

Rules of Evidence

By

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**How do the North Carolina
Rules of Evidence differ
from the Federal Rules of
Evidence?**

Rulings on Evidence (Rule 103)

State court rules require a specific objection to the evidence, if the objection is not apparent from the context. The federal rules do not require this.

Judicial Notice (Rule 201(e))

In state court, only the trial court can take judicial notice of matters, where in federal court, any court may take judicial notice.

Presumptions in Civil Actions and Proceedings (Rule 301)

- The state court rule contains an extra three sentences that seek to clarify the rule. They are:
 - 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.
- N.C.R. Evid. 301.

Relevancy and Its Limits (Rule 404)

Character Evidence (Rule 404(a)(1))

Federal prosecutors can introduce similar character evidence of an accused on direct, where the accused has offered evidence of the character trait of the victim.

Other Bad Acts Introduced to Show Conformity Therewith (Rule 404(b))

State Court Rule:

- Evidence can be used to show entrapment
- No notice of intent to admit such evidence for other purposes is required

Federal Court Rule:

- Entrapment is not listed as an exception
- The prosecution is required to give notice of an intent to admit

Methods of Proving Character (Rule 405(a))

The state rule explicitly prohibits the use of expert testimony on character to show circumstantial evidence of behavior.

Offer to Pay Medical Expenses (Rule 409)

State Rule Prohibitions:

- Medical Expenses
- Hospital Expenses
- Other Expenses

Federal Rules Prohibitions:

- Medical Expenses
- Hospital Expenses
- Similar Expenses

Plea Issues (Rule 410)

State Court:

- Inadmissible against or on behalf of defendant
- Additionally prohibits admission of statements made in proceedings under Article 58 of Chapter 15A

Federal Court:

- Inadmissible against the defendant
- Allows admission of plea statements in perjury trials

Rape Shield Provisions (Rules 412 et seq.)

The federal and state rules' frameworks differ substantially. Additionally, the federal rule contains three rules addressing sexual assault cases, child molestation cases, and civil cases involving sexual assault and child molestation.

Privileges (Rule 501)

State Rule:

- Privileges are codified

Federal Rule:

- Common law recognizes privileges
- BUT where state law is applied in federal court, state privileges will apply

Witnesses (Rule 601)

State Rule

- Disqualifies as a witness persons who:
 - Cannot be understood
 - Are incapable of understanding the duty to tell the truth
- Codifies the Dead Man's Statute

Impeachment By Evidence of Conviction of a Crime (Rule 609)

State Rule:

- Admissible if felony, Class A1, Class 1, or Class 2 misdemeanor
- Inadmissible where there has been a pardon

Federal Rule:

- Admissible where punishable by more than one year or if involves dishonesty
- Inadmissible where there has been a pardon, annulment, certificate of rehabilitation

Religious Beliefs (Rule 610)

- Inadmissible to show credibility because of the religious beliefs
- State rule explicitly provides for admissibility to show interest or bias

Interrogation of Witnesses (Rule 611)

- State court permits a wide open cross
- Federal court limits cross to matters raised on direct or credibility issues, subject to the court's discretion

Refreshing the Witness's Recollection (Rule 612)

State Rule:

- Permits use of writings and objects
- Applies in trials, hearings or depositions
- Allows for inspection of the item, if production is impractical
- Permits in camera review where item is not directly related to subject matter of testimony and where privilege is claimed

Federal Rule:

- Permits use of writings
- Applies specifically in trials
- Permits in camera review where item is not directly related to subject matter of testimony

Prior Statements of Witnesses (Rule 613)

- Federal Rule contains subpart 613(b) which provides that where extrinsic evidence is used to prove the prior inconsistent statement:
 - the witness must be afforded the opportunity to explain or deny the statement; and
 - the opposing party must be afforded the opportunity to interrogate the witness

Calling and Interrogation of Witnesses (Rule 614)

State Court:

- No need to object to the calling of witness
- No need to object to the court's questions

Federal Court:

- Must object to the calling of a witness
- Must object to the court's questions

Sequestering of Witnesses (Rule 615)

State Court:

- Court has discretion to sequester at party's request
- In addition to the other listed persons who cannot be sequestered, a person whose presence the court determines is in the interests of justice cannot be sequestered

Federal Court:

- Court must sequester at party's request
- In addition to the other listed persons who cannot be sequestered, a person authorized by statute to be present cannot be sequestered.

Opinions

and Expert Testimony

Opinion Testimony By Lay Witnesses (Rule 701)

- Prohibited by rule except in listed circumstances
- Additionally, in federal court, opinion is excluded where based on scientific, technical or other specialized knowledge within the scope of Rule 702

Expert Testimony (Rule 702)

**State rule differs significantly
in its subsections related to
medical malpractice**

Federal rule qualifies that an expert can testify when:

- Testimony is based on sufficient facts and data
- Testimony is product of reliable principles or methods
- Witness has applied the principles to the facts

Bases of Expert Opinion (Rule 703)

- Federal rule includes provision related to inadmissible facts on which an expert relied
- Inadmissible UNLESS probative value in assisting the jury to weigh the expert's opinion substantially outweighs the prejudice

Expert Opinion on the Ultimate Issue (Rule 704)

Federal rule prohibits expert to testify that the defendant in a criminal trial had the mental state that constitutes an element of the crime

Disclosure of Underlying Facts Forming Expert Opinion (Rule 705)

State Rule:

- Opposing counsel must request disclosure of underlying underlying data supporting expert opinion
- Explicit statement that opinion need not be given in response to hypothetical

Federal Rule:

- Court may require disclosure of underlying data supporting expert opinion

Hearsay

Admissions of a Party Opponent (Rule 801(d))

- State rules provide exception to the hearsay rule for an admission of a party opponent
- Federal rules provide that an admission of a party opponent is not hearsay
- Also provides explanation of what constitutes an admission of a party opponent in agency situations.

Prior Statements by Witnesses

In federal court, prior statements of witnesses are not hearsay in any of the following instances:

- Witness testifies at trial and the statement was inconsistent with trial testimony
- Prior statement was made under oath
- Prior statement was consistent and offered to rebut a charge of recent fabrication
- Prior statement regarded identification

Exceptions to Hearsay Rule Where Declarant Availability is Immaterial (Rule 803)

Federal rule has an additional exception to the hearsay rule for judgments of a previous conviction

**Exceptions to the Hearsay
Rule Where Declarant is
Unavailable (Rule 804)**

Statements Made Under the Belief of Impending Death (Rule 804(b)(2))

- State court recognizes the exception in all proceedings
- Federal court recognizes in civil actions and in prosecutions of homicides

Statement Against Interest (Rule 804(b)(3))

- State court does not permit admissibility of statements regarding criminal liability in criminal cases without corroborating circumstances indicating trustworthiness
- Federal court does not permit admissibility of statements regarding criminal liability in criminal cases when offered to exculpate the accused, unless corroborating circumstances indicate trustworthiness

Federal Rule 804(b)(6)

Provides for admissibility of witness's statements where the opposing party engaged in wrongdoing that was intended to and did procure the unavailability of the witness

Catchall Exceptions to the Hearsay Rule

State Rule:

- Codified at 803(24) and 804(b)(5)
- Requires written notice of an intent to introduce evidence under these sections

Federal Rule:

- Codified at 807

Self Authenticating Items (Rule 902)

Federal rule additionally provides for the self authentication of certain specified domestic and foreign records of regularly conducted activity

Writings and Recordings (Rule 1001)

Sound is defined as a writing or recording
under state law

Thank you!

Real Evidence



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What is presentation of real evidence?

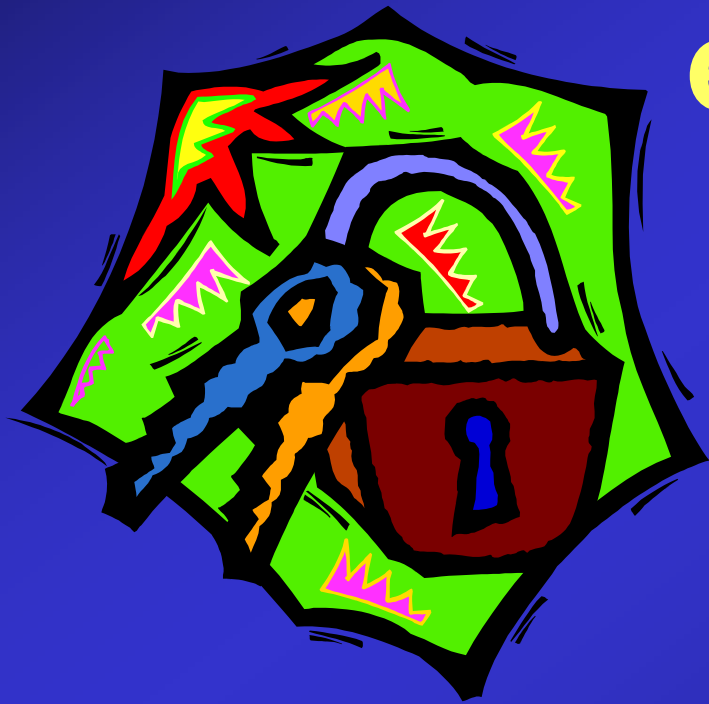
Production of the thing itself



General Care and Handling



**Secure the
evidence so that
it is not lost**



Where are you going to store it?

- The file
- Fireproof lock box
- Garage



Did you note where you stored it in the file?

- Did you take care to limit access to the evidence?
- Did you create a system to document who had access to the evidence?

Admissibility of Real Evidence

Readily admitted

Subject to relevancy, materiality,
and prejudice

Foundation Requirements

**Admissibility is within the
court's sound discretion**

Witness must:

- Identify the object as being the object in the incident
- Show that the object has not undergone a material change

Identifying the object

Usually sufficient that a witness testify that:

- the object is what it purports to be
- the object “looks like” the object in the incident
- the object “is similar to” the object in the incident

**Showing that the object has
not undergone material
change**

Especially where the object as been inspected and a later inspection reveals something different, testimony showing no change in condition is essential.

State v. Harbison, 293 N.C. 474, 238
S.E.2d 449 (1977)



Explaining the alteration

- State v. Fleming, 350 N.C. 109, 512 S.E.2d 720 (1998)



- State v. Handsome, 300 N.C. 313, 266 S.E.2d 670 (1980)





Chain of Custody

Needed where

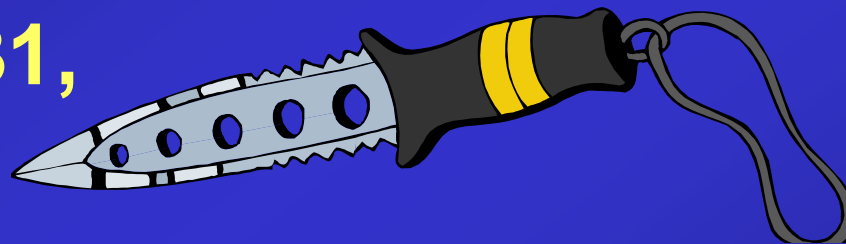
- Evidence is not readily identifiable and
- Reason to believe evidence has been altered

**Weak links in chain of
custody go to weight, not
admissibility of evidence**



**Timing issues do not always
defeat chain of custody**

State v. Bell, 311 N.C. 131,
316 S.E.2d 611 (1984)



State v. Barfield, 298 N.C.
306, 259 S.E.2d 510 (1979)

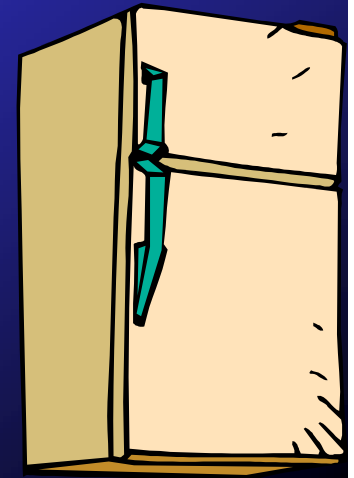


Handling Opposition

Tampering with the evidence



State v. Campbell, 311 N.C.
386, 317 S.E.2d 391 (1984)



**Special jury instructions
related to chain of custody
issues must be specifically
requested**

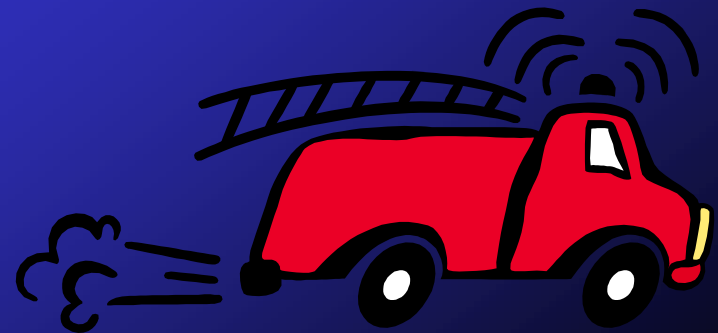
**Probative value of evidence
is substantially outweighed
by unfair prejudice**

No error to admit:

- Bloody clothing
- False teeth bearing scratch marks
- Victim's little finger

Jurors handling the evidence is okay

Constitutes a demonstration, not an
experiment



Thank you!

Demonstrative Evidence

Power Point Presentation

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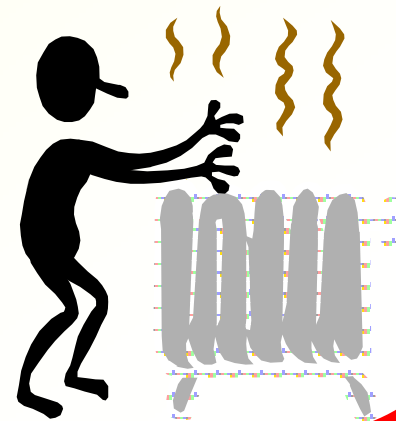
“Since “seeing is believing,” and demonstrative evidence appeals directly to the senses of the trier of fact, it is today universally felt that this kind of evidence possesses an immediacy and reality which endow it with particularly persuasive effect.”

2 McCormick On Evidence § 214

Real Evidence versus Demonstrative Evidence

**Real evidence is that which is
furnished by producing the thing
itself for inspection instead of having
it described by witnesses**

For example, a defective heater in a
products liability case



Demonstrative evidence helps to demonstrate a concept or a witness's testimony

For example, a drawing of a defective heater in a product's liability case

Types of Demonstrative Evidence

- X-rays
- Medical Illustrations
- Day in the Life Videos
- Before and After Photographs
- Maps
- Video Demonstrations

Practical Considerations

- Which exhibits have the greatest impact?
- How do you plan to use the exhibit? In examination?
In argument?
- How can an expert witness help prepare the exhibit?
- Does this case warrant the financial costs associated with creating the exhibit?
- Who is going to prepare the exhibit?
- How is the exhibit going to get into evidence?
- Does the exhibit convey the intended message?

Admissibility of Demonstrative Evidence

Rests in the trial court's discretion

Generally admissible where:

- Sufficiently explains or illustrates relevant testimony
- Supplements the witness's spoken testimony and clarifies case issues

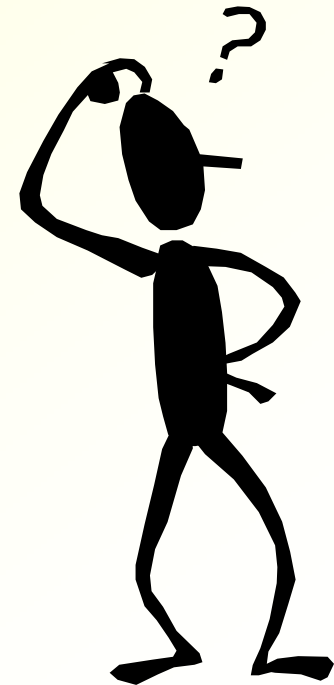
Must establish that evidence is:

- Relevant
- Authenticated
- And where appropriate, an adequate foundation was laid for admissibility



Generally inadmissible where:

- Confuses the jury
- Raises collateral issues
- More prejudicial than probative



**Will Daubert v. Merrell Dow
Pharmaceuticals, Inc., 509 U.S. 579 (1993)
apply to the admissibility of demonstrative
reenactment evidence used by my expert?**

Maybe

**Can I get the demonstrative
reenactment evidence in under Federal
Rule 703 which allows introduction into
evidence of inadmissible data if relied
upon by the expert?**

Maybe

Experts Use of Illustrative Demonstrative Evidence

Evidence is not required to possess a high degree of similarity with actual events

- Hinkle v. City of Clarksburg, 81 F.3d 416 (4th Cir. 1995)
- Gladhill v. General Motors Corp., 743 F.2d 1049 (4th Cir. 1984)
- Robinson v. Missouri Pacific Railroad Co., 16 F.3d 1083 (10th Cir. 1994)



What's the difference between reenactment and demonstrative evidence?

Experiments that are meant to recreate the incident constitute reenactment evidence while experiments that illustrate theories or scientific principles are illustrative

Narrated Videos

- Raise hearsay problems
- Hearsay is not overcome by making the narrator or film person available for cross
- Video can be played without sound to overcome the objection

Samples of a substance to demonstrate condition, quality, or nature allowed if the sample:

- Is properly identified as to source
- Is in substantially the same condition as it was at the time the sample's condition became material to the issues
- Is fairly representative of the whole, where offered to show the condition of the substance as a whole

Foundation Requirements

- Relevant and material
- It is what it purports to be
- In substantially the same condition as it was at time of incident

Charts, drawings, and photos

Require a witness to lay a foundation that it is a substantially true, accurate, and faithful representation

Films and videos

Require:

- a witness to lay a foundation that it depicts the events shown
- offering party to show that it is an accurate, faithful representation

Experiments and accident models

Require offering party to demonstrate that the experiment was conducted under conditions that were similar to those that existed at the time of the incident

Summaries of Voluminous Evidence (Rule 1006)

Permits admission of only summary into evidence if:

- Underlying documents are voluminous and not conveniently examinable in court
- Opposing party has had opportunity to examine the underlying documents
- The underlying documents would be admissible
- A witness familiar with information introduces the summary

Practical Considerations Regarding Questionable Exhibits

- Prepare different versions of the exhibit in anticipation of objections
- Move In Limine to address admissibility issues
- Preview the exhibits at the pretrial conference to flush out objections
- Use an expert to admit the exhibit
- Consider the use of a limiting instruction