

**Examination, Cross-Examination, and Redirect Examination**  
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**I. Introduction: Duty to Exercise Control – Rule 611**

Rule 611 is the starting point for analyzing objections based on the form of the question and the scope of direct, cross, and redirect examination. The rule supplements, but does not override, statutes that establish procedure for the order and presentation of evidence.

Under Rule 611 a trial judge is required to “exercise reasonable control over the mode and order” of witness interrogation and evidence presentation. Like the overriding purpose of the rules of evidence, the purpose of the trial judge’s duty to exercise control is to further the interests of truth and justice in a fair and efficient proceeding.

Specifically, the rule provides that order and control shall be exercised for three purposes: **“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.”** The case law offers numerous examples of trial judge’s exercising appropriate control to accomplish these three purposes.<sup>1</sup>

The broad duty to exercise control requires the judge to decide numerous questions that arise during the course of a trial “which can be solved only by the judge’s common sense and fairness in view of the particular circumstances.” Advisory Committee Notes, Fed. R. Evid. 611 (containing contents identical to N.C.R. Evid. 611). The manner by which the trial judges exercises control over the presentation of evidence rests primarily within the judge’s discretion. These decisions will not be “disturbed absent a manifest abuse of discretion.” *State v. Harris*, 315 N.C. 556, 562 (1986).

Thus, a judge, exercising sound discretion, may, among other things, control the order in which witnesses are called and depart from the regular order of proof to allow witnesses to be recalled and cases to be reopened. *See Huddleston v. United States*, 485 U.S. 681, 690 (1988)(“the trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial . . .”). But, a party has no right to these departures.

## **II. Specific Limitations on Witness Examination**

### **A. Direct Examination – Scope and Limitations**

Rule 611 requires the trial judge to exercise reasonable control over witness interrogation and evidence presentation. This broad duty covers issues related to the form of the question asked on direct. Courts have discretion to limit questions that call for a narrative, leading questions on direct examination, and cumulative evidence. The use of leading questions is discussed below.

### **B. Cross-Examination – Scope and Limitations**

Subsections (b) and (c) of Rule 611 specifically address two issues related to the presentation of evidence – the scope of cross-examination and the use of leading questions. Both subsections establish limits within which a trial judge should exercise discretion in maintaining control and order.

The scope of cross-examination is intentionally broad. Rule 611(b) allows cross-examination **“on any matter relevant to any issue in the case, including credibility.”** The North Carolina courts have consistently held that cross-examination may serve four purposes: to expand on the details offered on direct examination; to develop new or

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<sup>1</sup> *See, e.g., State v. Johnston*, 344 N.C. 596 (1996)(disallowing repetitive questions); *State v. Jaynes*, 342 N.C. 249 (1995)(limiting repetitious questions); *State v. Cook*, 280 N.C. 642 (1972)(prohibiting repetitious answer).

different facts relevant to the case; to impeach the witness; or to raise issues about a witness' credibility. Thus, when an objection is made that a question exceeds the permissible scope of cross-examination, the trial judge must overrule the objection if the question is "relevant to any issue in the case, including credibility."

Many decisions illustrate the broad scope of the cross-exam, but perhaps few better than the recent decision of *State v. Whaley*, 362 N.C. 156 (2008) in which the North Carolina Supreme Court reversed a conviction based upon limitations imposed on cross-examination of the victim. The defense sought to cross-examine the victim about her answers to a questionnaire completed during a visit to a counseling center. The defense argued that the evidence was relevant to the issue of the victim's credibility. The trial court excluded the evidence based on the absence of proof that the victim suffered from a mental defect and under Rule 403.

In reversing the decision, the Supreme Court emphasized the broad scope of cross-examination, the importance of the testimony on the key issue in the case, and the presence of contradictory evidence. Although there was no evidence that the witness suffered from a mental defect, the Supreme Court reasoned that the questions might produce answers that "bear upon credibility in other ways, such as to cast doubt upon the capacity of a witness to observe, recollect, and recount." *Id.* at 161 (quoting *State v. Williams*, 330 N.C. 711, 719 (1992)). "Excluding the cross-examination . . . had 'the effect of largely depriving defendant of [her] major defense.'" *Id.* (quoting *Williams*, at 721-22).

### C. Use of Leading Questions

Rule 611(c) addresses the use of leading questions. As Professor Broun notes a leading question is generally "one that suggests the answer." Broun, at §169. The prohibition on leading questions is based on fairness and the desire that the witness, not counsel, supply the answer to a question.

Rule 611 (c) provides that leading questions "**should not be used on the direct examination of a witness except as may be necessary to develop [the] testimony.**" Examples of situations in which leading questions are allowed to develop a witness' testimony include (1) questions that direct or redirect a witness' attention to a specific matter; (2) questions posed to a witness who demonstrates difficulty in understanding; (3) questions about sensitive or delicate matters; (4) questions that assist a witness in recollecting; (5) questions asked to contradict another witness' testimony; (6) questions regarding preliminary matters; and (7) questions about matters that are not in dispute.

Subsection (c) also provides that leading questions "**ordinarily . . . should be permitted on cross-examination.**" While this rule is consistent with the general trial practice principle that all questions on cross-examination should be leading, the rule preserves some discretion for the trial judge to limit leading questions in extraordinary situations consistent with the trial judge's general duty under Rule 611(a). The rule permits a trial judge to limit leading questions in extraordinary situations, but a trial judge

may not limit cross-examination. The North Carolina Supreme Court has recognized that the right to cross-examine is “absolute and not merely a privilege,” and that its denial is “prejudicial and fatal error.” See *State v. Short*, 322 N.C. 783, 791(1988)(quoting *Citizens Bank & Trust v. Reid Motor Co.*, 216 N.C. 432, 434 (1939)). In addition, the right to cross-examination is an essential element of a defendant’s constitutional right under the Sixth Amendment to the United States Constitution. *Crawford v. Washington*, 541 U.S. 36 (2004).

In addition to the general provision regarding the use of leading questions on cross-examination, Rule 611(c) allows the use of leading questions “[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.” Whether a witness is “hostile” or “identified with an adverse party” is a threshold matter for the trial judge to determine under Rule 104.

#### **D. Redirect and Recross Examination**

Redirect and recross examination are also subject to control by the trial judge. Redirect is for the purpose of clarifying the direct examination and addressing issues raised on cross-examination; counsel is not entitled to repeat matters or bring out new matters on redirect examination. The trial judge may allow exceptions to this limitation if the circumstances require. If the trial judge allows counsel to elicit new matters on redirect, recross should be allowed, but otherwise, the trial judge, in the exercise of reasonable discretion, may disallow a second cross-examination. See generally *State v. Cummings*, 352 N.C. 600 (2000); see also *United States v. Riggi*, 951 F.2d 1368, 1375 (3d Cir. 1991)(suggesting that denying recross if new matters are raised on redirect would violate Confrontation Clause).

Fairness may necessitate an opportunity for redirect or recross examination. As explained by the North Carolina Supreme Court more than a century ago:

A party cannot be allowed to impeach a witness on the cross-examination by calling out evidence culpatory of himself and there stop, leaving the opposing party without opportunity to have the witness explain his conduct, and thus place it in an unobjectionable light if he can. In such case the opposing party has the right to such explanation, even though it may affect adversely the party who cross examined. Upon the examination in chief, the evidence may not be competent, but the cross-examination may make it so.

*State v. Glenn*, 95 N.C. 677, 679 (1886).

### **E. Control Exercised Under Rule 611 vs. Limitation of Right to Cross-Exam**

The trial court's discretion to limit cross-examination must be exercised carefully. The Supreme Court of North Carolina consistently refers to the range of cross-examination as "very broad." *See, e.g., State v. Newman*, 308 N.C. 231, 254 (1983), but restrictions based on sound discretion will be upheld. In *State v. Cook*, 672 S.E.2d 25 (N.C. App. 2009), defendant challenged the trial court's decision to sustain objections to four lines of cross-examination questioning. The appellate court analyzed each line of questioning, considered its relevance and likely impact, searched the record for comparable testimony that was elicited, and ultimately concluded that defendant had not established prejudice from the rulings. The appellate court's in-depth analysis of each line of questioning that was forestalled emphasizes that trial judges should scrutinize rulings that restrict cross-examination.

Similarly, the trial judge must exercise control judiciously. In a recent unpublished decision, counsel's inept question led the trial judge to make a clarification unprompted by opposing counsel's objection. On appeal, counsel contended that the clarification amounted to an inappropriate expression of opinion about the evidence. The appellate court denied relief, but issue a caution to trial judges.

The trial judge also has the duty to supervise and control a defendant's trial, including the direct and cross-examination of witnesses, to ensure fair and impartial justice for both parties. With regard to the admission of evidence, a trial court has broad discretion and "this Court will not interfere with the exercise of his duty to control the conduct and course of a trial absent a showing of manifest abuse. . . . Perhaps it would have been a better practice for the judge to await an objection from the prosecutor, however, it is within his discretion to control the trial.

*State v. Arrington*, 2010 WL 697339 (N.C. App., Mar. 2, 2010).

The trial judge's duty to exercise control under Rule 611 is at a premium when a witness attempts to selectively answer questions, particularly when the witness testifies for the prosecution and then seeks to avoid cross-examination. In these situations, the witness' assertion of the Fifth Amendment privilege may conflict with defendant's rights under the Sixth Amendment to confront and cross-examine the witness.

To accommodate this conflict, North Carolina authorities require trial courts to follow a precise procedure when a witness asserts the privilege in a criminal trial. The trial judge must determine whether the witness invoked the privilege in response to questions pertaining to collateral matters or to questions relating to the details of the direct examination. This sometimes difficult question requires the judge to determine

“whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness’ direct testimony.” *State v. Ray*, 336 N.C. 463, 471 (1994)(internal citations and quotations omitted). The witness may not be permitted to “disclose part of the facts and withhold the rest.” *Perry v. State*, 210 N.C. 796, 798 (1936). If the privilege is invoked regarding questions that relate to the direct testimony, the trial judge must either require the witness to answer the questions or strike all or part of the testimony given on direct examination. *State v. Ray*, 336 N.C. 463 (1994).

### III. Specific Applications

#### A. Refreshing Recollection vs. Past Recollection Recorded

##### 1. Refreshing Recollection – A technique

Refreshing recollection, a technique for prompting a witness’ memory, varies substantially from past recollection recorded, an exception to the hearsay rule. Though completely different, the two are often confused; this is probably because when efforts to refresh fail, counsel will often seek to introduce the refreshing device through the past recollection recorded exception to the hearsay rule.

The practice of refreshing recollection emerged at common law as a method for prompting a forgetful witness’ memory. The foundation required for refreshing recollection is simply that the witness has a lapse in memory that might be revived by consulting some writing or object. If a witness is questioned about a matter that the witness is unable to recall, the practice allows counsel to show the witness a writing or object that might stimulate the memory. The witness is allowed to review the writing or object in order to refresh memory. The object or writing is then taken from the witness and the witness is again asked the question. If the witness’ memory has been refreshed, the witness’ testimony, not the writing or object, is the evidence. The trial court, in its discretion, may allow the witness to reconsult the memory device, but when the witness’ testimony is “*clearly* a mere recitation of the refreshing memorandum,” it is not admissible. *See State v. Smith*, 291 N.C. 505, 518 (1977)(emphasis in original).

Counsel is generally allowed to use leading questions to lay the foundation for refreshing recollection. Thus, for example, counsel may ask, “If I showed you X, would it help to refresh your memory?” and “Having shown you X, is your memory now refreshed?” even though both questions are leading.

Rule 612(a) of the Rules of Evidence requires that an adverse party is entitled to have **“the writing or object [used to refresh memory] produced at the trial, hearing, or deposition in which the witness is testifying.”** If the writing or object is used to refresh the witness’ memory before the witness testifies and **“if the court in its discretion determines that the interests of justice so require, [then] 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.”** N.C.R. Evid. 612(b). The rule also provides that the court may order that the writing or object be “made available for inspection” if production is impracticable. *Id.*

Often, however, counsel will argue that parts of the writing or object are privileged or irrelevant and should be excluded from production. In this situation, the rule provides that 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.”** N.C.R. Evid. 612(c). Other portions **“shall be preserved and made available to the appellate court in the event of an appeal.”** *Id.*

Some courts have analyzed what factors should effect the trial judge’s exercise of discretion to require production under Rule 612. The relevant factors include the degree or extent of the witness’ reliance on the writing or object, the significance of the information recalled, the effect or burden on the adverse party, and the potential disruption that production might cause. *See generally* MCCORMICK ON EVIDENCE §9 (5<sup>th</sup> ed. 1999).

Once a writing or object is used to refresh, and produced for the adverse party, the adverse party may seek to admit the writing or object into evidence. Rule 612(c) sets out the procedure which the trial court must follow in admitting the writing or object. The rule provides that the adverse party is entitled **“to inspect it, cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony at trial.”** N.C.R. Evid. 612 (c). This provision creates a safeguard by allowing the factfinder to inspect the writing or object and evaluate the witness’ claim that it refreshed the witness’ memory.

Thus the portions of a writing or object used to refresh a witness’ memory which have been produced to the adverse party may be introduced into evidence by the adverse party. The writing or object may not be introduced by the party utilizing them to refresh unless they are independently admissible. This is consistent with the underlying theory that the writing or object used to refresh recollection is not evidence but a memory aid.

If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court is required to “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. N.C.R. Evid. 612(c).

## **2. Past Recollection Recorded – A Hearsay Exception**

In some situations, a witness’ memory is not revived by viewing a writing or object. Counsel must then offer independent evidence to prove the matter. Often, counsel will attempt to introduce the attempted memory device. If the memory device is a writing, counsel will likely need to establish that it is admissible as an exception to the

hearsay rule. When the memory device is a writing by the witness, counsel will frequently rely upon the past recollection recorded hearsay exception.

To admit the memory device as a past recollection recorded, however, counsel must lay a foundation that satisfies all of the elements of that exception. The elements are that the writing is a (1) “**memorandum or record**” (2) “**concerning a matter about which a witness once had knowledge but now has insufficient recollection to allow [the witness] to testify fully and accurately**” (3) “**shown to have been made or adopted by [the witness] when the matter was fresh in [the witness’] memory**” and (4) **shown “to have reflected that knowledge correctly.”** N.C.R. Evid. 803(5). Each of the foundational elements is a preliminary issue for the trial judge which must be established by the proponent of the evidence.

#### **B. Prior Inconsistent Statements to Impeach v. Prior Inconsistent Statements as Substantive Evidence**

The dual uses of prior inconsistent statements also present confusion. Following a witness’ testimony, the witness will often be cross-examined concerning previous statements that are contradictory or inconsistent with the witness’ in-court testimony. The only foundational requirements for impeachment by prior inconsistent statement are that the witness made the prior statement and that the statement may be seen as inconsistent with the present testimony.

This impeachment use of the prior statement does not depend upon the truthfulness of the statement’s content. Rather, it is actually the inconsistent content that makes the prior statement relevant. The prior statement is being used to demonstrate that, on another occasion, the witness made inconsistent statements about the subject matter. Thus, the prior statement is not offered to prove the truth of its content, but is offered for its impact on the witness credibility. Rule 612 provides that a witness may be asked about a prior written or oral statement without having the statement’s content first disclosed. However, on request, the prior statement must be disclosed to opposing counsel. N.C.R. Evid. 612.

The admissibility of the prior inconsistent statement depends on other factors. Because when offered to prove the truth of its content, the prior inconsistent statement is classic hearsay (an out of court statement offered in court to prove the truth of the matter asserted, N.C.R. Evid. 801(c)) the prior inconsistent statement is only admissible as substantive evidence if the proponent establishes that it fits within an exception to the hearsay rule.

If the prior inconsistent statement is used for impeachment only, the factfinder should be instructed as to its limited use. North Carolina Pattern Jury Instructions Crim. 105.20 provides a general instruction as to the use of a prior inconsistent statement as impeachment evidence:



When evidence has been received tending to show that at an earlier time a witness made a statement which may be consistent or may conflict with his testimony at this trial, you must not consider such earlier statement as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made, and that it is consistent or does conflict with the testimony of the witness at this trial, then you may consider this, together with all other facts and circumstances bearing upon the witness's truthfulness, in deciding whether you will believe or disbelieve the witness's testimony at this trial.

In addition to instructing the jury, the court must also be cautious in the actual use of the evidence. For example, the content of a prior inconsistent statement used to impeach may not be considered by the court in weighing the sufficiency of the evidence and may not be argued to the jury by counsel.

### **C. Rule of Completeness vs. Concept of Opening the Door**

As Justice Cardozo noted “[m]etaphors in the law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Berkey v. Third Ave. Railway Co.*, 244 N.Y. 58, 94 (1926). Such is surely the case with the often used, and more often confused, principle of “opening the door.” As a general rule, the principle refers to the argument that otherwise inadmissible evidence should be admitted because of the conduct of counsel or the introduction of other evidence.

Few courts have engaged in a disciplined discussion of the principle of opening the door. This has resulted in an ad hoc case-by-case application. Recently, however, the New Hampshire Supreme Court detailed the history and underpinnings of the doctrine. Originally, the process was referred to as “curative admissibility” Under that principle, a trial judge was allowed “to admit otherwise inadmissible evidence in order to rebut prejudicial evidence that has already been erroneously admitted.” The doctrine applied “only when inadmissible evidence has been allowed, when that evidence was prejudicial, and when the proffered testimony would counter that prejudice.” Thus, curative admissibility “is triggered by the erroneous prior admission of inadmissible evidence.” *State v. Morrill*, 154 N.H. 547 (2006).

Over time, the principle of opening the door expanded beyond that of curative admissibility to the broader principle of “specific contradiction.” Under the specific contradiction doctrine, when a party creates a “misleading advantage, . . . the opponent is then permitted to use previously suppressed or otherwise inadmissible evidence to directly counter the misleading advantage.” Gilligan & Imwinkelreid, *Bringing the “Opening the Door” Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 Santa Clara L. Rev. 807 (2001). Because the initial evidence may be viewed as having created a misimpression, the rule operates to disallow a party from selectively introducing evidence and then attempting to prohibit

the opponent from “placing the evidence in proper context.” Specific contradiction “is triggered by the introduction of misleading admissible evidence.” *State v. Morrill*, 154 N.H. 547 (2006).

Because the two doctrines – curative admissibility and specific contradiction – are invoked by different kinds of evidence, it is argued that judges should require parties to be specific when claiming reliance on the general principle of opening the door. Identifying which doctrine is being relied upon will inform the judge’s decision regarding the type of evidence that may be offered in response.

## 1. Rule of Completeness – Rule 106

The rules of evidence contain a principle that is related to the common-law principle of opening the door, but that applies only to written or recorded statements. Under Rule 106, the “rule of completeness” applies when evidence of writings, recorded statements, or parts of writings or recorded statements are introduced. The rule provides that **“when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require [the party] 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.”** N.C.R. Evid. 106. Thus, for example, if the state offers a defendant’s written statement into evidence, but chooses to only offer the inculpatory parts of the statement, the defendant may require that the exculpatory parts of the same statement be admitted at the same time. The rule does not require the introduction of additional portions of the statements that are neither explanatory nor relevant, nor does it authorize the introduction of unrelated statements, statements made at different times or to different persons, or independent statements offered by the defendant. *See, e.g., State v. Jackson*, 340 N.C. 301 (1995)(involving statement to a different person); *State v. Thompson*, 332 N.C. 204 (1992)(involving unrelated statements); *State v. Barnes*, 116 N.C. App. 311 (1994)(involving statement offered by defendant).

In *State v. Hall*, 194 N.C. App. 42 (2008), the state offered portions of letters written by defendant at trial. The offered portions were copied before mailing and no evidence indicated that other portions of the letters were available. The Court of Appeals upheld the introduction of the portions of the letters, rationalizing that “defendant asks us to adopt a *per se* rule of exclusion in situations where only portions of a written or recorded statement are available.” 194 N.C. App. at 51. The appellate court noted that the North Carolina Supreme Court has endorsed the admission of portions of a recorded statement when other portions are inaudible, *State v. Womble*, 343 N.C. 667, 688-89 (1996), and that this flexible interpretation of Rule 106 seems consistent with federal authority which has allowed introduction when the unavailable portions were not destroyed deliberately.

## 2. Concept of Opening the Door at Common Law

The common-law doctrine of opening the door is broader than the rule of completeness under Rule 106. It is not necessarily triggered by the introduction of

statements, written or otherwise; rather it is prompted by the other party's conduct, be that the introduction of evidence, the cross-examination of a witness, or the content of opening statements or closing argument. The North Carolina Supreme Court has offered this general explanation: "Opening the door refers to the principle that where one party introduces evidence of a particular fact, the opposing party is entitled to introduce evidence in explanation or rebuttal." *State v. Baymon*, 336 N.C. 748, 753 (1994)(quoting *State v. Sexton* 336 N.C. 321, 360 (1994)). Even if the evidence is otherwise inadmissible, it may be introduced to rebut or explain. *State v. Johnson*, 344 N.C. 596 (1996).

While the common-law standards for determining whether the conduct has in fact opened the door are not clearly stated in the legal decisions, the overriding principle is the same as that recognized in the rule of completeness. The trial judge must, in the exercise of sound discretion, determine whether fairness requires that the other evidence be allowed. See e.g., *State v. Bishop*, 346 N.C. 365 (1997)(holding that defendant's misleading testimony about prior conviction opened the door for state to cross-examine about details of prior conviction); *State v. Jeffries*, 333 N.C. 501 (1993)(holding that state's direct exam of officer related to arrest of accomplice opened door for defendant's cross-exam that charges had been dismissed); *State v. Mason*, 159 N.C.App. 691 (2003)(holding that defense cross-exam of officer about why other leads were not followed opened door for re-direct about other potential suspects and reasons they were not pursued).

For a list of case summaries in which the doctrine is used, see Robert L. Farb, "Opening the Door for Admission of Evidence" NORTH CAROLINA PROSECUTOR'S MANUAL (4<sup>th</sup> ed. 2007).

#### **D. Right to Present a Defense**

A common claim of defense counsel is that an evidentiary ruling prohibiting certain evidence deprives the defendant of a right to present a defense. The claim may be raised when the court sustains an objection which limits the defense evidence in chief or which restricts defense cross-examination. While the claim is ambiguous, it is not devoid of merit. The United States Supreme Court has recognized the constitutional right of a criminal defendant to present a defense, but has not tethered the right to any particular constitutional provision.

In *Holmes v. South Carolina*, 547 U.S. 319 (2006), a South Carolina rule that operated to exclude defendant's evidence of third-party guilt was found to violate the defendant's right to present a meaningful defense. The lower court prohibited evidence of third-party guilt, holding that "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence, the proffered evidence about a third party's alleged guilt may be excluded." The Supreme Court noted that although "state and federal rulemakers have broad constitutional latitude to establish rules of evidence in criminal trials," this latitude is limited by the guarantee that criminal defendants have "a meaningful opportunity to present a complete defense,' a right protected by both the

Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. This right is violated by rules of evidence that ‘infringe upon a weighty interest of the accused’ and are arbitrary or ‘disproportionate to the purposes they are designed to serve.’” 547 U.S. at 324, 326 (quoting numerous cases).

Rather than establishing an applicable standard for future cases, the Supreme Court reasoned by way of example, citing four cases in which the Court had previously overturned other rules of evidence found to be arbitrary, and therefore, unconstitutional. The four cases were *Washington v. Texas*, 388 U.S. 14 (1967)(overturning Texas statute that prohibited coparticipant from testifying for defendant at trial); *Chambers v. Mississippi*, 410 U.S. 284 (1973)(overturning Mississippi’s common-law voucher rule); *Crane v. Kentucky*, 476 U.S. 683 (1986)(overturning Kentucky rule that prohibited defendant from introducing evidence of circumstances surrounding confession); and *Rock v. Arkansas*, 483 U.S. 44 (1987)(overturning Arkansas per se rule that excluded all hypnotically induced testimony). These cases are the starting point for analyzing claims that evidentiary rulings violate the right to present a defense.

#### **IV. Objections Based on Ethics Issues**

Objections are sometimes based on the principles found in the rules of professional conduct in addition to those set forth in the rules of evidence. While the professional conduct rules are “designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies,” and are not intended to create substantive liability or procedural advantage, N.C. Rev. R. P.C. 0.2 [21], the underlying ethical principles may constitute a valid basis for objection, or in egregious situations, for mistrial.

Rule 3.4(e) of the North Carolina Rules of Professional Conduct provides that:

[a] lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . . .

N.C. Rev. R. P.C. 3.4(e).

Some questions posed by counsel as well as statements made by counsel during opening statement and closing argument may be objectionable because they violate the principles of Rule 3.4(e). Examples include questions that ask for or refer to evidence that has been excluded or that is not admissible; statements that imply or assert personal knowledge; statements that refer to inadmissible evidence; statements that shift the burden of proof; or statements that comment on the defendant’s failure to testify. *See*

generally Judge John W. Smith, “Jury Arguments: Outline of the Law or Discretion in Quick-Sand” (<http://www.judges.unc.edu/200610conference/00610SmithOutline.pdf>)

Sometimes counsel’s statements violate both the ethics rules and applicable rules of evidence. In *State v. Allen*, 353 N.C. 504 (2001), the trial court allowed officers to testify to statements made by the victims under various hearsay exceptions. In closing argument, the prosecution told the jury that “you hear her words . . . because the Court let you hear it, because the Court found they were trustworthy and reliable.” The trial court’s decision overruling defendant’s objection was reversible error. In reversing the decision, the North Carolina Supreme Court focused on the trial judge’s obligation to prohibit counsel from revealing inappropriate information to the jury:

This portion of the argument was not part of the evidence presented to the jurors. Rather, it was a second-hand statement or revelation of the trial judge's legal determination or opinion on the evidence made during a hearing properly held outside the jury's presence. The jurors were not entitled to hear the trial judge's legal findings and conclusions regarding the admissibility of these hearsay statements.

Parties in a trial must take special care against expressing or revealing to the jury legal rulings which have been made by the trial court, as any such disclosures will have the potential for special influence with the jurors. . . .

The prosecutor's argument in the instant case spoke to and disclosed a legal opinion of the trial court on the admissibility and credibility of evidence, an opinion which was specifically outside the record. This argument may not be characterized as a reasonable “analysis of the evidence” or as argument for “any position or conclusion with respect to a matter in issue.” As this Court stated in *State v. Williamson*, it does not matter “in what way or manner” an opinion of the trial court is conveyed to the jury, “whether directly or indirectly.” The potential for prejudicial influence remains, even if the opinion is conveyed indirectly through a party's closing argument to the jury. Although the trial court in the instant case did not convey, through its own words, an improper opinion to the jury, it did allow the prosecutor to convey the court's opinion, with virtually the same effect.

353 N.C. 510-11.

Some of the limitations imposed by the rules of professional conduct are also imposed by North Carolina statute. North Carolina General Statute Section § 15A-1230 provides:

During a closing argument to the jury an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

The North Carolina Supreme Court has “repeatedly stressed that counsel may not ‘travel outside the record’ by arguing facts or matters not included in the evidence of record.” *State v. Allen*, 353 N.C. 504 (N.C. 2001)(citations omitted).