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The New North Carolina Rules of Evidence: Hearsay, Authentication, and the Best Evidence Rule.

Article VIII of the North Carolina Evidence Code establishes six rules that govern the admissibility of hearsay. Rule 801 defines hearsay,¹ statement,² and declarant,³ and specifies that admissions of a party-opponent are an exception to the hearsay rule.⁴ Rule 802 provides that hearsay is inadmissible unless an exception is applicable.⁵ Rule 803 lists exceptions to the hearsay rule that apply regardless of the availability of the declarant.⁶ Rule 804 lists five hearsay exceptions that apply only if the declarant is unavailable.⁷ Rule 805 provides for the admissibility of hearsay within hearsay if an available exception applies to each part of the combined statements.⁸ Rule 806 permits the credibility of the declarant to be attacked or supported by any evidence that would be admissible had the declarant testified as a witness.⁹

Rule 801(a) defines the "statement" required for hearsay¹⁰ as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."¹¹ This definition is identical to the federal rule and excludes from the definition of hearsay all nonverbal conduct not intended as an assertion.¹² A literal reading of the rule leaves unclear whether verbal conduct

1. N.C. R. EVID. 801(c) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

2. *Id.* 801(a) ("A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."). For a discussion of the effect of the definition of 'statement' in North Carolina, see *infra* notes 10-30 and accompanying text.

3. N.C. R. EVID. 801(b) ("A 'declarant' is a person who makes a statement.").

4. A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he had manifested his adoption or belief in his truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of such party during the course and in furtherance of the conspiracy.

Id. 801(d). For a discussion of the exception for admissions by a party-opponent, see *infra* notes 45-53.

5. See N.C. R. EVID. Rule 802. This rule is in accord with North Carolina practice. See *id.* comment.

6. See N.C. R. EVID. 803. FED. R. EVID. 803 lists 24 exceptions to the hearsay rule. There are 24 exceptions listed under the North Carolina rule, but North Carolina did not adopt the exception in FED. R. EVID. 803(22) (judgment of previous conviction). This exception is reserved for future codification. N.C. R. EVID. 802(22). For a discussion of the various hearsay exceptions that apply under rule 803, see *infra* notes 54-81 and accompanying text.

7. See N.C. R. EVID. 804. For a discussion of the exceptions that apply under rule 804, see *infra* notes 82-104 and accompanying text.

8. See N.C. R. EVID. 805. This rule is consistent with current North Carolina practice. See *id.* comment (citing *State v. Connley*, 295 N.C. 327, 245 S.E.2d 663 (1978)).

9. See *id.* 806.

10. The definition of "hearsay" under rule 801(c) requires that "hearsay" be a "statement." See *supra* note 1.

11. N.C. R. EVID. 801(a).

12. *Id.* comment (quoting FED. R. EVID. 801 comment). See 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 142 (1982 & Supp. 1983).

not intended as an assertion is hearsay.¹³ It is likely, however, that courts will characterize nonassertive verbal conduct as nonhearsay and therefore admissible evidence.¹⁴ Prior to the adoption of rule 801(a), North Carolina decisions as to whether nonassertive conduct should be excluded as hearsay were inconsistent.¹⁵ Some cases designated as hearsay both verbal and nonverbal conduct not intended by the declarant to be an assertion.¹⁶ Thus, the conduct was not admissible evidence. Other courts, however, admitted similar evidence, either as nonhearsay or without recognizing its possible hearsay nature.¹⁷ The trend has been to classify nonassertive conduct as nonhearsay,¹⁸ a result that may have been influenced by the treatment of nonassertive conduct in the federal rules.¹⁹ The extent to which the definition of "statement" will change North Carolina law will depend on the courts' willingness to find that conduct was an intentional assertion,²⁰ and on their willingness to hold that evidence is irrelevant or excludable under principles of unfair prejudice, undue consumption of time, or confusion of issues.²¹

By excluding from the definition of hearsay all nonverbal conduct not intended as an assertion, the Study Committee recognized that the declarant's perception, memory, and narration of the conduct would be untested.²² The Committee, however, determined that in the absence of an intent to make an assertion, these hearsay dangers and the danger of insincerity would be minimal, and, therefore, the evidence should not be excluded on hearsay grounds.²³ A number of objections were raised to the adoption of this rule.²⁴

13. See 1 H. BRANDIS, *supra* note 12, § 142 n.56.3 (Supp. 1983). A literal reading of rule 801, sections (a) and (c), indicates that the phrase "if it is intended by him as an assertion" modifies "an oral or written assertion."

14. See N.C. R. EVID. 801 comment (quoting FED. R. EVID. 801 comment). "The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion." *Id.*

15. See 1 H. BRANDIS, *supra* note 12, § 142.

16. See *id.* § 142 at 565 nn.54-55 (1982).

17. See *id.* § 142 at 565-66 n.56.

18. *Id.* § 142, at 566 n.57 (citing *State v. Tilley*, 292 N.C. 132, 232 S.E.2d 433 (1977) (defendant's act in carrying pistol not intended as assertion and was admissible in defendant's trial for murder and conspiracy); *Long v. Asphalt Paving Co.*, 47 N.C. App. 564, 268 S.E.2d 1 (1980) (deceased's act of walking around subdivision during trip not intended as assertion and was admissible to show business nature of trip)).

19. See 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, 11-12 (1981). Professor Blakey states that, prior to the adoption of the federal rules in 1975, North Carolina did not recognize an exception to the hearsay rule for nonassertive conduct. *Id.* at 11.

20. See 1 H. BRANDIS *supra* note 12, § 142. "The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility." N.C. R. EVID. 801 comment.

21. N.C. R. EVID. 403. See 1 H. BRANDIS, *supra* note 12, § 142. See also Blakey, *supra* note 19, at 15-16. Professor Blakey argues that it is difficult for a court to weigh the probative value of hearsay, especially when the evidence is as weak as nonassertive conduct.

22. See N.C. R. EVID. 801 comment (quoting FED. R. EVID. 801 comment).

23. See *id.*

24. See, e.g., Blakey, *supra* note 19, at 10-21, 24-30. Professor Blakey argues that describing evidence that is admitted for a testimonial purpose as "not hearsay" complicates the definition of hearsay. He suggests that North Carolina reject any hearsay exception for nonassertive conduct used for a testimonial purpose and proposes the following definition of "statement": "The term

First, by classifying as nonhearsay all nonverbal conduct not intended as an assertion, such conduct becomes admissible without cross-examination of the declarant.²⁵ The Committee concluded that, because the declarant had not intended the conduct as an assertion, there would be little danger of dishonesty.²⁶ This rationale, however, ignores the fact that the declarants' knowledge of the truth will go untested; he may have an honest belief in something totally false. Second, the nature of nonassertive, nonverbal conduct is ambiguous. Thus, it is difficult to determine what the declarant believed to be true.²⁷ Since it also is difficult for a court to assess nonassertiveness, there is a danger that assertive conduct may be admitted improperly into evidence.²⁸ Third, weighing the probative value of the evidence is difficult when the evidence is vague, nonassertive conduct. The danger exists that courts will admit evidence with insufficient probative value to outweigh its prejudicial effect.²⁹ Finally, by classifying as nonhearsay evidence that actually is hearsay, the Committee overlooked the testimonial character of the evidence being admitted.³⁰ Although each of these objections was raised before the rule was adopted, the Committee determined that the probative value of the evidence outweighed the possible hearsay dangers.

'statement' includes both written or spoken words and nonverbal conduct by a person when such words or conduct make an assertion either directly or by implication." *Id.* at 21.

25. *Id.* at 25 ("[T]he effect of a hearsay exception for nonassertive conduct would be to admit evidence of conduct to prove belief in situations in which a direct statement by the same person of the same belief would be excluded as inadmissible hearsay.").

26. N.C. R. EVID. 801 comment (quoting FED. R. EVID. 801 comment).

27. See Blakey, *supra* note 19, at 26-28. Professor Blakey argues that the difficulties involved in reaching conclusions about the beliefs of the declarant from the nonassertive conduct have been overlooked because the discussions have centered upon a few, isolated theoretical examples, such as the crowd of "passers-by with their umbrellas up [offered to prove it was raining]." *Id.* at 26. He stated that Wright v. Tatham, 7 Adolph & E. 313, 317-20, 112 Eng. Rep. 488, 490-91 (Ex. 1837) (three letters written to testator offered to prove persons who wrote the letters considered testator competent) and People v. Clark, 6 Cal. App. 3d 658, 86 Cal. Rptr. 106 (1970) (wife of murder suspect fainted when suspect asked her to corroborate his statement to police officer that he did not own certain type coat) were more representative situations. The conduct in both of these cases could have more than one explanation. Blakey, *supra* note 19, at 27-28.

28. Blakey, *supra* note 19, at 15. Professor Blakey argues that the first two federal cases to apply the nonassertive conduct exception applied it to assertive conduct. See Muncie Aviation Corp. v. Party Doll Fleet, Inc., 519 F.2d 1178, 1181 n.6 (5th Cir. 1975) (FAA regulation requiring every pilot, before beginning a flight, to familiarize himself with all available information concerning that flight was deemed admissible to show FAA's belief that the procedures recommended were safer than other procedures); United States v. Snow, 517 F.2d 441 (9th Cir. 1975) (name tag affixed to case in which gun was found declared not hearsay and was admissible to show defendant knowingly possessed the unregistered weapon).

29. Blakey, *supra* note 19, at 15-16. Professor Blakey argues that State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977), cert. denied, 294 N.C. 184, 241 S.E.2d 519 (1978), was a case in which the evidence of nonassertive conduct should have been excluded on relevancy grounds. In Garner defendant appealed a finding that he was the father of an illegitimate child. To suggest that defendant's mother believed that defendant was the father of the child, the prosecution introduced evidence that defendant's mother gave the prosecution a check. *Id.* at 499, 238 S.E.2d at 654. Professor Blakey argues that the court should have excluded the evidence on relevancy grounds because the mother's opinion would not have been admissible if she had been a witness at the trial. Blakey, *supra* note 19, at 16. Professor Brandis also disagreed with the result and analysis in Garner. He stated that the court's conclusion that the mother's credibility was not at stake was "most doubtful." See 1 H. BRANDIS, *supra* note 12, § 142, at 566 n.56.

30. Blakey, *supra* note 19, at 11.

Rule 801(d), *Exception for Admissions by a Party-Opponent*,³¹ differs significantly from its federal rule counterpart.³² Federal rule 801(d)(1) excludes from the definition of hearsay, and allows as substantive evidence, three categories of prior statements made by a witness who is subject to cross-examination at trial.³³ The statements excluded are: (1) a prior inconsistent statement given "under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition";³⁴ (2) a prior consistent statement offered to rebut an express or implied charge of recent fabrication or improper influence; and (3) an identification of a person made after the witness perceived the person.³⁵ The North Carolina common law allowed the use of prior inconsistent statements, not as substantive evidence, but for purpose of impeachment of the witness.³⁶ North Carolina admitted, without prior impeachment of the witness, a wide range of corroborative statements to support a witness' credibility.³⁷ Thus, prior identification is admissible either to corroborate or to impeach a witness's identification in court.³⁸ Because the federal rule differed substantially from the North Carolina common law, the Study Committee did not incorporate federal rule 801(d)(1) in the North Carolina rule.³⁹ Although not expressed, one concern may have been the fear of a criminal conviction or

31. N.C. R. EVID. 801(d).

32. *Id.* comment.

33. FED. R. EVID. 801(d)(1). The argument against use of prior statements as substantive evidence is based upon the fact that "the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination." *Id.* 801 comment. In adopting the rule for prior statements, however, Congress took the view that the hearsay dangers of these statements are eliminated because the witness is available for cross-examination at the trial.

34. *Id.* 801 comment. There was some support expressed to Congress for this view because of the concern for witness intimidation in criminal cases. *See id.* Congress, however, decided to compromise and limit the admissible statements to those made under oath, including statements made before a grand jury. *Id.* The rationale for allowing these statements is that there is no dispute that the prior statement was made and there was an opportunity to cross-examine the witness at the formal proceeding. *Id.*

35. The basis for this rule is the uncertainty and unsatisfactory nature of courtroom identifications compared to identifications made earlier under less suggestive circumstances. *See id.*

36. *See* 1 H. BRANDIS, *supra* note 12, § 46.

37. The rule in North Carolina concerning corroborative statements was less restrictive than the rule in other jurisdictions, which admitted evidence to support a witness' credibility only when the witness had been impeached directly. *See id.* § 50. Although North Carolina courts often recognized the necessity of impeachment, the requirement was more theoretical than real. *Id.* This liberal practice in North Carolina had been subject to severe criticism, but unrestricted use of corroborative evidence continued. *Id.* § 52. Professor Brandis approved of the liberal rule for corroboration in North Carolina. *Id.* *See also* Patrick, *Toward a Codification of the Law of Evidence in North Carolina*, 16 WAKE FOREST L. REV. 669, 700-01 (1980).

38. *See, e.g.,* State v. Neville, 175 N.C. 731, 95 S.E. 55 (1918).

39. *See* N.C. R. EVID. 801 comment. In keeping with his theory that North Carolina should simplify the federal definition of hearsay, Professor Blakey argued that the North Carolina Rules of Evidence should not include FED R. EVID. 801(d)(1). He stated that the concept of hearsay would be misunderstood if hearsay statements were defined as nonhearsay. Blakey, *supra* note 19, at 20-21. Professor Blakey took the view that the federal rule classifications of prior consistent statements and statements of identification largely were meaningless. Blakey argued that testimonial use of a prior consistent statement is unimportant and testimonial use of a prior identification only becomes important if a witness repudiates a prior identification. In the event of repudiation, Professor Blakey stated that the arguments against testimonial use of the prior identification are even stronger because, under the federal rule, there is no requirement that the prior identification be under oath. *Id.* at 23.

civil judgment based solely upon an alleged prior statement by a witness.⁴⁰

Had the Committee adopted federal rule 801(d)(1)(B), the North Carolina corroboration rule would have been restricted to cases in which the opposing party charged the witness with recent fabrication or improper influence. Because the Committee did not adopt the rule, however, there will be no change in the North Carolina law on corroboration, except to the extent that rule 608(a) requires that a character witness' character for truthfulness be attacked before reputation or opinion evidence of his truthfulness can be admitted.⁴¹ Since North Carolina already admitted prior inconsistent statements and prior identification for impeachment purposes, the effect of North Carolina's failure to adopt the federal rule will be limited. Although a party opposing a statement is entitled to a jury instruction that the statement cannot be used substantively, it is doubtful that the instruction will have a significant effect.⁴² The limitation, however, will have a practical effect when the inconsistent statement or identification is required to satisfy a party's burden of proving an essential element of the case. If the court admits the inconsistent statement or identification solely for impeachment purposes, and there is no other evidence to support a party's claim or defense, the party offering the statement will fail to meet its burden of proof.⁴³ The Study Committee should have adopted a hearsay exception for prior inconsistent statements given under oath. The oath provides an assurance that the witness made the statement, and the formal proceeding and opportunity for cross-examination provide additional assurances of reliability.⁴⁴

Federal rule 801(d)(2) excludes from the definition of hearsay admissions by a party opponent statements offered against him if the statements are (A) the party's own statement, either in an individual or representative capacity; (B) a statement that the party adopted or manifested a belief in the truth of; (C) a statement by a person authorized to make a statement concerning the subject; (D) a statement by an agent or employee concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or (E) a statement by a co-conspirator made during the course of and in furtherance of the conspiracy.⁴⁵ The North Carolina rule also provides for admissibility of the evidence, but treats it as an exception to the hearsay rule.⁴⁶ The North Carolina rule 801(d)(2) exceptions for a statement made by a party-opponent and a statement adopted by a party are in accord with North Carolina practice.⁴⁷ North Carolina courts also admitted statements made by an agent authorized to speak for the principal,⁴⁸ but new rule 801(d)(2)(C) will

40. See Blakey, *supra* note 19, at 22.

41. See 1 H. BRANDIS, *supra* note 12, § 50.

42. See T. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 52 (1978).

43. *Id.*

44. See FED. R. EVID. 801 comment.

45. See *id.* 801(d)(2).

46. See N.C. R. EVID. 801 comment. See also Blakey, *supra* note 19, at 23.

47. 2 H. BRANDIS, *supra* note 12, § 167.

48. *Id.* § 169.

clarify North Carolina law by including statements made by an agent either to the principal or to a third party.⁴⁹ Rule 801(d)(2)(D) represents a welcome change from a much criticized North Carolina practice.⁵⁰ North Carolina traditionally excluded statements made by an agent or employee if the statements were narrative of a past event, even though the agency relationship continued. The courts reasoned that the principal had not authorized the agent or employee to subject the principal to liability.⁵¹ Rule 801(d)(2)(D) adopts a more logical approach, and makes admissible any statement related to a matter within the scope of the agency or employment as long as the agent made the statement during the existence of the relationship.⁵² Rule 801(d)(2)(E) limits the admissibility of statements made by co-conspirators to those made "during the course and in furtherance of the conspiracy." This accords with current North Carolina practice.⁵³

Rule 803, *Hearsay Exceptions, Availability of Declarant Immaterial*,⁵⁴ is almost identical to its federal counterpart.⁵⁵ The theory underlying the exceptions is that hearsay exceptions possess "circumstantial guarantees of trustworthiness" sufficient to dispense with the requirement that the declarant testify in person even though he is available.⁵⁶ The most important of these exceptions are for excited utterances, present sense impressions, then existing mental, emotional, or physical conditions, statements for purposes of medical diagnosis or treatment, recorded recollections, business records, and public records.⁵⁷ Although North Carolina common law and statutory law already provided for most of the exceptions contained in rule 803, the rule will change the law in North Carolina by expanding the scope of some of the hearsay exceptions and clarifying uncertain points that existed in the law.⁵⁸ The most significant dif-

49. N.C. R. EVID. 801 comment. See also 2 H. BRANDIS, *supra* note 12, § 169, at 17 n.53. There was some question whether statements by an employee to the principal or a fellow employee were admissible. See *Bixler Co. v. Britton*, 192 N.C. 199, 134 S.E. 488 (1926) (letter from general manager to salesperson); *Willis v. Atlantic & Danville R.R.*, 120 N.C. 508, 26 S.E. 784 (1897) (conversation between section master and conductor). Although the evidence was excluded in these cases, Professor Brandis took the view that, in both instances, the court believed there was no adequate proof of the declarant's authority to speak for the principal. 2 H. BRANDIS, *supra* note 12, § 167, at 17 n.53.

50. See *Pearce v. Southern Bell Tel. & Tel. Co.*, 299 N.C. 64, 69, 261 S.E.2d 176, 179 (1980) (Copeland, J., dissenting) (record showed implied authority to make the statement even though agent who made the statement was not present at time of plaintiff's injury); *Branch v. Dempsey*, 265 N.C. 733, 756, 145 S.E.2d 395, 411 (1965) (Sharp, J., dissenting) (authority to drive should include authority to make statements to officer). See also 2 H. BRANDIS, *supra* note 12, § 169.

51. [W]hat an agent or employee says, relative to an act presently being done by him within the scope of his agency or employment, is admissible as a part of the *res gestae*, and may be offered in evidence either for or against the principal or employer, but what the agent or employee says afterwards, and merely narrative of a past occurrence, though his agency or employment may continue as to other matters . . . is only hearsay and is not competent as against the principal or employer.

Hubbard v. Southern R.R., 203 N.C. 675, 678, 166 S.E. 802, 804 (1932).

52. N.C. R. EVID. 801(d)(2)(D). See also *id.* 801 comment.

53. *Id.* 801 comment (quoting FED. R. EVID. 801 comment).

54. *Id.* 803.

55. See *id.* comment.

56. *Id.*

57. *Id.* 803

58. See Patrick, *supra* note 37, at 702.

ference between the North Carolina rules and their federal counterparts is in rule 803(22). Federal rule 803(22) admits evidence of a final judgment, entered after or upon a plea of guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment.⁵⁹ Under the new North Carolina law, a party cannot use a judgment or finding of a court in another case unless the principle of *res judicata* applies to make the former judgment conclusive or unless a common-law or statutory exception is applicable.⁶⁰ The Study Committee suggested that this precedent be retained by not adopting the exception in federal rule 803(22).⁶¹

Exception (1) under rule 803 concerns present sense impressions; exception (2) concerns excited utterances. Although these exceptions overlap considerably, and the basis for each exception is that the spontaneity of a statement decreases the likelihood of fabrication,⁶² they differ in their approach to the time allowed between the event and the statement.⁶³ The exception for present sense impressions recognizes that a statement usually is not contemporaneous with an event and allows a slight time lapse between the event and the statement.⁶⁴ The time lapse allowed for excited utterances, however, is the duration of the state of excitement, which is determined by the nature of each event.⁶⁵ The North Carolina common law recognized an exception for excited utterances,⁶⁶ but did not recognize an exception for present sense impressions. Thus, rule 803(1) creates a new exception in North Carolina.⁶⁷ Under the spontaneous declaration exception, many courts admitted declarations made shortly after the event. Other courts, however, insisted that the statement be contemporaneous with the event, excluding narrative statements made after the event.⁶⁸ Rule 803(2) should harmonize the discordant case law regarding the permissible time lapse for the exception to apply.⁶⁹

Exception (3) of rule 803 concerns statements of the declarant's then existing mental, emotional, or physical condition. The rule excludes statements of memory or belief to prove the fact remembered or believed because the inclusion of these statements within the hearsay exception would virtually de-

59. FED. R. EVID. 803(22). The rule admits into evidence a former judgment, but excludes minor offenses. The Federal Advisory Committee realized that the rule might leave a jury with evidence of a conviction and no means to evaluate the evidence, but the Committee assumed that the jury would give the evidence substantial effect unless the defendant offered a satisfactory explanation. *See id.* 803 comment. The rule was drafted to avoid violation of constitutional issues, therefore, the exception does not include evidence of the conviction of a third party offered against the accused in a criminal prosecution. To admit the evidence would be to violate the defendant's right of confrontation. *Id.*

60. *See* 1 H. BRANDIS, *supra* note 12, § 143; *see also* Patrick, *supra* note 37, at 702.

61. N.C. R. EVID. 803(22) comment. Rule 803(22) was reserved for future codification.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* 2 H. BRANDIS, *supra* note 12, § 164.

67. N.C. R. EVID. 803(1) comment.

68. *See* 2 H. BRANDIS, *supra* note 12, § 164.

69. N.C. R. EVID. 803(2) comment.

stroy the hearsay rule.⁷⁰ Exception (3) is identical to its federal counterpart and is similar to an exception previously recognized in North Carolina.⁷¹ The North Carolina common law, however, did not admit declarations made by an accused after the commission of a crime. The courts believed that to admit those statements would allow the accused to fabricate evidence in his favor.⁷² Although the federal rules do not deal specifically with this issue, new rule 803(3) is sufficiently broad to include the statements, and the Official Commentary indicates that the rule makes them admissible.⁷³

Rule 803(24) is a catch-all exception that admits hearsay statements not covered specifically by any of the other exceptions if the statement has "equivalent guarantees of trustworthiness"⁷⁴ and the court makes certain determinations regarding the statement's evidentiary value.⁷⁵ Although at common law North Carolina did not provide a catch-all exception to the hearsay rule, the North Carolina courts often admitted hearsay evidence under the general principle of "res gestae."⁷⁶ Courts first used the principle to admit statements relating to a particular event and did not examine closely the hearsay aspects of the statements.⁷⁷ Courts eventually expanded the use of the principle to include nonverbal acts and circumstances that aided a jury in evaluating an event.⁷⁸ Unfortunately, when courts used the "res gestae" concept, they emphasized a requirement of concurrence in time of the hearsay evidence with the event, and excluded evidence that would have been admitted under independent exceptions.⁷⁹ Because of confusion that resulted from use of the "res gestae" concept, courts and commentators advocated not using the principle as a basis for a hearsay exception.⁸⁰ Under the new rules, the "res gestae" concept no longer creates an exception to the hearsay rule; however, evidence previously admitted under the "res gestae" formula probably will fall within the catch-all provision or within specific hearsay exceptions, such as excited utterances or then existing mental, emotional, or physical conditions.⁸¹

70. *Id.* 803(3).

71. *See* 2 H. BRANDIS, *supra* note 12, § 161.

72. *Id.*

73. *See* 2 H. BRANDIS, *supra* note 12, § 161, at 175 n.16.

74. N.C. R. EVID. 803(24).

75. The court must determine that: (A) the statement is offered as evidence of a material fact; (B) the statement is more probative than any other evidence that the proponent can procure through reasonable means; and (C) the general purposes of the rules and the interest of justice will be best served by admission of the statement into evidence. *Id.* The North Carolina rule differs from the federal rule in that the North Carolina rule requires that the proponent of the evidence give written notice of his intention to offer the evidence in advance of offering the statement. *Id.* comment. The federal rule requires only that the proponent of the evidence make known to the adverse party sufficiently in advance of the trial or hearing the intention to introduce the evidence.

76. 2 H. BRANDIS, *supra* note 12, § 158. "Res gestae" literally means "things done."

77. *Id.*

78. *Id.*

79. *Id.*

80. *See, e.g.,* United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (res gestae "has been accountable for so much confusion that it had best be denied any place whatever in legal terminology").

81. N.C. R. EVID. 803(24) comment.

Rule 804, *Hearsay Exceptions: Declarant Unavailable*,⁸² expands similar exceptions under the common law and expands the North Carolina definition of unavailability.⁸³ Under rule 804(a), a declarant is unavailable under the following circumstances: (1) a court exempts the declarant on the ground of privilege; (2) the declarant refuses to testify despite a court order requiring him to do so; (3) the declarant testifies to a lack of memory; (4) the declarant cannot be present due to death, physical or mental illness, or infirmity; and (5) the declarant is absent from the hearing, and the proponent of the statement cannot compel his attendance by process or other reasonable means.⁸⁴ Under the North Carolina common law, the grounds that satisfied the requirement for unavailability varied with the different exceptions.⁸⁵ With the adoption of rule 804, however, the grounds for unavailability now apply uniformly to all rule 804(b) exceptions.⁸⁶

Exception (1) to rule 804(b) admits testimony given by a witness either at another hearing of the same or a different proceeding, or in a deposition, if the party against whom the testimony is now offered⁸⁷ had the motive and opportunity to develop the testimony by direct, cross, or redirect examination.⁸⁸ This exception is similar to the common-law rule in North Carolina.⁸⁹ Exception (4), which admits statements concerning the declarant's personal or family history, or statements concerning the personal or family history of another closely related person,⁹⁰ also is similar to the North Carolina common law.⁹¹

Rule 804(b)(2) admits statements made by a declarant who believed his death was imminent, if the statement concerned the cause or circumstances of what he believed to be his impending death.⁹² The rule is in accord with the statutory law in North Carolina,⁹³ but differs from its federal counterpart, which admits the statements only in prosecutions for homicides and in a civil proceedings.⁹⁴ Since dying declarations are not inherently more reliable in

82. *Id.* 804.

83. See Patrick, *supra* note 37, at 702.

84. N.C. R. EVID. 804(a).

85. Under the hearsay exception for testimony at a formal trial, North Carolina recognized unavailability grounds (1), (4), and (5). See 1 H. BRANDIS, *supra* note 12, § 145. Grounds (2) and (3) were neither accepted nor rejected, but Professor Brandis stated that North Carolina courts should accept these grounds when the occasion arises. *Id.* In contrast to the federal rule for statements made under a belief in impending death now adopted in North Carolina, however, prior North Carolina law required that the declarant be dead. *Id.* § 146. Under the exception for statements against interest, any legitimate reason for unavailability was sufficient. *Id.* § 147, at 589 n.80. Under the exception for statements of family history, older cases in North Carolina held that the declarant must be dead. Professor Brandis, however, argued that any legitimate reason for unavailability was sufficient. *Id.* § 149.

86. See N.C. R. EVID. 804 comment (quoting FED. R. EVID. 804 comment).

87. Or, in a civil action or proceeding, testimony against a predecessor in interest may be admitted.

88. N.C. R. EVID. 804(b)(1).

89. See 1 H. BRANDIS, *supra* note 12, § 145; see also Patrick, *supra* note 37, at 703.

90. N.C. R. EVID. 804(b)(4).

91. See 1 H. BRANDIS, *supra* note 12, § 149; see also Patrick, *supra* note 37, at 703.

92. N.C. R. EVID. 804(b)(2).

93. See 1 H. BRANDIS, *supra* note 12, § 146.

94. See FED. R. EVID. 804(b)(2). See also N.C. R. EVID. 804 comment. The new North

homicide prosecutions and in civil actions than in other prosecutions, the Study Committee was justified in eliminating the restriction.⁹⁵

Exception (3) under both North Carolina and federal rule 804(b) admits into evidence a statement that at the time of its making was so much contrary to the declarant's pecuniary or proprietary interest that a reasonable man would not have made the statement unless he believed it to be true.⁹⁶ The new North Carolina rule differs from both the federal rule and older North Carolina common law. The last sentence of federal rule 804(b)(3) states that "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."⁹⁷ North Carolina exception (3) differs from the federal rules by imposing the requirement of corroborating circumstances on both exculpating and implicating statements.⁹⁸ Traditionally, North Carolina admitted statements made against the pecuniary or proprietary interest of the declarant, but excluded statements made against the penal interest of the declarant.⁹⁹ In 1978, however, the North Carolina Supreme Court abandoned the rigid common-law rule in *State v. Haywood*¹⁰⁰ and listed seven requirements that a declaration against penal interest must satisfy: (1) the declarant must be unavailable; (2) the declaration must be an admission that the declarant committed the crime for which the defendant is on trial, and the admission must be inconsistent with the defendant's guilt; (3) the declaration must have had the potential of jeopardizing the personal liberty of the declarant at the time it was made, and the declarant must have understood the damaging potential of the statement; (4) the declarant must have been in a position to have committed the crime to which the statement refers; (5) the declaration must have been voluntary; (6) there must have been no probable motive for the declarant to make a false statement; and (7) the facts and circumstances surrounding the declaration and the crime must corroborate the declaration and indicate the trustworthiness of the statement.¹⁰¹ Although the new rule does not restate the specific requirements listed in *Haywood*, most of them probably will still apply under new rule 804(b)(3).¹⁰²

The Official Commentary makes clear that the rule 804(b)(3) exception should not be construed to add any requirements beyond "corroborating cir-

Carolina rule 804(b)(2) is in accord with N.C. GEN. STAT. § 8-51.1 (1981). Some statements not admissible under the prior statute, however, are now admissible because North Carolina adopted the federal definition of a qualifying statement and the federal definition of unavailability. For the changes in the prior statutory law, see 1 H. BRANDIS, *supra* note 12, § 146.

95. See Patrick, *supra* note 37, at 702.

96. N.C. R. EVID. 804(b)(3).

97. FED. R. EVID. 804(b)(3).

98. Compare N.C. R. EVID. 804(b)(3) with FED. R. EVID. 804(b)(3) (last sentence). See N.C. R. EVID. 804 comment.

99. See 1 H. BRANDIS, *supra* note 12, § 147, at 590 n.86.

100. 295 N.C. 709, 249 S.E.2d 429 (1978).

101. See *State v. Haywood*, 295 N.C. 709, 730, 249 S.E.2d 429, 442 (1978); see also Patrick, *supra* note 37, at 704.

102. See 1 H. BRANDIS, *supra* note 12, § 147, at 164 n.79.4 (Supp. 1983).

cumstances clearly indicat[ing] the trustworthiness of the statement.”¹⁰³ The purpose of requiring corroboration is to eliminate fabrication,¹⁰⁴ and the rule should be interpreted accordingly.

Article IX, *Authentication and Identification*,¹⁰⁵ is similar to existing North Carolina law. Rule 901(a) states that “the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”¹⁰⁶ Under rule 901(a), the requirement of authentication or identification is a matter of relevancy and is governed by the procedure set forth in rule 104(b).¹⁰⁷ Rule 104(b) makes authenticity and identification questions for the jury once the judge makes a preliminary determination that the foundation evidence is sufficient to support a finding of fulfillment of the condition.¹⁰⁸ Rule 901(b) lists examples of evidence that conform to the requirement of the rule, including handwriting, distinctive characteristics, voice identification, telephone conversations, public records or reports, and ancient documents.¹⁰⁹ The methods of proving authenticity or identity of the examples set out in rule 901(b) are, with minor exceptions, in accord with North Carolina practice.¹¹⁰ Exception (3) provides for comparison of specimens, by the trier of fact or by expert witnesses, with specimens that have been authenticated.¹¹¹ Prior North Carolina statutory law permitted witnesses to make “a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine.”¹¹² Rule 901(b)(3), in conjunction with rule 104(b), makes this question one for the jury, subject to the sufficiency-of-evidence requirement of rule 901(a).¹¹³

Rule 902 lists ten categories of writings that do not require extrinsic evidence of authenticity as a condition precedent to admissibility. The rule applies to domestic public documents under seal and not under seal, foreign public documents, certified copies of public records, official publications, newspapers and periodicals, trade inscriptions, and other writings whose authenticity generally is assured.¹¹⁴ Most of the methods of self-authentication are in accord with North Carolina practice, but rule 902 increases the number of writings that are self authenticating. For example, rule 902(6) provides that newspapers and periodicals are self authenticating,¹¹⁵ and rule 902(7) provides

103. N.C. R. EVID. 804 comment.

104. *Id.* comment.

105. *Id.* 901-903.

106. *Id.* 901(a).

107. *Id.* 901 comment (quoting FED. R. EVID. 901 comment).

108. *Id.* 104(b) (“When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”).

109. *Id.* 901(b).

110. See Patrick, *supra* note 37, at 706.

111. N.C. R. EVID. 901(b)(3).

112. N.C. GEN. STAT. § 8-40 (1981).

113. N.C. R. EVID. 901 comment. See also Patrick, *supra* note 37, at 706.

114. N.C. R. EVID. 902.

115. *Id.* 902(6).

that commercial and mercantile labels and inscriptions are self authenticating.¹¹⁶

Article X, *Contents of Writings, Recordings, and Photographs*,¹¹⁷ with a few exceptions, merely restates or clarifies North Carolina law.¹¹⁸ Rule 1001 defines writings and recordings,¹¹⁹ photographs,¹²⁰ originals,¹²¹ and duplicates.¹²² Since no authority in North Carolina had defined the original of a recording or photograph, it was unclear whether the best evidence rule¹²³ applied to recordings and photographs.¹²⁴ Rule 1001(1), however, clarifies North Carolina law by providing that the best evidence rule applies to recordings and photographs.¹²⁵ Rule 1002 is the best evidence rule and requires a party, except as otherwise provided, to produce the original writing, recording, or photograph to prove the content of a writing, recording, or photograph.¹²⁶ An important exception to the requirement of rule 1002 is rule 1003, which admits a duplicate to the same extent as the original unless an opponent raises a genuine question concerning the authenticity of the original, or circumstances make it unfair to admit the duplicate in place of the original.¹²⁷ Rule 1003 departs from the law in North Carolina that allowed an opponent of the evidence to require the original.¹²⁸ There were, however, several statutory and common-law exceptions that admitted duplicates.¹²⁹ Rule 1003 eliminates both the need for the exceptions and the technical requirement that a party produce an original even though no question exists concerning the authenticity of the duplicate.¹³⁰

116. *Id.* 902(7).

117. *Id.* 1001-1008.

118. See Patrick, *supra* note 37, at 706.

119. N.C. R. EVID. 1001(1) ("Writings' and 'recordings' consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.").

120. *Id.* 1001(2) ("Photographs' include still photographs, x-ray films, video tapes, and motion pictures.").

121. *Id.* 1001(3) ("An 'original' of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An 'original' of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'").

122. *Id.* 1001(3) ("A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.").

123. The best evidence rule is codified at *id.* 1002.

124. See 2 H. BRANDIS, *supra* note 12, § 190, at 100 nn.8-9.

125. N.C. R. EVID. 1001 comment.

126. *Id.* 1002; see Patrick, *supra* note 37, at 707.

127. *Id.* 1003; see Patrick, *supra* note 37, at 707.

128. See 2 H. BRANDIS, *supra* note 12, § 190.

129. See, e.g., *State v. Schumaker*, 251 N.C. 678, 680-81, 111 S.E.2d 878, 879-90 (1960) (deposit slips in duplicate); *Standard Sand & Gravel Corp. v. McClay*, 191 N.C. 313, 316-17, 131 S.E. 754, 756 (1926) (carbon copies of freight waybills). See also N.C. GEN. STAT. § 8-45.1 (1981) (photographic copies of business and public records).

130. See Patrick, *supra* note 37, at 707. The commentary to rule 1003 states that courts "should be liberal in permitting questions of genuineness to be raised." N.C. R. EVID. 1003 com-

Rule 1004, which is consistent with North Carolina practice,¹³¹ describes four situations in which a party is not required to produce an original.¹³² Rules 1005 through 1007 describe additional circumstances in which the original is not required. These exceptions also are consistent with North Carolina practice.¹³³ Rule 1008 states that it is for the court to determine whether the required condition of fact has been fulfilled in accordance with rule 104, but it is for the trier of fact to determine questions of fact concerning the writing.¹³⁴ This rule also is consistent with North Carolina practice.¹³⁵

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ment. Professor Brandis asserted that the commentary is "attempting to narrow the considerable modification of the best evidence rule." 2 H. BRANDIS, *supra* note 12, § 190, at 103 nn.21-23.

131. See 2 H. BRANDIS, *supra* note 12, § 192.

132. The four situations are when: (1) all originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith; (2) the original is not obtainable by judicial process; (3) the original is in the possession of the opponent; and (4) the evidence is a collateral matter. N.C. R. EVID. 1004.

133. Rule 1005 admits copies of public records that are certified as correct in accordance with rule 902. Rule 1006 admits summaries of the contents of writings, recordings, or photographs that are too voluminous to examine in court. Rule 1007 admits the contents of writings, recordings, or photographs when the opponent admits that the copy is correct. *Id.* 1005-07

134. *Id.* 1008. The trier of fact determines: (1) whether the writing ever existed; (2) whether another writing, recording, or photograph at the trial is the original; and (3) whether other evidence of contents correctly reflects the contents. *Id.*

135. See 1 H. BRANDIS, *supra* note 12, § 8. North Carolina traditionally admitted photographic evidence that illustrated a witness' testimony, but only as illustrative evidence and not as substantive evidence. *Id.* § 34. One commentator asserts that an additional rule needs to be drafted to clarify the admissibility of substantive photographic evidence. See Patrick, *supra* note 37, at 709 n.194. The commentator states that a rule admitting photographic evidence substantively is needed to put this "illustrative evidence rule" to rest. *Id.* at 708-09.