

# South Carolina Court of Appeals 2013 Appellate Practice Project

The South Carolina Court of Appeals and the South Carolina Commission on Indigent Defense announced the "2013 Appellate Practice Project" in late August. The cooperation of the South Carolina Bar Association combined with the approval of the Attorney General of South Carolina, and the Chief Justice of South Carolina have ensured the project's success. The project had two primary goals:

1. To assist the Commission's Appellate Division in controlling, and hopefully reducing, its enormous caseload (consistently over 1500 active cases), which the Appellate Division currently handles with only ten attorneys
2. To give South Carolina practicing attorneys an unprecedented opportunity to gain appellate experience in actual cases argued before the South Carolina Court of Appeals

Formal announcement of the project was met with overwhelming interest and the option to take a case was quickly filled. In mid-September, participants were each appointed to represent one of fifty-one indigent criminal defendants on direct appeal to the South Carolina Court of Appeals. As a requirement to participation, the participants agreed to attend a CLE on "Presenting Criminal Cases to the Court of Appeals," taught by preeminent leaders of the appellate Bar in South Carolina and sponsored by the South Carolina Bar Association. The participants were responsible for preparing the Appellant's brief and reply brief for filing and will argue the case before the Court of Appeals. Each participant will receive credit for the appointment under Rule 608, SCACR.

Participants in this program were required to:

- Be practicing members of the Bar in good standing who have complied with the requirements of Rule 403, SCACR
- Attend the appellate practice CLE which occurred on October 24, 2013
- Commit to filing the Appellant's initial brief and designation of matter by December 2, 2013, and to comply with other deadlines in the Appellate Court Rules

This was an excellent opportunity for some of the brightest lawyers in South Carolina to gain appellate experience while making a truly meaningful contribution

to the criminal justice system. Several people involved in planning this project commented on it:

- **Robert M. Dudek**, Chief Appellate Defender: "This project will greatly assist us in relieving the heavy caseload we face, while ensuring that indigent clients will continue to have high quality legal representation on appeal."
- **Chief Judge Few**: "We greatly appreciate each lawyer who participates in the 'Appellate Practice Project.' Each of these lawyers is demonstrating a sincere dedication to the administration of justice, and to the advancement of their careers."
- **C. Rauch Wise**, a veteran trial lawyer and accomplished appellate advocate who obtained three reversals of criminal convictions in 2013 alone, and a speaker at the CLE: "I wish someone had asked me to do this 30 years ago. You cannot pay for the experience lawyers will get from this program."
- **Chief Justice Toal**: "The '2013 Appellate Practice Project' will be a critical step in our fulfilling the legal system's responsibility to administer justice promptly and effectively. Lawyers who choose to participate in this program will make a significant contribution to their profession and, in the process, gain invaluable experience."

Several lawyers volunteered to act as consultants throughout the brief writing phase of this project. The effort was spearheaded by Chief of Appellate Defense Bob Dudek with selected members of appellate defense who were joined by former chief of appellate defense Dan Stacey and private attorneys Tanya Gee and Cameron Blazer.

When Dean Wilcox at the University of South Carolina school of Law found out about the Appellate Practice Project, the school made their Carolina Clerk program available. As a result, a number of students assisted the appointed attorneys with research. Additionally, Professor Bob Bockman, in conjunction with his appellate advocacy class, is working on a study to evaluate the quality of work done by the appointed attorneys.

## Presenting Criminal Cases to the Court of Appeals Agenda

October 24, 2013  
SC Bar Conference Center

- 9:00 a.m. The Diverse Experience of a Great Lawyer—Appellate Practice**  
The Honorable John Cannon Few  
Chief Judge, South Carolina Court of Appeals
- 9:15 a.m. The Strategy of Appellate Practice**  
John S. Nichols  
Bluestein, Nichols, Thompson, and Delgado, LLC, Columbia
- 9:45 a.m. Understanding Issue Preservation**  
Kathleen G. Chewning  
McNair Law Firm, Hilton Head Island
- 10:15 a.m. Identifying Issues that Get Convictions Reversed**  
Robert M. Dudek, Chief Appellate Defender  
South Carolina Commission on Indigent Defense
- 10:45 a.m. Morning Break**
- 11:00 a.m. Framing the Issue to Win the Case**  
C. Rauch Wise  
Greenwood
- 11:30 a.m. Writing and Arguing to "Your" Audience**  
Laura A. Gregg  
Law Clerk, South Carolina Court of Appeals
- 11:45 a.m. Motions Practice Before the Court of Appeals**  
Patricia Howard, Chief Staff Attorney  
Kate H. Crater, Deputy Chief Staff Attorney  
South Carolina Court of Appeals
- 12:15 p.m. Lunch Break**
- 1:30 p.m. What Your Opponent Doesn't Want to See**  
Salley W. Elliott  
Senior Assistant Deputy Attorney General

- 2:00 p.m. The Secrets of Oral Advocacy Revealed, At Last**  
Robert T. Bockman  
Professor, University of South Carolina School of Law
- 2:30 p.m. Logistical Information**
- 2:45 p.m. Breakout Sessions**
- 4:45 p.m. Adjourn**

### **Details for Breakout Sessions**

#### **Conference Room 1**

- Discussion Leader:** James W. Bannister, Bannister & Wyatt, LLC,  
Greenville
- Lead Participants:** Wanda H. Carter, Deputy Chief Appellate Defender  
Carmen V. Ganjehsani, Division of Appellate Defense

#### **Conference Room 2**

- Discussion Leader:** Charles Grose, Grose Law Firm, Greenwood
- Lead Participants:** Robert M. Dudek, Chief Appellate Defender  
Lara M. Caudy, Division of Appellate Defense

#### **Conference Room 3**

- Discussion Leader:** Harry A. Dest, Circuit Public Defender, 16th Circuit
- Lead Participants:** Kathrine Haggard Hudgins, Div. of Appellate Defense  
Robert M. Pachak, Division of Appellate Defense

#### **Main Room 1**

- Discussion Leader:** Deborah B. Barbier, Deborah B. Barbier, LLC, Columbia
- Lead Participants:** David Alexander, Division of Appellate Defense  
LaNelle C. DuRant, Division of Appellate Defense

#### **Main Room 2**

- Discussion Leader:** Chris D. Scalzo, Deputy Public Defender, Greenville
- Lead Participants:** Susan B. Hackett, Division of Appellate Defense

Ben J. Tripp, Division of Appellate Defense

## PRESERVATION OF ERROR IN THE TRIAL COURT

### Betsy Goodale

"[A]ll that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower court and passed upon by that Court." Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939).

#### A. Issue must be raised to trial court.

##### 1. General Rule.

(a) The appellate courts of this state have consistently refused to apply the plain error rule. Instead, it is the responsibility of counsel to preserve issues for appellate review. Only limited exceptions to this rule have been recognized.

(b) In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.

(c) "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. (Citation omitted). The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It 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." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

##### 2. Exceptions to the General Rule.

(a) **Subject-Matter Jurisdiction.** Issues raising questions of subject-matter jurisdiction may be raised at any time, including for the first time on appeal. Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. Subject matter jurisdiction may not be waived even by consent of the parties. If not raised as an issue by appellant, lack of subject-matter jurisdiction of the trial court should be raised by the appellate court on its own motion.

(b) **Cases Involving Rights of Minors or Parties Under Legal Disability.** Where the rights and best interests of a minor child are involved, an appellate court may overlook procedural rules or even raise, ex mero motu, issues not raised by the parties. There should be some evidence that adhering to the rules would jeopardize the child's best interest.

(c) **Additional Sustaining Grounds.**

(1) "Under the present rules, a respondent - the 'winner' in the lower court - may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." On, L.L.C. v. Town of Mt. Pleasant, *supra*. The basis for a respondent's additional sustaining ground must appear in the record on appeal. Id.

(2) An appellate court may ignore an additional sustaining ground, especially if it was not presented to the lower court. While the rules do not impose a preservation requirement, the failure to present an additional sustaining ground to the lower court reduces the likelihood an appellate court will rely on it to affirm a judgment.

(d) **Judicial Economy.** Jeter v. S.C. Dept. of Transp., 369 S.C. 433, 633 S.E.2d 143 (2006)("Regardless of any preservation problems we address this issue in the interest of judicial economy. The first time this case was tried, it ended in a mistrial. This appeal involves the second trial, and based on the unappealed rulings of the Court of Appeals, this case will be tried for a third time.")(citing S. Bell Tel. & Tel. Co. v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991)(deciding an issue on appeal in the interest of judicial economy)).

(e) **Waiver of Right to Counsel.** "A notable exception to this general rule requiring a contemporaneous objection is found when the record does not reveal a knowing and intelligent waiver of the right to counsel. The pro se defendant cannot be expected to raise this issue without the aid of counsel." State v. Rocheville, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993); Ex parte Jackson, 381 S.C. 253, 672 S.E.2d 585 (Ct. App. 2009). However, an appellant who validly waived her Sixth Amendment right to counsel is required to comply with preservation requirements.

**B. Issue must be raised by appellant.**

1. As a general rule, the objection in the trial court must have been made by the party who urges the error in the appellate court.
2. Where appellant's counsel makes no objection at trial, an issue cannot be raised on appeal even though appellant's co-defendant or another party objects.
3. If a defendant does not raise an issue at trial, but the judge addresses it, it is still not preserved for appeal since it was not raised by the defendant.

**C. Issues must have been raised in a timely manner.**

1. To preserve a question for review, the objection must be timely made, and usually it must be made at the earliest possible opportunity. Rule 103(a)(1), SCRE. The objection must be "contemporaneous."
2. Ordinarily, if an appellant fails to object the first time a statement is made, he waives his right to raise the issue on appeal.
3. The failure to make a proper contemporaneous objection to the admission of evidence cannot be later bootstrapped by a motion for a mistrial.

**D. Raising particular issues.**

**1. Opening and Closing Arguments.**

(a) Failure to make an objection to comments made during opening and closing argument precludes appellate review of the issue. The proper course is to object immediately to an improper argument.

(b) If an appellant objects and the objection is *sustained* but he does not move for a curative instruction or request a mistrial, he has received what he asked for and cannot be heard to complain on appeal. However, if an objection is *overruled*, it is not necessary to make a motion for mistrial or new trial to preserve an error for appellate review.

(c) Once the trial judge has ruled on an objection to an

improper argument, it is not necessary for counsel to object every time the argument is made thereafter. Rule 43(c)(1), SCRCP and Rule 17, SCRCrimP (if an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence).

(d) Except in flagrant cases where prejudice is clear, an objection to an argument which is raised for the first time after the verdict is untimely. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001)(failure to make a contemporaneous objection can be excused only when the challenged argument constitutes abuse of a party or witness); Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994); S.C. State Hwy. Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1971). However, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice despite the fact that there was no objection to the argument at the time it was made. Toyota of Florence, Inc. v. Lynch, *supra*.

The Court clarified Toyota in Dial v. Niggel Assoc., Inc., 333 S.C. 253, 509 S.E.2d 269 (1998). The Court stated that Toyota excuses failure to make a contemporaneous objection only where the challenged argument constitutes abuse of a party or witness. Moreover, the Court held the issue of an inflammatory argument must be raised to the trial judge by way of a post-trial motion in order to be preserved for appeal. See also Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000)(solicitor's comments during closing argument did not rise to level of a Toyota argument).

## 2. **Indictments.**

(a) An objection to defects which appear on the face of an indictment must be raised before the jury is sworn. S.C. Code Ann. § 17-19-90 (2003).

(b) When a defendant makes a motion for a directed verdict, the Court has never required him to object to the subsequent amendment of an indictment in order to preserve that issue for appellate review.

## 3. **Evidence.**

(a) To preserve an issue regarding the admissibility of

evidence, a contemporaneous objection must be made. Failure to object when evidence is offered constitutes a waiver of the right to have the issue considered on appeal.

(b) Furthermore, when a witness gives objectionable testimony and an objection is subsequently sustained, the issue is not preserved for appeal unless the objecting party moves to strike the testimony.

(c) However, the Supreme Court has held that when the trial judge has already ruled that certain testimony is proper, and it would be futile to move to strike the testimony, a defendant is not required to continue objecting to the testimony in order to preserve the issue for appellate review.

(d) The appropriate vehicle for challenging the admissibility of evidence based on a **search and seizure** violation is a motion to suppress.

(e) Failure to contemporaneously object to the introduction of evidence claimed to be prejudicial cannot be later bootstrapped by a motion for a mistrial.

#### 4. **Motions in limine / Pre-trial Motions.**

(a) Generally, a motion in limine seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.

(b) Even where a pre-trial motion is not considered to be a motion in limine, if the ruling by the court prior to trial is not a final ruling, the court expects counsel to offer a contemporaneous objection if allegedly improper testimony is offered, and significant testimony occurs between the pre-trial motion and the testimony that is challenged on appeal, the pre-trial motion does not act to preserve the issue for appeal. **Timing is the key.**

#### 5. **Statements.**

A ruling on the voluntariness of a statement must be sought in order for the issue to be preserved for appellate review.

6. **Curative instructions.**

(a) If an appellant objects and the objection is sustained but he does not move for a corrective instruction or request a mistrial, he has gotten what he asked for and cannot be heard to complain on appeal.

(b) The refusal of a trial judge's offer to give a curative instruction may constitute a waiver of the right to address the challenged testimony on appeal

(c) Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review.

7. **Trial in absence.** The defendant or his attorney must object at the first opportunity to the judge's failure to make findings required by Rule 16, SCRCrimP, in order to try a defendant in his absence.

8. **Jury instructions.**

(a) "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury." Rule 51, SCRCP.

(b) "All requests for legal instruction to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct." Rule 20(a), SCRCrimP. "Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury.

Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection." Rule 20(b), SCRCrimP.

(c) "In all cases tried before a jury, other than cases in a magistrate's or municipal court, after the court has delivered to the jury a charge on the law in the case, the court shall temporarily excuse the jury from the presence of counsel and litigants in order to give counsel and litigants an opportunity to express objections to the charge or request the charge of additional propositions made necessary by the charge, out of the presence of the jury." S.C. Code Ann. § 17-23-100 (2003).

(d) A jury charge is not preserved for appellate review unless a party either requested the charge and obtained a ruling or objected on specific grounds to the charge as given. When an instruction as given is inadequate, a party must request further instructions or object at the completion of the instructions in order to preserve the issue for review.

(e) Where a party requests a jury charge and after an opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request or to object to the failure to give the charge, at the conclusion of the jury instructions.

(f) A written request for instructions is not required.

(g) An appellate court will not review the failure to give a requested jury charge where the request to charge does not appear on the record.

## 9. **Jury selection/Voir dire.**

(a) Failure to object to voir dire constitutes a waiver of the right to claim error therein on appeal.

(b) Failure to move to strike jurors for cause does not render a voir dire issue unpreserved for appeal if appellant objected to voir dire.

(c) The failure to request an instruction to jurors during voir dire or to object to the trial judge's failure to give an instruction

constitutes a waiver of the issue on appeal.

(d) An objection to a juror must be made before the jury is impaneled. S.C. Code Ann. § 14-7-1030 (Supp. 2012). A party who objects after the impaneling of the jury must show due diligence would not have disclosed the basis for the objection.

(e) Failure to object to the exclusion of potential jurors by the trial judge constitutes a waiver of the issue on appeal.

(f) Failure to object to the excusal of a juror for good cause constitutes waiver of the issue on appeal.

(g) A challenge pursuant to Batson v. Kentucky must be made before the jury is sworn. A trial judge is not required to hold a Batson hearing without a request from one of the parties.

(h) However, where the initial jury is quashed and a second jury is impaneled, an appellant does not have to object to the composition of the second jury if appellant's argument in regard to selection of the initial jury, and the trial judge's ruling thereon, are contained in the record, and if the second jury is drawn immediately after the hearing on appellant's arguments on the composition of the first jury.

(i) Failure to exhaust all of a defendant's peremptory strikes will preclude appellate review of juror qualification issues.

(j) An appellant's failure to raise any objection to the State's strike of a juror precludes review of the issue on appeal.

(k) Failure to ask the trial court to conduct further voir dire of a juror will preclude an appellant from arguing on appeal that the trial court abused its discretion by not allowing extensive voir dire of the juror.

10. **Juror disqualification.** If dissatisfied with the trial judge's examination of a juror, a defendant should **immediately** move for permission to make additional inquiries of the juror. A request for additional questioning the day after the trial judge examines a juror and finds her qualified is untimely.

11. **Jury deliberations.** A defendant must make the trial judge

aware of alleged premature jury deliberations, or ask the trial judge prior to the verdict to question the jurors regarding any premature deliberations in order to preserve the issue for appeal.

12. **Improper or prejudicial comments/questions by judge.**

(a) Any objection must be raised when the remarks are made or the questions are asked.

(b) However, when the tone and tenor of the judge's remarks are such that any objection would be futile, failure to object does not result in a waiver of the issue on appeal. State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994).

13. **Expert witness.** Failure to object when an expert witness is qualified constitutes a waiver of the issue on appeal.

14. **Sequestration.** An objection must be made at trial.

15. **Waiver of right to address jury in death penalty cases.** Where there is no on-the-record waiver of a defendant's right to address the jury in the guilt or penalty phase of a death penalty trial as allowed by S.C. Code Ann. § 16-3-28, there must be a contemporaneous objection to preserve the issue for appeal.

16. **Directed verdict.**

(a) A party must state a specific ground for a directed verdict motion in order to preserve the issue for appellate review.

(b) Issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below.

(c) If a defendant presents evidence after the denial of his directed verdict motion at the close of the State's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency of the evidence.

17. **Conflict of interest.** A party is precluded from raising an attorney's conflict of interest for the first time on appeal.

18. **Competency.** The issue of competency to enter a guilty plea cannot be raised for the first time on appeal, nor can the failure to conduct a competency hearing.

19. **Probation revocation.** An appellant cannot complain on appeal about the circuit court judge's failure to make a determination on the record that appellant's failure to pay restitution was willful or the circuit court judge's authority to modify the conditions of probation where the appellant failed to raise the issues to the circuit court judge at the probation revocation hearing.

20. **Prior convictions.**

(a) The Supreme Court has refused to engage in speculation in reviewing claims of improper impeachment. When a trial judge makes a preliminary ruling on the admission of prior convictions for impeachment and the defendant chooses not to testify, a claim of improper impeachment is not preserved for appellate review.

(b) Where an appellant does not object to the trial court's basis for admitting his prior convictions, the issue is not preserved for appellate review.

21. **Damages.** Failure to raise the issue of a Gamble review of punitive damages in the circuit court constitutes a waiver of the issue on appeal.

22. **Post Trial Motions Based on Sufficiency of Evidence.** A directed verdict motion is a prerequisite for a post-trial motion based on the sufficiency of the evidence.

23. **Sentence/Sentencing.** Failure to object to sentence at the time of its imposition constitutes a waiver of the issue on appeal. However where an objection would be futile or place the defendant in a "perilous posture," no objection to the sentence is necessary. State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001).

24. **Guilty plea.**

(a) Absent a timely objection at the plea proceeding, the unknowing and involuntary nature of a guilty plea will not be considered on direct appeal. The proper avenue through which to

challenge a guilty plea which was not objected to at the time of its entry is through post-conviction relief.

25. **Recess.** Failure to request a recess constitutes a waiver of the right to raise the judge's failure to grant a recess on appeal.

26. **Continuance.** Must ask for continuance in order for the issue to be preserved for appellate review.

27. **Cameras in the courtroom.** Must object to filming of proceedings in order for issue to be preserved for appellate review.

28. **Interpreters.**

(a) Must object to judge's ruling on scope of interpreter's duties in order for issue to be preserved for appellate review.

(b) Must object to court's failure to appoint an interpreter in order for the issue to be preserved for review.

29. **Oath.** Must object to trial judge's failure to give an oath in order for the issue to be preserved for appellate review.

30. **Recusal.** When a cause for bias or prejudice on the part of the hearing judge is known to a party, the party must raise the issue of recusal before the matter is submitted for decision. Otherwise, any objections to the judge's impartiality are waived.

31. **Prosecution.** If there is no objection to special prosecutors, instead of the elected solicitor, prosecuting a case, the issue is not preserved for appellate review.

32. **Jail attire.** A defendant must object to jail attire at trial to preserve issue for appellate review.

33. **Verdict Form.** A party must make a timely objection to the verdict form in order to raise it as an issue on appeal.

34. **Reform verdict.** A party seeking to reform a verdict must object before the jury is discharged.

35. **Personal jurisdiction.** Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised.

36. **In-Court Identification.** A defendant must object to an in-court identification to properly preserve the issue for appeal.

37. **Request to Replay Testimony.** In order to preserve issue regarding judge's failure to require additional testimony, other than that requested by jury, the defendant must make a contemporaneous request at trial to have the remainder of the testimony replayed.

38. **Order for Removal.** Once the family court has conducted a merits hearing and ordered a treatment plan, failure to object to the sufficiency of a plan or the process by which a plan was developed waives the right to raise such an objection in a subsequent termination of parental rights action.

39. **Jury Trial.** Where defendant fails to request a jury trial on contempt charges and fails to object to imposition of contempt sentences without a jury trial, the issue of his entitlement to a jury trial is not preserved for review.

41. **Private Investigator Fees.** An objection must be made to an award of private investigator fees in order for the issue to be preserved for appeal.

42. **Guardian ad Litem.**

(a) Where appellant failed to object when the guardian ad litem gave her custody recommendation, she could not assert the family court erred in failing to set forth in the record the specific grounds for requesting the guardian ad litem's custody recommendation as required by the Private Guardian Ad Litem Reform Act. Payne v. Payne, 382 S.C. 62, 674 S.E.2d 515 (Ct. App. 2009).

(b) Where appellant argued the family court erred in relying on a guardian ad litem's report and recommendation because guardian conducted her investigation in a biased manner and the report was incomplete because it failed to include a custody recommendation, Court of Appeals held the issues were not preserved for review because while Father complained of the guardian ad litem's bias during his testimony, he never made a motion to relieve the guardian of her duties based on bias. In addition, Father never asserted the guardian's report was incomplete or otherwise objected to her report because it

lacked a recommendation. Spreeuw v. Barker, 385 S.C. 45, 682 S.E.2d 842 (Ct. App. 2009).

**E. Objection must be on a specific ground.**

1. Ordinarily, a general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for appellate review.
2. An objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge.
3. A trial judge commits no error in overruling a general objection.
4. Merely stating that the "standard motions" are being made at the conclusion of a trial fails to preserve the issue of the sufficiency of the evidence.

Examples of general objections:

- (a) "Highly prejudicial."
- (b) "We object."
- (c) General objection "for the record . . . [to] testimony or remarks from the victim's family in this case."
- (d) Objection that charge is not proper statement of law.
- (e) General objection on relevancy.
- (f) Objection stating no grounds.

5. However, this requirement has been relaxed somewhat by the Rules of Evidence. Rule 103(a)(1) states that a party must state the specific ground of objection if the specific ground was not apparent from the context. The note to the rule states that the better practice is for counsel to always give, and the court always to require, specific grounds for an objection to avoid later disputes regarding what was apparent from the context.

6. It should also be noted that Rule 18(b), SCRCrimP, and Rule

9(b), SCRFC, which state that no argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the Court, do not prevent counsel from stating the grounds for an objection, but merely control argument on the grounds for the objection.

**F. Proffer of excluded testimony.**

1. Generally, the failure to make a proffer of excluded evidence will preclude review on appeal.

2. Where no proffer of excluded testimony is made, the Court is unable to determine whether the appellant was prejudiced by the trial judge's refusal to admit the testimony into evidence.

3. However, the rule regarding proffers has been relaxed where the trial court refuses to allow a proffer and the record clearly demonstrates prejudice, or where the appellate court is able to determine from the record what the testimony was intended to show and that prejudice clearly exists.

**G. Issue must have actually been ruled on by trial judge.**

1. An issue not ruled upon by the trial judge is not preserved for appeal. Where an issue presented to the trial court is not explicitly ruled on in the final order, the issue must be raised by an appropriate **post-trial motion** to be preserved for appeal.

3. This rule also applies to actions before masters-in-equity, to the circuit court when it sits in an appellate capacity, and to arbitration, but does not apply to proceedings before the Workers' Compensation Commission. "An aggrieved party may not challenge the Commission's decision with a motion to the Commission, but only with an appeal to the circuit court." S.C. Code Ann. § 42-17-60; 25A S.C. Reg. 67-215.

4. A post-trial motion must also be made where there are inconsistencies in the order or inconsistencies between an oral ruling and a written order.

7. Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial judge but not yet ruled upon by him.

8. A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. In other words, an issue may not be raised for the first time in a motion to reconsider.

9. However, where an appellant learns for the first time when he receives the order that respondent will be granted certain relief, the appellant must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the record for appeal.

10. POST TRIAL MOTIONS CAN BE DANGEROUS! WHILE THEY ARE OFTEN NECESSARY TO PRESERVE ISSUES FOR APPEAL, IN SOME CASES, FILING SUCCESSIVE POST-TRIAL MOTIONS INSTEAD OF SERVING A NOTICE OF APPEAL MAY RESULT IN AN APPEAL BEING BARRED AS UNTIMELY.

It is very important to read Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004). In that case, the Court held that a party is usually free to file an initial Rule 59(e) motion, regardless of whether a previous JNOV/new trial motion was made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. The Court stated it views the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting a case to the trial court. However, the Court cautioned parties who file post-trial motions to note carefully the exceptions to this general rule as expressed in Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999), Quality Trailer Products, Inc. v. CSL Equip. Co., 349 S.C. 216, 562 S.E.2d 615 (2002) and Collins Music Co. v. IGT, 353 S.C. 559, 579 S.E.2d 524 (Ct. App. 2002). For the Court's most recent decisions in this area, see Fields v. Regional Med. Ctr., 363 S.C. 19, 609 S.E.2d 506 (2005) and Robinson v. Robinson, 365 S.C. 583, 619 S.E.2d 425 (2005)(in first post-trial motion, defendant contended award of attorney fees was excessive and at hearing on motion argued should have been calculated at \$250 per hour instead of \$300; circuit court rejected argument and found affidavit submitted by plaintiff's attorney referring to rate of \$250 per hour constituted scrivener's error, therefore, rate of \$300 per hour was correct; defendant filed second motion to alter or amend, requesting the court delete the paragraph concerning attorney's fees and the scrivener's error; after the motion was denied, defendant appealed; plaintiff moved to dismiss appeal on ground appeal was untimely;

Court found that because award of attorney's fees was affirmed and nothing from original judgment was altered, second motion was not appropriate and did not toll time for appeal); see also Chapman v. Upstate RV and Marine, 364 S.C. 82, 610 S.E.2d 852 (Ct. App. 2005).

11. Once the issue has been properly raised by a Rule 59 motion, it is preserved for appeal even if the trial judge does not rule on it.

12. For the necessity of Rule 59 motions in **post-conviction relief cases**, see Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007); Humbert v. State, *supra*; McCullough v. State, 320 S.C. 270, 464 S.E.2d 340 (1995); and Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

13. Rule 59(e) motions are permitted in Administrative Law Court proceedings where issue preservation is also required.

#### H. **Waiver of the right to raise issue on appeal.**

1. An issue conceded in the trial court cannot be argued on appeal.

2. Where an objection is expressly withdrawn, it cannot be raised on appeal. Similarly, where counsel states at trial that he has no objection to a specific aspect of a charge, he may not argue on appeal that the charge was erroneous.

3. Express consent to the admission of evidence constitutes a waiver of the issue on appeal.

4. One who purposefully elicits testimony on a particular subject without reserving his objections and receives the relevant response waives any alleged error.

5. A party cannot complain of error his own conduct has induced.

6. A party cannot seek and receive a particular result at trial and then challenge it on appeal.

7. Where an appellant expressly waives an argument at trial, it cannot be raised on appeal.