Chapter 29
Witnesses

This chapter discusses selected topics dealing with witnesses, including securing the attendance of witnesses and the production of documents at trial though the use of subpoenas. Subpoenas and other mechanisms for obtaining records before trial are also addressed in the chapter on discovery in Volume 1 of this manual. *See* 1 NORTH CAROLINA DEFENDER MANUAL § 4.6A, Evidence in

Possession of Third Parties, and § 4.7, Subpoenas (2d ed. 2013). Also covered in this chapter are the sequestration of witnesses, competency of adult and child witnesses to testify, general rules governing the examination of witnesses, use of remote testimony, and oaths and affirmations. The chapter does not address the requirements for the admission of expert testimony.

29.1 Securing the Attendance of Witnesses by Subpoena and Other Process

A writ issued under the authority of the court to compel the personal attendance of a witness is called a subpoena ad testificandum (also called a witness subpoena). *See Vaughan v. Broadfoot*, 267 N.C. 691 (1966). Generally, a jurisdiction's subpoena procedure is a statutory method of implementing a defendant's Sixth Amendment right to present a defense, which includes the right to compulsory process to obtain witnesses and documents for his or her defense. *See generally United States v. Echeles*, 222 F.2d 144, 152 (7th Cir. 1955) (observing that federal criminal procedure rules implement the right to compulsory process in federal cases).

Among the steps counsel should consider in preparing for trial are subpoenaing potentially helpful witnesses and examining and subpoenaing potentially helpful physical or documentary evidence. *See infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 7.1(c)(1), (2) General Trial Preparation (Nov. 2004) (2d ed. 2012); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 12, at 39 (7th ed. 2011) ("[I]f the defendant desires the testimony of . . . witnesses he or his counsel must call them."). If a witness has not been subpoenaed to appear, the witness is not required to be present, and the court has no authority to punish his or her failure to appear. *State v. Wells*, 290 N.C. 485 (1976).

For a discussion of subpoenas from the perspective of the recipient, see John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (UNC School of Government, Sept. 2005). Although the bulletin focuses on health department records, it discusses requirements and procedures applicable to all subpoenas.

A. Constitutional Basis of Right to Compulsory Process

The Sixth Amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." This federal constitutional right is applicable to the states through the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense," which is "a fundamental element of due process of law" and thus incorporated into the Fourteenth Amendment and applicable to state proceedings); *accord State v. Melvin*, 326 N.C. 173, 184 (1990); *see also infra* § 29.2F, Constitutional Right to Obtain Evidence in Possession of Third Parties (discussing Due Process right to favorable, material

evidence). The right to confront one's accusers and witnesses with other testimony is also guaranteed by article I, section 23 of the N.C. Constitution. *State v. Cradle*, 281 N.C. 198 (1972).

The right to compulsory process is not absolute. The court may require a defendant who requests such process at state expense to establish some "colorable need" for the person to be summoned, "lest the right be abused by those who would make frivolous requests." *State v. House*, 295 N.C. 189, 206 (1978) (quoting *Hoskins v. Wainwright*, 440 F.2d 69, 71 (5th Cir. 1971)); *see also United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (holding that the defendant could not establish a violation of his constitutional right to compulsory process merely by showing that the deportation of potential witnesses deprived him of their testimony; he had to make "some plausible showing" of how their testimony would have been material and favorable to his defense); *Washington v. Texas*, 388 U.S. 14, 23 (finding a violation of the defendant's right to compulsory process where state statutes prohibiting alleged accomplices from testifying for one another prevented the defendant from putting "on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense").

Under North Carolina's subpoena procedures, discussed in subsection B., below, the defendant does not have to make any showing to obtain a subpoena. Nor is it likely in the typical case for the need for a witness subpoena to be questioned before the witness is scheduled to appear because the significance of a witness's testimony is difficult to determine before the witness actually testifies. *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(f), at 487–88 (4th ed. 2015) (contrasting witness and document subpoenas). *But see In re A.H.*, ___ N.C. App. ___, 794 S.E.2d 866 (2016) (finding no abuse of discretion by the trial judge in allowing a motion to quash respondent-mother's subpoena for her son's testimony in termination of parental rights proceeding where judge found that respondent-mother's specific forecast of the testimony demonstrated that it would be of little probative value); *State v. Carroll*, 17 N.C. App. 691 (1973) (upholding the trial judge's denial of the defendant's request that the State subpoena inmate-witnesses in a prosecution of the defendant for escape where the witnesses had no knowledge of the facts of the alleged escape and could offer no testimony relevant and material to the defense); John Rubin, Ch. 11: Evidence, § 11.2.A.5, Quashing of Subpoena for Child (noting cases in which trial courts quashed the respondents' subpoenas for children in abuse, neglect, dependency, and termination of parental rights proceedings), *in* SARA DEPASQUALE & JAN S. SIMMONS, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA (2017).

The defendant may have to make a showing of "need" for a witness's testimony if the witness challenges a subpoena on the ground that the sought-after testimony is privileged. *See infra* § 29.1I, Motions to Modify or Quash Witness Subpoenas. The question of "need" for a witness's testimony also may arise when the defendant requests a continuance of the trial because the witness has failed to comply with the defendant's subpoena. *See, e.g.*, *State v. Beck*, 346 N.C. 750 (1997) (upholding the denial of a continuance where the likelihood of the witness's availability was de minimus—the record did not contain a copy of a subpoena

for the witness, defense counsel was uncertain whether the witness had been served, and law enforcement had been unable to locate the witness despite five outstanding warrants—and where counsel's asserted need for the witness consisted of his unsworn statements about the witness's potential testimony regarding events that occurred after the offense).

Although there are no time limits set by the Constitution within which to exercise the right to compulsory process, this right can be lost by the defendant's delay in subpoenaing witnesses. Thus, in the following cases, the defendants did not subpoena the witnesses until after the trial had started and failed to explain why they had not issued a subpoena for the witnesses earlier. *See State v. House*, 295 N.C. 189 (1978) (no error in trial judge's refusal to issue subpoenas for defense witnesses where the request was made after the State had rested its case and the testimony sought to be introduced did not appear to be material); *State v. Wells*, 290 N.C. 485 (1976) (finding no constitutional violation where trial judge did not issue subpoenas for defense witnesses mid-trial where defendant failed to subpoena his witnesses prior to trial when he had ample opportunity to do so); *State v. Cyrus*, 60 N.C. App. 774 (1983) (no constitutional or statutory violation by trial judge in denying defendant's motion to secure the attendance of a material out-of-state witness made on the first day of trial where the defense had knowledge well before the case was calendared that the witness had issues that might prevent him from coming back to North Carolina). *But cf. State v. Rankin*, 312 N.C. 592 (1985) (defendant's right to compulsory process was denied where trial judge denied his motion to compel the attendance of prisoners to testify at trial without giving defense counsel an opportunity to show "good cause" or to explain why the motion was not filed until the day before the trial was to start).

Practice note: You should prepare and serve your subpoenas far enough in advance of trial to give the witnesses a reasonable time to make arrangements to appear. If you wait until the last minute to serve a subpoena (without good reason for doing so) and the witness does not appear, the trial judge may have grounds to deny a motion to compel a witness's attendance or for a continuance. If you plan to use your county's sheriff's department to serve the subpoenas, you need to check with them to determine their policies and requirements. For example, in Mecklenburg County, a local order states that defendants who want the sheriff to serve a subpoena on a law enforcement officer must submit the subpoena to the sheriff no less than fourteen days before the scheduled court appearance.

B. Securing the Attendance of In-State Witnesses

Witnesses who are present in North Carolina must come to court to testify in a criminal proceeding if they are properly served with a subpoena ad testificandum. The subpoena must be issued and served in accordance with the provisions of N.C. Rule of Civil Procedure 45. This rule governs subpoenas in criminal proceedings, with certain exceptions discussed below. *See* G.S. 15A-801 (so stating for criminal cases); G.S. 8-59 (so stating for all causes in the trial divisions of the North Carolina courts).

A subpoena to obtain the testimony of a witness in a pending cause may be issued by

- the clerk,
- any district or superior court judge or magistrate, or
- any attorney for a party.

N.C. R. CIV. P. 45(a)(4) (clerk, district court judge, superior court judge, magistrate, or attorney); G.S. 7A-103(1) (powers of clerk of superior court); G.S. 7A-292(a)(4) (powers of magistrate). An unrepresented party may not issue a subpoena but may request the clerk to issue a subpoena, signed but otherwise blank, which the party then fills out. N.C. R. CIV. P. 45(a)(4).

Mandatory contents of subpoena. N.C. Rule of Civil Procedure 45(a)(1) requires that every subpoena state the following:

- the title of the action;
- the name of the court in which the action is pending;
- the name of the party who is responsible for summoning the witness;
- a command to the person to whom it is directed to attend and testify [including the place, date, and time that appearance is required];
- the protections of persons subject to subpoenas as stated in Rule 45(c); and
- the duties of persons in responding to subpoenas as stated in Rule 45(d).

The form subpoena issued by the Administrative Office of the Courts (AOC-G-100, "Subpoena" (Feb. 2018)), contains space for the issuing party to fill in the specific case information as well as the form language required in all cases.

Manner of service. A subpoena may be served by

- the sheriff,
- a sheriff's deputy,
- a coroner, or
- any person who is not a party and is not less than 18 years of age.

N.C. R. CIV. P. 45(b)(1).

Service on the party named in the subpoena may be made by

- personally delivering a copy of the subpoena to that person;
- registered or certified mail, return receipt requested; or
- telephone communication with the person to be subpoenaed if service is made by a sheriff, his or her designee who is not less than 18 years old and not a party, or a coroner. (This last form of service may be used for subpoenas to testify, not for subpoenas to produce documents, discussed *infra* in § 29.2B.)

Id. G.S. 8-59 states that a subpoena also may be served by telephone communication by any employee of a law enforcement agency; however, when a person is served by telephone

under that statute, neither a show cause order nor an order for the person's arrest may be issued for a violation of the subpoena until the person is personally served with the written subpoena. Although not expressly stated in Rule 45(b)(1), this limitation also may apply to subpoenas served by telephone by a sheriff, designee, or coroner under the above-cited rule of civil procedure.

Practice note: Because the court may not be able to issue a show cause order re contempt (with an order for arrest) to enforce a subpoena served by telephone communication, and because disputes may arise about whether a person named in a subpoena signed for and received a subpoena served by mail, counsel should consider serving all subpoenas by personal delivery on the person whose attendance is sought.

Service exception in criminal cases. In civil cases, a copy of the subpoena also must be served on other parties to the case, but G.S. 15A-801 exempts criminal cases from that requirement. The subpoenaing party in a criminal case need only serve the person or entity being subpoenaed in accordance with the above requirements.

Attendance required until discharge; consequences of failure to comply. Every witness who has been summoned in a criminal prosecution must appear and continue to attend from day to day and session to session until discharged by the court or by the party who summoned him or her to appear. G.S. 8-63. A "session" of superior court "refers to the typical one-week assignment within a term." *See State v. Johnson*, 238 N.C. App. 500, 503–04 (2014) (noting that "[t]he use of 'term' refers to the typical six-month assignment of a superior court judge" and holding that because there was no "session" of court scheduled for the date listed on the subpoena, the compulsory attendance of the witness was not triggered and she was not "required to appear 'from session to session' for that case until discharged"); *see also State v. Sammartino*, 120 N.C. App. 597, 599 (1995). A district court session typically lasts one day. *See* Alyson Grine, *District Court is in Session . . . But for How Long?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Nov. 20, 2009) (discussing multiday sessions in district court). The statute also states that the prosecutor may discharge a witness from a subpoena, but presumably this authority applies only to witnesses summoned by the prosecutor.

A person who fails to obey a properly served subpoena without adequate excuse may be held in contempt of court for violating a court order (that is, the subpoena directing attendance, whether signed by an attorney or a judicial official). N.C. R. CIV. P. 45(e)(1); *see also* G.S. 5A-11(a)(3) (criminal contempt for willful disobedience of a court's lawful process or order); G.S. 5A-21 (civil contempt for continuing failure to comply with order of a court). A court may issue an order for arrest along with an order to show cause re contempt if the court has probable cause to believe the person named in the show cause order will not appear in response to the show cause order. G.S. 5A-16(b).

G.S. 8-63 also provides that if a witness does not comply with a subpoena, he or she may be required to pay a financial penalty.

Avoidance of undue burden or expense. N.C. Rule of Civil Procedure 45(c)(1) provides that the party or attorney responsible for issuing a subpoena "shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena." Failure to do so may result in sanctions. The sanctions may include compensating the person unduly burdened for his or her lost earnings and for reasonable attorney's fees. *See infra* § 29.1I, Motions to Modify or Quash Witness Subpoenas.

Compensation and expenses. Witnesses under subpoena, other than salaried law enforcement officers, are entitled to be compensated in the amount of $5.00 per day. G.S. 7A-314(a) (amount of compensation). A witness also may be entitled to receive reimbursement for travel expenses. *See* G.S. 7A-314(b). Witnesses are not entitled to receive their fees in advance. G.S. 6-51. Rather, the witness must apply to the clerk after attendance for payment. *See* G.S. 6-53 (witness to prove attendance by oath or affirmation); G.S. 7A-316 (to same effect); AOC-CR-235, "Witness Attendance Certificate" (Mar. 2015). Subject to the specific limitations in G.S. 7A-305(d)(11), a judge decides, in his or her discretion, what compensation and allowances to authorize for a witness who appears in the capacity of an expert witness. *See* G.S. 7A-314(d). (This statute does not govern requests by the defense for funds for expert assistance, discussed in 1 NORTH CAROLINA DEFENDER MANUAL Ch. 5, Experts and Other Assistance (2d ed. 2013).)

C. Material Witness Orders

Statutory authorization. To assure the attendance of an uncooperative witness, the State or the defendant may seek a material witness order asserting that there are reasonable grounds to believe that a witness in a pending criminal proceeding has information material to the determination of the proceeding and may not come to court to testify even after being served with a subpoena. *See* G.S. 15A-803(a); *see also State v. Jacobs*, 128 N.C. App. 559 (1998).

G.S. 15A-803(g) authorizes the court to assure the attendance of a material witness by issuing a subpoena or an order for arrest. Since the purpose of a material witness order is to assure the attendance of a material witness who may not be responsive to a subpoena, it is not clear when a subpoena alone would be an effective device for the court to use. If arrested, the witness may be incarcerated or released on bond pending the proceeding where his or her testimony is required. *See* G.S. 15A-803(e).

Applicable to in-state witnesses only. G.S. 15A-803 should be used to secure the attendance of uncooperative in-state witnesses. For witnesses located outside North Carolina, the procedures outlined in G.S. 15A-813 (Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings) should be followed. *See State v. Tindall*, 294 N.C. 689 (1978). For a discussion of that procedure, see *infra* § 29.1E, Securing the Attendance of Nonresident Witnesses.

Mandatory procedure. To obtain a material witness order, the State or the defendant must file a motion supported by an affidavit showing cause for its issuance. The witness must be given

- reasonable notice;
- an opportunity to be heard and present evidence; and
- the right to representation by counsel at a hearing on the motion.

G.S. 15A-803(d). The witness is entitled to the appointment of counsel in accordance with rules adopted by the Office of Indigent Defense Services. *Id.*

Issuance of order. A material witness order may be issued by a district court judge at the time that a defendant is bound over to superior court at a probable cause hearing or by a superior court judge at any time after the criminal proceeding is initiated. G.S. 15A-803(b). The judge must make findings of fact that support the issuance of the material witness order. G.S. 15A-803(d).

Length of effectiveness. A witness may be incarcerated pursuant to a material witness order for up to twenty days. This order may be renewed one or more times by a superior court judge, in his or her discretion, for periods not longer than five days each. The material witness order remains in effect for the period stated in the order unless modified or vacated earlier by a superior court judge. G.S. 15A-803(c).

Modification or vacation. A superior court judge may modify or vacate a material witness order if the witness, the State, or any defendant shows new or changed facts or circumstances. G.S. 15A-803(f).

Compliance with the Sixth Amendment. The use of the term "may" in G.S. 15A-803 suggests that the decision whether to grant a motion for a material witness order lies within the discretion of the judge; however, the judge must exercise his or her discretion in a way that does not violate the guarantee of the Sixth Amendment to the U.S. Constitution that a criminal defendant be afforded compulsory process for obtaining witnesses in his or her favor. *State v. Tindall*, 294 N.C. 689 (1978); *see also State v. Jacobs*, 128 N.C. App. 559 (1998) (no abuse of discretion in denying defendant's motion for a material witness order because the testimony of the witness who was the subject of the motion would have been merely cumulative and was therefore not material to the determination of guilt or innocence).

It appears that it would be an abuse of discretion and a violation of the Sixth Amendment if a trial judge denied a motion for a material witness order where the defendant:

- has shown reasonable grounds to believe that the witness possesses material information;
- complies with the requirements of G.S. 15A-803; and
- has not been dilatory in securing the attendance of the witness.

Cf. State v. Love, 131 N.C. App. 350 (1998), *aff'd per curiam*, 350 N.C. 586 (1999); *Jacobs*, 128 N.C. App. 559; *State v. Coen*, 78 N.C. App. 778 (1986).

Practice note: You should file a motion for a material witness order as soon as you have reasonable cause to believe that a witness might not appear for the proceeding. If you have reason to know that the witness is not cooperating but wait until the last minute to file the motion, the trial judge's denial of your motion may be upheld for lack of diligence. *See State v. Coen*, 78 N.C. App. 778 (1986) (finding no abuse of discretion under G.S. 15A-803 and no violation of the Sixth Amendment in trial judge's denial of defendant's motion for a material witness order made right before the defense rested where the defense knew on the first day of trial that the witness was not cooperating with service of the subpoena, which the defense did not issue until the first day of trial); *State v. Poindexter*, 69 N.C. App. 691, 700 (1984) (no merit to pro se defendant's argument that the trial judge failed to assist him in locating and subpoenaing witnesses where defendant failed "to make the necessary motions and applications to secure the presence of any unwilling or confined witnesses" despite having the opportunity to do so, the defendant made his request after the close of the State's case-in-chief, and the judge directed police officers to try to locate defendant's witnesses).

D. Voluntary Protective Custody for Material Witnesses

If a witness wishes, he or she can ask a superior court judge to place him or her in protective custody. If the judge determines that the witness is material, the judge may order that the witness be:

- confined;
- placed in custody in a non-penal institution;
- released to the custody of a law enforcement officer or other person; or
- made subject to any other provisions appropriate to the circumstances.

G.S. 15A-804(a). A superior court judge can modify or vacate the order on request by the witness or on the judge's own motion. G.S. 15A-804(d). A voluntary protective custody order may be issued even if there is also a material witness order in effect for the witness and vice versa. G.S. 15A-804(c).

The custodian of a witness under a voluntary protective custody order may not release the witness without the witness's consent "unless directed to do so by a superior court judge, or unless the order so provides." G.S. 15A-804(b). The Official Commentary to this statute states that "[a]lthough it may seem farfetched in North Carolina, the basis for this section sprang from the fear that members of organized crime might attempt to obtain the release of a witness who would prefer to remain in custody."

E. Securing the Attendance of Nonresident Witnesses

Necessity of interstate cooperation. In 1902, the U.S. Supreme Court recognized that state legislatures did not have the power to make any provision that would result in the compulsory attendance of an out-of-state witness in a proceeding held in the home state's court. *See Minder v. Georgia*, 183 U.S. 559 (1902). After that decision, states began adopting the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. This Act was written "to provide a means for state courts to compel

the attendance of out-of-state witnesses at criminal proceedings." Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th 836, 837 (1981). The N.C. General Assembly adopted this Act in 1937, currently codified at G.S. 15A-811 through 15A-816. *See Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971). The Act has been enacted in all fifty states and the District of Columbia and has been found to be constitutional by the U.S. Supreme Court. *See New York v. O'Neill*, 359 U.S. 1 (1959); Rhonda Wasserman, *The Subpoena Power:* Pennoyer's *Last Vestige*, 74 MINN. L. REV. 37 (1989).

Required procedures and orders. If the State or the defendant wants to secure the presence of a person located in another state (as defined in G.S. 15A-811) to be a witness in a criminal proceeding in North Carolina, the party first must apply for a certificate and order from the North Carolina court in which the criminal proceeding is pending. The moving party then must seek an order from the other state's courts requiring the person to attend court proceedings in North Carolina. G.S. 15A-813; *see also State v. Tindall*, 294 N.C. 689, 699–700 (1978).

Practice note: The AOC has issued a form certificate for use by parties seeking to require the attendance of out-of-state witnesses. *See* AOC-CR-901M, "Certificate for Attendance of Out-of-State Witness" (Mar. 2015).

Witness must be material. In applying to a North Carolina court for a certificate and order of attendance for an out-of-state witness, the applicant must show that the person requested to be a witness "is a material witness" in a proceeding that is pending in a court of record in this state. G.S. 15A-813. For a discussion on what constitutes materiality, see Jay M. Zitter, Annotation, *Sufficiency of Evidence to Support or Require Finding that Out-of-State Witness in Criminal Case Is "Material Witness" Justifying Certificate to Secure Attendance Under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings*, 12 A.L.R.4th 742 (1982 & Supp. 2010).

***Practice note*:** Always support your application with affidavits or other testimony to meet your burden of materiality. Bare allegations may be insufficient. *See* 81 AM. JUR. 2D *Witnesses* § 45 (2004). Also, as with a motion for a material witness order, discussed *supra* in § 29.1C, you should file your application as soon as you know that the witness will be needed. *See State v. Cyrus*, 60 N.C. App. 774 (1983) (no constitutional or statutory violation by trial judge in denying defendant's motion to secure the attendance of a material out-of-state witness made on the first day of trial where the defense had knowledge well before the case was calendared that the witness had issues that might prevent him from coming back to North Carolina).

Specific location must be given. In addition to making an adequate showing that the testimony of the prospective witnesses is material, the applicant must adequately designate the location where the witness can be found. *See State v. Tindall*, 294 N.C. 689, 700 (1978).

Issuance of certificate. If the judge finds that the applicant has made a sufficient showing to secure the witness's presence, he or she may issue a certificate under seal that sets out the facts and specifies the number of days the witness will be required to attend. G.S. 15A-813. The certificate and order must be "presented to a judge of a court of record in the county [of the other state] in which the witness is found," and it may include a recommendation that the witness be immediately taken into custody and delivered to an officer of this state to assure his or her attendance. G.S. 15A-813.

The judge in the witness's home state then may have the witness appear before him or her to determine whether to issue an order. *See* 81 AM. JUR. 2D *Witnesses* § 48 (2004); *cf.* G.S. 15A-812 (witness in North Carolina may be summoned to another state to testify if found to be a material and necessary witness and no undue hardship will result). If the home state judge finds that the witness is material and necessary, will suffer no undue hardship, and will be protected from arrest and service of process by the trial state, he or she may issue an order directing the witness's attendance in North Carolina. *See Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971); *State v. Tindall*, 294 N.C. 689 (1978); Rhonda Wasserman, *The Subpoena Power:* Pennoyer's *Last Vestige*, 74 MINN. L. REV. 37 (1989).

Practice note: To obtain an order from another state requiring the attendance of a witness, North Carolina counsel will need to arrange for the matter to be presented to the court of the other state. The AOC form certificate states that it and the bill of indictment (or presumably an information if indictment has been waived) are to be transmitted to the presiding judge of the court of the other state, but counsel still needs to ensure that the matter is properly presented and argued. Typically, North Carolina counsel will associate counsel in the other state to appear before that state's court. A public defender's office in the other state, if there is one for the county where the witness is located, may be willing to handle the matter as a courtesy. Failing that, North Carolina counsel should request funds from the court to obtain counsel to appear in the other state. Counsel also may be able arrange to appear pro hac vice in the other state (that is, be permitted to appear in the other jurisdiction although not admitted to practice in the other jurisdiction).

Compensation. The out-of-state witness is entitled to compensation for mileage and $5.00 for each day that he or she is required to travel and attend as a witness. If the witness is required to appear for more than one day, he or she also is entitled to reimbursement of actual expenses incurred for lodging and meals in the same manner as state employees who are authorized to travel within the state. G.S. 7A-314(c); G.S. 15A-813; AOC-CR-235, "Witness Attendance Certificate" Side Two (Mar. 2015).

Failure to comply. If a witness fails to comply with an order directing him or her to attend a North Carolina proceeding, the witness may be punished by the home state court in the same manner as if the failure had been to attend a trial in the home state. *See Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971); *cf.* G.S. 15A-812 (providing this remedy when North Carolina witness fails to comply with order to attend out-of-state proceeding). Additionally, if a witness comes to this state and then fails without good cause to attend and testify as directed by the order, he or she may be punished as any other witness who disobeys an order issued from a North Carolina court of record. G.S. 15A-813.

Exemption from arrest and service of process. If a nonresident witness comes to North Carolina in obedience to an order directing him or her to attend and testify, the witness may not be arrested or served with criminal or civil process in connection with matters that arose before he or she entered this state under the order. G.S. 15A-814.

Compliance with Sixth Amendment. Use of the term "may" in G.S. 15A-813 indicates that the judge has discretion whether to grant a motion to procure the attendance of an out-of-state witness. Nevertheless, the trial judge may not exercise his or her discretion in a manner inconsistent with the Sixth Amendment's right to compulsory process. *See Preston v. Blackledge*, 332 F. Supp. 681 (E.D.N.C. 1971) (finding an abuse of discretion in the trial judge's denial of the defendants' request to secure the attendance of nonresident witnesses whose testimony was vital to the defendants' right to receive a fair trial); *State v. Brady*, 594 P.2d 94 (Ariz. 1979) (trial court abused its discretion and violated defendant's due process rights by denying her motion to compel the attendance of an out-of-state witness whose testimony went to the heart of the defense; written interrogatories admitted at trial were not a sufficient substitute for live testimony under the Sixth Amendment); *People v. Trice*, 476 N.Y.S.2d 402 (App. Div. 1984) (abuse of discretion found where trial judge denied defendant's motion to secure the attendance of a nonresident witness who signed an affidavit stating that he saw the victim alive two days after the defendant had allegedly killed her).

F. Securing the Attendance of Witnesses in Custody Within the State

Criminal Procedure Act. At common law, anyone who had been convicted of a crime was disqualified from testifying as a witness. The legislature removed this disqualification by enacting G.S. 8-49, which provides that no person shall be excluded from giving testimony "by reason of incapacity from interest or crime." *See* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 131, at 492 n.5 (7th ed. 2011). Pursuant to G.S. 15A-805(a), the State or the defendant in a pending criminal proceeding may move to require that a North Carolina prisoner "be produced and compelled to attend as a witness in the action or proceeding." If the movant shows good cause, the judge of the court in which a criminal proceeding is pending must order the person be produced as a witness. G.S. 15A-805(a).

G.S. 15A-805 does not require that the motion be in writing, that it be accompanied by an affidavit, or that it be made within a certain time (although see the practice note below). The statute does not specify any particular method by which the movant show the "good cause" necessary to the production of the witness. *See State v. Rankin*, 312 N.C. 592 (1985) (so noting and holding that the defendant's right to compulsory process was denied where trial judge denied defendant's motion to compel the attendance of prisoner to testify at defendant's trial without giving defense counsel an opportunity to show "good cause" or to explain why the motion was not filed until the day before the trial was to start).

Practice note: Although not required, you should file a written motion detailing the reasons why the witness's presence is necessary. Support the motion with an affidavit showing good cause for the production of the prisoner. File the motion as soon as practicable so that the

logistics of transporting a prisoner will not delay the trial and potentially provide grounds for denial of the motion. In addition to citing the statute in your motion, you should cite the Sixth Amendment to the U.S. Constitution and article I, sections 19 and 23 of the N.C. Constitution to reinforce your right to production of the witness as well as preserve the constitutional issue for appellate review if your motion is denied.

If the prisoner has pending criminal proceedings and the judge determines that the order of production would unreasonably interfere with those prior proceedings, G.S. 15A-805(b) provides that he or she may deny the motion. That statute also appears to provide that if an order of production is obtained for a prisoner with pending criminal proceedings, the prisoner (that is, that defendant) or the prosecutor in the other district may apply to a judge or justice in the appellate division and request that the order of production be vacated for good cause shown. G.S. 15A-805(b). Presumably, these provisions for denial or cancellation of an order of production would have to yield to the constitutional rights of the defendant then on trial to obtain necessary witnesses for his or her defense.

Habeas corpus ad testificandum. Independently of G.S. 15A-805, G.S. 17-41 to 17-46 set out a "much more complicated" procedure for obtaining the presence of a prisoner at a proceeding to testify. *See State v. Rankin*, 312 N.C. 592, 597 (1985). According to the Official Commentary to G.S. 15A-805, the provisions of G.S. 15A-805 "replace[d] the old 'habeas corpus ad testificandum' with a simple motion and order for the production of a prisoner (or other person confined in an institution)." Nevertheless, G.S. 17-41 et seq. still provide an alternative method of securing the attendance of a prisoner housed in North Carolina. *See also* AOC-G-112, "Application and Writ of Habeas Corpus Ad Testificandum" (June 2012).

The difference between a writ of habeas corpus ad testificandum and a subpoena ad testificandum is that a subpoena directs the witness to appear at the proceeding while the writ of habeas corpus directs the custodian of the witness to bring him or her to court. *Mabe v. Wythe County Dep't of Soc. Servs.*, 671 S.E.2d 425 (Va. Ct. App. 2009).

G.S. 17-41 authorizes "[e]very court of record," on application of any party to a pending civil or criminal proceeding, to issue a writ of habeas corpus to bring a prisoner in any jail or prison in North Carolina before the court to testify for the applicant. The writ also may be issued by a magistrate or clerk of superior court if the prisoner is confined in an institution within that county.

This statute allows judges to issue the writ for any incarcerated person except for a prisoner who has been sentenced to death. This exception does not apply to the State of North Carolina—a judge may issue a writ of habeas corpus to bring a condemned prisoner to court to testify on behalf of the State. *See State v. Jones*, 176 N.C. 702 (1918) (holding that the statute stating that a writ of habeas corpus ad testificandum could not be issued for a prisoner who had been sentenced to death did not apply to the State); *cf. State v. Adair*, 68 N.C. 68, 70 (1873) (a prohibition against writs ordering prisoners sentenced for a felony to testify "applies only to parties strictly so called, and not to the State"). There is not a

comparable restriction in G.S. 15A-805, discussed above, on the defendant's right to secure the attendance and testimony of a prisoner.

The application for the writ must:

- be made by the party to the proceeding or by his or her agent or attorney;
- be verified by the applicant;
- state "[t]he title and nature of the suit or proceeding in regard to which the testimony of such prisoner is desired"; and
- state that the prisoner's testimony is "material and necessary to such party on the trial or hearing of such suit or proceeding, as he is advised by counsel and verily believes."

G.S. 17-42. For other miscellaneous statutory requirements regarding the writ of habeas corpus ad testificandum, see G.S. 17-43 et seq.

G. Securing the Attendance of Witnesses in Custody Outside the State

If a prisoner (other than a person confined due to mental illness) who is confined in another state is needed as a witness in a criminal proceeding in North Carolina, the State or the defendant may apply to the court where the action is pending for a certificate securing the attendance of the prisoner. G.S. 15A-822. The judge may issue the certificate if

- there is reasonable cause to believe that the prisoner possesses material information; and
- the state in which the prisoner is confined has a statute that is equivalent to G.S. 15A-821 (permitting prisoners in North Carolina to testify in proceedings in other states).

Id. The certificate, if issued, must

- certify that the prisoner is a material witness in a pending criminal proceeding; and
- specify the number of days that the prisoner's attendance is required.

G.S. 15A-822(a)(4). After the certificate is issued, the judge "may cause it to be delivered to a court of such other state which is authorized to initiate or undertake action for the delivery of such prisoners to this State as witnesses." G.S. 15A-822(c).

H. Securing the Attendance of Witnesses in Federal Custody

The State or the defendant may secure the attendance of a witness who is confined in a federal institution by making application in the court where the defendant's criminal proceeding is pending. The applicant must show that there is "reasonable cause" to believe that the witness "possesses information material" to the pending proceeding. G.S. 15A-823.

Upon application, the judge may issue a certificate (known as a writ of habeas corpus ad testificandum) addressed to the Attorney General of the United States certifying that there is reasonable cause to believe that the prisoner possesses material information and requesting

the Attorney General to have the prisoner brought to court "for a specified number of days under custody of a federal public servant." G.S. 15A-823(a)(3).

The judge, after issuing the certificate, "may cause it to be delivered to the Attorney General of the United States" or to his or her authorized representative. G.S. 15A-823(c). It is the policy of the U.S. Bureau of Prisons to allow federal prisoners to testify in state court criminal proceedings pursuant to a writ of habeas corpus ad testificandum issued by a state court. *Barber v. Page*, 390 U.S. 719 (1968).

I. Motions to Modify or Quash Witness Subpoenas

A person commanded by a subpoena to appear at trial may file a motion to quash or modify the subpoena in the county in which the trial is to occur. The motion must be made within ten days after service of the subpoena or before the time specified for compliance if the time is less than ten days after service. N.C. R. CIV. P. 45(c)(5).

The judge may modify or quash a subpoena if the subpoenaed person shows that it

- fails to allow reasonable time for compliance;
- requires disclosure of privileged or protected matter and there is no applicable exception or waiver;
- subjects the person subpoenaed to an undue burden;
- is unreasonable or oppressive; or
- is procedurally defective.

N.C. R. CIV. P. 45(c)(3), (c)(5); *see, e.g., In re Will of Johnston*, 157 N.C. App. 258 (2003), *aff'd per curiam*, 357 N.C. 569 (2003) (propounder of will filed a motion to quash subpoena of deceased's attorney based on attorney-client privilege); *State v. Pallas*, 144 N.C. App. 277 (2001) (judge properly granted State's motion to quash subpoena of assistant district attorney who had prosecuted the co-defendant because his testimony may have been privileged work product [under former discovery statute] and lacked materiality); *State v. McRae*, 58 N.C. App. 225 (1982) (no error in trial judge's denial of defendant's motion to quash the State's subpoenas for two young children because there is no age below which one is considered incompetent as a matter of law to testify in North Carolina); *see also supra* § 29.1A, Constitutional Basis of Right to Compulsory Process (discussing defendants' constitutional right to compulsory process to secure testimony of witnesses for defense).

If the judge enters an order to quash or modify a subpoena, he or she may order the party who issued the subpoena to pay all or part of the reasonable expenses and attorney's fees of the subpoenaed person. N.C. R. CIV. P. 45(c)(8). This provision appears to have greater applicability to parties in civil cases than to either the State or defendant (particularly an indigent defendant) in a criminal case.

Practice note: If the judge quashes a subpoena or refuses to enforce a subpoena against a witness who fails to comply, you must make an offer of proof showing "the essential content or substance of the witness's testimony" in order for the appellate court to ascertain

whether prejudicial error occurred. *See State v. Simpson*, 314 N.C. 359, 370 (1985); *see also* N.C. R. EVID. 103(a)(2); *State v. Pallas*, 144 N.C. App. 277 (2001) (defendant waived appellate review of trial judge's decision not to enforce the subpoena of a co-defendant as a witness because the defendant made no offer of proof as to what the co-defendant would say and its significance was not obvious from the record).

J. Defense Depositions in Criminal Actions

Statutory authority and requirements. G.S. 8-74 provides a procedure for a criminal defendant in limited circumstances to take a witness's deposition before a proceeding. The defendant may take a deposition if he or she files an affidavit with the clerk of superior court where the action is pending stating that:

- the testimony of the named witness is important for the defense; and
- the witness's attendance cannot be procured for the proceeding because the witness is infirm, or otherwise physically incapacitated, or is a nonresident of North Carolina.

Once the affidavit is filed, the clerk must appoint "some responsible person" to take the witness's deposition. The district attorney must be given ten days' notice of the taking of the deposition and may appear (or send a representative) to cross-examine the witness. The deposition may be read during the criminal proceeding in the same manner as depositions in civil cases.

No corresponding right for State to depose. "There is no statute in North Carolina authorizing the taking of depositions to be used as evidence by the State in criminal prosecutions." *State v. Hartsfield*, 188 N.C. 357, 359 (1924) (recognizing that the privilege of taking depositions is extended to the defendant in certain cases pursuant to statute but it may not be exercised by the State as a matter of right because the defendant "is clothed with a constitutional right of confrontation"). However, the defendant can waive his or her confrontation rights by consenting to the State's taking of a deposition or by failing to object at trial to the admission of the deposition into evidence. *Id.*; *cf. State v. Clonts*, ___ N.C. App. ___, 802 S.E.2d 531 (2017) (reviewing defendant's argument that the trial judge erred in allowing a deposition of a State's witness deployed overseas into evidence where defendant opposed the State's motion to depose the witness prior to trial and its motion to admit the deposition at trial, opposed the release of the witness from the deposition subpoena, and offered to consent to a continuance and to waive his right to a speedy trial; court held that trial judge erred in finding that the witness was unavailable within the meaning of the hearsay exception Evidence Rule 804(a)(5) and was not unavailable for purposes of the Confrontation Clause), *aff'd per curiam in pertinent part*, ___ N.C. ___, 813 S.E.2d 796 (2018).

29.2 Securing the Production of Documents or Physical Evidence by Subpoena

A subpoena duces tecum (also called a document subpoena) is used to compel a witness to produce papers or other tangible objects needed at trial. It is a useful tool for obtaining

records that are not subject to discovery because they are not in the possession, custody, or control of the State. *See State v. Burr*, 341 N.C. 263 (1995). This ancient writ was recognized at common law, and its use is now authorized and governed by several statutes discussed below. *See Vaughan v. Broadfoot*, 267 N.C. 691 (1966) (in-depth discussion of subpoenas duces tecum); 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 13, at 42 (7th ed. 2011); *see also Wilson v. United States*, 221 U.S. 361 (1911) (discussing the origins of the subpoena duces tecum).

For a discussion of subpoenas from the perspective of the recipient, see John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82 (UNC School of Government, Sept. 2005). Although the bulletin focuses on health department records, it discusses requirements and procedures applicable to all subpoenas.

A. Statutory Authorization

The production of records, books, papers, documents, or tangible things in a criminal proceeding may be obtained by a subpoena properly issued and served as provided in Rule 45 of the N.C. Rules of Civil Procedure, which is applicable to criminal proceedings in most respects. G.S. 15A-802 (so stating); *see also* G.S. 8-61 ("Subpoenas for the production of records, books, papers, documents, or tangible things may be issued in criminal actions in the same manner as provided for civil actions in Rule 45 of the Rules of Civil Procedure.").

In 2011, Rule 45 was amended "to recognize that electronically stored information, as defined by Rule 34(a) [of the N.C. Rules of Civil Procedure], also can be sought by subpoena." N.C. R. CIV. P. 45 Official Commentary. While the related criminal statutes were not specifically amended to clarify that electronically stored information is discoverable in criminal cases, the criminal provisions appear to be broad enough to include the production of electronically stored information.

Generally, a criminal action must actually have been commenced for a party to issue a subpoena under G.S. 15A-802. *See In re Superior Court Order Dated April 8, 1983*, 70 N.C. App. 63 (1984), *rev'd on other grounds*, 315 N.C. 378 (1986); *see also* N.C. R. CIV. P. 45(a)(1)a. (every subpoena must state the name of the court in which the action is pending); *cf.* John Rubin & Aimee Wall, *Responding to Subpoenas for Health Department Records*, HEALTH LAW BULLETIN No. 82, at 3 & n.4 (UNC School of Government, Sept. 2005) (discussing circumstances in which a party may obtain a subpoena or its equivalent before the filing of a case).

Technically, the person named in the subpoena is not being compelled to testify but rather to produce and authenticate the specified records. If the party also needs the person to testify, he or she also should subpoena the person for that purpose. *See State v. Richardson*, 59 N.C. App. 558 (1982), *rev'd in part on other grounds*, 308 N.C. 470 (1983); *see supra* § 29.1, Securing the Attendance of Witnesses by Subpoena and Other Process (discussing subpoenas to testify). A subpoena to produce evidence may be issued separately or joined with a subpoena to appear and testify. N.C. R. CIV. P. 45(a)(2). The AOC form subpoena,

AOC-G-100, may be used for both purposes; it contains boxes for the subpoenaing party to indicate whether the recipient is being asked to testify, to produce documents, or both. *See* AOC-G-100, "Subpoena" (Feb. 2018).

The items sought by a subpoena duces tecum must be material to the inquiry. The subpoena "must specify with as much precision as fair and feasible the particular items desired." *State v. Newell*, 82 N.C. App. 707, 708 (1986). It must describe the items sought "with such definiteness that the witness can identify them without prolonged or extensive search." *Vaughan v. Broadfoot*, 267 N.C. 691, 696 (1966). Discovery is not a proper purpose for a subpoena duces tecum. Parties are not entitled to have a mass of records and other documents brought into court to search through them for evidence. *Id.* (disapproving of "fishing or ransacking" expeditions). A defendant is not limited, however, to using a subpoena duces tecum to require production of documents at trial; a subpoena duces tecum is an appropriate device for a defendant to obtain documents before trial that are potentially material and favorable to his or her defense, which is not for improper discovery but rather is considered a part of a defendant's right to a fair trial. *See infra* § 29.2F, Constitutional Right to Obtain Evidence in Possession of Third Parties. For a further discussion of the right to obtain documents before trial, see 1 NORTH CAROLINA DEFENDER MANUAL § 4.6A, Evidence in Possession of Third Parties, and § 4.7, Subpoenas (2d ed. 2013).

If the documents sought are not material to the issue or are protected by a privilege, the witness may contest their production. *See infra* § 29.2E, Motions to Modify or Quash a Subpoena Duces Tecum.

B. Statutory Requirements

The required contents of a subpoena duces tecum and its manner of service are similar to those for a subpoena ad testificandum under N.C. Rule of Civil Procedure 45(a) and (b). *See supra* § 29.1B, Securing the Attendance of In-State Witnesses. No affidavit showing materiality or necessity is required. *See Vaughan v. Broadfoot*, 267 N.C. 691 (1966). The admissibility of the items will be determined at trial unless the subpoena is quashed before trial. *Id.*

Mandatory contents of subpoena duces tecum. Rule 45(a)(1) requires that every subpoena state all of the following:

- the title of the action;
- the name of the court in which the action is pending;
- the name of the party who is responsible for summoning the witness;
- a command to the person to whom it is directed to produce and permit inspection and copying of designated records, books, papers, electronically stored information, documents, or tangible things in the possession, custody, or control of that person;
- the protections for recipients of subpoenas as stated in Rule 45(c); and
- the duties of recipients in responding to subpoenas as stated in Rule 45(d).

The AOC form subpoena, AOC-G-100, includes space for the issuing party to fill in the specific case information as well as the form language required in all cases. *See* AOC-G-100, "Subpoena" (Feb. 2018).

Manner of service. Under Rule 45(b)(1), a subpoena duces tecum may be served by

- the sheriff;
- a sheriff's deputy;
- a coroner; or
- any person who is not a party and is not less than 18 years of age.

Service on the party named in the subpoena duces tecum may be made by

- personally delivering a copy of the subpoena to that person; or
- registered or certified mail, return receipt requested.

Unlike a subpoena ad testificandum (discussed *supra* in § 29.1B), a subpoena duces tecum may not be served by telephone communication. *See* N.C. R. CIV. P. 45(b)(1).

In civil cases, a copy of a subpoena duces tecum also must be served on other parties to the case, but G.S. 15A-802 exempts criminal cases from that requirement. The subpoenaing party in a criminal case need only serve the person or entity being subpoenaed in accordance with the above requirements.

Form of compliance. To comply with a subpoena duces tecum, the person must produce the requested items as kept in the usual course of business, or the documents must be organized and labeled to correspond with the categories stated in the request. N.C. R. CIV. P. 45(d)(1)–(4) (also discussing production of electronically stored information).

Place of production. Typically, a subpoena duces tecum requires production at some sort of proceeding in the case to which the recipient is subpoenaed, such as a pretrial hearing, deposition (rare in criminal cases but common in civil cases), or trial. In 2003, the General Assembly amended Rule 45 of the N.C. Rules of Civil Procedure to modify this requirement for subpoenas for documents (but not subpoenas to testify). Thus, before the amendment, a party in a civil case would have to schedule a deposition, to which the party would subpoena the records custodian, even if the party merely wanted to inspect records in the custodian's possession and did not want to take any testimony. Under the revised rule, a party may use a subpoena in a pending case to direct the recipient to produce documents at a designated time and place, such as the issuing party's office, even though no deposition or other proceeding is scheduled for that time and place. Because G.S. 15A-802 makes Rule 45 applicable to criminal cases, this use of a subpoena appears to be permissible in a criminal case.

The change in Rule 45 authorizing an "office" subpoena may not be readily apparent. It is reflected in the following italicized portion of revised Rule 45(a)(2): "A command to produce evidence may be joined with a command to appear at trial or hearing or at a

deposition, *or any subpoena may be issued separately*." *See* North Carolina State Bar, 2008 Formal Ethics Opinion 4 (2008) (so interpreting quoted language); Bill Analysis, H.B. 785: Rules of Civil Proc/Rewrite Rule 45 (S.L. 2003-276), from Trina Griffin, Research. Div., N.C. General Assembly (June 27, 2003) (same); Memorandum to Superior Court Judges et al. re: Subpoena Form Revised (AOC-G-100) & S.L. 2003-276 (HB 785), from Pamela Weaver Best, Assoc. Counsel, Div. of Legal & Legislative Servs., N.C. Admin. Office of the Courts (Sept. 29, 2003) (same). The latter two memos are available from the authors of this manual. The revised language is comparable to Rule 45(a)(1)(C) of the Federal Rules of Civil Procedure, which has authorized a similar procedure in federal cases. *See* 9 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 45.02[3], at 45-18 (3d ed. 2018).

Practice note: When seeking sensitive records, defense counsel may not want to use an "office" subpoena. The subpoenaed party often will contest the subpoena, necessitating a court hearing in any event. Further, if a records custodian who is subpoenaed discloses confidential information to defense counsel without proper authorization (typically, consent by the subject of the records or a court order, not just a subpoena), defense counsel may be subject to sanctions. *See* North Carolina State Bar Ethics Opinion RPC 252 (1997) (attorneys should refrain from reviewing confidential materials inadvertently sent to them by opposing party); *Susan S. v. Israels*, 67 Cal. Rptr. 2d 42 (Cal. Ct. App. 1997) (attorney read and disseminated patient's confidential mental health records that treatment facility mistakenly sent directly to him in response to subpoena; court allowed patient's suit against attorney for violation of state constitutional right of privacy).

Notice of receipt and opportunity to inspect; potential applicability to criminal cases. Rule 45(d1) of the N.C. Rules of Civil Procedure states that within five business days of receipt of materials produced in compliance with a subpoena duces tecum, the party who was responsible for issuing the subpoena must serve all other parties with notice of receipt. On request, the party receiving the material must provide all the other parties a reasonable opportunity to copy and inspect such material at the inspecting party's expense.

The applicability of this requirement to criminal cases, particularly when the defendant is the subpoenaing party, is not entirely clear. In 2007, the General Assembly revised Rule 45 to add the notice and inspection requirements in subsection (d1) of Rule 45. This change appears to have been prompted by concerns from civil practitioners after the 2003 changes to Rule 45. Those earlier changes, discussed above, allowed a party to issue a subpoena for the production of documents without also scheduling a deposition, at which the opposing party would be present and would have an opportunity to review and obtain copies of the subpoenaed records.

Criminal cases are not specifically exempted from the notice and inspection requirements enacted in 2007, although somewhat paradoxically the subpoenaing party in a criminal case is not required to give notice of the service of a subpoena (discussed under "Manner of service," above). The new subpoena provisions also are in tension with G.S. 15A-905 and 15A-906, which essentially provide that a criminal defendant is only obligated to disclose to the State evidence that he or she intends to use at trial.

If the notice and inspection requirements in Rule 45(d1) apply to criminal cases, a party may have grounds to seek a protective order under G.S. 15A-908 to withhold records from disclosure. Alternatively, instead of using a subpoena, a party may move for a court order for production of records, which is not governed by Rule 45. For a discussion of motions for a court order requiring production of records, see 1 NORTH CAROLINA DEFENDER MANUAL § 4.6A, Evidence in Possession of Third Parties (2d ed. 2013).

C. Production of Public, Hospital Medical, and Nonparty Business Records

If a custodian of public records or hospital medical records (as defined in G.S. 8-44.1) has been subpoenaed to appear for the sole purpose of producing records in his or her custody and not also to testify, the custodian may elect to tender the records to the court in which the action is pending instead of making a personal appearance. The custodian may tender the records to the court by registered or certified mail or by personal delivery on or before the time specified in the subpoena. The custodian must certify by affidavit that the records are true and correct copies and that the records were made and kept in the regular course of business or, if no such records were kept, an affidavit to that effect. N.C. R. CIV. P. 45(c)(2).

Rule 45(c)(2) states that if records are delivered under this subsection, the records are admissible in the proceeding without further authentication or certification unless they are otherwise objectionable. The rule also states that if the records are hospital medical records, they are not open to inspection except by the parties and their attorneys until ordered published by the trial judge and nothing in Rule 45(c)(2) shall be construed as waiving the physician-patient privilege or requiring any privileged communication to be disclosed. *Id.* The meaning of this provision is not entirely clear. On the one hand, it appears to allow the parties to review the records without further order of the court; on the other hand, it appears to restrict disclosure of confidential information.

Practice note: As a practical matter, hospital records that have been mailed to the court will not be available for review, and should not be reviewed, by the parties unless the court so orders. Hospital records custodians typically will seal and mark as confidential mailed-in records; and clerks of court who receive the records will not make them available for review by the parties unless the court so orders. Further, counsel is at risk by reviewing confidential records mailed to the court if the court has not ordered disclosure. *See Bass v. Sides*, 120 N.C. App. 485 (1995) (before obtaining judge's permission, plaintiff's attorney reviewed confidential medical records of defendant that records custodian had sealed and provided to clerk of court in response to subpoena; judge ordered plaintiff's attorney to pay defendant's attorney fees, totaling approximately $7,000, and prohibited plaintiff from using the records at trial).

If counsel wants a hospital or public records custodian to appear and testify about the records, counsel should check both the record production and testimony boxes on the subpoena.

In 2015, the General Assembly amended Rule 803(6) of the N.C. Rules of Evidence to provide that business records of a nonparty are admissible if accompanied by an affidavit

attesting to their preparation and authenticity. The subpoena procedures in Rule 45 were not amended to allow recipients to respond by affidavit without appearing. If the recipient responds by affidavit, the records would still seem to be admissible under the revised evidence rule.

D. Objections to a Subpoena Duces Tecum

A person who has been served with a subpoena to produce records may object to the subpoena. The objection must be in writing and must be served on the party or the attorney designated in the subpoena within ten days of service of the subpoena or before the time set for compliance if the time is less than ten days after service. A person may object on the grounds that the subpoena:

- does not allow reasonable time for compliance;
- requires disclosure of privileged or protected matter and there is no applicable exception or waiver;
- imposes an undue burden on the party subpoenaed;
- is unreasonable or oppressive; or
- is procedurally defective.

N.C. R. CIV. P. 45(c)(3).

If the person objects to the subpoena because he or she believes that the information sought by the subpoena is privileged or otherwise protected from disclosure, he or she must object "with specificity" and support the objection by sufficiently describing the nature of the communications, records, books, papers, documents, electronically stored information, or other tangible things not produced. N.C. R. CIV. P. 45(d)(5).

Court order required to override objection. If an objection is made, the party serving the subpoena is not entitled to inspect or copy the designated materials unless the court enters an order permitting him or her to do so. N.C. R. CIV. P. 45(c)(4). In some instances, the subpoenaed party will appear in court at the time designated in the subpoena and make an objection to disclosure. If this procedure is followed, the defendant will have an opportunity to obtain a ruling from the court then and there. In other instances, the subpoenaed party will object before the scheduled proceeding. The subpoenaing party then will have to file a motion to compel production, with notice to the subpoenaed person, in the court of the county where the production is to occur. *Id.*

Practice note: If the judge refuses to require that the documents be turned over, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial judge's denial of motion to require production of witness's medical records because defendant failed to make documents part of record). If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

Subpoenaed person may be compensated for expenses of production. If following an objection (or motion to modify or quash, discussed next) a judge enters an order compelling the production of records, books, papers, documents, electronically stored information, or other tangible things, he or she may protect any person who is not a party or a party's agent from "significant" expense from complying with the subpoena. The judge may order the subpoenaed person to be "reasonably compensated" for the cost of producing the designated material. N.C. R. CIV. P. 45(c)(6).

Practice note: Typically, judges do not order the payment of document production expenses because compliance with a subpoena is an ordinary, not significant, expense of responding to court proceedings. In a case involving extraordinary production expenses, if a judge orders payment, defense counsel for an indigent defendant may request the court to authorize payment from state funds as a necessary expense of representation. *See* G.S. 7A-450(b); G.S. 7A-454.

E. Motions to Modify or Quash a Subpoena Duces Tecum

A person commanded by a subpoena duces tecum to produce items may test the relevancy and materiality (but not the admissibility) of the designated items by filing a motion to quash or modify the subpoena in the county where the items are to be produced. N.C. R. CIV. P. 45(c)(5); *Vaughan v. Broadfoot*, 267 N.C. 691 (1966). The motion must be made within ten days after service of the subpoena or before the time specified for compliance if the time is less than ten days after service. N.C. R. CIV. P. 45(c)(5).

The judge may modify or quash a subpoena duces tecum if the subpoenaed person shows that it

- does not allow reasonable time for compliance;
- requires disclosure of privileged or protected matter and there is no applicable exception or waiver;
- imposes an undue burden on the party subpoenaed;
- is unreasonable or oppressive; or
- is procedurally defective.

See N.C. R. CIV. P. 45(c)(3), (c)(5). If the judge enters an order to quash or modify a subpoena, he or she may order the party who issued the subpoena to pay all or part of the reasonable expenses and attorney's fees of the subpoenaed person. N.C. R. CIV. P. 45(c)(8).

Although it has been held that the decision whether to quash or modify the subpoena is within the discretion of the trial judge and is not subject to review absent an abuse of that discretion, the judge must be guided by sound legal principles when making the decision. *See Vaughan*, 267 N.C. 691. In exercising his or her discretion, "the trial judge should consider the relevancy and materiality of the items called for [by the subpoena], the right of the subpoenaed person to withhold production on other grounds, such as privilege, and also the policy against 'fishing expeditions.'" *State v. Newell*, 82 N.C. App. 707, 709 (1986). The ruling also must be measured against the defendant's constitutional right to obtain material,

favorable evidence in the possession of third parties, discussed in subsection F., below. *See also Love v. Johnson*, 57 F.3d 1305 (4th Cir. 1995) (finding that state trial judge violated defendant's due process rights by quashing subpoena on overbreadth grounds without requiring that records be produced for review by court after defendant made a plausible showing that information material and favorable to his defense existed within the records), *reviewing on habeas sub nom. State v. Love*, 100 N.C. App. 226 (1990).

Subject to constitutional limitations, a judge may quash or modify a subpoena if it is overly broad or not served in a timely manner. *See, e.g., Newell*, 82 N.C. App. 707, 709 (no abuse of discretion by trial judge in quashing overbroad subpoena where only a "tiny fraction" of the materials requested were "even arguably material to the inquiry") [decided before *Pennsylvania v. Ritchie*, discussed in subsection F., below]; *see also Vaughan*, 267 N.C. 691, 699 (subpoena for production of documents on first day of trial properly quashed where it was a "fishing or ransacking expedition"); *Ward v. Taylor*, 68 N.C. App. 74 (1984) (no abuse of discretion by trial judge in quashing subpoena as unreasonable and oppressive since plaintiffs waited until the last minute to serve an extremely broad subpoena for all time cards and records of all work over an eight-year period when they had known of the importance of the records for at least two weeks); *State v. Richardson*, 59 N.C. App. 558 (1982) (recognizing trial court's authority to modify subpoena to limit it), *aff'd in part and rev'd in part on other grounds*, 308 N.C. 470 (1983).

Practice note: If the judge quashes a subpoena requiring the production of documents, counsel should move to have the documents sealed and included in the record in the event of appeal. *See State v. Hardy*, 293 N.C. 105 (1977); *see also State v. Burr*, 341 N.C. 263 (1995) (court states that it could not review trial judge's denial of motion to require production of witness's medical records because defendant failed to make documents part of record). If the judge refuses to require production of the documents for inclusion in the record, make an offer of proof about the anticipated contents of the documents.

F. Constitutional Right to Obtain Evidence in Possession of Third Parties

A defendant's constitutional right to compulsory process, discussed *supra* in § 29.1A, includes the right to compel witnesses to produce records or other evidence. *See generally* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(f), at 489 (4th ed. 2015). A defendant also is entitled under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution to obtain records from third parties that contain favorable, material evidence even if the records are confidential under state or federal law. This right is an offshoot of the right to favorable, material evidence in the possession of the prosecution. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (records in possession of child protective agency). An attorney in a criminal case may apply directly to a judge for an order of production of records rather than issuing a subpoena duces tecum. Such an application is known as a *Ritchie* motion. For a discussion of the procedure to obtain a court order for the production of records, see 1 NORTH CAROLINA DEFENDER MANUAL § 4.6A, Evidence in Possession of Third Parties (2d ed. 2013).

G. Failure to Comply with a Subpoena Duces Tecum

A person who fails to obey a properly served subpoena duces tecum without adequate cause may be held in contempt of court. *See* N.C. R. CIV. P. 45(e)(1); *see also* G.S. 5A-11 (criminal contempt); G.S. 5A-21 (civil contempt).

H. Obtaining Documents or Other Items Located Outside North Carolina

A defendant should be able to secure the production of documents or other tangible items located outside of North Carolina by subpoenaing them through the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. Under the Uniform Act, the word "summons" includes a subpoena, order, or other notice requiring the appearance of a witness. G.S. 15A-811. G.S. 15A-813, which provides that a witness from another state can be summoned to testify in this state, does not use the term "subpoena duces tecum" or explicitly address requests for documents. However, several states have found that "in view of the remedial purpose of the Act and also in view of the broad construction placed on the term 'subpoena' in similar statutes, it is clear that the Act authorizes the issuance of a subpoena duces tecum." Jay M. Zitter, Annotation, *Availability under Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings of Subpoena Duces Tecum*, 7 A.L.R.4th 836, 837 (1981).

Additionally, the N.C. Court of Appeals implicitly approved of the issuance of a subpoena duces tecum pursuant to G.S. 15A-812 to require an in-state witness in North Carolina to produce documents in an out-of-state proceeding even though that statute does not use the term "subpoena duces tecum" or explicitly address requests for documents. *See In re McKinney*, 462 S.E.2d 530, 531 (N.C. App. 1995) (reversing order of trial judge that found that the North Carolina witness sought to be subpoenaed was not a material witness in a California proceeding and that the enforcement of the subpoena duces tecum would cause her undue hardship; matter remanded for issuance of a summons pursuant to G.S. 15A-812 directing witness "to attend, along with any and all videotapes, transcripts and documents relating to the interviews of Detective Mark Furhman, and testify, if called as a witness"). For a further discussion of the procedure to follow under the uniform interstate subpoena act, see *supra* § 29.1E, Securing the Attendance of Nonresident Witnesses.

The N.C. State Bar has issued a formal ethics opinion stating that an attorney may not serve an out-of-state health care provider with an unenforceable subpoena for medical records and may not use any documents produced pursuant to such a subpoena. *See* North Carolina State Bar, 2010 Formal Ethics Opinion 2 (2010). This opinion prohibits an attorney from simply serving a North Carolina subpoena on an out-of-state entity. It does not prohibit an attorney from using the interstate subpoena procedure discussed above. In addition, a later State Bar opinion clarifies that an attorney may serve an out-of-state entity with a subpoena as long as it is accompanied by a statement that "the subpoena is not enforceable in the foreign jurisdiction, the recipient is not required to comply with the subpoena, and the subpoena is being provided solely for the entity's records." In that instance, the lawyer has not misled the subpoena recipient, who may determine whether to provide the requested documents

voluntarily. 2014 Formal Ethics Opinion 7 (2014) (noting that foreign entity may be willing to comply if it has subpoena "for its records").

Other mechanisms may be effective in obtaining records from an out-of-state entity, such as service of a subpoena on a registered agent in North Carolina for an out-of-state corporation, service of a subpoena on a national company's compliance department if it has one, and use of the relatively new Uniform Interstate Deposition and Discovery Act (UIDDA). For a discussion of these mechanisms, see John Rubin, *How O.J. Got the Furhman Tapes (and You Can Get Out-of-State Materials)*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Apr. 4, 2017).

29.3 Sequestration of Witnesses

The practice of separating witnesses and excluding them from the courtroom until they are called to testify "is a long-established and well-recognized measure designed to increase the likelihood that testimony will be candid." *Bell v. Duckworth*, 861 F.2d 169, 170 (7th Cir. 1988). The value of sequestration has been extolled by courts and commentators. As early as 1917, the N.C. Supreme Court noted that "[n]o harm can come from separation of the witnesses, and much injury might result if it is not done when it is made to appear to the presiding judge that there may be collusion among the witnesses, tracking each other's testimony, like sheep jumping over a fence." *Lee v. Thornton*, 174 N.C. 288, 289 (1917); *see also* Gregory M. Taube, *The Rule of Sequestration in Alabama: A Proposal for Application Beyond the Courtroom*, 47 ALA. L. REV. 177, 179 (1995) (discussing the origins of sequestration and noting that it has been used without change for "perhaps longer than any other truth-seeking device"); Sarah Chapman Carter, Comment, *Exclusion of Justice: The Need for a Consistent Application of Witness Sequestration Under Federal Rule of Evidence 615*, 30 U. DAYTON L. REV. 63, 63 (2004) ("Separation of witnesses during a trial has been deemed 'one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice.'" (citation omitted)); *Geders v. United States*, 425 U.S. 80, 87 (1976) (noting that "the practice of sequestration of witnesses 'already had in English practice an independent and continuous existence, even in the time of those earlier modes of trial which preceded the jury and were a part of our inheritance of the common Germanic law'" (quoting 6 J. WIGMORE, EVIDENCE § 1837, at 348 (3d ed., 1940))).

A. Purpose of Sequestration

There are two purposes for sequestering witnesses at trial. First, sequestration prevents a later witness from tailoring his or her testimony to that of a previous witness and, second, it aids the factfinder in detecting testimony that is less than candid. *State v. Harrell*, 67 N.C. App. 57, 64 (1984) (citing *Geders v. United States*, 425 U.S. 80 (1976)). The idea of keeping the witnesses from interacting with each other is not to *prevent* the fabrication of false stories before they testify but to *detect* fabrications by separate cross-examinations. *State v. Jackson*, 309 N.C. 26 (1983).

B. Statutory Authorization

A judge's authority to exclude witnesses has been codified in two separate provisions. G.S. 15A-1225 authorizes, on motion of a party, the exclusion of some or all of the witnesses from the courtroom until they are called to testify. N.C. Rule of Evidence 615 (enacted after G.S. 15A-1225) also authorizes the exclusion of witnesses from the courtroom so they cannot hear the testimony of other witnesses. Under Rule 615, a trial judge may order sequestration on motion of either party or on his or her own motion.

Exceptions to the rule. Rule 615 sets out the following four exceptions to the general rule allowing the exclusion of witnesses from the courtroom until called to testify:

1. A party who is a natural person may not be excluded. To exclude parties would "raise serious problems of confrontation and due process." N.C. R. EVID. 615 Official Commentary; *see also Perry v. Leeke*, 488 U.S. 272, 282 (1989) ("The defendant's constitutional right to confront the witnesses against him immunizes him from . . . physical sequestration."). An alleged crime victim is not considered a "party" in a criminal action and has no statutory right that guarantees him or her the right to be present at all times during the trial. *Cf.* G.S. 15A-832(e) ("When the victim is to be called as a witness . . ., the court shall make every effort to permit the fullest attendance possible by the victim . . ."; however, "[t]his subsection shall not be construed to interfere with the defendant's right to a fair trial.").
2. An officer or employee of a party that is not a natural person is entitled to have its designated representative present. The exception would allow a police officer who has been in charge of an investigation to remain in the courtroom during testimony even though he or she will be a witness. N.C. R. EVID. 615 Official Commentary; *see also State v. Stanley*, 310 N.C. 353, 356–57 (1984) (in case involving charge of first-degree rape of child under twelve, no abuse of discretion shown where trial judge allowed two State's witnesses—a DSS worker and a juvenile court officer—to remain in the courtroom at the State's request during the victim's testimony because, as the trial judge explained, they "were instrumental in the preparation of the case and . . . necessary to the handling of the examination of" the witness).
3. A person whose presence is shown by a party to be essential to the presentation of his or her cause may not be excluded. This category includes an expert who needs to listen to other testimony in order to testify in his or her capacity as an expert. *See* N.C. R. EVID. R. 615 Official Commentary. It also has been used to allow a law enforcement officer in charge of an investigation to remain in the courtroom while other witnesses were sequestered. *See State v. Jones*, 337 N.C. 198 (1994) (no abuse of discretion by trial judge in allowing the lead officer to remain in the courtroom as a person essential to the presentation of the State's case; ruling did not amount to an endorsement of the officer's veracity at a critical point in the trial).
4. A person whose presence is determined by the judge to be "in the interest of justice" may be present during others' testimony. This exception would apply, for example, to a case in which a minor child is testifying and the judge determines that it is in the interest of justice for the child's parent or guardian to be in the courtroom even though the parent or guardian may be called subsequently to testify. *See* N.C. R. EVID. 615 Official

> Commentary. If the judge relies on this exception, he or she should state the reasons for determining that the presence of the person is in the interest of justice. *Id.* G.S. 15A-1225 also specifically allows (but does not mandate) the presence of the parent or guardian of a minor child who is called as a witness. *See State v. Weaver*, 117 N.C. App. 434, 436 (1994) (finding no error under G.S. 15A-1225 in the exclusion of the mother of two child witnesses from the courtroom; "[t]hat a parent *may* be present while a child is testifying does not mean that such presence is required" (emphasis in original)).

Sequestration not a matter of right but favored. The judge's ruling on a motion to sequester witnesses under either N.C. Rule of Evidence 615 or G.S. 15A-1225 is discretionary and will be reversed only on a showing of abuse of discretion. *See State v. Fullwood*, 323 N.C. 371 (1988), *vacated on other grounds*¸ 494 U.S. 1022 (1990); *State v. Harrell*, 67 N.C. App. 57 (1984). The Official Commentary to N.C. Rule of Evidence 615 notes that the rule is similar to Federal Rule of Evidence 615; however, the federal rule makes sequestration a matter of right on request. Still, in discussing the difference between the two rules, Judge (now Justice) Edmunds, in a concurring opinion, emphasized the importance of granting sequestration requests:

> Those with experience in state and federal trials cannot fail to have observed the impact of these different rules. Testimony provided by witnesses who hear each other testify often converges. This effect, while not necessarily sinister, appears to be a reflection of human nature; it can lead irresolute witnesses, consciously or not, to conform their testimony to what they have heard before, undermining a jury's ability to evaluate the evidence provided by each witness. Particularly in cases as consequential as the capital murder case at bar, trial courts should be mindful of the words of the Commentary to North Carolina Rule of Evidence 615: "[T]he practice should be to sequester witnesses on request of either party unless some reason exists not to."

State v. Wilds, 133 N.C. App. 195, 209–10 (1999); *see also State v. Anthony*, 354 N.C. 372, 396 (2001) (acknowledging the recommendation of the Official Commentary to N.C. Rule of Evidence 615 that witnesses should ordinarily be sequestered if requested and cautioning judges to give sequestration motions "thoughtful consideration," particularly in capital cases).

Scope of sequestration. G.S. 15A-1225 and N.C. Rule of Evidence 615 provide for the exclusion of witnesses from the courtroom itself. But, the cases indicate that, if requested, the judge may order further that witnesses not interact with each other before trial, outside the courtroom, or during recesses. *See Geders v. United States*, 425 U.S. 80 (1976) (trial judge had broad power to sequester witnesses before, during, and after their testimony); *State v. Stanley*, 310 N.C. 353, 357 (1984) (trial judge's power to control the progress of a trial "has long included the broad power to sequester witnesses before, during, and after their testimony"); *State v. Jackson*, 309 N.C. 26 (1983) (for good reason and at his discretion, the trial judge could have ordered the separation before trial of two inmate-witnesses who were incarcerated in the same cell); *State v. Washington*, 141 N.C. App. 354

(2000) (no error in judge's failure to prohibit two State's witnesses from travelling to court together while under a sequestration order because the order only precluded the witnesses from being present while the other testified in court, and defendant had made no specific request in his written motion to prevent contact outside the courtroom).

Grounds and timing. The sequestration statutes do not require that a motion to exclude witnesses be in writing or that it be made at a certain time. *See State v. Mason*, 295 N.C. 584, 590 (1978) (motions to sequester are not required to be made at or before arraignment under G.S. 15A-952(b), and no law prohibits them from being "made after the jury panel is called into open court and just prior to the State's calling its first witness"). However, when practical, a written motion to sequester should be filed before trial and should set out with specificity the reasons that it should be granted.

Practice note: Some appellate decisions have upheld a trial judge's denial of a motion to sequester when the motion was not timely or defense counsel failed to state specific reasons for believing that the State's witnesses would tailor their testimony to the testimony of previous witnesses. *See, e.g., State v. Conaway*, 339 N.C. 487 (1995) (denial of sequestration motion upheld where defendant had only a general concern that the co-defendant witnesses who were testifying for the State would tailor their testimony because they each had a stake in the outcome of the case); *State v. Pittman*, 332 N.C. 244 (1992) (no abuse of discretion by trial judge in denying defendant's motion for sequestration where defendant gave no reason for suspecting the State's witnesses would tailor their testimony); *State v. Patino*, 207 N.C. App. 322, 326 (2010) (upholding denial of defendant's motion to sequester the State's witnesses where defense counsel did not give specific reasons to suspect that witnesses might tailor their testimony; counsel's assertions that there were a "number" of State's witnesses and "they might have forgotten in the time since the incident occurred" were not "typical reason[s] for sequestering witnesses"); *State v. Lindsey*, 25 N.C. App. 343 (1975) (sequestration motion properly denied where it was made after the State had begun to present its case and defendant gave no explanation for seeking sequestration); *State v. Jones*, 21 N.C. App. 666 (1974) (to same effect).

It may be difficult to articulate specific reasons for suspecting that the State's witnesses will use a previous witness's testimony as their own. To penalize a defendant for not being able to do so appears to conflict with the recommendation of the Official Commentary to N.C. Rule of Evidence 615 that sequestration should be granted liberally "unless some reason exists not to." If you do not have a particular reason to suspect that the State's witnesses will tailor their testimony but still want them sequestered, you should emphasize the purpose of the rule, citing *State v. Anthony*, 354 N.C. 372, 396 (2001) (taking note of the commentary to Rule 615 and cautioning judges, particularly in capital cases, to give such motions "thoughtful consideration"), and *State v. Van Cross*, 293 N.C. 296, 299 (1977) ("It is the general practice in North Carolina in both civil and criminal cases to separate the witnesses and send them out of the hearing of the court when requested . . . .").

A sample sequestration motion can be found on the N.C. Office of Indigent Defense Services website in the Motions Bank, Non-Capital (indexed under the "Witnesses" heading).

Logistical issues in sequestering witnesses. If the logistics of separating witnesses in the courthouse is a problem, a motion to sequester should offer recommendations on how to implement the sequestration order. If no realistic solutions are offered, the trial judge's decision to deny the motion may be upheld on this ground. *See State v. Call*, 349 N.C. 382, 400 (1998) (no abuse of discretion by trial judge in denying defendant's motion to sequester because "the courthouse could not accommodate sequestration of the witnesses"); *see also State v. Bumgarner*, 299 N.C. 113, 117 (1980) (trial judge did not abuse his discretion by denying defendant's sequestration motion "on the grounds that no notice had been given, that there was no reason appearing from the statement of counsel to sequester, and that the number of witnesses involved was too great for the limited area in the courthouse").

Sequestration at pretrial hearings. Although sequestration of witnesses at pretrial hearings is not specifically addressed by statute, the discretionary power of judges to sequester witnesses includes the power to exclude witnesses at proceedings that occur before trial. *See State v. Hyde*, 352 N.C. 37 (2000) (pretrial motions hearing); *State v. Byrd*, 67 N.C. App. 168 (1984) (probable cause hearing); *State v. Trapper*, 48 N.C. App. 481 (1980) (suppression hearing); *State v. Accor*, 13 N.C. App. 10 (1971) (preliminary hearing), *aff'd*, 281 N.C. 287 (1972).

C. Constitutional Considerations

The U.S. Supreme Court has never held that a failure to sequester witnesses can violate a defendant's constitutional right to due process. *Larson v. Palmateer*, 515 F.3d 1057 (9th Cir. 2008) (stating that the decision whether to sequester witnesses at common law was a discretionary one and there is no indication that Fed. R. Evid. 615 has a constitutional basis); *see also Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988) (holding that a refusal to separate witnesses until they testify is not a denial of due process). Likewise, the N.C. Court of Appeals has held that "[d]ue process does not automatically require separation of witnesses who are to testify to the same set of facts." *State v. Harrell*, 67 N.C. App. 57, 64 (1984) (finding that although defendant's arguments in favor of sequestration were persuasive, there was no abuse of discretion by the trial judge and there was no violation of defendant's right to due process or his right to confront and cross-examine witnesses).

Even though due process may not "automatically" require sequestration, there may be instances where it is appropriate to argue a constitutional basis in addition to a statutory one. *See, e.g.*, *Commonwealth v. Fant*, 391 A.2d 1040, 1043–44 (Pa. 1978) (holding that the trial judge's denial of defendant's motion to sequester witnesses who identified defendant as the perpetrator of the crimes was an abuse of discretion and led to a denial of due process where the witnesses identified defendant for the first time "in the highly suggestive setting of open court"; the suggestive identification occurred nine months after the alleged murders; the witnesses, depending on when they testified, heard anywhere from one to sixteen other witnesses testify that the defendant was the perpetrator; and neither the prosecutor nor the judge offered any reason for the denial of the motion to sequester); *Commonwealth v. Lavelle*, 419 A.2d 1269 (Pa. Super. Ct. 1980) (applying *Fant* and finding an abuse of discretion and a denial of due process based on the trial judge's failure to sequester witnesses who identified defendant as the perpetrator of the alleged crimes).

D. Response to Violations of Sequestration Orders

Although not specifically addressed by the sequestration statutes, a trial judge has the discretion to impose a variety of sanctions in the event that a witness violates a sequestration order. These include:

- Sanctioning the witness. If a witness intentionally violates a sequestration order, he or she could be held in contempt. *See Holder v. United States*, 150 U.S. 91 (1893). The problem with this sanction is that it does not remedy any unfairness to the parties that may have resulted from the violation. *See Lee v. Thornton*, 174 N.C. 288 (1917).
- Instructing the jury to consider the violation in assessing the credibility of the witness. *See Holder*, 150 U.S. 91.
- Permitting cross-examination of the witness regarding the violation. *See, e.g., State v. Wilson*, 322 N.C. 117 (1988) (where defendant's mother remained in the courtroom during testimony by the State's witnesses, including that of an alleged accomplice, and then testified and directly contradicted that testimony, it was appropriate for the State to impeach her credibility by cross-examining her about her presence during parts of the trial and her knowledge of the existence of the sequestration order).
- Declaring a mistrial. *See, e.g., State v. Howell*, 343 N.C. 229, 237 (1996) (no evidence that the inadvertent violation of a sequestration order by a State's witness "so prejudiced defendant as to render the denial of a mistrial an abuse of discretion").
- Excluding the testimony of the witness who violated the order (*see Holder*, 150 U.S. 91) or striking the testimony once the violation becomes known. *See State v. McGraw*, 137 N.C. App. 726 (2000). Like the declaration of a mistrial, this is a harsh remedy and may be appropriate only when the party offering the testimony (or his or her attorney) is at fault and the opposing party will suffer prejudice if the testimony is not excluded. *See, e.g., United States v. Blasco*, 702 F.2d 1315 (11th Cir. 1983). The exclusion of testimony by a defense witness may be constitutionally limited, as discussed below.

For further discussion of this topic, see J.A. Bock, Annotation, *Effect of Witness' Violation of Order of Exclusion*, 14 A.L.R.3d 16 (1967 & Supp. 2011).

Exclusion of defense witness testimony. If the trial judge excludes the testimony of a material defense witness as a result of a sequestration order violation, "in the absence of connivance by the defendant or counsel (and possibly despite such connivance)," it "may well be an abuse of discretion or a denial of the defendant's constitutional right to present evidence." 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 174, at 649 (7th ed. 2011); *see also United States v. Cropp*, 127 F.3d 354, 363 (4th Cir. 1997) (finding that the trial judge who excluded a defense witness's testimony "would have been well advised to employ a lesser sanction to punish the violation because to do so would have preserved both the purpose of the sequestration rule and the defendant's right to present a defense").

Even though the defendant's right to present a defense may be impinged by the exclusion of the testimony of his or her witness, North Carolina appellate courts have upheld decisions by trial judges that have precluded a defense witness from testifying in some circumstances.

See, e.g., *State v. Williamson*, 122 N.C. App. 229 (1996) (no abuse of discretion in excluding the testimony of defendant's girlfriend because she was not on the potential witness list, she had been present in the courtroom for a portion of the State's evidence, she had discussed other testimony with the defendant's sister who had been present for the entire trial, and the defendant was the party who had moved for an order sequestering the witnesses); *State v. Williamson*, 110 N.C. App. 626, 632 (1993) (no abuse of discretion in the exclusion of a defense witness's testimony where he had been present during defendant's testimony in violation of a sequestration order, there was the "distinct possibility of collusive testimony," and it was unlikely that the witness's testimony could have "effectively controverted any of the State's case"); *State v. Sings*, 35 N.C. App. 1 (1978) (where defendant failed to show that his father's excluded testimony would have been material or that he suffered any prejudice as a result of the exclusion, the trial judge's refusal to permit the witness to testify after violating a sequestration order was upheld). *But see State v. Hare*, 74 N.C. 591 (1876) (error to exclude a defense witness from testifying who was not aware of the sequestration order and had come into the courtroom during the examination of a prior witness but did not hear that testimony).

Practice note: If the judge is considering excluding the testimony of your witness because of a sequestration violation, you should argue that exclusion would violate your client's right to present a defense as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and article I, sections 19 and 23 of the N.C. Constitution. Where appropriate, you should assert that the violation was unintentional, that it occurred without the fault of the defendant or yourself, and that the witness is material to the defense. Also explain how the defense will be prejudiced by the exclusion and make an offer of proof of materiality by asking that the witness be sworn and allowed to testify outside the presence of the jury. If the judge refuses to allow you to make your offer of proof, state with specificity what the witness would have testified to and in what way it would have been material. It is not enough for you simply to tell the judge that the witness's testimony is material. *See State v. Hodge*, 142 N.C. 676 (1906) (no error in the exclusion of a defense witness where counsel asserted that the testimony was material but did not make it known to the judge what that testimony would have been and how it would have been material).

E. Additional Resources

For additional discussion of sequestration of witnesses, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 174 (7th ed. 2011), and WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 615, at 517–23 (2017).

29.4 Competency of Witnesses

This section deals with the competency of witnesses to testify at trial. For a discussion of a defendant's capacity, or competency, to proceed to trial, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 2, Capacity to Proceed (2d ed. 2013).

A. General Rule

In order to testify, a witness must be competent. 81 AM. JUR. 2D *Witnesses* § 160 (2004). Before adoption of the N.C. Rules of Evidence, a witness was considered competent if he or she understood the obligations of an oath or affirmation and had sufficient capacity to understand and relate facts that would assist the fact finder. *See State v. Gordon*, 316 N.C. 497, 502 (1986). This standard is comparable to the competency standard under the N.C. Rules of Evidence, which has governed competency determinations since 1984. *Id.* (so noting). The common law imposed a variety of other grounds for disqualifying witnesses from testifying. Most of these disabilities have been removed by the rules of evidence, which allow anyone to be a witness who meets the standard of competency. *See* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 131, at 492–93 (7th ed. 2011).

N.C. Rule of Evidence 601(a) provides that, unless disqualified by the Rules of Evidence, "[e]very person is competent to be a witness." A person is only disqualified as a witness if the person is incapable of (1) expressing himself or herself so as to be understood (either directly or through an interpreter) or (2) understanding the duty of a witness to tell the truth. N.C. R. EVID. 601(b). This rule "does not ask how bright, how young, or how old a witness is." *State v. Davis*, 106 N.C. App. 596, 605 (1992). The only question is: "does the witness have the capacity to understand the difference between telling the truth and lying?" *Id.*; *see also State v. Hicks*, 319 N.C. 84 (1987) (to be found competent, a witness is not required to understand his or her obligation to tell the truth from a religious point of view; it is sufficient if the witness knows the difference between the truth and a lie, has the capacity to understand and relate facts, recognizes the obligation to tell the truth, and expresses the intention to tell the truth).

The competency standards set out in Rule 601(a) and (b) "are very nearly the lowest requirements that it is logically possible to imagine." WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 601, at 390–91 (2017). The witness need only "have some ability to communicate and some understanding of the duty to tell the truth." *Id.* at 391.

Whether a person is competent to testify is a decision within the discretion of the trial judge, and his or her determination will not be disturbed on appeal absent a showing of an abuse of discretion. *State v. Gordon*, 316 N.C. 497 (1986).

B. Procedures for Determining Competency

Generally. The trial judge must determine the competency of a witness when the issue is raised by a party or by the circumstances. *State v. Eason*, 328 N.C. 409 (1991). Competency is a preliminary question; therefore, the Rules of Evidence (other than those governing privileges) do not apply. *See* N.C. R. EVID. 104(a); *State v. Fearing*, 315 N.C. 167 (1985) (recognizing applicability of Rule 104 to competency determination). In determining competency, the judge may consider any relevant and reliable information even if that information would not be technically admissible in evidence at trial. *See, e.g.*, *In re Will of*

Leonard, 82 N.C. App. 646 (1986) (proper for trial judge to consider court records of the witness's involuntary commitment proceedings even if they were hearsay and not properly authenticated, identified, or received in evidence at the voir dire hearing).

Burden on party contesting competency. In jurisdictions such as North Carolina where every person is considered competent to testify unless shown otherwise, the party challenging a witness's competence has the burden of establishing incompetence. *See* JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE § 2.13[B], at 2-58 (6th ed. 2016).

Inquiry should be made before witness testifies. No particular procedure is required for determining competency but, if a party objects to a witness testifying based on competency grounds, a voir dire of the witness is typically conducted before he or she testifies. *See State v. Fearing*, 315 N.C. 167 (1985); *see also State v. Reynolds*, 93 N.C. App. 552, 556–57 (1989) (stating that the better practice is to determine competency before a witness begins to testify in order to avoid having to strike prejudicial testimony or to grant a mistrial). The trial judge must make sufficient inquiry to satisfy himself or herself that the witness "is or is not competent to testify." *In re Will of Leonard*, 82 N.C. App. 646, 649 (1986). "The form and manner of that inquiry rests in the discretion of the trial judge." *Id.* An adequate inquiry generally includes personal observation of the witness. *Fearing*, 315 N.C. 167. The judge also may hear testimony from witnesses who are familiar with the witness, but such testimony is not required. *See State v. Roberts*, 18 N.C. App. 388 (1973). If the competency of a State's witness is at issue, the defendant should have the opportunity to examine the witness, but the denial of that opportunity may not always violate the defendant's confrontation rights. *See State v. Beane*, 146 N.C. App. 220 (2001) (finding in circumstances of case that the trial judge's decision not to allow defense counsel to cross-examine a child witness at a competency hearing was harmless error and that the defendant's cross-examination of the witness at trial cured any prejudice).

The failure of the trial judge to hold a voir dire hearing or to make findings of fact or conclusions of law in support of his or her decision does not automatically entitle the defendant to a new trial. *See State v. Spaugh*, 321 N.C. 550 (1988); *State v. Huntley*, 104 N.C. App. 732 (1991).

Judge has no authority to order evaluation of witness. There is no statutory authority for a trial judge to order a witness to undergo a psychiatric or psychological evaluation to determine the witness's competency. *See State v. Phillips*, 328 N.C. 1 (1991); *State v. Fletcher*, 322 N.C. 415 (1988).

C. Unavailability Distinguished

The standard of incompetency under N.C. Rule of Evidence 601 is not the same as unavailability under North Carolina's hearsay rules. A person may be found unavailable for the purpose of admitting a hearsay statement by that person if he or she is unable to be present or to testify because of a then existing physical or mental illness or infirmity. *See*

N.C. R. EVID. 804(a)(4). An illness or infirmity does not necessarily mean that a person is incompetent to testify. Only if the person's illness or infirmity renders the person incapable of expressing himself or herself or understanding the obligation to tell the truth will the person be found incompetent to testify. *See In re Faircloth*, 137 N.C. App. 311 (2000) (explaining the difference between competency and unavailability and holding that the trial court erred in relying on the unavailability standard in disqualifying children from testifying). On the other hand, if a person is found incompetent to testify under Rule 601, then he or she also is "unavailable" within the meaning Rule 804. *See In re Clapp*, 137 N.C. App. 14, 20 (2000). Further discussion of this issue as it relates to child witnesses can be found immediately below.

D. Child Witnesses

No set age limit. There is no fixed age under which a person is considered too young to testify. *State v. Eason*, 328 N.C. 409 (1991). Children as young as four years old have been permitted to testify in North Carolina. *See, e.g.*, *State v. Kivett*, 321 N.C. 404, 414 (1988) (no abuse of discretion by the trial judge in finding a four-year-old witness to be competent where the voir dire record revealed that the witness testified that "he knew what it meant to tell the truth, that it was good to tell the truth and not good to tell a lie, that he knew that he was there to tell the truth, and that he was going to tell the truth"); *State v. Robinson*, 310 N.C. 530 (1984) (four-year-old found competent to testify as to events that allegedly occurred when she was three years old even though her answers on voir dire examination were sometimes vague and nonsensical); *State v. Ward*, 118 N.C. App. 389 (1995) (four-year-old found competent and allowed to testify as to offenses that allegedly occurred when she was two years old); *see also Wheeler v. United States*, 159 U.S. 523, 524 (1895) (stating that "[w]hile no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency"; competency depends on the capacity and intelligence of the child, his or her appreciation of the difference between truth and falsehood as well as of his or her duty to tell the truth). That a child may have told a lie in the past and is uncertain as to dates and times does not disqualify him or her from being a competent witness. *See State v. Fletcher*, 322 N.C. 415 (1988).

North Carolina cases finding a child incompetent to testify are: *State v. Wagoner*, 131 N.C. App. 285, 286–87 (1998) (four-year-old child found incompetent to testify to events that allegedly occurred when she was two years old because at trial "she could not then remember the events . . . , could not express herself in court, and did not understand the obligation of the oath or the duty to tell the truth"); *State v. Jones*, 89 N.C. App. 584 (1988) (four-year-old alleged victim found incompetent to testify).

Adequate inquiry required. As with determining the competency of any witness, the judge must make adequate inquiry. This generally includes a personal examination or observation of the child on voir dire. *See State v. Fearing*, 315 N.C. 167, 174 (1985) ("[I]n exercising . . . discretion in ruling on the competency of a child witness to testify, a trial judge must rely on his [or her] personal observation of the child's demeanor and responses to inquiry on . . . examination."). A stipulation by the parties as to the competency of a child witness is not sufficient. *Id.* (finding "no informed exercise of discretion" where trial judge merely adopted

the stipulations of counsel that a child was not competent to testify); *State v. Pugh*, 138 N.C. App. 60 (2000) (judge disqualified four-year-old from testifying without making adequate inquiry; judge's brief questions were insufficient to determine competency of the witness).

Instead of personally observing the child on voir dire, the judge may choose to observe the child while he or she testifies. *See State v. Spaugh*, 321 N.C. 550 (1988) (court states that primary concern in *Fearing* was that trial judge exercise independent discretion in deciding competency after observation of child and not particular procedure used by trial judge in conducting the observation; trial judge's observation of witness while she testified was adequate without separate voir dire). However, if the judge waits until the child begins testifying and then finds the child incompetent, the child's preceding testimony may need to be stricken and the jury instructed to disregard it. *See generally State v. Reynolds*, 93 N.C. App. 552 (1989) (stating that better practice is to determine competency before witness begins to testify to avoid prejudice); JOHN E.B. MYERS, MYERS ON EVIDENCE OF INTERPERSONAL VIOLENCE: CHILD MALTREATMENT, INTIMATE PARTNER VIOLENCE, RAPE, STALKING, AND ELDER ABUSE § 2.13[C], at 2-61 (6th ed. 2016) (if during a child's testimony the judge determines that the child is incompetent, the judge may order the child's testimony stricken).

Reconsideration of ruling. The party challenging competency may move for reconsideration if the child was found competent before testifying at trial but then it becomes apparent during the child's trial testimony that he or she is not competent. *See, e.g.*, *State in Interest of R.R.*, 398 A.2d 76 (N.J. 1979) (at close of State's case, defense attorney moved that the four-year-old witness be declared incompetent on basis of actual testimony given by the child).

Exclusion of defendant from competency hearing. Cases have upheld the trial judge's decision to exclude a defendant from the voir dire examination of a child to determine competency; however, exclusion may implicate the defendant's right to confront witnesses and right to be present under the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and article I, section 23 of the N.C. Constitution.

In *Kentucky v. Stincer*, 482 U.S. 730 (1987), the U.S. Supreme Court held that the defendant's Confrontation Clause rights were not violated by being excluded from a voir dire hearing to determine a child's competency where the questions asked were unrelated to the basic issues at trial, the judge found the children competent, and the defendant thereafter had the opportunity fully to cross-examine the children at trial. In *State v. Jones*, 89 N.C. App. 584 (1988), the court found no Confrontation Clause violation by the defendant's sequestration in the judge's chambers during the child victim's competency hearing. The court ruled that the defendant had the opportunity for effective cross-examination because he watched the hearing on closed circuit television and was able to hear all the testimony, interact freely with his attorney, and confront the victim through his attorney. Both decisions were issued before the U.S. Supreme Court's decisions in *Maryland v. Craig*, 497 U.S. 836 (1990), which set constitutional limits on remote testimony, and *Crawford v. Washington*, 541 U.S. 36 (2004), which drastically modified Confrontation Clause analysis. For a further

discussion of the impact of *Crawford*, including a post-*Crawford* decision by the N.C. Court of Appeals upholding the constitutionality of remote testimony by a child at trial, see i*nfra* § 29.8A, Constitutional Implications.

Stincer also found no due process violation in the circumstances of the case. In *Stincer*, the U.S. Supreme Court held that exclusion did not violate the defendant's federal constitutional right to presence at all critical stages of a criminal proceeding, finding first that the competency hearing was limited in scope and did not involve substantive testimony that might bear a substantial relationship to the defendant's opportunity to defend himself at trial. The Court noted, however, that if a competency hearing bears a substantial relationship to the defendant's opportunity to defend, the trial judge must balance the defendant's role in assisting his defense and substantial, identifiable injury to the specific child witness. *Stincer*, 482 U.S. at 746 n.20. The Court found next that the defendant provided no indication that his presence at the competency hearing would have been useful in ensuring a more reliable determination of the witness's competency. *Id.* at 747 (finding that the defendant presented "no evidence that his relationship with the children, or his knowledge of facts regarding their background, could have assisted either his counsel or the judge in asking questions that would have resulted in a more assured determination of competency").

Jones found no violation of the defendant's state constitutional right to be present in light of the remote testimony procedures used in that case. The charges were noncapital so the court did not discuss whether exclusion would violate a capital defendant's unwaivable right to presence under the N.C. Constitution. *See* Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07, at 5 (UNC School of Government, Dec. 2008) ("[E]xcluding a defendant from a voir dire presents a special problem in a capital case, given the capital defendant's unwaivable right to be present at all stages of a capital trial.").

For a further discussion of testimony by children outside the defendant's presence during trial, see *infra* § 29.8, Remote Testimony. For a further discussion of a defendant's right to presence, see *supra* § 21.1, Right to Be Present.

Incompetent child is "unavailable." As with any other witness, if a child witness is found incompetent, he or she would be considered unavailable to testify for purposes of the hearsay rules. *See In re Clapp*, 137 N.C. App. 14, 20 (2000). Whether the child's out-of-court statements would be admissible would depend on whether their admission would violate the defendant's right to confrontation (*see Crawford v. Washington*, 541 U.S. 36 (2004)), and whether the statements satisfy the requirements for admission of hearsay. *Compare State v. Wagoner*, 131 N.C. App. 285 (1998) (child's incompetence to testify satisfied unavailability requirement but did not render out-of-court statements too untrustworthy to be admitted under residual hearsay exception), *with State v. Stutts*, 105 N.C. App. 557 (1992) (court found child unavailable as witness on ground that child could not tell truth from fantasy and ruled that child's statements were inadmissible under residual hearsay exception); *see also State v. Hoxit*, 238 N.C. App. 364 (2014) (unpublished) (upholding trial judge's determination that out-of-court statements made by a four-year-old were inadmissible because the statements did not possess the required guarantees of

trustworthiness under Evidence Rule 804(b)(5); trial judge had conducted a voir dire hearing and found the child incompetent to testify based on his serious doubts about her ability to express herself truthfully). For further discussion of the residual hearsay exception where a child has been found to be incompetent, see Jessica Smith, *Competency and the Residual Hearsay Exception*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Jan. 6, 2015).

Appellate review of competency. Appellate decisions have generally upheld a trial judge's finding that a child witness was competent to testify. *See State v. Fearing*, 315 N.C. 167, 172–73 (1985) ("By far, the vast majority of cases in which a child witness's competency has been addressed have resulted in the finding, pursuant to an informal *voir dire* examination of the child before the trial judge, that the child was competent to testify."); *see also State v. Manno*, 243 N.C. App. 828 (2015) (unpublished) (finding that while the child witness's statements "as to the presence of supernatural beings [ghost and vampire] in the courtroom are admittedly troubling, and the better practice would have been for the trial court to require a *voir dire* examination and make appropriate findings of fact and conclusions of law regarding her competency[,]" the trial judge did not commit reversible error in implicitly finding her to the competent as a witness and allowing her to testify).

Additional resources. For a discussion of issues involving children as witnesses, including competency and examination issues, see Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, ADMINISTRATION OF JUSTICE BULLETIN No. 2008/07 (UNC School of Government, Dec. 2008); John Rubin, Chapter 11: Evidence, *in* SARA DEPASQUALE & JAN S. SIMMONS, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA (UNC School of Government, 2017).

E. Common Competency Issues

Elderly witnesses. Witnesses are not automatically disqualified from testifying due to their advanced age. As long as they meet the qualifications of Rule 601, they are competent to testify. *See State v. Forte*, 206 N.C. App. 699, 709 (2010) (no abuse of discretion by trial judge in finding the prosecuting witness who was at least 99 years old at the time of trial to be competent because "at certain points in his testimony" he showed an understanding of the difference between truth and falsehood and the importance of the truth; that some of his answers were vague and ambiguous and that he was unable to answer some questions was not determinative because "it would not be unusual for an elderly individual to have some difficulty in responding coherently to all of the questions asked during *voir dire*"). For further discussion of *Forte* and the apparently "low hurdle" required to show competency under Rule 601, see Jeff Welty, *State v. Forte and the Competency of Elderly Witnesses*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 9, 2010).

Hearing and speech impaired witnesses. People who cannot hear or speak are not incompetent as witnesses merely because of their disability. *State v. Galloway*, 304 N.C. 485 (1981). If the impaired person is capable of expressing himself or herself concerning the matter in a way that can be understood, and is capable of understanding the duty of a witness to tell the truth, the person is competent to testify. *See* N.C. EVID. R. 601(b). Testimony

presented through an interpreter utilizing American Sign Language is "proper in every respect" and "[a]ny confusion arising from the use of sign language to communicate with a deaf and [mute] witness goes to the weight, and not the admissibility, of the evidence." *Galloway*, 304 N.C. 485, 494; *cf. State v. Felton*, 330 N.C. 619 (1992) (although defendant's girlfriend had no formal training in sign language, sufficient evidence established her as a competent witness capable of understanding and recounting the deaf mute defendant's communications to her).

Mentally or physically disabled witnesses. A person who is mentally or physically disabled is not disqualified from testifying merely because of the disability. As long as the disability does not cause the witness to be incapable of expressing himself or herself in a way that can be understood, or incapable of understanding the duty of a witness to tell the truth, the person is competent to testify. *See State v. Oliver*, 85 N.C. App. 1 (1987) (no abuse of discretion by trial judge in finding a 16-year-old witness competent even though she was mentally retarded, functioned at an 8-year-old level, and was unable to answer some questions); *see also State v. Hyatt*, 355 N.C. 642 (2002) (no abuse of discretion in finding witness competent even though witness suffered from viral encephalitis, a disease affecting his speech, and he had to repeat himself many times so the court reporter could understand him); *State v. DeLeonardo*, 315 N.C. 762, 767 (1986) (mildly mentally retarded witness was properly not disqualified as a witness even though his I.Q. was between 55 and 64; his answers to voir dire questions demonstrated that he had "a sufficient level of intelligence to express himself concerning the matter involved" and "an understanding of the importance of telling the truth"); *State v. Davis*, 106 N.C. App. 596 (1992) ("intellectually limited" children were competent where they testified that they knew the difference between truth and falsehood and they swore to tell the truth). *But see State v. Washington*, 131 N.C. App. 156 (1998) (where mentally retarded witness with cerebral palsy was incapable of effectively communicating at trial because of her disabilities and her inability to speak in a manner that was easily understood, trial judge did not abuse his discretion in ruling that she was incompetent to testify).

Mentally ill witnesses. "[U]nsoundness of mind is not *per se* grounds for ruling a witness incompetent under Rule 601." *In re Will of Leonard*, 82 N.C. App. 646, 649–50 (1986); *see also State v. DeLeonardo*, 315 N.C. 762, 766 (1986) (the general rule is that "a lunatic or weak-minded person" may testify if he or she has sufficient understanding to apprehend the obligation of an oath and is capable of giving a correct account of the matters that he or she has seen or heard with respect to the questions at issue) (citing *State v. Benton*, 276 N.C. 641, 650 (1970), decided before enactment of the rules of evidence)).

Unless a person who is suffering from a mental illness meets the standards for disqualification of a witness set out in Rule 601(b), he or she is competent to testify. *See State v. Liles*, 324 N.C. 529 (1989) (trial judge properly found witness with a past history of mental illness to be competent where finding was based on the judge's personal observation and on a report by Dorothea Dix Hospital that the witness had the capacity to proceed as a defendant); *State v. Liner*, 98 N.C. App. 600, 607 (1990) (even though the witness was paranoid schizophrenic and a "walking drug store," trial judge properly found him competent to testify based on the evidence presented during voir dire and on judge's

"opportunity to view the witness and listen to his answers to the questions"). *But see Leonard*, 82 N.C. App. 646 (trial judge properly found witness to be incompetent, not based solely on the witness's diagnosis of schizophrenia, but on personal observation and on the witness's answers to voir dire questions in which she denied ever having been involuntarily committed even though court records directly contradicted that testimony).

Use of drugs or alcohol. A witness is not incompetent to testify on the basis of drug or alcohol abuse alone. The use of impairing substances is only relevant insofar as it affects the user's ability to be understood or to respect the importance of veracity. *See State v. Fields*, 315 N.C. 191, 203 (1985) (that witnesses were abusers of alcohol and hallucinogenic and psychotropic drugs and were actually impaired on the night in question did not render them "inherently incredible" so as to be incompetent to testify); *State v. Edwards*, 37 N.C. App. 47 (1978) (no abuse of discretion in ruling that accomplice was competent to testify where there was no evidence that the witness was under the influence of drugs at the time of testifying nor was there any showing that he was unable to see or remember the events to which he testified).

Credibility distinguished. Where mental instability or drug or alcohol use is concerned, the question is more properly one of the witness's credibility, not his or her competence. *See State v. Fields*, 315 N.C. 191 (1985); *State v. Williams*, 330 N.C. 711 (1992). "As such, it is in the jury's province to weigh his [or her] evidence, not in the court's to bar it." *Fields*, 315 N.C. at 204. A witness with a mental impairment or substance abuse problem may be cross-examined about that matter if it affects his or her ability to observe, remember, or narrate. *See State v. Newman*, 308 N.C. 231 (1983). Past mental problems, including chronic substance abuse, likewise may be a proper subject of cross-examination if they bear on the credibility of the witness's testimony about the relevant events in the case. *Williams*, 330 N.C. 711 (evidence of a key witness's past drug use, his suicide attempts, and his psychiatric history was proper and admissible for purposes of impeachment under Rule 611).

If a proper subject of impeachment, extrinsic evidence—that is, testimony of other witnesses as well as supporting documentation—may be used to impeach the witness's credibility. *Id.* at 719 (noting that "while specific instances of drug use or mental instability are not directly probative of truthfulness," if they cast doubt on the capacity of a witness to observe, recollect, and recount, they are properly the subject not only of cross-examination but of extrinsic evidence as well (quoting 3 DAVID LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 305, at 236 (1979)).

Practice note: If a witness has been impeached based on his or her mental illness or substance abuse, you should consider whether a jury instruction regarding the credibility of that witness would be helpful. If you decide that one would be helpful, you should draft one based on the specific impairments of that witness and submit it in writing to the trial judge at or before the charge conference. Since this is a subordinate feature of a case, the trial judge is not required to instruct on it unless a specific request has been made. For a discussion of instructions on subordinate features of the case, see *infra* § 32.3, Explanation of the Law (2d ed. 2012).

Additional resources. For a further discussion of impeachment of witnesses based on mental or physical impairments, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 156 (7th ed. 2011).

F. Preservation of Competency Issues for Appellate Review

Objection required to finding of competency. If the defendant fails to challenge the competency of a witness or object to a judge's implicit or explicit ruling that a witness is competent, he or she waives the right to appellate review of the issue. *See State v. Gordon*, 316 N.C. 497 (1986) (after voir dire hearing on a witness's competency, trial judge's action in allowing witness to testify was an implicit ruling of competency and defendant was required to object in order to preserve the issue for appellate review); *State v. Steen*, 226 N.C. App. 568 (2013) (issue of competency of child witness to testify was not preserved for appeal when defendant failed to challenge the witness's competence at trial).

If the defendant objects to the trial judge's finding of competency, he or she may assert as error on appeal the subsequent admission of evidence from that witness even though the defendant did not object to or move to strike the testimony on the ground of incompetency at the time the testimony was offered at trial. G.S. 15A-1446(d)(9); *see also Gordon*, 316 N.C. 497 (finding defendant was precluded from using G.S. 15A-1446(d)(9) to assign error to the competency issue where he did not object to judge's finding of competency after voir dire hearing held; issue was reviewable under much stricter "plain error" standard of review); *State v. Hodge*, 212 N.C. App. 236 (2011) (unpublished) (competency issue preserved for appellate review where defendant objected to witness's competency prior to trial; pursuant to G.S. 15A-1446(d)(9), it was unnecessary to renew objection when witness testified at trial). If there are other grounds for objection to the testimony (e.g., hearsay), counsel must make a specific objection on that additional ground when the objectionable question is asked to preserve the issue for appeal.

Practice note: If you believe that the trial judge erroneously found a witness to be competent to testify, always object on the record to the judge's finding, whether the judge explicitly finds the witness competent or implicitly so finds by allowing the witness to testify. *See State v. Gordon*, 316 N.C. 497 (1986).

Offer of proof required if finding of incompetency. If a judge finds that a witness is incompetent to testify, the party seeking to call the witness must make an offer of proof in order to preserve the issue for appellate review. *See, e.g., In re M.G.T.-B.*, 177 N.C. App. 771 (2006) (based on telephone conversation with child's therapist and without observing or examining child, trial judge found child incompetent and quashed subpoena for child; appellate court declined to address propriety of trial judge's determination of incompetency, finding that respondent made no offer of proof and therefore failed to preserve for appellate review the exclusion of the child's testimony).

G. Additional Resources

For additional information on the competency of witnesses, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE §§ 131–135 (7th ed. 2011) (also includes discussion of the competency of an accused and of spouses), and WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 601, at 389–402 (2017) (listing additional authorities and collecting cases).

29.5 Presentation of the Evidence

A. Order of Proceedings

Suppression hearings. The party with the burden of proof is generally the party that should present evidence first. *State v. Temple*, 302 N.C. 1 (1981). At hearings on a defendant's motion to suppress, the defendant has the initial burden of showing that his or her motion is timely and in proper form but once the defendant has done so, the burden ordinarily is on the State to show admissibility of the evidence sought to be suppressed. *See State v. Williams*, 225 N.C. App. 636 (2013) (stating that since the State had the burden of proof at the hearing on defendant's motion to suppress, it should have proceeded first in presenting evidence to the court). *But see* 1 NORTH CAROLINA DEFENDER MANUAL § 14.6E, Conduct of Evidentiary Hearing (2d ed. 2013) (discussing partial exception to rule that State has burden of proof when police act under a warrant).

However, the order of presentation of evidence is a rule of practice, not law, so the trial judge may depart from it whenever he or she, exercising discretion, believes it necessary to promote justice. *Temple*, 302 N.C. 1, 5 (finding no merit to defendant's argument that he was prejudiced in having to present evidence first at his suppression hearing; although the inversion of proof made it necessary for defendant to call the Chief of Police as his own witness, State was not allowed to ask the witness any question that it would not have been in a position to ask if the witness had been called by the State, and there was no "indication that defendant was denied permission to ask any question on direct examination that he would have been allowed to ask on cross-examination."). For one perspective on the order of proceedings at suppression hearings, see Jonathan Holbrook, *Who Goes First?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (June 12, 2018).

Jury trials. The order in which a criminal jury trial proceeds is governed by G.S. 15A-1221. After a jury is impaneled and an opportunity for opening statements is given, the State must present evidence of the defendant's guilt, that is, its "case-in-chief." *See* G.S. 15A-1221(a)(5). The State goes first because it has the burden of proof. *See State v. Temple*, 302 N.C. 1 (1981) (party with the burden of proof generally is the first to put on evidence).

After the State has rested, the defendant, if he or she desires, may present evidence, that is, his or her "case-in-chief." *See* G.S. 15A-1221(a)(6); *see also State v. Fair*, 354 N.C. 131,

149 (2001) ("The right to present evidence in one's own defense is protected under both the United States and North Carolina Constitutions.").

Thereafter, the State and the defendant may offer successive rebuttals concerning matters elicited in the evidence in chief of the other party. *See* G.S. 15A-1221(a)(7); G.S. 15A-1226. The defendant's rebuttal evidence is sometimes referred to as "surrebuttal."

G.S. 15A-1221 sets the usual order of presentation of evidence, but the Official Commentary to this section notes that this "does not preclude a differing order if authorized by the common law or other applicable statutes or rules of court." *See also* N.C. R. EVID. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . make the interrogation and presentation effective for the ascertainment of the truth . . . ."). For example, in *State v. Britt*, 291 N.C. 528 (1977), the court found no gross abuse of discretion by the trial judge in varying the order of proof by allowing the State's witnesses to testify as rebuttal witnesses when their testimony did not rebut the defendant's evidence but would have been admissible during the State's case-in-chief.

B. Rebuttal

Statutory authorization. The introduction of rebuttal evidence is governed by G.S. 15A-1226(a), which provides:

> Each party has the right to introduce rebuttal evidence concerning matters elicited in the evidence in chief of another party. The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal.

Scope of State's rebuttal. During the State's rebuttal of the defendant's evidence (if presented), it may offer evidence "to impeach defendant's witnesses or to explain, modify or contradict defendant's evidence." 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 166, at 598 (7th ed. 2011); *see also State v. Anthony*, 354 N.C. 372 (2001) (questions posed by prosecutor to rebuttal witnesses were properly formulated to rebut matters presented during defendant's case-in-chief and as such did not exceed the scope of rebuttal).

Scope of defendant's surrebuttal. After the State presents its rebuttal evidence, the defense then may be entitled to offer evidence on surrebuttal. "[I]n determining whether a defendant is entitled to present surrebuttal evidence, the dispositive issue is whether the state presented new evidence on rebuttal." *State v. Clark*, 128 N.C. App. 87, 98 (1997) (defendant had no right to surrebuttal where the State's rebuttal witness presented no new evidence regarding the State's version of the case); *see also State v. Yancy*, 58 N.C. App. 52 (1982) (defendant did not have the right to put on surrebuttal evidence where the State's evidence on rebuttal did not add primarily to its original case but only impeached the defendant's testimony and corroborated the earlier testimony of a State's witness).

Admission of new evidence during rebuttal or surrebuttal. Although the scope of rebuttal and surrebuttal is generally limited, G.S. 15A-1226(a) allows a trial judge, in his or her discretion, to permit a party to offer new evidence during rebuttal that could have been offered during the party's case-in-chief. *See State v. Anthony*, 354 N.C. 372 (2001); *see also State v. Lowery*, 318 N.C. 54 (1986) (double jeopardy principles are not applicable at the rebuttal phase of a trial, and due process rights are not violated when the State is allowed to introduce new evidence during the rebuttal phase as long as the defendant is given the opportunity to rebut the new evidence offered by the State); *State v. Boykin*, 298 N.C. 687 (1979) (State's witness properly allowed to testify as to new evidence during rebuttal; order of proof is within the trial judge's discretion).

If the judge allows the introduction of new evidence during the rebuttal phase, the other party must be permitted further rebuttal. G.S. 15A-1226(a); *see also State v. Quick*, 323 N.C. 675 (1989); *State v. Clark*, 128 N.C. App. 87 (1997).

Practice note: If the State presents new evidence during its rebuttal, object on the grounds that the evidence exceeds the scope of rebuttal. If the judge exercises his or her discretion and allows the testimony, you are entitled to further rebuttal. Assert in support of further rebuttal the defendant's statutory rights under G.S 15A-1226(a) and his or her due process rights to present a defense under the state and federal constitutions. If the judge denies further rebuttal, be sure to put the statutory and constitutional grounds for your request on the record and make an offer of proof of the evidence you intended to present.

C. Reopening the Case to Present Additional Evidence

Statutory authority. G.S. 15A-1226(b) authorizes a trial judge, in his or her discretion, to permit any party to introduce additional evidence at any time before verdict. *See also State v. Quick*, 323 N.C. 675, 681 (1989). Under this statute, a judge may allow a party to reopen its case to present new evidence at any stage of the trial, even after the jury has begun its deliberations. *See State v. Riggins*, 321 N.C. 107 (1987); *State v. Goldman*, 311 N.C. 338 (1984); *State v. Allen*, 19 N.C. App. 660 (1973). Once the verdict has been entered, however, the trial judge does not have the discretion to allow a party to reopen its case to introduce additional evidence. *State v. Murray*, 154 N.C. App. 631, 637 (2002) ("[T]he applicable statute and case law are clear that any additional evidence must be introduced prior to entry of the verdict.").

Essential elements of the crime. It appears that the trial judge has the discretionary authority to allow the State to reopen its evidence to introduce evidence of an essential element of the crime charged that was omitted during its case-in-chief. *See State v. Wise*, 178 N.C. App. 154 (2006) (no abuse of discretion by trial judge in allowing State to reopen its case to produce evidence of defendant's release date from prison to show defendant was required to register as a sex offender under G.S. 14-208.11); *see also State v. Miles*, 193 N.C. App. 611 (2008) (unpublished) (finding no abuse of discretion by trial judge in allowing "the State to reopen its case for the purpose of showing ownership of the property alleged to have been stolen"; court rejected defendant's argument that if allowed to reopen its case, the State is limited to introducing additional evidence that "clears up a

misunderstanding or corroborates evidence already presented" and may not introduce evidence that is used to establish an element of the offense).

Significant factors. While the appellate courts of North Carolina have not specifically described the factors that are significant in ruling on a party's motion to reopen the evidence, other jurisdictions have. Factors that have been considered important by the Fourth Circuit Court of Appeals in reviewing rulings on motions to reopen include:

1. whether the party moving to reopen provided a reasonable explanation for failing to present the evidence in its case-in-chief;
2. whether the evidence was relevant, admissible, or helpful to the jury; and
3. whether reopening the case would have infused the evidence with distorted importance, prejudiced the opposing party's case, or precluded the opposing party from meeting the evidence.

See United States v. Abbas, 74 F.3d 506, 510–11 (4th Cir. 1996); *see also United States v. Crawford*, 533 F.3d 133 (2d Cir. 2008) (expressing approval of 4th Circuit's approach and finding that the trial judge erred in reopening the evidence during jury deliberations to allow the government to introduce a trace report); *People v. Newton*, 87 Cal. Rptr. 394, 409–10 (Cal. Ct. App. 1970) (factors to consider in reviewing decisions on motions to reopen include the stage of the proceedings that had been reached when the motion was made, the diligence shown by the moving party in discovering the new evidence, the prospect that the jury would accord the evidence undue emphasis, and the significance of the evidence).

Illustrative cases. A review of North Carolina cases that address rulings on motions to reopen reveals that our appellate courts implicitly consider factors similar to the ones described above. For example, the granting of a motion to reopen was upheld in the following cases:

- The State did not know of the evidence before the parties rested their cases, the timing of the introduction did not appear to be prejudicial to the defendants, and the defendants were not denied the opportunity to offer testimony in rebuttal if they had so desired. *State v. Perry*, 231 N.C. 467 (1950).
- The judge allowed the State, after resting its case but before the defendant presented evidence, to introduce stipulated evidence concerning the results of a medical examination of the rape victim because the defendant could not have been surprised by its admission. *State v. Revelle*, 301 N.C. 153 (1980).
- The additional evidence was presented in response to a question by the jury regarding the date of a pretrial identification procedure; the defendant did not object to the State's recalling of the officer to the stand; and the question concerned an incidental aspect of the case and did not involve a necessary element or feature of the State's case-in-chief or that of the defendant. *State v. Riggins*, 321 N.C. 107, 109 (1987); *see also State v. Jackson*, 306 N.C. 642, 645 (1982) (finding that trial judge's ruling allowing State to reopen its case was not prejudicial to defendant because evidence did not relate to essential element of the case).

The denial of a motion to reopen was upheld in the following cases:

- The party seeking to reopen the case was at fault. *See, e.g., State v. Davis*, 317 N.C. 315 (1986) (no abuse of discretion in denying defendant's motion to reopen to allow the playing of a tape recording made after defendant rested his case where defense counsel had more than adequate opportunity to timely produce equipment to play the tape and substantially the same evidence was presented to the jury through a transcription); *State v. Mutakbbic*, 317 N.C. 264 (1986) (defendant's motion to reopen during jury deliberations in order to admit a DSS report properly denied where defendant knew about the report and chose not to introduce it during trial); *State v. McClaude*, 237 N.C. App. 350 (2014) (no abuse of discretion by trial judge in denying defendant's motion to reopen to allow a witness to testify where motion was made after judge learned the jury had just reached a verdict, attorney had ample opportunity to locate the witness during trial since, while not under subpoena, the witness had been present before both sides rested, and witness was still absent from the courtroom when motion was made); *State v. Perkins*, 57 N.C. App. 516 (1982) (defendant's motion to reopen after judge had concluded his charge to the jury because the defendant decided he wanted to testify was properly denied because defendant had the opportunity to present evidence and could have testified then); *see also United States v. Bayer*, 331 U.S. 532 (1947) (no reversible error for judge to refuse defendants' request to reopen their case after four hours of jury deliberations to admit corroborating evidence where no excuse was offered for the untimeliness of the offer of the evidence, the existence and importance of which should have been well-known to defendants, and the evidence was easily obtainable before trial).
- The evidence was merely cumulative. *See, e.g., State v. Hoover*, 174 N.C. App. 596 (2005) (no abuse of discretion in refusing to allow defendant to reopen his case to admit testimony from a witness about driving defendant to and from work because testimony about defendant's work schedule had already been admitted); *State v. Phillips*, 171 N.C. App. 622 (2005) (defense counsel was not dilatory in immediately moving to reopen to introduce newly discovered evidence, but no abuse of discretion in denial of motion because the evidence would have been merely cumulative of other evidence that had already been presented by defendant).

Special consideration of defendant's motion to reopen. If a trial judge denies a defendant's motion to reopen to present evidence that is crucial to his or her defense, the appellate courts may find an abuse of discretion. *See, e.g., State v. Allen*, 19 N.C. App. 660, 662–63 (1973) (trial judge abused discretion in denying defendant's motion to reopen to present an alibi witness's testimony that was newly discovered after jury deliberations had begun where the possibility of mistaken identification was obviously present under the identification procedures followed in the case); *see also State v. Lang*, 301 N.C. 508, 511–12 (1980) (although ruling on other grounds, court noted its "particular concern" about the trial judge's denial of defendant's motion to reopen to present a time card because the time card corroborated the "crucial testimony" of defendant's alibi witness).

Although not discussed in either of the above cases, there were also constitutional implications in the denial of the motions. The rights of a defendant charged with a crime to make a defense by confronting the evidence against him or her, presenting his or her own witnesses, and placing before the jury his or her own version of the facts are fundamental elements of due process of law as guaranteed by the Sixth and Fourteenth Amendments to the federal constitution and by article I, sections 19 and 23 of the state constitution. *See, e.g.*, *Faretta v. California*, 422 U.S. 806 (1975); *Washington v. Texas*, 388 U.S. 14 (1967); *State v. Locklear*, 309 N.C. 428 (1983). These constitutional grounds may apply to a motion to reopen along with the statutory grounds authorized by G.S. 15A-1226. *See State v. Carter*, 636 A.2d 821 (Conn. 1994) (trial judge abused his discretion in a murder case when he denied defendant's motion to reopen to introduce the victim's criminal record to show the victim's character for violence; the exclusion deprived defendant of his Sixth Amendment right to present his version of the facts, including his defense of self-defense; error not harmless beyond a reasonable doubt because the evidence was highly relevant and might well have influenced the jury's decision); *see also Blaikie v. Callahan*, 691 F.2d 64, 68 (1st Cir. 1982) (for a trial judge's adverse ruling on a defendant's motion to reopen to violate the Sixth Amendment "it must be shown that the proffered evidence was of such importance to the achievement of a just result that the need for admitting it overrides the presumption favoring enforcement of the state's usual trial procedures").

Although there are North Carolina cases stating that "there is no constitutional right to have one's case reopened" (*see, e.g.*, *State v. Hoover*, 174 N.C. App. 596, 599 (2005); *see also State v. Perkins*, 57 N.C. App. 516, 520 (1982)), this is not exactly true. *Hoover* and *Perkins* can be traced back to the court's holding in *State v. Shelton*, 53 N.C. App. 632 (1981), as support for the above assertion; however, *Shelton* did not hold that a constitutional right could *never* be the basis of a motion to reopen. In *Shelton*, the defendant argued that the trial judge's denial of his motion to reopen to present the testimony of a co-defendant who had pled guilty mid-trial violated his state and federal constitutional rights to due process and to fairly present one's evidence. The Court of Appeals held that "*under the facts and circumstances of this particular case*," the defendant did not have a constitutional right to have his case reopened. *Id.* at 647 (emphasis added). The court reasoned that the defendant had "ample opportunity" to present evidence in his defense and the witness in question had been available and could have been called as a witness at any time before the defendant rested.

Practice note: If you move to reopen the evidence pursuant to G.S. 15A-1226(b) because you mistakenly failed to introduce evidence or you discovered new evidence that was unavailable before resting your case, you should be prepared to offer an explanation for the untimeliness of the evidence. Tell the judge exactly what the evidence entails, why it is admissible, and the reasons why it is material or significant to the defendant's case. Also explain why the reopening of the evidence will not unduly delay the trial and why the State will not be unduly prejudiced by its late admission. Cite both the statutory and constitutional grounds for your motion, discussed above. If your motion is denied, make an offer of proof so that the denial of your motion can be properly reviewed on appeal.

If the State moves to reopen to introduce further evidence, object and assert (where applicable) that

- the State's failure to offer the evidence earlier was the result of a lack of due diligence;
- the evidence is merely cumulative;
- the evidence unfairly surprised the defendant; and
- due to the timing of the offer, the jury may give the evidence undue weight.

Base your objection on statutory grounds and, if the admission of the additional evidence would violate the defendant's constitutional rights to due process and to confront witnesses, state that those bases as well. *Cf. United States v. Nunez*, 432 F.3d 573, 580–81 (4th Cir. 2005) (finding an abuse of discretion based on Confrontation Clause concerns where trial judge allowed the government to reopen its case and (1) the government offered no "reasonable explanation" for its failure to timely introduce the report in question; (2) the defendants were not permitted to cross-examine witnesses about the report; and (3) the late introduction "infused the evidence with distorted importance," prejudiced the defendants' case, and denied them a fair opportunity to respond).

Right to present additional evidence if State is permitted to reopen its case. If the judge grants the State's motion to reopen its case, a judge's refusal to grant the defendant's request to present additional evidence in response may be reversible error. *See State v. Thompson*, 19 N.C. App. 693, 696 (1973) (stating that the judge's refusal to allow defendant to present material evidence in rebuttal after State was allowed to reopen its case to present further testimony "cannot be considered harmless error"); *see also United States v. Peay*, 972 F.2d 71 (4th Cir. 1992) (trial judge committed reversible error by allowing government to reopen its case to present new testimony of a witness who had testified for the defense while denying defendant the opportunity to impeach the witness with testimony of a new witness). If permission to offer further evidence is denied, the defendant must make an offer of proof to preserve the issue for appellate review.

Effect of sequestration orders on request to reopen. The trial judge has the discretion to grant a motion to reopen a party's evidence to recall a witness even if a sequestration order was in effect during the trial and that witness remained in the courtroom after his or her initial testimony. *See State v. Noblett*, 47 N.C. 418 (1855) (finding that a judge has the discretion to permit witnesses who already have been examined to be called again at any time before a verdict is rendered even though the witnesses had been sequestered before their first examination and had since had an opportunity to speak with each other).

Practice note: If the State is allowed to reopen its case to recall a witness who was originally subject to a sequestration order and who remained in the courtroom after testifying, you should consider requesting an instruction to the jury that the witness's presence in the courtroom during the testimony of other witnesses can be considered by the jury in determining his or her credibility. *See Gresham v. State*, 420 S.E.2d 71 (Ga. Ct. App. 1992).

29.6 Witness Examination

This section discusses the legal principles governing direct and cross examinations. It does not address how to fashion and deliver an effective direct or cross. There are many good practical guides on these advocacy skills. *See, e.g.,* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE (5th ed. 2015). The website of the N.C. Office of Indigent Defense Services also has a collection of materials on direct and cross-examination by various authors located in the "Training and Reference Materials Index" under the topic "Trial Practice." For additional considerations and recommendations with respect to preparing for direct and cross-examination, see *infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 7.5 Confronting the Prosecution's Case and Guideline 7.6 Presenting the Defense Case (Nov. 2004) (2d ed. 2012).

A. General Limits

The parties have considerable latitude in examining witnesses, but the trial judge has the ultimate authority to control the examination and cross-examination of witnesses. Pursuant to N.C. Rule of Evidence 611(a), the judge may 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.

See also State v. Fleming, 350 N.C. 109 (1999); *State v. Satterfield*, 300 N.C. 621 (1980); *State v. Arnold*, 284 N.C. 41 (1973).

In North Carolina, the examination of witnesses must be conducted from a seated position behind counsel table. If counsel wishes to approach the witness in order to present, inquire about, or examine him or her about an exhibit, document, or diagram, counsel must request permission from the trial judge. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 12; *see also State v. Bass*, 5 N.C. App. 429 (1969).

B. Direct Examination

Although sometimes paid less attention by defense counsel than other aspects of the case, direct examination is an important part of the entire trial process. Direct examination can be "a powerful tool . . . to tell the jury a compelling and convincing story, to convey to the jury the utter trustworthiness of the witness and the advocate, and to severely limit and frustrate the ability of the opposing party to cross-examine the witness." H. Mitchell Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423, 516 (2001).

Scope and form. The scope of direct examination is limited only by relevancy. The use of open-ended questions is generally advised, and leading questions are usually prohibited. *See* N.C. R. EVID. 611(c) ("Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony."). Leading questions are disapproved on direct examination because the witness usually favors the calling party's case, and he or she "may readily accede to the version of the events stated in the examiner's question rather than describing the [events] as he or she actually remembers" them. WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 611, at 476 (2017). For a detailed discussion of the use of leading questions on direct and cross-examination, see *infra* § 29.6F, Leading Questions During Direct or Cross-Examination.

C. Redirect Examination

Purpose and scope. Redirect examination of a witness after cross-examination is much narrower in scope than direct examination. The general purpose of redirect examination is "to clarify testimony which has been cast into doubt upon cross-examination, to clarify new matter brought out on cross-examination or to refute testimony elicited on cross-examination." *State v. Franks*, 300 N.C. 1, 12 (1980); *State v. Davis*, 68 N.C. App. 238, 242 (1984) (quoting *Franks*); *see also State v. Calloway*, 305 N.C. 747, 755 (1982) (noting that "after a witness has been cross-examined the party calling him may reexamine the witness so as to clarify the new matter elicited on cross-examination").

Counsel may not use redirect examination to introduce new matters (*State v. Weeks*, 322 N.C. 152 (1988)), or to have the witness merely repeat testimony from his or her direct examination. *State v. Stitt*, 147 N.C. App. 77 (2001). However, the trial judge has the discretion to expand the scope of redirect examination to allow testimony that exceeds the scope of direct and cross-examination as long as the testimony is relevant and otherwise admissible. *See State v. Barton*, 335 N.C. 696 (1994); *Davis*, 68 N.C. App. 238; *see also* N.C. R. EVID. 611(a).

Practice note: If the State is permitted to introduce new matters during redirect examination of a witness, you are entitled to recross-examine the witness about those matters. *See infra* § 29.6E, Recross Examination. If you are surprised by the new matters and need additional time to prepare for recross-examination, you should request a recess or continuance.

Opening the door. If a witness is impeached on cross-examination, the witness may be allowed to explain or clarify the matter on redirect examination even though the testimony would not have been admissible during the calling party's case-in-chief. *See, e.g.*, *State v. Johnston*, 344 N.C. 596, 606 (1996) (victim's girlfriend permitted to testify on redirect regarding the victim's character for peacefulness where defendant opened the door to this line of testimony on cross-examination by suggesting that the victim was "looking for a fight" on the night he was killed); *State v. Patterson*, 284 N.C. 190 (1973) (murder victim's daughter properly allowed to testify on redirect that one of the reasons she did not like defendant was that he had raped her; defendant had asked the witness on cross-examination about her dislike of defendant and her ill will against him); *see also* 1 KENNETH S. BROUN,

BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 171, at 632 n.606 (7th ed. 2011) (collecting cases).

D. Cross-Examination

Generally. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). It has been described as the "'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (citation omitted). It is also "'[o]ne of the most jealously guarded rights in the administration of justice.'" *State v. Harrill*, 289 N.C. 186, 191 (1976) (quoting 1 STANSBURY'S NORTH CAROLINA EVIDENCE § 35, at 100 (Brandis Rev. 1973)), *vacated in part on other grounds*, 428 U.S. 904 (1976); *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 394 (1959) (citation omitted). "The right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination in chief, is an absolute right and not a mere privilege." *Riverview Milling Co. v. State Highway Comm'n*, 190 N.C. 692, 696 (1925).

Constitutional bases. The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." *See also Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (the right of cross-examination is not just a desirable rule of trial procedure but "is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process'" (citation omitted)). This right of confrontation is secured for defendants in state as well as federal criminal proceedings. *Pointer v. Texas*, 380 U.S. 400 (1965); *see also* U.S. CONST. amend. XIV. The right to confront "means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). Its main and essential purpose is *"'to secure for the opponent the opportunity of cross-examination.'" Id*. at 315–16 (emphasis in original) (quoting 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940)). Article I, section 23 of the N.C. Constitution likewise guarantees a defendant the right to cross-examine adverse witnesses. *State v. Thorne*, 173 N.C. App. 393 (2005).

The right of confrontation "'ensure[s] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'" *State v. Brewington*, 352 N.C. 489, 507 (2000) (quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990)). A defendant has the right "to expose to the jury the facts from which jurors, as the sole triers of facts and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. 308, 318.

Purposes. Cross-examination serves three general purposes:

1. to elicit further details of the story related on direct examination, in the hope of presenting a complete picture that will be less unfavorable to the cross-examiner's case;
2. to bring out new and different facts relevant to the whole case; and
3. to impeach the witness or cast doubt on his or her credibility.

Barnes v. N.C. State Highway Comm'n, 250 N.C. 378, 394 (1959).

Scope. The scope of permissible cross-examination is generally limited only by the trial judge's discretion and the requirement that the questions be asked in good faith. *State v. Locklear*, 349 N.C. 118 (1998); *State v. Bates*, 343 N.C. 564 (1996). Cross-examination ordinarily may extend to any matter relevant to the issues in the case, including credibility. *See* N.C. R. EVID. 611(b); *State v. Stanfield*, 292 N.C. 357 (1977); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 150, at 542–43 (7th ed. 2011) ("[T]he range of facts that may be inquired into [on cross-examination] is virtually unlimited except by the general requirement of relevancy and the discretionary power of the trial judge to keep the examination within reasonable bounds.").

Because the scope of inquiry in North Carolina is not confined to matters testified to on direct examination, it is called "wide-open" cross-examination. *See State v. Burgin*, 313 N.C. 404 (1985); *State v. Penley*, 277 N.C. 704 (1971). "Wide-open" cross-examination does not mean, however, "that all decisions on cross-examination are left to the cross-examiner." *Stanfield*, 292 N.C. 357, 362. Rule of Evidence 611(b) allows cross-examination on any relevant matter, but it "neither stands alone nor preempts other rules of evidence." *State v. Lynch*, 334 N.C. 402, 410 (1993). Cross-examination questions remain subject to the limitations of other rules on relevancy and impeachment, including N.C. Rules of Evidence 402 (relevancy), 403 (prejudice, confusion, and waste of time), 404 (character evidence to prove conduct), 608 (character and conduct to impeach), and 609 (prior convictions). *Lynch*, 334 N.C. at 411; *see also State v. Wilson*, 118 N.C. App. 616 (1995). For example, during cross-examination, the trial judge should:

- Rule out immaterial, irrelevant, and incompetent matters. *Lynch*, 334 N.C. 402; *State v. Jones*, 98 N.C. App. 342 (1990);
- Disallow cross-examination on a matter if the probative value of the evidence 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 under Rule 403. *State v. Whaley*, 362 N.C. 156, 159–60 (2008);
- "'[B]an unduly repetitious and argumentative questions, as well as inquiry into matters of tenuous relevance.'" *State v. Hatcher*, 136 N.C. App. 524, 526 (2000) (citation omitted).
- Prohibit cross-examination that is intended to harass, annoy, or humiliate a witness. *State v. Mason*, 315 N.C. 724, 730 (1986); *State v. Pharr*, 110 N.C. App. 430 (1993).

A judge's ruling on the cross-examination of a witness will not be reversed unless the verdict was improperly influenced by that ruling. *State v. Woods*, 345 N.C. 294 (1997). However, if the trial judge violates a defendant's constitutional right to confrontation by improperly limiting his or her right to cross-examination, the State must show that the erroneous ruling was harmless beyond a reasonable doubt. *See State v. McNeil*, 350 N.C. 657 (1999); *State v. Hoffman*, 349 N.C. 167 (1998); *see also Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

Practice note: When objecting to a trial judge's ruling on the cross-examination of a witness, be sure to constitutionalize your objection; otherwise, the constitutional issue will be waived on appeal. *See State v. Greene*, 351 N.C. 562 (2000). Also, if the judge limits or prohibits your cross-examination of a witness on a particular subject, you must make an offer of proof to preserve the issue for appellate review. *See State v. Williams*, 355 N.C. 501 (2002) (appellate review of trial judge's rulings sustaining the State's objections to questions propounded by defense counsel during cross-examination was waived because defendant made no offer or proof as to the answers to the questions); *State v. Braxton*, 352 N.C. 158 (2000) (same).

Treatment of cross-examination testimony. Any testimony elicited during cross-examination is generally considered as coming from the party calling the witness, not from the cross-examiner. This is true "'even though its only relevance is its tendency to support the cross-examiner's case.'" *State v. Shuler*, 135 N.C. App. 449, 452 (1999) (quoting 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 170, at 559 (5th ed. 1998)) [now, 7th ed. 2011, § 170 at 626]. Leading questions asked on cross-examination "to which the witness is *expected* to answer 'yes' or 'no,' also become part of the testimony of the witness." *State v. Baize*, 71 N.C. App. 521, 526 (1984) (emphasis in original).

However, in certain situations, it may be determined that the defendant "introduced" evidence during his or her cross-examination of a State's witness. If the defendant is found to have "introduced" evidence within the meaning of Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts, his or her right to final argument may be lost. *See infra* § 33.5B, What Constitutes "Introduction" of Evidence (2d ed. 2012).

Additional resources. For further discussion of cross-examination in general, including the right to confrontation, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 170 (7th ed. 2011).

E. Recross-Examination

General rule. Once a witness has been cross-examined and re-examined (redirect), a party does not have the right to a second cross-examination (recross) unless the redirect examination included new matters. *See State v. Thompson*, 139 N.C. App. 299 (2000); *State v. Moorman*, 82 N.C. App. 594 (1986), *rev'd on other grounds*, 320 N.C. 387 (1987). If no new matter is brought forth during redirect examination, it is within the trial judge's discretion to permit or refuse recross-examination. *Moorman*, 82 N.C. App. 594; *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 171, at 634 (7th ed. 2011).

Multiple defendants. In cases involving multiple defendants, a defendant is entitled to recross-examine a witness if new matters are brought out by another party during its cross-examination even if there has technically been no redirect examination by the calling party. In *State v. Hamad*, 92 N.C. App. 282 (1988), *aff'd per curiam*, 325 N.C. 544 (1989), defendant Wells and defendant Hamad were tried together for trafficking in cocaine. Defendant Wells testified and was cross-examined by defendant Hamad's attorney. The

State then cross-examined defendant Wells and brought out new matters that incriminated defendant Hamad. Defendant Hamad sought a second cross-examination of defendant Wells to address the new matters brought up by the State. Defendant Wells objected to further cross-examination, and the trial judge sustained the objection. On appeal, the State argued that the trial judge's ruling was correct because defendant Wells' attorney had not tendered any questions on redirect; therefore, defendant Hamad was not entitled to recross-examination.

The court of appeals reversed the judge's ruling and found "that the semantic designation of the examination of defendant Wells by the State as cross-examination and the absence of redirect examination by Wells' counsel should not operate to abridge defendant Hamad's constitutional right to confront witnesses against him." *Hamad*, 92 N.C. App. at 286. Although the label attached to the State's examination of defendant Wells was "cross-examination," it had the "same practical import of a redirect examination" and since new matters were elicited, the trial judge's decision to permit or refuse defendant's recross-examination was not a discretionary one. *Id.* at 287.

F. Leading Questions During Direct or Cross-Examination

Definition. A leading question has been defined as one that suggests a desired answer. Questions that may be answered with a "yes" or a "no" have sometimes been regarded as leading. *State v. Young*, 291 N.C. 562 (1977); *see also State v. Williams*, 304 N.C. 394 (1981). However, that a question may be answered "yes" or "no" does not make it leading—the question also must suggest the answer. *See State v. Thompson*, 306 N.C. 526 (1982). Further, a question is not leading simply because the examiner directs attention to the subject matter at hand without suggesting answers. *See State v. White*, 349 N.C. 535, 557 (1998) ("A question is not leading where it directs the witness toward a specific matter . . . without suggesting an answer."); *State v. Smith*, 135 N.C. App. 649, 655 (1999) (challenged questions "were not so much 'leading' as they were 'bridges'"—that is, they directed the witness's attention to a certain topic in the long and complicated case). "Whether a question is leading 'depends not only on the form of the question but also on the context in which it is put.'" *State v. Howard*, 320 N.C. 718, 721–22 (1987) (quoting *Thompson*, 306 N.C. at 529).

Use of leading questions on direct or redirect examination. Ordinarily, counsel may not ask leading questions during the direct or redirect examination of his or her own witness. *See State v. Royal*, 300 N.C. 515 (1980); *see also* N.C. R. EVID. 611(c) ("Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony."). The purpose of this general prohibition is to prevent counsel from putting a desired response into the mouth of a witness that he or she has called to testify. *State v. Tate*, 307 N.C. 242, 246 (1982). The rule is not based on a technical distinction between direct and cross-examination, but on the alleged friendliness of the witness to the calling party's case. 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 169, at 611 (7th ed. 2011); *see also State v. Hosey*, 318 N.C. 330, 338 (1986) (noting concerns that this relationship "'would allow the examiner to provide a false memory to the witness by suggesting the desired reply to his [or her] question'" (citation omitted)).

Notwithstanding the general rule precluding the use of leading questions on direct examination, a trial judge has the discretion to allow counsel to ask leading questions of his or her own witness and, in the absence of abuse, the exercise of that discretion will not be disturbed on appeal. *Tate*, 307 N.C. 242, 246; *see also State v. Bass*, 280 N.C. 435 (1972). The trial judge should consider the true relationship between counsel and the witness in ruling on the propriety of leading questions on direct (or cross-examination) of the witness. *Hosey*, 318 N.C. 330 (1986). Where the relationship between the questioner and the witness belies the rationale of the general prohibition against leading questions on direct examination, the trial judge may be more inclined to permit counsel to lead the witness.

The trial judge's discretion to permit leading questions on direct examination is aided by certain guidelines that have evolved over the years. Generally, counsel may be allowed to lead a witness where:

- The witness is hostile, is an adverse party or is identified with an adverse party, or is unwilling to testify. *See* N.C. R. EVID. 611(c); *State v. Dickens*, 346 N.C. 26 (1997); *State v. Maddox*, 159 N.C. App. 127 (2003); *see also State v. Hosey*, 318 N.C. 330 (1986).
- The witness has difficulty in understanding the question because of immaturity, advanced age, infirmity, or ignorance. 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 169, at 613 (7th ed. 2011); *see also State v. Cox*, 344 N.C. 184 (1996) (low mentality); *State v. Riddick*, 315 N.C. 749 (1986) (young age); *State v. Smith*, 307 N.C. 516 (1983) (elderly).
- The inquiry is into a subject of a delicate nature such as sexual matters. *State v. Chandler*, 324 N.C. 172 (1989); *State v. Pearson*, 258 N.C. 188 (1962); *State v. Dalton*, 96 N.C. App. 65 (1989).
- The witness is called to contradict the testimony of prior witnesses. *State v. Greene*, 285 N.C. 482 (1974); *Gunter v. Watson*, 49 N.C. 455 (1857).
- The examiner seeks to aid the witness's recollection or refresh his or her memory when the witness has exhausted his or her memory without stating the particular matters required. *State v. Young*, 291 N.C. 562 (1977); *State v. Lesane*, 137 N.C. App. 234 (2000).
- The questions are asked for securing preliminary or introductory testimony. *State v. Corbett*, 307 N.C. 169 (1982); *State v. Williams*, 304 N.C. 394 (1981); *see also* WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 611, at 477 (2017) (leading questions may be allowed on direct examination when used to elicit preliminary matters that are usually undisputed).
- "[T]he mode of questioning is best calculated to elicit the truth." *State v. Greene*, 285 N.C. 482, 492–93 (1974); *see also State v. Hood*, 294 N.C. 30 (1978).

Practice note: If the prosecutor improperly uses leading questions during direct or redirect examination of his or her witness, you must object to preserve the issue for appellate review. *See State v. Williams*, 304 N.C. 394 (1981). If the answer the witness gives is objectionable on additional grounds, counsel must move to strike the answer on those additional grounds

to preserve the issue for review. *See State v. Proctor*, 62 N.C. App. 233 (1983); *State v. Wooten*, 20 N.C. App. 499 (1974).

Use of leading questions during cross or recross-examination. Rule 611(c) provides that leading questions ordinarily should be allowed on cross-examination. This rule follows the traditional view that counsel may use leading questions as a matter of right during cross-examination. *State v. Mitchell*, 317 N.C. 661 (1986). However, use of the qualifier "ordinarily" means that this right is not absolute. *See State v. Hosey*, 318 N.C. 330 (1986). As stated in the above discussion on leading questions on direct and redirect, the trial judge should consider the true relationship between counsel and the witness in ruling on the propriety of leading questions during cross-examination.

If the witness is "friendly" to the non-calling party and cross-examination is cross-examination in form only and not in fact, the trial judge has the discretionary power to deny the use of leading questions. *Id.* The denial is justified in a "friendly witness" situation to prevent counsel "from providing 'a false memory to the witness by suggesting the desired reply to his question' inadvertently or otherwise." *Id.* at 339 (citation omitted).

No formal requirements for finding a witness to be "hostile" or "friendly." A trial judge may make a determination that a witness is friendly or hostile without conducting a voir dire hearing. Although not required, the better practice is for the judge first to make findings of fact and conclusions of law and then formally declare that the witness is friendly or hostile before allowing or disallowing leading questions. *State v. Hosey*, 318 N.C. 330 (1986).

General limitations on the use of leading questions. When examining a witness, counsel may not use leading questions to:

- Inject his or her own knowledge, beliefs, and personal opinions that are not supported by the evidence. *State v. Sanderson*, 336 N.C. 1 (1994); *State v. Britt*, 288 N.C. 699 (1975); *State v. Phillips*, 240 N.C. 516 (1954).
- "[D]istort the witness' testimony by purposely misconstruing answers and cross-examining the witness on the basis of the misconstruction." *Sanderson*, 336 N.C. 1, 14; *see also Berger v. United States*, 295 U.S. 78 (1935); N.C. GEN. R. PRAC. SUPER. & DIST. CT. 12 ("Counsel shall not knowingly misinterpret . . . the testimony of a witness . . . .").
- Testify himself or herself. *See State v. Walls*, 342 N.C. 1 (1995) (counsel asked the witness whether she had told counsel that she did not remember making a particular statement to the sheriff; trial judge permitted counsel to rephrase the question and ask about the same matter). [Although generally disfavored, testimony by counsel may be unavoidable in some instances. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.7(a) (2003) (prohibiting counsel from acting as witness in a case in which he or she is an advocate but recognizing limited exceptions); *State v. Elam*, 56 N.C. App. 590 (1982) (the parties stipulated for the jury to what counsel would have testified if called as a witness; whether to allow defense counsel to testify on a collateral matter, impeachment of a witness, was within the trial judge's discretion); *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27 (1975) (observing that in most instances counsel

who acts as a witness has surrendered the right to participate in the litigation but that counsel is not incompetent to testify). To avoid this dilemma, counsel should have an investigator or other person present when interviewing a witness so, if necessary, counsel may cross-examine the witness about statements to the other person as well as call the other person to testify to those statements.]

Additional resources. For additional discussion of leading questions, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 169 (7th ed. 2011), and WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 611, at 475–98 (2017).

G. Witness Examination in Joint Representation Cases

Rule 11 of the General Rules of Practice for the Superior and District Courts states:

> When several counsel are employed by the same party, the examination or cross-examination of each witness for such party shall be conducted by one counsel, but the counsel may change with each successive witness or, with leave of the court, in a prolonged examination of a single witness.

Under this rule, it is within the trial judge's discretion whether to allow a change of counsel if an examination is to be lengthy. *State v. Houston*, 19 N.C. App. 542 (1973) (defendant failed to show he was prejudiced where trial judge permitted a second prosecutor to conduct a voir dire examination of a witness when another prosecutor had begun the examination of that witness).

H. Examination of Witness by Trial Judge

A trial judge may direct questions to a witness in order to clarify the witness's testimony, to enable the judge "to rule on the admissibility of certain evidence and exhibits, and to promote a better understanding of the testimony." *State v. Rios*, 169 N.C. App. 270, 281-82 (2005) (citing Evidence Rule 614(b)); *see also State v. Fleming*, 350 N.C. 109, 126 (1999) (stating that "it is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts.") (citations omitted). A judge may ask questions of a witness "when necessary to clarify even a critical element of the case." *See Rios*, 169 N.C. App. 270, 282 (citing *State v. Shepherd*, 163 N.C. App. 646 (2004)); *see also State v. Lowe*, 60 N.C. App. 549 (1983) (stating that a judge may ask questions that elicit testimony that proves an element of the State's case so long as he or she does not comment on the strength of the evidence or the credibility of the witness). N.C. Rule of Evidence 614(b) specifically allows the trial judge to "interrogate witnesses, whether called by itself or by a party." If the trial judge chooses to call a witness on his or her own motion or at the suggestion of a party, each party is entitled to cross-examine that witness. N.C. R. EV. 614(a).

While a trial judge may question a witness, the judge may not, by his or her questions, intimate an opinion regarding the guilt of the defendant, the witness's credibility, or

whether any fact essential to the State's case has been proved. *See State v. Yellorday*, 297 N.C. 574 (1979); *State v. Lowe*, 60 N.C. App. 549 (1983). A judge must conduct his or her questioning carefully and in a manner that avoids prejudice to the parties. If the judge expresses an opinion by the tenor, frequency, or persistence of his or her questions, error has occurred in violation of G.S. 15A-1222. *State v. Rinck*, 303 N.C. 551 (1981); *State v. Currie*, 293 N.C. 523 (1977). If the expression of opinion might reasonably have had a prejudicial effect on the defendant's trial, the error will not be considered harmless and a new trial will be awarded. *See, e.g.*, *State v. McEachern*, 283 N.C. 57 (1973); *State v. Oakley*, 210 N.C. 206 (1936); *see also supra* § 22.1B, Expression of Opinion Prohibited.

As with other remarks and conduct prohibited by G.S. 15A-1222, the prohibition against the trial judge expressing an opinion when questioning a witness applies only when the jury is present. *State v. Rogers*, 316 N.C. 203 (1986).

Practice note: N.C. Rule of Evidence 614(c) provides that no objection is necessary "to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." Counsel must still specifically object to prejudicial questioning by the trial judge on *constitutional* grounds to preserve the issue on those grounds.

29.7 Defendant's Right to Testify or Not to Testify

A criminal defendant has the right to testify in his or her own defense. Although not recognized at common law or specifically enumerated in the U.S. Constitution, this right is now accepted to be an inherent part of the Due Process Clause of the Fourteenth Amendment and the Compulsory Process Clause of the Sixth Amendment to the U.S. Constitution. *See Rock v. Arkansas*, 483 U.S. 44 (1987); *State v. Colson*, 186 N.C. App. 281 (2007). Article I, section 23 of the N.C. Constitution also guarantees a criminal defendant the right to testify. *See State v. Murray*, 154 N.C. App. 631 (2002); *see also* G.S. 8-54 (providing that a criminal defendant is "at his own request, but not otherwise, a competent witness").

Likewise, a criminal defendant has a right to refuse to testify under the Fifth Amendment to the U.S. Constitution, as incorporated by the Fourteenth Amendment, and also under article I, section 23 of the N.C. Constitution. *Griffin v. California*, 380 U.S. 609 (1965); *State v. Mitchell*, 353 N.C. 309 (2001). G.S. 8-54 grants the defendant the right to testify, but the language of the statute makes it clear that nothing in it renders a criminal defendant "compellable to give evidence against himself."

For a more detailed discussion on the defendant's right to testify and right to refuse to testify, see *supra* § 21.3, Right to Testify.

29.8 Remote Testimony

"Remote testimony" refers to testimony given by a witness outside of the defendant's physical presence by way of a "live," closed-circuit television system. The system can be either "one-way" where the witness is not in the defendant's presence and cannot see the defendant but the defendant can see the witness, or "two-way" where the witness is not in the defendant's presence but the witness and defendant can see each other over video monitors.

The use of closed-circuit television systems is most often sought in cases involving child witnesses where the State asserts that the child would be traumatized if required to testify in the defendant's presence. If the State's motion to allow remote testimony is granted, the child is generally in a separate room and testifies by way of a one-way, closed-circuit television. The child cannot see the defendant during the testimony, but the defendant and the trier of fact can see the child and his or her demeanor while testifying.

A. Constitutional Implications

Exception for one-way, remote testimony for child witness. Although the defendant has the right to confront witnesses against him or her under the Sixth Amendment to the U.S. Constitution and under article I, section 23 of the N.C. Constitution, the right to confront a witness "face-to-face" may not be absolute when child witnesses are involved. In *Maryland v. Craig*, 497 U.S. 836 (1990), the U.S. Supreme Court found no Sixth Amendment violation where a child victim in a sexual abuse case was permitted, pursuant to a Maryland statute, to testify outside the defendant's presence via one-way, closed-circuit television. The statute allowed the witness, the prosecutor, and the defense attorney to withdraw to a separate room while the witness testified. The defendant, the judge, and the jury remained in the courtroom and watched the witness's testimony on a video monitor. The defendant could communicate electronically with his attorney, but the witness could not see the defendant.

The U.S. Supreme Court reviewed the arrangement used in *Craig* and found that a defendant's right to confrontation "may be satisfied absent a physical, face-to-face confrontation at trial" if the denial of confrontation "is necessary to further an important public policy" and "the reliability of the testimony is otherwise assured." *Id.* at 850. The finding of necessity must be made on a case-by-case basis. *Id.* at 855. A majority of the Court found that the State could show that the use of the special procedure was necessary to further its interest in protecting the physical and psychological well-being of child abuse victims and that it could be sufficient to outweigh a defendant's right to face his or her accusers in court.

The Court stated that before this type of arrangement is allowed, the trial judge must:

- hold a hearing and take evidence to determine whether the use of the procedure is necessary to protect the welfare of the particular child witness;
- find that the child witness would be traumatized, not just by the courtroom generally, but by the defendant's presence; and

- find that the emotional distress suffered by the child witness in the defendant's presence is "more than *de minimis; i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'"

Id. at 855–56 (citation omitted). The majority held that the trial judge may rely solely on expert testimony in making his or her findings. The child need not attempt to testify in the defendant's presence to prove that he or she would be traumatized by doing so. *Id*. at 859–60.

The Court reasoned that even though there was no "face-to-face" confrontation, the reliability of the child witness's testimony was "otherwise assured" because the Maryland statute required the child to be competent as a witness and testify under oath, the defendant had the opportunity for contemporaneous cross-examination, and the defendant, judge, and jury all were able to view the demeanor and body of the child witness while he or she testified (albeit through the video monitor). *Id.* at 850–51; *see also In re Stradford*, 119 N.C. App. 654 (1995) (upholding the trial judge's authority to permit the remote testimony of a child witness on the facts of sexual abuse case and finding no state or federal constitutional violation).

Since the decision in *Craig*, "[t]he federal government and nearly all states have enacted statutes providing for alternatives to face-to-face confrontation when necessary to shield child witnesses or other sensitive witnesses." Hadley Perry, Note & Comment, *Virtually Face-to-Face: The Confrontation Clause and the Use of Two-Way Video Testimony*, 13 ROGER WILLIAMS U. L. REV. 565, 580 (2008). North Carolina statutes on remote testimony are discussed in subsections B. and C., below.

Questions remain, however, whether remote testimony by children or other witnesses satisfies the U.S. Supreme Court's revived approach to the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004). Although a majority of the Court in *Craig* approved remote testimony in that case, Justice Scalia dissented in typically strong language, arguing that the Confrontation Clause gives the defendant the right to cross-examine, face-to-face, witnesses against him or her and that remote testimony is not permissible under his reading of the Confrontation Clause. Justice Scalia later authored the *Crawford* decision, in which he led a majority of the Court in ruling that the Confrontation Clause restricts the introduction of out-of-court statements and in overruling the looser balancing test used in previous decisions. Cases challenging remote testimony have worked their way through the appellate courts, but as yet neither the U.S. Supreme Court nor the N.C. Supreme Court have addressed the issue. *See* Jessica Smith, *Two-Way Remote Testimony: Will It Pass Muster? (Parts I, II, & III)*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Feb. 8–10, 2011); *see also In re Court Rules*, 207 F.R.D. 89 (2002) (statement by Justice Scalia) (discussing proposed changes to Federal Rules of Criminal Procedure on remote testimony).

The N.C. Court of Appeals has addressed the permissibility of a child testifying remotely in light of *Crawford* in *State v. Jackson*, 216 N.C. App. 238 (2011). The court held that *Crawford* did not overrule earlier decisions holding that a child may testify remotely in a

criminal case when the court finds a sufficient showing of need and uses appropriate procedures for taking the child's testimony. *Id.* at 243 (collecting post-*Crawford* cases from other jurisdictions that continue to uphold *Craig*); *see also State v. Lanford*, 225 N.C. App. 189 (2013) (following *Jackson).* For a further discussion of *Jackson*, see Jessica Smith, *N.C. App. Holds that Maryland v. Craig Survives Crawford*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Oct. 13, 2011).

Practice note: If the judge excludes the defendant from the courtroom during a witness's testimony and orders that he or she be allowed to monitor the proceedings by closed-circuit television, counsel can request an instruction in accordance with N.C. Pattern Jury Instruction—Crim. 101.32 (June 2007), which directs that the jury be instructed regarding the defendant's absence and that the defendant's absence should not be considered with regard to his or her guilt or innocence. If no instruction is requested, the failure of the judge to instruct on this subordinate feature of the case will not be held to be error. *See generally State v. Turner*, 11 N.C. App. 670 (1971).

If the witness is allowed to testify in a separate room from the defendant and the trier of fact, counsel should consider whether it would be helpful for the jury to be instructed that the witness's absence from the courtroom should not create any presumption against the defendant or influence its decision in any way. The pattern jury instructions do not contain an instruction on this issue. If an instruction on the witness's absence is desired, counsel should draft one that fits the facts of the case and request that it be submitted to the jury.

Exceptions for adult witnesses. The U.S. Supreme Court has not determined whether, or under what circumstances, the Confrontation Clause would permit the use of one-way or two-way remote video testimony by adult witnesses. However, after *Crawford v. Washington*, 541 U.S. 36 (2004), courts in other jurisdictions and the N.C. Court of Appeals have extended the reasoning of *Maryland v. Craig*, 497 U.S. 836 (1990), to allow the use of remote testimony for adult witnesses in certain instances. *See State v. Seelig*, 226 N.C. App. 147 (2013) (collecting cases from other jurisdictions after *Crawford* that have applied the *Craig* test in deciding whether a defendant's constitutional right to confront was violated when an adult witness testified via live, two-way video transmission at trial); *see also* Jessica Smith, *N.C. Court of Appeals OKs Remote Two-Way Testimony for Ill Witnesses*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (April 10, 2013) (discussing *Seelig* and listing some policy reasons that other jurisdictions have found to satisfy the Confrontation Clause when deciding whether to permit remote testimony by adults).

In *Seelig*, a State's witness was permitted to testify via live, two-way, closed-circuit internet broadcast from Nebraska after he suffered a severe panic attack and was hospitalized on the day he was scheduled to fly to North Carolina for trial. In reviewing the defendant's Sixth Amendment challenge, the court adopted the two-part *Craig* test as "the controlling test to determine the admissibility of witness testimony absent face-to-face confrontation at trial." *Seelig*, 226 N.C. App. 147, 156 (noting the court's previous holding in *State v. Jackson*, 216 N.C. App. 238 (2011), that *Crawford* "did not address the face-to-face aspect of confrontation and did not overrule *Craig*"). Applying the *Craig* test, the court found no error in the admission of the remote testimony because (1) it was necessary to further the State's

important "interest in justly and efficiently resolving a criminal matter when a witness cannot travel because of his health"; and (2) the reliability of the testimony was assured because the deputy clerk administered the oath to the witness via the two-way video feed, the trial judge cautioned the witness that he would be subject to perjury charges if he answered falsely, the defendant had the opportunity to cross-examine the witness, and the defendant and the jury could view the witness while he testified. *Id.*, 226 N.C. App. at 158–59.

It remains to be seen whether the U.S. Supreme Court will sanction the extension of *Craig* and allow the use of remote testimony for adult witnesses in certain circumstances. *See Wrotten v. New York*, 560 U.S. 959, 960 (2010) (denying certiorari in an interlocutory case where the prosecuting witness was allowed to testify via two-way video due to his age and poor health; Justice Sotomayor noted in a statement filed with the denial that "[b]ecause the use of video testimony in this case arose in a strikingly different context than in *Craig*, it is not clear that the latter is controlling").

B. Statutory Authority for Remote Testimony of Child Witnesses

In general. G.S. 15A-1225.1, authorizes a trial judge to permit the remote testimony of a competent minor who is under the age of sixteen at the time of his or her testimony if certain procedures are followed. The statute applies to criminal and juvenile delinquency proceedings. G.S. 15A-1225.1(a)(2). The statutory requirements are similar to those delineated by the U.S. Supreme Court in *Craig*, but in some respects the statute may exceed the constitutional limits described in *Craig*—for example, remote testimony is statutorily permissible in any criminal or juvenile delinquency case (assuming the various requirements are met), not just in a case involving particularly serious or sensitive allegations like the sexual abuse charges in *Craig.* G.S. 15A-1225.1 survived a general challenge under the Confrontation Clause analysis of *Crawford v. Washington* in *State v. Jackson*, 216 N.C. App. 238 (2011), discussed in subsection A, above. *See also State v. Lanford*, 225 N.C. App. 189 (2013) (finding that defendant's confrontations rights under the Sixth Amendment and the N.C. Constitution were not violated when the trial judge allowed the child witness to testify outside defendant's presence via one-way, closed-circuit television).

For a further discussion of the statute, including ambiguities in the statute's provisions and potential constitutional issues, see John Rubin, *2009 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 23–26 (UNC School of Government, Dec. 2009).

Statutory procedures. Remote testimony of a child is authorized if the child would suffer serious emotional stress by testifying in the defendant's presence, and the child's ability to communicate with the trier of fact would be impaired. G.S. 15A-1225.1(b). The court, on its own motion or on motion of a party, must hold an evidentiary hearing to determine whether to allow the remote testimony. G.S. 15A-1225.1(c). The child need not be present at the hearing. *Id.*

After the hearing, the judge must enter an order setting out the ruling and stating the findings of fact and conclusions of law that support the determination. G.S. 15A-1225.1(d). If remote testimony is allowed, the order must:

1. state the method by which the witness is to testify;
2. list any individual or category of individuals allowed to be in or required to be excluded from the presence of the witness during testimony;
3. state any special conditions necessary to facilitate the cross-examination of the witness;
4. state any condition or limitation on the participation of individuals in the presence of the witness during the testimony; and
5. state any other conditions necessary for taking or presenting testimony.

Id. The statute also sets out the method to be used in cases where remote testimony is allowed. *See* G.S. 15A-1225.1(e).

Although the statute sets out detailed procedures that must be followed when remote testimony is requested, the failure to follow the statutory mandates is not necessarily reversible error. *See State v. Phachoumphone*, ___ N.C. App. ___, 810 S.E.2d 748 (2018) (finding multiple violations of the express requirements of G.S. 15A-1225.1 but holding that defendant failed to show how he was prejudiced by the particular procedure employed by the trial judge).

C. Statutory Authority for Remote Testimony of Intellectually or Developmentally Disabled Witnesses

Under G.S. 15A-1225.2, a trial judge may permit the remote testimony of a competent intellectually or developmentally disabled witness (regardless of the witness's age) in a criminal or juvenile delinquency case if the judge finds by clear and convincing evidence that the witness would suffer serious emotional distress from testifying in the defendant's presence and that the ability of the witness to communicate with the trier of fact would be impaired by testifying in the defendant's presence. The hearing procedure, requirements for an order allowing the use of remote testimony, and authorized method of testimony are similar to those set out in G.S. 15A-1225.1 for child witnesses, discussed in subsection B., above, but there are differences.

This statute extends the category of witnesses permitted to give remote testimony beyond that authorized by *Craig*. To comply with the constitutional requirements of *Craig*, the State may need to show that the protection of this specific class of witnesses is necessary to further an important public policy; that the particular witness in question needs special protection; and that the methodology used does not offend the defendant's right to confront the witnesses against him or her. The statute also would have to survive a general challenge under the Confrontation Clause analysis of *Crawford v. Washington*, discussed in subsection A., above. G.S. 15A-1225.1, discussed in subsection B., above, survived a general challenge under the Confrontation Clause analysis of *Crawford v. Washington* in *State v. Jackson*, 216

N.C. App. 238 (2011), but no case applying G.S. 15A-1225.2 has made its way through the North Carolina appellate courts.

For a further discussion of the statute, including ambiguities in the statute's provisions and potential constitutional issues, see John Rubin, *2009 Legislation Affecting Criminal Law and Procedure*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 26 (UNC School of Government, Dec. 2009).

D. Statutory Authority for Remote Testimony of Forensic Analysts

Under G.S. 15A-1225.3, effective September 1, 2014, a trial judge may permit the remote testimony of an analyst regarding the results of forensic testing admissible pursuant to G.S. 8-58.20 and reported by that analyst in a criminal or juvenile delinquency case if all of the following occur:

1. The State has provided a copy of the report to the attorney of record for the defendant, or to the defendant if that person has no attorney, as required by G.S. 8-58.20(d). For purposes of this subdivision, "report" means the full laboratory report package provided to the district attorney.
2. The State notifies the attorney of record for the defendant, or the defendant if that person has no attorney, at least 15 business days before the proceeding at which the evidence would be used of its intention to introduce the testimony regarding the results of forensic testing into evidence using remote testimony.
3. The defendant's attorney of record, or the defendant if that person has no attorney, fails to file a written objection with the court, with a copy to the State, at least five business days before the proceeding at which the testimony will be presented that the defendant objects to the introduction of the remote testimony.

G.S. 15A-1225.3(b). If the defendant's attorney, or a pro se defendant, fails to file a written objection as provided above, then the objection is deemed waived and the analyst shall be allowed to testify by remote testimony. *Id.*

The statute also sets out the method to be used in cases where remote testimony is allowed. *See* G.S. 15A-1225.3(c).

E. Additional Resources

For further discussion of remote witness testimony, see Jessica Smith, *Remote Testimony and Related Procedures Impacting a Criminal Defendant's Confrontation Rights,* ADMINISTRATION OF JUSTICE BULLETIN No. 2013/02 (UNC School of Government, Feb. 2013); Annotation, *Closed-circuit Television Witness Examination*, 61 A.L.R.4th 1155 (1988 & Supp. 2010); Ralph H. Kohlmann, *The Presumption of Innocence: Patching the Tattered Cloak After* Maryland v. Craig, 27 ST. MARY'S L. J. 389 (1996) (discussing the importance of the right of confrontation with respect to defendant's presumption of innocence); Cathleen J. Cinella, Note, *Compromising the Sixth Amendment Right to Confrontation*—United States v. Gigante, 32 SUFFOLK U. L. REV. 135 (1998) (discussing

compromise in the right of confrontation when adult witnesses are allowed to testify via closed-circuit television).

29.9 Oath or Affirmation

A. Applicable Statutes

Before testifying, each witness must declare by oath or affirmation that he or she will testify truthfully. The oath or affirmation must be "administered in a form calculated to awaken his conscience and impress his mind with his duty to do so." N.C. R. EVID. 603; *see also State v. James*, 322 N.C. 320 (1988). N.C. Rule of Evidence 603 "'is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required.'" N.C. R. EVID. 603 Official Commentary (quoting the Advisory Committee's Note to the virtually identical Fed. R. Evid. 603).

Solemnity required. An oath or an affirmation must be taken and administered "with the utmost solemnity." G.S. 11-1. The "solemnity" requirement applies both to the substance of the oath and to the form and manner of taking and administering it. *State v. Davis*, 69 N.C. 383 (1873).

Form of oath. When taking an oath, the witness is required to "lay his hand upon the Holy Scriptures." G.S. 11-2. If a witness has a conscientious objection to laying his or her hand on the "Holy Gospel," the witness may stand with his or her "right hand lifted up towards heaven" while taking the oath in accordance with G.S. 11-3.

There has been some controversy about the meaning of the "Holy Scriptures" and whether G.S. 11-2 allows witnesses to swear on other religious texts. The issue has not been resolved definitively, but in an appropriate case the N.C. appellate courts may rule that a witness (or juror) has the right to swear on a religious text other than the Bible. In *ACLU of N.C., Inc. v. State*, 181 N.C. App. 430 (2007), the plaintiffs sought a declaratory judgment that the term "Holy Scriptures" in G.S. 11-2 referred not only to the Bible but also to other religious texts, including the Quran. In the alternative, plaintiffs sought a declaratory judgment that the statute was unconstitutional under the U.S. and N.C. Constitutions. The trial judge dismissed the plaintiffs' case for lack of a justiciable controversy, and the plaintiffs appealed. The Court of Appeals reversed the trial judge's dismissal and remanded, holding that the case was justiciable under the Declaratory Judgment Act and "allowing ACLU-NC to obtain from the court an interpretation of N.C.G.S. § 11-2 and the rights of its members under the statute." *Id.* at 435. On remand, the superior court judge declined to declare that the term "Holy Scriptures" in G.S. 11-2 included texts other than the Bible and also declined to find that G.S. 11-2 was unconstitutional. He did find, however. that under North Carolina's common law and precedent of the N.C. Supreme Court, oaths can be administered on sacred texts other than the Bible. *See* *ACLU of N.C., Inc. v. State*, No. 05 CVS 9872 (N.C. Super. Ct., Wake County, May 24, 2007).

For further discussion of oaths to tell the truth, see Eugene R. Milhizer, *So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America*, 70 OHIO ST. L.J. 1 (2009).

Form of affirmation. A witness in a criminal case must swear that that he or she will tell "the truth, the whole truth, and nothing but the truth; so help [me] God." G.S. 11-11. If a witness has "conscientious scruples" against taking an oath with the "Holy Scriptures" or with his or her hand lifted up towards heaven, the witness may be "affirmed" instead. The witness will "affirm" instead of "swear" and the words "so help me God" will be deleted. G.S. 11-4.

B. Constitutional Implications

A defendant is entitled to have the testimony offered against him or her given under sanction of oath or affirmation as a part of his or her constitutional right of confrontation. *State v. Robinson*, 310 N.C. 530 (1984); *see also California v. Green*, 399 U.S. 149, 158 (1970) (the right to confront "insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury").

C. Interpreters

Interpreters are subject to the provisions of N.C. Rule of Evidence 603 and must make an oath or affirmation stating that they will make a true translation. N.C. R. EVID. 604; *see also* G.S. 8B-7 (specific oath for interpreters for deaf persons).

D. Preservation of Issue for Appeal

If a witness (or interpreter) offers testimony without being sworn or affirmed, a defendant must object or he or she waives the right to raise the issue on appeal. *State v. Robinson*, 310 N.C. 530, 540 (1984) (noting that the rationale for this rule is that if a defendant objects, the trial judge can "correct[] the oversight by putting the witness under oath and allowing him to redeliver his testimony, if necessary" and that "it would be detrimental to public justice to allow a defendant to remain silent, awaiting the chances of an acquittal, and, if disappointed in the result, fall back upon a reserved objection.") (citation omitted); *see also State v. Beane*, 146 N.C. App. 220, 225 (2001) ("Despite the constitutional nature of the oath requirement, our appellate courts have consistently held that where the trial court fails to administer the oath to a witness, the defendant's failure to object waives appellate review of the court's error."). However, if the judge's decision not to administer an oath is deliberate, a defendant is not completely barred from raising the issue on appeal by failing to object. An objection under those circumstances would not have prompted the trial judge to take corrective action so plain error review is appropriate in that situation. *See Beane*, 146 N.C. App. 220.

E. Additional Resources

For additional discussion of oaths and affirmations, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 146 (oaths of witnesses), § 147 (interpreters) (7th ed. 2011), and WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 603, at 411–12 (oath or affirmation), and Ch. 604, at 413–15 (interpreters) (2017).