The New North Carolina Rules of Evidence: Privileges, Relevancy, Competency, Impeachment, and Expert Opinion

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On July 7, 1983 the North Carolina General Assembly adopted the North Carolina Rules of Evidence and Official Commentary. The Code became effective July 1, 1984.[1] The major impetus for the adoption of an evidence code was the concern that North Carolina evidence law had become unwieldy.[2] Having developed over the years through a number of narrow statutes and conflicting judicial decisions, North Carolina evidence law was confusing and difficult to master.[3] The advantages of the Code will be its clarity and accessibility.[4]

Despite codification, the law of evidence in North Carolina will not be changed substantially.[5] Such changes would have defeated the utility of the Code by forcing trial judges and lawyers to relearn the law of evidence. Although there are important differences between the Code and previous North Carolina law, the transition should be manageable.

The drafters based the Code on the Federal Rules of Evidence[6] for two reasons. First, the federal rules are familiar to practitioners in North Carolina.[7] They consist of generally accepted rules that have been followed in North Carolina and other states,[8] and are typically the basis of instruction in

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1. STATE OF NORTH CAROLINA LEGISLATIVE RESEARCH COMMISSION EVIDENCE LAWS STUDY COMMITTEE REPORT TO 1983 GENERAL ASSEMBLY (Jan. 12, 1982) at v. [hereinafter cited as Committee Report]. The lapse between the adoption and effective dates was necessary to allow practitioners to become familiar with the rules. *Id.* at v-vi. The effectiveness of evidence rules depends on their familiarity, because attorneys and judges must make decisions in court within seconds. Blakey, *Moving Towards an Evidence Law of General Principles: Several Suggestions Concerning an Evidence Code for North Carolina*, 13 N.C. CENT. L.J. 1, 5 (1981).

2. Committee Report, *supra* note 1, at iii.

3. Patrick, *Toward a Codification of the Law of Evidence in North Carolina*, 16 WAKE FOREST L. REV. 669 (1980).

4. *Id.* at 670.

5. 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 2, at 2 n.6 (1982 & Supp. 1983).

6. Committee Report, *supra* note 1, at iv.

7. Blakey, *supra* note 1, at 4, 9.

8. *Id.* at 4. There have been cases in which the federal rule differed from the North Carolina rule, but the trial court applied the federal rule. For example, under FED. R. EVID. 405, on cross-examination of a character witness, inquiry is allowed into specific acts of the person whose character is in issue. Prior to the enactment of the new North Carolina Rules of Evidence, however, the North Carolina rule had been that such cross-examination into specific acts was not allowed. In State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978), a homicide case, the trial court had allowed the prosecuting attorney to cross-examine defendant's mother, a character witness, as to defendant's participation in two gang shootings. The North Carolina Supreme Court held that the trial court had erred by permitting such inquiry into prior acts of misconduct, but that the error had not prejudiced defendant. *Id.* at 573-74, 247 S.E.2d at 912-13.

In State v. Chapman, 294 N.C. 407, 241 S.E.2d 667 (1978), a prosecution for felonious assault, the court held that it was error to allow the prosecutor to ask defendant's character witness about an occasion when defendant "got his gun and went after some black people in Charlotte." *Id.* at

law school evidence classes.[9] Second, the Federal Rules of Evidence were used as a model because they have proved both thorough and manageable.[10]

The first major change under the new code is rule 301, *Presumptions in General in Civil Actions and Proceedings*.[11] Under prior North Carolina law, a presumption shifted the burden of persuasion in some cases,[12] and the burden of going forward with evidence in others.[13] Under new rule 301, unless a court decides otherwise, a presumption shifts the burden of going forward with evidence rather than shifting the burden of persuasion.[14] The new North Carolina rule differs from the majority rule, which shifts the burden of persuasion.[15] Shifting only the burden of production of evidence has been criticized because it "gives too little weight to the concerns that cause the initial creation of presumptions."[16] Those who support shifting only the burden of production, however, assert that presumptions are artificial rules to cope with difficult problems of proof, and that they should not compel one conclusion if evidence to the contrary exists.[17]

Rule 301 differs from the corresponding federal rule by recognizing judicially created presumptions.[18] The Official Commentary to the North Caro-

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416, 241 S.E.2d at 673. The error, however, was not prejudicial because defendant admitted his guilt at the trial. *Id.*

In State v. Hunt, 287 N.C. 360, 215 S.E.2d 40 (1975), a prosecution for rape, felonious assault, and armed robbery, it was held prejudicial error to permit the prosecuting attorney to ask defendant's character witness about defendant's prior convictions for crimes, including assault.

9. Blakey, *supra* note 1, at 9.

10. Committee Report, *supra* note 1, at v. (citing Mueller, *Symposium on the Federal Rules of Evidence*, 12 LAND & WATER L. REV. 585 (1977)).

11. For a discussion of presumptions in general and a specific proposal for a different presumption rule in North Carolina, see Broun, *The Unfulfillable Promise of One Rule for All Presumptions*, 62 N.C.L. REV. 697 (1984).

12. 2 H. BRANDIS, *supra* note 5, § 218 at 276-80. *See, e.g.*, *id.* § 246, at 256 (presumption that child born in wedlock is legitimate is "one of the strongest known to law" and "can be rebutted only by proof that the husband could not have been the father"). If a presumption shifts the burden of persuasion, rule 301 does not apply. N.C. R. EVID. 301 comment. The "burden of persuasion" means that if the party having the burden fails to persuade the trier of fact, the issue must be found against that party. C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 336 (E. Cleary 2d ed. 1972).

13. 2 H. BRANDIS, *supra* note 5, § 218. *See, e.g.*, Mitchell v. Republic Bank & Trust Co., 35 N.C. App. 101, 239 S.E.2d 867 (1978). A bank has the burden of going forward with evidence that there was no active loss when a customer shows that the bank paid a check despite a stop order. *Id.* at 104, 239 S.E.2d at 869. The "burden of going forward with evidence" means that the party having the burden must produce evidence "such that a reasonable man could draw from it the inference of the existence of the particular fact to be proved" or the trier of fact must find against him. C. MCCORMICK, *supra* note 12, § 338, at 789.

14. N.C. R. EVID. 301. McCormick defines "presumption" as "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts." C. MCCORMICK, *supra* note 12, § 342, at 803. Rule 301 states clearly that once the presumption is rebutted the issue goes to the jury and the jury may, but does not have to, infer the existence of the presumed fact.

15. 1 J. WEINSTEIN & M. BERGER, EVIDENCE at T-16 to -19 (1979); Patrick, *supra* note 3, at 681.

16. Patrick, *supra* note 3, at 681.

17. IX J. WIGMORE, WIGMORE ON EVIDENCE § 2491 (J. Chadbourn rev. ed. 1981).

18. The new North Carolina rule governs presumptions "not otherwise provided for by statute, by judicial decision, or by [the North Carolina Rules of Evidence]," N.C. R. EVID. 301, the federal rule covers presumptions "not otherwise provided for by Act of Congress or by [the Federal Rules of Evidence]." FED. R. EVID. 301.

lina Rules of Evidence states that "the General Assembly and the courts retain power to create presumptions having an effect different from that provided for in this rule";[19] however, "a presumption created by a prior statute or judicial decision should be construed to come within the scope of this rule unless it is clear that the presumption was not intended to be a 'mandatory presumption'[—a presumption that a court *must* follow a finding of a preliminary fact unless there is sufficient evidence that the presumed fact does not exist]."[20] The commentary has been criticized for favoring uniformity at the expense of the policies underlying previous judicial decisions.[21] This rule probably will have little impact, however, because courts have the discretion to adopt those rules existing before rule 301.[22]

Article Four deals with relevancy.[23] Rule 404, *Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes*,[24] is virtually the same as Federal Rule of Evidence 404.[25] The general rule that character evidence is not admissible as circumstantial evidence of conduct[26] is consistent with prior North Carolina practice.[27] There also remains an exception allowing the accused to offer evidence of his character and allowing the prosecution to rebut this evidence;[28] however, the type of evidence permitted under this exception has been changed by rule 404(a)(1).[29] Previously, North Carolina would allow evidence of the accused's general character to be admitted in evidence under this exception,[30] but rule 404(a)(1) limits the character evidence to "pertinent trait[s] of his character,"[31] or those character traits relevant to the conduct being investigated. The old North Carolina rule had originated in the ambiguous language of an earlier opinion, which subsequently was misinterpreted.[32] The old rule was construed to allow the witness to testify about rep-

19. N.C. R. EVID. 301 comment.

20. *Id.* Another limitation on the scope of the rule is that, "[i]f by statute or judicial decision a particular presumption shifts the burden of [persuasion], Rule 301 does not apply." *Id.*

21. 2 H. BRANDIS, *supra* note 5, § 215, at 173-74, nn.93-95 (Supp. 1983).

22. There is some benefit in uniformity. A uniform rule is easier to learn and apply. *See supra* note 1. Furthermore, the strongest policies that underly presumptions probably will be those shifting the burden of persuasion; for those presumptions, rule 301 will not apply. *See supra* note 20.

23. Relevancy, when used to describe evidence, means "render[ing] the desired inference *more probable than it would be without the evidence*." C. MCCORMICK, *supra* note 12, § 185, at 437.

24. N.C. R. EVID. Rule 404.

25. The North Carolina rule adds the word "entrapment" to the nonexclusion list of "crimes, wrongs, or acts" that may be admitted for a purpose other than to prove the conduct of a person. *Id.* 404(b).

26. *Id.* 404(a).

27. *Id.* 404 comment.

28. Patrick, *supra* note 3, at 684.

29. N.C. R. EVID. 404(a)(1).

30. *Id.* 404 comment.

31. *Id.* 404(a)(1).

32. 1 H. BRANDIS, *supra* note 5, § 114 (1982). In State v. Perkins, 66 N.C. 126 (1872), the court spoke in terms of "general character" but clearly meant "reputation" when it held that "a witness who swears to the general bad character of another witness on the other side, may, upon cross-examination, be asked to name the individual whom he heard speak disparagingly of the witness and what was said." *Id.* at 127. In a later decision, State v. Hairston, 121 N.C. 429, 28 S.E.

utation for specific traits of character, whether relevant to an issue in the case.[33] The new rule eliminates the danger that the prosecution will use the exception to introduce irrelevant evidence prejudicial to the defendant.[34]

Rule 405, *Methods of Proving Character*, which is very similar to federal rule 405, changes North Carolina law by allowing opinion evidence to prove character.[35] Previously, questions concerning character had to be stated in terms of "reputation."[36] Questions phrased with the terms "general character" or "reputation and character" also were permissible because it was understood that the question dealt with reputation.[37] The practical result of such leniency in the framing of questions, however, was the admission of opinion evidence, despite the prohibition against it.[38] Witnesses did not understand the distinction between reputation and personal opinion of character.[39] The old rule was also criticized for admitting "the second-hand, irresponsible product of multi-

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492 (1897), the court used the term "general character" but did not mean "reputation." The court held that, "[a] party introducing a witness as to character can only prove the general character of the person asked about. The witness, of his own motion, may say in what respect it is good or bad." *Id.* at 431, 28 S.E. at 494. Although the *Hairston* court did not cite *Perkins*, the contrast between uses of the term "general character" in these cases demonstrates that the exception evolved from allowing only evidence of reputation to allowing evidence of character.

33. 1 H. BRANDIS, *supra* note 5, § 114 (1982). In State v. Reagan, 185 N.C. 710, 117 S.E. 1 (1923), the witness was allowed to testify that defendant had a bad reputation for making liquor, although he was accused of larceny. Similarly, in State v. Fleming, 194 N.C. 42, 138 S.E. 342 (1927), an unlawful entry case, the witness was allowed to testify that defendant had a bad reputation for making liquor.

34. 1 H. BRANDIS, *supra* note 5, § 114, at 423 n.91 (1982).

> [The old rule] open[ed] the door to evidence of character traits which [were] irrelevant and prejudicial, and permit[ted] the prosecution, under the guise of impeaching the defendant as a witness, to prove traits having no relation to veracity but which [were] relevant on the issue of guilt, thus evading the rule (see § 104) prohibiting the State from attacking the defendant's character unless he first puts it in issue.

35. N.C. R. EVID. 405. The North Carolina rule is identical to FED. R. EVID. 405, except for North Carolina's explicit limitation on expert testimony: "Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." N.C. R. EVID. 405(a). Allowing opinion evidence to prove character opened the door for a new type of character evidence: expert testimony to prove character. 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 149 (1977 & Supp. 1978). The Official Commentary to the North Carolina rules explains that the rule's limitation "is not intended to exclude expert testimony of a personality or character change as it relates to the issue of damages," but only "to prohibit expert testimony as it relates to the likelihood of whether or not the defendant committed the act he is accused of." N.C. R. EVID. 405 comment. This limitation is based on the drafters' fear that in most cases such expert testimony would not be helpful and would waste time. *Id.*

36. N.C. R. EVID. 405 comment.

37. *Id.* (citing State v. King, 224 N.C. 329, 30 S.E.2d 230 (1944)). In *King* the court stated that "the test ordinarily applied here [is] that of general character, which with us means reputation." *King*, 224 N.C. at 331, 330 S.E.2d at 231. *See also* State v. Hicks, 200 N.C. 539, 540, 157 S.E. 851, 852 (1933) ("The rule is that when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify."); State v. Cathey, 170 N.C. 794, 796, 87 S.E. 532, 533 (1916) ("[A] character witness may be asked on cross-examination if there was not a general reputation as to particular matters.").

38. Blakey, *An Introduction to the Oklahoma Evidence Code: Relevancy, Competence, Privileges, Witnesses, Opinion, and Expert Witnesses*, 14 TULSA L. REV. 227, 265 (1978) (quoting 2 J. WEINSTEIN & M. BERGER, EVIDENCE § 405[02], at 405-20 (1978). "The average witness is unable to understand the admonition not to give his opinion, but that of others. He came to give his opinion and, despite some wrangling among attorneys and judges, that is what he usually manages to do.").

39. *See* 1 H. BRANDIS, *supra* note 5, § 110, at 403 n.13 (1982). In State v. Barbour, 295 N.C.

plied guesses and gossip which we term reputation,"[40] but excluding evidence based "on first hand knowledge and belief."[41] Underlying the old rule was the questionable assumption that a witness' bias could affect his opinion of the character of a person, but not his view of that person's reputation.[42] Rule 405 is an improvement over the old rule because, rather than allowing opinion evidence in disguise, it admits clearly labelled opinion evidence that the trier of fact can evaluate as such.

A further change in the rules of character testimony is that, contrary to prior North Carolina law[43] but consistent with the federal rule,[44] new North Carolina rule 405(a) permits inquiry on cross-examination into relevant specific acts of the person whose character is in question.[45] The rationale underlying this rule is that evidence of specific examples of conduct is necessary to evaluate the witness' testimony, which is based only on what he has heard.[46] The rule has been criticized because "[t]he probative value of such evidence to impeach a character witness seldom outweighs the prejudice suffered by the opponent."[47] Because the rule differs from prior case law,[48] however, North Carolina courts are likely to interpret it strictly to prevent abuse.

Article Six deals with witnesses.[49] Rule 601, *General Rule of Competency; Disqualification of Witness*,[50] revises the Dead Man's Statute that, in certain situations, disqualified persons interested in a transaction when the other party to the transaction subsequently had died or become insane.[51] Rule 601 nar-

66, 243 S.E.2d 380 (1978), the witness answered a question calling for "character" with her own opinion of the person's character when his reputation was in issue.

40. 1 J. WIGMORE, *supra* note 17, § 1986.

41. Patrick, *supra* note 3, at 685.

42. *Id.*

43. N.C. R. EVID. 405 comment.

44. FED. R. EVID. 405(a).

45. N.C. R. EVID. 405(a).

46. FED. R. EVID. 405 comment.

47. Patrick, *supra* note 3, at 686.

48. *See* 1 H. BRANDIS, *supra* note 5, § 115, at 425-26 (1982) & 122 (Supp. 1983). *See also id.* § 115, at 123 n.3.6 (Supp. 1983) ("Of course, it is inconceivable that the Rules intend that questions about specific conduct may be phrased in any way a master of insinuation may concoct.").

Further support for the federal rule is that it can be remembered more easily. Blakey, *supra* note 1, at 8. A rule cannot be effective unless it is sufficiently familiar to be followed. *See supra* note 1. A number of North Carolina trial judges and lawyers had demonstrated that they believed the federal rule already was the law in North Carolina. Blakey, *supra* note 1, at 7. *See also supra* note 8.

49. One notable but relatively minor change in North Carolina law occurs under article 6. Rule 607, *Who May Impeach*, identical to FED. R. EVID. 607, allows the credibility of a witness to be attacked by "any party, including the party calling him." N.C. R. EVID. 607. The common-law rule was that a party could not impeach his own witness. *Id.* 607 comment. The new rule should have little impact, because previous decisions and statutes almost had eliminated the common-law rule in North Carolina. Patrick, *supra* note 3, at 691-92. The Advisory Committee on the Federal Rules of Evidence explained that the common-law rule that a party vouches for the witnesses he calls was unrealistic: "A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them." FED. R. EVID. 607 comment (quoted in N.C. R. EVID. 607 comment).

50. N.C. R. EVID 601.

51. 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

rows the scope of excluded evidence under the Dead Man's Statute from "personal transactions or communications"[52] to "oral communications"[53] between the interested party and the deceased or insane person. The original Dead Man's Statute had been intended to prevent fraud against those unable to testify in their own behalf.[54] The concern that fraud might result was based on the assumption that a deceased or insane person would be unable to protect his own interests against a living adversary. This rationale is faulty, however, because the representatives of a decedent or a lunatic generally will have a sufficiently strong stake in the outcome to defend the incompetent's interests.[55] The Legislative Research Commission as well as several commentators had recommended the elimination of the Dead Man's Statute,[56] which "has fostered more injustice than it has prevented and has led to an unholy waste of the time and ingenuity of judges and counsel."[57] Dissatisfaction with the Dead Man's Statute has led to suggestions of better ways to protect the dead and the insane against fraud; one suggestion was the "creat[ion of] a hearsay exception for statements about the matter in dispute by the deceased or insane person."[58] The Dead Man's Statute was preserved in its newly restricted form,

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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 peron deriving is title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. Nothing in this section shall preclude testimony as to the identity of the operator of a motor vehicle in any case.

Id.

52. *Id.*

53. *Id.* 601(c)(1). The rule does not change any cases that have held the Dead Man's Statute inapplicable. *Id.* 601 comment.

54. McCanless v. Reynolds, 74 N.C. 301, 314 (1876) (neither parties nor assigness to deed executed by dead man competent as witness in dispute over rights under deed).

55. 1 H. BRANDIS, *supra* note 5, § 66, at 258-59 n.621 (1982):

[I]t seems that much of the argument in defense of the statute is based on a tendency to identify the deceased with his living representatives, and a resultant feeling that in some manner the controversy is between the dead man whose mouth is closed and his living adversary whose mouth ought also to be closed as a matter of fair play and sportsmanship. If the contest is viewed realistically as one between living individuals who in most cases are pure donees of the deceased on the one hand, and other living individuals who, if their stories are true, have parted with value and are asking only the promised equivalent, one's sympathies are likely to veer in the other direction. Viewed in this light, it is hard to see any better reason for silencing witnesses in the cases covered by this statute than in any other case where a party's evidence has been lost by the death, disappearance or forgetfulness of essential witnesses.

56. *See* Blakey, *supra* note 1, at 17-18; Patrick, *supra* note 3, at 691; *see also Survey of Developments in North Carolina Law, 1982—Evidence*, 61 N.C.L. REV. 1126, 1141-43 (1983).

57. 1 H. BRANDIS, *supra* note 5, § 66, at 259 n.62 (1982).

58. Blakey, *supra* note 1, at 18 (citing *Proposals for Legislation in North Carolina*, 11 N.C.L. REV. 51, 63 (1932)). The proposed legislation was as follows:

No person shall be disqualified as a witness in any action, suit or proceeding by reason of his interest in the event of the same as a party or otherwise.

In actions, suits or proceedings by or against the representatives of deceased persons, or the committee of a lunatic, including proceedings for the probate of wills, no statement of the deceased, or lunatic, whether oral or written, shall be excluded as hear-

however, because "of a concern that fraud and hardship could result if an interested party could testify concerning an oral communication with the deceased or lunatic."[59] The Dead Man's Statute should have been abolished entirely, because the dangers it addresses are exaggerated and because the statute may make proof of honest claims impossible. Although the risk of perjury remains, the function of the judge and jury is to evaluate the credibility of the witness' testimony. The new North Carolina rule restricting the scope of the Dead Man's Statute is a step in the right direction.

Rule 608, *Evidence of Character and Conduct of Witness*,[60] is very similar to Federal Rule of Evidence 608. The only difference is that North Carolina rule 608(a),[61] to prevent expert testimony on the credibility of a witness,[62] includes a reference to rule 405(a).[63] Rule 608(a) allows a witness' credibility to be attacked by reputation or opinion of character for untruthfulness, and supported—only after attack—by reputation or opinion of character for truthfulness.[64] Before this rule was enacted, opinion evidence was not admissible to prove a witness' character in North Carolina. Opinion evidence, however, was inadvertently admitted because questions could be phrased in terms of "general character" or "reputation and character."[65] The new rule will make clear to the trier of fact whether testimony is based on opinion. Furthermore, under the old North Carolina rule, evidence of specific traits of character was admissible whether or not relevant to the credibility of the witness.[66] Rule 608(a)(1) wisely limits evidence to character for truthfulness or untruthfulness.

Rule 608(b) states the general rule, already adopted in North Carolina,[67] that evidence of specific instances of conduct is not admissible to support or attack a witness' credibility.[68] One exception created by this subsection, however, extends North Carolina law. On cross-examination, specific acts of a witness relevant to his character for truthfulness or untruthfulness[69] are ad-

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say provided that the trial judge shall find as a fact that the statement was made, and that it was made in good faithe and on the declarant's personal knowledge.

Proposals for Legislation in North Carolina, 11 N.C.L. REV. 51, 63 (1932).

59. N.C. R. EVID. 601 comment.

60. *Id.* 608.

61. *Id.* 608(a).

62. *Id.* 608 comment. The concern that led to the express prohibition of expert testimony on the credibility of a witness was that such testimony usually would not be helpful and would waste time. *See supra* note 35.

63. N.C. R. EVID. 405(a).

64. *Id.* 608(a).

65. Witnesses did not understand the distinction between reputation and personal opinions of character. *See supra* notes 37-39 and accompanying text.

66. The rule in North Carolina had been that evidence of a specific trait of character was admissible only if asked on cross-examination, or if "volunteered" by the witness on direct examination in answer to a question whether the witness knew the subject's general reputation or reputation and character. N.C. R. EVID. 608 comment.

67. 1 H. BRANDIS, *supra* note 5, § 111 (1982).

68. N.C. R. EVID. 608(b).

69. The practice in North Carolina had been to allow inquiry into any "prior bad acts" of the principal witness. *See* State v. Purcell, 296 N.C. 728, 733, 252 S.E.2d 772, 775 (1979). Under the language of rule 608(b), this practice should be limited to questions concerning acts relevant to character for truthfulness or untruthfulness. N.C. R. EVID. 608(b). The danger exists, however,

missible at the discretion of the trial judge.[70] Previous North Carolina law had restricted this type of evidence to acts of the principal witness;[71] the new rule allows evidence of acts bearing on the credibility of any witness testifying about the credibility of the principal witness. The Advisory Committee recognized the possiblity of abuse of this rule and created safeguards to prevent such abuse.[72] Subdivision (b) makes clear that a witness does not waive his privilege against self-incrimination merely by testifying about matters of credibility.[73] This rule rejects earlier North Carolina decisions that allowed cross-examination concerning past criminal acts reflecting on a witness' credibility.[74]

Rule 609, *Impeachment by Evidence of Conviction of Crime*, deals with impeachment by evidence of criminal convictions.[75] Generally, under 609(a), evidence of a crime punishable by more than sixty day's confinement is admissible. Previously, North Carolina would allow inquiry into any criminal offense to attack the credibility of an witness.[76] In contrast, Federal Rule of Evidence 609 allows impeachment by evidence of conviction of a crime involving dishonesty or false statement, regardless of the punishment,[77] or evidence of conviction of any crime punishable by a sentence more severe than one year's imprisonment if the court finds that the probative value of the evidence outweighs its prejudicial effect.[78] Subsection (a) of the North Carolina rule requires no such balancing of the probative value and the potential prejudice of the evidence.[79] Thus, the new rule could be criticized for admitting evidence that may have no relation to the credibility of the witness. Rule 403, however, provides that any evidence may be excluded if the danger of prejudice outweighs its probative value. The new North Carolina rule has the advantage of being clear and simple to apply;[80] the federal rule has created ambiguity by its use of the term "dishonesty."[81]

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that in interpreting rule 608(b), North Carolina courts will read "acts concerning character for truthfulness or untruthfulness" so broadly as to continue much of the currect practice. This interpretation would be unfortunate and contrary to the spirit with which the rules were enacted.

70. N.C. R. EVID. 608(b).

71. 1 H. BRANDIS, *supra* note 5, § 111 (1982).

72. N.C. R. EVID. 608 comment. The safeguards mentioned are: that the instances of conduct must be probative of truthfulness; that the danger of prejudice or confusion must not outweigh the probative value; and that there must not be harassment or undue embarassment. With these safeguards, the rule can be useful because the credibility of every witness is important to consider.

73. N.C. R. EVID. 608(b).

74. *Id.* 608 comment. It is likely that this provision of the rule is constitutionally mandated. The accused's right to testify would be restricted severely if exercising this right would allow inquiry into all past criminal acts, in disregard of the privilege against self-incrimination. *Id.* (citing FED. R. EVID. 608 comment).

75. *Id.* 609.

76. 1 H. BRANDIS, *supra* note 5, § 112 (1982).

77. FED. R. EVID. 609(a)(2).

78. *Id.* 609(a)(1).

79. N.C. R. EVID. 609(a).

80. *See supra* note 1.

81. FED. R. EVID. 609(a)(2). The Conference Report to the federal rule explains that crimes involving dishonesty or false statement include: "crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature

Article Seven provides for opinion and expert testimony. Rule 703, *Bases of Opinion Testimony by Experts*,[82] identical to Federal Rule of Evidence 703, is consistent with the North Carolina Supreme Court decision in *State v. Wade*,[83] which allowed an expert to rely on data he observed outside of court. Rule 703 allows expert reliance on outside data that would not be admissible in evidence, if the data is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[84] Although the *Wade* court used the term "inherently reliable"[85] rather than "reasonably relied upon by experts,"[86] the Official Commentary says that the new rule does not change the holding in *Wade*.[87] Prior to *Wade*, North Carolina Supreme Court decisions concerning whether an expert witness could base his decision on such data were in conflict.[88] Rule 703 appears to adopt any clarification of North Carolina law contributed by the *Wade* opinion; however, use of the ambiguous phrase "reasonably relied upon by experts"[89] does not resolve the question of what can be the basis for the expert's opinion.[90]

Rule 704, *Opinion on Ultimate Issue*, allows an expert to give his opinion about the "ultimate issue to be decided by the trier of fact."[91] This rule is identical to Federal Rule of Evidence 704. The common-law rule precluded a

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of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." H. CONF. REP. No. 1597, 93d Cong., 2d Sess. 9, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098, 7103. The extent to which "dishonesty" extends the scope of convictions admitted into evidence has been a source of conflict under the federal rule. C. MCCORMICK, *supra* note 12, § 43, at 12 n.60.4 (Supp. 1978) (citing United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976) (conviction for attempted robbery excluded for not involving "dishonesty"); United States v. Carden, 529 F.2d 443 (5th Cir. 1976) (conviction for petty larceny admitted as involving "dishonesty")).

82. N.C. R. EVID. 703.

83. 296 N.C. 454, 251 S.E.2d 407 (1979). The court in *Wade* held that a "physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence." *Id.* at 462, 251 S.E.2d at 412.

84. N.C. R. EVID. 703.

85. *Wade*, 296 N.C. at 462, 251 S.E.2d at 412.

86. N.C. R. EVID. 703.

87. *Id.* comment.

88. *See* Blakey, *Examination of Expert Witnesses in North Carolina*, 61 N.C.L. REV. 1, 21 (1982); Note, State v. Wade—*Expert Testimony and the Dual Reliability Test*, 58 N.C.L. REV. 1161 (1980). Some pre-*Wade* cases admitted doctors' opinions derived from patients' out of court statements. *See, e.g.*, Penland v. Bird Coal Co., 246 N.C. 26, 97 S.E.2d 432 (1957) (doctor's testimony that plaintiff had been disabled was based on statements made outside of court by plaintiff that would have been inadmissible as hearsay); State v. Alexander, 179 N.C. 759, 103 S.E. 383 (1920) (psychiatrist's testimony that defendant was insane was based on conversations with defendant outside of court, which conversations would have been inadmissible as hearsay).

Another case excluded doctors' opinions based on statements made outside of court. Todd v. Watts, 269 N.C. 417, 152 S.E.2d 448 (1967) (doctors' opinions about plaintiff's injuries, based in part on conversations with plaintiff, excluded because not based on personal knowledge of accident and consequential injuries).

89. N.C. R. EVID. 703.

90. Blakey, *supra* note 88, at 26-32. Professor Blakey explores some of the questions remaining after the *Wade* decision on the subject of the proper bases for physicians' opinions. *Id.* at 29-32. One question, with respect to doctors, is whether information from persons who are not patients would be sufficiently reliable.

91. N.C. R. EVID. Rule 704.

witness from giving such an opinion.[92] North Carolina courts had abrogated the common-law rule to some extent by allowing expert opinion whenever "the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact."[93] The basis for the common-law rule was that the witness otherwise would be invading the province of the jury, or telling the jury how the case should be decided.[94] Problems arose in defining the province of the jury, however, because the jury must resolve a number of issues with the help of all available evidence before reaching its final decision. To preclude opinions on every issue to be considered by the jury would eliminate a great deal of relevant opinion evidence.[95] Furthermore, the common-law rule overlooked the more important concern whether the witness' opinion would help the trier of fact reach a conclusion.[96] Safeguards exist in rules 701[97] and 702[98] to exclude opinion evidence that would not be helpful to the trier of fact, and rule 403 excludes evidence if there is substantial danger of confusing the issues or wasting time.[99] Thus, an opinion that does no more than tell the jury how to resolve the ultimate issue would be excluded because the opinion would not help the jury and would waste time.[100]

An important rule that does not change North Carolina law is rule 705, *Disclosure of Facts or Data Underlying Expert Opinion*,[101] which preserves a recent statutory change. North Carolina General Statutes section 8-58.14, enacted in 1981, abolished the requirement of prior disclosure of facts underlying an expert's opinion; thereafter, hypothetical questions to avoid prior disclosure became unnecessary.[102] Rule 705, which replaces section 8-58.14,[103] however, does not permit an opinion based on inadequate data. Rule 705 and its predecessor were enacted in response to the confusion created by conflicting explanations of the basis for the expert's opinion.[104] Disclosure of underlying facts, however, will be required if requested by an adverse party.[105] In this respect, rule 705 differs from Federal Rule of Evidence 705

92. 1 H. BRANDIS, *supra* note 5, § 126 (1982).

93. State v. Wilkerson, 295 N.C. 559, 569, 247 S.E.2d 905, 911 (1975).

94. C. MCCORMICK, *supra* note 12, § 12. The fear was that the jury merely would adopt the expert's opinion without independent analysis of all the evidence. *Id.*

95. 1 H. BRANDIS, *supra* note 5, § 126 (1982) (witness could invade jury's province with factual, as well as opinion evidence, and jury is free to reject either.)

96. *See* Patrick, *supra* note 3, at 696. Professor Stansbury proposed an alternative rule: "Opinion is inadmissible whenever the witness can relate facts so that . . . the jury is as well qualified as the witness to draw inferences and conclusions from the facts." 1 D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE § 124 (Brandis rev. 3d ed. 1973). Professor Stansbury's concern is addressed adequately by rules 701 and 702, which limit opinion evidence to that which would be helpful to the trier of fact.

97. N.C. R. EVID. 701(b).

98. *Id.* 702.

99. *Id.* 403.

100. N.C. R. EVID. 704 comment (quoting FED. R. EVID. 704 comment).

101. *Id.* 705.

102. N.C. GEN. STAT. § 8-58.14 (1981).

103. N.C. R. EVID. 705 comment.

104. *See, e.g.*, C. MCCORMICK, *supra* note 12, § 17.

105. N.C. R. EVID. 705.

which gives the court, not the adverse party, the discretion to require such prior disclosure.[106]

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106. FED. R. EVID. 705.