 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. **HISTORY:** 1983, c. 701, s. 1.

i. Plaintiff husband's e-mail to wife and others stating that he will have to seek support from the devil to defend himself in court and that he may seek an arrest warrant against the wife and her family just to prove himself not guilty of charges against him were relevant under Rule 402 to impeach him regarding his testimony of his calmness and lack of anger problems. Ladhani v. Ladhani, 2004 N.C. App. LEXIS 883 (May 18, 2004). Additionally defendant failed to brief how he would have been prejudiced by the e-mail's admission and his obligation is to show that the admittance was both error and prejudicial to him. Id. at 7.

ii. Wife objected to Husband offering into evidence his power of attorney, his revocation of power of attorney, and his living will and health care power of attorney because she claimed these documents are not relevant proof of the parties' intent to separate. The trial court and Court of Appeals disagreed. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence [*10] to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1999). Generally, "all relevant evidence is admissible[.]" N.C. Gen. Stat. § 8C-1, Rule 402 (1999). To be relevant evidence, "it is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions." Perkins v. Perkins, 2002 N.C. App. LEXIS 2630 (December 31, 2002).

c. 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. **HISTORY:** 1983, c. 701, s. 1.

i. Even where evidence of other wrongs is admissible under Rule 404(b) to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident, as opposed to showing action in conformity therewith, the probative value of such evidence must still outweigh the danger of undue prejudice. Ex-wife's testimony as to Husband's use of pressure points to abuse her during their marriage was admissible in a hearing involving new wife's allegations of abuse using pressure points to show Husband's intent and knowledge where the incidents were sufficiently similar and not so remote in time to be more probative than prejudicial under the 403 balancing test. Head v. Head, 2004 N.C. App. LEXIS 2115 (December 7, 2004).

ii. Husband objected to wife's testimony regarding transfers of property between husband and Mr. Ritter as not relevant, or if relevant, excluded by Rule 403's balancing test. The wife sued husband for breach of the separation agreement, including harassing her in violation of the "No Molestation" clause. Wife contended that husband arranged it with Mr. Ritter to have him evict her from the property. Evidence of the excise taxes paid between husband and Mr. Ritter were therefore relevant under Rule 402. They were also not excluded under the balancing test where the probative value was not substantially outweighed by the danger of undue prejudice where the trial court gave a limiting instruction with regard to the evidence. Reis v. Hoots, 131 N.C. App. 721, 509 S.E.2d 198 (1998).

iii. Wife argued that the trial court violated Rule 403 and abused its discretion by limiting the time which her lawyer had to present evidence. Rule 403's balancing test allows the exclusion of evidence if the probative value of evidence is substantially outweighed by undue delay and waste of time. Wife failed to show how the court abused its discretion in the limitation of time for the custody hearing. Clair v. Clair, 2002 N.C. App. LEXIS 1937 (June 18, 2002). Solid win, here, for family law court's time limits.

iv. The trial court did not err in excluding evidence of defendant's previous involvement with another married man in an action for alienation of affections and criminal conversation more than 30 years before the events giving rise to the current claim because any probative value would be substantially outweighed by the danger of unfair prejudice and confusion of the issues. Boileau v. Seagrave, 2008 N.C. App. LEXIS 1833 (October 21, 2008).

v. The probative value of the husband's actions of shooting into the family home and holding the wife hostage was not substantially outweighed by the danger of unfair prejudice when the testimony was allowed only for purposes of calculating

the damage done to the home as a result of the shootout. Troutman v. Troutman, 193 N.C. App. 395, 667 S.E.2d 506 (2008).

vi. A psychologist's testimony regarding father-daughter relationships was offered into evidence to support an increased schedule in favor of father. Mother objected claiming Dr. Neilsen's testimony was irrelevant. 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." The Court found the testimony regarding research on shared parenting arrangements was relevant to the custodial arrangement in this case because it assisted the trial court in deciding what was in the best interests of the children. Mother failed to show that the trial court erred in deciding that the probative nature of the testimony was not outweighed by a danger of unfair prejudice, confusion of the issues, or misleading the trier of fact. The trial court assigned significant weight to Dr. Neilsen's testimony in altering the final custody determination but defendant failed to point to any way in which the testimony unfairly prejudiced defendant or confused or misled the trial court. Smith v. Smith, 786 S.E. 2d 212 (2016). April 19, 2016, to be specific.

vii. **Cautionary tale on Smith – there is a whole discussion of qualifications of an expert in this case. It precedes State v. McGrady.**

SCRIPT:

Lawyer: 403 objection, your honor. Any value, though we think very little, would be substantially outweighed by the prejudicial effect. Whether Mr. Jones guy smoked pot 25 years ago in college shouldn't have any bearing on his custody case for his one year old when there is not a shred of evidence he has done that since graduating from MIT. Try to not overtly show disgust for the waste of time. If ancient evidence is the best they have, you probably have a good case.

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

(a) *Character evidence generally.* – Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) *Character of accused.* – Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* – Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* – Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(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. **HISTORY:** 1983, c. 701, s. 1; 1994, Ex. Sess., c. 7, s. 3; 1995, c. 509, s. 7.

i. The questioning of the respondent father regarding whether he had ever been charged with a crime did not violate Rule 404(b) where the question was asked to determine the respondent's suitability as a caregiver for the minor child and not to determine that the person had acted in conformity with the charges. Rule 404(b) only precludes evidence of other crimes, wrongs, or acts to prove the character of a person in order to who that he acted in conformity therewith. Therefore, the questioning regarding the charges of theft was properly permitted. In re: Dorlac, 2003 N.C. App. LEXIS 2089 (November 18, 2003).

ii. Husband's ex-wife's testimony regarding the abuse she endured by husband, specifically as it related to his use of pressure points in order to avoid leaving marks was permissible under Rule 404(b) to prove his intent to inflict abuse in a manner leaving no visible marks as well as his knowledge of how to do so. Head v. Head, 2004 N.C. App. LEXIS 2115 (December 7, 2004).

iii. The trial court did not err by allowing defendant's witness to offer testimony concerning plaintiff's alleged attempts to bribe the witness to tamper with the blood grouping laboratory test results which were used to prove plaintiff's nonpaternity. The evidence was not being offered to show conformity therewith as provided in Rule 404(b), but was, rather, the evidence offered to show what the plaintiff had actually done in the current case. **The acts of the plaintiff described by the witness were of the offense related to the defendant's action for nonsupport against the plaintiff which became the basis of the malicious prosecution case filed by the plaintiff against the**

defendant for the nonsupport case. Lay v. Mangum, 87 N.C. App. 251, 360 S.E.2d 481 (1987).

SCRIPT:

Lawyer: Did defendant ever hurt you using pressure points during your marriage?

Other Lawyer: objection.

Lawyer: We are not offering this to show he acted in conformity therewith. We are offering it to show intent and plan to not leave marks as a result of the abuse.

e. Rule 405. Methods of proving character.

(a) Reputation or opinion. – In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

(b) Specific instances of conduct. – In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct. HISTORY: 1983, c. 701, s. 1.

i. The trial court's refusal to allow plaintiff's direct testimony regarding alleged acts of domestic violence by defendant occurring prior to the initial August 1997 custody and support order was not error warranting a new trial because the testimony was admissible to impeach defendant's testimony that he did not have an anger management problem. Plaintiff cited G.S. § 8C-1, Rule 405 which provides: "on cross examination, inquiry is allowable into relevant specific instances of conduct" where proof of a person's character is relevant and admissible at trial. N.C. Gen. Stat. § 8C-1, Rule 405(a) (2003). During her cross-examination of defendant, plaintiff was permitted to question him about conduct allegedly occurring prior to the August 1997 custody and support order. Her argument on appeal was without merit. Parker v. Alston, 2004 N.C. App. LEXIS (March 16, 2004).

f. Rule 406. Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. **HISTORY:** 1983, C. 701, S. 1.

g. Rule 407

i. No family law cases for this Rule.

h. Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

HISTORY: 1983, c. 701, s. 1.

i. Unrepresented wife refused to engage in settlement negotiations with counsel for husband to settle the equitable distribution of a net negative estate. The Trial Court refused to classify or distribute marital assets and liabilities and awarded husband attorney's fees for a trial that it determined didn't need to happen and could have been avoided by settlement negotiations. The trial court questioned the wife on why she would not enter into settlement negotiations. Rule 408 excludes the admissibility of offers to settle and, here, the trial court expressly relied on her refusal to engage in settlement negotiations as a basis for failing to classify, value, and distribute the property at issue. The case was remanded. Eason v. Taylor, 784 S.E. 2d 200 (2016).

SCRIPT:

Witness: when we were in mediation…
Or: he was willing to give me primary physical custody if I would just…
Lawyer: objection. 408 settlement offers are inadmissible.

i. **Rule 409. Payment of medical and other expenses.**
Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury is not admissible to prove liability for the injury. **HISTORY:** 1983, c. 701, s. 1.

j. **Rule 410. Inadmissibility of pleas, plea discussions, and related statements.**
Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible for or against the defendant who made the plea or was a participant in the plea discussions:
(1) A plea of guilty which was later withdrawn;
(2) A plea of no contest;
(3) Any statement made in the course of any proceedings under Article 58 of Chapter 15A of the General Statutes or comparable procedure in district court, or proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable procedure in another state, regarding a plea of guilty which was later withdrawn or a plea of no contest;
(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible in any proceeding wherein another statement made in the course of the same plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it. **HISTORY:** 1983, c. 701, s. 1.

k. **Rule 411.**
    i. No family law cases for this Rule.

l. Rule 412. Rape or sex offense cases; relevance of victim's past behavior.

(a) As used in this rule, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complainant and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) Sexual behavior otherwise admissible under this rule may not be proved by reputation or opinion.

(d) Notwithstanding any other provision of law, unless and until the court determines that evidence of sexual behavior is relevant under subdivision (b), no reference to this behavior may be made in the presence of the jury and no evidence of this behavior may be introduced at any time during the trial of:

(1) A charge of rape or a lesser included offense of rape

(2) A charge of a sex offense or a lesser included offense of a sex offense; or

(3) An offense being tried jointly with a charge of rape or a sex offense, or with a lesser included offense of rape or a sex offense.

Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desires to introduce such evidence. When application is made, the court shall conduct an in camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the argument of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the proponent seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the in camera hearing or at a subsequent in camera hearing scheduled for that purpose, shall accept evidence on the issue of whether that condition of fact is fulfilled and shall determine that issue. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

(e) The record of the *in camera* hearing and all evidence relating thereto shall be open to inspection only by the parties, the complainant, their attorneys and the court and its agents, and shall be used only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the in camera hearing without the questions being repeated or the evidence being resubmitted in open court. **HISTORY:** 1983, c. 701, s. 1.

V. PRIVILEGES

a. Rule 501. General rule.

Except as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with the law of this State. **HISTORY:** 1983, c. 701, s. 1.

i. No family law cases for this Rule.

ii. That being said, N.C.G.S. 8-56 provides that "no husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Hicks v. Hicks, 271 N.C. 204 155 S.E.2d 799 (1967).

iii. However, defendant's statement to the plaintiff that he met someone else and was leaving the family was overheard by one of their children. Additionally the statements were admissions of a party opponent and admissible pursuant to Rule 801(d). Cooper v. Cooper, 2002 N.C. App. LEXIS 2075 (June 4, 2002).

iv. Husband waives his right to object to a psychiatrist's testimony, who acted as a marriage counselor for the parties, on the ground of physician-patient privilege by failing to object to such testimony during the trial. Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984).

SCRIPT:

Witness: During marriage counseling he admitted….

Lawyer: Objection. Privilege. Marriage counseling privilege protects the parties and process.

Judge: Sustained.

VI. WITNESSES

a. **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 he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

(c) *Disqualification of interested persons.* – Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning any oral communication between the witness and the deceased person or lunatic. However, this subdivision shall not apply when:

(1) The executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf regarding the subject matter of the oral communication.

(2) The testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.

(3) Evidence of the subject matter of the oral communication is offered by the executor, administrator, survivor, committee or person so deriving title or interest.

Nothing in this subdivision shall preclude testimony as to the identity of the operator of a motor vehicle in any case. **HISTORY**: 1983, c. 701, s. 1.

i. The trial court did not err in an equitable distribution action by permitting the wife's father's testimony regarding the gift of checks from wife's dead grandmother to wife. 601(c) requirements were not met because neither the wife nor her dad was testifying against the interest of the wife's grandmother. Hunt v. Hunt, 85 N.C. App. 484, 355 S.E.2d 519 (1987).

b. **Rule 602. Lack of personal knowledge.**

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses. **HISTORY:** 1983, c. 701, s. 1.

i. Husband's assertion that wife was familiar with the corporation's books and knew or should have known about a loan to the corporation husband partially owned violated Rule 602, which bars a witness from testifying a fact, of which, she has no personal knowledge. Lee v. Lee, 93 N.C. App. 584, 378 S.E.2d 554 (1989). The evidence presented did not support wife's knowledge of the books. The separation agreement was then set aside for his material breach of failing to disclose the existence of the loan, regardless of its collectability.

SCRIPT:

Lawyer: so you have no firsthand knowledge of the loans of the company.

Witness: no.

Lawyer: did you have any knowledge of your husband applying for the loan?

Did you ever see the loan application?

Did you sign off as a co-borrower?

Were the proceeds ever deposited into an account you access?

If all are no…. 602 would bar her knowing or should have known…

See also:

Were you there the night of the fight?

No.

Did you see either party immediately thereafter?

No. But my other friends told me all about it.

Objection and move to strike. This witness lacks firsthand knowledge and what she thinks she knows is based upon hearsay.

c. **Rule 603. Oath or affirmation.**
Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so. **HISTORY:** 1983, c. 701, s. 1.

i. Counsel for plaintiff's recitation of defendant's bipolar disorder in her opening statement did not violate Rule 603 where the disorder had been referenced in previous court orders. Gardner v. Gardner, 2003 N.C. App. LEXIS 1363 (July 15, 2003). Plaintiff was not sworn and did not testify and Defendant contended that plaintiff's counsel improperly relied upon a statement by plaintiff regarding the disorder. However, the recitation of defendant's bipolar disorder was mentioned in previous orders of the court

and therefore did not violate Rule 603. Additionally, control over opening statements rests within the sound discretion of the court and Defendant did not object during the opening.

d. **Rule 604. Interpreters.**

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation. **HISTORY:** 1983, c. 701, s. 1.

i. No family law cases for this Rule.

e. **Rule 605. Competency of judge as witness.**

The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. **HISTORY**: 1983, c. 701, s. 1.

i. Trial court found mother was hostile and aggressive in reaching a determination that she was likely to abuse the child in the future. Mother challenged the finding and conclusion alleging they were made in violation of Rule 605. Mother had approached the Judge at an elevator during the pendency of the action and attempted to engage her in a conversation. The trial court made a finding about that as well to corroborate the other findings regarding Mother's aggressive and hostile behavior in the court room. The appellate court found that even if that finding was struck, the remaining findings support the conclusion. In re J.H-S, 2011 NC App. LEXIS 1779 (August 16, 2011).

f. **Rule 606. Competency of juror as witness.**

(a) *At the trial*. – A member of the jury may not testify as a witness before that jury in the trial of the case in which he is sitting as a juror. If he is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment*. – Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes. **HISTORY:** 1983, c. 701 s. 1.

i. A juror may not testify as to what effect that extraneous prejudicial information acquired by the juror had upon her vote. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

g. **Rule 607. Who may impeach.**

The credibility of a witness may be attacked by any party, including the party calling him. **HISTORY:** 1983, c. 701, s. 1.

h. **Rule 608. Evidence of character and conduct of witness.**

(a) *Opinion and reputation evidence of character*. – The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may

refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) *Specific instances of conduct*. – Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility. **HISTORY:** 1983, c. 701, s. 1.

SCRIPT

Lawyer: You've written bad checks before, haven't you?

You've impersonated your grandmother to obtain her social security checks, haven't you?

i. **Rule 609. Impeachment by evidence of conviction of crime.**

(a) *General rule.* – For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) *Time limit*. – Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon*. – Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.

(d) *Juvenile adjudications*. – Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal*. – The pendency of an appeal therefrom does not render evidence of a conviction admissible. Evidence of the pendency of an appeal is admissible. **HISTORY:** 1983, c. 701, s. 1; 1999-79, S. 1.

i. In a domestic violence protective order hearing the trial court properly sustained the question, "Ms. Duff, have you ever been convicted of a crime?" The defendant's question was not sufficiently tailored to the constraints imposed by Rule 609 for convictions of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor within the last 10 years. Duff v. Lineberger, 2005 N.C. App. LEXIS 1444 (August 2, 2005).

ii. The questioning of the respondent father regarding whether he had ever been charged with a crime did not violate 609(a) where the question was asked of charges, not convictions, and was meant to determine the respondent's suitability as a caregiver for the minor child and not to determine that the person had acted in conformity with the charges. Rule 609(a) provides for impeachment of a witness's credibility with evidence that the witness had been convicted of certain offenses. These questions

were not asked to attach credibility. Therefore, the questioning regarding the charges of theft was properly permitted. In re: Dorlac, 2003 N.C. App. LEXIS 2089 (November 18, 2003).

j. **Rule 610. Religious beliefs or opinions.**

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias. **HISTORY**: 1983, c. 701, s. 1.

i. Sood v. Sood, 2012 N.C. App. LEXIS 1102 (September 18, 2012). The judge's religious beliefs, as expressed on Facebook and raised for the first time in the Record on Appeal did not violate the father's First Amendment right where they were different than father's and where the judge did not recuse himself for said differences.

k. **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. **HISTORY**: 1983, c. 701, s. 1.

i. Credibility is a relevant matter in any case and a letter addressed by Respondent to WCHS (Wake County Human Services) beginning "Dear Satan" was properly admitted to impeach the Respondent's contention that he had only shown anger to WCHS one time. In re D.W., 2008 N.C. App. LEXIS 64 (January 15, 2008). The scope of cross examination is within the sound discretion of the trial court.

ii. In Rule 59 hearing Mother alleged that a two day limitation on the evidence was arbitrary and the court should have allowed her to reopen the evidence. The Court of Appeals disagreed where (1) the length of the trial was discussed during a pre-trial conference and both parties agreed to the two-day trial; (2) the court inquired about the ability of both parties to present evidence within a two-day time frame and neither party objected during pre-trial conferences; (3) the court reminded both parties by making several references to the time constrictions during the trial; and (4) at the close of Defendant's evidence, Defendant failed to object to the time limits enforced by the trial court on the second day of trial. The trial court was within its authority under Rule 611(a).

SCRIPT:

If the other side is asking cumulative questions or it is the fourth witness who will testify about the one baseball game where Mom knocked out the umpire, you could object here and ask the court to exclude evidence.

If calling a hostile witness: Your Honor, permission to treat opposing party's new spouse as a hostile witness and ask leading questions?

Judge: I have yet to see hostility counselor.

Lawyer: New wife: Last night, did you send a text to my client saying the children would be better off if you died and I raised them? (Hold up a paper like it's the text)

Witness: I didn't mean it like that…

Lawyer: I renew my request, your honor.

Judge…. Permission granted.

l. **Rule 612. Writing or object used to refresh memory.**

(a) *While testifying.* – If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

(b) *Before testifying.* -- If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court, in its discretion, determines that the interests of justice so require, an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

(c) *Terms and conditions of production and use.* – A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains privileged information or information not directly related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any such portions, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if justice so requires, declaring a mistrial. **HISTORY:** 1983, c. 701, s. 1.

i. No family law cases for this Rule.

ii. **SCRIPT**

1. Witness: "I can't remember exactly without looking at my calendar but I think that he bought me the new car in September."
2. Lawyer: "Would reviewing your calendar refresh your recollection regarding the date he bought you the car?"
3. Witness: "yes."
4. Lawyer: "I am handing you your calendar. Please review it and read silently to yourself. When your recollection is refreshed, please look up."
5. Witness reads silently and then looks up.
6. Lawyer: Does that refresh your recollection.
7. Witness: yes.
8. Lawyer: When did he buy you the car?
9. Witness: September 9, 1992.

m. **Rule 613. Prior statements of witnesses.**

In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel. **HISTORY:** 1983, c. 701, s. 1.

i. Credibility is a relevant matter in any case and a letter addressed by Respondent to WCHS (Wake County Human Services) beginning "Dear Satan" was properly admitted to impeach the Respondent's contention that he had only shown anger to WCHS one time. In re D.W., 2008 N.C. App. LEXIS 64 (January 15, 2008). The scope of cross examination is within the sound discretion of the trial court.

n. **Rule 614. Calling and interrogation of witnesses by court.**

(a) *Calling by court*. – The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) *Interrogation by court*. – The court may interrogate witnesses, whether called by itself or by a party.

(c) *Objections*. – No objections are necessary with respect to the calling of a witness by the court or to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled. **HISTORY:** 1983, c. 701, s. 1.

i. The trial court did not err when it called six additional witnesses to testify after DSS rested its case in a termination of parental rights hearing. In re Bethea, 2002 N.C. App. LEXIS 2212 (July 16, 2002). Rule 614(a) allows the trial court to call and interrogate witnesses where said witnesses are interrogated to clarify the witness' testimony or called to ensure the proper development of facts. Id., at 9. The court's interrogation does not alter or reduce the burden of proof.

ii. In a custody case where father was awarded primary custody after mother disappeared for three years with the child, mother asserted that the trial court erred by questioning the parties during the hearing. The trial court's questioning of the parties and the child psychologist was upheld on appeal where 614(b) allows for said questioning so long as the court is cautioned to not express an opinion as to the evidence or credibility of the witnesses in the presence of the jury. Since there was no jury, there was no concern regarding the opinions, expressed or implied, made by the court in its questioning. Bryson v. Bryson, 2004 N.C. App. LEXIS 1027 (June 1, 2004).

iii. During an equitable distribution hearing it is not reversible error for the trial court to inquire of both parties whether they had independent knowledge of the item on the pretrial order, an opinion to the fair market value of the same, an opinion on the current value of the items, and an opinion as to who should get the item. The trial court should not conduct an extensive direct examination of the parties, but because the trial court so limited itself, it did not violate Rule 614. Whisnant v. Whisnant, 2002 N.C. App. LEXIS 2071 (May 7, 2002).

iv. In a DVPO/Custody proceeding, the judge inquired of defendant/wife's counsel whether the defendant was going to plead the fifth. The judge indicated that if she asserted her Fifth Amendment privileges, the judge would send someone to jail. Rule 614 stands for the proposition that the lawyers do not have to expressly object to a particular question or questions the judge asks and the issue of whether the question should have been asked is preserved for appeal. However, this Rule 614 waiver of the need to object does not extend to constitutional issues. Constitutional issues need to be objected to at the trial in order for them to be preserved for appeal. Herndon v. Herndon, 368 NC 826, 785 S.E.2d 922 (2016).

v. The court has broad discretion to appoint and call expert witnesses and the trial court did not abuse the same by not appointing an expert to appraise a marital asset even where there was no credible evidence before the court of the value of the asset. Grasty v. Grasty, 125 N.C. App. 736 (1997).

o. **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. **HISTORY:** 1983, c. 701, s. 1.

i. Parties consented to resolve family financial issues in arbitration. Their daughter was going to testify. The daughter's psychologist recommended that the father not be present for the testimony. The arbitration was not recorded but it appears that the father objected orally to the child testifying outside of the presence of the parties. The arbitrator took the testimony while the parties were not present. Rule 615 prohibits the court from excluding a party but the parties' arbitration agreement Consent Order provided that evidence could be taken outside of the presence of the parties if a party waives their right to be present. The consent order also provided that any objections to the format of the arbitration had to be done in writing and filed with the arbitrator. Father failed to do that. As such, the trial court's order vacating the arbitration award was reversed. Eisenberg v. Hammond, 788 S.E. 2d 619 (2016).

SCRIPT:

Lawyer: Your Honor, pursuant to Rule 615 I request that you sequester the witnesses so that they cannot align their stories while watching all the witnesses who will go before them…

p. **Rule 616. Alternative testimony of witnesses with developmental disabilities or mental retardation in civil cases and special proceedings.**

(a) *Definitions*. – The following definitions apply to this section.

(1) The definitions set out in G.S. 122C-3.

(2) "Remote testimony" means a method by which a witness testifies outside of an open forum and outside of the physical presence of a party or parties.

(b) *Remote Testimony Authorized*. – A person with a developmental disability or a person with mental retardation who is competent to testify may testify by remote testimony in a civil proceeding or special proceeding if the court determines by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the presence of a named party or parties or from testifying in an open forum and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the presence of a named party or parties or from testifying in an open forum.

(c) *Hearing Procedure*. – Upon motion of a party or the court's own motion, and for good cause shown, the court shall hold an evidentiary hearing to determine whether to allow remote testimony. The hearing shall be recorded unless recordation is

waived by all parties. The presence of the witness is not required at the hearing unless so ordered by the presiding judge.

(d) *Order*. – An order allowing or disallowing the use of remote testimony shall state the findings and conclusions of law that support the court's determination. An order allowing the use of remote testimony also shall do all of the following:

(1) State the method by which the witness is to testify.
(2) List any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony.
(3) State any special conditions necessary to facilitate the cross-examination of the witness.
(4) State any condition or limitation upon the participation of individuals in the presence of the witness during the testimony.
(5) State any other conditions necessary for taking or presenting testimony.

(e) *Testimony*. – The method of remote testimony shall allow the trier of fact and all parties to observe the demeanor of the witness as the witness testifies in a similar manner as if the witness were testifying in the open forum. Except as provided in this section, the court shall ensure that the counsel for all parties is physically present where the witness testifies and has a full and fair opportunity for examination and cross-examination of the witness. In a proceeding where a party is representing itself, the court may limit or deny the party from being physically present during testimony if the court finds that the witness would suffer serious emotional distress from testifying in the presence of the party. A party may waive the right to have counsel physically present where the witness testifies.

(f) *Nonexclusive Procedure and Standard*. – Nothing in this section shall prohibit the use or application of any other method or procedure authorized or required by law for the introduction into evidence of statements or testimony of a person with a developmental disability or a person with mental retardation. **HISTORY:** 2009-514, s. 1.

VII. OPINIONS AND EXPERT TESTIMONY

a. Rule 701. Opinion testimony by lay witness.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to clear understanding of his testimony or the determination of a fact in issue. **HISTORY:** 1983, c. 701, s. 1.

i. It was not prejudicial error for the trial court to admit into evidence a doctor's letter regarding the respondent's micro psychotic episodes when the doctor was not tendered as an expert and the medical diagnosis contained therein went beyond the allowable scope of testimony by a non-expert medical witness under 701 where there was no indication the trial court relied upon the same to support the conclusion to terminate the parental rights of the mother. In re: Brim, 139 N.C. App. 73, 535 S.E.2d 367 (2000).

ii. Where a social worker had several in-home visits, her testimony was helpful to a determination of a fact in issue, which was the best plan for the minor child and Rule 701 permitted her testimony regarding the same. In re W.W., 2005 N.C. App. LEXIS 560 (January 26, 2005).

SCRIPT:

Lawyer: you saw the car swerving last Saturday night?

Witness: yes.

Lawyer: Who was driving?

Witness: the Dad. Based on the arm waving and swearing I heard at the red light, he and his kids were arguing.

Lawyer 2: objection. This witness wasn't in the car. He lacks firsthand knowledge.

Lawyer 1: this witness is telling the court what they actually observed and inferring that it was an argument. 701 permits this type of inference based upon perception of the witness.

Rule 702. Testimony by experts.

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

(1) The testimony is based upon sufficient facts or data.

(2) The testimony is the product of reliable principles and methods.

(3) The witness has applied the principles and methods reliably to the facts of the case.

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

(4) The results of a Horizontal Gaze Nystagmus (HGN) Test when the test is administered by a person who has successfully completed training in HGN.

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

(b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:
   a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or

   b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

   a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
   b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health

professional school or accredited residency or clinical research program in the same specialty.

(c) Notwithstanding subsection (b) of this section, if the party against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the action, must have devoted a majority of his or her professional time to either or both of the following:

(1) Active clinical practice as a general practitioner; or

(2) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the general practice of medicine.

(d) Notwithstanding subsection 9b) of this section, a physician who qualifies as an expert under subsection (a) of this Rule and who by reason of active clinical practice or instruction of students has knowledge of the applicable standard of care for nurses, nurse practitioners, certified registered nurse anesthetists, certified registered nurse midwives, physician assistants, or other medical support staff may give expert testimony in a medical malpractice action with respect to the standard of care of which he is knowledgeable of nurses, nurse practitioners, certified nurse anesthetists, certified registered nurse midwives, physician assistants licensed under Chapter 90 of the General Statutes, or other medical support staff.

(e) Upon motion by either party, a resident judge of the superior court in the county or judicial district in which the action is pending may allow expert testimony on the appropriate standard of health care by a witness who does not meet the requirements of subsection (b) or (c) of this Rule, but who is otherwise qualified as an expert witness, upon a showing by the movant of extraordinary circumstances and a determination by the court that the motion should be allowed to serve the ends of justice.

(f) In an action alleging medical malpractice, an expert witness shall not testify on a contingency fee basis.

(g) This section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section.

(h) Notwithstanding subsection (b) of this section, in a medical malpractice action against a hospital, or other health care or medical facility, a person may give expert testimony on the appropriate standard of care as to administrative or other nonclinical issues if the person has substantial knowledge, by virtue of his or her training and experience, about

the standard of care among hospitals, or health care or medical facilities, of the same type as the hospital, or health care or medical facility, whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

(i) A witness qualified as an expert in accident reconstruction who has performed a reconstruction of a crash, or has reviewed the report of investigation, with proper foundation may give an opinion as to the speed of a vehicle even if the witness did not observe the vehicle moving. **HISTORY:** 1983, c. 701, s. 1; 1995, c. 309, s. 1; 2006-253, s. 6; 2007-493, s. 5; 2011-283, s. 1.3; 2011-400, s. 4.

OLD CASES:

i. It was not error for the court to allow the testimony of a child support worker in an alienation of affection case to calculate and apply the then existing guidelines to the income earned by the parties in 1996 and 1997 where the worker was not offered nor accepted as an expert witness pursuant to Rule 702 but had knowledge of said guidelines and explained the application of the same. Nunn v. Allen, 154 N.C. App. 523, 574 S.E.2d 35 (2002).

ii. The trier of fact did not err in determining that a C.P.A.'s testimony would be helpful in valuing a law practice, even where the C.P.A. was admittedly unfamiliar with the subject area of the sale of law practices in Asheville. The training, education and experience gave him knowledge sufficient to render him better qualified than the trier of fact to set a value on the same. McLean v. McLean, 323 N.C. 543, 374 S.E.2d 376 (1988).

iii. A doctor's testimony regarding genetic tests that can be useful to determine paternity and his testimony on the scientific principles behind DNA testing was helpful to the jury pursuant to Rule 702. Collins v. Marion, 2005 N.C. App., LEXIS 639 (April 5, 2005).

iv. A bail bondsman with 27 years of experience was properly accepted as an expert in an equitable distribution action where he was in a better position than the trier of fact to testify as to the value of a bail bonding business because of his years of experience as a bail bondsman and his ten year tenure on the NC Bail Bonding Association's board of directors. Bass v. Bass, 2003 N.C. App. LEXIS 1755 (September 2, 2003).

v. The trial court properly excluded the testimony from an expert in the field of economics regarding the earning capacity of the wife. The expert would have testified regarding a hypothetical stream of income and wife's earning capacity as a registered nurse. There was no evidence that the plaintiff was intentionally depressing her income and the degree of speculation involved in calculating the stream of income from assets she might get in equitable distribution. Steg v. Steg, 2002 N.C. App. LEXIS 1710 (2002).

vi. In an action for alienation of affections, the trial court did not err in accepting as an expert a financial consultant even where his experience was primarily in evaluating investments in real estate and not in determining the financial loss to a wife as a result of her separation from her husband. The test is helpfulness to

the trier in fact and his 35 years of experience in the finance field made his testimony helpful. Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991).

NEW CASE:

State v. McGrady, 368 NC 880 (2016). We follow the Daubert line of cases.

vii. SCRIPT varies from specialty to specialty. Below are some basics for beginning said questioning:

2. Lawyer: where did you go to school?

a. Are you employed?
b. How?
c. For how long?
d. Do you have any certifications?
e. Do you have any degrees?
f. Have you engaged in any continuing education in your field?
g. What exposure have you had to _____?
h. How frequently?
i. What research have you done on this issue?
j. What, if anything have you published on this issue?
k. Have you been tendered an expert in this field before?
l. Have you been accepted as an expert in this field by a court before?
m. Have you been rejected as an expert in this field before?
n. What methodology did you use to form an opinion.
o. Did you have an opportunity to review the facts of this case?
p. How so?
q. Your honor, I would like to tender Ms. Jones as an expert in _____.

c. **Rule 703. Bases of opinion testimony by experts.**

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

HISTORY: 1983, c. 701, s. 1.

i. Statements made by the child regarding sexual abuse reviewed by the doctor are admissible under 703 and 803(6) business records exception. In Re: B.D., 174 N.C. App. 234, 620 S.E.2d 913 (2005).

ii. The mother also contended that the child's statements to the nurse were inadmissible when the petitioner failed to thereafter elicit the testimony from the child. The Court of Appeals reiterated that the Confrontation Clause was inapplicable to termination proceedings because they are civil actions where "the right to be present, to testify, and to confront witnesses [is] subjection to "due limitations."" In re D.R., 172 NC. App. 300, 616 S.E.2d 300, 303 (2005). Id.

iii. In this case the record indicated that rather than relying on the business records exception, the trial court also relied upon Rule 703. Rule 703 provides that an expert can testify regarding inadmissible facts and data "Made known to him or her "at or before the hearing" if the facts and data are "of a type reasonably relied upon by the experts in the particular field in forming opinions or inferences upon the subject." The doctor testified as to the "normal way" she arrived at her conclusions and also testified that such methods are "true of medical evaluations" in general. Id. At 234, 913.

iv. A psychological summary by a licensed psychologist was properly admitted in a custody case under Rule 703 to show the basis of an opinion offered by another psychologist. Plaintiff made a general objection and offered no voir dire to determine whether the summary was the type reasonably relied upon by experts in the field of psychology. Statements by one psychologist made to another are presumptively reliable and considered to be of a type reasonably relied upon by experts in the area of psychology and as the basis of an opinion does not have to be admissible in evidence if relied upon by other experts in the field, the admittance of the report as evidence as not error. Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989).

v. Wife argued that CPA in valuing a pension inappropriately relied upon an affidavit from the State Treasurer's office, retirement systems division. The affidavit was never offered into evidence. The CPA was tendered and accepted by the court as an expert. Wife offered no evidence to show that the State affidavit was not typically relied upon by experts in the pension valuation field and her argument was overruled. Lund v. Lund, 779 S.E.2d 175 (2015).

vi. **SCRIPT:**

3. **Have you formed an opinion on _____?**
4. **Yes.**
5. **What did you base your opinion on?**

6. **Did you review anything else arriving at your opinion?**
7. **Did you speak with anyone else, other than those mentioned, in arriving at your opinion?**
8. **What is your opinion?**

d. **Rule 704. Opinion on ultimate issue.**
Testimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. **HISTORY:** 1983, c. 701, s. 1.

i. The prohibition against witnesses, lay or expert, testifying to the ultimate issue has been eroded. The question, especially in regards to expert testimony, is whether the opinion articulated is based upon the expertise of the witness and whether the expert would be in a better position to have an opinion on the subject matter than the trier of fact. In re McDonald et. Al., 72 N.C. App. 234, 324 S.E.2d 847 (1985).

ii. Opinion testimony as to the ultimate issue is not objectionable under Rule 704 and as such the testimony of the psychologist recommending that primary custody be vested with the mother was correctly permitted where the witness was in an unquestionably better position than the court to have an opinion on the subject about which she testified. Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989). Additionally her testimony regarding the same met the helpfulness requirements set forth in Rule 702. Id.

SCRIPT:

Lawyer: After completing this custody evaluation do you have an opinion as to what the custodial arrangement should be for these children?

e. **Rule 705. Disclosure of facts or data underlying expert opinion.**
The expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or *voir dire* before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. There shall be no requirement that expert testimony be in response to a hypothetical question. **HISTORY:** 1983, c. 701, s. 1.

i. Trial Court did not err in admitting into evidence letters from IBM concerning the proposed QDRO where plaintiff's own expert testified that he used the letters in forming his opinion and that he advised plaintiff's counsel based upon the material in the letters. The letters were admissible as underlying facts and data set forth in Rule 705. Workman v. Workman, 106 N.C. App. 562, 418 S.E.2d 269 (1992).

f. **Rule 706. Court appointed experts.**

(a) *Appointment.* – The court may, on its own motion or on the motion of any party, enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the

parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) *Compensation.* – Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation for the taking of property. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) *Disclosure of appointment.* – In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) *Parties' experts of own selection.* – Nothing in this rule limits the parties in calling expert witnesses of their own selection. **HISTORY:** 1983, c. 701, s. 1.

i. An order giving the parties forty-eight hours to agree on an expert appraiser or otherwise the Court will appoint one of its choice is sufficiently explicit enough to be deemed an order to show cause per Rule 706. Swilling v. Swilling, 329 N.C> 219, 404 S.E.2d 837 (1991).

ii. Where a party fails to question an expert appointed under this Rule as to the reasonableness of the fee, that party has waived his right to contend that the trial court erred in failing to make findings on the reasonableness of the fee at the appellate level. Id. At 226.

iii. An order pursuant to Rule 706 is enforceable by contempt. A party's failure to participate in a custody evaluation ordered by the court to "assess the respective strengths and weaknesses of each party as a parent" is an order that, unlike a discovery order pursuant to Rule 37(b)(2)(d), can be enforced by Contempt proceedings set forth in N.C.G.S. 5A-21. Smith v. Barbour, 2004 N.C. App. LEXIS 1033 (May 17, 2005).

iv. On remand where the Court of Appeals rejected the trial court's valuation of a business, the Court of Appeals reminded the trial court that it could appoint an additional expert witness under Rule 706 to value a professional association, to determine whether there was any goodwill and to assist the court in determining how the values were calculated. Poore v. Poore, 75 N.C. App. 414, 331 S.E.2d 266 (1985).

v. Husband's testimony regarding goodwill was insufficient and, again, on appeal the Court of Appeals advises the trial court that it may appoint its own expert to value the same under Rule 706. Use of Rule 706 "may be necessary in this type of case since the trial court must value the goodwill of a professional practice for purposes of equitable distribution and valuation of good will

should be made with the aid of expert testimony." Dorton v. Dorton, 77 N.C. App. 667, 336 S.E.2d 415 (1985). Also see Offerman v. Offerman, 137 N.C. App. 289, 527 S.E.2d 684 (2000) and Franks v. Franks, 153 N.C. App. 793 571 S.E.2d 276 (2002).

vi. The trial court in an equitable distribution action did not err when it, in its discretion, denied the wife's motion for the appointment of appraisers pursuant to Rule 706. Godley v. Godley, 110 N.C. App. 99, 429 S.E.2d 382 (1993).

vii. A consent order appointing an expert and limiting the amount that the parties will pay the appointed expert does not limit the trial court's authority to award more than the same pursuant to Rule 706 at the end of trial, if the reasonable fees exceed and the court allows payment of the same. Sharp v. Sharp, 116 N.C. App. 513, 449 S.E.2d (1994).

viii. The trial court is not required to call an expert to value an asset where the parties fail to put on evidence of the same pursuant to Rule 706. Grasty v. Grasty, 126 N.C. App. 736, 482 S.E.2d 752 (1997).

SCRIPT

Not really a script here. You can make a 706 Motion for the Court to appoint an expert. You should do so early on in the case. If you do not have the client who has assets, you may want to join it for a Motion for Interim Distribution in an ED case so that the other side can pay for it.

VIII. HEARSAY

a. Rule 801. Definitions and exception for admissions of a party-opponent.

(a) Statement. – A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. – A "declarant" is a person who makes a statement.

(c) Hearsay. – "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.

(d) Exception for Admissions by a Party-Opponent. – A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a co-conspirator of such party during the course and in furtherance of the conspiracy. **HISTORY:** 1983, c. 701, s. 1.

i. Wife's father's testimony that his dead mother intended certain checks to be gifts to the wife was not hearsay as it was not a statement within Rule 801. Hunt v. Hunt, 85 N.C. App. 484, 355 S.E.2d 519 (1987). Rather, the objection should have been based on foundation of the father's knowledge. There is no way of determining the basis of the objection from the record and while it was briefed on hearsay, it was not hearsay.

ii. Son overheard father and stepmother in the hospital. Stepmother/wife told husband he could only return home from the hospital upon deeding certain land to wife. Husband/father refused. The parties separated, a divorce was granted, husband died and son was substituted as plaintiff by consent of the parties. Husband's statements to wife, as testified to by son, were not hearsay pursuant to 801 where wife failed to brief the same. Perkins v. Perkins, 2002 N.C. App. LEXIS 2630 (December 31, 2002).

iii. However, defendant's statement to the plaintiff that he met someone else and was leaving the family was overheard by one of their children. Additionally the statements were admissions of a party opponent and admissible pursuant to Rule 801(d). Cooper v. Cooper, 2002 N.C. App. LEXIS 2075 (June 4, 2002).

iv. The child's statements to social workers, the GAL and a nurse practitioner regarding sexual games was not inadmissible hearsay pursuant to Rule 801(c) where it was not offered to show that the child was sexually abused but proffered to show that he had inappropriate sexual knowledge for a six year old. In re Derreberry, 2003 N.C. App. LEXIS 1763 (September 2, 2003).

b. Rule 802. Hearsay rule.

Hearsay is not admissible except as provided by statute or by these rules. **HISTORY:** 1983, c. 701, s. 1.

NOTES: COMMENTARY

This rule is identical to Fed. R. Evid. 802 except that the phrase "by statute or by these rules" is used in lieu of the phrase "by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."

Rule 802 provides for the standard exclusion of hearsay evidence; hearsay is simply inadmissible unless an exception is applicable. This is in accord with North Carolina practice. Unless an exception to the hearsay rule is provided in these rules, the courts are not free to create new hearsay exceptions by adjudication. Rules 803(24) and 804(b)(5) allow for the admission of evidence in particular cases, but not for more general policy formulation.

SCRIPT:

Lawyer 1: Objection. Hearsay.

Lawyer 2: states any of the grounds set out in 803 and 804. We are not offering it for the truth of the matter asserted. Or, it is hearsay but it meets the following exception:

c. 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:

(1) Present Sense Impression. – A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
(2) Excited Utterance. – 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.
(3) Then Existing Mental, Emotional, or Physical Condition. – A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
(4) Statements for Purposes of Medical Diagnosis or Treatment. – Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character

of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection. – A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of Regularly Conducted Activity. – A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of Entry in Records Kept in Accordance with the Provisions of Paragraph (6). – Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. – Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation or other circumstances indicate lack of trustworthiness.

(9) Records of Vital Statistics. – Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. – To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent

search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. – Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts or personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. -- Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. – Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. – The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. – A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. – Statements in a document in existence 20 years or more the authenticity of which is established.

(17) Market Reports, Commercial Publications. – Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. – To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History. – Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation Concerning Boundaries or General History. – Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.
(21) Reputation as to Character. – Reputation of a person's character among his associates or in the community.
(22) (Reserved).
(23) Judgment as to Personal, Family or General History, or Boundaries. – Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence or reputation.
(24) 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. **HISTORY:** 1983, c. 701, s. 1.

i. Mother failed to show how the ruling excluding the statements of her children as to the then existing mental and emotional state under Rule 803(3) was prejudicial. As such the exclusion of the same as hearsay was not disturbed on appeal. In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988). Appellant must show that it was not only error but that the error was material and prejudicial, likely affecting the result and amounting to a denial of a substantial right.

ii. As state of mind is a relevant issue, the children's statements to their mother regarding their father's intimidation and their desire to live with their mother should have been permitted under Rule 803(3). However, as the children already voiced those fears and desires to the court in an interview, that evidence was cumulative and the exclusion of the same was not prejudicial. Griffin v. Griffin, 81 N.C. App. 665 (1986).

iii. In an action to terminate a father's parental rights, a DSS caseworker's testimony met the requirements of Rule 803(6), business records exception where she testified that she maintained the file in the case, kept summaries prepared for the court in the file, maintains other reports of other workers regarding the case in the file and had notes regarding dates of contact with the father. In re Smith, 2003 N.C. App. LEXIS 1243 (July 1, 2003).

iv. Statements made by a child to his therapist met the exception to the hearsay rule set forth in Rule 803(4), statements made for purposes of medical diagnosis where the child told his therapist that he was afraid to use the bathroom because his

mother hit him in the bathroom, he repeatedly said, "flush his head" during play therapy and stated that he was afraid to go because he would get hit. These statements were made in ongoing therapy sessions. All of the statements were spontaneous events and the child was not lead by the therapist. The therapist ultimately diagnosed the child with PTSD and as such the statements were clearly an exception to the hearsay rule under Rule 803(4). In re NMH, 2007 N.C. App. LEXIS 1174 (June 5, 2007).

v. The trial court correctly allowed several adults to testify as to what the five year old child had told them under Rule 803 where the child had been stressed by the defendant regarding hinting that she would move far away from the father. The trial court's recitation of its fear that allowing children's statements through 803 could be dangerous did not make the admitting of the evidence error. Phelps v. Phelps, 337 N.C. 344, 446 S.E.2d 17 (1994).

vi. Statements made by a child to a psychiatrist were admissible under the medical diagnosis and treatment exception to the hearsay rule under Rule 803(4) where the record was insufficient to support the contention that the examinations were made for trial purposes only. Williams v. Williams, 91 N.C. App. 469, 372 S.E.2d 310 (1988).

vii. Hearsay evidence is admissible under 803(4) where 1) the trial court has determined that the declarant intended to make the statements at issue in order to obtain medical diagnosis or treatment and the statements were reasonably pertinent to medical diagnosis or treatment. Statements made for purposes of trial preparation are appropriately excluded. State of NC v. Hinnant, 351 NC 277; 523 S.E. 2d 663 (2000).

viii. Where there was nothing in the record to show that the veterinarians were unavailable to testify at trial, the trial court properly excluded the veterinarian's reports proffered by wife regarding alleged bestiality. Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760 (2002). Additionally the reports did not meet an 803(3) exception because wife's state of mind was not reflected in the veterinarian's reports. 803(3) only permits the introduction of statements of the declarant's then existing state of mind. She was offering the reports to prove their contents and, as such, was required to produce an original pursuant to Rule 1002. She failed to do so and the reports were properly excluded. Id. at 765.

ix. It was not error for the trial court to allow the child's mother to testify as to the child's statements made 30 minutes after the incident regarding the incident with the child and the defendant in an indecent liberties case where the testimony could have been admitted as substantive evidence under the excited utterance exception of Rule 803(2). State of NC v. McGraw, 137 N.C. App. 726, 529 S.E.2d 493 (2000). A four to five day window between the incident and the statement is also permissible. State of North Carolina v. Thomas, 119 N.C. App. 708, 460 S.E.2d 349 (1995), or for "several hours after an attack" State of North Carolina v. Lowe, 154 N.C. App. 607, 572 S.E.2d 850 (2002).

x. Statements made by a child to a grandmother immediately after seeking medical assistance for sexual assaults were admissible as statements for medical diagnosis

under Rule 803(4). State of North Carolina v. Smith, 315 N.C. 76, S.E.2d 833 (1985).

xi. In a hearing to determine whether wife was cohabiting, husband's private investigator's testimony was excluded where she recited that boyfriend told PI that he lived at wife's house with his "wife and son." Boyfriend denied making that statement and the PI was called to rebut the evidence. Wife objected. Husband asserted that the testimony would be for impeachment purposes. The trial court ruled that if the PI did not testify in corroboration of the boyfriend's testimony, the testimony would not be considered. On appeal, for the first time, husband argued that the PI statements about boyfriend's statements were admissible under an 803(3) exception. However, since his state of mind exception was not raised at trial it was not considered on appeal. Husband also failed to show how he was prejudiced by the court failing to consider the statement. Smallwood v. Smallwood, 227 N.C. App 319, 742 S.E.2d 814 (2013).

d. Rule 804. Hearsay exceptions; declarant unavailable

(a) *Definition of unavailability.* – "Unavailability as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
(2) Persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
(3) Testifies to a lack of memory of the subject matter of his statement; or
(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) *Hearsay exceptions.* – The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. – Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
(2) Statement Under Belief of Impending Death. – A statement made by a declarant while believing that his death is imminent, concerning the cause or circumstances of what he believed to be his impending death.
(3) Statement Against Interest. – A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement.
(4) Statement of Personal or Family History. – (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of

the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(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. **HISTORY:** 1983, c. 701, s. 1.

i. Two letters by mother's counselor or in a child support hearing were properly admitted and not excluded as inadmissible hearsay where they were offered to corroborate mother's testimony that she believed she had diabetes and could not work. The letters from her physician setting forth her diabetes mellitus condition was not hearsay where it was not offered for the truth of the matter asserted. Leak v. Leak, 129 N.C. App. 142, 497 S.E.2d 702 (1998).

ii. Where there was nothing in the record to show that the veterinarians were unavailable to testify at trial, the trial court properly excluded the veterinarian's reports proffered by wife regarding alleged bestiality. Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760 (2002). Additionally the reports did not meet an 803(3) exception because wife's state of mind was not reflected in the veterinarian's reports. 803(3) only permits the introduction of statements of the declarant's then – existing state of mind. She was offering the reports to prove their contents and, as such, was required to produce an original pursuant to Rule 1002. She failed to do so and the reports were properly excluded. Id. at 765.

e. Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules. **HISTORY:** 1983, c. 701, s. 1.

i. No family law cases for this Rule.

f. Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination. **HISTORY:** 1983, c. 701, s. 1.

IX. AUTHENTICATION

a. Rule 901. Requirement of authentication or identification.

(a) *General provision.* – The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) *Illustrations.* – By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness with Knowledge. – Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. – Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Trier or Expert Witness. – Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. – Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice Identification. – Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. – Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. – Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient Documents or Data Compilations. – Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or System. – Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods Provided by Statute. – Any method of authentication or identification provided by statute. **HISTORY:** 1983, c. 701, s. 1.

i. The trial court did not err by excluding veterinary reports offered by the wife at trial to support her claims of husband's alleged bestiality based upon improper authentication because Rule 901(b) provides that witnesses with knowledge of

a matter may testify that a matter is what it is claimed to be and there was no evidence that either veterinarian who made notes in the reports was unavailable was a witness as defined in Rule 804(a)(2). Here, husband raised an issue of the authenticity of the reports and wife failed to then authenticate them. Additionally, the court reviewed the reports and found that there was no evidence in the reports that would substantiate that anyone had tampered with the dog. Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760 (2002).

SCRIPT:
Lawyer: Do you recognize the handwriting?
Do you recognize the voices on this tape?
Look at the specific subsection and make sure you hit every element in the Rule.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(11) Domestic Public Documents Under Seal. – A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory or insular possession thereof, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(12) Domestic Public Documents Not Under Seal. – A document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(13) Foreign Public Documents. – A document purporting to be executed or attested in his official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(14) Certified Copies of Public Records. – A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this State.

(15) Official Publications. – Books, pamphlets, or other publications purporting to be issued by public authority.

(16) Newspapers and Periodicals. – Printed materials purporting to be newspapers or periodicals.

(17) Trade Inscriptions and the Like. – Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(18) Acknowledged Documents. – Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.

(19) Commercial Paper and Related Documents. – Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(20) Presumptions Created by Law. – Any signature, document, or other matter declared by any law of the United States or of this State to be presumptively or *prima facie* genuine or authentic. **HISTORY:** 1983, c. 701, s. 1.

ii. No family law cases for this Rule.

b. Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. **HISTORY:** 1983, c. 701, s. 1.

i. No family law cases for this Rule.

X. CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

a. Rule 1001. Definitions.

For the purposes of this Article, the following definitions are applicable:

(1) Writings and Recordings. – "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, Photostatting, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. – "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. – An "original" of a writing or recording is the writing or recording itself of any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

(4) Duplicate. – A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original. **HISTORY:** 1983, c. 701, s. 1.

ii. Intervenors asserted the trial court improperly overruled an objection and permitted defendant to introduce a compilation of videotapes showing his interactions with the child. Intervenors asserted the compilation is a "duplicate" and admissible only pursuant to N.C. Gen. Stat. § 8C-1, Rule 1003 (2001). Intervenors' characterization of the videotapes as duplicates was misguided. "A 'duplicate' is a counterpart produced by. . . techniques which accurately reproduce the original." N.C. Gen. Stat. § 8C-1, Rule 1001(4) (2001). In this case, the videotape was a compilation of excerpts from videotapes of various family events. As such, the trial court properly characterized the videotapes as summaries whose admissibility is governed by N.C. Gen. Stat. § 8C-1, Rule 1006 (2001). In explaining this rule, our Court has noted: "summaries are admissible if they are an accurate summarization of the underlying materials involved. They were offered as "demonstrative aides and [to] corroborate testimony about [the paternal grandparents'] statements about the relationship between the child and the defendant. . . ." The tapes were not intended to corroborate any specific event. Accordingly, the editing in the instant case, focusing on the father-child relationship, was appropriate and did not raise concerns regarding the accuracy of the summary. Intervenors' assignment of error was overruled. Blum v. Rhodes, 2003 N.C. App. LEXIS 1263 (2003).

b. Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. **HISTORY:** 1983, c. 701, s. 1.

i. Where there was nothing in the record to show that the veterinarians were unavailable to testify at trial, the trial court properly excluded the veterinarian's reports proffered by wife regarding alleged bestiality. Kroh v. Kroh, 152 N.C. App. 3247, 567 S.E.2d 760 (2002). Additionally the reports did not meet an 803(3) exception because wife's state of mind was not reflected in the veterinarian's reports. 803(3) only permits the introduction of statements of the declarant's then – existing state of mind. She was offering the reports to prove their contents and, as such, was required to produce an original pursuant to Rule 1002. She failed to do so and the reports were properly excluded. Id. at 765.

c. Rule 1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. **HISTORY:** 1983, c. 701, s. 1.

i. Defendant mother failed to argue that the admission of the photocopy of the daycare application was unfair under the circumstances; copy was inadmissible under Rules 1002 and 1003 only if there was a genuine question raised as to the authenticity of the original. At no time was the authenticity challenged and the exceptions to Rule 1003 did not apply, therefore admitting the same was not error. Kilian v. Kilian, 2006 N.C. App. LEXIS 16 (January 3, 2006).

d. Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals Lost or Destroyed. – All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. – No original can be obtained by any available judicial process or procedure; or

(3) Original in Possession of Opponent. – At a time when an original was under the control of a party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be subject of proof at the hearing, and he does not produce the original at the hearing; or

(4) Collateral Matters. – The writing, recording, or photograph is not closely related to a controlling issue. **HISTORY:** 1983, c. 701, s. 1.

i. No family law cases found for this Rule.

e. Rule 1005. Public records.

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given. **HISTORY:** 1983, c. 701, s. 1.

f. Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by the other parties at a reasonable time and place. The court may order that they be produced in court. **HISTORY:** 1983, c. 701, s. 1.

i. A compilation of excerpts from videotapes of various family events is governed by Rule 1006. As the compilation is a summary of videos meant to be a demonstrative aide in a custody case to corroborate the testimony from paternal grandparents regarding the relationship between the father and child, the video was appropriate where it was not intended to corroborate any specific event. Additionally the video in this case seems to have been edited to illustrate the relationship between the father and child and was therefore appropriate. Blum v. Rhodes, 2003 N.C. App. LEXIS 1263 (July 1, 2003).

SCRIPT:

Lawyer:

I'm showing you Defendant's exhibit 1. What is it.

Financial affidavit.

Did you provide the other side with your two years of bank statements in discovery?

Did you provide them your tax returns?

Did you provide them your last three paystubs?

Yes.

Lawyer: Did you prepare this affidavit, summarizing all of your expenses in support of your needs and income in preparing for this alimony hearing?

Yes.

Does this affidavit accurately summarize the individual expenditures set forth in your bank statements?

Yes.

I move to admit Defendant's 1.

g. Rule 1007. Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by his written admission, without accounting for the nonproduction of the original. **HISTORY:** 1983, C. 701, S. 1.

i. No family law cases found for this Rule.

h. Rule 1008. Functions of court and jury.

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact. **HISTORY:** 1983, c. 701, s. 1.

XI. MISCELLANEOUS RULES

XII. **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 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.

(4) Contempt Proceedings. – Contempt proceedings in which the court is authorized by law to act summarily. **HISTORY:** 1983, c. 701, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 14; 1985, c. 509, s. 2.

XIII. §8-44.1. Hospital and medical records

Copies or originals of hospital medical records shall not be held inadmissible in any court action or proceeding on the grounds that they lack certification, identification, or authentication, and shall be received as evidence if otherwise admissible, in any court or quasi-judicial proceeding, if they have been tendered to the presiding judge or designee by the custodian of the records, in accordance with G.S. 1A-1, Rule 45(c), or if they are certified, identified, and authenticated by the live testimony of the custodian of such records. Hospital medical records are defined for purposes of this section and G.S. 1A-1, Rule 45(c) as records made in connection with the diagnosis, care and treatment of any patient or the charges for such services except that records covered by G.S. 122-8.1, G.S. 90-109.1 and federal statutory or regulatory provisions regarding alcohol and drug abuse, are subject to the requirements of said statutes. (1973, c. 1332, s. 1; 1983, c. 665, s. 2.)

A hospital record is a business record and is admissible upon the laying of a proper foundation. The proper foundation consists of testimony from a hospital librarian or records custodian or other qualified witnesses to the identity and authenticity of the documents and the manner of its preparation. Additionally, it must be shown to the court that the entries

were made at or near the time of the event by persons having knowledge of the data set forth and made *ante litem motam.* In re Parker, 90 N.C. App. 423, 368 S.E.2d 879 (1988).