SOUTH CAROLINA TRIAL EVIDENCE

A Reference Guide to
Common Evidentiary Issues

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Note on citations: The citation for each case is only from one reporter, and the citation does not contain a specific page number if there is a direct quote. Both of these omissions are for visual clarification and to allow for easier reading. The South Carolina Supreme Court may be referred to with a capitalized "Court" or "Supreme Court." The United States Supreme Court is referred to by its full name. The South Carolina Court of Appeals may be referred to as a capitalized "Court of Appeals" or the lower case "court."

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Why

South Carolina Supreme Court Justice John Few teaches and speaks about the Rules of Evidence quite often. Out of all of his teachings though, one of the most important comes down to a simple question:

> One of the most important questions a trial lawyer or judge can ask in thinking through a particular evidence problem is, 'Why is the evidence being offered?' There are two primary reasons for this. First, evidence struggles arise in the context of real problems faced by real people. So, to properly understand any evidence problem, lawyers and judges must understand the practical context in which the underlying problem arose. Focusing on the reason the party has for offering a particular piece of evidence draws us farther into this practical context. … Second, and most importantly, the purpose for which the evidence is offered relates directly to its admissibility. … But keep this very important principle in mind! The person offering the evidence does not get to choose what her purpose is. She gets to argue what her purpose is, but the other side gets to argue the point as well.[1]

This approach clarifies and narrows the potential evidentiary issues that are presented to a trial judge. By forcing the proponent of the evidence to explain the purpose of the evidence, the judge can figure out what rule or rules they should consider. Now, just because the proponent says what their purpose is, does not mean that is the true purpose, or the purpose that the jury will take. But it is a starting point.

[1] Few, John Cannon. "'Why?" Is a Critical Question in Evidence!" *Art of Evidence*, 12 Sept. 2018, artofevidence.com/2018/09/10/why-is-a-critical-question-in-evidence/.

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Summary: Remember that the standard with an SCRE 403 objection is that the probative value is substantially outweighed by its prejudicial effect. Even if the evidence is 50/50 probative and prejudicial, then it passes 403. Even if the evidence is slightly more prejudicial than probative, then it still passes 403. The prejudicial effect must substantially outweigh the probative value. Unfair prejudice will be fact and case specific:

> The critical inquiry in determining whether evidence is unfairly prejudicial is whether the evidence improperly appeals to the preferences of the trier of fact for reasons that are unrelated to the power of the evidence to establish a material fact. Unfair prejudice may arise from evidence that arouses the jury's hostility or sympathy for one side, confuses or misleads the trier of fact, or unduly distracts the jury from the main issues. Evidence is unfairly prejudicial if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case. Evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction.[2]

Also keep in mind who has the burden: the opponent of the evidence has the burden to prove that the prejudicial effect substantially outweighs its probative value.

- State v. Phillips, 430 S.C. 319 (2020) Under SCRE 403, even if evidence is relevant, it may be excluded if its relevance is substantially outweighed by its prejudicial effect. "Unfair prejudice is the tendency of the evidence to suggest a decision based on something other than the legitimate probative force of the evidence…We believe the danger of unfair prejudice is a separate analysis from the danger of confusion of the issues or misleading the jury."
- State v. King, 424 S.C. 188 (2018) "Rule 403, SCRE, is sometimes misstated. *See, e.g.*, *State v. Wallace* (incorrectly noting that for evidence to be admissible under a Rule 403 analysis, '[t]he probative value of evidence falling within one of the Rule 404(b) exceptions must substantially outweigh the danger of unfair prejudice to the defendant'). The correct test is the opposite: whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. The test described in *Wallace* incorrectly places the burden on the proponent of the evidence to establish admissibility, while the proper test places the burden on the opponent of the evidence to establish inadmissibility."
- State v. Hopkins, 431 S.C. 560 (Ct. App. 2020) "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided."

[2] 29 Am. Jur. 2d Evidence § 326.

404(a) Character Evidence

Summary: Character evidence is rarely admitted, and for good reason. Character evidence is essentially propensity evidence – that means that someone acted in conformity with their character. Character evidence is rarely admitted in civil trials, unless there is a relevant claim (e.g., slander). However it may come in criminal trials under certain situations. Character evidence revolves around the defendant, the victim, or a witness and is found under SCRE 404(a). If character evidence is allowed in, then the method for introducing it is found under SCRE 405 and 608(a) – depending who it is being used for or against.

First, the defendant might admit his good character in order to create reasonable doubt that he committed the crime – but this "good" character must be pertinent to the charged crime. If the defendant opens the door in this manner, then the State may rebut his good character. The issues that arise with this usually involve whether or not the defendant has actually opened the door. Second, the defendant might offer character evidence of the victim if it pertinent, and then the State can rebut that as well. This can arise in a self-defense claim if the defense wants to show that the victim was the first aggressor.

If character evidence is allowed in, then it must be in the form of opinion or reputation. Character evidence is based on a long period of time to either have an opinion of someone or to have heard a reputation about someone. If a witness testifies to an opinion or reputation about someone concerning their good character, then on cross-examination that witness may be asked about specific instances of conduct that run counter to this. The reason for these questions is two-fold. First, the practical effect is that the jury gets to hear challenges to the good character testimony (this is why a judge should limit any questions to be in good faith). Second, the witness is being challenged about their knowledge of the reputation of the person who they are vouching for – or perhaps maybe even changing their opinion about them.

See also the chapter "Impeachment: 608(a) (Character for Truthfulness)"

- State v. Holder, 382 S.C. 278 (2009) "The term 'character' refers to a generalized description of a person's disposition or a general trait such as honesty, temperance or peacefulness." State v. Nelson, 331 S.C. 1, 7, 501 S.E.2d 716, 719 (1998). "Generally speaking, character refers to an aspect of an individual's personality which is usually described in evidentiary law as a 'propensity.'"
- Pantovich v. State, 427 S.C. 555 (2019) A "good character alone may cause reasonable doubt" is an improper jury charge because it impermissibly comments on the facts.
- State v. Nelson, 331 S.C. 1 (1998) Character evidence is inadmissible if its purpose is to show propensity. Character evidence is generally defined as someone's disposition or propensity to act in conformity with their normal conduct. The Supreme Court held that it was error for the trial court to allow in statements that the defendant gave to law enforcement describing his general sexual attitudes towards children. These statements were inadmissible character evidence and were not proper confession statements.
- State v. Tufts, 355 S.C. 493 (2003) Trial court allowed in statements from defendant to law enforcement, where defendant stated that he knew he had a problem with his sexual desires. The Supreme Court held that this was a confession to the crime charged and was thus admissible. The trial court properly excluded statements that the defendant made concerning prior sexual crime charges.
- State v. Caldwell, 378 S.C. 268 (2008) Defendant's statements to law enforcement describing how he preferred younger boys was not inadmissible character evidence, but rather it was a confession that he had committed the crime.

- State v. Young, 378 S.C. 101 (2008) When a defendant opens the door to his character, the State is restricted to bad character for which the defendant raised. *See also* State v. Major, 301 S.C. 181 (1990).

- State v. Jones, 343 S.C. 562 (2001) Evidence that law enforcement began an investigation because of allegations of criminal activity are not inadmissible character evidence. However, testimony that identifies the defendant as a suspect in a criminal investigation crosses the line into character evidence. *See* State v. Brown, 317 S.C. 55 (1994); *compare with* German v. State, 325 S.C. 25 (1996).

- State v. Day, 341 S.C. 410 (2000) In a self-defense claim, evidence was admissible to show victim was violent and that the defendant was fearful of the victim because of this.

- State v. Williams, 430 S.C. 136 (2020) A defendant may offer evidence of their good character if it is pertinent. However, if they do this, then the State can rebut that with evidence to the contrary. In this case, a witness, while being questioned by the defense, testified that the defendant had a good character. If the defense elicited this question, then the door would be open to rebuttal evidence. However, if the answer was given gratuitously then the door would not be opened. The trial court found the defense did not elicit the answer, therefore the door was not open - however the trial court still let in rebuttal evidence under SCRE 404(a)(1). The Supreme Court held that rebuttal evidence was not proper and that the evidence should not have come in under impeachment either.

- Wilson v. State, 71 S.W.3d 346 (Tex. Crim. App. 2002) "Although Rule 405 of the Texas Rules of Evidence does not distinguish between opinion and reputation testimony on cross-examination, the better practice is to follow the traditional method of impeaching opinion witnesses with 'did you know' questions and reputation witnesses with 'have you heard' questions…. Since the reputation witness purportedly bases his or her testimony on hearsay in the community, his knowledge of the defendant's reputation in the community can best be impeached by questions of whether he has heard about specific instances of conduct inconsistent with that reputation. ... Conversely, the witness who testifies to the defendant's character on the basis of personal knowledge is most effectively challenged by 'did you know' questions regarding conduct inconsistent with the traits to which he has offered his opinion and not about rumors affecting the subject's character."

Pertinent Trait

- State v. Mizell, 332 S.C. 273 (Ct. App. 1998) A pertinent trait will somehow be involved or related to the charged crime. The term pertinent could be synonymous with the term relevant. The trait of honesty might be permissible if the defendant is charged with theft; but it would likely not be pertinent/relevant if the defendant was charged with murder. Likewise, the trait of peacefulness might be pertinent for murder but not for theft. When a defendant takes the stand in his own trial, he has the right to offer pertinent character traits, but he does not have an automatic right to offer his character for truthfulness – unless truthfulness is pertinent to the charged crime. He has a right to offer his character for truthfulness if his character for truthfulness is attacked under SCRE 608(a)(2) – he may rehabilitate himself under SCRE 608(a)(1). The rationale behind limiting the defendant's right to bolster his own reputation with character for truthfulness is that it is minimally probative: "For instance, an accused may have an excellent reputation in the community for truthfulness, but may nonetheless commit assault. … Moreover, evidence of an accused's reputation in the community for truthfulness may distract the jury from the issues in question and may be time-consuming and confusing."

404(b)/Lyle/Prior Bad Acts

Summary: Propensity evidence is extremely prejudicial to defendants because it creates an easy and acceptable belief in the prosecution's case – they acted bad before, so they acted bad again this time.

> Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.[3]

However, there are exceptions to this rule. If prior bad act evidence is allowed in, it should not be used to show that the person acted in conformity with their character, but it may be used to show motive, intent, absence of mistake or accident, common scheme or plan, or identity. This case has been codified into SCRE 404(b). Often one piece of evidence may sit in two boxes at once: it can be propensity and it can be used for another purpose. It is for the trial judge to determine the purpose of the evidence and if it passes SCRE 404(b) and 403.

In 2020, the South Carolina Supreme Court clarified that any *Lyle* evidence needs to pass the logical relevancy test.[4] For many years, the courts had diluted this test to merely a "similarity" between the prior act and charged act. However, it is clear now that there needs to be more: "The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes 'reasonably tends to prove a material fact in issue.'"[5]

- State v. Lyle, 125 S.C. 406 (1923) This is the seminal case for discussing prior bad act evidence. The case describes what propensity evidence is and how persuading it can be to a jury. Because of its power, propensity evidence is excluded unless it is being used for another purpose. *Lyle* lists several exceptions to the rule against propensity evidence, and SCRE 404(b) has codified these exceptions. *Lyle* requires that any prior bad act that fits in to an exception have a logical connection to the charged crime. It is not enough that the two acts are similar. *See* State v. Perry, 430 S.C. 24 (2020) for a discussion on this logical connection test and how case law had drifted away from this strict requirement.

- State v. Perry, 430 S.C. 24 (2020) Propensity evidence is evidence that tends to show someone acted in conformity with their character. This evidence is not allowed unless it is used for another purpose such as motive, identity, plan, etc. Sometimes evidence can be both propensity evidence and used for another purpose. Under *Lyle*, there must be a logical connection or relevancy between the prior act and the charged offense. This case overturns State v. Wallace, 384 S.C. 428 (2009), which created merely a "similarity" test between the prior act and new charge.

- State v. King, 424 S.C. 188 (2018) If the prior bad act was a crime that the defendant was not convicted of, then there must be clear and convincing evidence of the act. *See also* State v. Cope, 405 S.C. 317 (2013).

- State v. Cotton, 430 S.C. 112 (2020) The court followed up State v. Perry (2020) with another propensity case. The court reemphasized the "logical relevancy" test established under *Lyle*. The court also

[3] State v. Lyle, 125 S.C. 406 (1923).
[4] State v. Perry, 430 S.C. 24 (2020).
[5] State v. Perry, 430 S.C. 24 (2020).

reconfirmed the "viability of the common scheme or plan exception" to propensity evidence. *See also* State v. Durant, 430 S.C. 98 (2020).

- State v. Smalls 422 S.C. 174 (2018) Evidence of prior crime is improper if it does not serve legitimate purpose under SCRE 404(b).

- State v. King, 424 S.C. 188 (2018) Evidence of prior bad acts is generally not allowed to prove propensity. However, if it is being used for another purpose, then it could be admissible.

- State v. Cutro, 365 S.C. 366 (2005) The standard for joinder of a trial and *Lyle* evidence are separate and distinct. Prior bad acts that are not by conviction must be proved by clear and convincing evidence; and a trial court should hold a preliminary hearing to determine if the acts fall within the exception of SCRE 404(b). The standard for a joinder trial allows for charges to be tried together when the separate indicted offenses are of the same general nature and involved "connected transactions closely related in kind, place, and character[.]" The trial court does not need to conduct the same fact-finding "mini-trial" as it does with *Lyle* evidence because this has already been done through the law enforcement investigation process as well as the grand jury indictment stage.

- State v. Thompson, 420 S.C. 386 (Ct. App. 2017) A trespass letter that put defendant on notice that he was banned from an apartment was not prior bad act evidence. The Court of Appeals held that a person can be banned for many reasons, and the apartment manager did not explain why the defendant was banned.

- Citizens Bank of Darlington v. McDonald, 202 S.C. 244 (1943) Prior bad act evidence can be used in both civil and criminal trials. *See also* Judy v. Judy, 384 S.C. 634 (Ct. App. 2009); Winters v. Fiddie, 394 S.C. 629 (Ct. App. 2011).

Common Scheme or Plan

- State v. Perry, 430 S.C. 24 (2020) Propensity evidence is evidence that tends to show someone acted in conformity with their character. This evidence is not allowed unless it is used for another purpose such as motive, identity, plan, etc. Sometimes evidence can be both propensity evidence and used for another purpose. Under *Lyle*, there must be a logical connection or relevancy between the prior act and the charged offense. This case overturns State v. Wallace, 384 S.C. 428 (2009), which created merely a "similarity" test between the prior act and new charge.

Identity

- State v. Beck, 342 S.C. 129 (2000) A witness was allowed to testify to a similar robbery by defendant under the **identity** exception to *Lyle*. In both cases, the person committed similar offenses within a short period of time, wore similar boots, and had the same weapon.

- State v. Dickerson, 341 S.C. 391 (2000) The admission of defendant's drug use must have some relevant connection to the charged crime. Drug use in this case could have shown that it was the defendant who killed the victim, which would go to **identity**. The drug use was shown by clear and convincing evidence because the defendant freely admitted to using it during the time of the murder.

- State v. Southernland, 316 S.C. 377 (1994) Trial court properly admitted evidence that defendant had stolen a shotgun two weeks prior to him using that shotgun to murder victim. The prior bad act evidence went to **identity** and a **common scheme**.

Motive/Intent

- State v. Gore, 299 S.C. 368 (1989) The State properly admitted evidence of defendant's prior drug transactions to show his **intent** with the cocaine he possessed. "The State argues this testimony was admissible to establish the element of intent. We agree. The evidence that appellant sold cocaine from the trailer on two occasions only one month earlier tends to establish his intent regarding the cocaine in his possession at the time in question."

- State v. Sweat, 362 S.C. 117 (Ct. App. 2004) Defendant assaulted victim in October, and he subsequently spent 45 days in jail after that assault. Shortly after being released from jail, defendant committed Assault and Battery With Intent to Kill on the same victim. The trial court properly allowed in the October assault and his time in jail in order to show **motive** and **intent**. The state of mind of the defendant was relevant because the State had to prove malice.

State of Mind/Lack of Accident

- State v. Smith, 337 S.C. 27 (1999) Trial court properly admitted defendant's prior domestic violence conviction under SCRE 404(b) to show **state of mind**, **lack of accident**, and a **connection** between the abusive relationship and the murder.

- State v. Martucci, 380 S.C. 232 (2008) Prior child abuse was properly admitted against defendant who was charged with homicide by child abuse because it showed **intent** (material to state of mind of defendant), **absence of mistake or accident** (proof that the fatal injury was not an accident), identity (codefendants pointed the finger at each other), and **common scheme or plan** (evidence of a pattern in child abuse cases is probative).

Res Gestae

Summary: *Res gestae* is evidence of other acts to tell the whole story. It can be used to put actions in context and paint the whole picture. This evidence usually coincides with *Lyle* evidence, but it is different. If *res gestae* is permissible, then the court should still make an SCRE 403 ruling on the evidence.

- State v. Nelson, 331 S.C. 1 (1998) *Res gestae* evidence is used to present a full picture of the case and to put the crime in context. The Court cites a case which holds that *res gestae* is rarely used in child sexual abuse cases.

- State v. Bolden, 303 S.C. 41 (1990) Trial court improperly allowed in evidence that the defendant smoked crack the night of the armed robbery. Evidence of the drug use was not essential to the full presentation of the case, nor was it intimately connected with the charged crimes that it was needed to complete the whole story.

- State v. Wood, 362 S.C. 520 (Ct. App. 2004) The prior bad act should be related closely in temporal proximity to the charged offense. In this case, defendant shot and killed a state trooper, in Greenville County, shortly before committing several crimes in Anderson County. In the Anderson trial, the court allowed the State to refer to the murder as the "incident" and give brief facts, but none specifically about the murder. The trial court properly allowed in the "incident" evidence because it was necessary and relevant to put up a full presentation of the case: "The 'incident' provided the context and motivation for the crimes at issue. The testimony regarding the 'incident' was relevant to show the complete, whole, unfragmented story regarding Wood's crimes. ... The Wheelers' testimony elucidates both the reason police pursued the Jeep and the reason Wood shot at, harmed, and threatened the officers who attempted

to apprehend him. Furthermore, the crimes were temporally related. The shooting took place only two hours before the occurrence at issue. The two crimes comprise part of the same episode. The crimes are so concatenated as to be inextricably intertwined."

- State v. King, 334 S.C. 504 (1999) Res gestae theory allows in other bad act evidence if it is integral to the crime charged or to provide understanding and context. "when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae or the 'uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... [and is thus] part of the res gestae of the crime charged. And where evidence is admissible to provide this full presentation' of the offense, [t]here is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae."

- United States v. Sutherland, 921 F.3d 421 (4th Cir. 2019) There is another exception to 404(b) that is called res gestae ("things done"). This type of intrinsic evidence is not considered prior acts because it is part of the whole picture. It is used to explain a continuing situation. A question that arises then is when did the "situation" start and when did it end? "Evidence of other bad acts is intrinsic if, among other things, it involves the same series of transactions as the charged offense, or if it is necessary to complete the story of the crime on trial." (cleaned up)

- United States v. Bush, 944 F.3d 189 (4th Cir. 2019) The defendant was charged with distribution of crack cocaine and conspiracy to distribute. The conspiracy took place from approximately 2008-2017. Defendant was convicted and sentenced to prison for distributing crack cocaine on state charges and served in prison from 2011-2013. The government wanted to introduce this conviction to show his role in the conspiracy and claimed that this evidence was intrinsic to the alleged crime. However, the defense claimed that this conviction was extrinsic, or that it was separate or unrelated to the charged offense, and thus the judge should have conducted an FRE 404(b) ruling. The trial judge, after a thorough examination, held that the evidence was intrinsic of the conspiracy and allowed in the evidence without regards to 404(b). The Fourth Circuit upheld this ruling and explained the difference between intrinsic and extrinsic evidence as it relates to 404(b): "But the provisions of Rule 404(b) are only applicable when the challenged evidence is extrinsic, that is, 'separate' from or 'unrelated' to the charged offense. … Accordingly, we have consistently held that 'acts intrinsic to the alleged crime do not fall under Rule 404(b)'s limitations on admissible evidence.'" The court then held that other acts are intrinsic "when they are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged…And such evidence is inextricably intertwined with the evidence regarding the charged offense if it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted."

- State v. Gagum, 328 S.C. 560 (Ct. App. 1997) Res gestae has been used to describe both an exception to hearsay and evidence of prior acts. They are distinct and only share the same name.

Statements/Beliefs vs. Acts

- State v. Hawes, 423 S.C. 118 (Ct. App. 2018) Prior statements are not prior acts under SCRE 404(b). "But a prior statement of bad intent is not a prior bad act. *See* Anderson v. State, 354 S.C. 431 (2003) (determining a threatening statement was not a bad act); State v. Beck, 342 S.C. 129 (2000)

(explaining *Lyle* concerns bad acts and other crimes of a defendant, not statements of intent to commit crimes)." (cleaned up).

- State v. Bell, 430 S.C. 449, 455 (Ct. App. 2020) There is not a distinction between evidence of *beliefs* that the defendant committed prior bad acts and evidence that the defendant committed prior acts. If there were a distinction, then that would swallow the rule against propensity evidence and allow witnesses to merely state they believed that the defendant committed the prior act.

Applicability of Rules

Summary: Generally, the Rules of Evidence apply in trials. But the rules will often come into play in some form if a hearing is a final adjudication of the defendant's rights. The rules do not apply in preliminary hearings or sentencing hearings (except for capital cases). However, even if the rules do not directly apply, a judge will likely follow the spirit and common sense application of them. Look to SCRE 1101 for specifications about when the rules apply.

- S.C. Dep't of Motor Vehicles v. McCarson, 391 S.C. 136 (2011) The Rules of Evidence apply in driving license suspension hearings. Hearsay is allowed in preliminary hearings because these hearings are not a final adjudication of a defendant's rights.
- State v. Gulledge, 326 S.C. 220 (1997) The Rules of Evidence are inapplicable at sentencing hearings (except capital cases). Restitution hearings are considered part of the sentencing hearing.
- State v. Burkhart, 371 S.C. 482 (2007) Evidence admitted at a capital trial sentencing phase must be relevant to the "character of the defendant or the circumstances of the crime."

Authentication

Summary: Authentication is merely the first step in introducing a piece of evidence. Just because the evidence passes the low threshold of being what it claims to be, does not mean it will pass other Rules of Evidence (e.g., hearsay, relevance, probative, etc.). SCRE 901 provides a non-exhaustive list of methods to authenticate a piece of evidence.

- Berry v. Spang, No. 2017-001690, 2021 WL 116347 (S.C. Ct. App. Jan. 13, 2021)The burden to authenticate is low.
- State v. Lawson, 424 S.C. 51 (Ct. App. 2018) Evidence offered to authenticate other evidence must still be admissible under the Rules of Evidence. In this case, the State improperly elicited testimony that the defendant's fingerprint card originated from a prison many years before the current charge. The State claimed they needed this testimony in order to authenticate the fingerprint card; however, the court held that it was not necessary because the burden to authenticate is low and there are several other way that they could have authenticated the card. "As a result, the State may not bootstrap improper character evidence into admissible testimony by simply claiming it is offered to authenticate other evidence. This is especially true when the State can overcome the low threshold of authentication with otherwise admissible evidence such as a stipulation or, as discussed above, under Rule 901(b)(7)."

911 Calls

See the chapter "Hearsay: Exceptions (803) – 911 Calls"

Chain of Custody/Fungible Evidence

Summary: Chain of custody is a form authentication. Two questions often arise with chain issues: is the object what it claims to be and has it been tampered with? Fungible evidence essentially means that the evidence is easily replicated or not possessing unique characteristics that one can easily determine. For example, how does someone tell the difference between two identical blood droplets? How do you tell the difference between two baggies containing narcotics? Without further testing, it is hard to establish that one blood droplet is different from the other, and thus there is a greater risk that they could be mixed up. Also, remember to ask why the evidence is being introduced and what the testimony is regarding the evidence. For example, a lay witness may be able to properly authenticate a bloody t-shirt as the one that the victim was wearing. But an expert witness would need to prove the chain of custody to testify as to any analysis done on the blood.

- State v. Hatcher, 392 S.C. 86 (2011) A chain of custody needs to be established as far as practicable. It will depend on the individual case, but not every single person associated with the item has to be identified and testify – this is case specific. "The trial judge's exercise of discretion must be reviewed in the light of the following factors: '... the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.' Id. 'If upon the consideration of such factors the trial judge is satisfied that in reasonable probability the article has not been changed in important respects, he may permit its introduction in evidence." (citation omitted).
- State v. Brockmeyer, 406 S.C. 324 (2013) The goal of chain of custody is to authenticate the item and make sure it is what it claims to be. The chain of custody requirement may be more or less strict depending if the item is fungible or not fungible. "Because the challenged evidence in this case is not fungible, unlike

the cocaine in *Melendez–Diaz* or the blood sample in *Bullcoming,* here strict chains of custody are not required for admission into evidence."

- State v. Freiburger, 366 S.C. 125 (2005) Evidence that is unique and identifiable – non-fungible – does not require a strict chain of custody as compared to a fungible item, which cannot be easily identified. Non-fungible evidence will usually have fairly unique and readily identifiable characteristics and be relatively impervious to change.

- State v. Williams, 297 S.C. 290 (1989) "Proof of chain of custody need not negate all possibility of tampering but must establish a complete chain of evidence as far as practicable."

- Benton v. Pellum, 232 S.C. 26 (1957) "While proof need not negative all possibility of tampering, … it is generally held that the party offering such specimen is required to establish, at least as far as practicable, a complete chain of evidence, tracing possession from the time the specimen is taken from the human body to the final custodian by whom it is analyzed. As stated in Rodgers v. Commonwealth, 197 Va. 527, 90 S.E.2d 257, 260, 'Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.'"

- State v. Kahan, 268 S.C. 240 (1977) A proper chain was established even though there was no testimony as to the proper handling and care of the item in question. The lack of testimony would go to credibility – not admissibility.

- State v. Taylor, 360 S.C. 18 (Ct. App. 2004) Evidence is inadmissible where the identity of persons in the chain of custody who handled the item are unknown. However, if there is evidence that establishes the identity of the persons who handled the item and how it was handled, then the weakness in the chain should go to credibility not admissibility. "We believe it is clear from these decisions that if the identity of each person in the chain handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion is shown in the admission, absent proof of tampering, bad faith, or ill-motive."

- State v. Cribb, 310 S.C. 518 (1992) A proper and admissible chain of custody must identify every person who has sealed, labeled, and transported the blood sample. Trial court improperly admitted a blood sample where the chain did not identify all persons who handled the blood sample. *But see* State v. Carter, 344 S.C. 419 (2001) ("In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the blood was not established at least as far as practicable. *See State v. Cribb* ... On the other hand, where the identity of persons handling the specimen is established, we have found evidence regarding its care goes only to the weight of the specimen as credible evidence. *See, e.g., State v. Smith, supra* (storage of blood in arresting officer's home). In other words, where there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility.").

- State v. Smith, 326 S.C. 39 (1997) A chain of custody for a blood draw must be complete from the time of draw until its testing. This chain of custody does not have to negate all possibility of tampering, but needs to establish the chain as far as practicable. In this case, all persons who handled the blood sample testified at trial. A trooper, who handled the blood, stored it in his refrigerator. The South Carolina Supreme Court upheld the admission of the blood sample because the storage of the blood sample in the trooper's refrigerator went to its weight not admissibility. *See also* State v. Trapp, 420 S.C. 217 (2017) (An analyzed substance requires that every person who handled the substance be identified and how they handled the item. The trial court may admit the analyzed substance if all persons in the chain are identified, the manner in which they handled it are reasonably demonstrated, and there is no proof of tampering or bad faith.).

DNA

- State v. Patterson, 425 S.C. 500 (Ct. App. 2019) Trial court properly admitted DNA evidence after its authentication was challenged by the defense. The court held DNA evidence was properly authenticated because the State's witnesses testified that they had first-hand knowledge of the procedure for using the database and they personally verified the results (SCRE 901(b)(1)). The court also found that the DNA results had specific characteristics that set them apart (SCRE 901(b)(4)).

Taped Phone Conversation

- State v. Aragon, 354 S.C. 334 (Ct. App. 2003) Victim properly authenticated a taped recording of her conversation with the defendant under SCRE 901(b)(1), (5), and (6). She testified that she had known him for over ten years, been in a relationship with him, she listened to the tape, she recognized the tape from her initials on it, and that the tape fairly and accurately represented their conversation. Chain of custody was not necessary for the tape because the victim properly authenticated it. The court cited two cases in a footnote that held that a chain of custody is not necessary "where the witness had first-hand knowledge of conversations and identified the voices on the tape" and where the participant in the taped conversation reviewed the tape and testified that it was accurate of the conversation.

Best Evidence Rule

Summary: The Best Evidence Rule, (found under Rules 1001-1006) contrary to its name, does not require that a party produce the best evidence. Rather, this rule deals with copies of writings, recordings, or photographs and the actual content within them. For example, assume John read a note that said "I am happy" and he wanted to testify to that statement within the note (assuming obviously no other evidentiary rules apply). If the note is gone, then the best evidence of what the note said is also gone. John has no independent knowledge of the contents of the note. But what if there is a copy of the note and it is not the original? Duplicates are allowed under the rule if certain conditions are met. However, South Carolina District Court Judge Joseph Anderson has given a concise and informative view on the Best Evidence Rule in his recent book *Effective Courtroom Advocacy*[6]:

> A simple memory device for keeping the Best Evidence Rule straight is to recall that the Rule had its heyday back in a time where there were no photocopying machines or carbon paper. If someone wanted a second copy of a contract or a real estate deed, for example, that person had to manually write out the copy, thereby giving rise to the possibility that errors could be made. Modern technology has thus made the Best Evidence Rule practically obsolete.

- State v. Gulledge, 326 S.C. 220 (1997) The best evidence rule will not necessarily be violated by using summaries, as long as the supporting documents are made available.
- State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81 (2008) A duplicate is admissible as same as the original if conditions are met.
- State v. Mitchell, 399 S.C. 410 (Ct. App. 2012) Trial court properly admitted photographs from a deer camera. The Court of Appeals concluded that based on the testimony the photos were originals under SCRE 1001(3) and thus 1003 was not applicable.
- Sample v. Gulf Ref. Co., 183 S.C. 399 (1937) "The original of a document is, of course, the best evidence as to its contents, and before the receipt of secondary evidence can be required, it is necessary for the party offering the evidence to make certain preliminary proof to establish the necessity and propriety of the receipt of the secondary evidence in place of the original document; and while the sufficiency of this preliminary proof does not rest in the uncontrolled discretion of the trial judge, as statements in some of the cases seem to imply, yet at least some if not a large measure of discretion in this respect necessarily is vested in the trial judge."
- Turner v. Med. Univ. of S.C., 430 S.C. 569 (Ct. App. 2020) The best evidence rule does not apply to testimony that is not used to describe the contents of a writing or recording. "Turner argues the Blank Mayday Record and Ms. Scarbrough's testimony were used to describe the contents of Mikell's Mayday Record. He avers this violated the best evidence rule because Mikell's actual Mayday record should have been used. Because the Blank Mayday Record and Ms. Scarborough's testimony were used to show the type of information ordinarily contained in any Mayday record, not to indicate what was specifically included in Mikell's Mayday Record, we find the best evidence rule does not apply."

[6] "The Best Evidence Rule." *Effective Courtroom Advocacy*, by Joseph F. Anderson, South Carolina Bar, Continuing Legal Education Division, 2020, pp. 136–137. For a review of his book: https://www.everydayevidence.org/post/resolve-to-be-a-complete-lawyer-a-review-of-judge-joe-anderson-s-effective-courtroom-advocacy

Closing Argument

Summary: Closing arguments are just that – arguments. Counsel is given wide latitude to connect facts that are in evidence and bring them to their logical conclusion. However, there are certain areas that must be avoided. Generally, counsel should not inflame the passions or prejudice of a jury. They should not use the Golden Rule (i.e., "Put yourself in the victim's shoes."). They should not talk about the "community."

- Sulton v. HealthSouth Corp., 400 S.C. 412 (2012) "Closing arguments must be confined to evidence in the record and reasonable inferences therefrom."
- Branham v. Ford Motor Co., 390 S.C. 203 (2010) An attorney should not make a closing argument that is calculated to arouse passion or prejudice.
- State v. Northcutt, 372 S.C. 207 (2007) The trial judge is granted wide discretion with handling "the range of propriety" of a party's closing argument.
- State v. White, 246 S.C. 502 (1965) The State made improper closing arguments when they asked the jury to consider their wives, sisters, daughters, and mothers.

Competency

Summary: Every person is competent to testify as a witness unless a statute or the Rules of Evidence says otherwise. A witness will not be found incompetent merely because they have been convicted of perjury – that is what cross-examination is for. "The party opposing the witness has the burden of proving a witness is incompetent."[7]

The judge determines the competency of the witness, the jury determines the credibility. Witnesses are presumed competent, and the opposing party has the burden to prove the witness is not competent. A competency hearing should be held outside the presence of the jury. A judge should rule on the evidence in a neutral and formal way. And solicitors should not bolster witnesses by asking questions in the first person.[8]

[7] State v. Needs, 333 S.C. 134 (1998).
[8] State v. Reyes, No. 2019-001593, 2020 WL 7380276 (S.C. Dec. 16, 2020).

Conditional Relevancy

Summary: Evidence needs to be relevant in order to be admissible. But sometimes evidence is only relevant if something else is true. What is the standard for this conditional relevancy? The judge needs to look at all of the evidence and determine whether the jury **could** reasonably find the conditional fact true by a preponderance of the evidence.

- Huddleston v. United States, 485 U.S. 681 (1988) "In determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact[.]"

Dead Man's Statute

Summary: Under SCRE 601, every witness is competent to testify unless a statute or the Rules of Evidence say otherwise. The Dead Man's Statute is codified in South Carolina law and thus a rule for competency.[9] "Essentially, the rule prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest. *See* Long v. Conroy, 246 S.C. 225, 143 S.E.2d 459 (1965). The rule is founded on the principle that it is against public policy to allow a witness thus interested to testify as to such matters when such testimony, if untrue, cannot be contradicted."[10]

[9] **SECTION 19-11-20**. "Dead man's" statute. Notwithstanding the provisions of Section 19-11-10, no party to an action or proceeding, no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf in regard to such transaction or communication or when testimony of such deceased or insane person or lunatic in regard to such transaction or communication, however the same may have been perpetuated or made competent, shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing.

[10] Hanahan v. Simpson, 326 S.C. 140 (1997)

Defendant's Case

- State v. Rivera, 402 S.C. 225 (2013) The defendant has a fundamental right to testify or not testify.
- State v. Patterson, 367 S.C. 219 (Ct. App. 2006) While the defendant has a right to be present at trial, they do not have a right to be absent from trial.
- State v. Cottrell, 421 S.C. 622 (2017) A defendant does not have an unfettered and absolute right to put up a defense. A trial judge may limit a defense based upon the Rules of Evidence.
- State v. Mitchell, 330 S.C. 189 (1998) A trial judge may limit a defendant's range of cross-examination as long as it is reasonable.
- State v. Inman, 395 S.C. 539 (2011) A defendant has the right under some circumstances to call the prosecutor as a witness. *See also* State v. Sierra, 337 S.C. 368 (Ct. App. 1999) (A prosecutor could potentially become a witness by laying the foundation for a prior inconsistent statement if that witness denies the statement and the prosecutor never introduces actual extrinsic evidence to back up the foundation that was laid).

Demonstrative vs. Substantive Evidence

Summary: There are two main types of evidence presented in a trial: demonstrative and substantive (impeachment is a third, but that is discussed elsewhere). Demonstrative evidence usually explains other evidence or testimony. It is not directly relevant, rather it relies on other evidence that is material. It may be used in the courtroom for illustrative purposes, or it may become an exhibit.

Demonstrative evidence can be further divided into two categories: pedagogical and substitute. Substitution evidence is evidence that summarizes other material evidence. For example, a summary of a 10,000 page financial statement. There are certain requirements that summary evidence must meet and that is found under SCRE 1006. Pedagogical evidence is a demonstration of evidence that is already entered into evidence. An example of this would be a witness saying that she jumped on one foot the night of the incident, and the attorney jumping on one foot to demonstrate what the witness said.

If it is determined that the evidence that is being introduced is real or substantive evidence, then it will need to pass all of the regular Rules of Evidence that are applicable. However, if the evidence is considered demonstrative, then there are likely two Rules of Evidence that will come into play (at least at first). If the demonstrative evidence is a summary of other material evidence, then look to SCRE 1006. If the demonstrative evidence is pedagogical, then start with SCRE 611. This rule gives the trial judge discretion to determine if the evidence is a fair and accurate representation of what it is trying to depict. To determine the fairness and accuracy, a trial judge should also look to the rules concerning authentication, relevance, and probative/prejudicial value.

In his book *Navigating the Federal Trial*,[11] United States Magistrate Judge Robert Larsen explains the process for using demonstrative evidence in a closing argument:

> Yes. Pedagogical devices and other illustrative items that have not been admitted in evidence may be used during the closing argument. When intending to use such a device or item, alert opposing counsel and request permission from the trial judge before the arguments begin. In fact, it is probably a good idea to raise the subject in a motion in limine before the trial begins. Additionally, make sure the device or item accurately reflects the evidence at trial, or is not otherwise misleading in any respect. The judge's decision on whether or not to allow such devices or items is reviewed on appeal for abuse of discretion.

- Hamrick v. State, 426 S.C. 638 (2019) There is a difference between demonstrative evidence and substantive evidence. It is important to distinguish which type of evidence is being sought to be introduced in order to make sure it complies with the correct Rule of Evidence. In this case, an expert testified for the defense on accident reconstruction. He created a video of the accident to go along with his testimony to explain that the defendant did not do what the State claimed that he did. The judge allowed the testimony but excluded the video from being admitted as evidence. The Supreme Court held that video re-creation of the accident was not demonstrative evidence, but rather it was substantive evidence. It was substantive evidence because the video was offered prove how the incident did not happen. "The results of experiments are substantive evidence." Because it was substantive evidence, the trial judge should have used the proper Rules of Evidence to decide whether to admit the video and make a finding on the record of the rules that were used.

[11] "§ 15:67." *Navigating the Federal Trial*, by Robert Larsen, Thomson Reuters, 2020.

- Clark v. Cantrell, 339 S.C. 369 (2000) Demonstrative evidence usually explains other evidence or testimony. It is not directly relevant, rather it relies on other evidence that is material. Demonstrative evidence may be used in the courtroom for illustrative purposes, or it may become an exhibit. This case is from 2000, and the Supreme Court noted that computer-generated videos were "not an everyday occurrence." The Court distinguishes between computer animations and computer simulations. They held that the computer-generated video in this case was an animation and thus it was demonstrative evidence. A simulation on the other hand is based on science and data entered into a computer that subsequently draws a conclusion.

- Brown v. State, No. 2017-002269, 2020 WL 5946149 (S.C. Ct. App. Oct. 7, 2020) (Unpublished Opinion) "The trial court did not err in allowing the State to present still frames from the surveillance video to the jury during closing argument. *See Clark v. Cantrell* ('Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony.'); *id.* ('Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance.'); *id.* ('Demonstrative evidence is distinguishable from exhibits that compromise 'real' or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements.'); *id.* ('Demonstrative evidence often is admitted only for use in the courtroom to explain and illustrate a witness's testimony, but it also may be admissible as an exhibit for the jury to examine and consider during deliberations.'). Here, the State used the still video frames to summarize the entire surveillance video, which had already been admitted into evidence. The trial court did not allow the still frames to go back with the jury, and Petitioner used the same video and paused it throughout his closing argument." (cleaned up).

- State v. Warner, 430 S.C. 76 (Ct. App. 2020) cert. granted (Jan. 22, 2021) SCRE 1006 allows for parties to introduce summaries of evidence when the underlying evidence is extremely voluminous. Before introduction, these requirements must be met: "The party seeking to admit a summary must demonstrate (1) the contents of the documents upon which the summary is based are so voluminous it would be inconvenient to examine them in court; (2) the underlying documents are admissible in evidence; (3) the summary is a faithful rendering of the underlying data, and any inferences it contains are supported by the contents and are neutral and non-argumentative; and (4) the originals or duplicates of the underlying documents have been made reasonably available to the other parties. Rule 1006 should be interpreted in light of its intended purpose as an exception to the best evidence rule of Rule 1002, SCRE. This does not mean a summary may not include anything not in the contents of the underlying documents; it may contain fair inferences and conclusions supported by the documents. 2 *McCormick on Evidence* § 241 (8th ed. 2020). But the more inferences a summary chart contains, the less likely it will be admissible under Rule 1006, the more likely it will draw an objection based on other grounds (including Rule 403, SCRE), and the more likely the trial court will decide not to admit the summary as an exhibit but restrict it to being a demonstrative aid."

Computer Animations

Summary: A computer animation may be admissible if the proponent shows it is "(1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE."[12]

[12] Clark v. Cantrell, 339 S.C. 369 (2000).

Expert Opinion

Summary: The admission of expert testimony follows an extremely similar standard in both federal court and state court in South Carolina.[13] Federal courts follow the *Daubert*[14] standard and FRE 702, and state courts follow the *Council*[15] standard and SCRE 702. A recent South Carolina Supreme Court case[16] described the procedure for qualifying an expert witness as a *Daubert/Council* hearing (*Daubert/Council* describes the pretrial hearing procedure and not the actual factors considered. Even though the factors are similar, a trial court should use the *Council* factors as described below.).

When expert testimony is offered, the trial court should look to SCRE 702, 403, and *Council*. The proponent of the expert has the burden of each of these factors, including passing the 403 test.[17]

1. Evidence will assist the trier of the fact.
2. The expert must be qualified in that particular field.
3. The underlying science is reliable.
    a. *Scientific in nature*:
        i. (1) the publications and peer review of the technique;
        ii. (2) prior application of the method to the type of evidence involved in the case;
        iii. (3) the quality control procedures used to ensure reliability; and
        iv. (4) the consistency of the method with recognized scientific laws and procedures.
    b. *Nonscientific in nature*:
        i. No set test. Judge must still play gatekeeper though.[18]
4. Passes SCRE 403.

Generally

- State v. Phillips, 430 S.C. 319 (2020) When expert testimony is being offered, the trial court should follow SCRE 702 and the *Daubert/Council* procedure, and the court should make specific findings to each contested issue. In this case, the State used an expert to testify to DNA evidence. The Supreme Court explained that DNA is a very complicated subject and that expert testimony could be admitted to explain it to the jury. However, in this case, the trial court did not conduct a proper *Daubert/Council* hearing. The Court held that, based on the record, the State failed two factors: the State did not establish that the expert would assist the trier of the fact, and the DNA evidence's probative value was substantially outweighed by its prejudicial effect.

- State v. Council, 335 S.C. 1 (1999) South Carolina has not adopted the *Daubert* standard, but it is very similar. A trial court should follow SCRE 702, and find that the evidence will assist the trier of the fact, the expert is qualified, and the underlying science is reliable. To determine reliability, the judge should

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[13] State v. Warner, 430 S.C. 76 (Ct. App. 2020) ("Nevertheless, our approach is 'extraordinarily similar' to the federal test.").
[14] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
[15] State v. Council, 335 S.C. 1 (1999).
[16] State v. Phillips, 430 S.C. 319 (2020).
[17] State v. Phillips, 430 S.C. at 335 ("In addition, when the opponent makes a Rule 403 objection, the proponent must demonstrate the probative value of the evidence.") *but see* State v. King, 424 S.C. 188 (2018) ("The test described in *Wallace* incorrectly places the burden on the proponent of the evidence to establish admissibility, while the proper test places the burden on the opponent of the evidence to establish inadmissibility."); *see also* Coble, Daniel, "What's in a Name, Anyway? Daubert/Council and Expert Testimony" *South Carolina Lawyer* September 2021, pp. 40-45, https://mydigitalpublication.com/publication/?m=18928&i=719486&p=42&ver=html5
[18] *See* State v. Prather, 429 S.C. 583 (2020).

apply the *Jones* factors. These factors include: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." The judge should then make an SCRE 403 finding.

- Gathers By & Through Hutchinson v. S.C. Elec. & Gas Co., 311 S.C. 81 (Ct. App. 1993) "Opinion testimony of an expert may be based upon a hypothetical question. The hypothetical question must be based on facts supported by the evidence. Counsel posing the hypothetical may, however, frame the question on any theory which can reasonably be deduced from the evidence and select as a predicate for it such facts as the evidence proves or reasonably tends to prove. Stated another way, counsel may rely upon circumstantial evidence to prove an essential fact in framing a hypothetical question. Deciding whether a conclusion assumed in the hypothetical is at least reasonably supported by circumstantial evidence is a question of law for the court. If circumstantial evidence reasonably supports the assumptions, whether the evidence actually establishes the assumed facts becomes a question of fact for the trier of fact." (citations omitted).

- Watson v. Ford Motor Co., 389 S.C. 434 (2010) All expert testimony must satisfy subject matter, expert qualifications, and reliability. "Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate."

- State v. Herrera, 425 S.C. 558 (2019) A trial court should determine what expertise an expert is qualified in and make sure that the expert does not testify to opinions outside of this specific field. Officer was qualified in drug identification, however, he ultimately testified to weight and analysis, which were both outside of what he was qualified for.

- Graves v. CAS Med. Sys., Inc., 401 S.C. 63 (2012) Before an expert may testify, a judge needs to make preliminary findings, which are set forth in *Council*: Subject matter is beyond ordinary knowledge of jury; the expert must be qualified in that particular field; and the substance of the testimony must be reliable. If testimony is scientific in nature, court should consider: publications/peer reviews, prior application of the method to the type of evidence, quality control measures, and the consistency of the method with recognized scientific laws and procedures. If it is nonscientific in nature, then there is no set standard, but the judge will still be a gatekeeper.

- State v. Tapp, 398 S.C. 376 (2012) All expert testimony must be vetted for its reliability, whether it is scientific or nonscientific. "To be clear, the reliability of a witness's testimony is not a pre-requisite to determining whether or not the witness is an expert. The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony."

- Maybank v. BB&T Corp., 416 S.C. 541 (2016) Expert testimony falls under SCRE 702. The qualification of an expert witness is within the trial court's discretion.

- State v. Kromah, 401 S.C. 340 (2013) Experts cannot simply testify to hearsay because of SCRE 703, however, they can give their opinion based on facts and data that were not admitted into evidence.

- State v. Commander, 396 S.C. 254 (2011) A qualified expert may give an opinion as to the scientific bases of a victim's injury or death. Expert opinion testimony about state of mind or guilt is inadmissible.

- Watson v. Ford Motor Co., 389 S.C. 434 (2010) Expert opinion receives additional scrutiny because of how much weight an expert's opinion may carry with a jury.

- J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362 (2006) An expert does not have to be a statutory expert (i.e., comply with a statute to be professionally licensed). As long as the expert opinion complies with SCRE 702.

- State v. Ellis, 345 S.C. 175 (2001) Expert testimony exceeded the scope of his qualification when he testified as to whether or not the defendant was acting in self-defense. Expert was only qualified in crime scene processing and fingerprint identification. An expert may give his opinion on the ultimate issue, but only if they are qualified.

- Dawkins v. Fields, 354 S.C. 58 (2003) Expert opinion on issues of law is generally not admissible. An expert should not invade the trial court's decision making.

- State v. Frazier, 357 S.C. 161 (2004) For out of court experiments to be admissible, they do not have to recreate the exact conditions, however they need substantial similarity.

- Matter of Bilton, 432 S.C. 157 (Ct. App. 2020) An expert should not be used as a conduit or surrogate for another expert's scientific analysis.

- State v. Jones, 423 S.C. 631 (2018) A judge should not consider any answers or statements given in voir dire when assessing knowledge of an average juror.

Scientific vs. Nonscientific

- State v. Prather, 429 S.C. 583 (2020) Expert testimony generally falls into two categories: scientific and nonscientific. The test for nonscientific expert testimony: "a trial court must determine whether: (1) the qualifications of the expert are sufficient and (2) the subject matter of the expert's testimony is reliable." An expert should not testify as to a defendant's state of mind or guilt.

- State v. Chavis, 412 S.C. 101 (2015) There is not a specific formula for determining the requirements to qualify an expert in a nonscientific area. *See also* State v. Jones, 423 S.C. 631 (2018) (discussing nonscientific expert testimony); *See also* Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620 (2014) (All expert testimony must meet the requirements of SCRE 702, whether not it is scientific or nonscientific in nature.).

- United States v. Wilson, 484 F.3d 267 (4th Cir. 2007) South Carolina state courts generally view expert testimony as "scientific" or "nonscientific." However, the Fourth Circuit has also described "nonscientific" as "experiential" testimony and is based on the expert's experience: "Experiential expert testimony, on the other hand, does not 'rely on anything like a scientific method.' *Id.* But this does not lead to a conclusion that 'experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. … While a district court's task in examining the reliability of experiential expert testimony is therefore somewhat more opaque, the district court must nonetheless require an experiential witness to 'explain how [his] experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts.'"

Types of Experts

Accident Reconstruction

- Hamrick v. State, 426 S.C. 638 (2019) Accident reconstruction testimony requires an expert opinion. A trial court must make the proper SCRE 702 findings on the record to establish that the witness is an expert in that field. *See also* Gulledge v. McLaughlin, 328 S.C. 504 (Ct. App. 1997).

Battered Spouse Syndrome

- State v. Hill, 287 S.C. 398 (1986) Battered Spouse Syndrome is admissible through expert testimony for a self-defense claim in a homicide case. This syndrome is defined as "a series of common characteristics that appear in women who are abused physically and psychologically over an extended period of time by the dominant male figure in their lives." *See also* Robinson v. State, 308 S.C. 74 (1992); S.C. Code Ann. § 17-23-170 ("Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress.").[19]

Crime Scene Analysis

- State v. Prather, 429 S.C. 583 (2020) The Supreme Court held that "crime scene analysis" is nonscientific.
- State v. Jones, 383 S.C. 535 (2009) "Barefoot insole impression" did not pass SCRE 702 or *Council* and was thus unreliable.

Criminal Profile

- State v. Prather, 429 S.C. 583 (2020) Testimony about "criminal profiles" is unreliable and usually inadmissible. Because expert testimony can overlap with profile testimony and permissible opinion testimony, the court again emphasized that trial courts should limit any profile testimony.
- Underwood v. State, 309 S.C. 560 (1992) Expert's testimony was proper, and not inadmissible criminal profile testimony, where she did not testify to a personality or character trait that the defendant possessed in order to identify him as the perpetrator.
- State v. Huckabee, 419 S.C. 414 (Ct. App. 2017) Criminal profile testimony constitutes inadmissible propensity evidence. "While criminal profiling may have a legitimate function in law enforcement investigations, such information constitutes propensity evidence and, therefore, has no place in a trial to determine the guilt of a specific individual." The Court of Appeals distinguished this case from Underwood v. State, 309 S.C. 560 (1992) because the expert in Underwood never sought to identify the defendant. However, in this case the expert testimony could lead a juror to no other inference but that the defendant committed the offense based on a criminal profile.

CSC Cases

- State v. Anderson, 413 S.C. 212 (2015) Child abuse assessment is a proper type of expert opinion, but there are specific requirements for qualifying an expert in this field. Because of the danger of improper bolstering (i.e., the child gave a compelling indication of abuse), trial courts should avoid qualifying as

[19] **SECTION 17-23-170**. Admissibility of evidence concerning battered spouse syndrome; foundation; notice; lay testimony.
(A) Evidence that the actor was suffering from the battered spouse syndrome is admissible in a criminal action on the issue of whether the actor lawfully acted in self-defense, defense of another, defense of necessity, or defense of duress. This section does not preclude the admission of testimony on battered spouse syndrome in other criminal actions. This testimony is not admissible when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.
(B) Expert opinion testimony on the battered spouse syndrome shall not be considered a new scientific technique the reliability of which is unproven.
(C) Lay testimony as to the actions of the batterer and how those actions contributed to the facts underlying the basis of the criminal charge shall not be precluded as irrelevant or immaterial if it is used to establish the foundation for evidence on the battered spouse syndrome.
(D) The foundation shall be sufficient for the admission of testimony on the battered spouse syndrome if the proponent of the evidence establishes its relevancy and the proper qualifications of the witness.
(E) A defendant who proposes to offer evidence of the battered spouse syndrome shall file written notice with the court before trial.

experts the actual person who interviewed the child. Rather, it is better practice to have an independent expert testify.

- State v. Kromah, 401 S.C. 340 (2013) The Supreme Court expresses its hesitancy with qualifying experts in forensic interviewing. Because expert testimony is usually given more significance, courts should be careful in using forensic interviews. These types of interviews are helpful as a law enforcement tool, however, they can easily stray into vouching for the credibility of a witness. The Court reiterates that it is usually unnecessary to qualify the interviewer as an expert, because they are testifying to their personal knowledge and no specialized training is required. The Court stated that they "can envision no circumstance where their qualification as an expert at trial would be appropriate." When admitting forensic interviews or testimony related to the interview, courts should avoid testimony that the child was told to be truthful. An interviewer may testify to the circumstances surrounding the interview, personal observations, and other statements that the interviewer has personal knowledge of. This is not to say that an expert may never be qualified in forensic interviewing, however, the Court held that the "label of expert should be jealously guarded by the court and never loosely bandied about." *See also* State v. Baker, 411 S.C. 583 (2015) (Toal, C.J., dissenting)

- State v. Jennings, 394 S.C. 473 (2011) An expert should not vouch for the veracity of a child's accusations.

- State v. Smith, 411 S.C. 161 (Ct. App. 2014) It is improper witness bolstering for an expert to testify that a child witness gave a "compelling indication of abuse."

- State v. White, 361 S.C. 407 (2004) "In *Schumpert,* we held that both expert testimony and behavioral evidence are admissible as rape trauma evidence to prove a sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect."

Cell Site Location Information

- State v. Warner, 430 S.C. 76 (Ct. App. 2020) cert. granted (Jan. 22, 2021) When determining whether to qualify and admit expert testimony on CSLI data, the court should follow SCRE 702 and use the "nonscientific" standard. The trial court properly admitted the testimony because the expert had vast experience with historical cellular records coupled with his knowledge and experience with cell phones, towers, and networks. **Cert was granted for this case, so please confirm reliability of case**

False Confessions

- State v. Cope, 405 S.C. 317 (2013) A trial court should limit an expert on false confessions from describing specific cases. *See also* State v. Myers, 359 S.C. 40 (2004) (False confession expert should not testify about specific cases.).

Gang Affiliation

- State v. Price, 368 S.C. 494 (2006) Law enforcement investigator was qualified as an expert on gangs and testified that the defendant was a leader in the Bloods. The Supreme Court held that his testimony about the defendant's position in the gang was improper because it was not based on any of the expert's personal knowledge, rather, it was based on inadmissible hearsay from informants. This testimony did not pass under SCRE 703 because the testimony was not based on the expert's opinion, but he merely testified to the information that was relayed to him by informants.

Legal Malpractice

- Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620 (2014) "With respect to a legal malpractice claim, a claimant must rely on expert testimony to 'establish both the standard of care and the deviation by the defendant from such standard.' In this regard, a claimant must establish, through expert testimony, the following:

  (1) the existence of an attorney-client relationship;

  (2) a breach of duty by the attorney;

  (3) damage to the client; and

  (4) proximate cause of the plaintiff's damages by the breach.

  Furthermore, a claimant is required to demonstrate that he or she most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice."

Polygraph

- State v. McHoney, 344 S.C. 85 (2001) At the time of defendant's trial in 1997, polygraphs were generally not admissible because they were not reliable – and this is still the generally held view today. Polygraph evidence must be analyzed under *Council*, SCRE 702, and 403. "We recently addressed the admissibility of polygraph examinations in *State v. Council*. We held that the results of polygraph examinations are generally inadmissible because the reliability of the test is questionable. Furthermore, the United States Supreme Court recently held that a *per se* rule against the admission of polygraph evidence does not violate a defendant's right to present relevant evidence in his defense as guaranteed by the United States Constitution. *United States v. Scheffer*. According to the United States Supreme Court, 'there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques.' However, in light of the adoption of the SCRE, we held in *Council* that the admissibility of polygraph evidence should be analyzed pursuant to Rules 702 and 402, SCRE and the factors outlined in *State v. Jones*." *See also* United States v. Scheffer, 523 U.S. 303 (1998).

Fingerprints

Summary: When a party seeks to admit fingerprint evidence, they must produce evidence of latent fingerprints, inked prints, and a link between the two. Latent prints are fingerprints collected from a scene typically by a crime scene technician. The technician will testify as to his or her involvement in the case and the process by which he or she obtained the print or prints. Inked prints are known fingerprints of an individual, which are usually obtained by law enforcement through a jail or prison booking. The South Carolina Supreme Court has recognized that the police fingerprint record or inked prints falls into an exception to the hearsay rule under the public records exception or the business record exception. However, in order to admit evidence that the prints from the scene match a known individual, the moving party must also authenticate that the inked prints are of the individual from whom they claim to be. In *State v. Anderson*, [20] the Court reiterated that there is no "authentication requirement that necessitates the testimony of the actual person who took the fingerprints on the master fingerprint card." Instead, the moving party is merely required to show "'evidence as to *when and by whom* the card was made and that the prints on the card were in fact those of this defendant.'" The court held that the State authenticated the known, inked prints through SCRE 901(b)(4), 901(b)(7), 901(b)(9), and even a generalized approach to Rule 901.

- State v. Rich, 293 S.C. 172 (1987) Fingerprint cards generally fall under the business records exception to hearsay or the public records exception. In this case, the SLED agent, who was qualified as an expert in the area of fingerprint comparisons, properly authenticated the latent prints taken from the crime scene. However, he did not properly authenticate the inked impression taken from the defendant.
- State v. Anderson, 386 S.C. 120 (2009) In a footnote, the Court stated that other federal appellate courts have held that fingerprints are not testimonial and thus do not violate *Crawford*.
- State v. Anderson, 386 S.C. 120 (2009) For authentication purposes, fingerprints are not a fungible item and they are not analogous to blood samples.
- State v. Anderson, 386 S.C. 120 (2009) The Supreme Court created a two-prong approach to admitting fingerprints. First, the court must determine if the fingerprint card is testimonial in nature, and if it is, does it fall under a hearsay exception. If the fingerprint card falls under a hearsay exception, then the next step is to authenticate. Fingerprint identification was authenticated under SCRE 901 "Distinctive Characteristics" "Public Records" and "Process or System." The court also found the fingerprints were authenticated under a general approach to SCRE 901. The Court also held that it is not required that the person who actually took the fingerprints [of the defendant] must testify – that would create an unrealistic and "insurmountable obstacle for the State."
- State v. Heyward, 852 S.E.2d 452 (S.C. Ct. App. 2020) The Court of Appeals found that fingerprints were properly authenticated under SCRE 901(b)(3) – comparison by trier of fact with specimens that have been authenticated.

[20] State v. Anderson, 386 S.C. 120, 127 (2009).

GPS Data

- State v. Brown, 424 S.C. 479 (2018) Even though GPS and electronic monitoring are extremely common and used every day, they still must be authenticated under SCRE 901. A witness who is testifying about evidence of GPS location data "should have experience with the electronic monitoring system used and provide testimony describing the monitoring system, the process of generating or obtaining the records, and how this process has produced accurate results for the particular device or data at issue." The witness does not have to be qualified as an expert.

Habit

- State v. Brown, 344 S.C. 70 (2001) There is tension between habit evidence and propensity evidence, which can make admissibility difficult. Habit can be described "as conduct that is situation-specific or specific, particularized conduct capable of almost identical repetition." Character can be described as "a generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness." A victim's testimony describing what happens when her husband becomes angry was improper propensity evidence and not specific habit evidence. However, testimony that defendant always had a gun on him was proper habit evidence because of its specificity and pattern.

Hearsay

Summary: Hearsay is an out of court statement that is offered into evidence to prove the truth of the matter asserted in the statement. When a statement is offered into evidence, there are (at least) three things to consider: is it hearsay under the definition (e.g., statement, for the truth, etc.); is it nonhearsay (e.g., admission by party opponent, prior inconsistent statement, etc.); or is it hearsay that falls under an exception. Many times, a statement might fall in multiple categories – that is why it is important to ask the question "Why?" to determine the purpose of the evidence. Also remember that if a statement is objected to as hearsay, then the proponent of the statement has the burden of showing it is not hearsay or falls within an exception.[21]

Is it hearsay?

The first step is to figure out if the statement is being used to prove the truth of the matter asserted. This isn't always the easiest thing to do. As Judge Hill of the South Carolina Court of Appeals has noted:

> To be sure, there are times when out-of-court statements may be admitted for something other than their truth. Just as surely, there are times when the familiar refrain of 'it's not being offered for the truth' is the courtroom equivalent of 'it's not about the money.'[22]

The purpose of the statement could be used to show how someone reacted. It could be used to show that someone is a liar and the statement is merely for impeachment purposes. Or for a myriad of reasons. In determining the truthfulness of the statement, a trial judge can attempt to ask "does it matter whether or not this statement is true?" This does not always answer the question, but it is a starting point.

Is it nonhearsay?

If the statement is hearsay, then is it nonhearsay. This means that the statement is an out of court statement used to prove the truth of the matter asserted, but the Rules of Evidence have declared certain statements as not hearsay. These statements include (with certain conditions to be met): prior inconsistent statements, prior consistent statements, prior identification, CSC statements of time and place, and party admissions.

Does it fall under an exception?

There are two separate sets of exceptions to hearsay. The first exceptions do not require the proponent of the statement to explain why the declarant is not at trial to testify. This is because these types of statements are inherently reliable. These exceptions include excited utterance, present sense impression, business records, and many more. The second set of exceptions requires the proponent of the statement to explain why the declarant is unavailable – which is specifically defined in the rule. There are four statements which fall under this exception: former testimony, dying declaration, statement against interest, and personal/family history.

Crawford Issues

Confrontation Clause and *Crawford* will supersede any hearsay exceptions or rules. (*See the chapter "Sixth Amendment: Crawford")*.

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[21] State v. Simmons, 423 S.C. 552 (2018).
[22] Sanders v. S.C. Dep't of Motor Vehicles, 426 S.C. 21 (Ct. App. 2019).

For the Truth

- State v. Tennant, 394 S.C. 5 (2011) A statement might not be hearsay because of why it is being used – but this also means that it might not be relevant.

- State v. White, 425 S.C. 304 (Ct. App. 2018) The defendant attempted to testify to the conversation he had with the victim prior to the assault taking place. In this conversation, the victim told the defendant that he had weapons stored inside his moped. The trial court held that this was inadmissible hearsay. The Court of Appeals disagreed and held that the statement was not introduced to prove the truth of the statements in the conversation, but rather to show that the defendant *believed* the victim was armed.

Personal Observation

- Sanders v. S.C. Dep't of Motor Vehicles, 431 S.C. 374 (2020) Personal observations are not hearsay. Personal observations can include that a statement was made, not necessarily that the statement was true.

Nonhearsay

Admission by Party Opponent

- Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317 (Ct. App. 2010) Admission by a party opponent is nonhearsay if it is both the party's own statement and it is used against that party. In this case, the trial court properly excluded a party's own statement because it was being used against another co-party. Because the statement was not being used against the party who made the statement, it did not fall under nonhearsay. *See also* Eberhardt v. Forrester, 241 S.C. 399 (1962).

- Player v. Thompson, 259 S.C. 600 (1972) If a statement is admissible against one party and it is inadmissible against other parties, then the trial judge should admit the statement and give a jury instruction advising the jury who it is admissible against. If the statement can be redacted and only admit the admissible portion, then the judge should do that. If not, then a jury instruction is appropriate. (*But also see the chapter "Sixth Amendment: Bruton"*).

Adoption of Statement

- State v. Knoten, 347 S.C. 296 (2001) The trial court properly allowed an investigator to testify about a mother's statement made in front of law enforcement where she was attempting to get her son to admit to a crime and to tell the truth. The defendant did not refute his mother's statement. Additionally, the defendant admitted he lied when he denied involvement in the crime. The Court held that the defendant adopted the statements by his mother because of his failure to refute the statement and his admission of lying about the denial.

Conspiracy

Summary: The coconspirator exception to hearsay requires a conspiracy and statement made in furtherance of that conspiracy. Mere conversations or statements among conspirators is not enough for the exception. Rather, the statements should "induce enlistment, further participation, prompt further action, allay fears, or keep coconspirators abreast of an ongoing conspiracy's activities."[23] There needs to be independent evidence of a conspiracy – not just from the statement alone.[24]

[23] State v. Sims, 387 S.C. 557 (2010).
[24] State v. Gilchrist, 342 S.C. 369 (2000).

CSC Cases

- Thompson v. State: 423 S.C. 235 (2018) In CSC cases, there is an exception to hearsay (nonhearsay) that allows for statements of time and place of the assault, but it is limited to those only.
- State v. Simmons, 423 S.C. 552 (2018) The exception to hearsay of medical diagnosis or treatment can apply to CSC cases, but the exception has several requirements that must be met.
- State v. Whitner, 399 S.C. 547 (2012) Usually a prior consistent statement is not allowed unless there is allegation of recent fabrication. In CSC cases, there is a specific statute (17-23-175)[25] allowing prior consistent statements of victims if certain requirements are met.
- State v. Jennings, 394 S.C. 473 (2011) Trial court improperly allowed in forensic interviewer's written reports that contained inadmissible hearsay. This hearsay bolstered the children's testimony improperly.

[25] **SECTION 17-23-175**. Admissibility of out-of-court statement of child under twelve; determination of trustworthiness; notice to adverse party.
(A) In a general sessions court proceeding or a delinquency proceeding in family court, an out-of-court statement of a child is admissible if:
(1) the statement was given in response to questioning conducted during an investigative interview of the child;
(2) an audio and visual recording of the statement is preserved on film, videotape, or other electronic means, except as provided in subsection (F);
(3) the child testifies at the proceeding and is subject to cross- examination on the elements of the offense and the making of the out-of-court statement; and
(4) the court finds, in a hearing conducted outside the presence of the jury, that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness.
(B) In determining whether a statement possesses particularized guarantees of trustworthiness, the court may consider, but is not limited to, the following factors:
(1) whether the statement was elicited by leading questions;
(2) whether the interviewer has been trained in conducting investigative interviews of children;
(3) whether the statement represents a detailed account of the alleged offense;
(4) whether the statement has internal coherence; and
(5) sworn testimony of any participant which may be determined as necessary by the court.
(C) For purposes of this section, a child is:
(1) a person who is under the age of twelve years at the time of the making of the statement or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of making the statement; and
(2) a person who is the alleged victim of, or witness to, a criminal act for which the defendant, upon conviction, would be required to register pursuant to the provisions of Article 7, Chapter 3, Title 23.
(D) For purposes of this section an investigative interview is the questioning of a child by a law enforcement officer, a Department of Social Services case worker, or other professional interviewing the child on behalf of one of these agencies, or in response to a suspected case of child abuse.
(E)(1) The contents of a statement offered pursuant to this section are subject to discovery pursuant to Rule 5 of the South Carolina Rules of Criminal Procedure.
(2) If the child is twelve years of age or older, an adverse party may challenge the finding that the child functions cognitively, adaptively, or developmentally under the age of twelve.
(F) Out-of-court statements made by a child in response to questioning during an investigative interview that is visually and auditorily recorded will always be given preference. If, however, an electronically unrecorded statement is made to a professional in his professional capacity by a child victim or witness regarding an act of sexual assault or physical abuse, the court may consider the statement in a hearing outside the presence of the jury to determine:
(1) the necessary visual and audio recording equipment was unavailable;
(2) the circumstances surrounding the making of the statement;
(3) the relationship of the professional and the child; and
(4) if the statement possesses particularized guarantees of trustworthiness.
After considering these factors and additional factors the court deems important, the court will make a determination as to whether the statement is admissible pursuant to the provisions of this section.

Identification

Summary: When a witness is used to identify the defendant, they will oftentimes identify them both in-court during the trial and they will have given an out-of-court identification prior to trial. The in-court identification is not hearsay because it is made during trial. The out-of-court identification (e.g., a photo lineup where the declarant picks out the defendant) is nonhearsay under SCRE 801(d)(1)(c). There are three requirements for this: the declarant has to testify at trial, they have to be subject to cross-examination, and the statement has to be of identification after perceiving the person. The Montana Commission on the Rules of Evidence has explained the purpose behind this rule:

> There is substantial authority for the admissibility of these statements, "often without recognition of the presence of a hearsay problem". McCormick, Handbook on the Law of Evidence 603 (2d ed. 1972). The reasons for admitting these types of statements are first, "the generally unsatisfactory and inconclusive nature of courtroom identification ... "; second, the higher reliability of prior identifications "made at an earlier time under less suggestive conditions" (Advisory Committee's Note, supra 56 F.R.D. at 296); and third, questions as to the reliability of identifications are really concerned with constitutional issues and not a hearsay problem. Id.[26]

An issue that can arise with this requirement is whether or not the identification was an actual identification. However, as the Montana Commission pointed out, this is usually more of a constitutional issue. Thus, any out-of-court identification will likely have to first pass constitutional muster (i.e., *Neil v. Biggers* hearing) and then will likely pass the hearsay requirement.

- State v. Heyward, 432 S.C. 296 (Ct. App. 2020) Under SCRE 801, prior identification by a witness is not hearsay under certain conditions. The declarant must testify at trial and be subject to cross-examination. The prior identification must actually be an identification too (i.e., reliable). How does a court determine if the witness actually identified the person? "Based on the foregoing, we find the trial court did not err in admitting evidence regarding Granddaughter's out-of-court identification. Even though there was arguably some uncertainty in her initial selection, the jury was able to observe Granddaughter and attach credibility to her testimony."

Prior Consistent Statement

Summary: A prior consistent statement requires that the declarant testify at trial and be subject to cross-examination; there must be an accusation, either implicitly or explicitly, by the opposing party of recent fabrication or improper motive; the statement must be consistent with the declarant's testimony; and the prior statement must have been made prior to the alleged fabrication or improper influence. This prior consistent statement would be used to rebut the charge of recent fabrication.

- State v. Ard, 332 S.C. 370 (1998) Prior consistent statements have several requirements that must be met under SCRE 801(d)(1)(B). "The modification is similar to the pre-rules case law in this state holding the prior consistent statement must have been made before the declarant's 'relation to the cause.'"
- State v. Winkler, 388 S.C. 574 (2010) State laid a proper foundation for entering a witness's prior consistent statement: "We hold that Jonathan's statement to Pitts was a prior consistent statement

[26] Mont. R. Evid. 801. *See also* Cynthia Ford, In-Court Identifications Not Hearsay, Are Admissible , 38 Mont. Law. 23 (2013), Available at: http://scholarship.law.umt.edu/faculty_barjournals/64.

admissible under Rule 801(d)(1)(B), SCRE. First, Jonathan testified at trial and was subject to cross-examination. Second, Appellant accused Jonathan of recently fabricating the statement. Appellant was accusing Jonathan of lying when Jonathan testified that he told Knoch it was his stepdad who shot his mother, not his dad. This alleged fabrication was necessarily recent because it happened during the trial. Third, Jonathan's statement to Pitts was consistent with his testimony at trial. Fourth, the statement to Pitts occurred before the alleged recent fabrication."

- State v. Foster, 354 S.C. 614 (2003) A prior consistent statement is substantive evidence. A prior consistent statement comes in under SCRE 801(d)(1)(B) or it does not come in at all. There must be an express or implied charge of recent fabrication or improper motive or influence.

- State v. Saltz, 346 S.C. 114 (2001) A prior consistent statement should only be admitted if there is a charge of recent fabrication or improper motive or influence. Impeaching a witness about a prior inconsistent statement is not the same as charging them with recent fabrication. The purpose of the rule is to rebut an allegation of fabrication not to bolster the veracity of their story. There is a difference between questioning the accuracy of a witness's memory and challenging their motives. This case also provides an example of what the court describes as "precisely" what the rule was designed to address.

Exceptions (803)

Business Records

See also the chapter "Sixth Amendment: Crawford/Testimonial - Affidavits/Business Records"

- State v. Brockmeyer, 406 S.C. 324 (2013) Testimony by custodians for purposes of business records does not implicate *Crawford* if the records and testimony are nontestimonial in nature.

- In re Care and Treatment of Harvey, 355 S.C. 53 (2003) Business records that contain subjective opinions and judgments about defendant's behavior should not be admitted pursuant to business records exception.

- Ex parte Department of Health and Environmental Control, 350 S.C. 243 (2002) Medical records may be admitted as business records. This case discusses admitting HIV records without a chain of custody.

- State v. Thompson, 420 S.C. 386 (Ct. App. 2017) A trespass letter to the defendant putting him notice that he did not have consent to enter the premises was an exception to hearsay under the business records exception.

- State v. Mealor, 425 S.C. 625 (2019) NPLEx records were properly admitted under the business records exception because the records were not made in preparation for litigation. The records were compiled in order to comply with state law, not to investigate a specific individual.

- State v. Mealor, 425 S.C. 625 (2019) A foundation is the process of introducing evidence of facts needed to make later evidence relevant, material, or competent. Laying a foundation consists of preliminary questions that establish that the evidence is admissible. For business records, laying a foundation requires the custodian to ensure that "such records are free from adulteration after the fact."

- State v. Sarvis, 317 S.C. 102 (1994) Trial judge properly excluded a one page document because the custodian of that document had no knowledge of the program contained in the document, and no further foundation was laid. The testimony by the custodian did not comply with The Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510.

Excited Utterance

- State v. Prather, 429 S.C. 583 (2020) Excited utterance exception to hearsay falls under SCRE 803(2). "For a statement to be an excited utterance: '(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.'" See *also* State v. Marin, 415 S.C. 475 (2016).

- State v. Hill, 331 S.C. 94 (1998) Excited utterance exception to hearsay require spontaneity and personal observation, among other requirements. "The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, thus reducing the likelihood of fabrication." *See also* State v. McHoney, 344 S.C. 85 (2001).

- State v. Kromah, 401 S.C. 340 (2013) Time is just one factor to consider for excited utterance exception. Other factors to consider include declarant's demeanor and age, severity of the startling event, and the totality of the circumstances. Stress of an event can be different for a child compared to an adult. *See also* State v. Stahlnecker, 386 S.C. 609 (2010) (Passage of time is a factor to be considered, but it is not dispositive).

- State v. Ladner, 373 S.C. 103 (2007) Even though a child is not competent to testify at trial, their spontaneous statement may still be admissible as part of the excited utterance exception or *res gestae*. A competent witness may testify to a noncompetent's witness testimony through the excited utterance exception.

Medical Diagnosis

- State v. Simmons, 423 S.C. 552 (2018) The exception to hearsay of medical diagnosis or treatment can apply to CSC cases, but the exception has several requirements that must be met and are found under SCRE 803(4). "This hearsay exception requires that the statements be provided for the purpose of and be reasonably pertinent to medical diagnosis or treatment. Rule 803(4), SCRE, may well apply in a CSC case, but there must be a nexus between the information provided by the patient and the diagnosis or treatment of the patient. For example, after recent trauma, these type of statements can provide the doctor with specific areas to focus on or specific conditions to search for when performing the diagnostic physical exam and are reasonably pertinent to diagnosis or treatment. In this regard, 'a statement that the victim had been raped or that the assailant had hurt the victim in a particular area would be pertinent to the diagnosis and treatment of the victim.' However, '[a] doctor's testimony as to history should include only those facts related to him by the victim upon which he relied in reaching his medical conclusions. The doctor's testimony should never be used as a tool to prove facts properly proved by other witnesses.' *see also* Rule 803(4), SCRE, Note (stating a 'physician's testimony should include only those statements related to him by the patient upon which the physician relied in reaching medical conclusions'"

Present Sense Impression

- State v. Prather, 429 S.C. 583 (2020) Present sense impression exception to hearsay falls under SCRE 803(1). "To qualify as a present sense impression: '(1) the statement must describe or explain an event or condition; (2) the statement must be contemporaneous with the event; and (3) the declarant must have personally perceived the event.'"

- State v. Hendricks, 408 S.C. 525 (Ct. App. 2014) Declarant called 911 and repeated "her daughter's statement, specifically that her daughter's 'boyfriend just broke into her house, and beat her up and raped her.... [H]e sodomized her.... And his name is Matthew Hendricks.'" The Court of Appeals held that this

statement did not qualify under present sense impression because the "'event' [declarant] described in her statement was the rape, which [declarant] did not perceive."

Public Records

- State v. Morris, 376 S.C. 189 (2008) Public records under the hearsay exception should not contain opinions.
- State v. Cutro, 365 S.C. 366 (2005) Autopsy reports are not hearsay under SCRE 803(9), vital statistics exception.

Recorded Recollection

- State v. Lindsey, 394 S.C. 354 (Ct. App. 2011) Trial court improperly admitted notes an investigator took because the investigator had no problem recalling the event and the State did not lay the proper foundation. (*See also the chapter "Writing Used to Refresh Memory")*.

State of Mind

- State v. Weston, 367 S.C. 279 (2006) Under the state of mind exception to hearsay, the declarant can testify to their present state of mind at the time, but not the reason for the state of mind. The state of mind testimony was proper in this case because the declarant did not give reason for her state of mind.
- State v. Griffin, 339 S.C. 74 (2000) A declarant's plan to meet someone at a time or place may be admissible as a state of mind exception to hearsay.
- Turner v. Thomas, 431 S.C. 527 (Ct. App. 2020) Facebook post was properly admitted to show the mother's present state of mind at the time the post was made.

Treatise

- Mizell v. Glover, 351 S.C. 392 (2002) The treatise exception to hearsay applies to both treatises written by the witness and those written by others.

Exceptions (804)

Unavailable

- State v. Kinloch, 338 S.C. 385 (2000) There is possibly a different burden for demonstrating unavailability depending if the witness is for the defense or for the State. But the defense still has to make some showing of unavailability. "Although a lesser showing may be adequate as to defense witnesses in criminal cases than is necessary for the government's showing, **some effort** at locating the witness is necessary… (where nothing in record demonstrated defendant had used substantial diligence to obtain presence of witness, he had failed to demonstrate unavailability and court properly refused to permit introduction of declarant's hearsay testimony)."
- Dodd v. Berlinsky, 344 S.C. 172 (Ct. App. 2001) The proponent of the statement has the burden to prove the declarant is unavailable. Just because the declarant is absent, does not automatically mean they are unavailable. Attorney did not try and subpoena witness, so affidavit from "unavailable" witness was improper.

- State v. McDonald, 343 S.C. 319 (2000) A witness who invokes his Fifth Amendment right against self-incrimination is unavailable for hearsay purposes. *But see* State v. Terry, 339 S.C. 352 (2000) (discussing defendant who invoked right and also wanted to use statement against interest exception).

- State v. Terry, 339 S.C. 352 (2000) Defendant wanted to introduce a statement against interest, because he was unavailable to testify after invoking his privilege against self-incrimination. The court held that he could not use the privilege as both a shield and sword and found that he was not unavailable for the purposes of the hearsay exception.

- State v. Henley, 428 S.C. 649 (Ct. App. 2019) Defendant was tried twice for burglary. In the first trial, witness A testified. At the subsequent trial, the defense attempted to locate and procure the witness, however they were unable to. The defense sought to introduce witness A's former testimony. The State did not object, but they also pointed out that right before trial they were able to make contact with witness A and the witness claimed that they were never served a subpoena. Before the court allowed the former testimony to be read in, the State objected to all of it coming in. Rather, they just wanted portions of it to be read. The defense objected to the limited admission of the testimony. But the trial court let in only portions. The Court of Appeals didn't directly address the issue of limiting former testimony under 804(b), but rather held that the testimony should not have come in at all under 804(a) because the declarant wasn't "unavailable" – the defense had not satisfied the "process or other means."

Dying Declaration

- State v. McHoney, 344 S.C. 85 (2001) A witness does not have to directly express their knowledge of imminent death. It can be inferred from facts and circumstances surrounding the statement. Even if a person is assured that they will not die, this does not mean the person is not aware of imminent death. Circumstances that determine declarant's state of mind include repeated questions about whether they are going to survive, an answer to the contrary, the nature of the wound, and the person's critical condition. It is immaterial how long the declarant lives after making the statement. The focus should be on the state of mind when the statement was made. "In the instant matter, the fact the victim died two weeks after her injury does not indicate the victim did not believe her death was imminent, where she shook her head when told she would be fine, and where she never regained consciousness after she made the declaration."

- State v. Davis, 138 S.C. 532 (1927) "In order that the dying declarations of a deceased person may be admissible, under the dying declarations rule, the declarant must, at the time of making them, have been in extremis, and fully conscious of his impending dissolution. Both of these conditions must exist. Thus it has been said, that it is not alone sufficient that the declarant believe that he is about to die; to be admissible under the dying declarations rule, his dying declarations must have been made while he was in extremis. And even though the declarant was in extremis, his declarations are not admissible, unless they were made by him while he was under a sense of impending death. To render his declarations admissible, the declarant must not only believe that he is about to die, but must be without hope or expectation of recovery. According to the clear preponderance of authority, if the deceased had the slightest hope of recovery, when the declarations were made, they are inadmissible."

- State v. Johnson, 26 S.C. 152 (1887) "The rules in regard to such testimony are well settled: (1) That death must be imminent at the time the declarations in question are made; (2) that the declarant must be so fully aware of this as to be without any hope of life, and (3) that the 'subject of the charge' must be the death of the declarant, and the circumstances of the death must be the subject of the declarations"

Former Testimony

- State v. Nance, 393 S.C. 289 (2011) The Confrontation Clause gives the defendant the right to have an *opportunity* to cross examine a witness. Confrontation makes sure that the witness testifies under oath, is subject to cross-examination, and lets the jury observe the witness's demeanor. Just because defense counsel chooses not to cross-examine a witness, does not necessarily mean they didn't have an opportunity. Under the former testimony exception, the opposing party need only an opportunity and similar motive on cross.

- State v. Henley, 428 S.C. 649 (Ct. App. 2019) When former testimony is allowed in, how much is allowed and does a party get to choose which portions to allow in? The Court of Appeals didn't directly address this issue, but they did draw concerns when the State was allowed to select which portions of former testimony to allow in and excluding the portions the defense sought to introduce. If former testimony is being introduced under 804(a) (declarant unavailable), then trial court will have to first determine if it complies with the hearsay exception. Then likely the trial court would need to make an SCRE 403 ruling for all portions. If any portions are excluded, then the rule of completeness SCRE 106 could also come into play.

Statement Against Interest

Summary: A statement against interest only applies if the declarant is unavailable. A statement that is against the declarant's interest and at the same time exculpates the defendant, also requires corroboration. If a statement against interest is being used with codefendants in a joint trial, then the statement should be limited to the parts that inculpate the defendant who made the statement. (*See also the chapter "Sixth Amendment: Bruton"*).

- State v. Anders, 331 S.C. 474 (1998) Statements against interest must follow the SCRE 804 requirements. These statements are admissible in both civil and criminal trials. The exception doesn't apply if the declarant is available.

- State v. Cheeseboro, 346 S.C. 526 (2001) Lyrics written by the defendant were too general to be considered statements against interest.

- State v. Wannamaker, 346 S.C. 495 (2001) Defendant seeking to enter a statement pursuant to the exception of statement against interest, has the "formidable burden" of showing the corroborating circumstances of trustworthiness. The corroboration goes to the making of the statement, not the truth. *See also* State v. Cope, 405 S.C. 317 (2013) (Statements against interest that are used to exculpate the defendant need corroborating evidence to show its trustworthiness).

- State v. McDonald, 343 S.C. 319 (2001) The Court clarified that a statement against interest that exculpates the accused requires corroboration based on the totality of the circumstances. And that the corroboration requirement goes to the making of the statement not to the truth of the statement.

- State v. Terry, 339 S.C. 352 (2000) Defendant wanted to introduce a statement against interest, because he was unavailable to testify after invoking his privilege against self-incrimination. The court held that he could not use the privilege as both a shield and sword and found that he was not unavailable for the purposes of the hearsay exception.

- State v. Fuller, 337 S.C. 236 (1999) A statement against interest from a codefendant should be limited to the parts of the statement that are self-inculpatory and should keep out collateral non-self-inculpatory statements that inculpate the defendant. This could be a Confrontation Clause violation because the defendant cannot cross-examine the declarant.

Miscellaneous

911 Recording

Summary: A 911 recording presents multiple evidentiary issues that must be crossed. First, the recording has to be authenticated. Under SCRE 901(b), the rules provide a non-exhaustive list of methods to authenticate a 911 call. These examples include voice identification and telephone conversations. Because this is not a set list, the court may look to other circumstantial evidence to determine whether or not the 911 call is what it claims to be. A 911 call may also be authenticated under S.C. Code Ann. § 19-5-520.[27] This code section mimics Federal Rule of Evidence 902(11) which holds that if a record meets the exception of the business record exception to hearsay (SCRE 803(6)), then a qualified custodian of that record may provide an affidavit stating that it meets the business record requirements. The proponent of this has to give proper notice to the opposing party. An objection could be raised about having a copy of the 911 recording, thus invoking the best evidence rule. But this will likely not be an issue even if it is a duplicate if the copy is properly authenticated and thus permissible under SCRE 1003. (*See the chapter "Best Evidence Rule")*.

After the 911 call has been authenticated, the court will need to determine if the statements on the call are testimonial. If they are testimonial, then the declarant would have to testify or opposing counsel would need an opportunity to cross-examine the declarant. (*See the chapter "Sixth Amendment: Crawford")*.

If the statements are not testimonial, then they would still need to either be considered nonhearsay (not proved for the truth, admission by part opponent, etc.) or that they fit into an exception to hearsay.

- State v. Thompson, 420 S.C. 386 (Ct. App. 2017) A 911 recording may be authenticated with voice identification, the caller's self-identification, the phone number, and other circumstances surrounding the call. The trial court properly admitted the 911 call because the 911 operator testified to the accurate representation of the call plus the statements made by the declarant were confirmed by police when they arrived on the scene. Other courts have held that if circumstances around the call indicate the information given by the caller is accurate, then it is not necessary to have a witness identify the caller. This 911 call was nontestimonial and thus did not violate *Crawford*. The 911 caller (the declarant) did not testify at trial, however, the court found that her statements "were made to obtain police assistance, and the questions during the call were to elicit more information to enable police to assist her." Even though the declarant was asked questions on the scene after the defendant had already left, these questions were necessary to assist the officers locate the defendant and if declarant needed medical assistance.

[27] **SECTION 19-5-520**. Certified business records.
In addition to those matters provided by Rule 902, South Carolina Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
(A) The original or a copy of a domestic record that meets the requirements of Rule 803(6), South Carolina Rules of Evidence, as shown by a certification of the custodian or another qualified person that complies with a state statute or a court rule. Before the trial or hearing, the proponent shall give an adverse party reasonable written notice of the intent to offer the record and shall make the record and certification available for inspection so that the party has a fair opportunity to challenge the record.
(B) In a civil case, the original or a copy of a foreign record that is certified by the custodian or another qualified person and otherwise meets the requirements of subsection (A), modified as follows: the certification, rather than complying with a state statute or court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the jurisdiction where the certification is signed. The proponent also shall meet the notice requirements of subsection (A).

Catchall Exception

Summary: South Carolina does not have a catchall exception to the hearsay rule.[28] The Federal Rules of Evidence does contain a catchall.[29]

Hearsay within Hearsay

- State v. Prather, 429 S.C. 583 (2020) "Hearsay included within hearsay is not necessarily inadmissible; such may be admitted if each part of the combined statements satisfies an exception to the hearsay rule."

Impeaching Declarant

Summary: A hearsay statement, by definition, means that the person who said the statement is not at trial to testify. However, even though the declarant is not present, they can still be impeached just as if they were present and a witness. Through SCRE 806, they can be impeached under SCRE 608, 609, and 613. Keep in mind, the point of this rule is to allow a party to attack a witness's credibility, not to get substantive evidence in.

Also keep in mind, if a party calls a witness and that witness testifies to a statement made by the party opponent, then can the same party who called that witness go ahead and impeach the party opponent? The case law isn't clear, but it is an issue to look out for. If a party calls a witness and that witness gives a hearsay statement from that same party (would need to be hearsay exception, because it wouldn't be party opponent statement), then the opposing party would be able to impeach the opposing party at this point, even though they have not actually taken the witness stand.

- Richardson v. Donald Hawkins Const., Inc., 381 S.C. 347 (2009) "The Court of Appeals based its reversal on Rule 806, SCRE.[4] Because Taylor's first two statements were admitted under hearsay rules 801 and 804, the Court of Appeals concluded that "[p]ursuant to Rule 806 and basic concepts of fairness," the defense should have been allowed to impeach Taylor with evidence that was inconsistent with Statements One and Two."
- United States v. Brainard, 690 F.2d 1117 (4th Cir. 1982) "The basis for this rule is obvious. As the Federal Rules of Evidence Advisory Committee said: 'The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609.' By introducing the hearsay statements made by Moss, the prosecution put Moss' credibility in issue. Prior inconsistent statements are a well recognized means of impeaching a witness. FRE Rule 613. The secretary's testimony, which would have included conversations showing Moss had stated that Brainard and Bittick did not know the true nature of TVM, would have been such an inconsistent statement. As such, it would have been admissible under Rule 806, and failure to admit it was reversible error."
- United States v. Sadler, 48 F.3d 1218 (4th Cir. 1995) "But while Fed.R.Evid. 806 provides that the credibility of the declarant of a hearsay statement may be attacked by any evidence which would be admissible for that purpose if the declarant had testified as a witness, *e.g.* by evidence of bias, interest, prejudice, prior conviction of a crime, or inconsistent statements, the rule does not apply to statements which are not hearsay."
- United States v. Ging-Hwang Tsoa, 592 F. App'x 153 (4th Cir. 2014) "Rule 806 applies to hearsay statements and certain statements offered against an opposing party that have 'been admitted in evidence.' Fed.R.Evid. 806. By its terms, Rule 806 was not the mechanism for admission of Tsoa's written out-of-

[28] State v. Fuller, 337 S.C. 236 (1999).
[29] FRE 807.

court statements contained in the emails. Further, Tsoa's counsel offered the emails as probative of Tsoa's knowledge and abilities, not as bearing on credibility."

- United States v. Shay, 57 F.3d 126 (1st Cir. 1995) "Although the rule does not expressly include attempts to attack a defendant's out-of-court statements admitted pursuant to Fed.R.Evid. 801(d)(2)(A), the Senate Judiciary Committee's report concerning the proposed rules states: The committee considered it unnecessary to include statements contained in Rule 801(d)(2)(A) and (B)-the statement by the party-opponent himself or the statement of which he has manifested his adoption-because the credibility of the party-opponent is always subject to an attack on his credibility."

- United States v. Lawson, 608 F.2d 1129 (6th Cir. 1979) "The defendant Charles William Lawson appeals from his jury conviction for uttering and possessing counterfeit money. He contends that the district court committed reversible error in permitting the jury to hear evidence of two previous convictions. Though Lawson did not testify, his counsel cross-examined a government witness who was a secret service agent to bring out the fact that Lawson had consistently denied any involvement, and introduced a written statement in which Lawson denied all complicity in the counterfeit activities. By putting these hearsay statements before the jury his counsel made Lawson's credibility an issue in the case the same as if Lawson had made the statements from the witness stand…Thus, evidence which would have been admissible to impeach Lawson if he had testified was admissible for this purpose under the circumstances of this case. Prior felony convictions are admissible for this purpose under Rule 609(a), Fed.R.Evid. The jury was properly instructed that the evidence of previous convictions was to be considered only on the issue of credibility."

Investigative Information/Passkey

- State v. King, 422 S.C. 47 (2017) Prosecutors are cautioned to not use investigative information as a way to avoid hearsay. "Passkey" information is when an officer states that he spoke with a witness and after speaking with that witness, they learned some information which they testify to. This is essentially going around hearsay and introducing inadmissible hearsay without specifically stating what the witness told them. Trial courts should listen to or examine any evidence before deciding whether or not to allow it in so that they may conduct a proper hearing. *See also* State v. Davis, 420 S.C. 50 (Ct. App. 2017).

- State v. Kromah, 401 S.C. 340 (2013) An officer testifying about the actions he took in response to what a non-testifying child told him, were not improper as "indirect" hearsay. The officer did not relay any of the specific details of what the child told him, and the action the officer took was based on a multitude of information from other sources.

Police Interviews

- State v. Brewer, 411 S.C. 401 (2015) Statements by law enforcement to a defendant while conducting an interview are not always nonhearsay. A judge needs to determine the statements made by law enforcement and their purpose before allowing them into evidence.

- State v. Washington, 431 S.C. 619 (Ct. App. 2020) Police statements during interview with defendant were clearly hearsay and should not have been admitted to jury. The statements fit directly into what Brewer described as improper hearsay.

Impeachment

Summary: A witness always puts their credibility at issue when they take the stand. There are many methods to challenge a witness's credibility,[30] which include:

- Attacking the witness's character for truthfulness by opinion or reputation or otherwise (SCRE 608(a)) (*See also the chapter "404(a) Character Evidence")*
- Inquiries into specific instances of conduct that are probative of untruthfulness (SCRE 608(b))
- Evidence of bias (SCRE 608(c))
- Prior convictions of certain crimes (SCRE 609)
- Prior inconsistent statement (SCRE 613)
- Cross-examination in general

If a witness has their credibility impeached, then it is possible that they might be able to rehabilitate their credibility. Rehabilitation and rebuttal evidence will be in the discretion of the trial judge. (*See the chapter "404(a) Character Evidence" and also the chapter "Hearsay: Nonhearsay - Prior Consistent Statement").*

608(a) (Character for Truthfulness)

Summary: If the character evidence is about a witness, then look to SCRE 608(a). This rule applies to both ordinary witnesses and the defendant as a witness. In an article in the *S.C. Lawyer,*[31] Judge Joseph Anderson has given a detailed and practical explanation of using 608(a):

> Some trials present a prototypical swearing contest: In a slip and fall case, the plaintiff claims no warning signs were in place while the floor was being mopped; the store employee doing the mopping swears there were three. The entire case turns on whom the jury chooses to believe.
>
> There is a readily available aid at your disposal, and I have never seen it used in 33 years on the bench. FRE Rule 608(a) allows you to call another witness, who knows your slip and fall plaintiff well and can offer the jury an opinion on whether your plaintiff is a truthful person.10 Or, your second witness can relate the plaintiff's reputation in the community for truthfulness. There are two caveats: (1) you can only offer this evidence to "rehabilitate" a witness whose truthfulness is challenged. In most cases, sharp cross examination, or contradictory testimony by another witness is all you need to say your plaintiff's credibility has been put in issue. (2) Be careful. If your plaintiff has any skeletons in the closet, your opponent can ask about them on cross, assuming the cross examination has a good faith belief that the skeletons exist.
>
> In my view, such character witnesses could often be the "tie breaker" the jury needs to decide the swearing contest. And, generally speaking, an acquaintance who will give favorable character testimony about your critical witness should not be hard to find.
>
> Rule 608 also allows the converse. You may call a witness to give opinion or witness testimony that a witness from the other side is not a believable witness.

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[30] But see, Vanover v. State, No. 2016-001917, 2021 WL 377801 (S.C. Ct. App. Feb. 3, 2021) A witness may be impeached through SCRE 404(b), 608, 609, 613, and other methods (i.e., cross-examination).

[31] Anderson, Jr., Joseph F., "Calling Albert Einstein to the Stand." *South Carolina Lawyer* July 2020, pp. 48-53, https://mydigitalpublication.com/publication/?m=18928&i=665641&p=50

> I suspect that one reason Rule 608(a) is not used is that lawyers confuse it with the other rule on character evidence which goes the other way. Rule 404(a) strictly regulates the use of character evidence to show that, on a particular occasion, a person acted in accordance with that character.11 But Rule 404(a)(2) carves out an exception to the character of a witness as it relates to truthfulness and directs the reader to Rules 607–609.
>
> So, if you need a simple mnemonic device to master the differences, just say, "The FRE do not permit you to say 'once a bad driver, always a bad driver' but they do permit you to say 'once a liar, always a liar.'"

Also keep in mind that under SCRE 608(a), the rule allows for truthful character evidence to be admissible if the witness's character for truthfulness has been attacked by opinion, reputation, or **otherwise**. In State v. Chisolm,[32] the defense called an attorney as a witness who gave an alibi for the defendant. On cross-examination, the State questioned the attorney about his public reprimand from the South Carolina Supreme Court. The State had the attorney read rule that he violated out loud to the jury. After this, the defense attempted to call a separate witness who would testify to the attorney's reputation for honesty, but the trial court denied it. The Court of Appeals held that this was error because the attorney's credibility for truthfulness had been attacked under SCRE 608(a)(2), and the defense should have been allowed to call a character witness to rehabilitate the attorney under SCRE 608(a)(1). *(See also chapter "Impeachment: Miscellaneous - Defendant Takes the Stand")*.

608(b) (Specific Instances of Conduct)

Summary: When cross-examining a witness, counsel may ask that witness about specific instances of conduct that relate to their character for truthfulness under SCRE 608(b). However, counsel is stuck with whichever answer they provide – no extrinsic evidence or fishing expeditions.

- State v. Fossick, 333 S.C. 66 (1998) Extrinsic evidence of specific instances of conduct for impeachment are not allowed. "Although Rule 608 prohibits extrinsic evidence, it applies only to evidence of conduct and not evidence of a statement. United States v. Higa, 55 F.3d 448 (9th Cir.1995)."

- State v. Kelsey, 331 S.C. 50 (1998) Witnesses may be impeached about specific prior acts, but only if they relate to character of truthfulness or untruthfulness. These prior acts may be inquired into, but extrinsic evidence is not permitted – no fishing expeditions.

- Mizell v. Glover, 351 S.C. 392 (2002) Extrinsic evidence can be oral or written. Whether evidence is actually introduced or not, does not determine if it is extrinsic. SCRE 608(b) allows specific instances of conduct to be inquired into, but it does not allow them to be proved by extrinsic evidence. In this case, a question posed to the witness by counsel actually introduced extrinsic evidence because of its framing. The question allowed the jury to know that there had been a separate civil suit.

- State v. Sierra, 337 S.C. 368 (Ct. App. 1999) There is an inherent danger from an attorney "laying a foundation" of a prior inconsistent statement because that foundation is essentially extrinsic evidence of a statement that is now in front of the jury. An issue may arise if the witness denies making that statement and the attorney never introduces actual extrinsic evidence. This could potentially make the attorney a witness instead of an advocate. "Though it is proper to elicit testimony by leading questions on cross-examination, it is generally recognized as improper for the cross-examiner to testify by making statements of fact."

[32] State v. Chisolm, No. 2004-UP-499, 2004 WL 6334913 (S.C. Ct. App. Oct. 5, 2004).

- State v. Quattlebaum, 338 S.C. 441 (2000) A judge may limit cross-examination and the asking of specific instances of conduct if the conduct is not relevant.

- State v. Grace, 350 S.C. 19 (Ct. App. 2002) Evidence of specific instances of conduct must relate to credibility. Generally, acts of violence do not relate to credibility. The witness's prior domestic violence charge (which was dismissed) did not relate to credibility, thus the judge properly excluded the questioning of the charge.

608(c) (Evidence of Bias)

- State v. Starnes, 340 S.C. 312 (2000) Evidence of a romantic relationship can be a source of potential bias.

- State v. Quattlebaum, 338 S.C. 441 (2000) SCRE 608(c) allows impeachment of a witness with "evidence" of bias, prejudice, or motive to misrepresent.

- State v. Burgess, 408 S.C. 421 (2014) A witness may be impeached by evidence that they have bias, prejudice, or other motive to misrepresent. A judge may limit this impeachment on cross-examination. Law enforcement officer may or may not be impeached based on a negative personnel file depending on the circumstances.

Pending Charges/Plea Bargains/Dismissed

- State v. Gracely, 399 S.C. 363 (2012) A defendant has the right to impeach a witness about a plea deal that allowed the witness to avoid a mandatory minimum sentence.

- State v. Sims, 348 S.C. 16 (2002) Impeachment of pending charges fell under SCRE 608(c) because the pending charges against the witness could show bias of cooperation with the solicitor's office. *See also* State v. Smalls, 422 S.C. 174 (2018) (Witnesses can be impeached about pending charges).

- Felder v. State, 427 S.C. 518 (2019) The mention of the defendant's pending charges should have been analyzed under SCRE 404(b) as well as 403.

- State v. Mizzell, 349 S.C. 326 (2002) A judge may usually prevent the introduction of evidence which would allow the jury to know the possible sentence the defendant faces. However, a codefendant may be impeached by his pending charges and the sentence they carry even if those charges are the same as the defendant. It doesn't matter if the witness has a plea bargain or not with the pending charges.

- State v. Brown, 303 S.C. 169 (1991) A witness may be impeached about his pending charges and the sentence it carries even if the defendant is facing the same charges, and thus the jury could infer what the defendant is facing.

- State v. Jones, 343 S.C. 562 (2001) Defense should have been allowed to cross-examine State's witness about witness's prior plea bargains and dismissed charges that were handled by the same solicitor's office. These plea bargains should have been allowed under SCRE 608(c). "This subsection of Rule 608 preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'"

- State v. Williams, (Ct. App. 2021) A witness's potential legal exposure on pending charges should have been admissible on cross-examination to show his bias.

- State v. Taylor, 404 S.C. 506 (2013) Trial court properly excluded impeachment of witness who had charges dismissed by the same solicitor who he was testifying for. The judge found that these dismissed charged were not connected to the current case, and they were dismissed because the arresting officer had been arrested.

Prior Conviction (SCRE 608(c))

Summary: Prior convictions for impeachment purposes are handled under SCRE 609. However, if a prior conviction is not admissible under SCRE 609, then it could possibly be admissible under SCRE 608(c) in order to show bias.

- State v. Fuller, 425 S.C. 468 (Ct. App. 2019) In this case, the defendant was riding with the victim in the car, when he pulled a gun on her. He attempted to sexually assault her but she crashed the car in an effort to get away from him. The defense argued that the victim fabricated this story because she had been drinking and wanted to avoid a DUI. Furthermore, the victim had two previous convictions for DUI. The defense wanted to cross-examine the victim about her previous convictions. They argued that under 608(c) this evidence would show that she had a motive to misrepresent, most likely because of the potential DUI enhancement penalty she could face. The trial court denied this request and did not allow the defense to cross-examine her about the prior convictions. (The prior convictions would not come in under SCRE 609 because DUI carries less than a year of imprisonment and it is not a crime of dishonesty). The Court of Appeals agreed with the trial judge. The court then went through the testimony of the responding officer, who testified that he didn't believe the victim was under the influence, if he did think that, then he would have proceeded with an investigation, and there was no evidence of any pending DUI charges against the victim. Based on these facts, the court held that the prior DUI conviction did not tend to show any bias. While this case excluded the prior convictions, it goes to show that it could be possible to have prior convictions admitted either through the standard SCRE 609 method or the additional method found in SCRE 608(c).
- Hunter v. Staples, 335 S.C. 93 (Ct. App. 1999) The Court of Appeals held that it would have been improper for a party to impeach a witness of their prior conviction under 608(b). They stated that the use of a prior conviction falls exclusively under SCRE 609 and it is specifically excluded from SCRE 608(b). In this case, because the party did not specifically state which part of SCRE 608 they were using, the Court of Appeals assumed they were attempting to use SCRE 608(b)(specific instances of conduct). The court did not address the application of prior convictions through 608(c).

609 (Prior Conviction)

Summary: Impeachment by prior convictions carries multiple burdens and standards based on who is testifying, what the conviction was for, and when it happened. In State v. Robinson,[33] the South Carolina Supreme Court explained the different scenarios for introduction of prior convictions:

1. A witness is testifying and they have prior conviction for crime that carries more than 1 year but it is not crime of dishonesty. (E.g., armed robbery) **609(a)(1)**
2. A defendant is testifying and they have a prior conviction for crime that carries more than 1 year but it is not crime of dishonesty. (E.g., armed robbery) **609(a)(1)**
3. A witness or defendant is testifying and they have a prior conviction for a crime of dishonesty (E.g., perjury) **609(a)(2)**

[33] State v. Robinson, 426 S.C. 579 (2019).

4. A witness or defendant is testifying and they have a prior conviction of a crime of dishonesty or a crime that carries more than 1 year and it is 10 years old. **(609)(b)**

The Court then explains what the standard is for letting in the prior conviction and who carries the burden for that standard.

1. A witness is testifying and they have prior conviction for crime that carries more than 1 year but it is not crime of dishonesty. (E.g., armed robbery) **609(a)(1)**
    a. Standard: Rule 403
    b. Burden: The opponent of the evidence
2. A defendant is testifying and they have a prior conviction for crime that carries more than 1 year but it is not crime of dishonesty. (E.g., armed robbery) **609(a)(1)**
    a. Standard: Probative outweighs prejudicial
    b. Burden: Proponent of the evidence (i.e., the State)
3. A witness or defendant is testifying and they have a prior conviction for a crime of dishonesty (E.g., perjury) **609(a)(2)**
    a. No standard, no burden. This conviction comes in automatically (I would assume the proponent of the conviction would have to prove that it was an actual conviction if that was in dispute)
4. A witness or defendant is testifying and they have a prior conviction of a crime of dishonesty or a crime that carries more than 1 year and it is 10 years old **(609)(b)**
    a. Standard: Probative substantially outweighs prejudicial
    b. Burden: Proponent

Rule 403 and how it is mixed into Rule 609

One thing that SCRE 609 really does differently, is how it uses the rule "probative v. prejudicial." The test for probative value versus prejudicial effect is found under SCRE 403 and states: "probative value is **substantially outweighed** by … unfair prejudice." This means that relevant evidence might be exactly 50/50 probative and prejudicial, but it can still come in. It also seems to mean that the evidence might be somewhat more unfair than probative, and it still comes in. However, if the evidence is substantially more unfair than probative, it does not come in.

Different standards for each scenario

Under Scenario 1, the standard is simply SCRE 403, which means the conviction comes in unless it is **substantially** more prejudicial than probative.

Scenario 2, the standard is "that the probative value of admitting this evidence outweighs its prejudicial effect." This is a 50/50 scale and I believe it is analogous to a civil burden of proof: preponderance of the evidence, greater weight, etc. The burden seems to be on the probativeness of the evidence and if it is equal to or less than the prejudicial effect, then it does not come in. It must outweigh (even by a grain) the unfairness, then it may be allowed in.

Scenario 3, is simpler. If the conviction is a crime of dishonesty, then it automatically comes in. However, the issues that arise with this part of the rule are whether or not the conviction is a crime of dishonesty (Armed robbery was thought to be a crime of dishonesty, but it is not. *See* State v. Broadnax, 414 S.C. 468).

Scenario 4 - this involves old convictions and appears to have the highest standard: "the probative value of the conviction supported by specific facts and circumstances **substantially outweighs** its prejudicial effect." This

seems to be the flip of SCRE 403. Under 403, the probative value must be **outweighed** – while under this rule, the probative value must substantially **outweigh**.

On top of the standards and burden for each scenario, a trial judge must also weigh the *Colf*[34] factors for each scenario (not just old convictions). These factors should be considered by the trial judge when determining whether to let in a prior conviction (while at the same time using the standard and burden for each scenario):

1) The impeachment value of the prior crime

2) The point in time of the conviction and the witness's subsequent history

3) The similarity between the past crime and the charged crime

4) The importance of the defendant's testimony

5) The centrality of the credibility issue

To sum up, there are 4 scenarios where a prior conviction might come in:

	Who's testifying?	**Conviction type**	**Standard**	**Burden**	***Colf* Factors**
Scenario 1	Witness	Crime that carries more than year	403	Opponent	Yes
Scenario 2	Defendant	Crime that carries more than year	Probative must outweigh prejudicial (preponderance of evidence)	Proponent (The State)	Yes
Scenario 3	Anyone	Crime of dishonesty	N/A	N/A	N/A
Scenario 4	Anyone	Either (over 10 years)	Probative must substantially outweigh prejudicial	Proponent	Yes

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- State v. Robinson, 426 S.C. 579 (2019) If a defendant or other witness has a prior conviction, then there is a very specific criteria that must be met in order to introduce those prior convictions as impeachment. *See also* Earley v. State, 418 S.C. 255 (2016).
- State v. Colf, 337 S.C. 622 (2000) The *Colf* factors come from this case. But State v. Robinson is the best case to look at for this subject. *See also* Teamer v. State, 416 S.C. 171 (2016); Legare v. State, 333 S.C. 275 (1998).
- State v. Broadnax, 414 S.C. 468 (2015) Witnesses may be impeached by prior convictions if the conviction carried more than a year or was a crime of dishonesty. The Supreme Court held that armed robbery was

[34] State v. Colf, 337 S.C. 622 (2000).

not a crime of dishonesty, but could still be admitted pursuant to SCRE 609(a)(1). However, this rule requires a specific balancing test to determine if it should be allowed in.

- State v. Black, 400 S.C. 10 (2012) "The State bears the burden of establishing sufficient facts and circumstances to overcome the presumption against the admissibility of remote convictions."
- Wilder v. State, 388 S.C. 282 (2010) Filing false tax returns is impeachable conduct.
- State v. Bryant, 369 S.C. 511 (2006) Narcotic law violations and firearm violations are generally not probative of truthfulness. Also, convictions for "robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." Shoplifting and writing bad checks are probative for truthfulness. *See also* State v. Dunlap, 353 S.C. 539 (2003).
- State v. Cheeseboro, 346 S.C. 526 (2001) Impersonating a police officer is a crime of dishonesty.
- Felder v. State, 427 S.C. 518 (2019) For purposes of SCRE 609, convictions are different than charges.

613 (Prior Inconsistent Statement)

Summary: Under SCRE 613, a witness may be asked about a prior inconsistent statement to show that they are either not telling the truth or that their memory has changed. After being confronted with the prior statement, the witness will likely either admit it or deny it. If they admit it, and probably clarify it, then the impeachment is completed. If they deny that they made the statement, then the opposing party may introduce extrinsic evidence of the prior inconsistent statement. However, if the trial judge finds that the prior statement is collateral and/or not relevant, then they have discretion to exclude it and move on. The prior inconsistent statement can be used as substantive evidence (nonhearsay) if the declarant testifies at trial and is subject to cross-examination – subject to SCRE 801(d)(1).

- State v. Stokes, 381 S.C. 390 (2009) There is not a *Crawford* violation if a witness denies he made a statement and is subsequently impeached with a prior inconsistent statement. In this situation, the defense claimed that they were denied effective cross-examination of the witness, however the court held that they still had the *opportunity*.
- State v. Kelsey, 331 S.C. 50 (1998) When a witness is impeached with part of their prior inconsistent statement, they may bring out other parts of the statement for purposes of clarifying the inconsistency – not to use as a prior *consistent* statement.
- State v. Bixby, 388 S.C. 528 (2010) By denying making the statements and being apprised of the substance, the State laid the proper foundation to introduce extrinsic evidence of the prior inconsistent statements.
- State v. Cooper, 334 S.C. 540 (1999) The trial court properly excluded defendant's witness, when the sole purpose of that witness was to be impeached with a prior inconsistent statement. Normally, under SCRE 407, a party may impeach their own witness, however, this impeachment was only to prove third party guilt and there was not enough evidence for that. The judge properly excluded the prior inconsistent statement as irrelevant.

Denial of Making Statement

- State v. Blalock, 357 S.C. 74 (Ct. App. 2003) "Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence

proving the statement. For example, a witness's failure to fully recall her prior statement has been found to be a sufficient denial to allow extrinsic evidence."

- State v. Sullivan, 43 S.C. 205 (1895) "If the witness neither directly admit nor deny the act or declaration, as when he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember."

Extrinsic Evidence

- Vanover v. State, No. 2016-001917, 2021 WL 377801 (S.C. Ct. App. Feb. 3, 2021) A witness may be cross-examined on anything relating to credibility (credibility is always an issue for a witness), but the court does not have to admit extrinsic evidence of a collateral matter. "Although a witness may generally be cross-examined on anything, even a collateral matter, as credibility is always an issue, extrinsic evidence of a prior inconsistent statement is not admissible if the prior statement concerns a collateral matter."

- State v. Fossick, 333 S.C. 66 (1998) If a witness denies making a statement, then extrinsic evidence could be admissible. Extrinsic evidence of prior inconsistent statements for impeachment purposes are allowed if the conditions of SCRE 613(b) are met. "Although Rule 608 prohibits extrinsic evidence, it applies only to evidence of conduct and not evidence of a statement. United States v. Higa, 55 F.3d 448 (9th Cir.1995)." *See also* Rutland v. State, 415 S.C. 570 (2016).

- State v. Barnes, 421 S.C. 47 (Ct. App. 2017) Once the foundation has been laid to admit extrinsic evidence of a prior inconsistent statement, then there is no requirement that the extrinsic evidence be admitted immediately.

Substantive vs. Impeachment

- State v. Washington, 431 S.C. 394 (2020) A prior inconsistent statement is not hearsay, and is substantive evidence, if the declarant testifies at trial and is subject to cross-examination, and the statement is inconsistent. In order to get extrinsic evidence in, a proper foundation has to be laid under SCRE 613. *See also* State v. Copeland, 278 S.C. 572 (1982) ("Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination.").

Miscellaneous

- State v. Byram, 326 S.C. 107 (1997) Under SCRE 607, a party may impeach any witness, including their own.

- State v. Cheatham, 349 S.C. 101 (Ct. App. 2002) An *in camera* hearing allows a defendant to cross-examine a witness more vigorously and stringently. *See also* State v. Miller, 359 S.C. 589 (Ct. App. 2004).

Collateral/Irrelevant

- Matter of Campbell, 427 S.C. 183 (2019) Whether or not evidence is relevant is a low threshold. Impeachment only requires a showing of "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness."

- State v. Brock, 130 S.C. 252 (1925) "A generally approved test to determine whether a question is collateral to the issues joined or not has been thus stated: 'Would the cross-examining party be entitled to prove the fact as a part of, and as tending to establish, his case? If he would be allowed to do so, the matter is not collateral; but, if he would not be allowed to do so, it is collateral. Collateral matters, in this sense, are such as afford no reasonable inference as to the principal matter in dispute.'" *See also* Saunders v. City & Suburban R. Co., 99 Tenn. 130 (1897)

- State v. Gore, 299 S.C. 368 (1989) To determine if a matter is collateral, the question will hinge on whether or not the party could have introduced it in their case in chief. "When a witness denies an act involving a matter collateral to the case in chief, the inquiring party is not permitted to introduce contradictory evidence to impeach the witness. … The reply testimony in question was therefore not admissible unless it could have been admitted as part of the State's case in chief."

- State v. Dickerson, 395 S.C. 101 (2011) A judge may limit the testimony of drug use by the victim. Any fact may be elicited on cross-examination that shows bias or partiality of that witness. A judge may limit cross-examination to prevent testimony going down a "rabbit hole."

Defendant Takes the Stand

(See also the chapter "404(a) Character Evidence" and the chapter "Impeachment: 608(a) (Character for Truthfulness)"

- State v. Hawes, 423 S.C. 118 (Ct. App. 2018) If a defendant takes the stand, he may be impeached using the same methods as would be used against any other witness. A defendant may be impeached by prior bad acts that go to credibility. "When an accused takes the stand, he becomes subject to impeachment, like any other witness. Regardless of whether the accused offers evidence of his good character, an accused who takes the stand may be cross-examined about past transactions tending to affect his credibility. First, the accused may be asked about prior bad acts, not the subject of a conviction, which go to his credibility. However, the cross-examiner must take the accused's answer and may not contradict the accused if he denies them." (citations omitted).

- State v. Major, 301 S.C. 181 (1990) "When an accused takes the stand, he becomes subject to impeachment, like any other witness. Regardless of whether the accused offers evidence of his good character, an accused who takes the stand may be cross-examined about 'past transactions tending to affect his credibility.' ... These 'past transactions' are divided into two categories. First, the accused may be asked about prior bad acts, not the subject of a conviction, which go to his credibility. The cross-examiner must take the accused's answer concerning these alleged acts, however, and if the accused denies them, he may not be contradicted."

Mental Health Records

- State v. Blackwell, 420 S.C. 127 (2017) Defendants in a criminal trial have a constitutional right to cross-examine witnesses about their mental health records set out by a new standard in this case. Before the disclosure of any mental health records, a trial judge should hold a pretrial hearing. In order to have this hearing though, the party seeking the records must meet the minimal threshold requirement that the potential records are relevant. If the witness does not consent to the records being disclosed, then the judge should review the records alone and determine if disclosure is necessary – this includes how important the witness is to the State and whether or not the records contain exculpatory information. Disclosed records may still be redacted before admission.

Pitting Witnesses

- State v. Kelsey, 331 S.C. 50 (1998) It is improper for an attorney to pit one witness against another (e.g., "You heard Witness X testify earlier today, do you believe that she's telling the truth?"). "Although it is improper for an attorney to cross-examine a witness in such a manner as to force him to attack the veracity of another witness, improper 'pitting' constitutes reversible error only if the accused was unfairly prejudiced."

Improper Bolstering

See also the chapter "Expert Opinion: Types of Experts - CSC Cases"

- State v. Reyes, No. 2019-001593, 2020 WL 7380276 (S.C. Dec. 16, 2020) Solicitors should not bolster witnesses by asking questions in the first person.
- Thompson v. State: 423 S.C. 235 (2018) It is improper for one witness to give an opinion about whether another witness is telling the truth - that would be improper bolstering.
- State v. Chavis, 412 S.C. 101 (2015) Experts are not allowed to testify to credibility of others. "Specifically, it is improper for a witness to testify as to his or her opinion about the credibility of a child victim in a sexual abuse matter."

Insurance

- Ex parte Builders Mut. Ins. Co., 431 S.C. 93 (2020) Under SCRE 411, usually a jury should not know that a defendant is protected from liability by an insurance company.

- Todd v. Joyner, 385 S.C. 421 (2009) If a court determines that evidence of insurance should not be excluded under SCRE 411, then the court should still make a SCRE 403 ruling.

- Yoho v. Thompson, 345 S.C. 361 (2001) SCRE 411 prohibits the introduction of liability insurance if its purpose is to show negligence or other wrong doing. However, if the evidence of insurance is used for another purpose, then it might be admissible. In this case, the party admitted liability, so the purpose of the insurance was to prove bias, not liability. The Court also held that an expert witness testifying on behalf of an insured party, may be impeached about his employment with the insurance company to show bias if there is a substantial connection between the expert and the insurer: "A majority of jurisdictions addressing this issue apply a 'substantial connection' analysis to determine whether an expert's connection to a defendant's insurer is sufficiently probative to outweigh the prejudice to the defendant resulting from the jury's knowledge that the defendant carries liability insurance. *See, e.g., Bonser v. Shainholtz,* 3 P.3d 422 (Colo.2000) (expert's relationship with insurance Trust was admissible to show bias where expert was a co-founder and previous board member of Trust, and expert believed dentists insured by Trust were better quality than other dentists); *Mills v. Grotheer,* 957 P.2d 540 (Okla.1998) (insufficient connection between expert and insurer to justify admission where expert was merely a policyholder)."

- State v. Douglas, 369 S.C. 424 (2006) Life insurance may be admissible to show motive.

Judge as a Witness

- Risher v. S.C. Dep't of Health & Envtl. Control, 393 S.C. 198 (2011) Personal observations in a final order by the trial judge could be construed as the judge becoming a witness.

Judicial Notice

- State v. Odom, 412 S.C. 253 (2015) Courts may take judicial notice of certain facts, however, those facts should not be an element of the crime that the State must prove.

Juror Misconduct

- Ethier v. Fairfield Mem'l Hosp., 429 S.C. 649 (2020) The Court addresses juror misconduct. SCRE 606(b) generally prohibits inquiry into a jury's verdict. The exception to this rule is if juror misconduct affected the fundamental fairness of the trial. *See also* Winkler v. State, 418 S.C. 643 (2016) (Concurrence).
- Ex parte Greenville News, 326 S.C. 1 (1997) "Juror testimony regarding internal misconduct is generally inadmissible to impeach a verdict except when necessary to ensure fundamental fairness."

Lay Opinion

Summary: There is a fine line between lay opinion and expert opinion. Lay opinion will usually revolve around personal observation and logical connections and conclusions drawn from those observations. The line to expert opinion will likely be crossed if the opinion requires special knowledge, skill, experience or training. South Carolina Court of Appeals Judge Garrison Hill explains the development of lay opinion from its common law interpretation through its codification of SCRE 701:

> South Carolina adopted Rule 701 in 1995, expanding the common law rule that lay opinions were inadmissible "only when they are superfluous in the sense that they will be of no value to the jury." *State v. McClinton*, 265 S.C. 171,177, 217 S.E.2d 584, 586 (1975). This brought South Carolina closer to Wigmore's view and, perhaps more notably, to the view of Judge Frank Eppes, who routinely allowed borderline testimony into evidence "for what it's worth." Before McClinton, a lay opinion could not be admitted unless it was "the only method of proving certain facts." *Jones v. Fuller*, 19 S.C. 66 (1883) (quoting *Commonwealth v. Sturtivant*, 117 Mass. 122, 133 (1874)) ; see also *Green v. Sparks*, 232 S.C. 414, 102 S.E.2d 435 (1958) (lay opinion not admissible where facts underlying opinion may be described to the jury in manner that jury is able to form its own opinion).[35]

Judge Hill also cites State v. Williams to draw a clear picture of the distinction, or lack thereof, between facts and opinions:

> The terms 'fact' and 'opinion' denote merely a difference of degree of concreteness of description. Some statements are not mere opinions but are impressions drawn from collected, observed facts. A natural inference based on stated facts is not opinion evidence. Where the distinction between fact and opinion is blurred, it is often best to leave the matter to the discretion of the trial judge.[36]

- Huffman v. Sunshine Recycling LLC, 426 S.C. 262 (2019) Lay testimony is usually based on a witness's own perceptions and the inferences that are rationally drawn from those perceptions. Lay testimony will likely be allowed if the testimony does not require special knowledge, skill, experience, or training.
- State v. Williams, 386 S.C. 503 (2010) A lay witness may testify to the defendant's mental state.
- In re Thomas S., 402 S.C. 373 (2013) Lay witnesses may not cross the line into giving expert testimony. "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions."
- State v. Tennant, 394 S.C. 5 (2011) A witness, other than an expert, may not testify to matters which they have no personal knowledge.

[35] Hill, D. Garrison, "Lay Witness Opinions." *South Carolina Lawyer* September 2007, p. 34.
[36] State v. Williams, 321 S.C. 455 (1996) (citations omitted).

- State v. Frazier, 357 S.C. 161 (2004) A witness should not have been allowed to testify to a statement that he overheard – but that he could not recall when it was made, the content of it being made, or to whom it was being made.

- State v. Gibbs, 431 S.C. 313 (Ct. App. 2020) A detective was allowed to give his opinion about how a gun worked even though he was not qualified as an expert. The Court of Appeals stated that the detective had personal knowledge.

- Gulledge v. McLaughlin, 328 S.C. 504 (Ct. App. 1997) Lay opinion testimony is admissible if it is "(a) rationally based on the perception of the witness, (b) helpful to the determination of a fact in issue, and (c) does not require special knowledge, skill, experience, or training."

Identification

- United States v. Robinson, 804 F.2d 280 (4th Cir. 1986) "A lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury."

- State v. Fripp, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) "Finally, the identification of a familiar person does not require any specialized knowledge, skill, experience, or training as contemplated by subpart (3) of Rule 701."

Missing Witness Doctrine

Summary: The missing witness doctrine holds that "if a party fails, without satisfactory explanation, to produce the testimony of an available witness on a material issue in the case and the evidence is within his knowledge, is within his power to produce, is not equally accessible to his opponent, and is such as he would naturally produce if it were favorable to him, it may be inferred that such testimony, if presented, would be adverse to the party who fails to call the witness."[37]

- In re Gonzalez, 409 S.C. 621 (2014) This case explains the "missing witness doctrine" and limits it to fact witnesses and advises that judges should not give adverse inference instructions to jurors, but rather counsel may make those arguments.
- Way v. State, 410 S.C. 377 (2014) The Supreme Court again reiterates its position on this doctrine and that it should be limited to fact witnesses, not opinion witnesses.

[37] In re Gonzalez, 409 S.C. 621 (2014).

Neil v. Biggers

Summary: During a criminal trial, if there is an eye witness to the crime, then it will be very likely that the defense will make a motion to hold a *Neil v. Biggers* hearing. This pretrial hearing involves questioning the eyewitness to determine if law enforcement used an improperly suggestive photo lineup (or other procedure).

In State v. Warner,[38] the court described the procedure for this pretrial hearing.[39] First, the judge must decide "whether the identification was the result of a police procedure that was both unnecessary and suggestive. If it was not, the inquiry ends." But if the judge finds it was unduly suggestive, then the eyewitness testimony would be suppressed "if the procedure created a substantial likelihood of irreparable misidentification." The court cited both the United States Supreme Court and the South Carolina Supreme Court in holding that not every identification witness needs a hearing, "only those procured by needlessly suggestive state action." "Our supreme court has interpreted *Perry* as requiring a preliminary judicial inquiry (and generally a hearing) 'once it is contended that an identification is obtained under unnecessarily suggestive circumstances arranged by state action, regardless of the witness's prior knowledge of the accused.'"[40]

[38] State v. Warner, 430 S.C. 76 (Ct. App. 2020) cert. granted (Jan. 22, 2021).
[39] State v. Liverman, 398 S.C. 130 (2012) (*Neil v. Biggers* hearings should be held outside the presence of the jury); *See also* State v. Ramsey, 345 S.C. 607 (2001).
[40] State v. Warner, 430 S.C. 76 (Ct. App. 2020) cert. granted (Jan. 22, 2021).

Objections

Summary: A party wanting to object to the admissibility of evidence needs to make a specific objection unless it is apparent from the context what the party is objecting to. If evidence is excluded because of an objection, a party may ask that they be able to make an offer of proof what they believe would have been admitted. This proffer testimony will allow them to build a record for any potential appeal. A judge should make a clear ruling on all objections.

Courts should not allow speaking objections – where a party objects and then explains the objection and argument in front of the jury and allows the jury to hear potentially prejudicial information. Speaking objections are limited by S.C. Criminal Rule 18 and S.C. Civil Rule 43.

Motions *in limine* are conducted outside the presence of the jury. These rulings are not final and a party should make another motion to exclude when the evidence is actually admitted. In an article in the *S.C. Lawyer*,[41] Warren Moise gives an excellent summation of motions *in limine* and renewing an objection:

> Once I make a motion in limine, I don't have to object again, right?
>
> Once again, yes and no. The federal and state courts have different rules for motions in limine. In federal court, a ruling in limine is final, assuming that it's dispositive. If circumstances change during trial such that the judge's ruling no longer fits the facts, you must object again before the evidence is presented.
>
> Assume, for example, a prosecution for conspiracy and kidnaping. The defendant objects in an in-limine hearing to certain rule-404(b) bad acts. The defendant argues that the bad acts are inadmissible as to both conspiracy and kidnaping. The court agrees that the bad acts are inadmissible as to kidnaping, holds that they are admissible as to conspiracy. Later, however, the conspiracy charge is dismissed through a judgment by acquittal (i.e., directed verdict), and the trial will continue on the kidnaping charge. The defendant must now object again because the bad acts are admissible as to either charge. In other words, circumstances have changed, and this should be brought to the judge's attention.
>
> On the other hand, in South Carolina courts, motions in limine are usually not final. You must object again before the evidence is actually introduced. There are at least two exceptions to this requirement that objections be raised when the evidence is being introduced (in limine or otherwise). A renewed objection is unnecessary if either: (a) no evidence was introduced between the hearing on admissibility and when the objectionable evidence is introduced, or (b) the judge rules and then tells you that you need not object again later when the evidence is introduced.

- State v. Heyward, 426 S.C. 630 (2019) "A specific objection to an evidentiary ruling is required unless the grounds are apparent from context. Rule 103(a)(1), SCRE. However when this Court can discern the basis of the objection from the record, the issue is preserved for review." SCRE 103.
- State v. Wiles, 383 S.C. 151 (2009) "Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced. *State v. Forrester,* 343 S.C. at 642, 541 S.E.2d at 840. There is an exception to this general rule when a ruling on the motion *in limine* is made 'immediately prior to the introduction of the evidence in question.' *Id.* This exception is based on

[41] Moïse, Warren, "Beyond the Bar." *South Carolina Lawyer* January 2020, pp. 21-23, https://mydigitalpublication.com/publication/?m=18928&i=644340&p=24

the fact that when the trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection."

- State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc., 414 S.C. 33 (2015) This case provides a wide range of legal issues, however, the main evidentiary issue is with proper objections. The Supreme Court did not rule on many of the evidentiary issues because counsel did not properly object during trial. The objection needs to be specific and contemporaneous.

- State v. Kromah, 401 S.C. 340 (2013) Usually a motion *in limine* ruling is not a final determination, and thus a party needs to make a contemporaneous objection later. However, this will depend on the timing of the motion *in limine* and its proximity to the actual introduction of evidence.

- State v. Smith, 337 S.C. 27 (1999) A pretrial ruling is preliminary and is subject to change at trial.

- State v. Byers, 392 S.C. 438 (2011) Objections must be made at the time evidence is presented and they must be specific. If a witness answers a question before the objection is made, then the objecting party needs to move to strike the answer.

- State v. Saltz, 346 S.C. 114 (2001) A party only has to move to strike testimony when an objection has been sustained.

- State v. Stahlnecker, 386 S.C. 609 (2010) A party does not have to use the exact legal doctrine name when making an objection, but it should be clear to what the argument is.

- State v. McDaniel, 320 S.C. 33 (Ct. App. 1995) So long as the judge had an opportunity to rule on an issue, and did so, it was "not incumbent upon defense counsel to harass the judge by parading the issue before him again."

Offers to Compromise

- S.C. Human Affairs Comm'n v. Zeyi Chen, 430 S.C. 509 (2020) Generally, offers to compromise are inadmissible in trial under SCRE 408.
- Winrose Homeowners' Ass'n, Inc. v. Hale, 428 S.C. 563 (2019) In a footnote, the court explained that under SCRE 408 offers to compromise are not allowed into evidence to prove liability. However, in this case, the settlement negotiations were being used for another purpose, which was permissible.
- Fesmire v. Digh, 385 S.C. 296 (Ct. App. 2009) The idea behind SCRE 408 is to allow parties to feel free to make certain assumptions for negotiations purposes, and that those statements of assumptions are only true for negotiation purposes. The law favors compromise. Prior inconsistent statements that arise from negotiations are generally discouraged from being used as impeachment evidence.
- QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196 (Ct. App. 2004) Evidence that a party sent a check for $250 was not an offer of compromise, but rather a payment on a loan, thus SCRE 408 was not violated. This payment was a payment that one party tendered to the other because it was due. The check was not used as "an attempt curb further litigation."

Opening Statement

Summary: An opening statement is just that, a statement. Since the trial has just started, there is no evidence admitted. This means that counsel can give a framework picture of what they expect to happen in the trial. However, they need a good faith basis to describe what they believe will be admitted or testified to. Counsel should also follow any pre-trial motions to exclude. A judge will usually allow counsel to state what they believe the jury will see – even if they don't see it ultimately – because it could possibly hurt that party if they over promise and under deliver.

- State v. Smalls 422 S.C. 174 (2018) Misstatements in opening can be handled in several ways, including objecting at the time of the misstatement or by pointing out the misstatement in their closing argument.
- State v. Patterson, 425 S.C. 500 (2019) A trial judge should not instruct the jury to "search for the truth" or any related statement that might divert from the State's burden of proof beyond a reasonable doubt.

Photographs

Summary: For a photograph to be authenticated, it is not required to have the person who took the photo testify. Authentication simply requires a witness to be able to recognize the photo and be able to testify that it is what the photo portrays it to be.

- State v. Brockmeyer, 406 S.C. 324 (2013) The admission of photographs is within the discretion of the trial judge and should be weighed under SCRE 403 (among other rules if necessary).
- State v. Salley, 398 S.C. 160 (2012) Photographs should not be introduced to arouse the sympathy or prejudice of a jury. However, they may be introduced to corroborate testimony. "Before" photographs of victims may be admitted if they are relevant.
- State v. Green, 397 S.C. 268673 (2012) Offensive photographs can be admitted to corroborate testimony.

Autopsy Photographs

Summary: While these photographs may be gruesome and vivid, that does not automatically mean they are excluded. A trial judge should make a 403 ruling to determine their probative value and prejudicial value. Often autopsy photos are used to show how a victim died, when they died, and other relevant motives. However, a judge may limit the number of photos or even redact portions if necessary. The admission of these photos will be in the discretion of the judge.

- State v. Kelsey, 331 S.C. 50 (1998) The introduction of autopsy photographs is in the discretion of the trial judge and the judge should follow SCRE 403.
- State v. Collins, 409 S.C. 524 (2014) The admissibility of photographs are in the discretion of the trial judge. Just because the photos are prejudicial and gruesome, does not automatically render them inadmissible.
- State v. Torres, 390 S.C. 618 (2010) Autopsy photographs should be excluded if they are "irrelevant or not necessary to substantiate material facts or conditions." These photos are likely improper if they tend to suggest an emotional decision.

Plea Negotiations

- State v. Wills, 409 S.C. 183 (2014) The Supreme Court held that a defendant may waive his protections under SCRE 410, which protect against admissibility of plea discussions and related statements.
- Brown v. Theos, 345 S.C. 626 (2001) This case discusses using a no contest plea in a legal malpractice claim.
- State v. Compton, 366 S.C. 671 (Ct. App. 2005) The State was allowed to use defendant's statement made to law enforcement because it was not in furtherance of a guilty plea.

Prior Conviction as Element of Crime

Summary: Some crimes require the State to prove that the defendant has a prior conviction of that same crime in their past. This element of the crime is both extremely prejudicial to the defendant as well as extremely probative to the State. At the very least, the trial court will need to make a SCRE 403 ruling to determine how the prior conviction will come in. But recently, the Supreme Court has created a different procedure for CSC cases.[42]

There are several ways a trial court may handle the prior conviction evidence, including limiting the number of convictions entered into evidence (e.g., defendant has six prior burglaries, but the State only needs to prove two), limit any testimony surrounding the convictions beyond the conviction, stipulation (however, *See* Old Chief, 519 U.S. 172 (1997) about the limits on mandatory stipulation), and bifurcation (this likely only applies in CSC cases).

- State v. Cross, 427 S.C. 465 (2019) The defendant was charged with Criminal Sexual Conduct with a Minor in the First Degree. This charge is based on the underlying allegations of intercourse plus a prior conviction of CSC (a prior conviction of CSC is an element of CSC 1st). The issue that arises with these types of indictments at trial is that the State needs to introduce evidence of the prior conviction in order to prove the charge. However, as the Supreme Court points out, this can have a negative effect on the jury and the prior conviction might inadvertently be used as propensity evidence. The question is: how does a trial court balance the two? The Court acknowledges the conundrum of prior conviction evidence when it's an element of the crime: the prior conviction has "insurmountable probative value" but the conviction is extremely prejudicial (particularly in CSC cases): "Nevertheless, we distinguish this case from the first-degree burglary cases because of the inherently prejudicial stigma a prior sex-related offense undoubtedly carries." Because of the prior conviction is both very probative and very prejudicial, the court focuses on when the conviction can be introduced. This means using SCRE 611(a). The Court held that the trial court, using 611(a), needed to bifurcate the trial - that means the first trial would consist of the State proving the underlying facts of the incident. Then, if convicted of those facts, the State would have to prove at a second phase/trial the prior conviction. This case only applies to CSC cases.
- State v. Benton, 338 S.C. 151 (2000) Certain burglary offenses require the State to prove that the defendant has two prior burglary convictions. Because this is an element of the crime, the defense cannot require the State to stipulate these convictions instead of presenting the evidence to the jury. When admitting this type of evidence, the trial court should limit any evidence surrounding the convictions, and if requested, the court should instruct the jury on the limited purpose of the evidence.
- State v. James, 355 S.C. 25 (2003) The defense cannot force the State to accept stipulation to prior convictions. *See* Old Chief, 519 U.S. 172 (1997). The admission of prior burglary convictions should be weighed under SCRE 403. It is likely highly prejudicial to admit more than two convictions (more than is required to prove the offense).

[42] State v. Cross, 427 S.C. 465 (2019).

Privilege

Attorney-Client

- In re Mt. Hawley Ins. Co., 427 S.C. 159 (2019) Attorney-client privilege is a privilege recognized by the courts and thus a privilege under SCRE 501.
- State v. Doster, 276 S.C. 647 (1981) The elements of this privilege are: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived."
- State v. Thompson, 329 S.C. 72 (1998) Attorney-client privilege extends between communications of client and non-lawyer in preparation of case.

Marital Privilege

- State v. Chandler, 126 S.C. 149 (1923) "Confidential communication between attorney and client and husband and wife cannot be forced to be disclosed, but that is a personal privilege of the parties." *See also* S.C. Code Ann. § 19-11-30. [43]

Trade Secrets

- Hartsock v. Goodyear Dunlop Tires N. Am. Ltd., 422 S.C. 643 (2018) The Rules of Evidence only has one rule for privileges. This rule essentially states that statutes and common law should define the specific privileges. The court held that there does exist a privilege for trade secrets and thus falls under SCRE 501.

[43] **SECTION 19-11-30**. Competency of husband or wife of party as witness.
In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law or consent of the parties, authority to examine witnesses or hear evidence, no husband or wife may be required to disclose any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage.
Notwithstanding the above provisions, a husband or wife is required to disclose any communication, confidential or otherwise, made by one to the other during their marriage where the suit, action, or proceeding concerns or is based on child abuse or neglect, the death of a child, or criminal sexual conduct involving a minor.

Rebuttal Evidence/Open-Door

- Daniel v. Tower Trucking Co., 205 S.C. 333 (1944) "He upon whom lies the burden of proof has the right to offer reply (rebuttal) testimony to that of his adversary and the latter's witnesses, provided it is in the nature of true reply and not such as should have been offered in the case in chief. The latter may also be allowed, but only in the discretion of the Court."

- State v. Prather, 429 S.C. 583 (2020) Rebuttal evidence should be limited to what was raised by the defense.

- State v. Simmons, 430 S.C. 1 (2020) Rebuttal evidence can make inadmissible evidence admissible. However, this open-door doctrine should be proportional in response. *See also* State v. Heyward, 426 S.C. 630 (2019).

- State v. Northcutt, 372 S.C. 207 (2007) Defendant was allowed to present evidence of his remorse after the State presented evidence that he lacked remorse.

Relevant Evidence

Summary: Relevancy is a low bar for admitting evidence – and it is the first step in determining whether or not evidence is admitted. So even if evidence is relevant, there are countless ways in which it might still be excluded. Relevance is defined as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[44] Another way of determining relevance is if the evidence would assist "a jury at arriving at the truth of an issue."[45]

Generally

- Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff, 420 S.C. 305(2017) Evidence must be relevant, otherwise it is inadmissible. *See also* State v. Livingston, 327 S.C. 17 (1997).
- Riley v. Ford Motor Co., 414 S.C. 185 (2015) Relevant evidence may be inadmissible if it is overly cumulative.
- State v. Salley, 398 S.C. 160 (2012) Trial judge improperly allowed the State to introduce two wooden sticks that "could have been used" to commit the crime, even though this was not shown through forensic evidence.
- State v. Page, 406 S.C. 272 (Ct. App. 2013) A trial judge should not make a credibility judgment of a witness because that is exclusively in the province of the jury. Relevance is not the same as credibility.
- State v. Heyward, 432 S.C. 296 (Ct. App. 2020) The Court of Appeals held that the testimony by an expert about whether a gun was operational was irrelevant because it is not required under the statute to be operational. Thus that testimony served no purpose. "Because section 16-23-410 provides it is unlawful to present or point an unloaded firearm at another person, it would produce an absurd result that would defeat the plain legislative intent of the pointing and presenting charge to require proof that the firearm is capable of propelling a projectile while also allowing an unloaded gun to meet the criteria."

Escape/Flight

- State v. Pagan, 369 S.C. 201 (2006) Evidence of defendant's escape was relevant and it may be used to show guilty knowledge, intent, and that the defendant avoided apprehension. It is relevant where there is a connection between the flight and the charged crime. "The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities." If the flight is from an unrelated crime, then it should not go to the jury. *See also* State v. Wiles, 383 S.C. 151 (2009).
- State v. Crawford, 362 S.C. 627 (Ct. App. 2005) "Flight, when unexplained, is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee."

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[44] SCRE 401.
[45] State v. Schmidt, 288 S.C. 301 (1986).

Nickname/Tattoo

- State v. Day, 341 S.C. 410 (2000) "Evidence concerning a defendant's tattoo or nickname is not prejudicial when used to prove something at issue in a trial, such as the identification of the defendant…. This Court held in *State v. Tubbs, supra*, that a prosecutor's use of a nickname can deprive the defendant of due process if the use of the nickname is so excessive and repetitious as to infect the entire trial with unfairness."

Prior Acquittal Evidence

- State v. Henley, 428 S.C. 649 (Ct. App. 2019) The defendant was tried for larceny and burglary. At the first trial, he was acquitted on the larceny and the jury hung on burglary. At the second trial, the defense wanted to introduce evidence of the acquittal of larceny. The trial judge properly used his discretion under SCRE 403 to keep that evidence out because it would be too confusing and had little probative value.

Thoughts/Feelings

- State v. Saltz, 346 S.C. 114 (2001) A witness's thoughts and feelings were not relevant. "The witness's thoughts and feelings did not make the existence of any fact of consequence to the case more or less probable. On the contrary, the testimony only served 'to arouse the sympathy or prejudice of the jury.'"

- State v. Caldwell, 378 S.C. 268 (2008) Victim's testimony about how a peeping tom made them feel when he looked in the bathroom and if they had ever felt that way before was proper because it had a logical connection to an element of the crime charged.

Suicide Attempt as Evidence

- State v. Cartwright, 425 S.C. 81 (2018) Generally, evidence of guilt by an accused can be introduced as circumstantial evidence. However, the Court held that evidence of a suicide attempt by an accused is not analogous. The Court set out a specific standard that must be met before this evidence may be introduced. The trial court should conduct a pretrial hearing outside the presence of the jury and "determine whether the State has proven that: (1) a jury could reasonably find that a suicide attempt occurred; (2) the defendant was aware of the occurrence of the alleged crimes at the time of the suicide attempt; and (3) an unmistakable nexus exists by clear and convincing evidence linking the suicide attempt to a guilty conscience derivative of the offense for which the defendant is on trial. If the trial court concludes that the three factors have been established, the evidence is relevant and may be admitted, subject to a Rule 403, SCRE analysis. The suicide-attempt evidence may be admitted only when all three factors have been met, and the evidence survives a Rule 403 analysis. We recognize that in view of our rigorous framework, suicide-attempt evidence will rarely be admitted."

Witness Intimidation

- State v. Edwards, 383 S.C. 66 (2009) Witness intimidation may be admissible to show consciousness of guilt. However, there must be evidence that links the evidence to the defendant. This evidence should pass a SCRE 403 ruling. *See also* State v. Tucker, 423 S.C. 403 (Ct. App. 2018).

Rule of Completeness

Summary: When part of a statement is introduced, the opposing party may introduce the rest of the statement to clarify or put into context the entire dialogue. This rule is about fairness. The rule can also be broken down into two doctrines. First, the actual Rule of Evidence, SCRE 106, which deals with a writing or recording being partially introduced and giving the opposing party an opportunity to make the party introduce the entire statement at that time – instead of waiting until cross-examination. Second, the common law rule of completeness still exists. The South Carolina Supreme Court has stated that the common law applies to oral communications.[46] The rule of completeness is similar to the open-door doctrine.

Another issue that arises with this rule, is whether or not it is a rule of timing or a rule of admissibility. In his blog EvidenceProf, South Carolina Law Professor Colin Miller has explained these two theories in context:

> There's a split among states as to whether this "rule of completeness" is simply a rule of **timing** or also a rule of **admissibility**. In other words, does it merely regulate **when** otherwise admissible evidence can be admitted or can it be used to transform otherwise inadmissible evidence into admissible evidence.
>
> As the recent opinion of the Supreme Court of Delaware in *Thompson v. State*, 2019 WL 845674 (De. 2019), makes clear, Delaware's rule of completeness is a rule of **admissibility**.
>
> …
>
> > Where, as here, the cross-examiner's goal is to impeach the credibility of the testifying witness by arguing that the witness's whole story is made up and does this by bringing up isolated examples of inconsistencies with a prior statement that are insignificant to the whole story, it is appropriate under Rule 106 for the jury to hear the entire prior statement to properly assess the witness's credibility. Thompson's line of attack was that since Bey could not keep his story straight (or consistent), he must have made the whole thing up. The recorded statement, however, was largely consistent with Bey's trial testimony. Therefore, playing the entire statement countered Thompson's argument that Bey was making everything up.
>
> Finally, the court concluded that "[s]ince we find that Bey's September 5 statement was admissible under Rule 106, we need not consider its admissibility under Rule 801(d)(1)(B)." Therefore, Delaware Rule of Evidence 106 clearly allows for the admissibility of evidence that is not admissible under any other rule of evidence.[47]

The South Carolina Supreme Court has held that the rule of completeness is a procedural device.[48]

- State v. Cabrera-Pena, 361 S.C. 372 (2004) The common law rule of completeness applies to oral communications. Remaining parts of a statement should be allowed if they tend to explain or qualify the statement as a whole. The Court cites a Utah case that states the rule of completeness may be applied through SCRE 611.

[46] State v. Cabrera-Pena, 361 S.C. 372 (2004).
[47] Miller, Colin. "EvidenceProf Blog: Supreme Court of Delaware Finds the Rule of Completeness Allows for the Admission of Otherwise Inadmissible Evidence." *EvidenceProf Blog*, Law Professors Blog Network, 1 Mar. 2019, lawprofessors.typepad.com/evidenceprof/2019/03/like-its-federal-counterpart-delaware-rule-of-evidence-106-provides-that-if-a-party-introduces-all-or-part-of-a-writing-o.html.
[48] State v. Tennant, 394 S.C. 5 (2011).

- State v. Thomas, 159 S.C. 76 (1930) "Where a part of a conversation is put in evidence, the adverse party is entitled to prove the remainder of the conversation, particularly in so far as it modifies or explains the part admitted. All statements made in a conversation, in relation to the same subject or matter, are to be supposed to have been intended to explain or qualify each other, and, therefore the plainest principles of justice requires that if one of the statements is to be used against the party, all the other statements tending to explain it or to qualify this use should be shown and considered in connection with it."

- State v. Taylor, 333 S.C. 159 (1998) "Technically, Rule 106, Fed.R.Evid., applies in instances when a party introduces a writing or recorded statement into evidence. … Given the purposes behind Rule 106, fairness and completeness, it is also applied where a party's use of a writing or recorded statement is 'tantamount to the introduction of the [document] into evidence.'"

- State v. Tennant, 394 S.C. 5 (2011) The rule of completeness is a procedural device. This rule concerns the order of proof.

- State v. Cheeseboro, 346 S.C. 526 (2001) "Evidence that is otherwise inadmissible is not admissible under Rule 106."

- State v. Stokes, 345 S.C. 368 (2001) Redacted excerpts from a statement should not have been admitted under SCRE 106 because the redacted portions did not explain or clarify the admitted portions.

- State v. Patterson, 367 S.C. 219 (Ct. App. 2006) The rule of completeness applies to "insinuations, innuendos, and omissions." "The Rule restates the common law rule of completeness with one significant change. Prior to the enactment of Rule 106, when part of a document, writing, or conversation was introduced into evidence, the opposing party could introduce the remainder of the communication. However, whereas under common law the opposing party was required to wait until cross-examination to complete the communication, under Rule 106, the party can now require introduction of the remainder of the statement contemporaneous with the original proffer." (citation omitted).

Sequestration

- State v. Huckabee, 388 S.C. 232 (Ct. App. 2010) The purpose of sequestration is to prevent witnesses from tailoring their testimony to what they might hear before they testify. The right to sequestration is not guaranteed, but rather in the discretion of the trial judge.
- State v. Sullivan, 277 S.C. 35 (1981) Merely having the opportunity to compare statements does not require sequestration of the witnesses. Witnesses may be sequestered if there is a showing that a witness will be coerced or threatened by other witnesses inside the courtroom.
- State v. Carmack, 388 S.C. 190 (Ct. App. 2010) Trial judge properly denied motion to have all of the State's witnesses sequestered. Any concern of witnesses tailoring their statements was alleviated by the judge allowing the defense to impeach the witnesses with prior statements.

Sixth Amendment

Summary: The Sixth Amendment and specifically the Confrontation Clause allow for a defendant in a criminal trial to confront any witnesses used against him. Because the Confrontation Clause is a constitutional issue, it will trump any rule or statute. The most common issues that arise under the Sixth Amendment are *Bruton* and *Crawford* issues.

Bruton

Summary: When there are codefendants in a case, the issue of confessions can implicate the Confrontation Clause and the right to confront witnesses. If two defendants are tried jointly, and the State wants to use the confession of one of them against the other, the other defendant cannot confront his codefendant because he has a Fifth Amendment right against self-incrimination. These types of situations create *Bruton* issues. Usually to get around this, the State is allowed to introduce the confession of the codefendant, as long as it redacts any mention of the other defendant. Sometimes the redactions aren't enough, and the jury could still infer who the codefendant was referring to, and thus implicating him in the crime. Other times the confession does not implicate the other defendant on its face, but other evidence in the trial would allow a juror to reasonably infer the connection – which is likely permissible. (*See also the chapter "Hearsay: Exceptions (804) - Statement Against Interest")*.

- State v. King, 367 S.C. 131 (Ct. App. 2005) "A *Bruton* violation occurs when two defendants, A and B, are tried jointly, and defendant A makes a confession that inculpates defendant B. If defendant A does not testify, then A's statement against B is inadmissible because B will be unable to exercise his right under the Confrontation Clause to cross-examine A."

- Richardson v. Marsh, 481 U.S. 200 (1987) In a joint trial, *Bruton* prohibited the introduction of a non-testifying codefendant's out of court statement that on its face incriminated the other defendant. However, the United States Supreme Court held that if the confession is not incriminating on its face, but evidence introduced later in the trial makes it incriminating, then a jury instruction might suffice and allow in the confession. *See also* United States v. Benson, 957 F.3d 218 (4th Cir. 2020) ("*Richardson v. Marsh* made clear that *Bruton*'s rule was a narrow one.")

- Gray v. Maryland, 523 U.S. 185 (1998) "The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Moreover, the redacted confession with the blank prominent on its face, in *Richardson*'s words, '*facially* incriminat[es]' the codefendant."

- State v. Prather, 429 S.C. 583 (2020) A redacted confession might still violate *Bruton* if it is inferable on its face who the redaction is referring to. The Court cites several examples where redactions were insufficient and the confessions incriminated the defendant. In this case, the State redacted a non-testifying codefendant's statement so that only the word "rapeist" remained. The Court held that this was nontestimonial and thus did not violate *Bruton* – even though evidence introduced later at trial would make the redacted statement incriminating against the defendant.

- State v. Johnson, 390 S.C. 600 (2010) A codefendant's confession was properly redacted to eliminate defendant's name. However, the investigator gave testimony at trial that allowed the jury to infer that the redacted name was the defendant's. Trial court should have granted the mistrial motion. "Under *Bruton,* a non-testifying co-defendant's confession that inculpates another defendant is inadmissible at their joint trial, even if the jury is instructed that the confession can only be used as evidence against the confessor.

However, such a confession may be admissible if the confession is redacted in a way that removes any reference to the non-testifying codefendant."

- State v. Holder, 382 S.C. 278 (2009) The Supreme Court interpreted *Bruton* in a narrow sense: it "applies only when the statement implicates the defendant 'on its face'; the rule does not apply where the statement becomes incriminating only when linked to other evidence introduced at trial, such as the defendant's own testimony." In this case, the trial court should not have admitted a redacted statement where the defendants name was redacted with the pronoun "she" because this defendant was the only female.

- State v. Holmes, 342 S.C. 113 (2000) A self-inculpatory statement should be limited to the parts that are self-inculpatory to the declarant. The exception does not allow a broader narrative that includes non-self-inculpatory statements.

- State v. Nelson, 331 S.C. 1 (1998) A defendant's confession or statement should be limited based on SCRE 403. Only the parts that are relevant and material should be admitted. *See also* State v. Myers, 359 S.C. 40 (2004) (A confession must be voluntarily made and not coerced.).

Crawford/Testimonial

Summary: The Sixth Amendment provides that every accused has a right to confront witnesses against him. In *Crawford v. Washington*,[49] the defendant was charged with stabbing a man. His wife was a witness and gave a statement to police indicating, among other things, that the victim did not have a weapon. At trial, the wife asserted the marital privilege and could not be called to testify. The State sought to admit her hearsay statement under the statement against penal interest exception, which the trial court allowed. The United States Supreme Court held the admission of this testimonial hearsay statement violated the Sixth Amendment because the defendant was not afforded the right to confront the witness. Therefore, a *Crawford* violation occurs when a hearsay statement is admitted, the statement is testimonial in nature, and the defendant does not have the opportunity to cross examine that witness. "Testimonial" has not been neatly and clearly defined, but the United States Supreme Court has given some guidance.

Generally

- Crawford v. Washington, 541 U.S. 36 (2004) "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

- Davis v. Washington, 547 U.S. 813 (2006) "Without attempting to produce an exhaustive classification of all conceivable statements—or even all conceivable statements in response to police interrogation—as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

- State v. Perez, 423 S.C. 491 (2018) According to the S.C. Court of Appeals and the S.C. Supreme Court, the trial court did commit an error by not allowing defendant to cross-examine the witness about her U-

[49] Crawford v. Washington, 541 U.S. 36 (2004).

visa application. The Supreme Court disagreed with the Court of Appeals and held that this was not a harmless error.

- State v. Anderson, 413 S.C. 212 (2015) There is not a *Crawford* violation when the defense has a meaningful opportunity to cross-examine a child witness.

- State v. Brockmeyer, 406 S.C. 324 (2013) Nontestimonial evidence is excluded from Confrontation Clause analysis. In determining whether or not the statement is testimonial, the court should look to the primary purpose of the statement and if it is being used as "an out-of-court- substitute for trial testimony. "In determining the primary purpose of the out-of-court statement, 'the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.'"

- State v. Ladner, 373 S.C. 103 (2007) Ohio v. Roberts can still be used as the primary authority for nontestimonial hearsay.

- State v. Ladner, 373 S.C. 103 (2007) Crawford did not define what is testimonial, but it did give some guidance:

  "*ex parte* in-court testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially;

  extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions;

  statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial; and

  statements taken by police officers in the course of interrogations."

- State v. Davis, 317 S.C. 170 (2006) Statement made outside of an investigatory or judicial context is nontestimonial.

Affidavits/Business Records

- Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) Affidavits that are testimonial in nature require the declarant to testify or opposing party to have an opportunity to cross-examine. Certificates of drug analysis that confirmed the results of the analysis as cocaine were testimonial in nature and thus required live testimony.

- State v. Brockmeyer, 406 S.C. 324 (2013) Testimony by custodians for purposes of business records does not implicate *Crawford* if the records and testimony are nontestimonial in nature. *See also* State v. Trapp, 420 S.C. 217 (2017) (Trial court properly admitted records from a non-testifying witness because these records were nontestimonial and the primary purpose of their maintenance and creation "was to document seized evidence and attempt to accurately account for the items as they were transferred" for analyzing.)

- United States v. Denton, 944 F.3d 170 (4th Cir. 2019) There is a distinction between affidavits used to provide evidence against a defendant and affidavits used to provide evidence of authentication. Trial court properly admitted affidavits of business record certifications. "Accordingly, business records, 'having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial,' are not testimonial. Indeed, Denton does not dispute that the Facebook, Google, and Time Warner Cable records themselves were not subject to confrontation. And

although affidavits generally fall within the 'core class' of testimonial statements, the Supreme Court has differentiated between an affidavit that is created 'for the sole purpose of providing evidence against a defendant' and an affidavit that is created to '*authenticate* or provide a copy of an otherwise admissible record,'. Put simply, the former is testimonial and therefore subject to confrontation, while the latter is not." (citations omitted).

Closed Circuit Testimony

- Maryland v. Craig, 497 U.S. 836 (1990) In a sexual assault case, a child witness is not automatically prohibited from testifying via closed circuit video outside of the physical presence of the defendant. However, the trial court the must make a finding that the reason for the closed circuit testimony furthers a public policy and the testimony is reliable. The physical and psychological welfare of the testifying child may outweigh the defendant's right to personally confront their accuser. This finding of necessity must be case-specific and many requirements must be met.

- State v. Lewis, 324 S.C. 539 (1996) In a sexual assault case, trial court needs to make specific findings on the record to determine if close circuit testimony is appropriate. The evidence must relate to the particular child who is giving testimony. The South Carolina Supreme Court has adopted the *Craig* test.

- State v. Johnson, 422 S.C. 439 (Ct. App. 2018) A defendant has a right to in-person confrontation and this should not be limited by electronic testimony (e.g., Skype) unless there is an important public policy reason or an exceptional circumstance. "[I]n the absence of an important public policy or at least an exceptional circumstance, modifying a defendant's truest exercise of the Sixth Amendment right via in-person confrontation is inappropriate." The Court of Appeals did not create a specific test for the use of closed circuit testimony. This case was decided before the COVID-19 pandemic. *See also* S.C. Code Ann. § 16-3-1550(E) ("The circuit or family court must treat sensitively witnesses who are very young, elderly, handicapped, or who have special needs by using closed or taped sessions when appropriate. The prosecuting agency or defense attorney must notify the court when a victim or witness deserves special consideration.").

Social Media Posts/Text Messages

Summary: Social media posts and text messages are becoming more prevalent throughout trials. Many evidentiary issues arise with social media and texts, which include authentication, hearsay, *Crawford*, best evidence, and more. Aside from making sure the evidence is relevant, the first step is to authenticate it – is the post what it claims to be? This should be done through the normal authentication rules – look to SCRE 901(b) as well as The Uniform Business Records as Evidence Act.[50] The next question – what is the purpose of the evidence? This will help determine if it is hearsay, nonhearsay, impeachment, or being used for some other purpose.

Another issue that often arises, is that the person who allegedly sent the text messages denies ever having sent it. In this case, the judge would need to hold a preliminary hearing under SCRE 104 to determine if the texts were sent by the alleged person. If they weren't sent by that person, then they are not relevant. If they were sent by that person, then they are relevant. *See* State v. Young, (Ct. App. 2021) below.

An article in the American Bar Association by Michaela Sozio sums up the issues of authentication and how to potentially address them:

> The authentication standard is the same regardless of whether the evidence is digital or in a more traditional form—that is, FRE 901(a) requires the party proffering the evidence to demonstrate that the evidence is what it is claimed to be. FRE 901(b) sets forth examples of evidence that satisfy the general requirements of FRE 901(a), including, but not limited to, the testimony of a witness with knowledge under FRE 901(b)(1), distinctive characteristics of the item under FRE 901(b)(4), or a comparison by an expert witness under FRE 901(b)(3).
>
> E-mails are now commonly offered as evidence at trial. After first demonstrating that the evidence is relevant pursuant to FRE 401, the attorney proffering this evidence must establish authenticity: Was the e-mail sent to and from the persons as indicated on the e-mail? Here, a witness with personal knowledge may testify as to the e-mail's authenticity, which typically is the author of the e-mail or a witness who saw the proffered e-mail drafted and/or received by the person the proponent claims drafted/received the e-mail. In addition, if the e-mail has been produced in response to a sufficiently descriptive document request, the production of the e-mail in response may constitute a statement of party-opponent and found to be authenticated under FRE 801(d)(2).
>
> Texts are also becoming increasingly offered as evidence at trial. Typically, evidence of texts is obtained in one of two forms: (1) as screen shots; or (2) as photographs of the text messages. Whether a screen shot or a photograph, it is important that the screen with the text message, the name and/or phone number of the person sending the text message, and the date and time the message was sent are clearly displayed. Text messages can be authenticated by the testimony of a witness with knowledge or by distinctive characteristics of the item, including circumstantial evidence such as the author's screen name or monikers, customary use of emoji or emoticons, the author's known phone number, the reference to facts that are specific to the author, or reference to facts that only the author and a small number of other individuals may know.
>
> Social media networks such as Facebook, Linked-In, and the like are now ubiquitous; consequently, social media posts have increasingly become evidence at trial. However, authenticating a social media post generally is more difficult than an e-mail or a text. For example, it is insufficient to simply show that a post was made on a particular person's webpage; it is

[50] S.C. Code Ann. § 19-5-520.

generally too easy to create a Facebook page or the like under someone else's name. In addition, an individual could have gained access to someone else's social media account. To properly introduce evidence of a social media post at trial, you must first have a printout (or download, if a video) of the webpage that depicts the social media post you seek to introduce as evidence, and the person who printed or downloaded the post must testify that the printouts accurately reflected what was on his or her screen when it was printed or downloaded.

Once that is established, the social media post must be authenticated. This can be done in several ways. Direct witness testimony can be obtained by the purported creator of the post, from someone who saw the post being created, and/or from someone who communicated with the alleged creator of the post through that particular social media network. Testimony can be obtained from the social media network to establish that the alleged creator of the post had exclusive access to the originating computer and the social media account. The subscriber report can also be subpoenaed from the social media network, which can identify all posts made and received as well as any comments, "likes," "shares," photographs, etc. As with e-mails and texts, circumstantial evidence may also be used for authentication pursuant to FRE 901(b)(4) if, for example, the post contains references or information relating to family members, a significant other, or co-workers; the writing style of the posts or comments is in the same style (i.e., slang, abbreviations, nicknames, and/or use of emoji/emoticons) the purported author uses; or there are private details about the author's life or details that are not widely known that are indicated in the post. Finally, do not overlook the option of having the author of the social media post authenticate the post and testify regarding the post in his or her deposition.[51]

- State v. Green, 427 S.C. 223 (Ct. App. 2019) Social media content should be authenticated just like any other evidence through SCRE 901. This can be done through personal knowledge, circumstantial evidence of distinctive characteristics, or another general approach. (The South Carolina Supreme Court affirmed the Court of Appeals' holding on the authentication of social media evidence in State v. Green, 432 S.C. 97 (2020)).

- State v. Young, (Ct. App. 2021) The Court of Appeals had to determine if text messages were properly allowed into evidence. The text messages allegedly involved the defendant's phone and the State argued that the messages were sent by the defendant. The defendant claimed that they lost the phone previously. The trial court held a preliminary hearing to determine if the defendant sent the text messages. This preliminary hearing falls under SCRE 104(b), where the relevancy of a piece of evidence depends on the fulfillment of another condition. In this example, the text message is relevant if it was sent by the defendant (and nonhearsay). But if the defendant did not send it, then they wouldn't be relevant. The standard for determining conditional relevancy is: "The court simply examines all the evidence in the case and decides whether the jury **could** reasonably find the conditional fact...by a preponderance of the evidence." *See* Huddleston v. United States, 485 U.S. 681 (1988). *(See also the chapter "Conditional Relevancy")*.

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[51] Sozio, Michaela. "Authenticating Digital Evidence at Trial." *American Bar Association*, 27 Apr. 2017, www.americanbar.org/groups/business_law/publications/blt/2017/04/03_sozio/.

Stipulation

- State v. Jackson, 364 S.C. 329 (2005) The State has a right to prove every element of an offense and is not obligated to rely up on a defendant's stipulation. *See also* Old Chief, 519 U.S. 172 (1997).

Subsequent Remedial Measures

- Carson v. CSX Transp., Inc., 400 S.C. 221 (2012) The purpose of SCRE 407 is to encourage people to takes step toward added safety. "Rule 407 bars the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose."

- Webb v. CSX Transp., Inc., 364 S.C. 639 (2005) The Supreme Court disagreed with the Court of Appeals' narrow interpretation of SCRE 407 and held that it ignored the literal reading of the rule. The rule "bars the introduction of any change, repair, or precaution that under the plaintiff's theory would have made the accident less likely to happen, unless the evidence is offered for another purpose."

Surveillance Video

Summary: Surveillance video can usually be authenticated one of two ways. The first is by a person who witnessed what the video recorded. In the same manner that an eye-witness can lay a foundation for a photograph that they recognize, an eye-witness with the proper personal knowledge may be able to authenticate a video recording. But this would likely not include words or characters that are on the video (e.g., time stamp, captions, etc.). A chain of custody is likely not necessary if the witness can testify to everything they heard or saw on the recording is accurate.[52] But the recording still has to pass hearsay and other Rules of Evidence.

The second method is through what is known as the "silent witness" doctrine. When a camera is set up to automatically record, there might not be anyone who can testify to actually witnessing the event – rather, the camera and its footage is the witness. The video footage in this case would have to be authenticated by someone who is familiar with the recording process and other aspects of how it operates – similar to a custodian of the records.

As the treatise *McCormick on Evidence* has stated:

> *Unscripted Recordings as Substantive Evidence*. Without a percipient witness to testify as to their accuracy, visual recordings, again as with still photographs, are subjected to more careful scrutiny under the "silent witness" theory of authentication. Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process, the foundation required by Federal Rule of Evidence 901(b)(9). However, admission of such videotapes have also been upheld upon a more tenuous foundation.
> …
>
> *Sounds Recordings*. … More commonly, modern technology provides many modes of recording communications from persons who are heard but not seen; for example, tape recordings, answering machines and voice messages. As with video or film recordings of real events, if a percipient witness overheard the voices as they were recorded, this witness may provide the required authentication foundation by testifying that the sound recording is an accurate record of what the witness did hear. In such a case, no chain of custody is required either, since the purpose of proving the chain is to show that the recording is in the same condition as when first recorded.
>
> If no witness testifies that he overheard the crucial information being recorded, then the record must be authenticated by the "silent witness" process; that is, testimony concerning the accuracy of the recording system and the absence of tampering, often through its chain of custody.
>
> Under either foundation, sound recordings are treated as independent substantive evidence of messages, conversations or other sounds. It would blink reality to consider them solely as illustrative evidence. The recorded voices, inflections of speech and other sounds defy adequate description by the testifying witness and are inevitably subject to interpretation directly by the trier.[53]

As stated by *McCormick* above, even if the video is authenticated, it still must pass the other Rules of Evidence. If there are statements on the video, then the court would need to first determine if they are testimonial or not.

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[52] State v. Aragon, 354 S.C. 334 (Ct. App. 2003).

[53] "§ 216. Video, Film and Sound Recordings." *McCormick on Evidence*, by Charles McCormick, Kenneth S. Broun, George E. Dix, Edward J. Imwinkelried, David H. Kaye, Robert P. Mosteller, and Eleanor Swift, 8th ed., Thomson Reuters Publishing, 2020.

After that, the court would need to determine if any statements are nonhearsay or exceptions to hearsay. If there are inadmissible statements, then the video could possibly be redacted or edited so as to remove the statements.

- United States v. Marshall, 332 F.3d 254 (4th Cir. 2003) "The district court did not abuse its discretion in admitting videotaped footage under a 'silent witness' theory, *see* 2 John W. Strong et al., *McCormick on Evidence* § 214 (5th ed.1999), because the Government introduced sufficient evidence establishing the reliability of the footage."

Third Party Guilt

- Holmes v. South Carolina, 547 U.S. 319 (2006) The United States Supreme Court overturned the South Carolina Supreme Court's holding on third party guilt. The South Carolina Supreme Court created a standard that made third party guilt admissible based upon the strength of the prosecution's case. The United States Supreme Court held that this was unconstitutional and that the admission of third party guilt should be based on the probative value of the evidence and other factors stated in *State v. Gregory,* 198 S.C. 98 (1941). "Interpreted in this way, the rule applied by the State Supreme Court does not rationally serve the end that the *Gregory* rule and its analogues in other jurisdictions were designed to promote, *i.e.,* to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues."

- State v. Cooper, 334 S.C. 540 (1999) "However, this Court has imposed strict limits on the admissibility of third-party guilt. In *State v. Gregory,* 198 S.C. 98, 16 S.E.2d 532 (1941), this Court held: The evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... *But before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.* An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty."

Transcripts

- State v. Winkler, 388 S.C. 574 (2010) In the judge's discretion, the jury may review a transcript of testimony in the defendant's presence.
- State v. White, 416 S.C. 135 (2016) Trial court properly allowed the use of a transcript where audio of a forensic interview was inaudible. Trial judge explained to the jurors that they needed to listen and watch the video and "decide what was said and done on the video" not the transcript.

Words of Contract/Legal Document

- Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545 (2008) Generally, words of a contract or legal document are excluded from hearsay. The theory behind this is that the words are not being used to prove the truth, but rather the utterance of them is part of the litigation issue. The examples include "words or utterances include words accompanying the making of a contract, utterances evidencing a promise to marry, words accompanying the performance of a contract, words charged as a libel or slander, words evidencing the fact of sending notice, and words evidencing reputation."
- Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58 (Ct. App. 2015) Written words of a contract that are offered to show a duty or the existence of a contract should not be excluded as hearsay.

Writing Used to Refresh Memory

Summary: Writing used to refresh memory is often confused with the hearsay exception "recorded recollection." However, these are two distinct evidentiary issues. Professor Jessica Smith of UNC School of Government has written several blog posts that summarize this distinction:

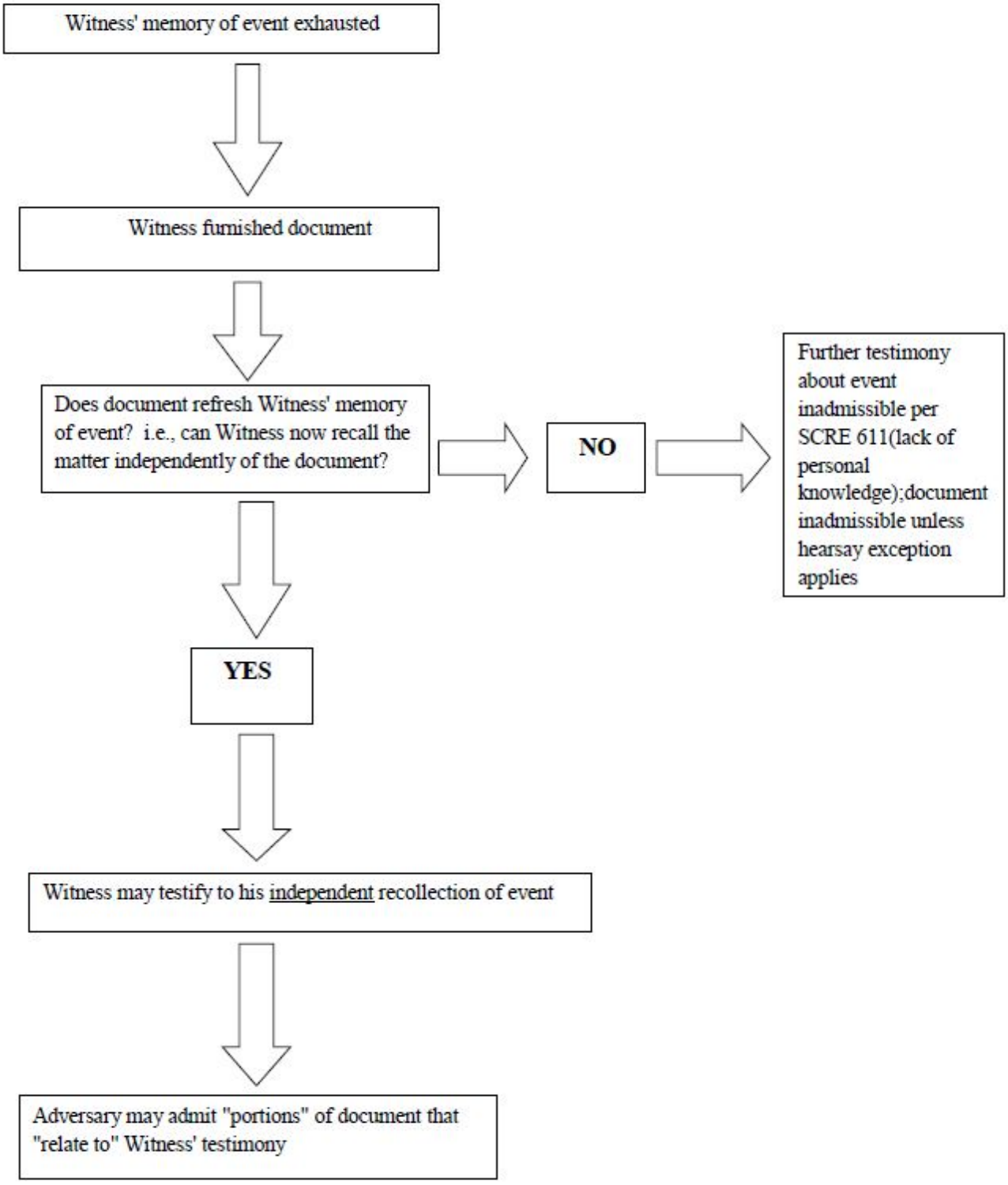
> A lot of folks confuse this hearsay exception with the technique of present recollection refreshed under Evidence Rule 612. Don't do that! When a witness testifies that he or she cannot remember the matter in question, the proponent may have the witness review a document or item in order to refresh the witness' memory. If reviewing the material sufficiently refreshes the witness's recollection, the witness then testifies to the matter in question and no hearsay issues are presented. That is present recollection refreshed. When, however, the witness' memory cannot be refreshed, the proponent may seek to introduce the contents of a memorandum or record created by the witness as a recorded recollection, and in lieu of the witness' trial testimony. … One final note about trial practice. If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party. N.C. R. EVID. 803(5). The rationale for this is to "prevent a jury from giving too much weight to a written statement that cannot be effectively cross-examined." State v. Spinks, 136 N.C. App. 153, 159 (1999) (citation omitted).[54]

See also the chapter "Hearsay: Exceptions (803) – Recorded Recollection"

- State v. Hughes, 346 S.C. 339 (Ct. App. 2001) If a witness uses notes before testifying, the judge must use their discretion to determine if the witness must produce them for the other party to inspect. A trial judge should be guided by the interests of justice, and in making their decision, they "should balance the interests of the party seeking production against the burden of requiring production." In this case, the witness used notes before testifying, however the notes were in another county. Based on the notes not being in the courtroom, the trial court did not make the witness produce the notes. The Court of Appeals held that this was error because the trial judge did not use their discretion in making a determination of production. SCRE 612 is not limited to notes located inside the courtroom.

[54] Smith, Jessica. "Hearsay Exceptions: Recorded Recollection." *North Carolina Criminal Law*, 18 Feb. 2014, https://nccriminallaw.sog.unc.edu/hearsay-exceptions-recorded-recollection/. Reprinted with permission of the School of Government, copyright 2021. This copyrighted material may not be reproduced in whole or in part without the express written permission of the School of Government, CB# 3330 UNC-Chapel Hill, Chapel Hill, NC 27599-3330, sog.unc.edu.

Laying Foundation For Refreshing Recollection of Witness, SCRE 612



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[55] Flowchart by Judge Garrison Hill.

RULE 101
SCOPE

Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101.

Note:

This rule differs from the federal rule in two regards. First, the phrase "except as otherwise provided by rule or by statute" is added to make it clear that statutes or other rules promulgated by the Supreme Court may limit the applicability of these rules. An example of such a rule is Rule 11 of the South Carolina Administrative and Procedural Rules for Magistrate's Court which provides that the rules of evidence apply in civil actions before the magistrate's court, but allows those rules to be relaxed in the interest of justice. Second, the phrase "courts of South Carolina" has been substituted for the phrase "courts of the United States, and before the United States bankruptcy judges and United States magistrate judges." Rule 1101 provides greater detail regarding the applicability of these rules in various proceedings.

RULE 102
PURPOSE AND CONSTRUCTION

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Note:

This rule is identical to the federal rule.

RULE 103
RULINGS ON EVIDENCE

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

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

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

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

Note:

This rule is identical to the federal rule with the exception of the omission of subsection (d) relating to plain error. The rule of plain error contained in the federal rule is inconsistent with the law in South Carolina. Cf. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (abolishing in favorem vitae review in capital cases and holding that error must be preserved by contemporaneous objection in the trial court). It should be noted that the Supreme Court has recognized a very few limited circumstances in which it will review issues raised for the first time on appeal. Cf. Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994) (challenge to abhorrent and outrageous argument raised for first time on appeal); State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994) (failure to make contemporaneous objection to judge's comments excused where judge's tone and tenor made it clear that any objection would have been futile). Further, the failure to adopt a rule of plain error in no way limits the authority of trial judges to raise evidentiary issues on their own motion.

Subsection (a) means that reversal on appeal is only required where a substantial right of a party has been affected; error which is harmless does not affect a substantial right. Graham, Handbook of Federal Evidence, 103.1 (3rd ed. 1981). This is equivalent to South Carolina law holding that reversal is not required unless an error is prejudicial and not harmless. State v. Sosebee, 284 S.C. 411, 326 S.E.2d 654 (1985) (probable prejudice must be shown); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985) (a new trial is not required for harmless error), cert. denied, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 266 (1985), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); Watts v. Bell Oil Co., 266 S.C. 61, 221 S.E.2d 529 (1976) (prejudice must be shown).

Subsection (a)(1) is generally in accord with prior South Carolina law which required a contemporaneous objection with specific grounds to preserve an error for review. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994) (contemporaneous objection); White v. Wilbanks, 298 S.C. 225, 379 S.E.2d 298 (Ct. App.1989) (contemporaneous objection), rev'd on other grounds, 301 S.C. 560, 393 S.E.2d 182 (1990); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (specific grounds required; general objection preserves nothing). It does somewhat relax the requirement of stating specific grounds where the grounds are apparent from the context. The better practice, however, is for counsel to always give, and the court always to require, specific grounds for an objection; this will avoid later disputes regarding what was apparent from the context. It should be noted that Rule 43(i), SCRCP, Rule 18, SCRCrimP, and Rule 9(b), SCRFC, do not prevent counsel from stating the grounds for an objection, but merely control argument on the grounds for the objection. This rule does not alter the prior practice regarding motions in limine, which allowed the motion to exclude evidence to be made at the pretrial stage, State v. Glenn, 285 S.C. 384, 330 S.E.2d 285 (1985), but required a contemporaneous objection when the evidence is actually offered into evidence at the trial to preserve the issue for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App.1992).

Subsection (a)(2) is the federal rule modified to require the grounds for admission to be stated. As modified, this rule is consistent with South Carolina law which requires a proffer of the excluded evidence and the grounds for admission to be stated to preserve the trial court's ruling for review. State v. Cabbagestalk, 281 S.C. 35, 314 S.E.2d 10 (1984); State v. Cox, 258 S.C. 114, 187 S.E.2d 525 (1972); Legrande v. Legrande, 178 S.C. 230, 182 S.E. 432 (1935); Gold Kist, Inc. v. Citizens & Southern Nat'l Bank, 286 S.C. 272, 333 S.E.2d 67 (Ct.

App.1985). The rule does change South Carolina law by dispensing with the requirement of a proffer and a statement of the grounds for admissibility where the substance of the evidence and the grounds are apparent from the context. The prior law only dispensed with the requirement of a proffer where the judge refused to allow a proffer. State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986). To avoid later disputes over what was apparent from the context, however, the better practice is for a proffer and a statement of the grounds to always be made.

The first sentence of subsection (b) is similar to language contained in former Rule 43(c), SCRCP. Although no specific South Carolina case can be found to support the second sentence, requiring an offer to be made in question and answer form is within the discretion of the judge.

Subsection (c) is in accord with prior South Carolina law. Chandler v. People's Nat'l Bank, 140 S.C. 433, 138 S.E. 888 (1927); Rule 43(c), SCRCP.

RULE 104
PRELIMINARY QUESTIONS

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. Hearings on the admissibility of confessions or statements by an accused, and pretrial identifications of an accused shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

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

(e) Weight and Credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

Note:

Except for subsection (c), this rule is identical to the federal rule.

The first sentence of subsection (a) is in accord with prior South Carolina law. Wright v. Pub. Sav. Life Ins. Co., 262 S.C. 285, 204 S.E.2d 57 (1974). No South Carolina authority has been found which specifically determines whether a judge must apply the rules of evidence in conducting a hearing on the admissibility of evidence. Cf. Congdon v. Morgan, 14 S.C. 587 (1880) (passing comment that judge did not violate rules of evidence during hearing on admissibility of evidence).

Subsection (b) addresses situations where the relevancy of an item of evidence depends upon the existence of a particular preliminary fact. Prior South Carolina case law has recognized that a judge commits no error in admitting evidence where its relevancy is established later in the trial. Perry v. Jefferies, 61 S.C. 292, 39 S.E. 515 (1901) (evidence of acts of defendant's agents admitted before any evidence of agency introduced).

Subsection (c) modifies the federal rule by adding the phrase "or statements made by an accused, and pretrial identifications of an accused." This addition is made to emphasize the fact that hearings on the admissibility of all statements made by a criminal defendant, whether inculpatory or exculpatory, must be made outside the presence of the jury. State v. Primus, 312 S.C. 256, 440 S.E.2d 128 (1994); State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971). The addition also requires all hearings regarding the admissibility of pretrial identifications (to include any assertion that an in-court identification should be excluded as a result of a pretrial identification) to be heard outside the presence of the jury. State v. Simmons, 308 S.C. 80, 417 S.E.2d 92 (1992).

No South Carolina cases have been found which address the matters stated in subsections (d) and (e).

RULE 105
LIMITED ADMISSIBILITY

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Note:

This rule is identical to the federal rule and is in accord with prior South Carolina law. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973); State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244 (1942).

RULE 106
REMAINDER OF OR RELATED WRITINGS OR STATEMENTS

When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Note:

The law in this State has been that, when a part of a document or writing is introduced into evidence, the remainder may be introduced by the other party. Dukes v. Smoak, 181 S.C. 182, 186 S.E. 780 (1936). The same rule was applicable to conversations. State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975). However, the party seeking to bring out the remainder had to wait until cross-examination or the presentation of that party's case to do so. This rule, which is identical to the federal rule, changes the prior law as to written or recorded statements. The party seeking to introduce the remainder of a written or recorded statement can now require the remainder to be introduced at the same time the other part of the written or recorded statement is introduced. This rule does not change the order of proof as to the remainder of an unrecorded conversation; the party seeking to bring out the remainder must do so during cross-examination or during that party's case.

RULE 201
JUDICIAL NOTICE OF ADJUDICATIVE FACTS

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

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

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

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

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

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing Jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

Note:

Except for subsection (g), this rule is identical to the federal rule. As stated by subsection (a), this rule governs only judicial notice of adjudicative facts. Adjudicative facts are "facts about the particular event which gave rise to the lawsuit and ... [help] explain who did what, when, where, how and with what motive and intent." Legislative facts, on the other hand, are the factual grounds on which judges base their opinions "when deciding upon the constitutional validity of a statute, interpreting a statute, or extending or restricting a common law rule." C. McCormick, McCormick on Evidence 328 and 331 (4th ed. 1992). The courts of this State continue to have authority to take judicial notice of legislative facts. Cf. Davenport v. City of Rock Hill, 315 S.C. 114, 432 S.E.2d 451 (1993) (history of tax anticipation notes considered).

Subsection (b) is consistent with prior case law in this State. See In Re Harry C., 280 S.C. 308, 313 S.E.2d 287 (1984); State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935). This rule does not allow a judge to take judicial notice of a fact merely because it is within his personal knowledge, and the case of Gamble v. Price, 289 S.C. 538, 347 S.E.2d 131 (Ct. App.1986) is inconsistent with this rule.

Regarding subsection (c), no South Carolina case has been found discussing this matter.

Subsection (d) is consistent with prior case law in this State. See Toole v. Salter, 249 S.C. 354, 154 S.E.2d 434 (1967); State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935).

Regarding subsection (e), the law of this State has not previously entitled a party to be heard on the issue of taking judicial notice. This opportunity appears to be a useful safeguard to protect a party's rights. J. Weinstein and M. Berger, Weinstein's Evidence, 201[05] (1994).

Subsection (f) is consistent with prior case law in this State. Cf . State v. Squires, 311 S.C. 11, 426 S.E.2d 738 (1992) (Supreme Court took judicial notice that infrared spectroscopy process had gained general acceptance in the scientific community); McCoy v. Town of York, 193 S.C. 390, 8 S.E.2d 905 (1940) (Supreme Court took judicial notice of dangerous qualities of gasoline and kerosene).

Subsection (g) requires a court to instruct the jury to accept as conclusive any fact judicially noticed. The rule differs from the federal rule in that it makes no distinction between civil and criminal cases. The language of the rule is taken from the 1974 Uniform Rules of Evidence, Rule 201.

RULE 301
PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Note:

This rule is the same as the federal rule. It is consistent with the case law in this State. See Long v. Metropolitan Life Insurance Co., 228 S.C. 498, 90 S.E.2d 915 (1956); Ford v. Atlantic Coast Line R. Co., 169 S.C. 41, 168 S.E. 143 (1932).

RULE 401
DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Note:

This rule is identical to the federal rule and is consistent with South Carolina law. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

RULE 402.
RELEVANT EVIDENCE GENERALLY ADMISSIBLE;
IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.

Note:

This rule is the federal rule amended to reference South Carolina law. The rule reflects the law in South Carolina. Levy v. Outdoor Resorts of South Carolina, 304 S.C. 427, 405 S.E.2d 387 (1991); State v. Petit, 144 S.C. 452, 142 S.E. 725 (1928).

RULE 403
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Note:

This rule is identical to the federal rule and is consistent with the law in South Carolina. State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) (relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice); State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (limitation of defense testimony upheld where it was merely cumulative to other testimony), cert. denied, 464 U.S. 827, 104 S.Ct. 100, 78 L.Ed.2d 105 (1983); State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941) (trial judge properly limited the defendant's presentation of certain evidence to guard against confusion of the jury by the injection of collateral issues).

RULE 404
CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTION; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

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

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

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

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Note:

Rule 404(a) is identical to the federal rule and is consistent with the law in South Carolina. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990).

Rule 404(a)(1) is identical to the federal rule and is consistent with the law in South Carolina. State v. Lyles, 210 S.C. 87, 41 S.E.2d 625 (1947) (a defendant may put in evidence of his good character); State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990) (when the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the state may cross-examine as to acts relating to the traits focused on by the accused).

Rule 404(a)(2) identical to the federal rule and is consistent with the law in South Carolina. State v. Boyd, 126 S.C. 300, 119 S.E. 839 (1923).

Rule 404(b) differs in two respects from the federal rule. First, unlike the federal rule which does not limit the purposes for which evidence of other crimes may be admitted, the South Carolina rule limits the use of evidence of other crimes, wrongs, or acts to those enumerated in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). See also Citizens Bank of Darlington v. McDonald, 202 S.C. 244, 24 S.E.2d 369 (1943) (Lyle applicable in civil cases). Second, the South Carolina rule does not contain the requirement which is in the federal rule that, upon request by an accused, the prosecution must provide reasonable notice of the general nature of any evidence it intends to introduce under the rule. With the exception of notice of evidence to be used in aggravation in the sentencing phase of capital cases, S.C. Code Ann. § 16-3-20(B) (Supp. 1993), there is no similar requirement under South Carolina law. The rule does not set forth the burden of proof required for the admission of evidence of bad acts not the subject of a conviction and, therefore, case law would control. State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989) (in a criminal case, evidence of other crimes or bad acts must be clear and convincing if the acts are not the subject of a conviction). Further, when the prejudicial effect of evidence substantially outweighs its probative value, the evidence may be excluded under Rule 403 which is consistent with prior case law. State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991).

RULE 405
METHODS OF PROVING CHARACTER

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Note:

Rule 405(a) is identical to the federal rule and changes the law in South Carolina in one respect. Formerly, only testimony as to a person's general reputation was allowed. State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); In re Greenfield's Estate, 245 S.C. 595, 141 S.E.2d 916 (1965). Rule 405(a) allows evidence of character to be in the form of opinion or reputation evidence. The portion of Rule 405(a) regarding cross-examination as to specific acts is consistent with the law in South Carolina. State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990) (when the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, the state may cross-examine as to particular bad acts or conduct relating to the traits focused on by the accused).

Rule 405(b) is identical to the federal rule and is consistent with South Carolina law. State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945).

RULE 406
HABIT; ROUTINE PRACTICE

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

Note:

This rule is identical to the federal rule and makes it clear that the presence or absence of eyewitnesses does not affect the relevancy of evidence of habit or routine practice. To the extent that South Carolina law regarding evidence of habit or routine was previously read to require the absence of eyewitnesses, this rule constitutes a change in the law. Compare Laney v. Atlantic Coast Line Railway Co., 211 S.C. 328, 45 S.E.2d 184 (1947); State v. Hester, 137 S.C. 145, 134 S.E. 885 (1926); Dowling v. Fenner, 131 S.C. 62, 126 S.E. 432 (1922) with Holcombe v. Watson Supply Co., 171 S.C. 110, 171 S.E. 604 (1933).

RULE 407
SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Note:

This rule is identical to the federal rule. The general rule that evidence of subsequent measures is inadmissible to establish negligence is consistent with South Carolina law. Green v. Atlantic Coast Line R. Co., 136 S.C. 337, 134 S.E. 385 (1926). Under South Carolina law another stated purpose for admitting evidence of subsequent measures is to show the conditions existing at the time of the event or accident. Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992); Plunkett v. Clearwater Bleachery Mfg. Co., 80 S.C. 310, 61 S.E. 431 (1906); see also Eargle v. Sumter Lighting Co., 110 S.C. 560, 96 S.E. 909 (1918).

RULE 408
COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another

purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Note:

This rule is identical to the federal rule. It is generally the rule in South Carolina that evidence relating to settlements is not admissible to prove liability. Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960); see also Woodward v. Southern Railway, 88 S.C. 453, 70 S.E. 1060 (1911) (evidence of disclosures made by either party to the other, directly or indirectly, in negotiations for a compromise is not admissible). Evidence of an offer to compromise may be admissible for some other purpose. Meehan v. Commercial Casualty Ins. Co., 166 S.C. 496, 165 S.E. 194 (1932) (evidence of offers of compromise made by alleged agent of a party admissible for purpose of proving agency).

RULE 409
PAYMENT OF MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Note:

This rule is identical to the federal rule. Formerly, South Carolina law, while generally prohibiting the admission of evidence of offers to pay, or payment of, medical or other expenses, McIntire v. Winn Dixie Greenville, Inc., 275 S.C. 323, 270 S.E.2d 440 (1980), did allow its admission if the circumstances surrounding the payment indicated an admission of liability rather than an act of benevolence. Crosby v. Southeast Zayre, Inc., 274 S.C. 519, 265 S.E.2d 517 (1980). The rule strictly prohibits the admission of evidence of offers to pay, or payment of, medical or other similar expenses.

RULE 410
INADMISSIBILITY OF PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any court proceedings regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered

contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Note:

Except for subsection (3), this rule is identical to the federal rule. Subsection (3) was amended because South Carolina has no equivalent to Rule 11 of the Federal Rules of Criminal Procedure. It should be noted that convictions based on pleas of nolo contendere are admissible under Rule 609 for impeachment. The rule is consistent with prior South Carolina law. State v. Mathis, 287 S.C. 589, 340 S.E.2d 538 (1986); State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981).

RULE 411
LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Note:

This rule is identical to the federal rule and is consistent with the law in South Carolina. Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 426 S.E.2d 756 (1993) (the fact that a defendant is protected from liability by insurance shall not be made known to the jury); Sarvis v. Register, 288 S.C. 236, 341 S.E.2d 791 (1986) (generally, the existence of insurance should not be brought to the attention of the jury).

RULE 412
ADMISSIBILITY OF EVIDENCE CONCERNING VICTIM'S SEXUAL CONDUCT IN CRIMINAL SEXUAL CONDUCT CASES

In prosecutions for criminal sexual conduct or assault with intent to commit criminal sexual conduct, the admissibility of evidence concerning the victim's sexual conduct is subject to the limitations contained in S.C. Code Ann. 16-3-659.1 (1985).

Note:

In a prosecution for criminal sexual conduct or assault with intent to commit criminal sexual conduct, the admissibility of evidence of the victim's sexual conduct is controlled by S.C. Code Ann. 16-3-659.1 (1985). Unlike the federal rule which contains the standards and procedures governing the admissibility of such evidence, this rule merely references the statute.

RULE 501
GENERAL RULE

Except as required by the Constitution of South Carolina, by the Constitution of the United States or by South Carolina statute, the privilege of a witness, person or government shall be governed by the principles of the common law as they may be interpreted by the courts in the light of reason and experience.

Note:

This rule modifies the federal rule to refer to the South Carolina Constitution and statutes. Like the federal rule, this rule does not set forth a list of privileges. Among those privileges which would be covered by this rule are: husband and wife (S.C. Code Ann. 19-11-30); priest and penitent (S.C. Code Ann. 19-11-90); certain mental health professionals and clients (S.C. Code Ann. 19-11-95); news media and sources (S.C. Code Ann. 19-11-100); attorney and client [Drayton v. Industrial Life & Health Ins. Co., 205 S.C. 98, 31 S.E.2d 148 (1944)]; privilege against self-incrimination (U.S. Const. amend. V; S.C. Const. art. I, 12; S.C. Code Ann. 19-11-80); and the identity of a confidential informant [State v. Hayward, 302 S.C. 75, 393 S.E.2d 918 (1990)].

RULE 601
COMPETENCY

(a) General Rule. Every person is competent to be a witness except as otherwise provided by statute or these rules.

(b) Disqualification of a Witness. A person is disqualified to be a witness if the court determines that (1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth.

Note:

Subsection (a) differs from the federal rule which provides that the only exceptions to the competency rule are those set forth in the Rules of Evidence. Because legislation such as the Dead Man's Statute, S.C. Code Ann. § 19-11-20 (1985), still exists limiting witness competency, the rule also refers to exceptions provided by statute.

At common law, there were numerous grounds which would render a witness incompetent. Legislation has eliminated many of these common law disqualifications resulting in a liberalization of the rules regarding competency. See, e.g., S.C. Code Ann. §§ 19-11-10 (1985) (party competent to be witness); 19-11-30 (Supp. 1993) (spouse of party competent); 19-11-40 (1985) (witness having interest in action is not disqualified); 19-11-50 (1985) (criminal defendant may testify); 19-11-60 (1985) (convicted person may testify). Subsection (a) continues this trend of liberalization by creating a general rule of competency.

This rule will result in a change in the law regarding competency of children. Under prior South Carolina law, proof of competency for children under the age of fourteen was required unless the child was a victim of abuse or neglect, as defined in the Children's Code, who was testifying concerning the abuse or neglect. South Carolina Department of Social Services v. Doe, 292 S.C. 211, 355 S.E.2d 543 (Ct. App.1987); S.C. Code Ann. § 19-11-25 (Supp. 1993). Under this rule, children are presumed to be competent unless it is shown otherwise.

The federal rule does not contain a subsection (b). This provision was added to establish a minimum standard for competency of a witness and to make it clear that the determination of a witness' competency is within the sound discretion of the trial judge. In re Robert M., 294 S.C. 69, 362 S.E.2d 639 (1987); State v. Camele, 293 S.C. 302, 360 S.E.2d 307 (1987); State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971).

RULE 602
LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Note:

This rule is identical to the federal rule and is consistent with South Carolina law. See Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967); Wilson v. Clary, 212 S.C. 250, 47 S.E.2d 618 (1948).

RULE 603
OATH OR AFFIRMATION

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Note:

This rule is identical to the federal rule which sets forth the common law tenet that a witness is required to take an oath or affirmation to tell the truth before being allowed to testify. See 98 C.J.S. Witnesses § 320(a) (1957). The use of an affirmation instead of an oath is consistent with prior law. See S.C. Code Ann. § 19-1-40 (1985); Rule 43(d), SCRCP.

RULE 604
INTERPRETERS

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.

Note:

This rule is identical to the federal rule. The qualification of an interpreter is within the discretion of the trial judge and depends on the circumstances of each case. Peoples National Bank v. Manos Brothers, 226 S.C. 257, 84 S.E.2d 857 (1954).

RULE 605
COMPETENCY OF JUDGE AS WITNESS

The judge presiding at the trial may not testify in that trial as a witness.

Note:

This rule is identical to the first sentence of the federal rule and is consistent with South Carolina law providing that a judge may not testify as a witness in a case being tried before that judge. State v. Bagwell, 201 S.C. 387, 23 S.E.2d 244 (1942). The second sentence of the federal rule dispenses with the requirement of an objection to a judge being a witness. This sentence was deleted as being inconsistent with the law of this state. See State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

RULE 606
COMPETENCY OF JUROR AS WITNESS

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

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

Note:

The language of this rule is identical to the federal rule. Subsection (a) of this rule changes the law in South Carolina in two regards. First, while prior law allowed a juror to testify as to venue, State v. Vari, 35 S.C. 175, 14 S.E. 392 (1892) (juror allowed to testify as to isolated, particular matter such as value or venue but not as to general facts and circumstances of the offense), this subsection would prohibit such testimony. Second, the prior law did not require that the party opposing the calling of a juror as a witness be given an opportunity to object outside the presence of the jury.

Subsection (b) is consistent with the general rule that a juror may not present testimony as to the deliberations in the jury room; as to any mistake, irregularity, or misconduct on the part of the jurors; or which would impeach the verdict or contradict the record. Barsh v. Chrysler Corp., 262 S.C. 129, 203 S.E.2d 107 (1974); State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967); Caines v. Marion Coca-Cola Bottling Co., 196 S.C. 502, 14 S.E.2d 10 (1941). An affidavit of a juror has been admitted on a post-trial motion "with great hesitation" when there was an allegation that a party had attempted to influence the juror. Cohen v. Robert, 33 S.C.L. (2 Strob.) 410 (1848). The rule is also consistent with South Carolina cases holding that no one may invade the secrecy of a grand jury's deliberations. State v. Sanders, 251 S.C. 431, 163 S.E.2d 220 (1968); Margolis v. Telech, 239 S.C. 232, 122 S.E.2d 417 (1961).

RULE 607
WHO MAY IMPEACH

The credibility of a witness may be attacked by any party, including the party calling the witness.

Note:

This rule is identical to the federal rule. However, it is contrary to the former law in this State that a party must vouch for its own witness and may not impeach its witness unless the witness is declared hostile upon a showing of actual surprise and harm, or unless the party is required to call someone, such as a subscribing witness to a deed or will, as a witness. State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991); Hicks v. Coleman, 240 S.C. 227, 125 S.E.2d 473 (1962); White v. Southern Oil Stores, Inc., 198 S.C. 173, 17 S.E.2d 150 (1941).

RULE 608
EVIDENCE OF CHARACTER, CONDUCT AND BIAS OF WITNESS

(a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

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

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(c) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.

Note:

Except for the addition of subsection (c), this rule is identical to the federal rule.

Subsection (a) of this rule permits a witness' truthfulness to be impeached by opinion or reputation evidence. The general rule in South Carolina is that a witness' general reputation for truth and veracity is placed in issue when taking the witness stand. See State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990); State v. Robertson, 26 S.C. 117, 1 S.E. 443 (1887); State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct. App.1985), cert. denied, 286 S.C. 127, 332 S.E.2d 533 1985). Formerly, although evidence of a person's general reputation in the community was admissible, opinion testimony was not admissible. State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); In re: Greenfield's Estate, 245 S.C. 595, 141 S.E.2d 916 (1965). The provision prohibiting bolstering of a witness until

after the witness' credibility is attacked is consistent with prior South Carolina law. State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981); Woods v. Thrower, 116 S.C. 165, 107 S.E. 250 (1921). However, there was an exception allowing bolstering prior to attack when the witness was a stranger to the community. State v. Lynn, supra; Woods v. Thrower, supra. This exception is not included in the rule.

As to subsection (b), no South Carolina cases have been found which permit cross-examination regarding specific acts to show truthfulness. The use of specific acts to attack credibility is similar to prior South Carolina case law which allowed a witness to be cross-examined about prior bad acts if they constituted crimes of moral turpitude. State v. Outlaw, 307 S.C. 177, 414 S.E.2d 147 (1992); State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990); State v. McGuire, 272 S.C. 547, 253 S.E.2d 103 (1979). The cross-examiner was required to take the answer given by the witness and could not use extrinsic evidence or other testimony to prove the bad act. State v. Outlaw, supra; State v. Major, supra. Additionally, the inquiry could only go so far as to bring out the general nature of the misconduct and could not go into specific details. State v. Outlaw, supra; State v. Major, supra.

Subsection (b), like its federal counterpart, does not set forth what conduct may adversely affect a witness' credibility. The former case law standard, which allowed impeachment if the conduct was a crime of moral turpitude, is not the appropriate standard in light of the Court's decision to abandon the moral turpitude standard under Rule 609. Instead, the trial courts should be guided by the decisions of the federal courts which limit inquiry into those specific instances of misconduct which are "clearly probative of truthfulness or untruthfulness" such as forgery, bribery, false pretenses, and embezzlement. See Weinstein's Evidence, 608[05] (1994). This will reduce the kinds of misconduct which can be inquired into from that permitted under prior law. Further, this rule, like the prior case law, does not allow a cross-examiner to go on a "fishing expedition" in the hopes of finding some misconduct. State v. McGuire, supra. The decision whether to allow such impeachment remains in the discretion of the trial judge. Id.

Subsection (c) was added to address impeachment by showing bias or impartiality. State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976); North Greenville College v. Sherman Const. Co., Inc., 270 S.C. 553, 243 S.E.2d 441 (1978).

RULE 609
IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970).

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that

conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation or Other Equivalent Procedure. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule if conviction of the crime would be admissible to attack the credibility of an adult.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Note:

Except for subsections (a) and (d), this rule is identical to the federal rule.

Subsection (a) is identical to the federal rule except for the addition of the last sentence. This addition was made to make it clear that the term "conviction" includes a conviction resulting from a trial or any type of plea, to include a plea of nolo contendere or a plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Allowing a plea of nolo contendere to be used for impeachment is consistent with the prior law. State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981). Subsection (a) does change the law in South Carolina. The prior law was that a witness could be impeached by evidence that the witness had been convicted of a crime of moral turpitude. State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct.App.1985), cert. denied, 286 S.C. 127, 332 S.E.2d 533 (1985); State v. Harvey, 275 S.C. 225, 268 S.E.2d 587 (1980). Further, the standard for balancing probative value against prejudicial effect was the same for all witnesses, to include the accused in a criminal case. Green v. Hewett, 305 S.C. 238, 407 S.E.2d 651 (1991). This subsection does not use the moral turpitude standard, but instead allows impeachment with a conviction for any crime which carries a maximum sentence of death or imprisonment for more than one year. Further, the rule provides for a different standard for balancing probative value and prejudicial effect for an accused who is a witness.

Regarding subsection (b), the adoption of a general ten year limit on the use of convictions for impeachment constitutes a change in South Carolina law. The former case law did not set forth a time limit on the use of convictions for impeachment. Green v. Hewett, supra. Instead, the determination whether a conviction was too remote rested in the discretion of the trial judge. Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991); State v. Livingston, 282 S.C. 1, 317 S.E.2d 129 (1984); State v. Johnson, 271 S.C. 485, 248 S.E.2d 313 (1978). The ten year limit was adopted to help guide trial courts in making uniform determinations in this area.

Subsection (c) regulates the effect of a pardon, annulment, certificate of rehabilitation or other equivalent procedures on the admissibility of a conviction for impeachment purposes. As to the effect of pardons issued by South Carolina, this subsection is arguably more restrictive than S.C. Code Ann. § 24-21-990(5) (Supp. 1993) which provides that a witness cannot be impeached by a conviction for which the witness received a pardon unless the crime indicates a lack of veracity.

The language of subsection (d) of the federal rule, which allows evidence of juvenile adjudications only in criminal cases and does not allow such evidence against the accused, was not used so that the South Carolina rule would conform with state law. Juvenile adjudications are admissible in this state to impeach any witness, including the accused, if the conduct would be criminal if it were committed by an adult. State v. Mallory, 270 S.C. 519, 242 S.E.2d 693 (1978). It should be noted that S.C. Code Ann. § 20-7-780 (Supp. 1993), which makes juvenile records confidential unless otherwise ordered by the family court, may limit access to records of juvenile adjudications.

No South Carolina authority existed as to the effect of the pendency of an appeal on the admissibility of evidence of the conviction. Subsection (e) of the federal rule was adopted verbatim.

RULE 610
RELIGIOUS BELIEFS OR OPINIONS

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.

Note:

No changes were made to the language of the federal rule. The South Carolina Supreme Court has held that a belief in God is not a prerequisite to allowing the witness to testify. State v. Green, 267 S.C. 599, 230 S.E.2d 618 (1976); State v. Hicks, 257 S.C. 279, 185 S.E.2d 746 (1971). However, in State v. Turner, 36 S.C. 534, 15 S.E. 602 (1892), the State was allowed to question the accused concerning comments ridiculing religion which he had allegedly made in order to impeach his credibility. This case is inconsistent with the rule.

RULE 611
MODE AND ORDER OF INTERROGATION AND PRESENTATION

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

(d) Re-examination and Recall. A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

Note:

The language of subsection (a) of this rule is identical to that used in the federal rule. It is consistent with the general rule in this State that the conduct of the trial, including the examination of witnesses, is within the sound discretion of the trial judge. See McMillan v. Ridges, 229 S.C. 76, 91 S.E.2d 883 (1956); State v. Nathari, 303 S.C. 188, 399 S.E.2d 597 (Ct. App. 1990). It should be noted that Rule 614 controls the calling and interrogation of witnesses by the court.

Under South Carolina law, cross-examination is limited only by the requirement that the inquiry relate to matters pertinent to the issues involved or to impeachment of the witness. See State v. Ham, 259 S.C. 118, 191 S.E.2d 13 (1972); Hansson v. General Insulation and Acoustics, 234 S.C. 177, 107 S.E.2d 41 (1959). The scope of cross-examination is within the discretion of the trial judge. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991). Subsection (b) rejects the more restrictive language of the federal rule which limits cross-examination to the subject matter of direct examination and matters affecting the credibility of the witness.

Subsection (c) is consistent with former law. See Rule 43(b)(1), SCRCP; Rule 43(b)(2), SCRCP. The use of leading questions when examining a child, State v. Hale, 284 S.C. 348, 326 S.E.2d 418 (Ct. App. 1985), cert. denied, 286 S.C. 127, 332 S.E.2d 533 (1985), is still permissible under the first sentence of subsection (c) which allows leading questions when "necessary to develop the witness' testimony."

There was no provision in the federal rule as to re-examination and recall of witnesses. The provision concerning re-examination and recall of witnesses was added to the rule to make it consistent with South Carolina law. See Levy v. Outdoor Resorts of South Carolina, Inc., 304 S.C. 427, 405 S.E.2d 387 (1991); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); Huff v. Latimer, 33 S.C. 255, 11 S.E. 758 (1890).

RULE 612
WRITING USED TO REFRESH MEMORY

If a witness uses a writing to refresh memory for the purpose of testifying, either -

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Note:

Except for the deletion of a reference to federal law, no changes were made to the federal rule. Requiring a party to provide a copy of a memorandum used by a witness to refresh recollection so that it may be used on

cross-examination of the witness is consistent with prior law. State v. Hamilton, 276 S.C. 173, 276 S.E.2d 784 (1981); State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). Rule 37(b)(2), SCRCP, and Rule 5(d)(2), SCRCrimP, are similar to the provision in this rule concerning the trial judge's authority to decide the remedy for failure to produce a document for the adverse party.

RULE 613
PRIOR STATEMENTS OF WITNESSES

Subject to the provisions of S.C. Code Ann. §§ 19-1-80, 19-1-90 and 19-1-100:

(a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Note:

The language at the beginning of this rule was added to provide that the rule is subject to the provisions of S.C. Code Ann. §§ 19-1-80 to -100 (1985) regarding written statements made to public employees.

Subsection (a) is identical to the federal rule. This provision was included in the federal rule to abolish the holding in The Queen's Case, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820), that a witness must be shown a prior statement before being examined about the statement. Although no South Carolina case has been found adopting the holding in The Queen's Case, the language of the federal rule eliminating the requirement of showing the witness the prior statement has been included in the South Carolina rule.

Subsection (b) of the federal rule was amended to provide that a proper foundation must be laid before admitting a prior inconsistent statement. A witness must be permitted to admit, deny, or explain a prior inconsistent statement. McMillan v. Ridges, 229 S.C. 76, 91 S.E.2d 883 (1956). Extrinsic evidence of the statement is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made. State v. Galloway, 263 S.C. 585, 211 S.E.2d 885 (1975). In addition, language was added to subsection (b) to set forth the rule that if the witness admits making the prior statement, the witness has been impeached and no further extrinsic evidence of the statement, including the statement itself, is admissible. State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981); McMillan v. Ridges, supra.

RULE 614
CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) Calling by Court. In extraordinary circumstances, the court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. Before calling a court's witness, the court shall afford the parties a hearing on the matter outside the presence of the jury.

(b) Interrogation by Court. When required by the interests of justice only, the court may interrogate witnesses.

Note:

Subsection (a) is the federal rule modified in two respects. First, the phrase "[i]n extraordinary circumstances" was added to emphasize that under our adversarial system the decision whether to call a witness should generally be made by the parties, and the power of the court to call a witness ought to be sparingly used. The formulation of this rule differs from the rule established in State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991), although the circumstances in that case would be extraordinary circumstances justifying a court in calling a witness under this rule. Second, the federal rule was modified to require the court to afford the parties a hearing outside the presence of the jury before a witness is called by the court. This modification is consistent with prior case law. Id.; Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994). Allowing all parties to cross-examine a court's witness is also consistent with the prior case law. Riddle v. State, supra; State v. Anderson, supra.

Subsection (b) is the federal rule modified by adding the phrase "[w]hen required by the interests of justice only." This language was added to emphasize that this power, like the power to call a court's witness, should be used sparingly. If the court does interrogate a witness, the court must be careful not to intimate any opinion as to the force and effect of the testimony by its questions. Fowler v. Laney Tank Lines, Inc., 263 S.C. 422, 211 S.E.2d 231 (1975).

The federal rule contains a subsection (c) which may obviate the need for a timely objection to the calling of a court's witness or the interrogation of a witness by the court in certain circumstances. This provision is inconsistent with the law of South Carolina and was deleted. See State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

RULE 615
EXCLUSION OF WITNESSES

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Note:

The federal rule requires sequestration of witnesses upon the request of a party. The South Carolina rule adheres to prior state practice which leaves the sequestration decision in the sound discretion of the trial judge. See State v. Jackson, 265 S.C. 278, 217 S.E.2d 794 (1975); State v. Miokovich, 257 S.C. 225, 185 S.E.2d 360 (1971). Otherwise, the South Carolina rule is consistent with the federal rule.

RULE 701
OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Note:

Except for the addition of subsection (c) and minor grammatical changes, this rule is identical to the federal rule. The language of subsection (c) is based on language contained in the rules of evidence of Florida and Tennessee, and is intended to emphasize the fact that lay persons may not give expert opinions.

Subsection (a) appears to be consistent with prior law. Cf. State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973) (opinion must be based upon the personal observations of the witness and not merely upon the statements of another witness).

As to subsection (b), the prior case law has held that opinion evidence is admissible as long as it is not superfluous. State v. McClinton, 265 S.C. 171, 217 S.E.2d 584 (1974). This is roughly equivalent to saying that opinion evidence must be helpful.

As to subsection (c), the Court of Appeals has stated that expert testimony is essential where the topic is not a matter within the common knowledge and experience of most lay persons. Spartanburg Regional Med.Center v. Bulsa, 308 S.C. 322, 417 S.E.2d 648 (Ct. App. 1992); Armstrong v. Union Carbide, 308 S.C. 235, 417 S.E.2d 597 (Ct. App. 1992). Subsection (c) merely states this proposition in the reverse.

RULE 702
TESTIMONY BY EXPERTS

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

Note:

The rule is identical to the federal rule, and to former Rule 43(m)(1), SCRCP, and former Rule 24(a), SCRCrimP.

RULE 703
BASES OF OPINION TESTIMONY BY EXPERTS

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

Note:

The rule is identical to the federal rule and former Rule 43(m)(2), SCRCP, and former Rule 24(b), SCRCrimP. This rule makes it clear that an expert may rely on facts or data in giving an opinion which are not admitted into evidence.

RULE 704
OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Note:

This rule is identical to former Rule 43(m)(3), SCRCP, and former Rule 24(c), SCRCrimP. It is identical to the federal rule as it existed prior the 1984 amendment which added subsection (b) to the rule to prohibit expert testimony on the ultimate issue of whether a criminal defendant is insane.

RULE 705
DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Note:

The rule is identical to the federal rule. It differs from former Rule 43(m)(4), SCRCP, and former Rule 24(d), SCRCrimP, which contained the phrase "without prior disclosure of" in place of the phrase "without first testifying to."

RULE 801
DEFINITIONS

The following definitions apply under this article:

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

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

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

(d) Statements Which Are Not Hearsay. A statement is not hearsay if -

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose, or (C) one of identification of a person made after perceiving the person, or (D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Note:

With the exception of subsection (d)(1), this rule is identical to the federal rule.

While case law has not defined the words "statement" and "declarant," the definitions in subsections (a) and (b) are consistent with how those words are used in numerous cases discussing the hearsay rule. Prior law recognized that wordless conduct intended as a communication may be hearsay. State v. Williams, 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985).

Subsection (c) is consistent with South Carolina law. Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531 (1972).

Subsection (d)(1) changes the law in South Carolina. Previously, where the declarant testified at trial and was subject to cross-examination, the general rule was that prior statements made by the declarant/witness were admissible regardless of the hearsay nature of the statements. See State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991); State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980); but see State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987) (all out-of-court statements made by alleged victim not necessarily admissible simply because victim testifies at trial). Subsection (d)(1), however, treats prior statements of a witness as not being hearsay in only four instances. Subsection (A) omits the requirement of the federal rule that the declarant's prior inconsistent statement be given under oath. This modification renders the rule consistent with South Carolina law. See State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982), cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 367 (1983). It should be noted that the foundation requirements of Rule 613(b) must be met before extrinsic evidence of a prior inconsistent statement is admissible. Subsection (B) is the federal rule modified by adding the phrase "provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose." This modification, which is taken from the United States Supreme Court's interpretation of Rule 801(d)(1)(B) of the Federal Rules of Evidence in Tome v. United States, 513 U.S. 150, 130 L.Ed.2d 574, 115 S.Ct. 696 (1995), is somewhat similar to the limitation previously contained in the case law that a prior consistent statement is admissible only where it was made prior to the declarant's relation to the cause. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994); Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960). Subsection (C) is identical to the federal rule and consistent with South Carolina law that evidence regarding pre-trial identifications, which are not the product of unconstitutional procedures, are admissible. State v. Stewart, 275

S.C. 447, 272 S.E.2d 628 (1980); State v. Gambrell, 274 S.C. 587, 266 S.E.2d 78 (1980). Subsection (D), which is not contained in the federal rule, was added to make admissible in criminal sexual conduct cases evidence that the victim complained of the sexual assault, limited to the time and place of the assault. Subsection (D) is consistent with South Carolina law. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).

Subsection (d)(2)(A) is consistent with South Carolina law. Bunch v. Cobb, 273 S.C. 445, 257 S.E.2d 225 (1979) (admission against interest of a party opponent is admissible); State v. Good, 308 S.C. 313, 417 S.E.2d 643 (Ct. App. 1992) (an out of court admission of a criminal defendant is admissible). Subsection (B) is consistent with South Carolina law. State v. Sharpe, 239 S.C. 258, 122 S.E.2d 622 (1962) (testimony that defendant was silent in response to an accusation by a third party admissible), rev'd on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); Coleman & Lipscomb v. Frazier, 38 S.C.L. (4 Rich.) 146 (1850) (where party received a statement and acted on it as true, statement admissible). Subsection (C) is consistent with South Carolina law. Harper v. American Ry. Express Co., 139 S.C. 545, 138 S.E. 354 (1927) (statements by a person authorized to speak are admissible). Subsection (D) is consistent with South Carolina law that statements made by an agent in the scope of his authority were admissible. Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960). Subsection (E) is consistent with South Carolina law. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); Yeager v. Murphy, 291 S.C. 485, 354 S.E.2d 393 (Ct. App. 1987) (statements made by co-conspirators in furtherance of the conspiracy are admissible).

RULE 802
HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.

Note:

The rule replaces the words "by the Supreme Court pursuant to statutory authority or by Act of Congress" found in the federal rule with "by the Supreme Court of this State or by statute." It is consistent with the general rule that hearsay is not admissible unless it fits within an exception to the hearsay rule. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994); Lee v. Gulf Ins. Co., 248 S.C. 296, 149 S.E.2d 639 (1966).

RULE 803
HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling,

pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

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

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

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

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel; provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible. Accident reports required by S.C. Code Ann. §§ 56-5-1260 to -1280 (1991) are not admissible as evidence of negligence or due care in an action at law for damages.

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

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

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

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

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

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

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

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

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

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

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

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to Character. Reputation of a person's character among associates or in the community.

(22) Judgment of Previous Conviction. Evidence of a final judgment (to include final judgments in juvenile delinquency matters), entered after a trial 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, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to Personal, Family or General History, or Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Note:

Except for modifications to subsections (4), (6), (8), (18), and (22), and the deletion of subsection (24) which contained a "catchall" or residual hearsay exception, this rule is identical to the federal rule.

Subsections (1) and (2): These subsections constitute a change in South Carolina law. Previously, a statement had to meet the conditions of both subsections (1) and (2) before it would be admissible under the res gestae exception to the hearsay rule. State v. Harrison, 298 S.C. 333, 380 S.E.2d 818 (1989).

Subsection (3): This subsection is consistent with prior state practice. Winburn v. Minnesota Mut. Life Ins. Co., 261 S.C. 568, 201 S.E.2d 372 (1973); Sligh v. Newberry Elec.Coop.,Inc., 216 S.C. 401, 58 S.E.2d 675 (1950); Ervin v. Myrtle Grove Plantation, 206 S.C. 41, 32 S.E.2d 877 (1945); Lazar v. Great Atl.& Pac. Tea Co., 197 S.C. 74, 14 S.E.2d 560 (1941); Spires v. Spires, 111 S.C. 373, 97 S.E. 847 (1919).

Subsection (4): The first part of this subsection is identical to the federal rule and is consistent with state practice. State v. Camele, 293 S.C. 302, 360 S.E.2d 307 (1987) (physician's testimony should include only those statements related to him by the patient upon which the physician relied in reaching medical conclusions); Gentry v. Watkins-Carolina Trucking Co., 249 S.C. 316, 154 S.E.2d 112 (1967) (statements of present condition and past symptoms made to a physician consulted as a potential witness are admissible, not as substantive evidence, but, in the absence of fraud or bad faith, as information upon which the physician relied in reaching a professional opinion). The final phrase was added to the subsection to provide that the admissibility of statements made after commencement of the litigation is within the trial judge's discretion. Gentry v. Watkins-Carolina Trucking Co., supra.

Subsection (5): This subsection is similar to previous state law which allowed a witness to testify from a writing when it was the original document prepared by the witness contemporaneously with the event for the purpose of preserving the memory of it. Gwathmey v. Foor Hotel Co., 121 S.C. 237, 113 S.E. 688 (1922); The Bank of Charleston Nat'l Banking Ass'n v. Zorn, 14 S.C. 444 (1881). The provision of this rule limiting the introduction of the writing to when it is offered by an adverse party is a change in South Carolina law.

Subsection (6): This subsection differs from the federal rule in that the word "opinions" in the first sentence is deleted and the phrase, "provided, however, that subjective opinions and judgments found in business records are not admissible" is added to the federal rule to make it consistent with state law. Kershaw County Dep't of Social Serv. v. McCaskill, 276 S.C. 360, 278 S.E.2d 771 (1981); see also State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987) (admission of properly authenticated fingerprints); Uniform Business Records as Evidence Act, S.C. Code Ann. § 19-5-510 (1985).

Subsection (7): While the case law has recognized the admissibility of negative evidence to prove the non-existence of records of regularly conducted activity, the courts have not recognized this as a separate hearsay exception. E.g., Peoples Nat'l Bank v. Manos Bros., Inc., 226 S.C. 257, 84 S.E.2d 857 (1955); see also Flowers v. South Carolina Dep't of Highways and Pub. Transp., 309 S.C. 76, 419 S.E.2d 832 (Ct. App. 1992) (citing federal rule).

Subsection (8): This subsection differs from the federal rule in that it does not include item (C). The subsection also contains two limitations not included in the federal rule. First, investigative notes involving opinions, judgments, or conclusions are not admissible. Further, accident reports required by statute are not admissible as evidence of negligence or due care in actions for damages. As modified, this subsection is consistent with prior state practice. State v. Pearson, 223 S.C. 377, 76 S.E.2d 151 (1953); S.C. Code Ann. § 56-5-1290 (1991); see also State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987) (admission of properly authenticated fingerprints).

Subsection (9): This subsection constitutes a change in South Carolina law. Prior case law limited admissions of such reports to matters within the knowledge of the person making the report. Williams v. Metropolitan Life Ins. Co., 116 S.C. 277, 108 S.E. 110 (1921).

Subsection (10): While the case law has recognized the admissibility of negative evidence to prove the non-existence of public records, the courts have not recognized this as a separate hearsay exception. See Peoples Nat'l Bank v. Manos Bros., Inc., 226 S.C. 257, 84 S.E.2d 857 (1955) (introduction of evidence of the non-existence of public record entries); Flowers v. South Carolina Dep't of Highways and Pub. Transp., 309 S.C. 76, 419 S.E.2d 832 (Ct.App.1992) (citing federal rule). See also Rule 44(b), SCRCP.

Subsection (11): There does not appear to be any South Carolina law concerning this exception to the hearsay rule.

Subsection (12): No prior South Carolina authority has been found which states the hearsay exception expressed in this subsection.

Subsection (13): This exception is apparently consistent with prior case law in this State. See Dobson v. Cothran, 34 S.C. 518, 13 S.E. 679 (1891) (entry in family Bible of the birth date of a person is admissible as evidence of the person's age only where better evidence cannot be obtained).

Subsection (14): This subsection is consistent with statutory and case law in this State. Wilson v. Moseley, 113 S.C. 278, 102 S.E. 330 (1920) (a record book from a clerk's office, wherein a deed was authorized to be recorded and was recorded, is admissible to prove the existence and contents of the deed if sufficient evidence is presented to prove that the original deed is not available); S.C. Code Ann. § 19-5-10 (1985) (admissibility of certified copies or certified photostatic copies of documents).

Subsection (15): This provision is apparently consistent with prior case law in this State. See Smith v. Williams, 141 S.C. 265, 139 S.E. 625 (1927) (husband's statements in a deed and accompanying memorandum purporting to convey an interest in property admissible to show whether family agreement had been made following husband's death entitling widow to retain use and possession of the property).

Subsection (16): The ancient document exception to the hearsay rule in subsection (16) is consistent with prior case law in this State. However, prior case law qualified a document as "ancient" if the document was thirty years old or older. Atlantic Coast Line R.R. Co. v. Searson, 137 S.C. 468, 135 S.E. 567 (1926) (map more than thirty years old could be introduced as ancient document); Johnson v. Pritchard, 302 S.C. 437, 395 S.E.2d 191 (Ct. App. 1990) (duly authenticated ancient documents of thirty years or more constitute an exception to the hearsay rule). Subsection (16) qualifies a document as "ancient" if it is twenty years old or older.

Subsection (17): This provision is consistent with prior case law in this State. Peoples Nat'l Bank v. Manos Bros., Inc., 226 S.C. 257, 84 S.E.2d 857 (1954) (on the issue of domicile, a city directory is admissible); Kirkpatrick v. Hardeman, 123 S.C. 21, 115 S.E. 905 (1923) (accredited current price lists and market reports, including those published in trade journals or newspapers, which are accepted as trustworthy, are admissible on the question of market value of stock).

Subsection (18): This exception is identical to the federal rule except for the addition of the last sentence. This rule changes and expands previous South Carolina law which held that medical books are not admissible into evidence to be read to the court and jury except in the situations set forth in S.C. Code Ann. § 19-5-410 (1985). See LaCount v. General Asbestos & Rubber Co., 184 S.C. 232, 192 S.E. 262 (1937); Baker v. Southern Cotton Oil Co., 161 S.C. 479, 159 S.E. 822 (1931); Edwards v. Union Buffalo Mills Co., 162 S.C. 17, 159 S.E. 818 (1931). This rule is consistent with the case of Baker v. Port City Steel Erectors, Inc., 261 S.C. 469, 200 S.E.2d 681 (1973), which states that a scientific textbook can be used for the purpose of impeaching an expert witness.

Subsection (19): This exception is consistent with prior state law. Hazelwood v. Mayes, 111 S.C. 23, 96 S.E. 672 (1918); Horry v. Glover, 11 S.C.Eq. (2 Hill Eq.) 515 (1837).

Subsection (20): This exception is consistent with prior state law. Culbertson v. Culbertson, 273 S.C. 103, 254 S.E.2d 558 (1979) (boundary); County of Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977) (general history).

Subsection (21): There is no South Carolina law dealing with this exception. This section is included in the rules to insure that reputation evidence is not excluded on the basis of hearsay. See Weinstein's Evidence ¶ 803(21)[01] (1994). Rules 404, 405, and 608 deal with when reputation evidence may be admissible.

Subsection (22): This subsection is identical to the federal rule except for the addition of the phrase "to include final judgments in juvenile delinquency matters." This addition makes it clear that a final judgment in a juvenile delinquency matter is to be treated in the same manner as an adult conviction under this subsection; to determine if the crime is punishable by death or imprisonment in excess of one year, the maximum punishment an adult would receive for the offense is controlling. Traditionally, evidence of a judgment in a criminal case was not admissible in a civil case as evidence of the facts upon which the conviction was based. Fontville v. Atlanta & Charlotte Air Line Ry. Co., 93 S.C. 287, 75 S.E. 172 (1910). This traditional rule has, however, been eroded in several cases. South Carolina State Board of Dental Examiners v. Breeland, 208 S.C. 469, 38 S.E.2d 644 (1946) (at least where the police power of the state is involved in a civil case, a criminal conviction based on a jury verdict is admissible); Globe & Rutgers Fire Ins. Co. v. Foil, 189 S.C. 91, 200 S.E. 97 (1938) (evidence of a conviction based on a guilty plea is admissible in a civil case as an admission against the criminal defendant). The adoption of this rule now allows criminal judgments based on a plea of guilty or a trial for an offense which carries a maximum punishment of death or imprisonment for more than one year to be admissible in almost all civil actions to prove the facts essential to the criminal judgment. Not allowing a criminal judgment based on a plea of nolo contendere to be used to prove the facts on which the judgment is based is consistent with the prior case law. Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976) (plea of nolo cannot be used as an admission in a civil case); see also In re Anderson, 255 S.C. 56, 177 S.E.2d 130 (1970) (attorney disciplinary proceeding). It should be noted that S.C. Code Ann. § 56-5-6160 (1991) limits the admissibility of evidence of a conviction for a traffic offense. Further, S.C. Code Ann. § 20-7-780 (Supp. 1993), which makes juvenile records confidential unless otherwise ordered by the family court, may limit access to final judgments in juvenile delinquency matters.

Subsection (23): This exception is consistent with prior state law. Bradley v. Calhoun, 116 S.C. 7, 106 S.E. 843 (1921).

RULE 804
HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant -

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

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

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

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. 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.

(4) Statement of Personal or Family History. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Note:

Subsection (a) is identical to the federal rule and consistent with South Carolina law. Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) (witness unavailable who refuses to testify even after being threatened with contempt); State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992) (witness who asserts a privilege is unavailable); State v. Steadman, 216 S.C. 579, 59 S.E.2d 168, cert. denied, 340 U.S. 850, 71 S.Ct. 78, 95 L.Ed. 623 (1950) (witness who is absent from the jurisdiction and cannot be found is unavailable); State v. Rogers, 101 S.C. 280, 85 S.E. 636 (1914) (witness who is dead, insane, beyond the seas, or kept away by the contrivance of the opposing party is unavailable).

Subsection (b) omits subsection (5), the "catch all" or residual hearsay exception found in the federal rule, but is otherwise identical to the federal rule. Subsection (1) is consistent with South Carolina law. State v. Steadman, 216 S.C. 579, 59 S.E.2d 168, cert. denied, 340 U.S. 850, 71 S.Ct. 78, 95 L.Ed. 623 (1950). It should be noted that S.C. Code Ann. § 19-11-50 (1985), which provides that the testimony of a criminal defendant may not be used in any subsequent criminal case against him except prosecution for perjury founded on that testimony, may place some limit on the admissibility of evidence under this subsection. Subsection (2) broadens the admissibility of dying declarations by making them admissible in civil cases. See Sligh v. Newberry Electric Co-op., 216 S.C. 401, 58 S.E.2d 675 (1950). The rigid requirement that the declarant must actually have died, State v. Dawson, 203 S.C. 167, 26 S.E.2d 506 (1943), is relaxed under the Rule which only requires the death of the declarant in a homicide prosecution. Subsection (3) is consistent with South Carolina law. State v. Doctor, 306 S.C. 527, 413 S.E.2d 36 (1992). Subsection (4) is consistent with South Carolina law. McLain v. Woodside, 95 S.C. 152, 79 S.E. 1 (1913).

RULE 805
HEARSAY WITHIN HEARSAY

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Note:

The rule is identical to the federal rule and is consistent with prior South Carolina case law. Bain v. Self Memorial Hosp., 281 S.C. 138, 314 S.E.2d 603 (Ct. App. 1984).

RULE 806
ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT

When a hearsay statement, or a statement defined in Rule 801(d)(2)(C), (D), or (E) has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Note:

The rule is identical to the federal rule. However, it is a departure from prior South Carolina case law. There are cases which have addressed a similar matter by holding that a declarant who made a dying declaration could not be impeached with an inconsistent statement that did not independently fall within a hearsay exception. State v. Brown, 108 S.C. 490, 95 S.E. 61 (1918); State v. Taylor, 56 S.C. 360, 34 S.E. 939 (1900).

RULE 901
REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

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

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

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

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

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

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

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

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

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

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

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

(10) Methods Provided by Statute or Rule. Any method of authentication or identification provided by statute or by other rules promulgated by the Supreme Court.

Note:

In considering the rules in Article IX, it is important to remember that these rules relate to how a party authenticates evidence to show it is what the party claims. Even when evidence is properly authenticated, it must still be admissible under the other rules of evidence. See State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983).

With the exception of subsection (b)(10) which is discussed below, this rule is identical to the federal rule.

Subsection (a) is consistent with South Carolina law which requires authentication as a condition precedent to admissibility. See State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987). As noted in the Advisory Committee's Notes to the Federal Rules, the requirement of showing authentication or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

Subsection (b) contains illustrations of how evidence may be authenticated. These illustrations are consistent with the prior case law indicating that evidence in support of authentication can be direct or circumstantial. Winburn v. Minnesota Mutual Life Ins. Co., 261 S.C. 568, 201 S.E.2d 372 (1973); State v. Wilson, 246 S.C. 580, 145 S.E.2d 20 (1965).

Subsection (b)(1) is in accord with the prior law in this state. Williams v. Milling-Nelson Motors, Inc., 209 S.C. 407, 40 S.E.2d 633 (1946); Brazeale v. Piedmont Mfg. Co., 184 S.C. 471, 193 S.E. 99 (1937).

Subsection (b)(2) is generally consistent with state law State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983) (signature on check identified by signator's bookkeeper); Weaver v. Whilden, 33 S.C. 190, 11 S.E. 686 (1890) (no error in refusing to allow nonexpert witness who was unfamiliar with handwriting to testify as to genuineness of signature). There does not appear to be any South Carolina law that states that the familiarity cannot have been acquired for the purposes of litigation.

Subsection (b)(3) is in accord with the prior case law in South Carolina. Pee Dee Production Credit Ass'n v. Joye, 284 S.C. 371, 326 S.E.2d 650 (1984); Benedict, Hall & Co. v. Flanigan, 18 S.C. 506 (1883); Boman v. Plunkett, 13 S.C.L. (2 McCord) 518 (1823) (comparison by jury was permitted in aid of doubtful proof). South Carolina has also recognized that nonexperts can make such comparisons. State v. Ezekial, 33 S.C. 115, 11 S.E. 635 (1890); Benedict, Hall & Co. v. Flanigan, 18 S.C. 506 (1883).

Subsection (b)(4) is consistent with prior law. Kershaw, Cty. Bd. of Educ. v. U.S. Gypsum, 302 S.C. 390, 396 S.E.2d 369 (1990); IKT Company Inc. v. Hardwick, 274 S.C. 413, 265 S.E.2d 510 (1980); State v. Hightower, 221 S.C. 91, 69 S.E.2d 363 (1952). A common form of authentication permissible under this subsection is the reply doctrine which provides that once a letter, telegram, or telephone call is shown to have been mailed, sent, or made, a letter, telegram or telephone call shown by its contents to be in reply is authenticated without more. Graham, Handbook of Federal Evidence, § 901.4 (2nd ed. 1986). This appears to be the law in South Carolina. Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S.C. 342, 55 S.E. 768 (1906) (reply letter is presumed genuine).

Subsection (b)(5) is consistent with the law in South Carolina. State v. Stewart, 275 S.C. 447, 272 S.E.2d 628 (1980) (identification of defendant's voice as that of armed robber was admissible in criminal prosecution where circumstances demonstrate reliability of evidence); State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980)

(sufficient testimony as to recognition of the voice warrants its admission); State v. Vice, 259 S.C. 30, 190 S.E.2d 510 (1972) (voice identification permissible; further, jury can compare recorded telephone call and defendant's voice, recorded prior to trial, for purposes of comparison); State v. Porter, 251 S.C. 393, 162 S.E.2d 843 (1968) (identification of party with whom witness talked need not be known at time of conversation, but is sufficient if knowledge enabling witness to identify other party is later obtained), cert. denied, 393 U.S. 1079, 89 S.Ct. 859, 21 L.Ed.2d 773 (1969); State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950); State v. Smith, 307 S.C. 376, 415 S.E.2d 409 (Ct.App.1992) (dispatcher allowed to identify voice of anonymous caller as that of defendant, even though no prior voice identification training).

Subsection (b)(6) is in accord with the prior law in this State. Fielding Home for Funerals v. Pub. Sav. Life Ins. Co., 271 S.C. 117, 245 S.E.2d 238 (1978) (business); State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950); Gilliland & Gaffney v. Southern Ry., 85 S.C. 26, 67 S.E. 20 (1910) (business).

Section (b)(7) is consistent with South Carolina law. State v. Pearson, 223 S.C. 377, 76 S.E.2d 151 (1953); Ex parte Steen, 59 S.C. 220, 37 S.E. 829 (1901). As to the authentication of police fingerprint records, see State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987).

Subsection (b)(8) is in accord with prior case law with the exception that the prior cases required 30 years before a document was classified as ancient rather than 20 years as required by this subsection. See Atlantic Coast Line Ry. v. Searson, 137 S.C. 468, 135 S.E. 567 (1926); Polson v. Ingram, 22 S.C. 541 (1885); Thompson v. Brannon, 14 S.C. 542 (1881); Johnson v. Pritchard, 302 S.C. 437, 395 S.E.2d 191 (Ct. App. 1990). See also, Rule 803(16), which also reduces the minimum period for receipt of "ancient" records under the hearsay rule.

Subsection (b)(9) appears to be in accord with South Carolina law. See State v. Hester, 137 S.C. 145, 134 S.E.2d 885 (1926).

Subsection (b)(10) is the federal rule modified to make the language applicable to South Carolina statutes and rules. An example of such a rule is Rule 44, SCRCP, which deals with the authentication of official records.

RULE 902
SELF-AUTHENTICATION

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

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

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

(3) Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a

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

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

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

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

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

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

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

(10) Presumptions Under Statutes. Any signature, document or other matter declared by statute to be presumptively or prima facie genuine or authentic.

Note:

With the exception of subsections (4) and (10) which are discussed below, this rule is identical to the federal rule.

Subsection (1): South Carolina law has previously permitted self-authentication of certain classes of domestic public documents under seal. See e.g., S.C. Code Ann. § 19-5-220 (1985) (proof of various documents under seal of any city or state).

Subsection (2): There does not appear to be any South Carolina law permitting self-authentication in these circumstances.

Subsection (3) is similar to Rule 44(a)(2), SCRCP.

Subsection (4) is identical to the federal rule except that it is amended so as to also allow compliance with "any statute or rule prescribed by the Supreme Court." Examples of such statutes and rules include: S.C. Code Ann. § 19-5-10 (1985) (admissibility of certified copies or certified photostatic copies of documents); S.C. Code Ann. § 19-5-30 (Supp. 1993) (admissibility of photostatic or certified copies of certain motor vehicle records); Rule

44(a)(1), SCRCP (authentication of domestic records); Rule 6, SCRCrimP (self-authentication of chemist's or analyst's report of nature of "controlled dangerous substances").

Subsection (5): There does not appear to be any South Carolina authority for this proposition.

Subsection (6) appears to be consistent with South Carolina law. See Kirkpatrick v. Hardeman, 123 S.C. 21, 115 S.E. 905 (1923) (although unclear if Court treated as hearsay or authentication problem, newspaper reports of stock quotations were admitted for purpose of proving market value of stock).

Subsection (7): There does not appear to be any South Carolina authority for this proposition.

Subsection (8): This is similar to South Carolina Code Ann. §§ 19-5-220 and 19-5-230 (1985) which allow the self-authentication of certain documents of city, state or foreign governments under seal of a notary public.

Subsection (9): Under the Uniform Commercial Code, certain items are self-authenticating. See S.C. Code Ann. § 36-1-202 (1976) (includes bills of lading, insurance policies or any document authorized by the contract to be issued by third party); § 36-3-307 (1976) (signatures, unless specifically denied in the pleadings); § 36-3-510 (1976) (formal certificate of protest, a stamp by drawee that payment was refused, or bank records showing dishonor are all admissible in evidence and create a presumption of dishonor); § 36-8-105(3) (Supp. 1993) (signatures on a certificated security, in a necessary indorsement, on an initial transaction statement or on an instruction is admitted unless put into issue).

Subsection (10): This subsection differs from the federal rule only in that "declared by statute" is substituted for "declared by Act of Congress." An example of a statute under this subsection is S.C. Code Ann. § 39-15-140 (1985) (certificate of trademark registration issued by the Secretary of State).

RULE 903
SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by statute or by the laws of the jurisdiction whose laws govern the validity of the writing.

Note:

This rule adds "by statute" to the federal rule. The law in South Carolina is that the testimony of a subscribing witness is generally not necessary for authentication. Edgar v. Brown, 15 S.C.L. (4 McCord) 91 (1827); S.C. Code Ann. § 19-1-120 (1985) (the absence of a witness to any bond or note shall not be deemed a good cause by any court for postponing a trial, but the signature may be proved by other testimony); S.C. Code Ann. § 62-2-503 (Supp. 1993) (Uniform Probate Code's provision for self-proved wills); §§ 62-3-405 and -406 (Supp. 1993) (requirements of proof of execution when will not self-proved and submitted for formal probate).

RULE 1001
DEFINITIONS

For purposes of this article the following definitions are applicable:

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

(2) Photographs. "Photographs" include still photographs, X-ray films, video tapes, motion pictures or other similar methods of recording information.

(3) Original. 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".

(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

Note:

This rule is identical to the federal rule except that the word "sounds" is added to subdivision (1) and "other similar methods of recording information" was added to subdivision (2). This additional language does not significantly alter the rule, and provides for advances in technology.

RULE 1002
REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

Note:

This rule is better known as the best evidence rule. This rule is identical to the federal rule except the words "by statute" were substituted at the end of the rule in place of the words "by Act of Congress."

The proposed rule is consistent with current case law as it applies to writings. See, e.g., Riddle v. City of Greenville, 251 S.C. 473, 163 S.E.2d 462 (1968); Sample v. Gulf Refining Co., 183 S.C. 399, 191 S.E. 209 (1937); Cain v. Whitlock, 178 S.C. 289, 182 S.E. 752 (1935); Mull v. Easley Lumber Co., 121 S.C. 155, 113 S.E. 356 (1922); Guinarin v. So. Life & Trust Co., 106 S.C. 37, 90 S.E. 319 (1916); Mayfield v. So. Ry., 85 S.C. 165, 67 S.E. 132 (1910); McCoy v. Atl. Coast Line Ry., 84 S.C. 62, 65 S.E. 939 (1909).

There are no cases which deal with the applicability of the best evidence rule to photographs and only one case in which the best evidence rule has been applied to recordings. State v. Worthy, 239 S.C. 449, 123 S.E.2d 835 (1962), overruled on other grounds, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Examples of statutes that have an effect on the requirement to produce the original are: S.C. Code Ann. § 19-1-110 (1985) (instruments of common carriers); S.C. Code Ann. § 19-5-10 (1985) (public documents); S.C. Code Ann. § 19-5-210 (1985) (grants issued by North Carolina); S.C. Code Ann. §§ 19-5-310 and -320 (1985) (missing person reports); S.C. Code Ann. § 19-5-510 (1985) (business records).

RULE 1003
ADMISSIBILITY OF DUPLICATES

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

Note:

This rule is identical to the federal rule. There is no case law in this State on the admissibility of a duplicate in this context, only on the admissibility of a duplicate as secondary evidence. See Note following Rule 1004.

RULE 1004
ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

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

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

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

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

(4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

Note:

This rule is identical to the federal rule and is consistent with our case law. It has long been the law in South Carolina that secondary evidence is admissible under the circumstances outlined in this rule. See, e.g., Pee Dee Prod. Credit Ass'n v. Love, 284 S.C. 371, 326 S.E.2d 650 (1984) (original lost); Windham v. Lloyd, 253 S.C. 568, 172 S.E.2d 117 (1970) (original lost); Wynn v. Coney, 232 S.C. 346, 102 S.E.2d 209 (1958) (original in possession of opponent); Greer v. Equitable Life Assur. Soc'y, 180 S.C. 162, 185 S.E. 68 (1936) (collateral matter); Rose v. Winnsboro Nat'l Bank, 41 S.C. 191, 19 S.E. 487 (1894) (original in possession of opponent).

RULE 1005
PUBLIC RECORDS

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the

original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Note:

This rule is identical to the federal rule and is substantially similar to S.C. Code Ann. § 19-5-10 (1985) and Rule 44, SCRCP.

RULE 1006
SUMMARIES

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Note:

This rule is identical to the federal rule except for the language "provided the underlying data are admissible into evidence" and is consistent with South Carolina case law. Adamson v. Marianne Fabrics, Inc., 301 S.C. 204, 391 S.E.2d 249 (1990); Zemp Constr. Co. v. Harmon Bros. Constr. Co., 225 S.C. 361, 82 S.E.2d 531 (1954); Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774 (Ct. App.1985); Butler v. Sea Pines Plantation Co., 282 S.C. 113, 317 S.E.2d 464 (Ct. App.1984). It should be noted that the case of Peagler v. Atlantic Coast Line R.R., 234 S.C. 140, 107 S.E.2d 15 (1959), is inconsistent with these prior cases and has been effectively overruled.

RULE 1007
TESTIMONY OR WRITTEN ADMISSION OF PARTY

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.

Note:

This rule is identical to the federal rule. The case law has not previously recognized any limitation on the form of the statement or admission which can be used. Gardner v. City of Columbia Police Dep't, 216 S.C. 219, 57 S.E.2d 308 (1950). Therefore, this rule may be somewhat narrower since it limits the statements or admissions which can be used to those contained in testimony, deposition or written admission.

RULE 1008
FUNCTIONS OF COURT AND JURY

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

Note:

This rule is identical to the federal rule. It has long been held in this State that a question as to whether to admit a document under the best evidence rule is addressed to the discretion of the trial judge. Shirer v. O.W.S. & Associates, 253 S.C. 232, 169 S.E.2d 621 (1969); Vaught v. Nationwide Mut. Ins. Co., 250 S.C. 65, 156 S.E.2d 627 (1967); Drayton v. Industrial Life & Health Ins. Co., 205 S.C. 98, 31 S.E.2d 148 (1944); Sample v. Gulf Refining Co., 183 S.C. 399, 191 S.E. 209 (1937); Atlantic Coast Line R.R. v. Dawes, 103 S.C. 507, 88 S.E. 286 (1916); Leesville Mfg. Co. v. Morgan Wood & Iron Works, 75 S.C. 342, 55 S.E. 768 (1906); Wayne Smith Constr. Co., Inc. v. Wolman, Duberstein, and Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987). There are no cases discussing the role of the trier of fact in this area.

RULE 1101
APPLICABILITY OF RULES

(a) Courts and Judges. Except as otherwise provided by rule or statute, these rules apply to the courts of South Carolina. The term "judge" in these rules includes justices of the Supreme Court; judges of the Court of Appeals; judges of the circuit, family, probate and municipal courts; magistrates; masters-in-equity; and special referees.

(b) Proceedings Generally. These rules apply generally to civil actions and proceedings, to criminal cases and proceedings, and to contempt proceedings except those in which the court may act summarily.

(c) Rule of Privilege. The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.

(d) Rules Inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) Grand Jury. Proceedings before grand juries.

(3) Miscellaneous Proceedings. Proceedings for extradition; preliminary hearings in criminal cases; sentencing (except in the penalty phase of capital trials as required by statute), dispositional hearings in juvenile delinquency matters, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

Note:

Except for subsections (a), (b), and (d)(3), this rule is identical to the federal rule.

In subsection (a), the federal rule has been amended by adding the phrase "except as otherwise provided by rule or statute." See Note to Rule 101. Further, the phrase "courts of South Carolina" replaces the list of courts in the federal rule, and the term "judge" is modified to include all levels of the unified judiciary. These changes emphasize the fact that these rules are applicable to all levels of the unified judiciary.

Subsection (b) indicates that these rules apply generally to all civil and criminal proceedings except for summary criminal contempt. This exception is consistent with the relaxed procedural requirements for the imposition of summary contempt. Cf. State v. Weinberg, 229 S.C. 286, 92 S.E.2d 842 (1956).

Regarding subsection (c), no South Carolina authority has been found to support the proposition that the rules of privilege remain applicable even if the other rules of evidence are inapplicable.

Regarding subsection (d)(1), no South Carolina authority has been found regarding this proposition.

Subsection (d)(2) is consistent with the case law in South Carolina. See State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990) (the validity of an indictment is not affected by the character of the evidence considered by the grand jury and, if valid on its face, the indictment may not be challenged on the ground that the grand jury acted on the basis of incompetent evidence); State v. Williams, 263 S.C. 290, 210 S.E.2d 298 (1974) (a grand jury indictment is not subject to dismissal on the basis that it was founded upon hearsay evidence).

To be consistent with the terminology used in this State, the phrase "preliminary hearings" in subsection (d)(3) replaces the phrase "preliminary examinations" in the federal rule. In addition, the phrase "dispositional hearings in juvenile delinquency matters" has been added to subsection (d)(3). Although no cases have been found regarding the application of the rules of evidence to extradition proceedings, subsection (d)(3) is generally consistent with prior law in this State. See State v. Dingle, 279 S.C. 278, 306 S.E.2d 223 (1983) (rules concerning hearsay inapplicable in preliminary hearings); State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976) (before imposing a sentence, judge may appropriately conduct an inquiry largely unlimited either as to the kind of information he may consider or the source from which it may come); State v. Sullivan, 267 S.C. 610, 230 S.E.2d 621 (1967) (a search warrant may be issued on an affidavit even when the affidavit is based on hearsay statements); State v. Hill, 5 S.C.L. (3 Brev.) 89, 6 S.C.L. (1 Tread.) 242 (1812) (the court may hear and consider affidavits when determining whether to admit a defendant to bail). However, as to probation revocation, the rule may constitute a change in the law. See State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950) (hearsay rules applied in review of probation revocation).

RULE 1102
AMENDMENTS

Amendments to the South Carolina Rules of Evidence may be made by the South Carolina Supreme Court.

Note:

This is the federal rule modified to apply to South Carolina.

RULE 1103
TITLE AND EFFECTIVE DATE

(a) Title. These rules shall be entitled South Carolina Rules of Evidence, and may be cited by rule number and the letters SCRE, i.e., Rule ____, SCRE.

(b) Effective Date. These rules shall become effective September 3, 1995.

Note:

The language of subsection (a) is based on Rule 85(a), SCRCP. The federal rules do not contain a counterpart to subsection (b).

South Carolina Evidence Act

CHAPTER 1

General Provisions

SECTION 19-1-10. Rules of construction.

The rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this Title.

SECTION 19-1-20. "Clerk" defined.

The word "clerk," as used in this title, signifies unless the context otherwise indicates, the clerk of the court where the action is pending.

SECTION 19-1-30. Pleading shall not be evidence against accused.

No pleading can be used in a criminal prosecution against the defendant as a proof of a fact admitted or alleged in such pleading.

SECTION 19-1-60. Request for admission of authenticity of documents and other papers.

Either party to a civil action may exhibit to the other or to his attorney at any time before the trial any paper material to the action and request an admission of its genuineness in writing. If the adverse party or his attorney fail to give the admission within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness and the same be finally proved or admitted on the trial, such expense shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there was good reason for the refusal.

SECTION 19-1-70. Proof of negligence by plaintiff in certain motor vehicle cases.

The provisions of Chapter 5, Title 56 declaring prima facie speed limitations shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence on the part of the defendant as the proximate cause of the accident.

SECTION 19-1-80. Conditions on examination of witness in criminal proceeding concerning written statement made to public employee.

No witness in any preliminary hearing or in any criminal judicial proceeding of any kind or nature shall be examined or cross-examined by any examiner, solicitor, lawyer or prosecuting officer concerning a written statement formerly made and given to any person employed by this State, or any county, city or municipality thereof, or any part of any such governing body, unless it first be shown that at the time of the making of the statement the witness was given an exact copy of the statement, and that before his examination or cross-examination the witness was given a copy of the statement and allowed a reasonable time in which to read it.

SECTION 19-1-90. Admissibility in criminal proceeding of written statement made to public employee.

Unless the provisions of Sections 8-15-50 and 19-1-80 have been complied with, no statement such as is referred to in those sections shall be admissible in evidence in any case, nor shall any reference be made to it in the trial of any case.

SECTION 19-1-100. No statement shall be used for impeachment in civil proceeding unless copy furnished when signed.

No statement taken from and signed by a witness or litigant after July 1, 1966 shall be used in any civil judicial proceeding for the purpose of contradicting, impeaching or attacking the credibility of such a witness or litigant, unless such party shall have been furnished a copy of said statement at the time of its signing.

SECTION 19-1-110. Introduction of certain instruments or copies issued by common carriers.

It shall be competent (a) to introduce in evidence as prima facie evidence that the same is genuine any instrument purporting to be the original of any waybill, receipt, bill of lading or similar instrument issued by any common carrier or (b) to introduce in evidence a copy of any such instrument as prima facie evidence that the same is a true and correct copy if the adverse party shall fail, upon due notice given, to produce the original instrument.

SECTION 19-1-120. Proving signature of absent witness to bond or note; effect of sworn denial of signature.

The absence of a witness to any bond or note shall not be deemed a good cause by any court of justice for postponing a trial respecting the same, but the signature to such bond or note may be proved by other testimony, unless the defendant in his answer shall swear or affirm, according to the form of his religious profession, that the signature to the bond or note in suit is not his, or in case the defendant or defendants should be executors or administrators unless one of them shall swear or affirm, as aforesaid, in his answer that he has cause to believe the signature to such bond or note is not the testator's or intestate's, as the case may be.

SECTION 19-1-130. Situations in which notary's protest is sufficient evidence.

Whenever a notary public who may have made protest for nonpayment of any inland bill or promissory note shall be dead or shall reside out of the county in which the bill or note is sued his protest of such bill or note shall be received as sufficient evidence of notice in any action by any person whatsoever against any of the parties to such bill or note.

SECTION 19-1-140. Use of testimony in subsequent trials when witness is in armed forces.

In all civil causes pending in the courts of this State when a witness has testified and has been cross-examined or the right given the opposing side to cross-examine him his testimony so given may be read in all subsequent trials or hearings concerning the same cause when such witness is in the armed forces of our country.

SECTION 19-1-150. Life expectancy tables.

When necessary, in a civil action or other litigation, to establish the life expectancy of a person from any period in his life, whether he is living at the time or not, the table below must be received in all courts and by all persons having power to determine litigation as evidence, along with other evidence as to his health, constitution, and habits, of the life expectancy of the person. In determining the age of a person as of any particular time, periods of six months or more beyond the last full year must be treated as one year in using the table below.

Table removed

SECTION 19-1-160. Nonsealed instruments may be considered as sealed.

Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

SECTION 19-1-180. Out-of-court statements by certain children.

(A) An out-of-court statement made by a child who is under twelve years of age or who functions cognitively, adaptively, or developmentally under the age of twelve at the time of a family court proceeding brought pursuant to Title 63 concerning an act of alleged abuse or neglect as defined by Section 63-7-20 is admissible in the family court proceeding if the requirements of this section are met regardless of whether the statement would be otherwise inadmissible.

(B) An out-of-court statement may be admitted as provided in subsection (A) if:

(1) the child testifies at the proceeding or testifies by means of videotaped deposition or closed-circuit television, and at the time of the testimony the child is subject to cross-examination about the statement; or

(2)(a) the child is found by the court to be unavailable to testify on any of these grounds:

(i) the child's death;

(ii) the child's physical or mental disability;

(iii) the existence of a privilege involving the child;

(iv) the child's incompetency, including the child's inability to communicate about the offense because of fear;

(v) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television; and

(b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(C) The proponent of the statement shall inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered. If the child is twelve years of age or older, the adverse party may challenge the professional decision that the child functions cognitively, adaptively, or developmentally under the age of twelve.

(D) In determining whether a statement possesses particularized guarantees of trustworthiness under subsection (B)(2)(b), the court may consider, but is not limited to, the following factors:

(1) the child's personal knowledge of the event;

(2) the age and maturity of the child;

(3) certainty that the statement was made, including the credibility of the person testifying about the statement;

(4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;

(5) whether more than one person heard the statement;

(6) whether the child was suffering pain or distress when making the statement;

(7) the nature and duration of any alleged abuse;

(8) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(9) whether the statement has a ring of verity, has internal consistency or coherence, and uses terminology appropriate to the child's age;

(10) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

(E) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

(F) Any hearsay testimony admissible under this section shall not be admissible in any other proceeding.

(G) If the parents of the child are separated or divorced, the hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced. Notwithstanding this subsection, a statement alleging abuse or neglect made by a child to a law enforcement official, an officer of the court, a licensed family counselor or therapist, a physician or other health care provider, a teacher, a school counselor, a Department of Social Services staff member, or to a child care worker in a regulated child care facility is admissible under this section.

SECTION 19-1-190. South Carolina Unanticipated Medical Outcome Reconciliation Act; legislative purpose; definitions; inadmissibility of certain statements; waiver of inadmissibility; impact of South Carolina Rules of Evidence.

(A) This section may be cited as the "South Carolina Unanticipated Medical Outcome Reconciliation Act".

(B) The General Assembly finds that conduct, statements, or activity constituting voluntary offers of assistance or expressions of benevolence, regret, mistake, error, sympathy, or apology between or among parties or potential parties to a civil action should be encouraged and should not be considered an admission of liability. The General Assembly further finds that such conduct, statements, or activity should be particularly encouraged between health care providers, health care institutions, and patients experiencing an unanticipated outcome resulting from their medical care. Regulatory and accreditation agencies are in some instances requiring health care providers and health care institutions to discuss the outcomes of their medical care and treatment with their patients, including unanticipated outcomes, and studies have shown such discussions foster improved communications and respect between provider and patient, promote quicker recovery by the patient, and reduce the incidence of claims and lawsuits arising out of such unanticipated outcomes. The General Assembly, therefore, concludes certain steps should be taken to promote such conduct, statements, or activity by limiting their admissibility in civil actions.

(C) As used in this section, the term:

(1) "Ambulatory surgical facility" means a licensed, distinct, freestanding, self-contained entity that is organized, administered, equipped, and operated exclusively for the purpose of performing surgical procedures or related care, treatment, procedures, and/or services, by licensed health care providers or health care institutions, for which patients are scheduled to arrive, receive surgery or related care, treatment, procedures, and/or services, and be discharged on the same day. This term does not include abortion clinics.

(2) "Designated meeting" means any meeting scheduled by the health care provider, representative or agent of a health care provider, or representative or agent of a health care institution:

(a) to discuss the outcome including any unanticipated outcome of the provider or institution's medical care and treatment with the patient, patient's relative or representative; or

(b) to offer an expression of benevolence, regret, mistake, error, sympathy, or apology between or among parties or potential parties to a civil action.

(3) "Health care institution" means an ambulatory surgical facility, a hospital, an institutional general infirmary, a nursing home, or a renal dialysis facility.

(4) "Health care provider" means a physician, surgeon, osteopath, nurse, oral surgeon, dentist, pharmacist, chiropractor, optometrist, podiatrist, or similar category of licensed health care provider, including a health care practice, association, partnership, or other legal entity.

(5) "Hospital" means a licensed facility with an organized medical staff to maintain and operate organized facilities and services to accommodate two or more nonrelated persons for the diagnosis, treatment, and care of such persons over a period exceeding twenty-four hours and provides medical and surgical care of acute illness, injury, or infirmity and may provide obstetrical care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina. This term includes a hospital that provides specialized service for one type of care, such as tuberculosis, maternity, or orthopedics.

(6) "Institutional general infirmary" means a licensed facility which is established within the jurisdiction of a larger nonmedical institution and which maintains and operates organized facilities and services to accommodate two or more nonrelated students, residents, or inmates with illness, injury, or infirmity for a period exceeding twenty-four hours for the diagnosis, treatment, and care of such persons and which provides medical, surgical, and professional nursing care, and in which all diagnoses, treatment, or care are administered by or performed under the direction of persons currently licensed to practice medicine and surgery in the State of South Carolina.

(7) "Nursing home" means a licensed facility with an organized nursing staff to maintain and operate organized facilities and services to accommodate two or more unrelated persons over a period exceeding twenty-four hours which is operated either in connection with a hospital or as a freestanding facility for the express or implied purpose of providing skilled nursing services for persons who are not in need of hospital care. This term does not include assisted living, independent living, or community residential care facilities that do not provide skilled nursing services.

(8) "Renal dialysis facility" means an outpatient facility which offers staff assisted dialysis or training and supported services for self-dialysis to end-stage renal disease patients.

(9) "Skilled nursing services" means services that:

(a) are ordered by a physician;

(b) require the skills of technical or professional personnel such as registered nurses, licensed practical (vocational) nurses, physical therapists, occupational therapists, and speech pathologists or audiologists; and

(c) are furnished directly by or under the supervision of such personnel.

(10) "Unanticipated outcome" means the outcome of a medical treatment or procedure, whether or not resulting from an intentional act, that differs from an expected or intended result of such medical treatment or procedure.

(D) In any claim or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, any and all statements, affirmations, gestures, activities, or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error, or a general sense of benevolence which are made by a health care provider, an employee or agent of a health care provider, or by a health care institution to the patient, a relative of the patient, or a representative of the patient and which are made during a designated meeting to discuss the unanticipated outcome shall be inadmissible as evidence and shall not constitute an admission of liability or an admission against interest.

(E) The defendant in a medical malpractice action may waive the inadmissibility of the statements defined in subsection (D) of this section.

(F) Nothing in this section affects the South Carolina Rules of Evidence.

CHAPTER 3

Proof of Ordinances and Laws

ARTICLE 1

Ordinances

SECTION 19-3-10. Proof of ordinances of municipalities.

In all the courts held in this State the printed ordinances of the municipalities in the State, whether they be in pamphlet or book form, shall be admitted into evidence in such courts and shall constitute prima facie evidence of the genuineness of the same, provided the clerk of such municipality certifies to the correctness of the same.

ARTICLE 3

Uniform Judicial Notice of Foreign Law Act

SECTION 19-3-110. Short title.

This article may be cited as the "Uniform Judicial Notice of Foreign Law Act."

SECTION 19-3-120. Judicial notice of laws of other United States jurisdictions.

Every court of this State shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States when such common law or statutes shall have been put in issue by the pleadings.

SECTION 19-3-130. Means by which court may inform itself of other United States laws.

The court may inform itself of such laws in such manner as it may deem proper and may call upon counsel to aid it in obtaining such information.

SECTION 19-3-140. Court shall determine other United States laws.

The determination of such laws shall be made by the court and not by the jury and shall be reviewable.

SECTION 19-3-150. Parties also may present evidence of other United States laws; notice.

Any party may also present to the trial court any admissible evidence of such laws but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties either in the pleadings or otherwise.

SECTION 19-3-160. Proof of laws of other jurisdictions.

The law of a jurisdiction other than those referred to in Section 19-3-120 shall be an issue for the court but shall not be subject to the foregoing provisions concerning judicial notice.

SECTION 19-3-170. No evidence of foreign law shall be received or noticed judicially unless pleaded.

No foreign law shall be received in evidence nor shall any court in this State take judicial notice of any foreign law unless such foreign law shall have been appropriately pleaded in the cause in the manner provided by law.

SECTION 19-3-180. Rule of construction.

This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact substantially identical legislation.

CHAPTER 5

Public Documents, Records, and Books

ARTICLE 1

Public Documents

SECTION 19-5-10. Admissibility of certified copies or certified photostatic copies of documents.

When the original of any instrument, document or other paper is required or authorized by law to be recorded or is kept on file in any public office of the United States or any agency thereof, the State of South Carolina or any agency thereof or any political subdivision of this State and the original of any such paper is required to be kept on file in any such office, is in the possession of any adverse party or has been lost or destroyed, a certified copy of the record of such paper, if it has been recorded, or copy of such paper, certified by the lawful custodian thereof, if it is kept on file in any such office, must be received in evidence in any court of competent jurisdiction in lieu of the original of such paper. A certified photostatic copy of any such paper may be used in lieu of a certified copy thereof, and such certified photostatic copy shall in all respects be treated as a certified copy under the provisions of this section.

SECTION 19-5-20. Notice required under Section 19-5-10.

In case of possession of such paper by any adverse party or his agent or attorney no such paper shall be received in evidence unless two days' notice shall have been given to such adverse party or his attorney that a certified copy thereof will be offered in evidence unless the original be produced as required in such notice. But the time of giving notice herein to any such adverse party, his agent or attorney, may be lessened by the officer presiding at trial in which such certified copy may be offered.

SECTION 19-5-30. Admissibility of photostatic or certified copies of certain motor vehicle records.

Photostatic, optical disk, or certified copies of motor vehicle registration applications, registrations, notices of cancellation, suspensions or revocations, reports of violations, and documents pertaining to the motor vehicle safety responsibility laws of this State, when certified by the director of the Department of Motor Vehicles, or his designee, as true copies of originals, on file with the Department of Motor Vehicles, shall be admissible in any proceedings in any court in like manner as the original thereof.

SECTION 19-5-40. Admissibility of certified photographic copy of instrument or record pertaining to business or government when original is lost or destroyed.

Any certified or authenticated photographic copy of any instrument or record in writing used in or acquired in the conduct of business, or of government, in this State shall, upon certification that the original of such instrument or record has been lost or destroyed, be admitted in evidence in any court in this State as the original of such instrument or record would have been admitted when offered.

SECTION 19-5-50. Evidence of appointment of executors or administrators.

The judge of probate, on application by the executor or administrator of any deceased person to whom letters testamentary or of administration have been granted, shall furnish a true copy of such order as he may make concerning the probate of the will or granting of administration, certified under his hand, which shall be sufficient evidence of the appointment of such executor or administrator in any such court in this State.

SECTION 19-5-60. Production of instruments required to be recorded as evidence of execution and recording.

The production, without further or other proof, of the original of any instrument in writing, other than a will, required by law to be recorded shall be prima facie evidence of the execution and recording of such instrument if such instrument shall have been recorded in the manner and place and within the time prescribed by law for recording the same and the recording thereof shall have been certified by the clerk of court or register of deeds.

SECTION 19-5-70. Applicability of foregoing section when fraud is alleged.

The provisions of Section 19-5-60 shall not apply when any such recorded instrument is assailed or attacked on the ground of fraud in its execution if at least ten days' previous notice in writing of such ground by a pleading or otherwise duly sworn to shall have been given by the party or his attorney so assailing or attacking such instrument to the opposite party or his attorneys.

ARTICLE 3

Foreign Documents

SECTION 19-5-210. Admissibility of certified copies of grants issued by North Carolina.

It shall be lawful, in every court of this State, for any party, plaintiff or defendant, to produce in evidence certified copies of grants under the authority of the state of North Carolina; provided, however, that the person or persons so applying to produce an office copy of a grant in evidence swear that the original grant is lost, destroyed or out of his power to produce and that he has not destroyed, mislaid or in any way willingly, previous to that time, put it out of his power to produce the same with an intention to produce an office copy of the same in evidence.

Nothing herein contained shall be construed to deprive any person in possession of the original grant of any advantage he would have had or derived from possessing the same in case this section had never been passed.

SECTION 19-5-220. Proof of various instruments.

All exemplifications of records, all deeds and bonds or other specialities, all letters of attorney, procuration, or other powers in writing and all testimonials which shall at any time be produced in any of the courts of this State and shall be attested to have been proved, upon oath, under the corporation seal of any mayor or chief officer of any city, borough or town corporate in any foreign state, under the hand of the governor and public seal of any state in the United States or under the notarial seal of any notary public shall be deemed and adjudged good and sufficient in law in any of the courts of judicature in this State, as if the witnesses to such deeds were produced and proved the same viva voce, except as herein otherwise provided.

SECTION 19-5-230. Foreign evidences of debt shall be admissible only on basis of reciprocity.

No testimonial, probate, certificate or other instrument under the seal of any foreign court of law, notary public or other magistrate or person qualified and empowered to give the same shall be received in the courts of the State as evidence of any debt or demand owing by any person resident within the limits of this State unless it shall appear to the court that testimonials, probates, certificates or other instruments of writing for the purposes aforesaid which shall be issued from any of the courts of this State or by any of the officers thereof authorized and empowered to give the same are received and allowed as evidence in the courts of such foreign country.

ARTICLE 5

Reports as to Missing Persons

SECTION 19-5-310. Effect of finding of presumed death under Federal Missing Persons Act.

A written finding of presumed death made by the Secretary of War, the Secretary of the Navy or other officer or employee of the United States authorized to make such finding, pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P. L. 408, Ch. 371, 2d Sess. 78th Cong.) 50 U.S.C. App. 1001-1017, as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this State as prima facie evidence of the death of the person therein found to be dead and the date, circumstances and place of his disappearance.

SECTION 19-5-320. Effect of report that person is missing, besieged, captured by the enemy or the like.

An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, beleaguered, besieged or captured by an enemy or is dead or alive, made by any officer or employee of the United States authorized by the act referred to in Section 19-5-310 or by any other law of the United States to make the same shall be received in any court, office or other place in this State as prima facie evidence that such person is missing, missing in action, interned in a neutral country, beleaguered, besieged or captured by an enemy or is dead or alive, as the case may be.

SECTION 19-5-330. Signature of reports or copies shall prima facie be deemed authorized.

For the purposes of Sections 19-5-310 and 19-5-320 any finding, report or record, or duly certified copy thereof, purporting to have been signed by such officer or employee of the United States as is described in said sections, shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing the same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same such certified copy shall be prima facie evidence of his authority so to certify.

ARTICLE 9

Business Records

SECTION 19-5-510. Uniform Business Records as Evidence Act.

The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.

A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

This section may be cited as the Uniform Business Records as Evidence Act.

SECTION 19-5-520. Certified business records.

In addition to those matters provided by Rule 902, South Carolina Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(A) The original or a copy of a domestic record that meets the requirements of Rule 803(6), South Carolina Rules of Evidence, as shown by a certification of the custodian or another qualified person that complies with a state statute or a court rule. Before the trial or hearing, the proponent shall give an adverse party reasonable written notice of the intent to offer the record and shall make the record and certification available for inspection so that the party has a fair opportunity to challenge the record.

(B) In a civil case, the original or a copy of a foreign record that is certified by the custodian or another qualified person and otherwise meets the requirements of subsection (A), modified as follows: the certification, rather than complying with a state statute or court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the jurisdiction where the certification is signed. The proponent also shall meet the notice requirements of subsection (A).

ARTICLE 11

Photographic Copies

SECTION 19-5-610. Uniform Photographic Copies of Business and Public Records as Evidence Act.

If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile does not preclude admission of the original.

This section shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact or adopt it.

This section may be cited as the Uniform Photographic Copies of Business and Public Records as Evidence Act.

CHAPTER 7

Compelling Attendance of Witnesses

SECTION 19-7-50. Means by which prisoners shall be brought into court as witnesses.

Whenever it shall be necessary to bring any prisoner into court as a witness in any case the presiding judge may order such prisoner to be brought into court, without the necessity of a writ of habeas corpus. And when the said prisoner shall have given his evidence the judge shall cause him to be remanded to the custody of the officer to whose keeping he shall have been originally committed.

SECTION 19-7-60. Process to compel attendance of criminal defendant's witnesses; sanctions for disobedience.

In all criminal prosecutions the accused shall have compulsory process for obtaining witnesses in his favor. The compulsory process shall be in misdemeanors a subpoena under the official signature of the clerk of the court or other judicial officer. Such subpoena or a copy thereof shall be served upon the witness a reasonable time before such witness is required to attend court. For any disobedience to such subpoena the court may punish for contempt.

CHAPTER 9

Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings

SECTION 19-9-10. Short title.

This chapter may be cited as "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings."

SECTION 19-9-20. Definitions.

"Witnesses" as used in this chapter shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

The word "state" shall include any territory of the United States and the District of Columbia.

The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

SECTION 19-9-30. Holding of hearing when resident is wanted as witness in another state.

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies under the seal of such court that there is a criminal prosecution pending in such court or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution or grand jury investigation and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing.

SECTION 19-9-40. Ordering resident witness to attend out-of-state proceedings.

If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or grand jury investigation in the other state and that the laws of the state in which the prosecution is pending or grand jury investigation has commenced or is about to commence and of any other state through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process,

he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court in which the prosecution is pending or in which a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

SECTION 19-9-50. Delivery of witness to custody of officer of requesting state.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for such hearing. And the judge at the hearing, being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability, may, in lieu of issuing a subpoena or summons, order that such witness be forthwith taken into custody and delivered to an officer of the requesting state.

SECTION 19-9-60. Penalty for failure to attend as witness out of state.

If the witness who is summoned as provided in Section 19-9-40, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State.

SECTION 19-9-70. Request by this State for witness from reciprocating state.

If a person in any state which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence in this State is a material witness in a prosecution pending in a court of record in this State or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Such certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to assure his attendance in this State. The certificate shall be presented to a judge of a court of record in the county in which the witness is found.

SECTION 19-9-80. Costs and fees paid to nonresident witness.

If the witness is summoned to attend and testify in this State he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he is required to travel and attend as a witness.

SECTION 19-9-90. Limit on time nonresident witness may be kept in State.

A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this State a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court.

SECTION 19-9-100. Penalty for failure to attend as witness in this State.

If such witness after coming into this State fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State.

SECTION 19-9-110. Nonresident witness shall not be subject to arrest or service of process.

If a person comes into this State in obedience to a summons directing him to attend and testify in this State, he shall not, while in this State pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons.

SECTION 19-9-120. Witnesses passing through State shall not be subject to arrest or service of process.

If a person passes through this State while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this State be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons.

SECTION 19-9-130. Rule of construction.

This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact substantially identical legislation.

CHAPTER 11

Competency of Witnesses

SECTION 19-11-20. "Dead man's" statute.

Notwithstanding the provisions of Section 19-11-10, no party to an action or proceeding, no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, and no assignor of anything in controversy in the action shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee shall be examined on his own behalf in regard to such transaction or communication or when testimony of such deceased or insane person or lunatic in regard to such transaction or communication, however the same may have been perpetuated or made competent, shall be given in evidence on the trial or hearing in behalf of such executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, survivor or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing.

SECTION 19-11-30. Competency of husband or wife of party as witness.

In any trial or inquiry in any suit, action, or proceeding in any court or before any person having, by law or consent of the parties, authority to examine witnesses or hear evidence, no husband or wife may be required to disclose any confidential or, in a criminal proceeding, any communication made by one to the other during their marriage.

Notwithstanding the above provisions, a husband or wife is required to disclose any communication, confidential or otherwise, made by one to the other during their marriage where the suit, action, or proceeding concerns or is based on child abuse or neglect, the death of a child, or criminal sexual conduct involving a minor.

SECTION 19-11-50. Testimony of defendant in criminal cases.

The testimony of a defendant in a criminal case shall not be afterwards used against the defendant in any other criminal case, except upon an indictment for perjury founded on that testimony.

SECTION 19-11-80. Privilege against self-incrimination.

No person shall be required to answer any question tending to incriminate himself.

SECTION 19-11-90. Priest-penitent privilege.

In any legal or quasi-legal trial, hearing or proceeding before any court, commission or committee no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline of his church or religious body. This prohibition shall not apply to cases where the party in whose favor it is made waives the rights conferred.

SECTION 19-11-95. Confidences of patients of mental illness or emotional conditions.

(A) For purposes of this section:

(1) "Provider" means a person licensed under the provisions of any of the following and who enters into a relationship with a patient to provide diagnosis, counseling, or treatment of a mental illness or emotional condition:

(a) Chapter 55, Title 40;

(b) Chapter 75, Title 40;

(c) Section 40-63-70 as a licensed master social worker or a licensed independent social worker;

(d) Section 40-33-10 as a registered nurse who meets the requirements of a clinical nurse specialist and who works in the field of mental health.

(2) "Patient" means a person who consults or is interviewed by a provider to diagnose, counsel, or treat a mental illness or emotional condition as authorized in subsection (A)(1).

(3) "Confidence" is a private communication between a patient and a provider or information given to a provider in the patient-provider relationship.

(4) "Written authorization after disclosure", or a similar phrase, includes an authorization in the application or claims procedure of an insurer or a person providing a plan of benefits.

(5) "Mental illness or emotional condition" is defined consistent with accepted diagnostic practices.

(B) Except when permitted or required by statutory or other law, a provider knowingly may not:

(1) reveal a confidence of his patient;

(2) use a confidence of his patient to the disadvantage of the patient;

(3) use a confidence of his patient for the advantage of himself or of a third person, unless the patient gives written authorization after disclosure to him of what confidence is to be used and how it is to be used.

(C) A provider may reveal:

(1) confidences with the written authorization of the patient or patients affected, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed;

(2) confidences when allowed by statute or other law;

(3) the intention of the patient to commit a crime or harm himself and the information necessary to prevent the crime or harm;

(4) confidences reasonably necessary to establish or collect his fee or to defend himself or his employees against an accusation of wrongful conduct;

(5) in the course of diagnosis, counseling, or treatment, confidences necessary to promote care within the generally recognized and accepted standards, practices, and procedures of the provider's profession;

(6) confidences in proceedings conducted in accord with Sections 40-71-10 and 40-71-20;

(7) confidences with the written authorization of the patient or patients affected for processing their health insurance claims, but only after disclosure to them of what confidences are to be revealed and to whom they will be revealed.

(D) A provider shall reveal:

(1) confidences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding; provided, however, confidences revealed shall not be used as evidence of grounds for divorce;

(2) confidences pursuant to a lawfully issued subpoena by a duly constituted professional licensing or disciplinary board or panel;

(3) confidences when an investigation, trial, hearing, or other proceeding by a professional licensing or disciplinary board or panel involves the question of granting a professional license or the possible revocation, suspension, or other limitation of a professional license.

(E) A disclosure pursuant to subsection (C) or (D) is limited to the information and the recipients necessary to accomplish the purpose of the subsection permitting the disclosure.

(F) A person to whom a disclosure is made pursuant to subsections (C)(1), (5), and (7), an employee to whom a disclosure is made pursuant to subsection (G), and any other person to whom a confidence, written or

oral, is disclosed by a provider are bound by the same duty of confidentiality as the provider from whom he received the information.

(G) A provider shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences of a patient, except that a provider may reveal the information allowed by subsections (C) and (D) through an employee.

(H) A provider releasing a confidence under the written authorization of the patient or under the provisions of this section is not liable to the patient or other person for release of the confidence to the person authorized to receive it; provided, however, a patient has a cause of action for damages against a provider, associate, agent, employee, or any other person who intentionally, wilfully, or with gross negligence violates the provisions of this section.

(I) Nothing in this section alters the existing requirements of nonproviders to preserve confidences or the requirements of providers subject to Sections 44-23-1090 and 44-52-190.

SECTION 19-11-100. Qualified privilege against disclosure for news media; waiver.

(A) A person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, magazine, radio, television, news or wire service, or other medium has a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any judicial, legislative, or administrative proceeding in which the compelled disclosure is sought and where the one asserting the privilege is not a party in interest to the proceeding.

(B) The person, company, or other entity may not be compelled to disclose any information or document or produce any item obtained or prepared in the gathering or dissemination of news unless the party seeking to compel the production or testimony establishes by clear and convincing evidence that this privilege has been knowingly waived or that the testimony or production sought:

(1) is material and relevant to the controversy for which the testimony or production is sought;

(2) cannot be reasonably obtained by alternative means; and

(3) is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

(C) Publication of any information, document, or item obtained in the gathering and dissemination of news does not constitute a waiver of the qualified privilege against compelled disclosure provided for in this section.

CHAPTER 21

Perpetuation of Evidence

SECTION 19-21-10. Substituting new records for lost, destroyed, or abstracted records of decrees and judgments.

The plaintiff in any judgment or decree, the record whereof has been destroyed, abstracted or lost, or his personal representatives, or other person claiming under or through them, or any of them, or any person whatever having an interest in the preservation of the evidence of such judgment or decree, may upon notice of not less than twenty-one days, served as a summons in actions is now served pursuant to law, upon the defendant therein or upon those upon whom his liability has devolved, or others interested to oppose the application, apply to the

court in which such judgment or decree was rendered for leave to substitute a new record. If, upon hearing the evidence on each side, the court is satisfied of the existence and loss of such record, an order for leave to substitute shall be made, conforming as nearly as possible in all respects to the lost, abstracted or destroyed record; and if it be for the payment of money, the balance due thereon and date of lien, if any, shall be made to appear thereon. Such substituted record shall be good and valid in law to all intents and purposes.

SECTION 19-21-20. Perpetuation of testimony as to lost, destroyed, or defective instruments.

Any person interested in the preservation of the contents of any deed, release, private writing usually put on record or document alleged to have been lost, destroyed or defective in the record thereof and desiring to preserve the evidence thereof for any purpose may, by summons and complaint as provided by Title 15, institute an action in the court of common pleas to perpetuate testimony as to the existence and true contents of the same. In such complaint the defects, if any, complained of in the record shall be substantially set forth and to such action all persons interested or known or supposed to claim an interest in the property to which such testimony may relate shall be made parties defendant and served with summons as provided by law in civil actions.

SECTION 19-21-30. Issuance of orders in action to perpetuate testimony.

The court or judge at chambers having jurisdiction of the subject matter may hear, determine and grant all orders as will best subserve the purposes of the complaint and the preservation of the testimony sought without delay.

SECTION 19-21-40. Recordation and force and effect of perpetuated testimony.

The evidence so taken shall be preserved, and the parties may have the same recorded in the office to which the same may relate. And such evidence so taken, preserved and recorded shall be received in all courts, subject to the same rules as to competency and credibility as any other evidence.

SECTION 19-21-50. Proof of lost papers other than by perpetuation of testimony.

Nothing herein contained shall prevent anyone from establishing on the trial of any cause any lost papers, according to the rules of evidence.

SECTION 19-21-60. Costs.

The costs of such proceedings as shall be had under the provisions of this chapter shall be in the discretion of the presiding judge.

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