South Carolina Bar
Continuing Legal Education Division

2024 It's All a Game: Top Trial Lawyers Tackle Evidence

24B-004

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The South Carolina Bar
Continuing Legal Education Division

http://www.scbar.org/CLE

SC Supreme Court Commission on CLE Course No. 241901

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2024 It's All a Game: Top Trial Lawyers Tackle Evidence
Friday, February 9th, 2024

This program qualifies for 6.0 MCLE; 1.0 LEPR

8:30 a.m. **Registration**

8:55 a.m. **Welcome and Opening Remarks**
The Honorable Daniel M. Coble – South Carolina Circuit Court

9:00 a.m. **Putting Experts Through Their Paces Under the Council/Daubert Framework**
Vordman Carlisle Traywick III, Robinson Gray Stepp & Laffitte, LLC

10:00 a.m. **I'd love to tell you, but … Lawyer's Duties of Confidentiality to Prospective Clients.**
Thomas A. Pendarvis, Pendarvis Law Offices, PC

11:00 a.m. **Break**

11:15 a.m. **Evidence Round Table Discussion**
The Honorable George C. James, Jr., South Carolina Supreme Court
A. Mattison Bogan, Nelson Mullins Riley & Scarborough, LLP
The Honorable Letitia H. Verdin, South Carolina Court of Appeals

12:15 p.m. **Lunch (on your own)**

1:30 p.m. **Cracking the Code: Winning Strategies with Digital Evidence**
Allyson Haynes Stuart, Charleston School of Law

2:30 p.m. **Evidence: Rules and Persuasion**
Justin S. Kahn, Kahn Law Firm, LLP

3:30 p.m. **Break**

3:45 p.m. **Evidence Lessons Learned the Hard Way**
Christopher M. Paschal, Goings Law Firm, LLC

4:45 p.m. **Adjourn**

2024 It's All a Game: Top Trial Lawyers Tackle Evidence

SPEAKER BIOGRAPHIES
(by order of presentation)

The Honorable Daniel M. Coble
South Carolina Circuit Court
(course planner)

Judge Daniel McLeod Coble was born and raised in Columbia, South Carolina. Judge Coble attended public schools in Columbia and graduated from Clemson University with a B.A. in Economics. He attended the University of South Carolina School of Law. Upon graduating law school, Judge Coble worked as an assistant solicitor for the Fifth Judicial Circuit where he also was the lead prosecutor for South Carolina's first homeless court. He was appointed as a full-time magistrate judge for Richland County in 2017 and served as the associate chief from 2018-2021. Judge Coble subsequently opened his own law practice, Coble Law Group, and focused on criminal and civil litigation.
Judge Coble has written several legal books and articles and has been published by the South Carolina Bar, SC Lawyer, and several law reviews. He served as the chair of the South Carolina Bar Publications Committee.
He was elected in 2022 to fill the seat of the Honorable L. Casey Manning, resident judge for the Fifth Judicial Circuit, upon his retirement.

Vordman Carlisle Traywick III
Robinson Gray Stepp & Laffitte, LLC

Lisle primarily focuses his practice at Robinson Gray on appellate advocacy, complex civil litigation, and utility regulation. For his appellate work, Lisle has been recognized on the lists of Best Lawyers in America: Ones to Watch, South Carolina Super Lawyers Rising Stars, and Columbia Business Monthly Legal Elite of the Midlands.

In addition to practicing, Lisle enjoys teaching Election Law and serving on the Advisory Board of the NMR&S Center on Professionalism at the University of South Carolina Joseph F. Rice School of Law. He was also the first President of the School of Law Young Alumni Council. Lisle currently serves as Vice President of the South Carolina Chapter of the Federal Bar Association and State Chair for the American Bar Association Council of Appellate Lawyers.

Lisle is a 2020 graduate of Leadership Columbia and a 2019 graduate of the South Carolina Defense Trial Attorneys Association's Emerging Leaders Program. He serves as Co-Chair of the

Appellate Subcommittee for the South Carolina Bar's Judicial Qualifications Committee. In 2022, the Supreme Court of South Carolina appointed him to the Commission on Continuing Legal Education and Specialization.

An avid writer, Lisle has published articles in the South Carolina Law Review, the South Carolina Lawyer, and the South Carolina Young Lawyer. He has also lectured, moderated, and participated in multiple CLEs and panel discussions at events hosted by the South Carolina Court of Appeals, University of South Carolina School of Law, South Carolina Bar, South Carolina Defense Trial Attorneys Association, South Carolina Chapter of the Federal Bar Association, and American Bar Association Litigation Section.

Prior to joining Robinson Gray, Lisle clerked for the Honorable H. Bruce Williams at the South Carolina Court of Appeals and the Honorable David C. Norton at the U.S. District Court for the District of South Carolina.

A Columbia native, Lisle graduated cum laude from Wofford College, receiving his bachelor's degree in government with a concentration in political thought and a minor in economics. He then earned his Juris Doctor from the University of South Carolina School of Law, where he tutored in legal writing and served as Editor in Chief of the South Carolina Law Review.

Thomas A. Pendarvis

Pendarvis Law Offices, PC

Thomas A. Pendarvis graduated from the University of South Carolina School of Law in 1992 after receiving a degree in Business Administration from the University of Georgia in 1984. The focus of his civil trial practice since 1992 has been representing who were injured by negligent lawyers, accountants, real estate appraisers, and other professionals. Thomas also has experience providing advice to lawyers on ethics and professional responsibility matters, lawyer moves between law firms, and law firm dissolutions. He also handles business and commercial disputes, wrongful death claims, personal injury claims, and other complex litigation matters.

Mr. Pendarvis currently sits on the Professional Responsibility Committee for the South Carolina Bar.

The Honorable George C. "Buck" James, Jr.

South Carolina Supreme Court

Justice James was born in Savannah, Ga. and grew up in Sumter, South Carolina, aka, the center of the universe. He is a son of the late Ren F. James and the late George C. James.
Justice James graduated from Wilson Hall School and graduated from The Citadel in 1982, earning a Bachelor of Science degree in Business Administration. He earned his Juris Doctor from the University of South Carolina School of Law in 1985.
Justice James was in private practice in Sumter for 21 years. In 2006, he was elected to the circuit court bench and served for eleven years until he was elected to the Supreme Court of South Carolina in 2017. He was re-elected in 2020 to a ten-year term.

In addition to his membership in the South Carolina Bar Association and the Sumter County Bar Association, he is chairman of the Supreme Court of South Carolina Judicial Education Committee and is a member of the Supreme Court Commission on Continuing Legal Education. Justice James is also a member of the ABA Judicial Division and a member of the Executive Committee of the ABA Appellate Judges Conference. He is also a member of the Board of Directors of the ABA Appellate Judges Education Institute.
Justice James is married to the former Dena Owen and they have a daughter, Alston (a speech pathologist in Pawleys Island) and a son, George (a lawyer in Columbia).

A. Mattison Bogan

Nelson Mullins Riley & Scarborough, LLP

Matt Bogan is a partner of Nelson Mullins Riley & Scarborough LLP who practices in Columbia, S.C. Mr. Bogan's practice concentrates on complex civil litigation, primarily financial services matters, and on the coordination of appellate, litigation, and trial strategies. He has also represented businesses accused of engaging in the unauthorized practice of law which often involves the modern-day intersection of commerce and technology.

Matt received his Juris Doctor (2004) from University of South Carolina School of Law (Student Member, John Belton O'Neall Inn of Court; President, Student Bar Association; Member, Southeastern Environmental Law Journal) and his Bachelor of Arts degree in Finance (2001) from Wofford College.

Professional Associations and Memberships: American Bar Association; Defense Research Institute; Member, Law School Task Force, South Carolina Bar Association (2005-2006); Chair, Paralegal Task Force, South Carolina Bar Association (Present); Board Member of the South Carolina Chapter of the Federal Bar Association; Former Co-chair, Young Lawyers Section, Richland County Bar; Member, John Belton O'Neall Inn of Court; President (2012-2013); Executive Committee (2010-2012).

Awards and Honors: South Carolina "Super Lawyers Rising Stars" list, appellate work (2012-2015)

Clerkships: Served as a law clerk for the Honorable Chief Justice Jean H. Toal of the South Carolina Supreme Court; Served as a law clerk to the Honorable Richard Mark Gergel, United States District Judge for the District of South Carolina.

The Honorable Letitia H. Verdin

South Carolina Court of Appeals

Judge Verdin graduated from Furman University in 1992 with a Bachelor of Science degree in Biology and received her Juris Doctor from the University of South Carolina in 1997. While in law school, she was a member of the National Moot Court team and was named the outstanding student volunteer at the University of South Carolina.

After graduation from law school, she became an Assistant Solicitor with the Office of the 13th Circuit Solicitor, and later, the Office of the 8th Circuit Solicitor. It was during this time that she headed the Family Court unit for juvenile prosecution in both circuits. In 2000, she accepted a position as an Associate Attorney with the firm of Clarkson, Walsh, Rheney, & Turner, P.A. in Greenville, SC, practicing in the areas of governmental and general civil liability defense, criminal defense, and family law. In 2005, she returned to the Office of the 13th Circuit Solicitor where she prosecuted cases in the areas of child abuse and neglect and domestic violence.

Judge Verdin was elected to the Family Court as a resident judge in the Thirteenth Judicial Circuit in 2008. In 2011, the South Carolina Legislature elected her to the Circuit Court, Seat 2, Thirteenth Judicial Circuit.

Allyson Haynes Stuart

Charleston School of Law

Allyson Haynes Stuart, Professor of Law at Charleston School of Law, is an expert on privacy, data security, and e-discovery issues. She is a frequent speaker and writer on those topics, and her latest articles have been published in the George Mason Law Review, the Virginia Journal of Law and Technology, and the Vanderbilt Journal of Entertainment and Technology. Professor Stuart teaches Civil Procedure, Evidence, E-Discovery, and Information Privacy Law. She has taught as an adjunct at Brooklyn Law School, the Instituto de Empresa in Madrid, Spain, Stetson University in Granada, Spain, and Suffolk University in Madrid, Spain. Professor Stuart graduated from Duke University and from the University of South Carolina School of Law magna cum laude. She served as a law clerk for U.S. District Court Judge David C. Norton before practicing as an associate with Cleary, Gottlieb, Steen & Hamilton and then as in-house counsel for Sony Corporation of America in New York City. She returned to Charleston in 2004 to become a founding faculty member at Charleston School of Law.

Justin S. Kahn

Kahn Law Firm, LLP

Justin is a civil litigator with Kahn Law Firm, LLP in Charleston, S.C. He handles a variety of cases including professional liability and personal injury. He has written, lectured, and taught throughout the country on advocacy, procedure, evidence, ethics, technology, and persuasion.
He is triple board certified by the American Board of Professional Liability Attorneys in medical malpractice by the National Board of Trial Advocacy as a civil trial advocate and in civil pretrial practice advocacy. Justin is currently president of ABPLA and is on the board of NBTA. He is a diplomate with the National College of Advocacy of the American Association of Justice.
He is AV rated by Martindale-Hubbell and certified by the South Carolina Supreme Court as a civil circuit court mediator.

As an adjunct professor at the Charleston School of Law, Justin teaches civil pretrial practice and deposition skills.
For over 30 years, he has authored the South Carolina Rules Annotated and the South Carolina Rules of Evidence Annotated used by judges and attorneys throughout South Carolina.
He is a member of various professional organizations including the American Association for

Justice, South Carolina Association for Justice, South Carolina Bar Association, American Bar Association, permanent member of the Fourth Circuit Judicial Conference, MENSA and the International Brotherhood of Magicians.

He has practiced in state and federal courts throughout the country. He is admitted to practice before the United States Supreme Court, United States Fourth Circuit Court of Appeals, United States Third Circuit Court of Appeals, United States Second Circuit Court of Appeals, United States Court of Federal Claims, United States District Court for the District of South Carolina and the South Carolina Supreme Court.

He has argued appellate
cases before the South Carolina Supreme Court and Court of Appeals, as well as
Fourth and Second Circuit Courts of Appeal.

Christopher M. Paschal

Goings Law Firm, LLC

Chris graduated from law school at the University of South Carolina in 2020 and has since practiced at the Goings Law Firm in Columbia. He is involved in the Richland County Young Lawyers Division and has previously helped coach Mock Trial at the law school. Chris was also involved in Wofford College's pre-law society as a student and tries to give back in any way he can.

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Putting Experts Through Their Paces Under the Council/Daubert Framework

Lisle Traywick

Putting Experts Through Their Paces Under the *Council/Daubert* Framework

Vordman Carlisle Traywick, III
ROBINSON GRAY STEPP & LAFFITTE, LLC

It's All a Game: Top Trial Lawyers Tackle Evidence CLE
February 9, 2024

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- Quick Overview on Preservation
- *Council/Daubert* Motions
- Objections and Expert Cross

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Rule 103, SCRE
Rulings on Evidence

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

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

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

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

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

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Fed. R. Evid. 103
Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

****(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

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State vs. Federal

- The state rule "is identical to the federal rule with the exception of the omission of [the] subsection . . . relating to plain error." Rule 103, SCRE (note).
- The Supreme Court of South Carolina "has routinely held the plain error rule does not apply in South Carolina state courts." *State v. Sheppard*, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011).

Because the plain-error backstop is only available in federal court, we will focus primarily on preserving evidentiary objections in state court.

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So what is required?

- A specific, timely objection
- Made outside the presence of the jury
- When opposing admission, a concomitant motion to strike if the witness already answered the question
- If opposing exclusion, an offer of proof of the substance of the evidence
- A ruling from the Court

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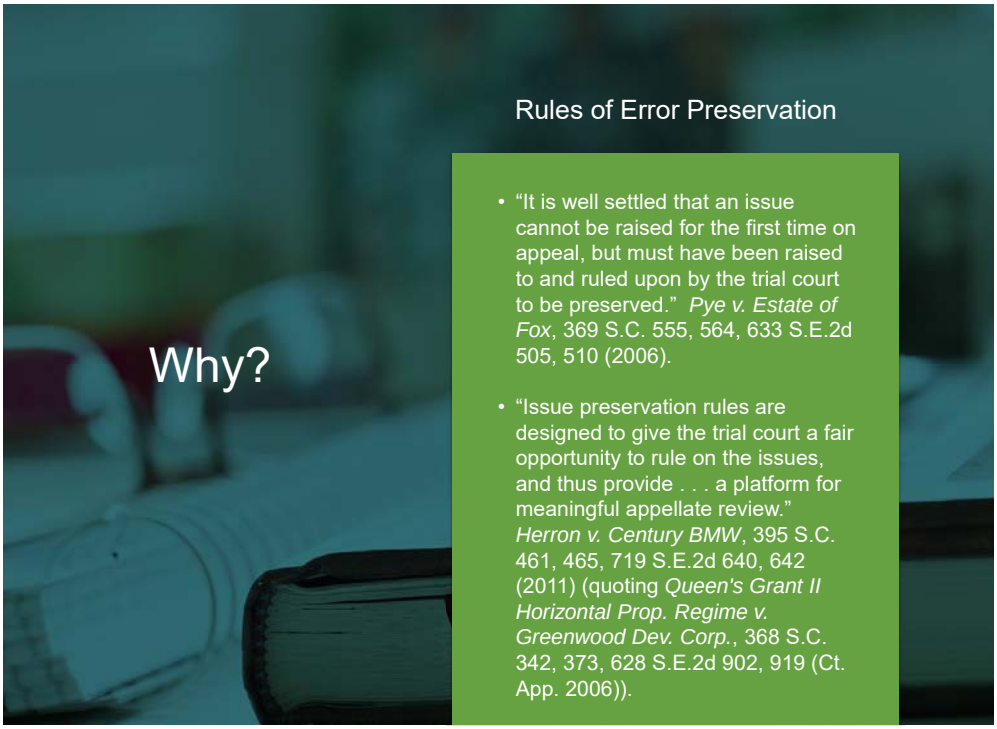

Rules of Error Preservation

- "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006).
- "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide . . . a platform for meaningful appellate review." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)).

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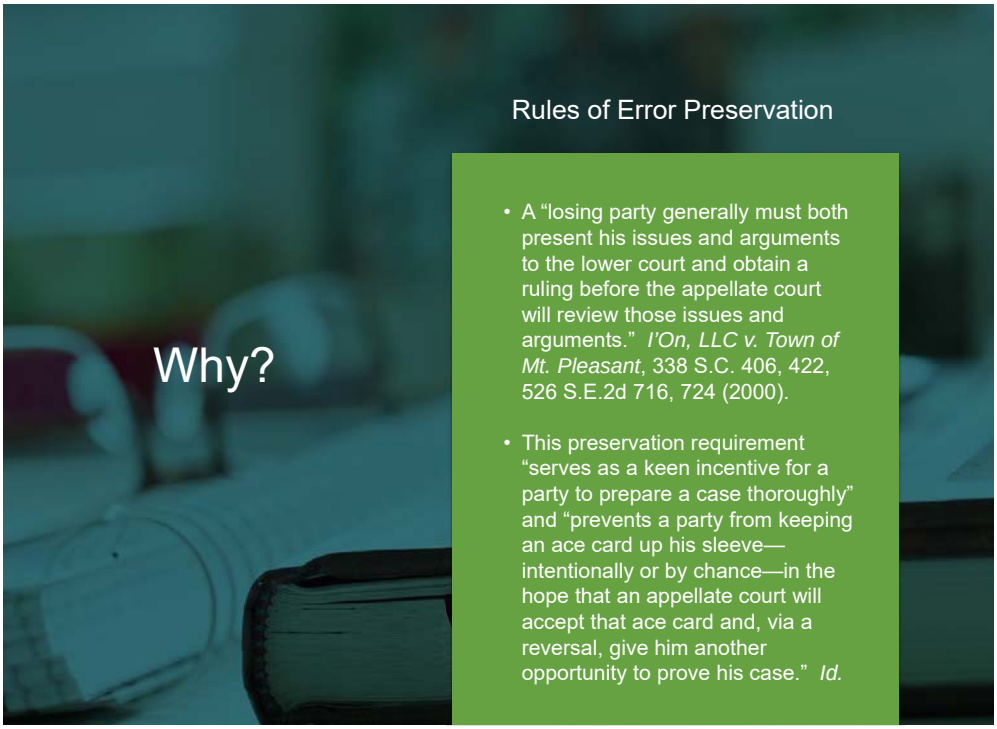

Rules of Error Preservation

- A "losing party generally must both present his issues and arguments to the lower court and obtain a ruling before the appellate court will review those issues and arguments." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).
- This preservation requirement "serves as a keen incentive for a party to prepare a case thoroughly" and "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *Id.*

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Here's the good news:

- "Our supreme court has cautioned that issue preservation 'is not a "gotcha" game aimed at embarrassing attorneys or harming litigants.'" *Johnson v. Roberts*, 422 S.C. 406, 411, 812 S.E.2d 207, 210 (Ct. App. 2018) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)).
- "Instead of being hyper-technical, [courts] approach preservation with a practical eye." *State v. Bowers*, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019), *aff'd*, 436 S.C. 640, 875 S.E.2d 608 (2022).

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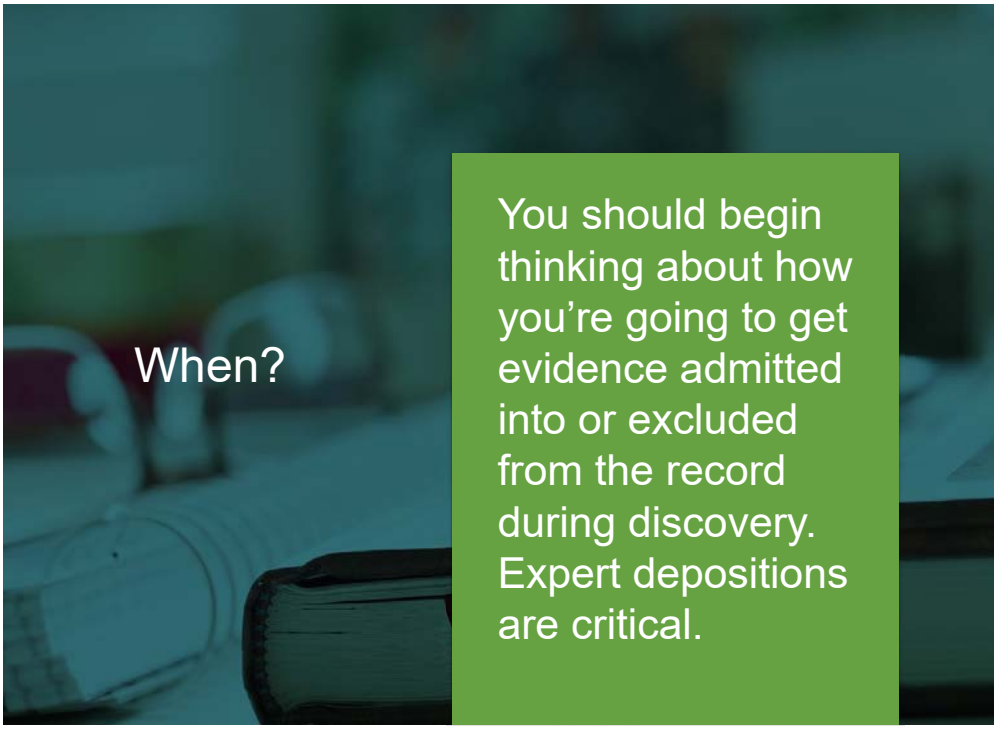

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Rule 32, SCRCP

(b) Objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

. . .

(d) Effect of Errors and Irregularities in Depositions.

. . .

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

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Fed. R. Civ. P. 32

(b) Objections to Admissibility. Subject to Rules 28(b) and 32(d)(3), an objection may be made at a hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

. . .

(d) Waiver of Objections.

. . .

(3) To the Taking of the Deposition.

(A) Objection to Competence, Relevance, or Materiality. An objection to a deponent's competence—or to the competence, relevance, or materiality of testimony—is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(B) Objection to an Error or Irregularity. An objection to an error or irregularity at an oral examination is waived if:

(i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(ii) it is not timely made during the deposition.

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State vs. Federal Rules on Expert Testimony

- **Rule 701, SCRE**: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."
- **Fed. R. Evid. 701**: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

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State vs. Federal Rules on Expert Testimony

- **Rule 702, SCRE**: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."
- **Fed. R. Evid. 702**: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
  (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
  (b) the testimony is based on sufficient facts or data;
  (c) the testimony is the product of reliable principles and methods; and
  (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

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State vs. Federal Rules on Expert Testimony

- **Rule 703, SCRE**: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."
- **Fed. R. Evid. 703**: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

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State vs. Federal Rules on Expert Testimony

- **Rule 704, SCRE**: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."
- **Fed. R. Evid. 704**:

  (a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

  (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

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State vs. Federal Rules on Expert Testimony

- **Rule 705, SCRE**: "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."
- **Fed. R. Evid. 705**: "Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination."

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Backstop

- **Rule 403, SCRE**: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
- **Fed. R. Evid. 403**: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

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Motions in Limine

- In general, "a motion in limine seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter." *State v. Smith*, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999).
- "The purpose of a motion in limine is to allow a court to rule on evidentiary issues in advance of trial . . . to avoid delay, ensure an even-handed and expeditious trial, and focus the issues the jury will consider." *Davenport v. Goodyear Dunlop Tires N. Am., Ltd.*, No. 1:15-cv-3751-JMC, 2018 WL 2355222, at *1 (D.S.C. May 24, 2018) (quoting *Newkirk v. Enzor*, No. 2:13-cv-1634-RMG, 2017 WL 823553, at *2 (D.S.C. Mar. 2, 2017)).
- The proponent of expert testimony must demonstrate that the testimony satisfies these requirements. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001).

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State Court

In *Watson v. Ford Motor Co.*, our supreme court laid out a three-prong test a trial court must consider before admitting expert testimony:

- First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.
- Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter.
- Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable.

389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

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State Court

- "[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions." *Id.*
- The Court must serve "as the gatekeeper" in deciding "whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence." *Id.* at 445, 699 S.E.2d at 174.
- "In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact." *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009).
- And "[t]he familiar evidentiary mantra that a challenge to evidence goes to 'weight, not admissibility' may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence." *Id.*

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State Court

- "The test for reliability for expert testimony does not lend itself to a one-size-fits-all approach." *Watson*, 389 S.C. at 450 n.3, 699 S.E.2d at 177 n.3.
- "In considering the admissibility of scientific evidence under the Jones standard, the Court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." *State v. Council*, 335 S.C. 1, 19–20, 515 S.E.2d 508, 516 (1999).
- But "the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony." White, 382 S.C. at 274, 676 S.E.2d at 688.

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Federal Court

- "Implicit in the text of Rule 702 . . . is a district court's gatekeeping responsibility to 'ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Nease v. Ford Motor Co.*, 848 F.3d 219, 229 (4th Cir. 2017) (quoting *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 597 (1993)).
- "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592–93.
- Indeed, "district courts must ensure that an expert's opinion is 'based on scientific, technical, or other specialized knowledge and not on belief or speculation.'" *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (quoting *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999)).

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Federal Court

- Rule 702 affords a court wide latitude to admit expert testimony, to be sure, but it must be (1) based on the special knowledge of the expert and (2) helpful to the trier of fact. *See Daubert*, 508 U.S. at 589–91.
- A court's gatekeeping function under Daubert is equally applicable to scientific and nonscientific expert testimony. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–49 (1999).
- Although the gatekeeping function is the same, "[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id.* at 150.
- The district court must ensure that the proffered expert opinion is "based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods." *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4th Cir. 1999).

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Council/Daubert

- Recently, the Supreme Court of South Carolina referred to a hearing on a challenge to an expert as a "*Daubert/Council* hearing." *State v. Phillips*, 430 S.C. 319, 343, 844 S.E.2d 651, 663 (2020); *see also id.* at 343–44, 844 S.E.2d at 664 (Beatty, C.J., concurring in result) (arguing "the majority's instruction regarding a '*Daubert/Council*' hearing is confusing and constitutes an implicit adoption of Daubert").
- Putting aside whether the court formally adopted *Daubert*, it is well settled that South Carolina's approach under Rule 702, SCRE, "is 'extraordinarily similar' to the federal test." *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020) (quoting Hon. Roger M. Young, *How Do You Know What You Know? A Judicial Perspective on* Daubert *and* Council/Jones *Factors in Determining the Reliability of Expert Testimony in South Carolina*, S.C. LAW., Nov. 2003, at 28, 31), *aff'd in part and remanded in part on other grounds*, 436 S.C. 395, 872 S.E.2d 638 (2022).

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Council/Daubert

- Indeed, as the Chief Justice of South Carolina has noted, "our appellate courts have referenced *Daubert* in at least ten cases since 1999." *Phillips*, 430 S.C. at 344, 844 S.E.2d at 664 (Beatty, C.J., concurring in result).
- Accordingly, "there is no clear reason why our state trial court judges should not study federal court cases that have utilized Daubert when determining the reliability of a particular type of expert testimony." Young, *supra*, at 31; *see also State v. Mealor*, 425 S.C. 625, 649 n.13, 825 S.E.2d 53, 66 n.13 (Ct. App. 2019) (noting "Rule 702 of the Federal Rules of Evidence is identical to Rule 702 of the South Carolina Rules of Evidence" (quoting *In re Robert R.*, 340 S.C. 242, 246, 531 S.E.2d 301, 303 (Ct. App. 2000))).

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Beyond the Ordinary Knowledge of the Jury

- "While Rule 602[, SCRE,] requires lay testimony to be grounded in the witness's personal knowledge, that rule does not give a lay witness license to testify about any subject simply because he has personal knowledge of the subject." *State v. Gibbs*, 438 S.C. 542, 550, 885 S.E.2d 378, 382 (2023).
- "Even if a witness has personal knowledge, the general rule is that the witness must be qualified as an expert to testify about matters requiring scientific, technical, or other specialized knowledge." *Id.*
- "[I]t is proper for trial courts to assess the level of complexity presented by the testimony when deciding whether expert testimony is required." *Id.* at 552, 885 S.E.2d at 383.
- "Even when subject matter is at the periphery of ordinary knowledge, expert testimony is not required when a witness can give an explanation of the concept that a reasonable juror can grasp instantly." *Id.*

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Qualifications

- Although "defects in the amount and quality of education or experience" admittedly often "go to the weight to be accorded the expert's testimony and not its admissibility," *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990), this is not a rudderless standard.
- The Court must satisfy itself that "the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175.
- When a purported expert "clearly has no relevant qualifications," a court may exclude the witness. *Templeton v. Bishop of Charleston*, No. 2:18-CV-02003-DCN, 2021 WL 3419442, at *3 (D.S.C. Aug. 5, 2021).
- "Even where a witness has special knowledge or experience, qualification to testify as an expert also requires that the area of the witness's competence matches the subject matter of the witness's testimony." 29 Charles A. Wright. et al., *Federal Practice & Procedure* § 6265, at 255 & nn.34–35 (1977).

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Relevance

- "Relevant evidence, of course, is evidence that helps 'the trier of fact to understand the evidence or to determine a fact in issue.'" *Nease v. Ford Motor Co.*, 848 F.3d 219, 229 (4th Cir. 2017) (quoting *Daubert*, 509 U.S. at 591).
- "To be relevant under *Daubert*, the proposed expert testimony must have 'a valid scientific connection to the pertinent inquiry as a precondition to admissibility.'" *Id.* (quoting *Daubert*, 509 U.S. at 592).
- "While the fit between an expert's specialized knowledge and experience and the issues before the court need not be exact, an expert's opinion is helpful to the trier of fact, and therefore relevant under Rule 702, 'only to the extent the expert draws on some special skill, knowledge or experience to formulate that opinion; the opinion must be an expert opinion (that is, an opinion informed by the witness' expertise) rather than simply an opinion broached by a purported expert.'" *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 392–93 (D. Md. 2001)

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Reliability

- *Daubert* offered a number of guideposts to help a district court determine if expert testimony is sufficiently reliable to be admissible:
  - **First**, "a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested." *Daubert*, 509 U.S. at 593.
  - **Second**, a district court must consider "whether the theory or technique has been subjected to peer review and publication." *Id.*
    - Publication regarding the theory bears upon peer review; "[t]he fact of publication (or lack thereof) in a peer reviewed journal will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised." *Id.* at 594.
  - **Third**, "in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error." *Id.*
  - **Fourth**, despite the displacement of *Frye*, "'general acceptance'" is nonetheless relevant to the reliability inquiry. Id.
    - "Widespread acceptance can be an important factor in ruling particular evidence admissible, and a known technique which has been able to attract only minimal support with the community may properly be viewed with skepticism." Id.

Nease v. Ford Motor Co., 848 F.3d 219, 229 (4th Cir. 2017)

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Reliability

- *Daubert*'s list of relevant considerations is not exhaustive; indeed, the Court has cautioned that this "list of specific factors neither necessarily nor exclusively applies to all experts or in every case," *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), and that a trial court has "broad latitude" to determine whether these factors are "reasonable measures of reliability in a particular case," *id.* at 153.
- As now-Justice Hill has recognized, "[t]he number of times a court has qualified a witness as an expert or found a method reliable will almost never be relevant to the trial court's Rule 702 task, as what matters is the method's endorsement by the relevant field, not the bench." *Warner*, 430 S.C. at 87, 842 S.E.2d at 366.

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Reliability

- "The Supreme Court has advised district courts to require more than the mere 'ipse dixit' of the expert witness." *Nucor Corp. v. Bell*, No. 2:06-cv-02972-DCN, 2008 WL 4442571, at *4 (D.S.C. Jan. 11, 2008).
- Courts have "often point[ed] to [an expert's] use of anecdotal evidence as a marker of unreliability." *Id.* at *7.
- A district "court is to exclude 'subjective belief or unsupported speculation.'" *In re Bausch and Lomb Inc. Contact Lens Sol. Prods. Liab. Litig.*, No. 2:06-MN-77777-DCN, 2009 WL 2750462, at *9 (D.S.C. Aug. 26, 2009) (citing *Daubert*, 509 U.S. at 590).
- Courts often consider "whether the expert's analysis leaves unexplained analytical gaps and whether the expert has reasonably accounted for alternative explanations." *Wickersham v. Ford Motor Co.*, No. 9:13-cv-1192-DCN; 9:14-cv-0459-DCN, 2016 WL 5349093, at *2 (D.S.C. Sept. 26, 2016) (citing *Gen. Elec. Co. v. Joinder*, 522 U.S. 136, 146 (1996)).

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Reliability

- Also worthy of consideration is "[w]hether the expert is proposing to testify about matters growing naturally out of research he has conducted independent of the litigation, or whether he has developed his opinion expressly for the purposes of testifying." Fed. R. Evid. 702, advisory committee note.
- "In considering these factors, the focus 'must be solely on principles and methodology, not on the conclusions that they generate.'" *Wickersham*, 2016 WL 5349093, at *2 (citing *Daubert*, 509 U.S. at 591).
- "Although an inquiry under *Daubert* is flexible," "courts have held that experts fail to pass *Daubert* scrutiny when the expert has failed to measure, test, or validate their opinions." *Walker v. DDR Corp.*, No. 3:17-cv-01586-JMC, 2019 WL 3409724, at *9 (D.S.C. Jan. 4, 2019).
- After all, "[u]ntested potentialities do not satisfy the Daubert standard." *Bausch*, 2009 WL 2750462, at *11.

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Reliability

- "[A]n opinion based on an inadequate or inaccurate factual foundation cannot be a reliable opinion, no matter how valid the principles and methods applied or how well-qualified the expert." *Fernandez v. Spar Tek Indus., Inc.*, No. 0:06-cv-3253-CMC, 2008 WL 2185395, at *6 (D.S.C. May 23, 2008).
- "[A] bold statement of the experts' qualifications, conclusions, and assurances of reliability are not enough to satisfy the Daubert standard." *In re Bausch & Lomb, Inc. Contact Lens Sol. Prod. Liab. Litig.*, No. 2:06-MN-77777-DCN, 2009 WL 2750462, at *10 (D.S.C. Aug. 26, 2009) (cleaned up).
- "'Expert reports must not be sketchy, vague, or preliminary in nature' and 'must include how and why the expert reached a particular result, not merely the expert's conclusory opinions.'" *Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 210 (4th Cir. 2017) (quoting *Salgado by Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 741 n.6 (7th Cir. 1998)).

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Hypotheticals

- "It is well-settled . . . that an expert can answer hypothetical questions and offer opinions not based on first-hand knowledge because his opinions presumably 'will have a reliable basis in the knowledge and experience of his discipline.'" *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000).
- "Forecast and estimate, based on a solid premise of fact and experience, are not to be confused with mere speculation and conjecture." *Kansas City S. Ry. Co. v. Rd. Imp. Dist. No. 3 of Sevier Cnty., Ark.*, 266 U.S. 379, 388 (1924).
- But "the facts upon which the hypothetical opinion is based 'must be established by independent evidence properly introduced.'" Pound v. Wilcox Mktg., Inc., No. 3:20-CV-02097-JMC, 2022 WL 2015426, at *3 (D.S.C. June 6, 2022) (quoting Newman v. Hy-Way Heat Sys., Inc., 789 F.2d 269, 270 (4th Cir. 1986)).

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Hypotheticals

- "When the assumptions made by an expert are not based on fact, the expert's testimony is likely to mislead a jury, and should be excluded by the district court." *Tyger Constr. Co. Inc. v. Pensacola Constr. Co.*, 29 F.3d 137, 144 (4th Cir. 1994).
- After all, "the great[] danger is that the jury may accept as fact not just the faulty assumptions on which [the putative expert] relied, but may also accept the conclusions that are drawn through his use of these assumptions." *Id.*

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Legal Opinions

- "Courts have frequently found [] expert reports or testimony opining as to the law governing the case or containing legal conclusions to be inadmissible under Rule 702 and controlling case law." *Brown v. Dennis*, No. 3:15-3334-JMC-PJG, 2016 WL 4618892, at *2 (D.S.C. Sept. 6, 2016).
- "In general, expert testimony on issues of law is inadmissible." *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003).

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Otherwise Inadmissible Evidence

- Our appellate courts "have made it clear that—in South Carolina—Rule 703 allows admissibility of otherwise inadmissible evidence only in limited circumstances. In other words, the mere fact an expert relies on inadmissible evidence does not make the evidence admissible." *State v. Jenkins*, 436 S.C. 362, 382, 872 S.E.2d 620, 630 (2022).
- "The standard is whether the probative value of the statement for explaining [the putative expert's] opinion 'substantially outweighs' the probative value for its truth." *Id.* at 384, 872 S.E.2d at 632.

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Motions in Limine

- In preparation for trial, you should file motions in limine on evidence you want excluded, particularly the opposing party's purported expert testimony. This serves four functions:
  - *First*, if you win the motion, then you accomplished your goal.
  - *Second*, even if you don't win, it flags important issues for the Court.
  - *Third*, you have the arguments fully briefed and ready to go at trial.
  - *Fourth*, you can highlight the expert's defects on cross at trial.
- But that is *not* the end of the story.

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Motions in Limine

- "Making 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." *Watson ex rel. Watson v. Chapman*, 343 S.C. 471, 480–81, 540 S.E.2d 484, 489 (Ct. App. 2000).
- "If a motion in limine to exclude evidence is denied, a party must renew its objection when the evidence is presented during trial." *Parr v. Gaines*, 309 S.C. 477, 481, 424 S.E.2d 515, 518 (Ct. App. 1992).

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Limited Exceptions

- "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." *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001).
  - "The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling." *State v. Jones*, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021), *cert. denied*, 142 S. Ct. 2843 (2022).
- And the Court has found "a different approach is warranted where a court rules after a hearing on a constitutional issue. Under those circumstances, the ruling is final and, unless something changes during trial that may reasonably cause the trial judge to alter the pretrial ruling, no further objection is required to preserve the issue for appellate review." *Id.* at 144, 866 S.E.2d at 561.
  - This will primarily arise in criminal cases on motions to suppress, but it's still worth noting.

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Contemporaneous Objection

- The general rule is that "[a] contemporaneous objection is required to properly preserve an error for appellate review." *Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997). "The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." *Id.*
- "When a witness answers a question before an objection is made, the objecting party must make a motion to strike the answer to preserve the issue of that statement's admissibility." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).
- "The requirement that a party move to strike objectionable testimony [also] applies when an objection has been sustained." *State v. Saltz*, 346 S.C. 114, 129, 551 S.E.2d 240, 248 (2001).

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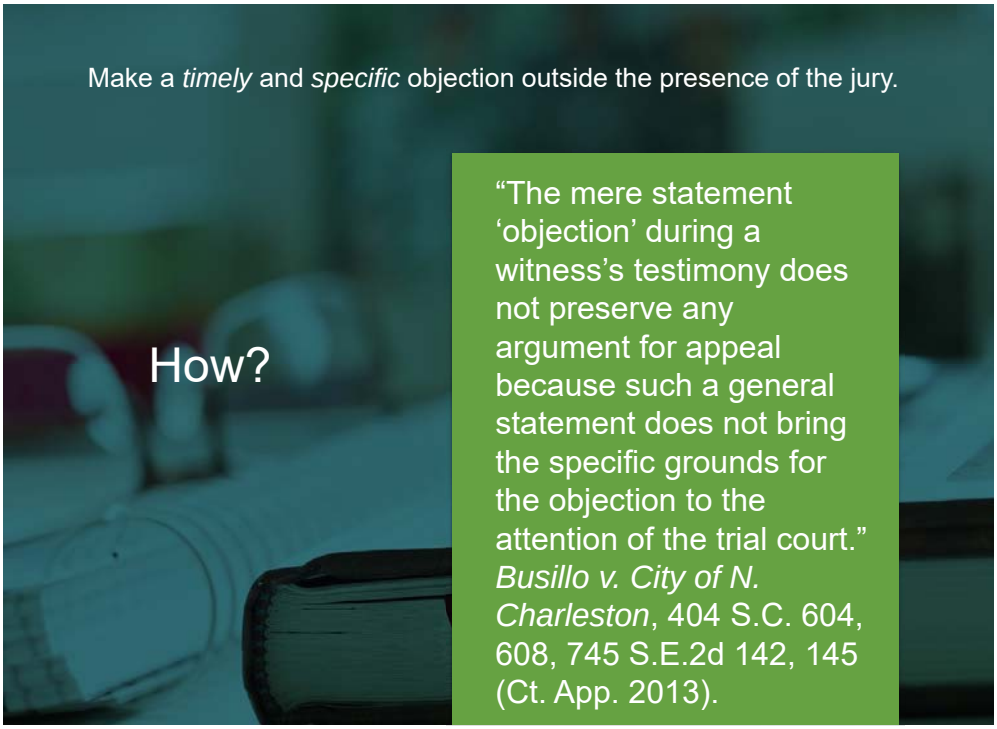

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Pitfalls to Avoid

- "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).
- "An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review." *Ligon v. Norris*, 371 S.C. 625, 633, 640 S.E.2d 467, 472 (Ct. App. 2006).
  - Even if you've already lost an evidentiary ruling beforehand, you can't simply resign yourself to that fact when the evidence comes up at trial.
  - Simply say something like, "Subject to our previous objections, we have no further objection to this evidence coming in."
  - Be careful about withdrawing objections altogether just to move trial along.
- "Although [Appellant] noted a generalized 'continuing objection' at the outset of trial, apparently believing it could make a more specific after-the-fact objection to any alleged improper argument or evidence, such an approach is wholly inconsistent with our law requiring a contemporaneous objection." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. 33, 59, 777 S.E.2d 176, 189–90 (2015).

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Pitfalls to Avoid

Lawyers commonly object to evidence on the ground that it is "prejudicial." Sometimes they emphasize their unhappiness by saying "highly prejudicial." Without anything more, such an objection does not preserve the issue of admissibility. Evidence cannot be excluded simply because it is prejudicial. Almost all evidence is prejudicial to somebody. Saying evidence is prejudicial is another way of saying it is relevant. A proper objection, based on the prejudicial nature of evidence, should say that it is "unduly prejudicial." In other words, the objection should be based on the ground that any probative value the evidence may have is outweighed by its prejudicial nature.

State v. Bostick, 307 S.C. 226, 230 n.3, 414 S.E.2d 175, 177 n.3 (Ct. App. 1992).

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Specific Objection

- "[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).
- "While 'a party is not required to use the exact name of a legal doctrine . . . to preserve the issue,' the party nonetheless must be sufficiently clear in framing his objection so as to draw the court's attention to the precise nature of the alleged error." *Buist v. Buist*, 410 S.C. 569, 574–75, 766 S.E.2d 381, 383–84 (2014) (quoting *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011)).

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Specific Objection

- "If the party is not reasonably clear in his objection to the perceived error, he waives his right to challenge the erroneous ruling on appeal." *Buist*, 410 S.C. at 575, 766 S.E.2d at 384.
- "It is possible, however, that the context of the proceeding may make the specific ground for the objection sufficiently apparent to the trial court so that a general statement such as 'objection' is enough to preserve an argument for appeal." *Busillo*, 404 S.C. at 608, 745 S.E.2d at 145. When, for example, a party references (or a court acknowledges) a pretrial objection, an appellate court will "look back to that discussion as part of the context from which the trial court could have understood any specific ground for the [party']s objection." *Id.* at 608–09, 745 S.E.2d at 145.

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Use Common Sense

- Once the court rules on an objection, counsel need not repeat the objection after each question. *See State v. Ross*, 272 S.C. 56, 60–61, 249 S.E.2d 159, 162 (1978).
- "A party is not required to harass the trial judge with repetitive objections when an intelligible one has been made." *Long v. Norris & Assocs., Ltd.*, 342 S.C. 561, 578, 538 S.E.2d 5, 14 (Ct. App. 2000)
- "Additionally, our courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused." *State v. Passmore*, 363 S.C. 568, 584, 611 S.E.2d 273, 282 (Ct. App. 2005).
  - This is reserved for extreme circumstances.

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Tips for Expert Cross

- Typically, you want to get in and get out. Going toe-to-toe with the expert rarely ends well.
- Don't ask a question to which you don't already know the answer.
- This should be obvious, but ask leading questions. Given the decline in trials, it's amazing to see how many lawyers don't take advantage of that tool.
- Pick the biggest gaps in the expert's qualifications and weaknesses in the analysis, and make sure those are digestible points for the jury.
- Consider starting with matters on which you and the expert agree and then pivoting.
- Don't beat a dead horse.

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Appellate Review

- "It is well settled that the admission and rejection of testimony is largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion." *Pike v. S.C. Dep't of Transp.*, 343 S.C. 224, 234, 540 S.E.2d 87, 92 (2000).
- "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).
  - Remember: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Rule 103(a), SCRE.

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Raising Issues on Appeal

- "A party may not argue one ground at trial and an alternate ground on appeal." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (citing *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001); *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000)).
- Keep up the specificity. When it comes to evidentiary rulings, lawyers tend to relegate their arguments to a footnote or keep them short. If it's a real issue, then brief it.
- "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001).

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Bottom Line

- *Daubert* case law is helpful and persuasive authority in state court.
- A court's gatekeeping function is equally applicable to scientific and nonscientific expert testimony.
- An expert opinion must be supported "by something more than the 'it is so because I say it is so' of the expert."
- The weight vs. admissibility argument, standing alone, won't fly.
- Don't forget to contemporaneously object if you lose your *Daubert* motion.
- Get in and get out with leading cross of the opposing expert at trial.

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Questions?

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South Carolina Bar

Continuing Legal Education Division

I'd love to tell you, but...Lawyer's Duties of Confidentiality to Prospective Clients

Thomas Pendarvis

MEMORANDUM

TO: SOUTH CAROLINA BAR – CLE Division
BY: Thomas A. Pendarvis
DATE: January 18, 2024
SUBJECT: It's All a Game: Top Trial Lawyers Tackle Evidence

Lawyers' Confidentiality Obligations To Prospective Clients

**'I'd love to tell you all about it,
but there's this little thing called confidentiality.'**

Table of Contents

Lawyers' Confidentiality Obligations To Prospective Clients

Lawyers owe duties of confidentiality not only to existing clients and former clients but also to prospective clients. These duties of confidentiality are covered in Rule 1.6, RPC, (existing clients), Rule 1.9, PRC (former clients), and our duties of confidentiality to prospective clients are defined in Rule 1.18, RPC. *See* Rule 1.18, RPC, Rule 407, SCACR. This memorandum will summarize and highlight our confidentiality obligations and hopefully provide practical tips for guidance in dealing with prospective clients.

In June 2020, the American Bar Association's Standing Committee on Ethics and Professional Responsibility released Formal Opinion 492, titled "*Obligations to Prospective Clients: Confidentiality, Conflicts and "Significantly Harmful" Information*." A copy of this Formal Opinion 492 is included with these materials. This Formal Opinion was intended to guide lawyers on assessing whether information received from a prospective client could disqualify the lawyer or the lawyer's firm from representing a different client or prospective client.

I. Confidentiality.

Maintaining client confidentiality is at the heart of every client-lawyer relationship. Lawyers are not permitted to disclose information related to the lawyer's representation of a client or former client absent a court order, subpoena, client consent, or other limited circumstances outside the scope of this memorandum. *See* Rule 1.6, Rule 1.8(b), and Rule 1.9(c)(2), RPC, Rule 407, SCACR. (Adopted effective September 1, 1990.) The obligation to maintain confidentiality also applies to information provided by a prospective client.

II. Prospective Clients and Confidentiality.

A prospective client is a person who consults a lawyer about the possibility of forming a client-lawyer relationship, but no client-lawyer relationship is formed. In October 2005, our Supreme Court adopted several the ABA's Model Rules of Professional Conduct, including what became Rule 1.18, RPC, with some changes to the text in subparagraphs (a), (b), and in the Comments to the Model Rule. This is the South Carolina version of Model Rule 1.18 of the Rules of Professional Conduct:

Rule 1.18, RPC, Rule 407, SCACR: Duties to Prospective Client

(a) A person who engages in mutual communication with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Rule 1.18, RPC, Rule 407, SCACR.

Prospective clients often reveal confidential information during an initial consultation with a lawyer, even if only enough to allow the lawyer to determine whether a conflict of interest exists with an existing client. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, §15 cmt. *c* (2000). While the confidentiality duties owed to prospective clients are not as arduous as those owed to existing or former clients, this Rule has a few interesting features worthy of attention. For example, under Rule 1.18(c), RPC, a lawyer is prohibited from accepting a new client whose interests are materially adverse to a former prospective client in a matter that is the same or substantially related to the consultation with the former prospective client. But this prohibition applies only if the lawyer received information that could be "significantly harmful" to the prospective client; whereas lawyers are absolutely prohibited from representing someone adverse to a former client concerning the same or substantially related matter.

A. What does it take for someone to be a "prospective client"?

Not everyone who calls or contacts you about a potential representation is a "prospective client" under Rule 1.18, RPC. The Rule in South Carolina defines a "prospective client" as "[a]

person who engages in mutual communication with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship." Rule 1.18(a), RPC, Rule 407, SCACR (emphasis added). Comment [2] to Rule 1.18, RPC, provides the following guidance on who is a "prospective client":

> [2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. Whether communications, including written, oral, or electronic communications, create a prospective client-lawyer relationship depends on the circumstances. For example, **such a relationship is likely to be formed if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response.** See also Comment [4]. In contrast, such a relationship does not arise solely if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is likely to form a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). Moreover, **a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."**

Rule 1.18 [cmt. 2], RPC, Rule 407, SCACR (emphasis added).

Please remember because a client-lawyer relationship may be formed during a consultation, consider how deep you can dive into the facts with a prospective client before a client-lawyer relationship is formed. *See Disciplinary Counsel v. Cicero*, 982 N.E.2d 650 (Ohio, 2012) (individual under federal investigation who met with lawyer and expressed dissatisfaction with current lawyer was a prospective client; lawyer advised him about whether memorabilia seized by law enforcement during drug raid could be recovered, told him he could "sit in … jail" or "start cooperating," and quoted him a fee). *See also Jimenez v. Rivermark Community Credit Union*, 2015 WL 2239669 (D. Or. May 12, 2015) (fact that lawyer was contacted by husband, acting as wife's English-language facilitator, did not preclude wife, who did not speak English, from being prospective client); *De David v. Alaron Trading Corp.*, 2012 WL 1429564 (N.D. Ill. Apr. 23, 2012) (corporation became prospective client when its representative discussed possibility of retaining lawyer to determine if it was subject to US investment laws); D.C. Ethics Op. 346 (2009) (when prospective client authorizes lawyer to approach another lawyer about taking case,

first lawyer acts as prospective client's agent; second lawyer must therefore treat information is confidential under Rule 1.18).

Whether the prospective client pays a fee is not dispositive. *See United States v. Carlisle*, 2014 WL 958027 (N.D. Ind. March 12, 2014) (prospective client did not become client by paying lawyer a dollar to ensure attorney-client privilege; disqualification analyzed under Rule 1.18 rather than Rule 1.19); *Kuntz v. Disciplinary Board*, 869 N.W.2d 117 (N.D. 2015) (payment of initial consultation fee does not itself create client-lawyer relationship; Rule 1.18 governed relationship). *See also*, Susan R. Martyn, *Accidental Clients*, 33 Hofstra L. Rev. 913 (Spring 2005) (discussing potential client problems and scenarios involving beauty contests, public speeches, advertising, E-lawyering, social gatherings, consultations with other lawyers, referral fees, and unrepresented parties).

A lawyer's website invitations and posts can give rise to "unanticipated reliance or unexpected inquiries or information from website visitors seeking legal advice." *See* ABA Formal Ethics Op. 10-457 (2010). Based on the ABA Formal Ethics Opinion, the ABA amended Model Rule 1.18 and Comment [2] to Model Rule 1.18 "to help lawyers understand how to avoid the inadvertent creation of such relationships in an increasingly technology-driven world, and to ensure the public does not misunderstand the consequences of communicating electronically with the lawyer." ABA Report to the House of Delegates No. 105(b) (Aug. 12, 2012). *See also*, South Carolina Bar Ethics Op. 12-03 (2003) (lawyer may not participate in "Just Answer" website inviting specific questions about specific legal matters and offering specific legal advice, notwithstanding website's "buried" warning and disclaimer); N.H. Ethics Op. 2009-10/1 (n.d.) (firm whose website invites emails from public, but uses click-through electronic disclaimer, requiring waiver of confidentiality and/or conflicts before visitor discloses anything, must be able to prove waiver is sufficiently informed; should also consider effective advance waiver on possible privilege claim later). *See also*, Martin Whitaker, *Ethical Considerations Related to Blogs, Chat Rooms, and Listservs*, 21 Prof. Law., no. 2, at 3 (2012) (chat rooms and listservs more likely to implicate Rule 1.18 duties than websites and blogs).

So, to avoid an unintended client-lawyer relationship, lawyers should take the precautions discussed in Formal Opinion 492, such as warning the prospective client against disclosing detailed information in the initial consultation.

As noted in Comment [2], someone *"who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is likely to form a client-lawyer*

relationship, is not a 'prospective client'" within the protection of Rule 1.18, RPC. *See Conn. v. U.S. Steel Corp.*, 2009 WL 260955 (N.D. Ind. Feb. 2, 2009) (employment discrimination plaintiff's meeting with union lawyer did not make her his prospective client under Rule 1.18; her actions "prior to, during, and after the meeting at the Country Lounge Inn indicate that she kept [him] at arm's length").

An individual must have consulted with the lawyer in "good faith" to secure legal representation to be considered a prospective client under Rule 1.18, RPC. This provision prevents putative solicitations intended to create a conflict of interest precluding the contacted lawyer from representing an adverse party when the individual initiating the call never intended to retain the lawyer. It was simply as set up. *See e.g.*, *Bernacki v. Bernacki*, 1 N.Y.S.3d 761 (Sup. Ct. 2015) (husband in a divorce case contacted 12 of the most experienced divorce lawyers in county in an attempt to disqualify them from representing wife was not a prospective client; wife's lawyer not disqualified as result of phone messages left by husband ostensibly seeking representation). *See generally* Kenneth D. Agran, Note, *The Treacherous Path to the Diamond-Studded Tiara: Ethical Dilemmas in Legal Beauty Contests*, 9 Geo. J. Legal Ethics 1307 (Summer 1996) (analyzing competitive interviewing process in which prospective client interviews several law firms).

B. Could the information "be significantly harmful"?

The more you are told, the more likely the prospective client will have conveyed "*significantly harmful information*." As noted in ABA Formal Opinion 492, "Rule 1.18 prohibits the representation if the prospective client provided the lawyer with information that 'could be significantly harmful' to the prospective client in the new matter." Under the "significantly harmful" test, there is no requirement "that the harm is certain to occur" for there to be a conflict. *Id*. *See also*, *Zhuang v. Lucky Nail Spa, Inc.,* 2024 WL 184266, at *10 (E.D.N.Y. Jan. 17, 2024) ("The test [under Rule 1.18] focuses on the *potential* use of the information [received from the prospective client]," not the "*actual* use." citing N.Y.C. Bar Ass'n, *Duties to Prospective Clients After Beauty Contests and Other Preliminary Meetings*, Formal Opinion 2013-1, at 5 (Oct. 1, 2013)).

Instead, the appropriate standard is whether the information acquired "*could be* significantly harmful." Applying this analysis requires the lawyer to consider the prospective client's view to the import of the information provided to the lawyer in the initial consultation. *See also*, *BeSang, Inc. v. Intel Corp.*, No. 3:23-CV-00113-HZ, 2023 WL 6542124, at *6 (D. Or. Oct. 4, 2023), *redacted opinion issued,* No. 3:23-CV-00113-HZ, 2023 WL 6534015 (D. Or. Oct. 4,

2023) ("[I]n determining whether information is significantly harmful, other states have considered whether the information is publicly available; would likely be disclosed in discovery; relates to motives, strategies or weaknesses; or has the potential to impact settlement proposals.") (citing Sarra Yamin, *Understand the Duties That Arise from Consultations Meeting Prospective Clients*, Or. St. B. Bull., Nov. 2020, at 12-13.)

Examples of information that "could be significantly harmful," include subjects like settlement negotiations, personal or sensitive information concerning the prospective client's marital relationship, strategic or tactical considerations on pending litigation, real estate investment opportunities, and merger or acquisition matters concerning corporate affairs. These examples typically come into play months or even years after the lawyer's initial consultation with the prospective client, when considering accepting the representation of a new client. Careful documentation of the information the lawyer obtains during the consultation with the prospective client is valuable in assessing whether the information acquired "could be significantly harmful" to the prospective client.

C. Obligation to protect information obtained from a potential client.

Rule 1.18(b), RPC creates a duty to protect information a lawyer obtains during a consultation with a prospective client, even when no client-lawyer relationship is formed. Lawyers are required to protect all information obtained during the consultation and are not permitted to "*use"* or "*reveal"* information acquired from the prospective client unless the lawyer obtains the prospective client's informed consent at the time of consultation permitting the lawyer to use or reveal the information provided by the potential client. Rule 1.0(g) defines *informed consent* as "*the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct*." Rule 1.0(g), RPC, Rule 407, SCACR.

As to the confidentiality aspects of Rule 1.18(b), RPC, lawyers have suffered consequences for revealing information obtained from prospective clients. *See In re Beguelin*, 417 P.3d 1118 (Nev. 2018) (after declining to represent divorce client upon learning she married to a friend, lawyer called friend tell him his wife wanted divorce; discipline imposed).

Rule 1.18(b), RPC, does, however, permit lawyers to treat prospective clients like former clients when it comes to protecting information. Although lawyer may neither use nor reveal information related to the representation of a *current* client, lawyer may use information related to

the representation of a *former* client once it is "*generally known*".[1] *See generally*, Rule 1.8(b), RPC ("A lawyer shall not use information relating to the representation of a *client* to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."); Rule 1.9(c)(1), RPC ("A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the *former* client except as these Rules would permit or require with respect to a client, *or when the information has become generally known*[.]") (Emphasis added).

Absent the information from the prospective client becoming "generally known," lawyers are not permitted to use the information at all. *Cf. United States v. Quest Diagnostics, Inc.*, 734 F.3d 154, 168 (2d Cir. 2013) (lawyer who used information relating to the representation to the disadvantage of a former client to bring *qui* tam action violated Rule 1.9(c) of the Rules of Professional Conduct; affirmed dismissal of Complaint and disqualification of the lawyer, outside counsel, and others "from bringing any subsequent related *qui tam* action, on the basis that such measures were necessary to prevent the use of [lawyer]'s unethical disclosures against [former clients].")

D. Disqualification in subsequent matters.

The prohibition against using or revealing information learned in consultation with a prospective client (the duty of confidentiality), is separated in Rule 1.18(c), RPC, from the prohibition against subsequent adverse representation in a substantially related matter (loosely characterized as a duty of loyalty). While a lawyer owes a prospective client the same duty of confidentiality owed to a client or former client, the duty of loyalty is different. It is only when the prospective client revealed information that "could be significantly harmful" will the lawyer be prohibited from representing someone else with materially adverse interests in a substantially related matter. The circumstances are "less exacting than the corresponding restriction on representations that are materially adverse to a former client," as to whom the prohibitions against acting adversely in a substantially related matter are "automatic." *See Kidd v. Kidd*, 219 So. 3d 1021 (Fla. 2017) (When no confidential information was divulged during consultation with

[1] In Formal Opinion No. 479 (2017), the ABA Committee addressed the "generally known" exception to the duty of confidentiality, by advising the information is generally known if it is widely known by members of the public in the relevant geographic area or in the former client's profession, industry, or trade. Information is not generally known simply because it is publicly available.

prospective client, lawyer may represent adversary); *State ex rel. Thomson v. Dueker*, 346 S.W. 3d 390 (Mo. Ct. App. 2011) (error to disqualify wife's lawyer under Rule 1.9's irrefutable-presumption test when husband had only been a former prospective client; Rule 1.18 required husband to show he actually imparted disqualifying information).

So, what is "significantly harmful" information? Courts have determined that for the information to be "deemed 'significantly harmful' within the context of [Rule 1.18], disclosure of that information cannot be simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospect client within the confines of the specific matter in which the disqualification is sought, a determination that is exquisitely fact-sensitive." *O'Builders & Assoc., Inc. v. Yuna Corp.*, 19 A.3d 966 (N.J. 2011) (motion to disqualify denied; prospective client claimed only that she disclosed information "concerning pending litigation and business matters" and disclosed "business, financial and legal information … believe[d] to be related to the current [lawsuit]."); *Benevida Foods, LLC v. Advance Mag. Publishers Inc.*, 2016 WL 3453342, at *14 (S.D.N.Y. June 15, 2016) (prospective client's "assessment of its own claims, its financial situation and risk tolerance, and its litigation and settlement strategies […] is precisely the type of information that, if shared, can provide an opposing party with a substantial, unfair advantage, and thus this Court finds that [prospective client] has adequately demonstrated that it disclosed information that could have been 'significantly harmful' to it, within the meaning of Rule 1.18.")

E. Imputed Disqualification.

Another distinction between treatment of prospective clients and former clients relates to methods for other lawyers in the firm to undertake a subsequent adverse representation over the objection of the former prospective client. *See* Rule 1.18(d)(2), RPC. Whereas former clients can prevent other lawyers in the firm from undertaking subsequent adverse representation, Rule 1.18(d)(2), RPC, provides for nonconsensual screening, which, if followed, allows other lawyers in the firm to undertake representation adverse to a former prospective client. To do so, however, the intake lawyer needed to have taken "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary" and provided the firm takes steps to ensure (i) "the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (ii) written notice is promptly given to the prospective client." *Id*.

III. Take-Aways!

A. Do not solicit communication from prospective clients, especially over a website, email or other communication that allows a client to divulge excessive information.

B. Take and preserve careful notes documenting information obtained from a prospective client.

C. Limit the information you accept to the bare essentials needed to perform a conflict check.

D. Implement a timely screen for any individual who received confidential information.

E. Implement procedures by which non-lawyer staff receive and review inquiries to screen for conflicts.

F. An individual who consults with a lawyer to disqualify the lawyer is not a "prospective client."

IV. Relevant South Carolina Rules of Professional Conduct and Comments.

A. Rule 1.6(a), RPC, Rule 407, SCACR: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

B. Rule 1.6(b), RPC, Rule 407, SCACR: Confidentiality of Information

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act;
(2) to prevent reasonably certain death or substantial bodily harm;
(3) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
(4) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
(5) to secure legal advice about the lawyer's compliance with these Rules;
(6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a

criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(7) to comply with other law or a court order; or

(8) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

C. Rule 1.9(c)(2), RPC, Rule 407, SCACR: Duties to Former Clients

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

D. Rule 1.18, RPC, Rule 407, SCACR: Duties to Prospective Client

(a) A person who engages in mutual communication with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client only when there is a reasonable expectation that the lawyer is likely to form the relationship.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph,

no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's mutual communications with a prospective client can be written, oral, or electronic and usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. Whether communications, including written, oral, or electronic communications, create a prospective client-lawyer relationship depends on the circumstances. For example, such a relationship is likely to be formed if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, such a relationship does not arise solely if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is likely to form a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a). Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial conference prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter

is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit mutual communication to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition communication with a prospective client on the person's informed consent that no information disclosed during the communication will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(g) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(l) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the client, a reasonable delay may be justified.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to a lawyer's care, see Rule 1.15.

Amended by Order dated November 17, 2021.

South Carolina Bar

Continuing Legal Education Division

Cracking the Code: Winning Strategies with Digital Evidence

Allyson Haynes Stuart

Cracking the Code: Winning Strategies with Digital Evidence

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Charleston School of Law
February 9, 2024

1

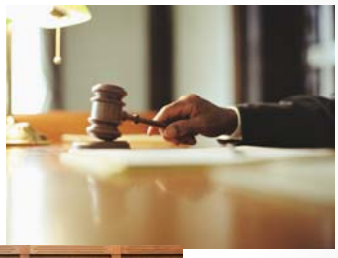
Types of Digital Evidence

- Email
- Social media
- Text messages
- Cell phone video
- Search inquiries
- Databases
- Backup tapes
- IOT devices
- Demonstrative CGA

2

Issues in Admissibility of Digital Evidence

1. Relevance & 403
2. Authenticity
3. Hearsay
4. Best evidence



3

1. Relevance – Rule 401

- Special Issue of identity
  - Problem when it's not clear who made an online comment, posted information online, or sent an email.
  - Without a basis for tying the evidence to the individual in question, the evidence is arguably irrelevant.
- Courts should admit evidence under 104(b) subject to a showing that the evidence is connected to the particular individual.
- Also important: when relevance is *substantially outweighed by unfair prejudice, confusion of the issues, misleading the jury, etc.* under 403

4

2. Authenticity: Rules 901 and 902

- 901(a): "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."
- 901(b) includes illustrations conforming with the rule.
  - (1) Testimony of a witness with knowledge
  - (4) Distinctive characteristics and the like
  - (5) Voice Identification
  - (9) Process or system

5

Authentication of emails

- 901(b)(1): testimony of a witness who sent or received the emails
- 901(b)(4): authentication based on "appearance, contents, substance, internal patterns, or other distinctive characteristics" -- like the name of a business appearing in an email address, or other circumstantial evidence like "To" and "From" headings, signature blocks, content itself
- 901(b)(3) comparison with evidence that is otherwise authenticated: emails with no signature block or names in the addressing info can be authenticated by comparing to emails from the same address but with such a signature block, etc.
- Trustworthiness argument:
  - goes to weight, not admissibility/authenticity
  - not specific to email

6

Authentication of Text Messages

- The mere fact that text messages were sent from a person's phone does not provide sufficient proof to establish that person authored them,
- but timing and distinctive characteristics of the messages can provided the circumstantial evidence necessary for authentication.
- In one recent case, contents of some messages demonstrated that defendant had possession of his phone when the messages were sent, and timing of other messages provided additional circumstantial evidence that defendant sent them, including text messages sent to accomplices during a period when others were frequently sent to a phone number saved in the phone as My Love addressed to a woman who defendant identified at trial as his girlfriend.
- State v. Benton, 865 S.E.2d 919 (S.C. Ct. App. 2021)

7

Authentication of Cell Phone Video

- Proposed witness had personal knowledge required to authenticate video messages which purported to show her boyfriend inside their apartment at the time he had allegedly been exiting defendant's car with another individual and shooting victim,
- trial court erred in excluding such messages from defendant's murder trial, in which they had been offered to discredit testimony that boyfriend had been seen exiting defendant's car, notwithstanding the trial court's concern that the date and time stamp had been manipulated;
- although there was a risk that the messages were not recorded at the time they were sent, witness had received the messages from boyfriend and a reasonable jury could find that they were what she said they were.
- State v. Hall, 876 S.E.2d 328 (S.C. Ct. App. 2022).

8

Authentication of Surveillance Video

- Personal knowledge of owner of home security system was sufficient to authenticate surveillance video that showed shooting, even though owner was not contemporaneously watching his monitor at time of shooting or at the scene of the shooting.
- Owner testified that he owned and operated the security system that recorded the video, testified that the camera that recorded the video faced street where shooting occurred, and explained that the time stamp on the video was incorrect because he did not set correct date or time when he set up his security system.
- State v. Gray, 438 S.C. 130, 882 S.E.2d 469 (Ct. App. 2022).

9

Authentication of website data

- May include data posted by the owner of the site (such a government website's posting of information), or data posted by others to the website (such as comments or chat room postings)
- Authentication: the exhibit accurately reflects what was actually on the website
  - Proponent: may use testimony that witness accessed site and exhibit accurately reflects what was there.
  - Opponent: may try to show that the exhibit does not accurately reflect the contents of the website, or that the contents are not attributable to the owner of the site.
  - Court: will look at the totality of the circumstances, including the length of time the data was posted on the site, whether others report having seen it, whether it remains on the site for the court to verify, etc.

10

Authentication of Social Media Posts

- Added wrinkle of proving who posted certain comments; see Chavan v. Doe, W.D. Wash., No. 2:13 cv-01823-RSM (10/28/13) (allowing early discovery to ID FB/Google user based on risk of losing ISP log evidence)
- Evidence sufficient to attribute a post to a particular individual may include:
  - Use of screen name;
  - Following instructions;
  - Self-identification;
  - Hard drive screen name use.

- Messages on social media from defendant, inviting victim to defendant's house, contained sufficient distinctive characteristics for authentication in defendant's prosecution for murder and desecration of human remains; messages were from account on social networking website associated with defendant's girlfriend, mentioned name of girlfriend's sister, and stated defendant's home address.
- State v. Green, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019).

11

Authentication of Computer Animation

Computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is
(1)authentic under **Rule 901 SCRE**;
(2)relevant under Rules 401 and 402, SCRE;
(3) a fair and accurate representation of the evidence to which it relates, and
(4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403.

Accident reconstruction was authenticated by testimony of the expert who prepared the underlying data and the computer technician who used that data to create the animation.
Clark v. Cantrell, 339 S.C. 369 (2000).

12

3. Hearsay

- Hearsay: is it an out-of-court statement being offered for the truth of the matter asserted?
  - If so, you need an exclusion ("not hearsay") under 801(d), or an exception under 803 or 804.
- Relevant exclusions/exceptions:
  - Prior Statement by a Witness under 801(d)(1)
  - Admission of a Party-Opponent under 801(d)(2)
  - Business records under 803(6) or public records under 803(8)
  - Present sense impression under 803(1)
  - Excited utterance under 803(2)
  - Then Existing Condition under 803(3)
  - Statement for purpose of medical diagnosis or treatment under 803(4)
  - Ancient Documents under 803(16): note difference between Federal and SC rule

13

Examples in Case Law

- United States v. Salgado, 250 F.3d 438 (6th Cir. 2001) (upholding admission of computer printouts of telephone toll records as business records)
- State v. Craycraft, 2010 WL 610601 (Ohio App. 12 Dist. 2010) (Instant messages sent by D admissible as admissions)
- In the Matter of K.W., 666 S.E.2d 490 (N.C. Ct. App. 2008) (evidence of minor's MySpace page admissible for impeachment purposes as prior inconsistent statement, but improper exclusion harmless; not admissible as substantive evidence)

14

4. The Best Evidence Rule: Requirement of the Original

- 1002: To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided.
- 1001: An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect… An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

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US v. Bennett, 363 F.3d 947 (9th Cir. 2004)

- To prove importation, testimony of Customs Officer that he discovered GPS device on boat and it revealed that the boat had traveled from Mexico
- Government did not have the GPS device or any record of it.
- Best evidence rule required exclusion

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Best Evidence Rule: Admissibility of Duplicates

- 1003: A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.
- 1001(4): A "duplicate" is a counterpart produced by the same impression as the original, or from the matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

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The New World of AI

- Authentication in the age of deepfakes?
- Resources:
  - The Sedona Conf. Comm. on ESI Evid. & Admiss., 22 The Sedona Conf. J. 83 (2021)
  - Grimm, Joseph, and Capra, Authenticating Digital Evidence, 69 Baylor L. Rev. 1 (2017)
  - Grimm, Grossman, and Cormack, Artificial Intelligence as Evidence, 19 N.W. J. Tech. & Intell. Prop. 9 (2021)

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Questions?

Thank you!

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