# KEEPING EVIDENCE OUT

# (PRE AND POST TRIAL)

# THE RULES OF EVIDENCE: A PRACTICAL TOOLKIT

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## VI. KEEPING EVIDENCE OUT (PRE AND POST TRIAL)

South Carolina modeled its rules of evidence on the federal rules. There remain some significant differences in practice and content, however. These materials attempt to explain the differences.

### A. Practical Application of the "Big Six" to Real-World Courtroom Events

#### 1. Hearsay Objections

In order for the testimony to be hearsay, it must be presented to prove the truth of an out-of-court statement. Evidence presented for reasons other than establishing the truth of the facts asserted is not hearsay. *R & G Const., Inc. v. Lowcountry Regional Transp. Authority*, 343 S.C. 424, 439-40, 540 S.E.2d 113, 121-22 (Ct. App. 2000). Federal and South Carolina rules defining hearsay are very similar. The South Carolina rule, however, includes an additional non-hearsay category at 801(d)(1)(D) for consistent out-of-court statements by a victim in a sexual-conduct or attempted sexual-conduct trial. Further, the South Carolina rule does not contain the federal rule's admonition that the alleged admission of a party opponent made in a representative capacity does not, alone, establish the capacity to bind the opponent, although the statement should be considered. S.C. R. Evid. 801(d)(2). In practice, however, the party propounding the evidence must usually present some non-hearsay evidence other than the statement itself to establish the representative capacity in South Carolina courts as well. *See, e.g., State v. Ferguson*, 221 S.C. 300, 70 S.E.2d 1952 (1952); *State v. Sims*, 377 S.C. 598, 608-609; 661 S.E.2d 122, 127-28 (Ct. App. 2008) (both dealing with a co-conspirator's testimony); *Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 330-31, 696 S.E.2d 599, 606 (Ct. App.

2010) (rejecting one shareholders statement to a bank officer as evidence against another shareholder as shareholders are not agents or employees of each other).

The numerous exceptions (and in federal practice the catch-all exception in Rule 807) make it difficult to spot an exception if you failed to analyze the issue pre-trial. Err on the side of objecting if the evidence harms your case and the exception is not obvious.

Rules 803 and 804 list specific exceptions to hearsay. However, they apply in very different fashions. Rule 803 exceptions apply whether or not the declarant is available to testify. Rule 804 exceptions only apply if the declarant cannot testify at trial. You must know from your pre-trial preparation which declarants can be forced to appear at trial and which cannot.

2. General Practical Considerations

Most lawyers can spot hearsay in live testimony. The witness recounts a conversation or phone call with another. The witness says "Person X" told me or "Person X said to my wife." BUT REMEMBER—documents may be or contain hearsay, and even a description of a person's conduct, when the witness did not observe the conduct, is hearsay unless an exception applies.

The proper gut reaction is to object. Two issues must be quickly analyzed before reacting to your gut: (1) is there an exception and (2) might the evidence get worse?[1]

The review of the laws and rules informs you what you need to know when objecting: (1) how to argue the statement is

[1] NOTE: The ever-present rule regarding objecting: does the evidence negatively impact my case? Just because it is objectionable does not mean it is worth the time to object if the evidence merely deals with background or does not actually harm my case.

actually being admitted, at least in part, to prove the truth of the matters asserted[2], (2) why no exception applies.

I usually make the objection as follows: "May it please the court, objection, an improper question calling for inadmissible hearsay not subject to an exception." [I would then add detail as needed]. We will discuss why under issue preservation below.

If the hearsay evidence being presented by your opponent is much weaker than direct evidence your opponent can likely bring forward if your objection is sustained, you may not want to object. An example of this can be found in *United States v. Moon*, 512 F.3d 359, 361 (7th Cir. 2008). The court noted hearsay evidence is usually less persuasive than live testimony. Opposing counsel can undermine the hearsay witness' lack of personal knowledge. But if the objection is granted and the issue is of importance to your opponent, then the declarant or other substitute evidence may be introduced instead. The ever present rule of PREPARE PREPARE PREPARE comes into play here—you cannot select the right strategy unless you know the options available to you opponent for proving the facts on the issue.

If documents or other exhibits contain what you believe to be hearsay, do not allow your opponent to rely on simple document-custodian foundation to introduce the exhibit into evidence. Try: "May it please the court, I object as the exhibit appears to contain hearsay and request *voir dire* of the witness to establish that there is not a foundation of personal knowledge and an exception does not apply…[add detailed objections as needed]." If the judge does not want to take the time, you made a record.

[2] If your opponent admits that truth is part of the reason, you should win. *See*, *First South Bank v. South Causeway, LLC*, 414 S.C. 434, ___, 778 S.E.2d 493, 500-501 (Ct. App. 2015).

The conspiracy exception to hearsay presents the greatest problem for an objecting party. Many trial courts will conditionally allow the evidence subject to the foundation if: (1) a conspiracy existed at the time of the statement; (2) the declarant made the statement in the course and furtherance of the conspiracy; and (3) the declarant and the party against whom the evidence is being admitted both belonged to the conspiracy. *See, e.g., U.S. v. Ramsey*, 785 F.2d 184, 191 (7th Cir. 1986); *U.S. v. Haimowitz*, 725 F.2d 1561, 1574-75 (11th Cir. 1984). This approach calls out for continuing objections, close record keeping on the issue as trial progresses, motions to strike, and curative instructions. If possible, when representing the party opposing admission of the evidence, insist that foundation come first and oppose conditional admission. *U.S. v. Bolick*, 917 F.2d 135 (4th Cir. 1990) (insisting on proper foundation for prior consistent statements prior to admission and reversing for new trial).

And I repeat, do not object if it is not important. Objections distract the jurors, who sometimes resent the interruption, and also cause some jurors to place unwarranted emphasis on what was said. This is particularly important if your objection did not cut off the answer to the question. However, when you are truly in doubt, OBJECT. You can neither exclude it nor receive post-trial or appellate review if you fail to object.

3. Motion *in Limine*, Motion to Exclude, and Motion to Strike

Motions *in limine,* to exclude, or to strike seek to prevent evidence from being considered by the finder of fact. Each refers to a different time, although motion *in limine* and motion to exclude are used interchangeably in some jurisdictions.[3]

[3] A motion to suppress evidence (not addressed in these materials) is used to keep out evidence obtained in an illegal or unfair manner by your opponent. Usually this applies to illegal search, seizure or illegally obtained confessions in criminal cases, although recorded phone conversations may be subject to such a motion in a civil proceeding.

Motions *in Limine*

A motion *in limine* is a pretrial request that evidence be found inadmissible and to bar any reference to the evidence at trial. *Black's Law Dictionary* p. 1109 (9th Ed. 2009). You should make this motion, not just to bring up a common evidentiary issue, but also because the mere mention of the evidence would be highly prejudicial and an instruction to disregard may be ineffective. *Id*. In practice, lawyers use the motion to bring up all kinds of evidentiary issues before trial. In Latin, *in limine* means literally "on the threshold," an accepted phrase for "at the start." Thus, the motion should be presented before trial in order to prevent the evidence being mentioned.

Motions to Exclude

In prior times, a motion to exclude differed from a motion *in limine* because a party made a pre-trial motion based on a definite matter, not a preliminary one. The motion to exclude preserves a record for appeal as a final ruling. Often, parties make a motion to exclude during trial, sometimes after the evidence has been preliminarily or conditionally admitted. In modern practice, with the exception of certain administrative proceedings,[4] many treat the two motions are interchangeable. I prefer to use *in limine* for pre-trial motions and exclude for motions during trial simply for organizational purposes. If you base your motion on a matter which should have finality without further rulings during trial, such as untimely disclosed evidence or *Daubert* issues for the unreliability of expert testimony, then it should be a motion to exclude and you should ensure the Court articulates the ruling as final, if possible.

[4] See, e.g. 37 C.F.R. §41.155, which make a distinction between motions to exclude to preserve objections in pre-filed evidence and a motion *in limine* seeking a ruling on admissibility in certain patent office proceedings.

In regard to expert testimony, the trial court acts as the "gatekeeper" and may exclude an expert's opinion because the expert is unqualified to offer it, or because the opinion itself is irrelevant or unreliable. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *Watson v. Ford Motor Co.*, 389 S.C. 434, 456, 699 S.E.2d 169, 180 (2010). The gatekeeping function of the trial court makes motions based on expert qualifications, reliability, and scientific/professional acceptance of expert techniques, and use of prior similar incidents all good subjects of a pre-trial motion to strike. While this has long been true in federal court, South Carolina decisions recently made clear the "meaningful gatekeeper function of the trial judge" in relations to expert testimony. S.C. R. Evid. 702; *Jamison v. Morris*, 385 S.C. 215, 228, 684 S.E.2d 168, 175 (2009). Whether made pretrial or during trial, a motion under Rule 702 to exclude expert testimony should be presented as a motion to exclude requesting that the trial court make a final ruling based on its gatekeeping function.

The other common use of a pre-trial motion to exclude comes when you wish to prevent the introduction of evidence based on late, unexcused disclosure in discovery or pre-trial disclosures. *See, e.g., Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996). The rules place a continuing duty on a party to supplement its discovery responses. S.C. R. Civ. P. 33(b); Fed. R. Civ. P. 26(e). "The trial court has the discretion to determine whether a sanction is warranted for a violation of Rule 33(b)'s continuing duty to disclose information." *Jenkins v. Few*, 391 S.C. 209, 219, 705 S.E.2d 457, 462 (Ct. App. 2010). Before excluding a witness as a sanction for violating the continuing duty to disclose information, the trial court should consider the following five factors: (1) the type of witness involved, (2) the content of the evidence, (3) the explanation for the failure to name the witness in answer to the interrogatory, (4) the importance of the witness's testimony, and (5) the degree of surprise to the other party. *Bensch v. Davidson*, 354 S.C. 173, 182, 580 S.E.2d 128, 133 (2003).

"Exclusion of a witness is a sanction which should never be lightly invoked." *Moran v. Jones*, 281 S.C. 270, 276, 315 S.E.2d 136, 139 (Ct. App. 1984). The best motions touch on and discuss all five factors when you are in Circuit Court.

Federal Rule of Civil Procedure 37(c)(1) requires excluding non-disclosed evidence except when the failure to disclose is either substantially justified or harmless. The same factors inform both prongs of the analysis. The federal test also contains five factors, but slightly different in emphasis:

> [I]n exercising its broad discretion to determine whether a nondisclosure of evidence is substantially justified or harmless for purposes of a Rule 37(c)(1) exclusion analysis, a district court should be guided by the following factors: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence.

*Southern States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596-97 (4th Cir. 2003).

If you are filing a motion *in limine* for its defined purpose—avoiding the mention of highly prejudicial evidence in any form—be sure to ask for the full relief you need. The motion should ask the Court to make a final ruling: (1) excluding the evidence; (2) forbidding counsel or witnesses from mentioning the evidence before the jury in statements, arguments, questions or testimony; and (3) warning that appropriate sanctions may issue if any of those occur before the jury.

This type of motion follows the traditional policy underlying true exclusion *in limine*. It allows a party to exclude from consideration of the jury a prejudicial matter without drawing attention to the matter by having to contemporaneously objection to it. See, J. Ghent, Annotation, *Modern Status of Rules as to Use of Motion In Limine or Similar Preliminary Motion to Secure Exclusion of Prejudicial Evidence or Reference to Prejudicial Matters*, 63 A.L.R.3d 311 § 1(a) (1975).

You can also use a motion *in limine* to raise substantive law questions which have not been previously briefed. For example, you can argue that the presence an integration clause in a contract makes any evidence of pre-execution promises or understandings irrelevant and, therefore, inadmissible. The motion *in limine* drafted in this way takes the place of a motion for partial summary judgment.

Motions to Strike

What if the inadmissibility of the evidence becomes apparent after it is already before the jury? Then you use the motion to strike. Fed. R. Evid. 103(a)(1)(A); S.C. R. Evid. 103(a)(1). Most commonly this happens when the witness' answer makes the evidence inadmissible. For example, the lawyer's question calls for what arguably is an admissible answer, but the witness responds with a non-responsive or hearsay answer. Similarly, if the witness responds before opposing counsel can object or during the objection, move to strike. The motion should always be accompanied by a request for an instruction that the jury disregard the evidence.

The request for a limiting instruction cannot be left out. Even if you object and the court sustains the objection, if you do not move to strike and instruct the jury no error is preserved. The evidence is in for what it is worth and the best you can do is remind the jury in closing that the judge sustained your objection so that evidence should not be considered.

> On appeal, Thompson contends the trial judge erred in allowing hearsay identification testimony. The record reveals, however, the trial judge sustained defense counsel's objections to the testimony of which appellant complains. No motion to strike, no request for instruction that the jury disregard the testimony, nor a motion for a new trial based on the admission of the testimony was made at trial. Appellant has failed to preserve this issue. He obtained the only relief he sought and this court, therefore, has no issue to decide.

*State v. Thompson*, 304 S.C. 85, 87, 403 S.E.2d 139, 140 (Ct. App. 1991) (citations omitted).

You must weigh the value of the motion to strike. You cannot preserve error without it, unless the admission of the evidence rises to the plain error level of Fed. R. Evid. 103(e). When you are making a motion to strike, the jury has already heard the evidence. The prejudice exists. You must decide whether a limiting instruction will be effective or will the jury keep the prejudicial evidence in mind? If you fail to make the motion to strike, you are gambling that a federal appellate court will find plain error and reverse a bad result. Thus, you normally should make the motion to strike. Keep in mind, however, that if you prevail on the motion to strike, an appellate court will most likely find the curative instruction precludes any harm to your client. *See, e.g., U.S. v. Collins*, 372 F.3d 629, 634 (4th Cir. 2004); *U.S. v. Hayden*, 85 F.3d 153, 158 (4th Cir. 1996). There is no "plain error" exception in South Carolina evidence law so this strategy does not apply. (S.C. R. Evid. 103, reporter's comments).

The second, and much less common, occurrence that calls for a motion to strike is when later evidence, or lack thereof, shows previously admitted evidence is actually inadmissible. This occurs with the "I will connect the dots in a few minutes your honor" or with conditionally admitted evidence. In order to

make a record for review, opposing counsel must point out to the court the failure to put in necessary evidence to make the earlier evidence admissible or the circumstances which make it inadmissible later in the case. *Richland County v. Lowman*, 307 S.C. 422, 425, 415 S.E.2d 433, 435 (Ct. App. 1992) (Referee admitted expert appraisal testimony conditioned on later hearing foundation, since opposing party did not make a later motion to strike based on lack of foundation, error not preserved); *U.S. v. Bolick*, 917 F.2d 135, 149 (4th Cir. 1990) (Trial judge admitted corroborative testimony regarding the source of cocaine over the objection of defendant but conditioned on later establishment of foundation; since defendant failed to move to strike on that basis at end of government's case, error not preserved). The proper vehicle is a motion to strike.

As will be discussed in motions on sanctions below, this second type of motion to strike often should be combined with a motion for mistrial. The prejudicial effect of the improperly admitted evidence, together with the time the jury has been allowed to consider it without any limiting instruction, may require a mistrial.

4. Motions for Sanctions

Three situations usually prompt the filing of motions for sanctions related to evidence. If your opponent hides, destroys, or fails to preserve evidence during discovery, you can make a motion for sanctions based on spoliation. If your opponent attempts to use evidence not disclosed in a timely fashion in discovery or pre-trial findings, you can seek certain sanctions. Finally, if your opponent disregards the court's rulings excluding evidence, you may seek sanctions.

The sanctions range from monetary relief to an adverse-inference jury instruction on the destruction of evidence to a presumption in your favor regarding certain facts or an issue to striking the opposing party's pleadings and entering judgment

in your favor. When a former corporate-officer defendant destroyed evidence on a computer hard drive in violation of a court order to turn over the hard drive to the plaintiff, the Court of Appeals affirmed striking the answer and entering judgment for the plaintiff in *QZO, Inc. v. Moyer*, 358 S.C. 246, 257-58, 594 S.E.2d 541, 547-48 (Ct. App. 2004). When a party repeatedly violates orders compelling discovery, the court may strike pleadings and enter judgment as a sanction. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 489 S.E.2d 679 (Ct. App. 1997). The appropriate sanction for violation of discovery duties or orders lies in the trial court's discretion. *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990); *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). The standard makes it difficult to prevail on appeal, as there must be a clear error of law or factual conclusion without evidentiary support.

In the federal courts, the authority to impose sanctions for destroying, altering, or failing to preserve evidence comes from the inherent power to control the judicial process. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). The trial court enjoys broad discretion in crafting an appropriate sanction and will only be reversed if abused. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991); *Silvestri*, 271 F.3d at 590. A district court enjoys broad discretion to select a fitting response, which should serve the twin purposes of "leveling the evidentiary playing field and . . . sanctioning the improper conduct." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Dismissal or entry of judgment is the most severe sanction allowed and should only be used if no other sanction is justified and the party despoiling the evidence acted intentionally or with a reckless disregard and with great prejudice to the other party's case. Contempt, fines, and jail time can also be used, but may be criminal in nature requiring a different level of consideration and review. *See*, *Bradley v. American Household, Inc.,* 378 F.3d 373 (4th Cir. 2004).

In order to maximize the sanction imposed, include in your motion specific evidence by affidavit, admission, document, or otherwise showing how the opponent altered, destroyed, or concealed the object, document, or other evidence. You must then establish why the altered, destroyed, or concealed evidence prejudiced your client's case. Finally, include all relevant facts established by affidavit, deposition testimony, or other admissible evidence supporting your opponent's intent, bad faith, or reckless disregard. Be sure to keep careful time entries and expense logs related to your investigation of the spoliation and the research, preparation, and drafting of the motion and supporting materials. If the court finds spoliation, it will likely compensate your client for the expenses and fees involved in uncovering and seeking relief for the spoliation. With certain exceptions, the federal rules require such compensation if a motion is granted. Fed. R. Civ. P. 37(a)(5)(A) and 16(f)(2).

I discussed above the use of a motion to exclude as a sanction for failure to timely disclose evidence in discovery or under a pre-trial order. The exclusion of such evidence is a sanction. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434-35, 673 S.E.2d 448, 457 (2009). Other lesser sanctions may be imposed as well. A trial judge must weigh the nature of the discovery request or pretrial requirement, the posture of the case, the willfulness of the non-disclosing party, and the prejudice to the other party. If the judge does not review these factors, then the judge failed to exercise discretion and any sanction or failure to impose a sanction may be an abuse of discretion. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 270, 644 S.E.2d 755, 767 (Ct. App. 2007). Courts may also exclude a witness from testifying at trial as a sanction for non-disclosure, but again this is viewed as a severe sanction and must be justified. *Jenkins v. Few*, 391 S.C. 209, 219, 705 S.E.2d 457, 462 (Ct. App. 2010). If the trial court allows for a recess and deposition or *in camera* voir dire of the witness to cure prejudice, lesser sanctions such as paying the other party's

fees and costs related to the motion and deposition should be considered.

Know your full range of sanctions available for violation of a discovery order: "(A) ordering that certain matters or designated facts be deemed established in accordance with the claim of the party obtaining the order; (B) prohibiting the party from supporting or opposing designated claims or defenses, or prohibiting him from introducing certain matters into evidence; (C) striking the pleadings or parts thereof, dismissing all or part of the action, or rendering a judgment by default against the disobedient party; and/or (D) treating the violation as a contempt of court." S.C. R. Civ. P. 37(b)(2).

Note that the same general principles apply in criminal cases. *State v. Landon*, 370 S.C. 103, 634 S.E.2d 660 (2006) (holding a violation of Rule 5, S.C. R. Crim. P., is not reversible unless prejudice is shown); *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452 (1996) (holding the proper remedy when a party fails to comply with Rule 5 is to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the undisclosed evidence, or such other order as it deems just under the circumstances); *State v. Salisbury*, 330 S.C. 250, 498 S.E.2d 655 (Ct. App. 1998), *aff'd as modified*, 313 S.C. 520, 541 S.E.2d 247 (2001) (holding the denial of a motion to suppress evidence based on a Rule 5 violation is within the discretion of the trial judge and will not be disturbed absent an abuse of discretion).

In federal court, the rules provide for other sanctions, but exclusion is the default as discussed above. Other sanctions include award of fees and costs, an instruction to the jury regarding the failure, or any of the orders that can be issued on a motion to compel. Fed. R. Civ. P. 37(c)(1). Repeated discovery abuses combined with a failure to cure the prejudice caused to the opposing party can result in dismissal of a plaintiff's case or entry of judgment against a defendant. *See,*

*Projects Management Co. v. Dyncorp Internat'l, LLC,* 734 F.3d 366 (4th Cir. 2013).

In order to maximize your chances of excluding the late-disclosed evidence and maximize monetary chances, you must present credible evidence regarding the materiality of the evidence, the prejudice to your client, and the willfulness or recklessness of your opponent. If you can show a pattern of failures to comply or late compliance with requirements of the rules and court orders, you improve your chances.

Knowing that each attempt to introduce objectionable evidence may lead to a waiver of the earlier-granted objection, your opponent may attempt to try over and over again. If changed circumstances might justify a different ruling, your opponent would be following the proper course. If, however, your opponent's efforts represent "trickeration" (a colloquialism developed by football announcers for trickery) it shows disrespect for the court, delays trial, and may be subject to sanctions. When your opponent repeatedly attempts to bring in evidence excluded on the traditional *in limine* grounds of being highly prejudicial and difficult to cure by limiting instruction, then sanctions become more appropriate.

Courts recognize that a violating of an order granting a motion *in limine* violates both professional standards and counsel's duty to the court. *Burdick v. York Oil Co.*, 364 S.W.2d 766, 770 (Tex. Civ. App. 1963). An attorney will be sanctioned independently of his client for ignoring the court's objectively final *in limine* ruling. An attorney used evidence consisting of altered medical records in violation of an *in limine* ruling in *In re Gould*, 77 Fed.Appx. 155 (4th Cir. 2003). The trial court determined the evidence to be highly prejudicial both at the *in limine* stage and after its wrongful introduction and, therefore, granted a motion for mistrial. The Fourth Circuit affirmed an order requiring the attorney to pay fees and costs to the opposing party. *Id*. The court found that the attorney's failure to approach the bench and raise the issue out of the hearing of

the jury an important supporting factor to sanctions pursuant to 28 U.S.C. § 1927. The statute provides that any attorney admitted to a court of the United States who vexatiously and unreasonably multiplies proceedings shall personally pay the excess costs, expenses, and attorney's fees incurred because of the attorney's misconduct. Bad faith is a precondition to the award; it cannot be based on mere negligence. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 411 n. 14 (4th Cir. 1999). Likewise, duplicative litigation raising the same issues already ruled on *in limine* or otherwise can lead to a different sort of sanction, even when you prevail in the case. The victorious plaintiff saw a 60% reduction in its attorneys' fee award request based, in large part, on misconduct in re-litigating issues already ruled upon including motion *in limine* issues, in *Uhlig, LLC v. Shirley*, 895 F.Supp.2d 707, 713-14 (D.S.C. 2012).

In seeking sanctions for in-court violations of an *in limine* order, stress the prejudicial effect and the intent of opposing counsel. Request a mistrial, not just a curative instruction.

5. Curtailing Speaking Objection

We all know about the rules against speaking objections in depositions that are used to coach a witness on how to answer. The elusive boundary between making an objection on clear grounds that allow the opponent a chance to cure, and give the court a basis for ruling, on one hand, and coaching the deponent, on the other hand, is beyond the scope of this presentation. A speaking objection at trial serves a very different purpose. Counsel uses a speaking objection to make an argument to the jury disguised as an objection. *See, State v. Douglas*, Case No. 2004-UP-599 (2004 WL 6337240) (S.C. Ct. App. Nov. 30, 2004) (Note 1: "We further note that the jury had the benefit of Douglas's response to the State's argument through counsel's speaking objection, i.e., "I never said it didn't happen. I simply said they can't determine identity of the people involved from forensic evidence." This reply to the jury by Douglas's counsel, disguised as an

objection to the court, mitigates against a finding of prejudice resulting from the improper argument.") As both federal and South Carolina cases note, the rules of examination at trial do not allow counsel to interrupt trial testimony to make a statement and the same extends to depositions. *In re Anonymous Member of South Carolina Bar*, 346 S.C. 177, 191, 552 S.E.2d 10, 17 (2001); *Hall v. Clifton Precision, a div. of Litton Sys., Inc.*, 150 F.R.D. 525 (E.D. Pa. 1993).

A speaking objection goes "beyond what is necessary to give the grounds on which the objection is based." Cornell Univ. Law School, Legal Information Institute, Wex Legal Dictionary. Articulating in a way the jury can understand why you are objecting, is not a speaking objection. McElhaney's Trial Notebook in the section on Foundations and Objections gives some great examples:

- Objection, Your Honor. The jury cannot evaluate the credibility of the speaker who is not in court, hearsay.

- Objection, Your Honor. The question tells the witness how to answer, leading.

- Objection, Your Honor, it is unfair for counsel to discuss a document not present in court. This is not the best evidence.

- Objection, Your Honor. The question calls for testimony that has nothing to do with this case. May we approach?

A true speaking objection tries to introduce argument or "lawyer evidence" to the jury. It is improper. You can spot the speaking objection. If the objection goes beyond the type of objection rule that is violated, and the legal grounds for the objection include comment, argument, or elaboration not directly related to why the evidence should be excluded, you should cut it off. *U.S. v. Robinson*, 922 F.3d 1531 (11th Cir. 1991).

You must interrupt the speaking objection. Be polite but firm. "Your Honor, please pardon the interruption, but I request counsel approach so that we can address this objection with the Court." When you approach be able to delineate for the judge how the objection really constitutes impermissible argument to the jury as it goes beyond stating the grounds and, in any event, that it should be addressed here, at sidebar. You should show the judge why the objection prejudices your client and request an instruction to counsel regarding the objection and a curative instruction to the jury. If the material in the objection is so prejudicial a curative instruction likely will not help, ask for a mistrial.

6. Use of the Sidebar Conference

In order to conserve time, many trial judges use the side bar to discuss evidence out of the hearing of the jury. The practice involves approaching the bench and arguing the evidentiary issue or requesting a fuller opportunity to argue or proffer with the jury excused. You must know your courtroom. A sidebar only works if the jury really cannot hear any of the discussion. The appellate court will assume the jury could not hear, even if that was not the case.

A trial judge will sometimes suggest that the sidebar need not be on the record. Never agree to that proposal. If it is not on the record, nothing is preserved. The court reporter needs to reposition and be able to take down the entire conference. If that is not possible, ask for the jury to be excused.

When a sidebar conference occurs without a stenographer, it is not a part of the record at trial unless reiterated on the record. *Davis v. Davis*, 372 S.C. 64, 86, 641 S.E.2d 446, 457 (Ct. App. 2006). "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997); *Benton v. Davis*, 248 S.C.

402, 410, 150 S.E.2d 235, 239 (1966); *State v. Fletcher*, 363 S.C. 221, 250, 609 S.E.2d 572, 587 (Ct. App. 2005), *rev'd on other grounds*, 379 SC. 17, 664 S.E.2d 480 (2008). However, it is sufficient if the party puts the grounds or arguments and the trial judge's ruling in the record at a later time during the trial. *See State v. Hamilton*, 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001), *overruled on other grounds*, *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Bostick*, 307 S.C. 226, 228, 414 S.E.2d 175, 176 n. 1 (Ct. App. 1992); see also *City of North Charleston v. Gilliam*, 311 S.C. at 254, 428 S.E.2d at 721 (rulings made buy trial judge at sidebar conferences without presence of court reporter may still be preserved for appellate review if they are reiterated for the record when the case is called for trial or trail resumes)." *Id*. If for any reason a sidebar ends up off the record and you do not prevail on a ruling, as soon as record proceedings resume, ask the court for permission to reiterate the sidebar for the record. If refused, make a proffer of your position.

Remember that a statement limiting evidence or providing it is for a limited purpose in a sidebar will be found ineffective—it was not addressed to the jury. *U.S. v. Ince*, 21 F.3d 576, 584 (4th Cir. 1994). If you propose evidence and tell the court it is for a limited purpose or otherwise needs a limiting instruction during a sidebar, make sure to put the limitation on the record in front of the jury afterwards. A federal statute requires verbatim recording of every court session, and in criminal cases it applies to sidebars. *U.S. v. Winstead*, 74 F.3d 1313, 1321 (D.C. Cir. 1996). EXTRA TIP: In a federal civil trial, proposed jury instructions and arguments off the record pre-trial or at sidebar WILL NOT preserve error as to improper jury charge. You must object on the record and provide a basis for the error. *Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 154 n. 6 (4th Cir. 2012).

7. Jury Instructions After the Objection

After an objection, a jury charge may be needed. If the court admits evidence under certain conditions, a limiting instruction may be needed. Typical examples include evidence admitted for a limited purpose or evidence admissible against only one of multiple parties or the evidence is only partially admissible. In each case, the court must deliver a limiting instruction telling the jury how to consider the evidence.

An example is evidence of other crimes. When the prosecution prevails on admitting evidence of a prior crime not a part of the *res gestae* of the crime being prosecuted, the trial court MUST give a limiting instruction. It is error not to tell the jury to only consider the evidence for the limited purpose. *State v. Timmons*, 327 S.C. 48, 54-55, 488 S.E.2d 323, 326-27 (1997) (error not to instruct jury to only consider other crimes evidence for proof of common scheme or plan). In a civil context, evidence of other railroad crossing deficiencies came in during a wrongful death trial in *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 655, 625 S.E.2d 440, 449 (2005). The trial court gave no instruction limiting the evidence to the issue of punitive damages. Since the jury may have relied on the evidence in determining negligence, the Supreme Court reversed. A curative instruction delivered later in the case may also be considered sufficient to remove prejudice. *Judy v. Judy,* 384 S.C. 634, 644, 682 S.E.2d 836, 841 (Ct. App. 2009).

If the party objecting prevails on excluding the evidence, but the jury heard all or a portion of it, then the objecting party must request an instruction to disregard the evidence. Similarly, if the question asked by proposing counsel gives the jury all or a part of the evidence, an instruction should be requested. For example, when a prosecutor cross-examines a defendant's expert witness and mentions a notorious criminal that the expert also worked with, a limiting instruction should be requested. The limiting instruction needs to be strong. When such an inference is isolated, the limiting instruction is assumed to work. See, e.g., *U.S. v. Lamb*, 155 F.3d 562 (4th Cir. 1998) (Unpublished opinion **attached**); *U.S. v. Harrison*,

716 F.2d 1050, 1052 (4th Cir. 1984). The limiting instruction needs to closely follow the damaging testimony to be effective. Once a limiting instruction is made, the courts presume the jurors will follow it. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

If the objection itself contained improper information the jury should not consider, the party opposing the objection needs to ask for an instruction to disregard, that counsel's objections are not evidence, or properly limiting what was said.

If you object to closing argument by your opponent, it will often come after the other lawyer said the offending statement. If you fail to ask for a curative instruction, error will not be preserved and your client will not receive effective relief even if the court rules in your favor by sustaining the objection. Ask for an instruction to disregard the statement, including the key phrases that it is not evidence and not to be considered in any way. If you do not raise the issue and request the curative instruction, you waive the error. *See, e.g., Kalchthaler v. Workman,* 316 S.C. 499, 503, 450 S.E.2d 621, 622-23 (Ct. App. 1994). A curative instruction almost always relieves the prejudice, even in a capital murder trial, unless the improper argument was so extreme that the trial was fundamentally unfair. *Humphries v. Ozmint*, 397 F.3d 206, 218 (4th Cir. 2005).

If the curative or limiting instruction involves a complex issue, request a recess to craft your request to the trial court.

B. Preserving Evidentiary Issues for Appeal

Preservation for appeal does not constitute a level playing field for the parties. When the trial court has denied the objection, the objecting party may only rely on the grounds stated below, unless a rare exception exists. *See, e.g., United States v. Whitaker,* 127 F3d 595, 600 (7th Cir. 1997) ("A specific objection made on the wrong grounds and overruled precludes a party from raising a specific

objection on other, tenable grounds on appeal."). The party that prevailed on admitting evidence can, however, rely on any ground apparent from the record, even if the ground specified by the trial court turns out to be incorrect. S.C. App. Ct. R. 220(c); *United States v. Barone*, 114 F3d 1284, 1296 (1st Cir. 1997) ("We may affirm the district court's evidentiary rulings on any ground apparent from the record on appeal.").

Why you might ask? The courts want to give each litigant their day in court, once. The government designs the rules to make the outcome final whenever possible, as a retrial stresses the system and delays the cases behind from getting a first full and fair hearing.

The techniques discussed below will help you preserve your position for appellate review.

1. Timing and Frequency of Objections

The most-effective and likely-to-succeed objection comes BEFORE the evidence comes out in court. Modern procedure for exhibit exchange, pre-marking, and pre-trial objections makes this much less of a challenge for documents and other exhibits. It remains tricky when an opponent uses an exhibit for an unexpected purpose or an undisclosed exhibit used on cross examination or rebuttal.

Do your best to object to a question posed to a witness before the answer begins. If you cannot, interrupt the answer. I will say "Excuse me Ms. Witness, but I have an objection I must take up with her Honor," when I am before a judge who will allow it. Many judges do not like you addressing a witness when you are not the questioning attorney, so know your court!

If the witness insists on speaking over your objection, do not hesitate to ask the Judge for an instruction to the witness to wait until the objection is ruled upon and the Judge tells them to answer or not.

If you are unsure if the matter is objectionable and whether the evidence materially helps the opponent's case or hurts your case OBJECT. Without a timely objection you will almost certainly lose the issue at trial. Jurors may not like the interruption, but they will understand that it is a necessary part of the case. Try to be polite and articulate your objections in an understandable fashion. DON'T BE A JERK. You may know your opponent is trying the same thing a slightly different way for the tenth time and that is annoying, but do not show your annoyance or irritation in open court. Save that argument for the side bar and ask the Judge to instruct your opponent to stop.

Once again, I stress the old law school and CLE theme of preparation and more preparation. Ask yourself these questions:

- What evidence, arguments and potential prejudicial tactics might my opponent use to attack my theory of the case?

- What relevant and sustainable objections can I make to those tactics? (remember, "it hurts" is NOT a good objection—it just emphasizes the negative evidence and then doesn't get sustained; object when you have a reason or a serious doubt that the evidence can be admitted)

- What evidence and arguments will my opponent offer in support of his or her theory of the case?

- What relevant and sustainable objections can I make to that evidence and those arguments?

If you thoroughly prepare and know the answers to these questions, objections will come much more easily. Once you know the theories and evidence, it is time for legal research.

You must decide if a motion *in limine* should be filed. Even if you decide not to file a motion, bring copies of the cases supporting your objection (and any you might think important to distinguish if the other side is prepared) in folders.[5]

If you have the luxury of another attorney or attorneys at trial with you, they can assist in spotting objectionable evidence. Discuss how you want them communicating this to you in advance of trial.

If your objection didn't come before the evidence came out in Court, MAKE IT ANYWAY. You must to get a ruling. If sustained, you then ask for an appropriate remedy: strike the testimony, curative instruction, or mistrial. You must object every time your opponent attempts to introduce the same testimony or other objectionable evidence.

Never let the judge bully you into withdrawing an objection you believe has any merit. It makes you look foolish to the trier of fact and it destroys any chance for appellate review. If you prepared, you should have faith in your objections as reasonable issues.[6]

Standing objections can be dangerous. The basic rule states that once a party objects and is overruled, it need not repeat the objection each time the evidence comes up. 88 C.J.S. Trial §217 (West 2015). In order for this to work, you must ask the trial court for permission to treat the objection as continuing and get that permission on the record, not just in an unreported side bar. This procedure carries great risk—the objection cannot be overbroad and the later evidence must be the same kind and nature of evidence. *Id*.

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[5] (Electronic folders work if you are comfortable organized by topic and specific evidence or witness likely to bring up the issue).

[6] In federal criminal cases motions to suppress evidence as improperly seized or obtained MUST be filed pre-trial and, absent an extraordinary circumstance, will be waived once trial commences. *U.S. v. Wilson*, 115 F.3d, 1185, 1190 (4th Cir. 1997); Fed. R. Crim. P. 12(b)(3)(C).

If, however, the evidence is excluded on objection, or if a question asked and objected to is not answered, YOU MUST repeat the objection when the evidence is again offered or the question again asked. *Id*. If a question is repeated in a different form after you object to the original question, then YOU MUST make an additional objection. *Id*.

In South Carolina state court, a generalized continuing objection "is wholly inconsistent with our law requiring a contemporaneous objection." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 59, 777 S.E.2d 176, 189-90 (2015). Further, standing objections rarely apply to hearsay issues as the foundation for who the declarant may be, and possible exceptions will almost always vary. *See, e.g.*, *U.S. v. Roach*, 164 F.3d 403, 410 (8th Cir. 1999). I advise against trying to use one in almost every instance.

Continuing objections, including those voiced outside the presence of the jury in side bars (but still on the record), receive somewhat more favorable treatment in the federal courts. *U.S. v. Ghiz*, 491 F.2d 599 n. 1 (4th Cir. 1974). However, a party must not only present and argue an objection, but if the trial court admits the evidence the objecting party must point out any specific error articulated by the trial court, not just rely on a continuing objection based on prior argument that does not alert the trial court to the supposed error in admitting the evidence. *Daskarolis v. Firestone Tire and Rubber Co.*, 651 F.2d 937, 940-41 (4th Cir. 1981); *Subecz v. Curtis*, 483 F.2d 263, 266 (1st Cir. 1973). A motion to strike, discussed above, can be a very effective tool for preserving the real issue after admission on an unexpected ground. *Daskarolis*, 651 F.2d at 941. See also, *Malbon v. Pennsylvania Millers Mutual Insurance Co.*, 636 F.2d 936 (4th Cir. 1980) (party's failure to call to district court's attention its omission to rule on one of party's contentions deprives district court of opportunity to rule in the first instance and precludes party from raising omission to rule on appeal).

The better approach is to object each time. You can phrase your objection in such a way, politely of course, to make clear to the jury that your opponent is attempting to get around the judge's earlier ruling. If the opponent insists on the repeated attempt, use a side bar as discussed above to get a limiting instruction. Just make sure the instruction is on the record.

2. Specificity of Objections

Objections must inform the trial court why the evidence should be rejected so that it receives an opportunity to consider and rule on the relevant issue. *State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (holding that a contemporaneous objection ruled on by the trial court must be stated in a "sufficiently specific manner that brings attention to the exact error."); *U.S. v. Stewart*, 256 F.3d 231, 239 (4th Cir. 2001) (contemporaneous objection rule ensures trial court avoids errors that might necessitate time-consuming retrial and prevents "sandbagging" and issue for new trial or appeal); *United States v. Vargas*, 471 F3d 255, 262 (1st Cir. 2006). The requirement does not mean that you must include a rule number or a specific legal citation. However, many practitioners direct the judge to the specific rules of evidence involved. This does not constitute a "speaking objection" meant to impact the jury and often it can alert the trial court to the specifics of the objection. Obviously, this requires a thorough knowledge of the appropriate rules of evidence.

A good objection states specific grounds to support excluding the evidence. A general objection will not suffice. "[A] general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for review." *State v. Patterson*, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997) (citations and internal quotation marks omitted); *United States v. Swan*, 486 F.3d 260, 264 (7th Cir. 2007) (objection "hearsay" not sufficient to raise issue that witness not an agent of party opponent); *United States v. Moore*, 923

F2d 910, 915 (1st Cir. 1991) (objection "foundation" failed to properly raise issue that computer records not reliable); *Hollywood Fantasy Corp. v. Gabor*, 151 F.3d 203, 211 (5th Cir. 1998) (objection "no foundation" failed to raise issue that question called for expert opinion from lay witness).

Let's look at some examples of good objections.

- "May it please the court, the statement offered from the book constitutes hearsay as the witness is not the author and no foundation exists that the book is a generally accepted learned treatise in the field of _____, Rules 802 and 803(18)."

- "May it please the court, the offered business record contains subjective opinions that constitute inadmissible hearsay not within the exception found at Rule 803(6)."[7]

3. Motions *in Limine*

Pre-trial motions present special preservation problems. The trial court MUST characterize its ruling granting your motion *in limine* as a final ruling. I like to include specific instructions that instruct the opponent not to mention or attempt to introduce the evidence in the order, preferably on pain of sanctions being considered, to make crystal clear for the reviewing court that no issue remained open for my opponent to revisit at trial.

State courts in South Carolina tend to view *in limine* rulings as preliminary without strong evidence of finality. On the other hand, federal courts view *in limine* rulings as final absent some reservation or other indication of matters needing attention at trial.

[7] **NOTE**: This objection highlights an important distinction between federal and state practice. There is no federal limitation on subjective opinions in business records (records of regularly conducted activity) if the document meets all the other conditions. The State rule differs.

Even if you prevailed on a motion *in limine*, failure to object at trial may lead to waiver of the objection. Here is the relevant law in South Carolina state court:

> In most cases, `[m]aking a motion in limine to exclude evidence at the beginning of trial does not preserve an issue for review because a motion in limine is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced.' *See State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996). However, where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection. The issue is preserved:
>
> > Because no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, ... [the] motion was not a motion in limine. The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal.
>
> *State v. Mueller*, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct. App. 1995). Here, the witness introducing the cocaine for the state was the initial witness in the trial. No evidence was taken between the trial court's ruling on the admission of the cocaine and its introduction. Since no

> opportunity existed for the court to change its ruling, Forrester did not need to object a second time to the introduction of the cocaine for the issue to be properly preserved for review. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997); see also Toal, Vafai, & Muckenfuss, Appellate Practice in South Carolina 76 (1999).

*State v. Forrester*, 343 S.C. 637, 643-43, 541 S.E.2d 837, 840 (2001). Even if the disputed evidence does not come immediately after the *in limine* ruling, the issue will be preserved IF the trial court clearly and unambiguously indicated that its ruling to exclude was a final ruling. *State v. Wiles*, 383 S.C. 151, 157, 679 S.E.2d 172, 175 (2009); *State v. Atieh*, 397 S.C. 641, 646-47, 725 S.E.2d 730, 733 (Ct. App. 2012).

On the other hand, the Fourth Circuit views an order granting a motion *in limine* that says it is "preliminary" as immediately appealable if the relief granted appears final. *U.S. v. Siegel*, 536 F.3d 306,314 (4th Cir. 2008).

4. Offers of Proof

An offer or proof (also called an "avowal") comes when the trial court indicates it will exclude evidence you have proposed or is uncertain of its admissibility. The offer serves two purposes. First, it preserves for appellate review the exclusion of the evidence. Second, it may persuade the trial judge to admit the evidence. An offer of proof must be given to the trial court in order for an appellate court to review any error in excluding evidence, unless the substance of the evidence appears clear on the record. Offers of proof occur without the jury being present.

> Offer of Proof (17c) Procedure. A presentation of evidence for the record (but outside the jury's presence) usually made after the judge has sustained an objection to the admissibility of that

> evidence, so that the evidence can be preserved on the record for an appeal of the judge's ruling. An offer of proof, which may also be used to persuade the court to admit the evidence, consists of three parts: (1) the evidence itself, (2) an explanation of the purpose for which it is offered (its relevance), and (3) an argument supporting admissibility. Such an offer may include tangible evidence or testimony (through questions and answers, a lawyer's narrative description, or an affidavit).

B. Garner, *Black's Law Dictionary*, 10th Ed. 2014 (West).

The rules of evidence place you on notice of the need for an offer of proof. Fed. R. Evid. 103(a)(2); S.C. R. Evid. 103(a)(2). The rules also memorialize the principle that offers should be made outside the presence of the jury. Fed. R. Evid. 103(d); S.C. R. Evid. 103(c). While both rules state that a proffer need not be done when the substance of the evidence appears from the context, (*Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 174 (1988) (evidence abundantly clear from record without proffer)), you should almost always make an offer of proof. The South Carolina rule differs from the federal rule in that it specifically requires the party proponent to make a statement of the basis for admissibility, but you should do so as a standard practice in any jurisdiction.

Two ways exist to make the proffer: formal and informal. The traditional, and time consuming, method presents a formal offer of proof with a sworn witness engaged in question and answer, full foundation for any exhibits, and presentation of the exhibit. In an informal proffer, counsel identifies the witnesses or exhibits that would be offered and describes them providing the exhibits. An informal proffer can consume much less time but introduces certain risk.

If you want to use an informal proffer, ask the trial court for permission! Make sure your opponent receives an opportunity to object and call for a formal proffer and waives the objection. As one judge summarized:

> A trial court may deem an informal offer of proof sufficient if counsel informs the court, with particularity, (1) what the offered evidence is or what the expected testimony will be, (2) by whom it will be presented, and (3) its purpose. However, an informal offer is inadequate if counsel (1) `merely summarizes the witness' testimony in a conclusory manner' or (2) offers unsupported speculation as to what the witness would say. In deciding whether to permit an informal offer of proof, the court should ask itself the following questions: (1) Are counsel's representations accurate and complete? and (2) Would a better record be made by requiring counsel to make a formal offer of proof, even though doing so might be inconvenient and require more time?

*In re Marriage of Miller,* 359 Ill.App.3d 659, 663, 834 N.E.2d 578, 581-82, *vacated,* 217 Ill.2d 564, 838 N.E.2d 4 (2005).

The trial court's refusal to allow an offer of proof, after excluding the evidence, constitutes prejudicial error unless the nature of the evidence and the basis for excluding the evidence appear from the record without the proffer. *Elrod v. Elrod*, 230 S.C.109, 94 S.E.2d 237 (1956). You must push the trial judge to rule on you proffer. Simply making the proffer and being told no off the record or without a definitive ruling will not preserve the error.

The offer of proof must show the court why the evidence offered is both relevant and admissible over the objections raised by your opponent.

The failure to make a proffer will often prevent any appellate review of the issue. *State v. Simmons*, 360 S.C. 33, 46, 599 S.E.2d 448, 454 (2004) (stating the failure to make a proffer of excluded evidence will preclude review on appeal); *State v. Santiago*, 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006) (requiring a proffer of testimony to preserve the issue of whether testimony was properly excluded by the trial judge and stating an appellate court will not consider alleged error in the exclusion of testimony unless the Record on Appeal shows fairly what the excluded testimony would have been); *State v. Hawkins*, 310 S.C. 50, 54, 425 S.E.2d 50, 57 (Ct. App. 1992) (declining to rule on the court's alleged error of excluding evidence when no proffer was made, and the excluded evidence was not contained in the Record); *see also, Rental Uniform Service of Greenville v. K&M Tool and Die, Inc.*, 292 S.C. 571, 574, 357 S.E.2d 722, 724 (Ct. App. 1987). You do not want to rely on the exception allowed when both the nature of the evidence and the prejudice caused by exclusion are clear from the record. *State v. King*, 367 S.C. 131, 136, 623 S.E.2d 865, 868 (Ct. App. 2005). You control the proffer and can shape it to preserve your issues. The exception will be a "crap shoot," with appellate courts inclined not to review the issue.

An offer of proof need not occur at a particular point in trial, but waiting until after judgment will foreclose your position. *Collins Entertainment Corp. v. Coats and Coats Rental Amusement*, 355 S.C. 125, 144-45, 584 S.E.2d 120, 130 (Ct. App. 2003). While the proffer need not be made at the point of objection, it should be raised then. One useful method is to raise it and ask the court for permission to prepare a proffer overnight. You can then place your proffer in writing, make sure all the elements of the evidence are included, and make an argument supported by authorities. You can also articulate why you believe it necessary to actually examine the witness or present the proof live outside the presence of the jury. All those points will then be written, in the record, and up for review at the next level—or may persuade the trial judge to go ahead and allow the evidence.

May all your evidence be admitted and all your objections sustained!

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# Find

## U.S. v. Lamb, 155 F.3d 562, 1998 WL 413995, 4th Cir.(N.C.), July 23, 1998, (No. 97-4196)

155 F.3d 562
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.
United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
David Howard LAMB, Defendant-Appellant.

No. 97-4196.
|
Argued April 9, 1998.
|
Decided July 23, 1998.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. WILLIAM L. OSTEEN, Sr., District Judge. (CR-96-39)

**Attorneys and Law Firms**

Gregory Davis, Assistant Federal Public Defender, Greensboro, North Carolina, for Appellant.

Walter C. Holton, Jr., United States Attorney, Greensboro, North Carolina, for Appellee.

ON BRIEF: John Stuart Bruce, Acting Federal Public Defender, Greensboro, North Carolina, for Appellant.

Before WIDENER and LUTTIG, Circuit Judges, and DOUMAR, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

**OPINION**

PER CURIAM.

*1 David Howard Lamb appeals his convictions and sentences arising out of a two-count indictment for threatening a federal agent (Count I), and possession of a firearm by a person having been committed to a mental institution (Count II). For the reasons stated herein, we affirm.

**I.**

Lamb, who has a long history of mental instability (including multiple instances of involuntary commitment) and dangerous, threatening behavior, left the following message in an angry, menacing tone on the answering machine of Dan Wozniak, the agent in charge of the FBI's office in Greensboro, North Carolina:

> This message is for Special Agent Daniel Wozniak. It is from David Howard Lamb. He's got my number. The message is [pause] those who cannot or will not do their duty, sooner or later, are replaced by those who can and will do the job for them. J.I. Smith will not be the sheriff of Caswell County for ever and ever and ever and you, Daniel Wozniak, will not live happily ever after for looking the other way on this one. Whether I live or not, trouble is coming. The FBI wants to threaten my life, kill me, G** d*** you, the killing will only just have begun, mother f*****, and if you don't like this call, G** d*** you, come out here and try [unintelligible] f****** army, I've got one.

J.A. at 417. Minutes later, Lamb left a message for Agent Tom Childry at the Greensboro office of the State Bureau of Investigation ("SBI"):

> This message is for Tom Childry. It's from David Lamb. Tom, [pause] some people are real upset about Dan Wozniak's absolute refusal to do anything to J.I. Smith, whatsoever. I think he's got some real bad trouble coming. I'm not going to cuss you out, Tom. I'm trying to keep people off your a**. I don't particularly like you, but I don't think the ball is in your hands in this one. I think that this is a call you were not allowed to make and you might woulda took that badge offa J.I. Smith, but it wasn't up to [background noise] you, it was up to somebody higher than you. And now, guess what? It's up to somebody higher than them. I'm gonna tell ya something, Tom, if something happens to Dan Wozniak and it does fall to you, I think you need to take another look at really seriously charging J.I. Smith with something [pause] 'cause this ain't gonna go on for ever.

J.A. at 511. Both messages apparently referred to complaints previously made by Lamb to state and federal law enforcement agencies about the alleged involvement in illegal activities of J.I. Smith, the Sheriff of Caswell County, North Carolina.

Wozniak interpreted Lamb's message as a threat to his life, J.A. at 36, and accordingly initiated contact with other law enforcement agencies, including the SBI, in an attempt to assess the threat. Wozniak learned of Lamb's call to Childry, and other information about Lamb. The more information Wozniak gathered, the more concerned he became. J.A. at 37. A federal warrant was issued for Lamb's arrest, and, when Lamb was arrested, a search of the passenger area of his truck revealed a .380 caliber pistol-loaded with a full magazine and a round in the chamber-as well as two additional magazines of ammunition, various knives and cutters, and a large steel needle. J.A. at 66-69, 71-72.

***2** Thereafter, Lamb was indicted and convicted for violating 18 U.S.C. § 115 (threatening to assault a federal officer with the intent to retaliate against him on account of the performance of his official duties) (Count I), and 18 U.S.C. § 922(g)(4) (possessing in commerce and affecting commerce a firearm following commitment to a mental institution) (Count II). The district court sentenced Lamb to 60 months on Count I, to run concurrently with 106 months on Count II, with three years supervised release on each count. Lamb appeals his convictions and sentences.

## II.

Lamb raises three challenges to his convictions. First, he contends that his message to Wozniak cannot reasonably be construed as a threat, and that the district court therefore erred in denying his motion for a judgment of acquittal on Count I. Where a communication is susceptible of more than one meaning-one of which constitutes a threat of physical injury-a court should submit the case to a jury, regardless of the subjective intent of the speaker, if there is evidence from which a jury could find beyond a reasonable doubt that a reasonable recipient familiar with the context of the message would interpret it as a threat of injury. *United States v. Darby,* 37 F.3d 1059, 1066 (4th Cir.1994); *United States v. Roberts,* 915 F.2d 889, 890-91 (4th Cir.1990); *United States v. Maisonet,* 484 F.2d 1356, 1358 (4th Cir.1974). Because we find that Lamb's message, viewed in context, amply satisfies this standard, we hold that the district court did not err in denying Lamb's motion for a directed verdict on Count I.

Second, Lamb maintains that the district court erred in refusing to submit an insanity instruction to the jury as to Count II. The district court correctly reasoned that, to establish *mens rea* for the violation of section 922(g), the government needed to prove only that Lamb knew he was in possession of a firearm, and not that he knew that such possession was wrongful or unlawful. *See* J.A. 406-10. This reading of the statute clearly follows from our decision in *United States v. Langley,* 62 F.3d 602, 604-06 (4th Cir.1995) (*en banc* ) (so interpreting analogous prohibition of firearm possession by a convicted felon), and

Lamb essentially concedes the correctness of this interpretation, *see* Appellant's Br. at 25. Because even the defendant's own expert witness testified that Lamb's mental disorder did not prevent him from knowing that he had a firearm, J.A. at 280; *accord* J.A. at 401-02 (government's expert), we hold that no insanity instruction was warranted as to this count.

Third, Lamb argues that the district court abused its discretion in denying his motion for a mistrial on the grounds of prosecutorial misconduct.* The alleged prosecutorial misconduct consisted of the prosecutor's reference, during cross-examination of Lamb's expert witness, that the witness had psychologically evaluated Michael Hayes, a notorious North Carolina murderer, in connection with the latter's criminal defense. *See* J.A. at 311. The district court immediately sustained Lamb's objection to this line of questioning, *id.*, and, immediately after a sidebar, gave the jury an emphatic curative instruction, including the following:

> ***3** The last question involved the recognition of an individual's name, and I sustained the objection to it. So, you will not even speculate what the answer would have been. Do not give that objection or the question any further consideration. Do not speculate as to what the answer would have been. That has nothing to do with this case at this point.

*See* J.A. at 313. Even assuming the reference to Hayes constituted misconduct, Lamb concedes that such misconduct was isolated. Appellant's Br. at 32; *cf. United States v. Harrison,* 716 F.2d 1050, 1052 (4th Cir.1984) (whether improper prosecutorial remarks are prejudicial depends, in part, on whether the remarks were isolated or extensive). Especially in light of the immediate and emphatic response of the district court, we hold that the prosecutor's isolated reference to Hayes did not so prejudice Lamb's substantial rights as to deprive him of a fair trial. *See United States v. Adam,* 70 F.3d 776, 780 (4th Cir.1995).

## III.

Lamb also argues that the district court erred in calculating his sentencing range, and abused its discretion in departing upward from that range. As for the first point, Lamb argues that the district court erred in (1) grouping the two counts together under U.S.S.G. §§ 3D1.2(b), 3D1.2(c), or both, (2) applying a four-level enhancement under § 2K2.1(b)(5) for using or possessing a firearm or ammunition in connection with another felony offense, and (3) applying a three-level enhancement under § 3A1.2(a) because the victim was a government officer and the offense was motivated by such status.

We hold that the district court did not err in calculating Lamb's sentencing range. Grouping of the two counts was proper under § 3D1.2(c) because possession of the firearm and ammunition served to evidence Lamb's intent to carry out his threat, a specific offense characteristic of Count I under § 2A6.1(b)(1). Alternatively, grouping was proper under § 3D1.2(b), because the district court could reasonably have found that the two counts involved the same victim and were connected by the common criminal objective of harming or killing Wozniak. *Cf. United States v. Morrow,* 925 F.2d 779, 782. The existence of such an objective could be readily inferred from Lamb's threatening phone calls to Wozniak and the SBI, and also by a letter written by Lamb following his arrest "bragging to[his] fellow inmates, to the guards and especially to the FBI, that [he] ... was actively involved in the conspiracy to kill FBI agent Dan Wozniak...." J.A. at 368. And the district court's enhancements under § 2K2.1(b)(5) and § 3A1.2(a) also appear permissible for the same reasons. Even if the court's determination and enhancement of the offense level were erroneous, however, such error was assuredly harmless. For, as we discuss below, the district court did not abuse its discretion in departing upward in sentencing Lamb, and that court made clear that it would have departed upward to the ultimate sentence imposed, regardless of the offense level from which it started. *See* J.A. at 718-19.

***4** We also hold that the district court did not abuse its discretion in departing upward. Prior to his arrest, Lamb had engaged in numerous violent and threatening incidents, which are recounted in the sealed volume of the joint appendix. *See* J.A. at 514-16, 518, 520, 603-04, 666, 671-72, 679-83. Despite all of these incidents, and because he is clearly mentally unstable, Lamb had frequently been institutionalized, but had, prior to this case, rarely been charged with, and only once been convicted of, serious criminal offenses (and even on that one occasion he received only a suspended sentence, J.A. at 514). Accordingly, he fell within a very low criminal history category-category I-that clearly did not reflect the seriousness of his past conduct or the likelihood that he would commit future crimes. Departure upward is clearly permissible in such circumstances. *See* § 4A1.3 (authorizing departure in such circumstances); § 4A1.3(e) (expressly authorizing consideration of prior similar criminal conduct not resulting in a conviction); § 4A1.3(5) (policy statement) (authorizing consideration of occasions when the defendant received an extremely lenient sentence for a serious offense); § 5K2.0 (court may depart

upward for special circumstances not otherwise provided for in the guidelines). And the district court properly engaged in a level-by-level analysis of each criminal history category as it departed upward in sentencing Lamb. *Compare United States v. Cash,* 983 F.2d 558, 561 (4th Cir.1992), *with* J.A. at 702-03. Accordingly, we cannot find an abuse of discretion.

*CONCLUSION*

For the reasons stated herein, we affirm the judgment of the district court.

*AFFIRMED*

**All Citations**

155 F.3d 562 (Table), 1998 WL 413995

Footnotes

* Lamb also contends that the district court abused its discretion in denying his motion for a mistrial on the grounds that the district court failed to give an insanity instruction as to Count II. We reject this contention for the reasons stated above.

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