

EVIDENCE GUIDELINES

SOUTH CAROLINA

2010

HOW TO USE THIS BOOK

This book is designed to be “user friendly” for a non-attorney to comfortably move through evidence issues presented at a hearing.

The beginning index is keyed to most of the evidence objections raised in a non-jury hearing. Thus, when an objection is made, the reader should be immediately able to key into the stand-alone page identifying the objection, an example of it, the ruling options available, the street definition, the underlying rules to aid the reader.

Further, in the end of the book, the user can find a short summary of the procedure for a hearing.

There are several sources of evidence rules, and the major one for use is the South Carolina Court Evidence Rules.

EVIDENCE GUIDELINES

SOUTH CAROLINA

INTRODUCTION

The purpose of this booklet is to allow the user to become familiar with and able to competently operate under evidence rules in hearings.

Evidence is nothing more than a system designed like a filter, which is to filter out all but the relevant truth.

The rulings are based on the applicable law and the evidence. It is to the latter proposition that this book is presented.

INDEX

OBJECTION

Argumentative

Asked and Answered

Best Evidence Rule

Beyond the Scope of Direct Examination

Business Record

Computer Animation

Question is Confusing

Question is Cumulative

Question Assumes Facts Not in Evidence

Habit or Routine

Irrelevant

Improper Taking of Judicial Notice

Lay Witness Cannot Give Opinion

Leading the Witness

Misleading

Misstates the evidence or misquotes the witness

Answer is narrative

Non-responsive answer

Parole Evidence Rule

Privileged Communications

Speculative

Summary of documents

Unduly delaying the hearing

Hearsay

"Objection: Argumentative"

Example:

Q: Since you are clearly biased in favor of your daughter, how can you ever be fair in her punishment for not cleaning her dishes after supper?

Objection Argumentative

Ruling Options

I sustain the objection

I overrule the objection

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Is the question argumentative or more makes a speech to the commissioners rather than to get information.

Law Involved

S.C. Rules of Evidence Section.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

“Objection: Asked and answered”

Example:

Q: How old are you?

A. 42 years old.

Q: How old are you?

Objection: asked and answered.

Ruling Options

I sustain the objection

I overrule the objection

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Has the question already been asked and answered.

Law Involved

S.C. Rules of Evidence Section.

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

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

“Objection: Best Evidence Rule”

Example:

Attorney: “I offer a copy of the ticket into evidence”.

Objection: Best Evidence Rule

Ruling Options

I admit the evidence over objection

I deny the admission of the evidence

I will take the evidence subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Normally the original is not required to be introduced into evidence. Copies are usually satisfactory unless there is a genuine dispute about the authenticity of the original.

Law Involved

S.C. Rules of Evidence Section.

RULE 1003 ADMISSIBILITY OF DUPLICATES

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

“Objection: Beyond the scope of direct examination”

Example:

Q: (Asked in Cross Examination) What was the weather like on x-mas day, 2007, in Columbia, SC?

Objection: Beyond the scope of direct examination.

Ruling Options

I overrule the objection

I will take the evidence subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

This objection is not proper in South Carolina. On cross-examination you are allowed wide latitude in questions.

Law Involved

S.C. Rules of Evidence Section.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

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

"Objection: Business Record"

Example:

Attorney: I offer this record into evidence.

Objection: Business Records

Ruling Options

I admit the evidence over objection

I deny the admission of the evidence

I will take the evidence subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Is this a normal business record?

Law Involved

S.C. Rules of Evidence Section.

Rule 803

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

OTHER LAW:

The exceptions to the Hearsay Rule enumerated in the Business Records as Evidence Act is *limited in scope* and does not extend to subjective opinions or judgments which might be found in a business record. Not everything contained in a "business record" is automatically admissible. This section makes it a requirement for admission that "in the opinion of the

court, the sources of information, method and time of preparation were such as to justify its admission." This gives some control to the trial judge to exclude or require additional proof, if the authority or veracity of the record were a genuine issue.

KERSHAW COUNTY DEPARTMENT OF SOCIAL SERVICES, V. CATHERINE MCCASKILL, IN RE JONATHAN MCCASKILL, INFANT BORN 10/5/78. 276 S.C. 360, 278 S.E.2D 771 (1981)

"Objection: Computer Animation"

Example:

Attorney: I offer this computer animation into evidence.

Objection: Computer Animation

Ruling Options

I admit the evidence over objection

I deny the admission of the evidence

I will take the evidence subject to the objection and will at the end of the case rule on it's ultimate admissibility.

Law Involved

S.C. Rules of Evidence Section.

No direct cite.

OTHER LAW:

Demonstrative evidence often is admitted only for use in the courtroom to explain and illustrate a witness's testimony, but it also may be admissible as an exhibit for the jury to examine and consider during deliberations. *E.g., State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63, 76 (1998) (photographs and diagram of crime scene properly admitted in evidence); *Holmes v. Black River Elec. Co-op., Inc.*, 274 S.C. 252, 258, 262 S.E.2d 875, 878 (1980) (photographs of plaintiffs injured arm properly admitted in evidence); *State v. Barrs*, 257 S.C. 193, 199, 184 S.E.2d 708, 711 (1971) (upholding admission of coil of copper wire that was like the one allegedly stolen by defendants as proper demonstrative evidence);

Despite the dangers, computer animations can serve worthwhile purposes if screened carefully and admitted cautiously. We hold that a 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, SCRE. **JOHN KEVIN CLARK AND MAGGIE LEE ANDERSON, V. ANNETTE ROCHELLE CANTRELL. 339 S.C. 369, 529 S.E.2D 528 (2000)**

"Objection: Question is confusing"

Example:

Q: If Einstein created the theory of relativity, what did the calculus of math have to do with the absolute theory?

"Objection: Question is confusing"

Ruling Options

I sustain the objection

I overrule the objection

I will take the evidence subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Is the question confusing to the average person.

Law Involved:

S.C. Rules of Evidence Section.

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

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

More Discussion:

SEE: STATE V GREGORY, 198 S.C. 98, 165 S.E.2D 532(1941)

“Objection: Question is cumulative”

Used for both testimony and documents

Example:

Q: How old are you?

A. 42 years

Q: How old are you?

Objection: Question is cumulative

Ruling Options

I sustain the objection (testimony)

I overrule the objection (testimony)

I admit the evidence over objection (documents)

I deny the admission of evidence (documents)

I will take the evidence subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Is the question or document cumulative or repetitive.

Law Involved

S.C. Rules of Evidence Section.

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

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

“Objection: The question assumes facts not in evidence.”

Example:

Q: Assuming the accident happened at 4:02 pm on Sunday, August 22, 2007, at the intersection of Smith St., and Broad St., Charleston, SC, in clear daylight, and only three cars in the intersection, and the plaintiff had the green light, can you give an opinion on what caused the accident

Objection: Assumes facts not in evidence, more specifically the color of the light.

Ruling Options

I sustain the objection

I overrule the objection

I will take the evidence subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Does the question assume facts not in evidence.

Law Involved

S.C. Rules of Evidence Section.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

MORE DISCUSSION:

When an expert is giving an opinion on facts not in evidence, this is improper. The cure is to prove the underlying facts before giving the opinion, or promise the tribunal that it will be supplied and connected up later.

“Objection: Habit or Routine practice of organization improper testimony”

Used for both testimony and documents

Example:

Q: What does your club do every weekday at 8 am as a routine?

A: We salute the flag and say the pledge of allegiance.

Objection: Habit or Routine practice of organization, improper testimony

Ruling Options

I sustain the objection

I overrule the objection

I admit the evidence over objection

I deny the admission of the evidence

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Evidence of routine habit or practice is normally admissible.

Law Involved:

S.C. Rules of Evidence Section.

RULE 406 HABIT; ROUTINE PRACTICE

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

MORE DISCUSSION:

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

"Objection: Irrelevant"

Used for both testimony and documents

Example:

Q: If this case is about Mexican traditions, what is the traditional x-mas gift in Alaska?

Objection: Irrelevant

Ruling Options

I sustain the objection

I overrule the objection

I admit the evidence over objection

I deny the admission of the evidence

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Does the evidence advance the inquiry.

Law Involved

S.C. Rules of Evidence Section.

RULE 401 DEFINITION OF "RELEVANT EVIDENCE"

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

RULE 402 RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

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

MORE DISCUSSION:

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The admission or exclusion of evidence in general is within the sound discretion of the trial court. Fields, 363 S.C. at 25, 609 S.E.2d at 509.

MARIA A. HOLLINS, AS PARENT AND GUARDIAN AD LITEM
OF JANE DOE, A MINOR UNDER THE AGE OF FOURTEEN
YEARS, V. WAL-MART STORES, INC., OP. NO. 4473. (S.C.
CT APP. FILED DECEMBER 22, 2008)

“Objection: Improper taking of judicial notice.”

Example:

Statement by counsel to the Commission:

I ask that the court take judicial notice of the fact that gasoline has dangerous qualities.

Objection: Improper taking of judicial notice.

Ruling Options

I sustain the objection

I overrule the objection

I admit the evidence over objection

I deny the admission of the evidence

I will take the judicial notice subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Judicial notice means the commission puts into the record some fact not reasonably disputed.

Law Involved

S.C. Rules of Evidence Section.

RULE 201 JUDICIAL NOTICE OF ADJUDICATIVE FACTS

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

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

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

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

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

MORE DISCUSSION:

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

"Objection: Lay witness cannot give opinion"

Example:

Q: Do you have an opinion on what caused the automobile accident, that you did not even see?

Objection: Lay witness cannot give opinion

Ruling Options

I sustain the objection

I overrule the objection

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Lay (non-expert) witnesses are supposed to stick to facts, and not draw conclusions or opinions from them. There is a major exception to this under SCRE 701 below.

Law Involved

S.C. Rules of Evidence Section.

RULE 701 OPINION TESTIMONY BY LAY WITNESSES

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

MORE DISCUSSION:

Opinion must be based upon the personal observations of the witness and not merely upon the statements of another witness. **STATE V. BOTTOMS, 260 S.C. 187, 195 S.E.2D 116(1973)**

Opinion evidence is admissible as long as it is not superfluous. State v. McClinton, 265 S.C. 171, 217 S.E.2d 684 (1974). This is roughly equivalent to saying that opinion evidence must be helpful.

“Objection: Leading the witness”

Example:

Q: Do you think the accident happened at 4:02 pm on Sunday, August 22, 2007, at the intersection of Smith St., and Broad Street in Charleston, SC?

Objection: Leading the witness

Ruling Options

I sustain the objection

I overrule the objection

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Does the question suggest the answer.

Law Involved

S.C. Rules of Evidence Section.

RULE 611 MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

“Objection: The question is misleading”

Example:

If you are in China in a wreck, what time is it if it is noon in Moscow, anyday?

Objection: The question is misleading

Ruling Options

I sustain the objection

I overrule the objection

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Is the question itself misleading in the eyes of an average person.

Law Involved

S.C. Rules of Evidence Section.

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

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

"Objection: Misstates the evidence or misquotes the witness"

Example:

Q: The witness Jones said you did hit her from the side at the intersection where the accident occurred.

Objection: Misstates the evidence or misquotes the witness

Ruling Options

I sustain the objection

I overrule the objection

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Does the question contain a misstatement or misquote?

Law Involved

S.C. Rules of Evidence Section.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

“Objection: Answer is narrative”

Used for testimony

Example:

Q: Where did the accident happen?

A: It happened at 4:02 pm, on August 22, 2007, Sunday, at the intersection of Smith St, and Broad St., in Charleston, SC, I was warhing my Sunday suit.

Objection: Answer is narrative

Ruling Options

I sustain

I overrule the objection

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

A witness may do a narrative answer or chair may require the question and answer to be broken up into smaller parts.

Law Involved

S.C. Rules of Evidence Section.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

"Objection: Non - responsive answer"

Used for testimony

Example:

Q: What was the weather in Charleston, SC, the date of the accident?

A: The weather in Spokane, Washington was clear on X-mas day, 2007.

Objection: Non - responsive answer

Ruling Options

I sustain the objection

I overrule the objection

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Some witnesses volunteer more information than they were asked, or give a non-responsive answer.

Law Involved

S.C. Rules of Evidence Section.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

"Objection: Parole Evidence rule"

Used for both testimony and documents

Example:

Q: What did you discuss about contract price before the actual contract negotiations aware over and the contract signed?

Objection: Parole Evidence rule

Ruling Options

I sustain the objection

I overrule the objection

I admit the evidence over objection

I deny the admission of the evidence

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Prior or contemporaneous evidence is not admissible to change a written contract that was meant to be the complete agreement.

Law Involved

S.C. Rules of Evidence Section.

There is no South Carolina Rules of Evidence Rule for this.

Other law

Parol evidence may not be admitted to explain, enlarge or contradict minutes which are complete and unambiguous on their face. *Berkeley Elec. Coop. v. Town of Mt. Pleasant*, 308 S.C. 205, 208, 417 S.E.2d 579, 581 (1992). "Otherwise, parol evidence could render official minutes uncertain or unreliable so that the minutes would fail to afford dependable evidence of the proceedings...." *Id.*; see also *Moore v. Postal Telegraph-Cable Co.*, 202 S.C. 225, 236, 24 S.E.2d 361, 365 (1943) (stating that where company's Pension and Benefit Committee was required to keep minutes of meetings, the original minutes of the meetings were the best evidence of changes in the pension plan and parol testimony was properly excluded). A court must initially review the minutes to determine whether the minutes are incomplete or ambiguous and whether parol evidence is admissible to then clarify them. *Berkeley Elec. Coop.*, 308 S.C. at 209, 417 S.E.2d at 582 (holding that, after review, the minutes were unambiguous and the trial judge erred in admitting parol evidence). **JOSHUA DAVIS, V. ORANGEBURG-CALHOUN LAW ENFORCEMENT COMMISSION**, 344 S.C. 240, 542 S.E.2D 755 (2001)

"The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument." *Gilliland v. Elmwood Properties*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990). Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties. *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 486 S.E.2d 742 (1997).

The parol evidence rule is a rule of substantive law, not a rule of evidence. Accordingly, admission of evidence violating the parol evidence rule is legally incompetent and should not be considered even if no objection is made at trial. *Penton v. J.F. Cleckley & Co.*, *supra*; *Muckelvaney v. Liberty Life Ins. Co.*, 261 S.C. 63, 198 S.E.2d 278 (1973). **IN THE MATTER OF THE ESTATE OF WILLIAM D. HOLDEN, 539 S.E.2D 703, 343 S.C. 267 (2000)**

“Objection: Privileged Communication”

Used for both testimony and documents

Example:

Q.: What did you and your lawyer say to each other on February 13, 2008 about this case?

Objection: Privileged Communication

Ruling Options

I sustain the objection

I overrule the objection

I admit the evidence over objection

I deny the admission of the evidence

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Is the testimony about communications between:

lawyer/client,
husband/wife,
priest/penitent,
health professional/client,
self incrimination,
identity of confidential informant

Law Involved

S.C. Rules of Evidence Section.

RULE 501 GENERAL RULE

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

MORE DISCUSSION:

Among those privileges which would be covered by this rule are: husband and wife (S.C. Code Ann. § 19-11-30) priest and penitent (S.C. Code Ann. § 19-11-90); certain mental health professionals and clients (S.C. Code Ann. § 19-11-95) news media and sources (S.C. Code Ann. § 19-11-100); attorney and client *Drayton v. Industrial Life & Health Ins. Co.*, 205 S.C. 95, 31 S.E.2d 148 (1944)]; privilege against self incrimination (U.S. Const. amend. V; S.C. Const. art. I, § 12; S.C.Code Ann. § 19-11-50); and the identity of a confidential informant [*State v. Hayward*. 302 S.C. 75, 393 S.E.2d 918 (1990)].

“Objection: Speculative.”

Used for both testimony documents

Example:

Q: Can you give an opinion on the weather conditions at noon, ten years ago, in Columbia, S.C.

Objection: Speculative

Ruling Options

I sustain the objection

I overrule the objection

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Does the question call for a speculative answer?

Law Involved

S.C. Rules of Evidence Section.

RULE 611. MODE AND ORDER OF INTERROGATION AND PRESENTATION

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

"Objection: Summary of documents"

Used for documents

Example:

By counsel: I introduce into evidence this sheet of paper which is a summary of the 30 daily documents earlier put into evidence.

Objection: Summary of documents

Ruling Options

I admit the evidence over objection

I deny the admission of the evidence

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

Summaries are normally admitted into evidence.

Law Involved

S.C. Rules of Evidence Section.

RULE 1006 SUMMARIES

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

MORE DISCUSSION:

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

OTHER LAW:

ADO next contends the court erred in allowing Adamson to submit *his summaries* of ADO's computer

printouts to establish the amount of commission shortages. We disagree.

7 The admission of evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of discretion, amounting to an error of law. *Hofer v. St. Clair*, 298 S.C. 503, 381 S.E.2d 736 (1989).

8 Since ADO was permitted to cross-examine Adamson on the accuracy of his summaries, we find no abuse in their admission.

BILL ADAMSON, V. MARIANNE FABRICS, INC. AND ADO CORPORATION, 301 S.C. 204, 391 S.E.2D 249 (1990)

"Objection: Unduly delaying the hearing"

Used for both testimony and documents.

Example:

Q: Have all of the dead people you buried been actually dead?

Objection: Unduly delaying the hearing

Ruling Options

I sustain the objection

I overrule the objection

I admit the evidence over objection

I deny the admission of the evidence

STREET DEFINITION

Does the questioning unduly delay the hearing in the eyes of a reasonable person.

Law Involved

S.C. Rules of Evidence Section.

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

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

"Objection: Hearsay"

Used for both testimony and documents.

Example:

Q: What did the Unknown bystander tell you about the accident?

Objection: Hearsay

Ruling options

I sustain the objection

I overrule the objection

I admit the evidence over objection

I deny the admission of the evidence

I will take the testimony subject to the objection and will at the end of the case rule on it's ultimate admissibility.

STREET DEFINITION

The test is whether the out of court statement is being offered to prove the truth of what it says.

Law Involved

S.C. Rules of Evidence Section.

RULE 802 HEARSAY RULE

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

RULE 801 DEFINITIONS

The following definitions apply under this article:

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

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

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

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

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

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

THE FOLLOWING ARE EXCEPTIONS TO HEARSAY:

RULE 803 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

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

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

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

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

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

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

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

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

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

and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

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

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

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

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

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

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on

rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

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

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

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

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

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

(19) Reputation Concerning Personal or Family History. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth,

adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

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

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

(22) Judgment of Previous Conviction. Evidence of a final judgment (to include final judgments in juvenile delinquency matters), entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

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

RULE 804 HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

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

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

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

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

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

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

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

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

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

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

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

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

MORE DISCUSSION:

In *Brown*, the Court held police officer's testimony about complaints they had received in the neighborhood prior to setting up their surveillance was admissible for the nonhearsay purpose of explaining why officers began their surveillance of defendant's apartment. The officers statements here were similar to those in *Brown* in that in both cases the officers were explaining their actions in pursuing the defendants and the statements were not offered for their truth. **ROBERT J. CAPROOD, V. THE STATE OF SOUTH CAROLINA, 338 S.C. 103, 525 S.E.2D 514 (2000)**

A statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay. *Hawkins v. Pathology Assocs.*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998) (allowing admission of letters, an anniversary card, and video to show close familial bond between decedent, her husband, and her children in malpractice action.

The closure letter and report were not admitted to prove the truth of their contents but to demonstrate R & G completed the work. **R & G CONSTRUCTION, INC., v. LOWCOUNTRY REGIONAL TRANSPORTATION AUTHORITY, 343 S.C. 424, 540 S.E.2d 113 (2000)**