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Overcoming Counterfeit Objections and Preserving Evidence for Review

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Today's faculty features:

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Overcoming Counterfeit Objections and Preserving Evidence

Objections are an important part of discovery and trial. A proper objection can keep bad evidence out, but when bad evidence is allowed in despite a proper objection, the issue is then preserved for appeal. Absent "plain error," objections which are not timely made are waived. Part of a trial lawyer's work is to timely and properly make objections when necessary.

Counterfeit objections, also called "speaking objections," are an improper form of objecting. Trial lawyer Eric Guster defined speaking objections as follows:

> A speaking objection is an objection where the lawyer speaks a complete thought in an effort to either a) provide additional information to the jury that they should not have b) aggravate opposing counsel c) give additional information to the judge that they want the judge to know or d) all of the above at the same time. More than likely, it is "d," all of the above.

Guster, E. (2013, July 2). George Zimmerman Trial: What Is A Speaking Objection? http://newsone.com/2625255/george-zimmerman-tria-speaking-objection/. Speaking objections are a hallmark of unprofessionalism. In *Brewer v. State*, 2006 OK CR 12, ¶ 9, 133 P.3d 892, 894, the Oklahoma Court of Criminal Appeals noted that the trial "was an ugly brawl . . . that went well beyond what could be considered professional." In a footnote, the appellate court explained, "Time after time, the trial judge instructed the parties to stop using "speaking objections." Her instructions were ignored." *Id.* at n. 7. A speaking objection occurs when, under the guise of making an appropriate objection, opposing counsel makes improper speech or argument. At trial, speaking objections are a tactic employed to interrupt a line of questioning, distract the factfinder, make inappropriate argument, and even coach a witness. At minimum, speaking objections are a waste of precious trial time with no benefit to the judge or jury.

Speaking objections can occur during direct and cross examination, often taking the following form: the lawyer says "Objection," followed by a tirade about the question, the questioner, any part of the lawsuit, or a personal opinion about the case. On cross examination,

the opposing lawyer may purport to object to a question to coach the witness. "Objection, if he knows." The inevitable response from the witness: "I don't know." On direct examination, frustrated counsel may try to interrupt the trial to make a mini-closing argument. "Objection, this document should not be relied upon because the court should not consider the contents due to way it was prepared. Also, this witness isn't even telling the truth so the court should not give this any weight."

A common misconception is that when an objection is made, the non-objecting lawyer has an automatic right to respond to the objection. Rule 103 of the Federal Rules of Evidence concerns rulings on evidence, and it does not say anything about the right of a party to respond to an objection to the admission of evidence. Although objections to the admission of evidence are often immediately followed by frantic argument by non-objecting counsel in support of what he or she was trying to accomplish, there is no authority supporting a response. A response may only be warranted if it is invited by the trial court. Often, unsolicited argument in response to an objection contains as much evil as a speaking objection.

Unless dealt with appropriately, speaking objections and improper responses to objections can improperly influence testimony and the outcome of trial. Fortunately, there are several tools available to us to combat this behavior. The following techniques are progressive methods for dealing with speaking objections.

When available, review transcripts from opposing counsel's other trials and depositions. Bad behavior by opposing counsel in other cases or at deposition in the case at issue puts us on notice that speaking objections may be a problem in trial. A pretrial motion helps bring the issue to the Court's attention. In addition to the statute concerning objections and *Brewer*, *supra*, other authorities support a pretrial ruling prohibiting speaking objections include *Damaj v. Farmers*

Ins. Co., Inc., 164 F.R.D. 559 (1995) and Rule 8 of Federal Judge Claire Eagan's trial rules.[1] These authorities, combined with a transcript showing counsel's tendencies, strongly support a pretrial ruling against speaking objections at trial. The requested relief may include a proposed order that the objecting lawyer may only state "Objection" and nothing more until the witness is allowed to leave the room, whereupon the objecting lawyer may state whatever he wants for as long as needed. While the judge may take such a motion under advisement or even overrule the motion at the pretrial stage, the effect of raising the issue early with supporting legal authority makes us more persuasive when battling speaking objections during trial.

Another tool for dealing with speaking objections at trial is to object. When the lawyer starts coaching and arguing, object to counsel's speaking objection. "Objection, counsel is making improper argument." "Objection, improper commentary on the evidence." If the Court requests an explanation, ask for a sidebar conference and highlight the distinction between a proper objection and counsel's improper argument. Make a point that speaking objections are improper and will make the trial take much longer, then move to strike opposing counsel's statements as improper commentary and coaching of the witness rather than a proper objection.

A third technique is to "loop" off the speaking objection.[2] Speaking objections are generally improvised monologues made out of desperation. Counsel will often unwittingly give information in a speaking objection that supports your theory of the case and can be looped back on the witness. The speaking objection can provide valuable information and guidance as trial continues.

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[1] Trial Rules for Judge Claire V. Eagan, available at http://www.oknd.uscourts.gov/docs/834029f6-6b75-4725-9265-c5d5e28de143/Trial_Rules_Eagan.htm, Rule 8.

[2] On looping and cross-examination, *see* Pozner, L. S., & Dodd, R. J. (2004). Cross-examination: Science and techniques. Charlottesville, VA: LexisNexis.

The following techniques are controversial because they involve engaging in the bad behavior. When the Court continues to permit speaking objections after the first three techniques have been employed, a fourth, advanced technique is to fight fire with fire. Respond to each speaking objection with argument to level the playing field. During your opponent's examination of witnesses, emphasize each objection with argument. Often, when both counsel engage, the judge will realize what is happening and shut down all speaking objections from that point forward.

The final, drastic measure is exercising the nuclear option, a weapon of last resort after all the foregoing tools have been used. The nuclear option for dealing with speaking objections is to interrupt each speaking objection and loudly start talking over counsel. "Your Honor, I object. This is an improper speaking objection and it is taking away trial time and coaching the witness. Counsel has done this several times and should be admonished . . ." One may expose the lack of an evidentiary basis for an objection with the following remark: "Would counsel please state the rule upon which he bases his objection?" The nuclear option is extremely disruptive, and it should only be employed if opposing counsel's speaking objections are influencing witness testimony or the outcome of trial.

Credibility is everything at trial. Dealing with speaking objections requires situational awareness: in some situations, speaking objections by an opponent can signal desperation and actually help you win your case, while in other cases speaking objections can be highly obstructive and result in an adverse trial outcome if they are not dealt with. A calculated approach for addressing speaking objections can enhance our credibility with the Court while neutralizing our opponent's bad behavior. Like many aspects of trial practice, the exercise of discretion is key. The nuclear option is not necessary if simple diplomacy will resolve the issue.

When evidence is offered but excluded from admission by the trial court, counsel must make what is called an "offer of proof." An offer of proof describes the evidence which was excluded. A proper offer of proof should have two goals: 1. Give enough factual detail and description of the evidence so that an appellate court can decide whether the trial court's ruling was right or wrong, and 2. Persuade the trial court by the offer of proof that the evidence is relevant and admissible.

When the trial court sustains an objection to evidence that has been offered, counsel may ask to make an offer of proof. This is called an "informal offer of proof," where counsel says what the evidence would be or what the witness would say. The offer of proof should be made in such a way that the jury does not hear the substance of the offer, because the evidence has been excluded by the trial court. An offer of proof by counsel may be made at a sidebar or after the jury has been excused from the courtroom. This is the way most offers of proof are made, but this form of an offer of proof has been described as the "least favorable" method for making an offer of proof. *U.S. v. Adams*, 271 F.3d 1236, 1241-1241, (10th Cir. 2001).

A more powerful way to make an offer of proof is through the witness, as if the evidence has not been excluded by the trial court. This is called a "formal offer of proof." *Miller v. Miller*, No. 4-05-0286, 2005 IL App (4th) 04D247. Although Federal Rule of Evidence 103 contemplates this method by saying, "The court may direct that an offer of proof be made in question-and-answer form," this method is often overlooked and is a missed opportunity. The formal offer of proof eliminates the ability of an opponent to argue to the judge or on appeal that counsel misrepresented what the evidence would be, because the evidence is actually elicited on the record. Because the evidence is actually elicited, the judge is given a real-time opportunity to reconsider the ruling excluding evidence, which is the most ideal outcome of an offer of proof. When the evidence is delivered through the question-and-answer format, the appellate court has

access to all the information it could possibly have concerning what the evidence would have been and how the trial court may have erred in excluding the evidence.

Aaron Bundy

Kathleen Egan

Rule 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.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Proposed Rules

George Zimmerman Trial: What Is A Speaking Objection?

newsone.com/2625255/george-zimmerman-tria-speaking-objection/

Written By Eric Guster Posted July 2, 2013 July 2, 2013

For those watching the **George Zimmerman** trial, you have heard Judge **Debra Nelson** state that she was not going to allow any **speaking objections**. She has made that statement numerous times each day. Several readers have asked me to explain what a speaking objection is, so I will explain in terms easy to understand.

RELATED:Prosecution's Best Evidence? Zimmerman's Words: 'These As*holes, They Always Get Away'

A speaking objection is an objection where the lawyer speaks a complete thought in an effort to either a) provide additional information to the jury that they should not have b) aggravate opposing counsel c) give additional information to the judge that they want the judge to know or d) all of the above at the same time. More than likely, it is "d," all of the above.

RELATED: Rachel Jeantel: Trayvon Martin's Friend Offers Riveting Testimony [VIDEO]

An objection is a lawyer's way to prevent evidence or testimony from coming into a case that is not proper or not properly presented. Lawyers have ways of getting information into evidence for the jury to consider. However, if the evidence is not presented properly, then an objection should be made. Additionally, if the evidence is not allowable for the jury to consider then the lawyer can object to the evidence being admitted.

RELATED: Trayvon Martin's Stepmother Speaks Out [VIDEO]

The proper way to object is for the attorney to say "Objection, based upon Rule____, "(he or she will state the rule which prevents the evidence from being entered). Or, the lawyer will state "Objection, hearsay, your honor." Then the judge will either sustain or overrule. Sustained means the lawyer making the objection won the argument.

Overruled means the lawyer making the objection lost the argument.

A speaking abjection in the above reference would be "Objection, You Honor, Mr. O'meara is aware that Zimmerman changed his statement to the police twice" instead of the proper, "Objection Your Honor, Hearsay"

The speaking objection gives the jury additional information that they probably should not hear and provides the evidence in a case. It is quite common for lawyers to make speaking objections until the judge instructs them not to do so.

*Eric L. Welch Guster is founder and managing attorney of **Guster Law Firm** in Birmingham, Ala., handling criminal and civil matters, catastrophic injuries, criminal defense, and civil rights litigation. Mr. Guster has become a go-to lawyer for the New York Times, NewsOne, NBC, CBS, ABC, FOX, Black*

164 F.R.D. 559
United States District Court,
N.D. Oklahoma.

Abed DAMAJ, Plaintiff,
v.
FARMERS INSURANCE COMPANY, INC., d/b/a Farmers Insurance Group of Companies, Defendant.

No. 94–CV–531–H. | Dec. 27, 1995.

Plaintiff moved for order directing defense counsel to cease obstructionist tactics during oral depositions. The District Court, McCarthy, United States Magistrate Judge, held that imposition of certain requirements for conduct of further depositions was appropriate.

Motion for order granted, application for fees denied.

West Headnotes (2)

[1] **Federal Civil Procedure**
Examination in General

Defense counsel would be required to cease obstructionist tactics during oral depositions, as one such deposition was primarily conversation and argument between counsel as opposed to question and answer session between deposing attorney and witness; court would impose various requirements, such as (1) that witness ask deposing counsel, rather than witness' own counsel, for clarification, definition, or explanation of any words, questions or documents presented during course of deposition, (2) that counsel not make objections or statements that might suggest answer to witness, and (3) that deposing counsel provide witness' counsel copy of all documents shown to witness during deposition, but that witness and witness' counsel not discuss those documents privately before witness answers questions about them. Fed.Rules Civ.Proc.Rule 30(c), 28 U.S.C.A.

12 Cases that cite this headnote

[2] **Federal Civil Procedure**
Nature and Purpose

Federal Civil Procedure
Examination in General

Purpose of depositions is to find out what witness saw, heard and knows, or what witness thinks, through question and answer conversation between deposing lawyer and witness; frequent and suggestive objections by opposing counsel can, and oft times do, completely frustrate that objective, and suggestive objections by counsel tend to obscure or alter facts of case and consequently frustrate entire civil justice system's attempt to find truth. Fed.Rules Civ.Proc.Rule 30(c), 28 U.S.C.A.

9 Cases that cite this headnote

Attorneys and Law Firms

***559** N. Franklyn Casey and Bruce A. McKenna, Casey, Jones & McKenna, P.C., Tulsa, OK, for plaintiff.

Ray H. Wilburn and Scott R. Taylor, Wilburn, Masterson & Smiling, Tulsa, OK, for defendant.

ORDER

McCARTHY, United States Magistrate Judge.

Before the Court for decision is PLAINTIFF'S MOTION FOR ORDER DIRECTING COUNSEL TO CEASE OBSTRUCTIONIST TACTICS DURING ORAL DEPOSITIONS [Dkt. 40]. The Court has ***560** reviewed all of the pleadings relating to this issue and heard argument of counsel concerning the same.

Plaintiff contends that counsel for Defendant have interposed numerous speaking objections which either suggest a response to the witness, or are unnecessarily disruptive of the oral deposition. Counsel for Defendant contend that the objections interposed were proper and that the comments of defense counsel were an attempt to assist Plaintiff's counsel by explaining the objection so that a more appropriate question could be asked and the objection thereby resolved.

The Court notes that in the deposition of Mr. Banks which consists of 102 pages, defense counsel interposes objections on 64 of those pages, many of the objections take up a good part, if not all, of the page in question. Thus, it would be fair to characterize Mr. Banks's deposition as primarily conversation and argument between counsel as opposed to a question and answer session between the deposing attorney and the witness. It is also fair to say Mr. Banks's deposition did not proceed pursuant to the requirement of Rule 30(c) that the examination and cross examination of witnesses proceed as *permitted at trial*. It is no stretch to conclude that the objections interposed at the deposition would not have occurred had the testimony been taken before a judge and jury at trial.

[1] **[2]** The Court's research produced the case of *Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D.Pa.1993) which the Court finds to be particularly instructive. In *Hall,* the Court noted that the purpose of a deposition is to find out what the witness saw, heard and knows, or what the witness thinks, through a question and answer conversation between the deposing lawyer and the witness. Frequent and suggestive objections by opposing counsel can, and oft times do, completely frustrate that objective. Additionally, suggestive objections by counsel can tend to obscure or alter the facts of the case and consequently frustrate the entire civil justice system's attempt to find the truth. [1]

This Court is particularly concerned about this truth altering aspect of the problem because the vast majority of the civil cases in this country are decided by way of settlements which are reached on the basis of "facts" developed during discovery, particularly oral depositions. [2] If the truth finding function of discovery has been obstructed by improper conduct of the attorneys, then the settlement will not reflect a just result based upon the truth.

The belief that the rules of evidence and procedure utilized by the courts during trial are the best means yet devised to ascertain the truth is central to our civil justice system. Since the fact (truth) finding process in civil litigation is almost exclusively conducted in the discovery phase of litigation, it follows logically that the efficacy of the discovery process as the central truth finding mechanism would be enhanced by employing, to the extent possible, the same rules of procedure during discovery as employed at trial. As stated in the Advisory Committee Notes to the 1993 Amendments to Rule 30, "In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer." Toward that end, the *Hall* Court imposed a series of stringent restrictions on the conduct of counsel at depositions. The restrictions included: a prohibition against counsel for the witness speaking with the witness once the deposition had started, even during recesses and evening breaks; a prohibition against discussions between counsel for the witness and the witness concerning documents presented ***561** to the witness during the deposition prior to the witness answering questions concerning the documents; and, a prohibition against any suggestive conversation or comment by counsel for the witness.

On the record before this Court, the full range of *Hall* restrictions will not be imposed. However, the Court will impose the following requirements for the conduct of further depositions in this case:

1. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarification, definition, or explanation of any words, questions or documents presented during the course of the deposition. The witness shall abide by these instructions;

2. All objections, except those which would be waived if not made at the deposition under F.R.Civ.P. 32(d)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion pursuant to F.R.Civ.P. 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.

3. Counsel shall not make objections or statements which might suggest an answer to a witness. Counsel's statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more. If the form of the question is objectionable, counsel should say nothing other than "object to the form of the question". Should deposing counsel desire clarification of the precise basis of the objection, that inquiry shall be made outside the presence of the witness.

4. Deposing counsel shall provide to the witness's counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness's counsel do not have the right to discuss documents privately before the witness answers questions about them.

Plaintiff's request for a fee of not less than $1,000 to be assessed against Farmers in connection with the preparation of Plaintiff's motion is unsupported by citation to specific legal authority and documentation of the fees incurred. The Court therefore DENIES Plaintiff's application for fees in connection with the bringing of this motion.[3]

In sum, PLAINTIFF'S MOTION FOR ORDER DIRECTING COUNSEL TO CEASE OBSTRUCTIONIST TACTICS DURING ORAL DEPOSITIONS [Dkt. 40] is GRANTED and further depositions shall proceed in accordance with the instructions contained in this order. Plaintiff's application for fees is DENIED.

SO ORDERED.

All Citations

164 F.R.D. 559

Footnotes

1 Regarding suggestive objections, the *Hall* Court wrote: "I also note that a favorite objection or interjection of lawyers is, 'I don't understand the question; therefore, the witness doesn't understand the question.' This is not a proper objection. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition. In addition, counsel are not permitted to state on the record their interpretations of questions, since those interpretations are irrelevant and often suggestive of a particularly desired answer." *Hall* at 530, n. 10. The instant case presents the type of improper objections noted in *Hall.*

2 From October 1, 1994 to September 30, 1995, of the 1360 civil cases terminated in the Northern District of Oklahoma, only 33, or 2.4%, were terminated by jury or non-jury trial.

3 The Court will consider a proper supplemental motion for fees should Plaintiff elect to file such a motion.

274 P.3d 336 (2012)
174 Wash.2d 207

Ronald and Deborah TETER, husband and wife, Petitioners,

v.

Andrew DECK, M.D., Respondent.

No. 85342-8.

Supreme Court of Washington, En Banc.

April 5, 2012.

Peter McNaughton Vial, Barbara Himes Schuknecht, Avi Joshua Lipman, McNaul Ebel Nawrot et al., Matthew N. Menzer, Menzer Law Firm, PLLC, Seattle, WA, for Petitioner.

Mary H. Spillane, Mark Stephen Davidson, Williams Kastner & Gibbs, Nancy C. Elliott, Merrick Hofstedt & Lindsey PS, David L. Martin, Lee Smart PS Inc., Seattle, WA, for Respondent.

WIGGINS, J.

¶ 1 Before excluding a witness as a sanction for discovery violations, the trial court must make findings that the violation was willful and prejudicial and was imposed only after explicitly considering less severe sanctions. In this medical negligence case, a pretrial motions judge excluded a key medical expert witness without the required findings. A different judge presided over the jury trial, subsequently granting a new trial on the ground that the exclusion order was a prejudicial error of law.[1]

¶ 2 We hold that the trial judge was well within his discretion in granting the new trial. CR 59 authorizes a new trial under these circumstances, the facts amply supported the ruling, and a new trial was within the range of acceptable rulings. We cannot emphasize too forcefully the importance of adequate findings to support more severe discovery sanctions such as exclusion of a witness.

FACTS

¶ 3 Ron Teter was diagnosed with a tumor in his right kidney. Urologist Dr. Andrew Deck, assisted by Dr. David Lauter, performed surgery to remove Teter's kidney. During the surgery, Teter's abdominal aorta was lacerated and vascular surgeon Dr. Richard Towbin was called in to repair the aorta. Immediately after surgery, Teter developed a condition in which increased pressure in one compartment of the body compromises the tissues in that compartment. Even after a procedure to relieve the pressure, Teter continues to suffer from pain in his left leg that interferes with his ability to stand for long periods of time and with his ability to engage in his usual activities.

¶ 4 Teter and his wife (the Teters) sued Drs. Deck and Lauter for negligence. The Teters eventually settled with Dr. Lauter and stipulated to his dismissal as a defendant.

I. Discovery and Expert Witnesses

¶ 5 The parties encountered difficulties in preparing for trial. The trial was continued to March 17, 2008, on Dr. Lauter's motion, and again to September 22, 2008 on a joint motion of all parties. The parties agreed that they needed more time to complete discovery. As a result of a pretrial conference in September 2008, the trial was continued again to January 12, 2009. Neither the Teters nor Dr. Deck complied completely with discovery deadlines and the trial court granted motions to compel by both sides.

¶ 6 The Teters initially retained Dr. William Duncan as their urologist-expert. They submitted a declaration from Dr. Duncan that detailed his opinions that (1) Dr. Deck breached the standard of care at several points during the course of the laparoscopic procedure; (2) Dr. Deck's breaches caused Teter's injuries;[2] and (3) Dr. Deck failed to adequately inform Teter of the risks involved in performing a laparoscopic procedure, supporting a lack of informed consent claim against Dr. Deck.

¶ 7 Dr. Deck deposed Dr. Duncan in January 2008. In late January 2008, the Teters notified Dr. Deck that Dr. Duncan might not be available for the March 2008 trial date, due to his impending back surgery. However, the February 2008 stipulated continuance obviated the need to replace Dr. Duncan. In August, the Teters learned that Dr. Duncan had fallen and ruptured his spleen, making him unavailable for the scheduled September trial date. Due to the imminence of the trial, the Teters requested the court's permission to replace Dr. Duncan. The Teters timely disclosed their replacement urologist-expert, Dr. Robert Golden, on November 12, 2008.

¶ 8 To the Teters' surprise, Dr. Golden withdrew shortly thereafter, based solely on his discovery of a professional conflict, in the form of a long standing personal and professional relationship with one of Dr. Deck's partners, precluding his testimony as the Teters' expert. Both the Teters and Dr. Golden himself immediately informed Dr. Deck's counsel of Golden's withdrawal. More than one month before the January 2009 trial date, the Teters notified Dr. Deck that they had retained Dr. Thomas Fairchild to replace Dr. Golden and that Dr. Fairchild would testify to the liability and causation issues previously identified. The Teters offered several dates for Dr. Deck to take Dr. Fairchild's deposition. Although Dr. Deck tentatively agreed to one of those dates, he later refused all of the proposed dates. Instead, Dr. Deck moved to strike Dr. Fairchild on December 29, 2008.

¶ 9 On the first day of trial, Judge Christopher Washington granted the motion to strike Dr. Fairchild as the Teters' expert witness.[3] Before then, the case had been reassigned from Judge Washington to Judge Steven González.[4]

II. The Trial and Counsel's Conduct

¶ 10 Judge González made it clear that he expected a high level of formality and decorum during the course of the trial. He laid out detailed instructions regarding objections, including speaking objections on the first day of trial:

> You will say, objection, rule number, you will cite the rule, or you will give the heading or title of the rule, but you won't make speaking objections during trial. If you need to supplement the record, I will certainly give you the chance later to do so. If you wish to make additional argument, you could ask for that argument, but if I don't invite it at that point, we won't hear any more argument at that time.

I Verbatim Report of Proceedings (RP) (Jan. 12, 2009) at 59. The judge also clearly laid out his requirements that counsel must show opposing counsel anything to be shown to a witness or published to the jury, that exhibits must be marked before they could be used to refresh a witness's memory or used for illustrative purposes, and that counsel must ask permission before publishing anything to the jury.

¶ 11 During trial, defense counsel Nancy Elliott continued to make speaking objections after reminders from the trial court of its prohibition. Ms. Elliott also repeatedly attempted to put exhibits before the jury that had not been admitted and to elicit testimony regarding subjects that the court had ruled inadmissible or irrelevant. After one attempt, the trial court threatened to fine Ms. Elliott. Finally, Ms. Elliott told both the court and opposing counsel that Dr. Deck intended to call two witnesses, Ms. Bonnie Ellison and Dr. Lauter. However, Ms. Ellison had been told that she would not be needed, and Dr. Lauter's counsel disclaimed any attempt by Ms. Elliott to schedule Dr. Lauter's testimony.

¶ 12 Eventually, Judge González made a record of his concerns (outside the jury's presence) regarding Ms. Elliott's conduct:

> Finally, I'd like to make a record about a few things, including my displeasure with some of the conduct in this case.

> ... There was late disclosure of discovery, including the CD [(compact disk)], which I thought was the original CD, but turned out to be an edited version, which was presented after 9:00 p.m. last night to opposing counsel, and I just heard about it on the record in trial.
>
> I'm also very concerned about the issues regarding disclosure of witnesses and the timing of notifying opposing counsel and the court, and the accuracy of the representations to the court about the availability of witnesses and which witnesses would be called.
>
> ... I'm concerned about the representation from Dr. Lauter's counsel that counsel was unaware that Dr. Lauter was being requested to testify. That is different from the representation made to the court by defense counsel that efforts were being made to procure him.
>
> I'm also concerned about attempts to circumvent the court's ruling on admissibility of documents. It certainly appears that way by putting issues before the jury regarding documents in a purported attempt to lay foundation.
>
> For disregard for protocol and rules of evidence which are repeated — and this is not the first court in which they have occurred — for continued speaking objections after clear direction from me not to do so, and what can only be described as feigned ignorance when I say that a document must be marked before it's shown to a witness, it certainly doesn't mean it has to be admitted before a witness can refer to it to refresh recollection. It is fairly fundamental and basic how you refresh and when you can refresh a witness's recollection.

XRP at 1903-04. After the trial court put these concerns on the record, Ms. Elliott made further attempts to elicit testimony on subjects previously ruled inadmissible.

III. New Trial

¶ 13 After the jury returned a defense verdict, Judge González granted the Teters' motion for a new trial on two grounds: (1) that Judge Washington's order striking Dr. Fairchild was an error of law under CR 59(a)(8) and (2) that defense counsel's misconduct prevented a fair trial under CR 59(a)(1) and (a)(2).[5] Judge González also concluded that the "cumulative effect of defense counsel's misconduct throughout the trial proceedings warrants a new trial, as it casts doubt on whether a fair trial had occurred." Clerk's Papers (CP) at 713. The Court of Appeals reversed the trial court. *Deck v. Teter,* noted at 158 Wash.App. 1015, 2010 WL 4216151, at *1.

ANALYSIS

¶ 14 We review a trial court's grant of a new trial for abuse of discretion, unless that grant is based on an error of law. *Detrick v. Garretson Packing Co.*, 73 Wash.2d 804, 812, 440 P.2d 834 (1968). We require a much stronger showing of abuse of discretion to set aside an order granting a new trial than one denying a new trial. *Id.*

I. Judge González Did Not Abuse His Discretion When He Granted a New Trial Based on an Error of Law

¶ 15 A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Littlefield,* 133 Wash.2d 39, 46-47, 940 P.2d 1362 (1997). Here, Judge González's decision to grant the Teters a new trial would be manifestly unreasonable if it was "outside the range of acceptable choices, given the facts and the applicable legal standard." *Id.* at 47, 940 P.2d 1362. CR 59 allows a trial judge to grant a new trial based on an error of law.[6] CR 59(a)(8). Accordingly, Judge González's decision to grant the new trial on that basis was within the range of acceptable choices.[7] However, because Judge González concluded that the

exclusion of Dr. Fairchild was an error of law, we review that conclusion de novo. *See* Detrick, 73 Wash.2d at 812, 440 P.2d 834. If that conclusion was correct, we would overturn the decision to grant a new trial only if we find that it was based on untenable grounds or untenable reasons. *See* Littlefield, 133 Wash.2d at 47, 940 P.2d 1362.

A. The exclusion of Dr. Fairchild was an error of law

¶ 16 Discovery sanctions are generally within the sound discretion of the trial court. *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494, 933 P.2d 1036 (1997). However, the court may impose only the least severe sanction that will be adequate to serve its purpose in issuing a sanction. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 355-56, 858 P.2d 1054 (1993). A trial court may impose only the most severe discovery sanctions upon a showing that (1) the discovery violation was willful or deliberate, (2) the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the court explicitly considered less severe sanctions. *Burnet*, 131 Wash.2d at 494, 496-97, 933 P.2d 1036. Discovery sanctions that trigger consideration of the *Burnet* factors include exclusion of witness testimony. *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 690, 132 P.3d 115 (2006) (holding that while imposition of the most serious sanctions, such as witness exclusion, triggers a *Burnet* analysis, imposition of lesser sanctions, like monetary compensation, does not).

¶ 17 Findings regarding the *Burnet* factors must be made on the record. *Id.* A trial court may make the *Burnet* findings on the record orally or in writing. *See Blair v. TA-Seattle E. No. 176,* 171 Wash.2d 342, 348-49, 254 P.3d 797 (2011) (noting that the trial court did not make *Burnet* findings on the record where it did not engage in a colloquy with counsel or hear oral argument and did not include the findings in the written order). Thus, where an order excluding a witness is entered without oral argument or a colloquy on the record, findings on the *Burnet* factors must be made in the order itself or in some contemporaneous recorded finding. *Id.* at 349, 254 P.3d 797 (rejecting the argument that "the record below speaks for itself" and thus obviates the need for the trial court to explain its reasons on the record).

¶ 18 In *Blair,* we addressed a situation very similar to this case. Blair had not met certain discovery deadlines and TA-Seattle moved twice to strike witnesses as untimely disclosed. *Id.* at 345-46, 254 P.3d 797. The trial court granted both motions. *Id.* at 346, 347, 254 P.3d 797. The trial court's first order struck half of Blair's witnesses; the second order struck two late-disclosed additions to her list. *Id.* The trial court did not enter findings supporting either order, nor did it engage in colloquy with counsel or hear oral argument. The Court of Appeals affirmed the trial court's exclusion orders. *Id.* at 347, 254 P.3d 797. In doing so, the Court of Appeals agreed with TA-Seattle that the juxtaposition of the two orders indicated that the trial court had considered lesser sanctions. *Id.* at 350, 254 P.3d 797. We reversed, rejecting the premise "that an appellate court can consider the facts in the first instance as a substitute for the trial court findings that our precedent requires." *Id.* at 351, 254 P.3d 797.

¶ 19 The similarities between *Blair* and this case are striking. The discovery process was quite contentious and the Teters admit that they missed several discovery deadlines. Teters' Suppl. Br. at 3. And Judge Washington's order excluding Dr. Fairchild did not contain the findings required by *Burnet.* CP at 351-54. Although Judge Washington found that the Teters failed to comply with discovery orders and that Dr. Deck was prejudiced in his trial preparation, Judge Washington made no record other than the order: he held no colloquy with counsel and heard no oral argument on the motion. Therefore, the requisite findings must be set forth in the order itself. *See Blair,* 171 Wash.2d at 349, 254 P.3d 797. Because the order contains no finding (1) that the Teters discovery violations were willful or (2) that Judge Washington explicitly considered less severe sanctions, Judge González was correct when he concluded that the order does not comply with *Burnet.*[8] *See* CP at 709-10.

¶ 20 Dr. Deck argues, and the Court of Appeals agreed, that the record plainly reflects that Judge Washington considered each of the *Burnet* factors. We reject Dr. Deck's and the Court of Appeals' attempts to read willfulness and lesser sanction findings into the order from a review of the record as a whole.

1. Willfulness

¶ 21 The Court of Appeals noted that a party's violation of a court's order is deemed willful if it was without reasonable excuse or justification. *Teter,* 158 Wash.App. 1015, 2010 WL 4216151, at *5 (citing *Magaña v. Hyundai Motor Am.*, 167 Wash.2d 570, 584, 220 P.3d 191 (2009)). But in *Magaña,* the trial court made findings that Hyundai's discovery violations were willful; on appeal, we agreed with the Court of Appeals that the trial court's willfulness findings were reasonable because the record supported them. 167 Wash.2d at 585, 220 P.3d 191. *Magaña* is therefore inapposite.

¶ 22 Here, the Teters explained that Dr. Golden's sudden withdrawal was beyond their control because Dr. Golden himself was not aware of the basis for his conflict of interest when he agreed to be their expert witness. In *Magaña,* the trial court explicitly discredited Hyundai's excuse based on facts in the record. *Id.* at 585-86, 220 P.3d 191. Here, only Dr. Deck asserts that the Teters had "no reasonable excuse" for the late disclosure. CP at 365. This bare assertion cannot substitute for the trial court's rejection of the Teters' explanation. Judge Washington made no reference to the Teters' explanation and did not explicitly reject it. Therefore, the Court of Appeals' cursory reliance on *Magaña* conflicts with our holding in *Blair. Teter,* 158 Wash.App. 1015, 2010 WL 4216151, at *5; *Blair,* 171 Wash.2d at 351, 254 P.3d 797.

2. Lesser sanctions

¶ 23 The Court of Appeals also agreed with Dr. Deck's argument that Judge Washington's consideration of lesser sanctions is "apparent from the record" because Judge Washington had already imposed lesser sanctions. Resp't's Answer to Pet. for Review at 12; *see Teter,* 158 Wash.App. 1015, 2010 WL 4216151 at *5. Again, we rejected this argument in *Blair,* when we held that a prior order excluding only some of Blair's witnesses could not substitute for consideration of lesser sanctions on the record for the subsequent exclusion order. 171 Wash.2d at 350-51, 254 P.3d 797. We continue to reject this argument here. Mere issuance of lesser sanctions during the discovery process cannot substitute for on-the-record consideration of lesser sanctions when excluding a witness.[9]

B. A new trial is the appropriate remedy

¶ 24 Since Judge González did not err in concluding that the exclusion of Dr. Fairchild was an error of law, his decision to grant a new trial on that basis would be an abuse of discretion only if it were based on untenable grounds or reasons. *See Littlefield,* 133 Wash.2d at 46-47, 940 P.2d 1362. A court's decision is based on untenable grounds if the factual findings are not supported by the record; the decision is based on untenable reasons if it is based on an incorrect standard. *Id.* at 47, 940 P.2d 1362. CR 59 allows a trial court to order a new trial based on an error of law where that error "materially affect[s] the substantial rights" of a party. CR 59(a), (a)(8). Here, Judge González found that the exclusion of Dr. Fairchild "substantially and severely prejudiced" the Teters' right to a fair trial. CP at 710. Substantial and severe prejudice qualifies as a material effect; accordingly, Judge González's decision was based on the correct standard.

¶ 25 Further, Judge González's findings of prejudice are supported by the record. First, the record shows that the Teters were forced to abandon their claim of lack of informed consent against Dr. Deck because Dr. Fairchild was their only expert who could give evidence on that claim. I RP at 30. Second, the record shows that Dr. Fairchild was the Teters' only medical expert who was a urologist. His exclusion opened the door to the defense argument that the Teters could not prove their case against Dr. Deck, a urologist, because they did not produce a urologist expert, a door that defense counsel stepped through repeatedly in closing. XII RP (Jan. 30, 2009) at 2222-24, 2236, 2240. Thus, Judge González's decision to grant the Teters a new trial was not an abuse of discretion.

¶ 26 Dr. Deck argues that even if Judge Washington's order contained technical errors, the correct remedy is a remand to Judge Washington to make the *Burnet* findings.[10] We rejected a similar argument in *Blair,* 171 Wash.2d at 352 n. 6, 254 P.3d 797 (allowing the trial court to make after-the-fact findings to support its exclusion orders "would be inappropriate"). Admittedly, we have remanded cases to the trial court for *Burnet* findings. *Rivers v. Wash. State Conf. of Mason Contractors,* 145 Wash.2d 674, 700, 41 P.3d 1175 (2002). However, the action under review in *Rivers* was a dismissal with prejudice rather than the grant of a new trial after a judgment on the merits; we remanded for a new

determination of whether the complaint should be dismissed, with specific *Burnet* findings on the record. *See id.,* at 683, 700, 41 P.3d 1175. Where a case has been decided on the merits, either by jury trial or on summary judgment, we have remanded for a new trial. *Blair,* 171 Wash.2d at 352, 254 P.3d 797; *Burnet,* 131 Wash.2d at 498-99, 933 P.2d 1036.

¶ 27 This case is more like *Burnet* — in both *Burnet* and here the sanction order forced plaintiffs to abandon one of their claims. In *Burnet,* plaintiffs were precluded from bringing negligent credentialing claims by an order limiting discovery on the issue, 131 Wash.2d at 490-91, 933 P.2d 1036, while here the Teters were forced to abandon an informed consent claim due to exclusion of Dr. Fairchild. Moreover, the *Burnet* majority rejected the argument that the Burnets had waived the issue on appeal by failing to move for reconsideration. Here, the Teters placed the issue before Judge González by making their offers of proof, and Judge González made it clear that he had accepted the case only because it was "ready to go." I RP at 9. Nonetheless, he allowed the Teters to make their proffers on the record. ER 103 provides that an offer of proof is sufficient to preserve an issue for appeal. ER 103(a)(2). In addition, the Teters could not ask Judge Washington to reconsider since he had already been replaced as the trial judge when he signed the exclusion order. We decline Dr. Deck's invitation to "allow the trial court to make after-the-fact findings" to support the exclusion order. *Blair,* 171 Wash.2d at 352 n. 6, 254 P.3d 797. An order for new trial was the appropriate remedy.

II. Judge González Did Not Abuse His Discretion By Granting a New Trial Based on Defense Counsel's Misconduct

¶ 28 We review a trial court's order granting a new trial solely for abuse of discretion when it is not based on an error of law. *Detrick,* 73 Wash.2d at 812, 440 P.2d 834. And we require a much stronger showing of abuse of discretion to set aside an order granting a new trial than one denying a new trial. *Id.* A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *Littlefield,* 133 Wash.2d at 46-47, 940 P.2d 1362. A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices. *Id.* Under CR 59(a)(2), a trial court may grant a new trial where misconduct of the prevailing party materially affects the substantial rights of the losing party. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.,* 140 Wash.2d 517, 539, 998 P.2d 856 (2000) (*Alcoa).* Accordingly, Judge González's decision to grant a new trial on this basis was also within the range of acceptable choices and we will overturn that decision only if we find that it was not supported in the record or was made under an incorrect standard. *See Littlefield,* 133 Wash.2d at 47, 940 P.2d 1362.

¶ 29 The Court of Appeals, however, appears to have reviewed Judge González's ruling as an issue of law. Without identifying the standard of review, the Court of Appeals held that Judge González's findings were too general and nonspecific to support his conclusion that defense counsel's misconduct deprived the Teters of a fair trial. *Teter,* 158 Wash.App. 1015, 2010 WL 4216151, at *5. The Court of Appeals went on to hold that the instances of misconduct identified by the Teters in their briefing did not "appear[] so out of the ordinary or so irregular or flagrant as to deprive the Teters of a fair trial." *Id.* In reaching this conclusion, the Court of Appeals appears to have substituted its own judgment for that of the trial court. *See State v. Lord,* 117 Wash.2d 829, 887, 822 P.2d 177 (1991) ("The trial court is in the best position to most effectively determine if [counsel's] misconduct prejudiced a [party's] right to a fair trial."), *cert. denied,* 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

¶ 30 The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury. ER 103(c). Persistently asking knowingly objectionable questions is misconduct. 14A Karl B. Tegland, Washington Practice: Civil Practice § 30:33 (2d ed. 2009). Even where objections are sustained, the misconduct is prejudicial because it places opposing counsel in the position of having to make constant objections. *Id.* These repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important. Misconduct that continues after warnings can give rise to a conclusive implication of prejudice. *Id.* § 30:41.

¶ 31 Applying the deferential review appropriate to misconduct findings in civil cases, *see Alcoa,* 140 Wash.2d at 539, 998 P.2d 856, we conclude that the record supports Judge González's findings of misconduct.

¶ 32 First, the trial record reveals that defense counsel repeatedly violated the evidence rules by attempting to put

exhibits before the jury that had not been admitted and to elicit testimony regarding subjects that the court had ruled inadmissible or irrelevant. For example, defense counsel moved repeatedly for admission of Teter's entire hospital record as defense exhibit 1002.[11] The Teters objected because the exhibit included documents not relevant to their claims, hearsay, and documents that violated the court's rulings on plaintiff's motions in limine. *See* X RP at 1787. Nonetheless, defense counsel continued to move admission of the exhibit in its entirety because Dr. Deck's experts had relied on it in forming their opinions. Judge González eventually admonished defense counsel, "As counsel well knows, and as I mentioned already in this trial, an expert may rely upon documents. That does not make them admissible as substantive evidence themselves." X RP at 1788.

¶ 33 Additional misconduct included violation of the following rulings: order granting plaintiff's motion in limine regarding evidence that Teter failed to mitigate his damages; order limiting the evidence regarding Dr. Lauter's role in the surgery; and Judge González's prohibition on speaking objections.[12] Examples of improper speaking objections include:

> Ms. Elliott: Your honor, object to this based upon the depositions and the subpoenas and the outstanding discovery request.
>
> The Court: The jury will disregard the speaking objection. The objection is overruled.

III RP at 310 (from the first day of testimony).

> Mr. Lipman [plaintiff's counsel]: Objection, relevance.
>
> Ms. Elliott: They have a claim for —
>
> The Court: You know what? If I'm not asking for argument, I don't want to hear it from either counsel. The objection is overruled.

Id. at 325.

> Mr. Menzer: Same objection.
>
> The Court: Sustained.
>
> Ms. Elliott: Your honor, experience is in question here. I believe that it's relevant.
>
> The Court: I believe that I've spoken already about my opinion of speaking objections, and I won't tolerate more.

VI RP at 961.

> Ms. Elliott: Your honor, object to this, since their expert said that this complication was not negligence.
>
> The Court: No speaking objections.

IX RP at 1572-73.

¶ 34 These examples show that Judge González was sufficiently troubled to make a record of his concerns about defense counsel's conduct. Finally, the repeated instances of misconduct after warnings by the court support Judge González's finding that the cumulative effect of the misconduct warranted a new trial.[13] *See* CP at 713. Therefore, Judge González's findings of misconduct and prejudice are supported by the record. Moreover, he made these findings under the appropriate standard because misconduct that "unfairly and improperly exposed the jury to inadmissible evidence[and] prejudiced [the Teters]" qualifies as a material effect on the Teters' substantial right to a fair trial. CP at 712-13; CR 59(a). Accordingly, Judge González did not abuse his discretion in granting a new trial.

¶ 35 The Court of Appeals held that the Teters had waived their claim to a new trial based on defense counsel's misconduct because they did not move for a mistrial. *Teter,* 158 Wash.App. 1015, 2010 WL 4216151, at *6. The Court of

Appeals cited *Nelson v. Martinson,* 52 Wash.2d 684, 689, 328 P.2d 703 (1958), for the premise that a party may not "wait and gamble on a favorable verdict" before claiming error. While the basic premise is correct, the Court of Appeals ignores the exception for misconduct so flagrant that no instruction can cure it. *Warren v. Hart*, 71 Wash.2d 512, 518, 429 P.2d 873 (1967) (addressing a party's reliance on *Nelson,* 52 Wash.2d 684, 328 P.2d 703). Equally important, *Nelson* is also inapposite because there the respondents made no objection when the misconduct occurred. 52 Wash.2d at 689, 328 P.2d 703. Conversely, the Teters consistently objected to inappropriate lines of questioning and attempts to put exhibits that had not been admitted before the jury. In fact, the trial court sustained one of the Teters' objections when defense counsel relied on such testimony during closing argument.

¶ 36 Moreover, we more recently articulated a different standard in *Alcoa:* a court properly grants a new trial where (1) the conduct complained of is misconduct, (2) the misconduct is prejudicial, (3) the moving party objected to the misconduct at trial, and (4) the misconduct was not cured by the court's instructions. 140 Wash.2d at 539, 998 P.2d 856. Here, the first two criteria are met by Judge González's findings of misconduct and prejudice. In addition, the Teters objected regularly and requested curative instructions. This meets the standard set forth in *Alcoa.* It would be onerous to require a party to also move for mistrial to preserve a claim for error based on misconduct. We reverse the Court of Appeals holding to that effect.

CONCLUSION

¶ 37 We have quite clearly held that explicit findings regarding the *Burnet* factors must be made on the record when a court imposes the most severe discovery sanctions, like excluding a witness. In this case, neither the record nor the order excluding Dr. Fairchild contains explicit findings on the *Burnet* factors. We also hold that the trial court did not abuse its discretion in granting a new trial based on defense counsel's misconduct because the trial court's findings of misconduct are adequately supported by the record, and we will not substitute our own judgment for the trial court's judgment in evaluating the scope and effect of that misconduct. Accordingly, we reverse the Court of Appeals, reinstate the order for a new trial, and remand for proceedings consistent with this opinion.

WE CONCUR: BARBARA A. MADSEN, Chief Justice, CHARLES W. JOHNSON, TOM CHAMBERS, SUSAN OWENS, MARY E. FAIRHURST, JAMES M. JOHNSON, and DEBRA L. STEPHENS, Justices, and GERRY L. ALEXANDER, Justice Pro Tem.

[1] Misconduct of defense counsel was an alternative ground for new trial. A different counsel represented defendant on appeal.

[2] Dr. Duncan's declaration included similar opinions regarding Dr. Lauter. However, Dr. Lauter was dismissed from the lawsuit after settling with the Teters.

[3] On the same day, Judge Washington disposed of two more outstanding motions in the case: (1) he denied the Teters' motion to limit expert testimony and (2) he denied Dr. Deck's motion to exclude cumulative lay witnesses. In both orders, Judge Washington indicated that the new trial court would make the decisions regarding admissibility and scope of witness testimony.

[4] The same Judge González was appointed to the Washington Supreme Court after this case was argued and decided. He took no part in the deliberations or decision in this case.

[5] Judge González rejected several additional grounds the Teters proposed in their motion for a new trial.

[6] CR 59 also allows a trial judge to grant a party a new trial based on "any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial." CR 59(a)(1). It is arguable that we would need to review for manifest abuse of discretion only Judge González's grant of a new trial on the basis that the exclusion order was an abuse of discretion that prevented the Teters from having a fair trial. *See Nast v. Michels,* 107 Wash.2d 300, 308, 730 P.2d 54 (1986) (appellate court may affirm trial court on any correct ground). However, the Teters' request for a new trial based on the exclusion order was couched in terms of CR 59(a)(8) (error of law) as was Judge González's decision on the motion. CP at 223, 710.

[7] Dr. Deck argues that "[i]t was not within Judge González's purview after the verdict and entry of judgment to act as an appellate court and reverse Judge Washington's order as an abuse of discretion or reversible error." Appellant's Br. at 39-38. Dr. Deck misinterprets Judge González's action. Judge González was authorized by CR 59 to grant the Teters' request for a new trial based on an error of law. CR 59(a)(8). The order for new trial was not an appellate decision. While Judge González was required to

evaluate Judge Washington's exclusion order, he did not "reverse" the order: he concluded that it was an error of law. CP at 710. Moreover, we have answered this argument before:

[T]he succession of judges cannot be considered by this court; the office is a continuing one; the personality of the judge is of no legal importance. The action of Judge Griffin was in legal effect a correction of his own action, which he deemed to have been erroneous; and it were far better that he should correct it, than to perpetuate an error which would have to be corrected by this court.

Shephard v. Gove, 26 Wash. 452, 454, 67 P. 256 (1901) (holding that it was not error for successor trial judge to direct a judgment for defendant based on the statute of limitations where initial judge had denied a motion for summary judgment on the same issue).

[8] It is also unclear whether the exclusion order's finding of prejudice satisfied the *Burnet* requirements in that it finds only that Dr. Deck was "prejudiced" rather than substantially prejudiced. *See* CP at 354.

[9] Dr. Deck argues that Judge Washington considered lesser sanctions when he orally ordered the Teters at the November 12, 2009 pretrial conference to disclose their expert by the end that day or they would not be allowed to call a urologist expert. There is no transcript of that pretrial conference in the record and no record that Judge Washington considered lesser sanctions at that time.

[10] Dr. Deck notes, in particular, that the Teters failed to move for reconsideration of the exclusion order. Although the Teters initially planned to move for reconsideration, they ultimately chose to make two offers of proof on the record. Judge González indicated that he understood the purpose of the proffer and did not require a motion to reconsider. Judge González also allowed defense counsel to respond to the second proffer.

[11] Several individual pages of exhibit 1002 were admitted for illustrative purposes; other documents in the exhibit had been admitted individually as plaintiff's exhibits.

[12] Speaking objections can be another method of exposing the jury to inadmissible evidence and inappropriate argument.

[13] The prejudice finding is also supported by the fact that one member of the jury felt it necessary to inform Judge González's clerk that the juror felt "like strangling a couple of lawyers." XI RP at 1917.

773 So.2d 1230 (2000)

Alexander MICHAELS, Appellant,
v.
The STATE of Florida, Appellee.

No. 3D00-917.

District Court of Appeal of Florida, Third District.

December 13, 2000.

Kenneth P. Speiller, Miami, for appellant.

Robert A. Butterworth, Attorney General, and Barbara A. Zappi, Assistant Attorney General, for appellee.

Before GODERICH and SORONDO, JJ., and NESBITT, Senior Judge.

SORONDO, J.

Alexander Michaels appeals from the trial court's judgment and sentence for direct criminal contempt.

During the trial of Ulysses Sidney Morris, Michaels, his defense counsel, was admonished by the court on several occasions to refrain from making speaking objections. After several warnings, defense counsel again began voicing his objections and concerns in front of the jury. The jury was excused and the trial court instructed Michaels to show good cause why he should not be held in contempt of court for his behavior.

In an explosive outburst, Michaels stated that he believed the court was biased against his client and criminal defendants in general.[1] Michaels asserted that his allegedly contumacious statements were in response to the court's question to him, which put him in the position of being embarrassed before the jury and was unfair.

The court found Michaels in direct criminal contempt, placed him on probation for six months, and ordered that he take six hours of continuing legal education in ethics, refrain from violating court rulings and act in a professional manner consistent with the Code of Professional Responsibility.

The trial judge had made her feelings known on the subject of speaking objections during the course of jury selection. At some point during voir dire examination it became necessary to examine certain jurors individually. Michaels was allowed to ask questions first. He was followed by the prosecutor. During one such examination Michaels asked for leave to ask additional questions after the prosecutor was finished. His request was denied and the following exchange between Michaels and the court occurred:

> MR. MICHAELS: Well, Judge, I am going to strongly object to this procedure. I am going to refuse from now on to ask questions first. I don't think that that is fair and I think that the state should be the one to ask the questions first and I come after. I feel I am being sandbagged here and I don't appreciate it.
>
> COURT: I think maybe we need to get some ground rules out of the way. *There will be no speaking objections.* If you wish to voice any objections you need to do them side bar from now on. I will allow you to ask a follow-up question if you wish to do so and then we will address your concern after.

(Emphasis added). This exchange took place in the presence of the juror being questioned. Immediately after the juror was excused from the courtroom the judge returned to the subject:

> COURT: Okay. Mr. Michaels, let's get this issue out of the way right now. *There will be absolutely and I mean absolutely no speaking objections.* You can either say yes or no or state your objection in two or

three legal type words, but *there will be no speaking objections* and I will very strongly insist that you follow those rulings.

MR. MICHAELS: I assume you instruct everybody, not just me, right?

COURT: Everybody. I usually do it before the trial. I neglected to do so at my own parol (sic), obviously. *Usually the lawyers know you are not allowed to have speaking objections, but I always make a point to announce it before trial. But since I neglected to do so, I just want to make it clear right now, okay.*

MR. MICHAELS: Yes, Judge.

(Emphasis added). It is clear, therefore, that from the very beginning of the trial, even before the opening statements were delivered, the trial judge made it absolutely clear that she would not tolerate speaking objections. As the judge observed, all trial lawyers know that so-called speaking objections are improper, as they constitute nothing less than unauthorized communications with the jury. Such objections characteristically consist of impermissible editorials or comments, strategically made by unscrupulous lawyers to influence the jury. They are distinguishable from legitimate objections which simply state legal grounds that arguably preclude the introduction of the evidence at issue. Where an objection requires more than a simple statement of such legal grounds, experienced trial lawyers know they need to seek a side bar conference or ask the court to excuse the jury so that more thorough arguments can be made.[2]

Michaels argues that the comments for which he was held in contempt were not technically speaking "objections." This argument has no merit. In addition to the admonition concerning speaking objections, the trial judge warned Michaels repeatedly about his outbursts, his constant tendency to speak out of turn in the presence of the jury, and his refusal to lower his voice during side bar conferences. To suggest that the trial judge had only forbidden speaking "objections," and that the statements which resulted in the contempt adjudication were not covered by that order is a total distortion of what occurred below.

We review the trial court's order holding Michaels in direct criminal contempt under the abuse of discretion standard. *Thomas v. State,* 752 So.2d 679 (Fla. 1st DCA 2000); *Carnival Corp. v. Beverly,* 744 So.2d 489 (Fla. 1st DCA 1999); *Pompey v. Cochran,* 685 So.2d 1007 (Fla. 4th DCA 1997). Having thoroughly reviewed the transcript, we conclude that the trial judge did not abuse her discretion.

Affirmed.

[1] Michaels' tirade, which followed the order to show cause, can only be characterized as a disgraceful personal assault on the integrity of the trial court. The judge, exhibiting the same remarkable patience she displayed during the rest of the proceeding, did not pursue an additional contempt citation, nor did she impose a jail sentence. Indeed, she clearly demonstrated the "care and circumspection" the Florida Supreme Court spoke of in *State v. Clemmons,* 150 So.2d 231 (Fla.1963), before holding this most obstreperous lawyer in contempt.

Because of his misconduct in this case, we refer attorney Alexander Michaels to the Florida Bar for disciplinary proceedings. We note that this is our second referral of this seemingly uncontrollable attorney. *See Quiñones v. State,* 766 So.2d 1165 (Fla. 3d DCA 2000).

[2] Michaels advised the trial judge during the course of the trial that he has been a practicing criminal trial lawyer for over 15 years.

NO. 4-05-0286

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Marriage of DUSTIN MILLER, Petitioner-Appellee, and BETHANY MILLER, Respondent-Appellant.	)))))))))	Appeal from Circuit Court of Adams County No. 04D247 Honorable John C. Wooleyhan, Judge Presiding.

JUSTICE STEIGMANN delivered the opinion of the court:

In this 2004 marriage dissolution proceeding between petitioner, Dustin Miller, and respondent, Bethany Miller, the trial court limited the number of witnesses each party could call at the custody hearing. The court ultimately made Dustin the custodian of the parties' two children.

Bethany appeals, arguing only that the trial court erred by limiting the number of witnesses who could testify at the custody hearing. Because Bethany failed to make an adequate offer of proof regarding what testimony her additional witnesses would provide, we affirm.

I. BACKGROUND

Dustin and Bethany were married in July 2001. During their marriage, they had two children, Alexander (born July 12, 2001) and Madeline (born May 6, 2003). In September 2004, Dustin filed separate petitions seeking (1) to dissolve the marriage and (2) temporary custody of the parties' two children. In October 2004, Dustin and Bethany entered into an agreed order, under which the trial court granted Dustin temporary custody of the parties' two children.

In early December 2004, the trial court entered an order (1) setting the case for a February 9, 2005, hearing on custody and other issues and (2) providing that if either party wanted to call more than two witnesses at the hearing, that party would need to request a pretrial conference at least seven days prior thereto.

In late January 2005, Bethany's counsel, F. Donald Heck, Jr., filed a motion to withdraw as her counsel. On February 2, 2005, the trial court granted Heck's motion, and two other attorneys, Richard D. Frazier and Scott D. Larson, took over as Bethany's counsel. That same day, Larson filed a motion to continue the February 9, 2005, hearing. At a February 7, 2005, hearing on that motion, Larson argued that a continuance was necessary because he needed time to discuss the case with Bethany and conduct discovery. Dustin's counsel argued against the continuance, pointing out that (1) the court's December 2004 order indicated that the parties had represented that they would be ready for the February 9, 2005, hearing; (2) in late December 2004, Larson sent Heck a motion to substitute Larson as Bethany's counsel, which Heck signed and returned to Larson later that month; and (3) in mid-January 2005, Frazier filed an entry of appearance as Bethany's counsel. After considering counsel's arguments, the court denied the motion to continue.

At the start of the February 9, 2005, custody hearing, Frazier asked the trial court to reconsider its ruling on the motion to continue, so that the court could hold a pretrial conference in accordance with its December 2004 order and Bethany could request eight additional witnesses. Frazier stated, in pertinent part, as follows:

"Your Honor, this is a custody case. Obviously[,] it's a very serious matter. We would have liked to have called 10 witnesses for the hearing today, and probably the most important witness that we--which we could

have called today as a witness, although we did not allow [sic] him because we believe the 2 other occurrence witnesses were probably more important, is [Bethany's] current psychologist, Dr. Brian Heatherton. Now, the reason that would be important is the court is going to hear some issues concerning [Bethany's] mental condition, which basically [is that] she's been diagnosed as bipolar 2, which is a less severe form of bipolar 1, but his testimony concerning her treatment and her ability to care for her children would be very important for the court to hear, I think.

We also would have other witnesses who would also be occurrence witness[es] because of, again, this court's reasonable pretrial order, but, again, it was not complied with, including a mentor and a priest of both individuals, who would give the court helpful information, Dr. Dennis Schafer, and other occurrences witnesses, such as [Bethany's] father; [Bethany's] sister, *** Sister Mary Ellen at QUANADA [(an organization that provides services for victims of domestic violence and sexual assault)], who would testify concerning some emotional and physical abuses that may have occurred during the marriage, and 2 other witnesses, Danny Reid and Monica Esela, who also could testify concerning what their observations were of the parties concerning the 2 children in this matter."

After considering counsel's argument, the trial court declined to reconsider its ruling, and the hearing proceeded. Dustin testified on his own behalf and called two witnesses, his mother and sister. Bethany testified on her own behalf and called two witnesses, her mother and a family friend. After considering the evidence, the court made Dustin the custodian of the parties' children.

This appeal followed.

II. ANALYSIS

A. Offers of Proof

When a party claims she has not been given the opportunity to prove her case because the trial court improperly barred certain evidence, she "must provide [the] reviewing court with an adequate offer of proof as to what the excluded evidence would have been." In re Estate of Romanowski, 329 Ill. App. 3d 769, 773, 771 N.E.2d 966, 970 (2002). An offer of proof serves two primary functions: (1) it discloses to the trial court and opposing counsel the nature of the offered evidence, thus enabling the court to take appropriate action, and (2) it provides the reviewing court with an adequate record to determine whether the trial court's action was erroneous. People v. Thompkins, 181 Ill. 2d 1, 10, 690 N.E.2d 984, 989 (1998).

The traditional way of making an offer of proof is the "formal" offer, in which counsel offers the proposed evidence or testimony by placing a witness on the stand, outside the jury's presence, and asking him questions to elicit with particularity what the witness would testify to if permitted to do so. People v. Wallace, 331 Ill. App. 3d 822, 831, 772 N.E.2d 785, 794 (2002); M. Graham, Cleary & Graham's Handbook of Illinois Evidence §103.7, at 22 (8th ed. 2004).

In lieu of a formal offer of proof, counsel may ask the trial court for permission to make representations regarding the proffered testimony. If counsel so requests, the court may--within its discretion--allow counsel to make such an informal offer of proof.

A trial court may deem an informal offer of proof sufficient if counsel informs the court, with particularity, (1) what the offered evidence is or what the expected testimony will be, (2) by whom it will be presented, and (3) its purpose. Kim v. Mercedes-Benz, U.S.A., Inc., 353 Ill. App. 3d 444, 451, 818 N.E.2d 713, 719 (2004). However, an informal offer is inadequate if counsel (1) "merely summarizes the witness' testimony in a conclusory manner" (Snelson v. Kamm, 204 Ill. 2d 1, 23, 787 N.E.2d 796, 808 (2003)) or (2) offers unsupported speculation as to what the witness would say (People v. Andrews, 146 Ill. 2d 413, 421, 588 N.E.2d 1126, 1132 (1992)). In deciding whether to permit an informal offer of proof, the court should ask itself the following questions: (1) Are counsel's representations accurate and complete? and (2) Would a better record be made by requiring counsel to make a formal offer of proof, even though doing so might be inconvenient and require more time?

In addition, before deciding whether to accept counsel's representations in lieu of a formal offer, the trial court should ask opposing counsel if he objects to proceeding in that fashion, even though counsel's response in no way limits the court in exercising its discretion on this matter. If opposing counsel concedes the sufficiency of the offer or has no objection to proceeding by counsel's representations, then opposing counsel's client may not later challenge the court's decision to proceed by counsel's representations, rather than a formal offer. See In re Detention of Swope, 213 Ill. 2d 210, 217, 821 N.E.2d 283, 287 (2004) ("Simply stated, a party cannot complain of error which that party induced the court to make or to which that party consented"); In re Marriage of Sobol, 342 Ill. App. 3d 623, 630, 796 N.E.2d 183, 188 (2003) (a party forfeits the right to complain of an alleged error when to do so is inconsistent with the position the party took in the trial court).

We emphasize that a trial court is never required to settle for less than a formal offer of proof, whatever the positions of the parties at trial may be. Whether to do so is left entirely to the court's discretion. Thus, if the trial court is not satisfied that counsel's representations alone are sufficient, the court may require counsel to place his witnesses on the stand and make a formal offer of proof.

B. Bethany's Failure To Make an Adequate Offer of Proof

Bethany argues that the trial court abused its discretion by limiting each party to two witnesses at the custody hearing. Dustin responds, in part, that Bethany failed to make an adequate offer of proof regarding what testimony the witnesses she was not permitted to call would provide. In her reply brief, Bethany contends that at the start of the February 9, 2005, hearing, Frazier made an adequate offer of proof through his representations to the court. We disagree with Bethany's characterization of the record.

At the February 9, 2005, hearing, Frazier did not make clear to the trial court that he sought to make representations in lieu of a formal offer of proof. Thus, the court was never called upon to exercise its discretion in determining whether Frazier should be allowed to make an informal offer.

Even if we were inclined to view Frazier's remarks as indicating his wish to make an informal offer of proof, his statements to the trial court fell far short of meeting the criteria for making such an offer. He failed to inform the court, with particularity, (1) what the expected testimony would be or (2) its purpose. His representations constituted nothing more than conclusory descriptions of the subject matter of some of the witnesses' testimony. See People v. Singmouangthong, 334 Ill. App. 3d 542, 547-48, 778 N.E.2d 390, 395 (2002) (a conclusory summary of a witness's anticipated testimony is not adequate to serve as an offer of proof).

Nor was this a case in which it was apparent that the court clearly understood the nature and character of the evidence sought to be introduced. See Dillon v. Evanston Hospital, 199 Ill. 2d 483, 495, 771 N.E.2d 357, 365 (2002) (an offer of proof is not required when "it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced"). Indeed, lawyers should be very hesitant to rely on the notion that "it is apparent" that the trial court clearly understands the nature and character of the evidence it is barring, thus obviating the need not only to make a formal offer of proof but also the need to discuss the issue with the court. By far, the better practice is always for counsel to discuss with the court on the record how counsel proposes to proceed regarding an offer of proof concerning evidence the court has barred. Doing so will avoid the unpleasant surprise for counsel of discovering on appeal that the reviewing court does not share counsel's view that "it is apparent" from the record that the trial court clearly understood the nature and character of the evidence at issue, despite the absence of an offer of proof.

Because Bethany failed to make an adequate offer of proof, we have no way of knowing whether the excluded testimony would have (1) been admissible in the custody proceeding or (2) mattered in the custody determination. Thus, Bethany's failure to make an adequate offer of proof deprives this court of the resources we need to determine whether the trial court abused its discretion by limiting each party to two witnesses at the custody hearing. Given that we have no basis upon which to conclude that the court abused its discretion by limiting the number of witnesses, we affirm the court's judgment. See Tsoukas v. Lapid, 315 Ill. App. 3d 372, 382, 733 N.E.2d 823, 832 (2000) (noting that absent an adequate offer of proof, the reviewing court could not conclude that the trial court abused its discretion by limiting the number of expert witnesses each party could call).

III. CONCLUSION

In closing, we commend the trial court for its December 2004 order, in which it addressed discovery and scheduling issues so as to resolve the custody issue in a timely fashion.

For the reasons stated, we affirm the trial court's judgment.

Affirmed.

COOK, P.J., and McCULLOUGH, J., concur.

No. 00-3411
United States Court of Appeals, Tenth Circuit

U.S. v. Adams

271 F.3d 1236 (10th Cir. 2001)
Decided Nov 27, 2001

No. 00-3411.

November 27, 2001.

1237 Appeal from the Court of Appeals, Paul J. Kelly, Jr., Circuit Judge. *1237

Nancy Landis Caplinger, Assistant United States Attorney (and James E. Flory, United States Attorney, on the 1240 briefs), Topeka, Kansas, for Plaintiff-Appellee.– *1240

– The appellee was unable to attend and thus, waived oral argument.

Timothy J. Henry, Assistant Federal Public Defender (and David J. Phillips, Federal Public Defender, on the briefs), Wichita, Kansas, for Defendant-Appellant.

Before KELLY and ANDERSON, Circuit Judges and STAGG,— District Judge.

— The Honorable Tom Stagg, Senior District Judge, United States District Court for the Western District of Louisiana, sitting by designation.

1239 *1239

PAUL KELLY, Jr., Circuit Judge.

Defendant-Appellant Dale L. Adams was found guilty by a jury of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1), and sentenced to 51 months and three years supervised release. At trial, the government relied upon a series of incriminating statements made by Mr. Adams immediately following his arrest. On appeal, he contends that the district court's exclusion of expert testimony by a clinical psychologist denied his right to due process and a fair trial. He also claims that his conviction under 18 U.S.C. § 922(g)(1) exceeds the scope of congressional power.

Background

Wichita police responded to a residential disturbance on March 2, 2000. Upon arriving at the scene, an officer looked into a vehicle occupied by Mr. Adams and another individual and saw a black plastic case, which he determined contained an assault-style semi-automatic pistol.

Upon questioning, Mr. Adams told the officer that both the vehicle and the weapon inside the vehicle belonged to him. The officer then retrieved the weapon, a 9mm semi-automatic pistol, from the interior of the car and arrested Mr. Adams on charges of possession of an illegal firearm. After being read his *Miranda* rights, Mr. Adams stated that he purchased the weapon a few days earlier, stowed it at his residence, and that day had

removed it to the vehicle. Mr. Adams gave the same account after the officers transported him to police headquarters where he was re-interviewed. In both statements, Mr. Adams provided details about his purchase of the weapon, such as the time, date, and location of purchase, and the name of the seller.

Mr. Adams was charged with possession of a firearm by a felon.[1] He was arraigned on June 16, 2000, and trial was set for August 22, 2000. After a possible plea agreement collapsed on August 14, 2000, defense counsel arranged a psychological examination for Mr. Adams. The defense anticipated introducing the resulting psychological report and, on August 18, 2000, delivered the report to the government. The government immediately moved for exclusion of the report, first, because the substance was inadmissible, and, second, because the defense notified the government about the report past the deadline set out in the district court's discovery order. The district court sustained the government's motion.

[1] Mr. Adams had a prior felony conviction for the sale of cocaine.

Mr. Adams tried again at the onset of trial to admit the psychologist's report, claiming that it was relevant to Mr. Adams's mental condition and education, factors that could be considered in judging the credibility of his incriminating statements. Again, the government objected to the substance and timing of the evidence and again the court excluded it.

At trial, the government relied heavily on the incriminating statements that Mr. Adams made to the officers immediately following his arrest. Mr. Adams testified at trial, denying the veracity of his earlier confessions, 1241 and claiming that he lied to *1241 protect his girlfriend from incrimination. Nevertheless, the jury returned a guilty verdict.

Discussion

A. Adequacy of the Offer of Proof

At the outset we are faced with the question of whether Mr. Adams made an offer of proof to the trial court adequate to preserve the claimed error of excluding the psychologist's testimony. "Error may not be based on a ruling excluding evidence unless `the substance of the evidence was made known to the court by offer [of proof] or was apparent from the context within which questions were asked.'" *Inselman v. S J Operating Co.,* 44 F.3d 894, 896 (10th Cir. 1995) (quoting Fed.R.Evid. 103(a)(2)). On numerous occasions we have held that "`merely telling the court the content of . . . proposed testimony' is not an offer of proof." *Polys v. Trans-Colorado Airlines, Inc.,* 941 F.2d 1404, 1407 (10th Cir. 1991) (quoting *Gates v. United States,* 707 F.2d 1141, 1145 (10th Cir. 1983)). In order to qualify as an adequate offer of proof, the proponent must, first, describe the evidence and what it tends to show and, second, identify the grounds for admitting the evidence. *Phillips v. Hillcrest Med. Ctr.,* 244 F.3d 790, 802 (10th Cir. 2001); *Polys,* 941 F.2d at 1407. If the proponent's offer of proof fails this standard, then this court can reverse only in instances of plain error that affected appellant's substantial rights. *Phillips,* 244 F.3d at 802; Fed.R.Evid. 103(d).

A twofold purpose underlies these required showings. First, an effective offer of proof enables the trial judge to make informed decisions based on the substance of the evidence. *Polys,* 941 F.2d at 1406. Second, an effective offer of proof creates "a clear record that an appellate court can review to `determine whether there was reversible error in excluding the [testimony].'" *Id.* at 1407 (quoting *New Mexico Sav. Loan Assoc. v. United States Fidelity Guar. Co.,* 454 F.2d 328, 334 (10th Cir. 1972)).

Federal Rule of Evidence 103(a)(2) does not mandate a particular form for offers of proof. Instead, the rule invests the trial judge with discretion in determining the form of the offer. Fed.R.Evid. 103(b). There are at least four ways to make an offer of proof of testimony and achieve the purposes underlying the rule. 1 *McCormick on Evidence* § 51, at 216 n. 9 (John W. Strong, 5th ed. 1999). First, and most desirable from all standpoints except cost, the proponent may examine the witness before the court and have the answers reported on the record. *Id.*; 21 Charles Alan Wright Kenneth W. Graham, *Federal Practice and Procedure* § 5040, at 214 (1977). The question and answer method necessitates excusing a jury, but this concern is not present when the offer of proof is made, as here, at a pretrial motion hearing. When the proponent proffers testimony in this manner, opposing counsel may be permitted "to cross-examine the witness to develop any factors which would put the preferred testimony in its true light." Wright Graham § 5040, at 214.

The second, and least favorable, method for making an offer of proof of testimony is a statement of counsel as to what the testimony would be. *Id.* at 215. In this case, the colloquy between counsel and the district court was so lacking in detail that it is difficult to decipher why exclusion of the evidence might be error. During the hearing on the motion in limine, defense counsel stated that he had asked the examining psychologist to "look into whether or not [Mr. Adams's] personality, mental makeup, however you want to put it, would he be so
1242 inclined — given the testing that's done, would there be a possibility *1242 that he would give a false statement to the police." R.O.A. Supp. Vol. I, at 4. Counsel then proffered that the examining psychologist had "suggested in one of the paragraphs [of the report] . . . that his personality certainly is one that could have been — statements to the police could have been false." *Id.*

An offer of proof of testimony by counsel is the least favored method because of its potential to fall short of the standard required by the rules of evidence as well as the standard set out in *Phillips* and *Polys*. Defense counsel's offer of proof made during the colloquy with the judge illustrates the potential pitfalls of this method. Specificity and detail are the hallmarks of a good offer of proof of testimony, Wright Graham § 5040, at 213, and conclusory terms, especially when presented in a confused manner, mark poor ones. 1 Christopher B. Mueller Laird C. Kirkpatrick, *Federal Evidence* § 14, at 71 (2d ed. 1994). Defense counsel hardly met the baseline requirement of "`merely telling the court the content of . . . [the] proposed testimony.'" *Polys,* 941 F.2d at 1407. As for the additional requirements set out in *Phillips* and *Polys,* counsel did not explain the significance of the proposed evidence or what he expected the evidence to show. *Phillips,* 244 F.3d at 802; *Polys,* 941 F.2d at 1407. Nor did counsel clearly identify "the grounds for which [he] believes the evidence to be admissible." *Id.*

Documentary offers of proof comprise the third and fourth proper forms of proffering anticipated testimony. McCormick § 51, at 216 n. 9. The first of these, and least common, is a statement written by examining counsel describing the answers the proposed witness would give if permitted to testify. *Id.* More common, and relevant to this case, the proponent of the evidence may introduce a "written statement of the witness's testimony signed by the witness and *offered as part of the record.*" *Id.* (emphasis added). In using either method of documentary proffer for anticipated testimony, "[i]t is suggested . . . that the writing be marked as an exhibit and introduced into the record for proper identification on appeal." *Id.*; *see also Palmer v. Hoffman,* 318 U.S. 109, 116, 63 S.Ct. 477, 87 L.Ed. 645 (1943); 1 Michael H. Graham, *Handbook of Federal Evidence,* § 103 .7, at 61 (5th ed. 2001). Indeed the primary, formal reason for an offer of proof is "to preserve the issue for appeal by including the proposed answer and expected proof *in the official record of trial.*" McCormick § 51, at 216 n. 9 (emphasis added).

On the morning of the pretrial hearing, counsel for Mr. Adams apparently sent a facsimile of the psychologist's report directly to the district court judge, who referred to the report during the hearing. R.O.A. Supp. Vol. I, at 8. The report was not marked as an exhibit. "Documents and other exhibits are usually marked for identification and become part of the record on appeal, even if excluded." Wright Graham § 5040, at 213. Nor was it filed as an exhibit to a pleading. The report is not part of the record below.

Merely sending a facsimile of the psychologist's report to the judge on the morning before the hearing unfortunately does not guarantee that the faxed item will actually be marked as an exhibit or filed and become part of the record. Our rules anticipate that when an appeal is based upon the challenge to the admission or exclusion of evidence, we be furnished not only with pertinent transcript excerpts, but also with pertinent trial exhibits that are part of the record. 10th Cir.R. 10.3(D)(1) (2).

Mr. Adams has moved to supplement the record. The appellate rules allow supplementation of the record on
1243 *1243 appeal in instances where "anything material . . . is omitted from or misstated in the record by error or accident." Fed.R.App.P. 10(e)(2). Because the district court judge did make passing reference to a recently faxed psychologist's report, R.O.A. Supp. Vol. I, at 8, and because counsel as an officer of the court represents that this is the same report that was before the district court, and because the government does not oppose it, we will grant the motion. We remind counsel, however, of the importance of a valid, properly presented, detailed, and recorded offer of proof when testimony is involved and of the importance of insuring that supporting documentary evidence be made part of the record.

B. Exclusion of Psychologist's Testimony

The admission or exclusion of expert testimony is reviewed for abuse of discretion. *United States v. Rice,* 52 F.3d 843, 847 (10th Cir. 1995). However, Mr. Adams suggests that, in this case, exclusion of thepsychologist's report effectively precluded Mr. Adams's theory of defense, thereby violating his right to a fair trial and due process — a violation that he claims warrants de novo review. We disagree. Mr. Adams cites *United States v. Smith,* 63 F.3d 956 (10th Cir. 1995), and *United States v. Bindley,* 157 F.3d 1235 (10th Cir. 1998), as evidence that de novo review is required here. Aplt. Br. at 12. Both cases are inapposite. Both *Smith* and *Bindley* determined that it was reversible error for a trial court to refuse a jury instruction on a theory of defense after a defendant makes a threshold showing as to each element of the defense, and that the adequacy of the defendant's threshold showing is reviewed de novo. *Smith,* 63 F.3d at 965; *Bindley,* 157 F.3d at 1241. But while an adequate threshold showing entitles a defendant to a jury instruction on that theory of defense, it does not entitle that defendant to have admitted whatever evidence he desires to support that theory. The Constitution affords trial judges "wide latitude" to exclude evidence that is repetitive, marginally relevant, poses an undue risk of harassment, prejudice, or confusion of the issues, or is otherwise excluded through the application of the evidentiary rules. *Crane v. Kentucky,* 476 U.S. 683, 689-90, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). Mr. Adams confuses a fundamental right, the right to present a theory of defense, with one that is not fundamental, the right to present that theory in whatever manner and with whatever evidence he chooses. Exclusion of the report was an evidentiary ruling which we review for abuse of discretion. *Rice,* 52 F.3d at 847.

1. Exclusion Based Upon Timing.

On June 21, the district court issued a discovery order requiring the defendant to file all motions and notices pursuant to Federal Rules of Criminal Procedure 12(b)(1), 12(b)(2), and 12.2 no later than 30 days following arraignment. R.O.A. Vol. I: 11. The order also warned that failure to comply with this order or to show good cause for not being able to comply may result in disallowance of use of evidence or defenses not disclosed. *Id.* Mr. Adams concedes that his failure to notify the government of the psychological report until three days prior

to trial — over a month past the prescribed deadline — permits sanctions by the district court under Rule 16 of the Federal Rules of Criminal Procedure. Aplt. Br. at 16-17. Nevertheless, Mr. Adams claims that the district court erred when it excluded this evidence as untimely.

The test for determining whether a witness was appropriately excluded for untimely disclosure was described in *United States v. Wicker,* 848 F.2d 1059, 1061 (10th Cir. 1988). In *Wicker,* the court considered *1244 three factors: (1) the reason for the delay in disclosing the witness; (2) whether the delay prejudiced the other party; and (3) the feasibility of curing any prejudice with a continuance. *Id.*

The court clearly weighed the first *Wicker* factor concerning the reason for the delay in identifying the proposed witness, noting that three months had passed since the defendant's indictment, that defense counsel knew or should have known of defendant's claim that he lied to the police in order to protect his girlfriend, and that concerns about the defendant's mental state and ability had been raised by the defendant's grandmother both prior to and at the plea hearing. R.O.A. Supp. Vol. I, at 6-7.

The court did not explicitly weigh the second factor, the potential prejudice to the government, or the third factor, the feasibility of granting a continuance. While the court in *Wicker* suggested that a district court "should consider [the three factors] in determining if a sanction is appropriate," the court also noted that the three factors "merely guide the district court" and do not "dictate the bounds of the court's discretion." *Id.* Furthermore, even in the absence of prejudice, a district court may suppress evidence that "did not comply with discovery orders to maintain the integrity and schedule of the court . . ." *Id.* The district court justifiably excluded the evidence on the basis of its unexplained untimeliness alone.

The record on appeal indicates, however, that the final two factors weigh strongly in favor of exclusion of the evidence. First, Mr. Adams's notice of intent to introduce expert psychological testimony only three days before a trial date, left the government no opportunity to conduct its own psychological examination of the defendant, or otherwise mount a rebuttal. The untimely notice seems significantly prejudicial to the government.

With regards to the third factor, the feasibility of a continuance, the government suggested during the hearing in limine that it would need up to 120 days to conduct its own psychological examination of Mr. Adams, as permitted under Rule 12.2(c) of the Federal Rules of Criminal Procedure. R.O.A. Supp. Vol. I, at 3. A continuance adequate to accommodate the described needs of the government would significantly delay the trial. We agree with the district court that its ruling could be sustained on the grounds of untimeliness alone.

2. Exclusion Based on the Substance of the Evidence

Mr. Adams also challenges the exclusion of the psychologist's report on the basis of its substance. Mr. Adams sought to introduce the psychological evidence in order to diminish the credibility of his earlier statements to the police. R.O.A. Supp. Vol. I at 4-5. On appeal, he indicates that "[t]he proffered testimony . . . showed Adams' neurocognitive impairment and dependent personality structure [and] support[s] the possibility the statements he gave to the police were false." Aplt. Br. at 14.

Mr. Adams cites *Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), as precedent for allowing expert testimony bearing on the credibility of prior testimony or a confession. Aplt. Br. at 15, 16. *Crane* did distinguish pretrial inquiries into the voluntariness of a confession from a defendant's challenge to the reliability of the confession during the course of the trial. *Crane,* 476 U.S. at 687, 106 S.Ct. 2142. Even after a confession is deemed voluntary, evidence concerning the "physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate *1245 factual issue of a defendant's guilt or innocence." *Id.* at 689, 106 S.Ct. 2142. The "blanket exclusion" of evidence regarding the

circumstances of a confession precludes a fair trial. *Id.* at 690, 106 S.Ct. 2142. *Crane* did not address, however, whether the "physical and psychological environment that yielded the confession," *id.* at 689, 106 S.Ct. 2142, includes the psychological makeup of the confessor, or when expert testimony should be admitted to address that element. Only two circuit courts have dealt with the question of the admissibility of expert testimony concerning credibility, and both, under the facts of those cases and the manner of presentation, concluded that the respective trial court committed error in excluding such testimony. *United States v. Shay,* 57 F.3d 126, 132 (1st Cir. 1995); *United States v. Hall,* 93 F.3d 1337, 1346 (7th Cir. 1996).

A district court may allow expert testimony "[i]f [the expert] scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702.[2] The Supreme Court has held that Rule 702 imposes a special obligation upon a trial judge to ensure that all expert testimony, even non-scientific and experience-based expert testimony, is both relevant and reliable. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592-93, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[2] An amendment to Federal Rule of Evidence 702 became effective December 1, 2000, after the trial in this case.

We have said that "[t]he credibility of witnesses is generally not an appropriate subject for expert testimony." *Toledo,* 985 F.2d at 1470. Though *Crane* prohibits categorical exclusion of this type of evidence, it does not require its categorical admission — the rules of evidence still apply. There are a variety of reasons that evidence related to the credibility of a confession may be excluded. First, "expert testimony which does nothing but vouch for the credibility of another witness encroaches upon the jury's vital and exclusive function to make credibility determinations, and therefore does not `assist the trier of fact' as required by Rule 702." *United States v. Charley,* 189 F.3d 1251, 1267 (10th Cir. 1999) (quoting Rule 702). *See also United States v. Call,* 129 F.3d 1402, 1406 (10th Cir. 1997) (testimony concerning credibility is often excluded because it usurps a critical function of the jury, which is capable of making its own determinations regarding credibility); *United States v. Samara,* 643 F.2d 701, 705 (10th Cir.), *cert. denied,* 454 U.S. 829, 102 S.Ct. 122, 70 L.Ed.2d 104 (1981). Also, a proposed expert's opinion that a witness is lying or telling the truth might be "inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert's specialized knowledge and therefore merely informs the jury that it should reach a particular conclusion." *Shay,* 57 F.3d at 131. Yet another rationale for exclusion is that the testimony of impressively qualified experts on the credibility of other witnesses is prejudicial, unduly influences the jury, and should be excluded under Rule 403. *Toledo,* 985 F.2d at 1470; *cf. Call,* 129 F.3d at 1406 (polygraph results may be excluded under Rule 403 because jury may overvalue scientific results as indication of truthfulness).

In this case, Mr. Adams defended on the basis that the repeated, incriminatory statements he gave to law enforcement were untrue, made only to protect his girlfriend, who he believed at the time to be pregnant. R.O.A. Vol. II, at 208-09. *1246 The expert concluded that Mr. Adams's low neurocognitive functioning and dependent personality structure "strongly raise the possibility, *given the conflicting explanations made by Mr. Adams and others,* that he was not telling the truth when he made incriminating statements to Wichita Police Officers and ATF agents. His statements that he was `protecting a girlfriend' when he confessed to possession of the firearm is consistent with his personality and cognitive state, and indicative of his difficulty making appropriate and reasoned choices." Report at 5 (emphasis added).

The district court was careful to recognize that, in some circumstances, credibility testimony by an expert might be allowed, however, it did not abuse its discretion in excluding it here. R.O.A. Supp. Vol. I, at 8. The psychologist, in light of the conflicting explanations and his evaluation of Mr. Adams, concluded that Mr.

Adams's account (that he lied to protect his pregnant girlfriend) was plausible, albeit misguided. We have reviewed the report, and find the district court within its discretion in holding that the report was little more than a professionally-trained witness testifying that, based upon his history, "Mr. Adams is the type of person who would have lied about his involvement to the police." *Id.* at 7. This case is readily distinguishable from *Hall,* 93 F.3d at 1341, where the defendant claimed that a personality disorder caused him to confess during interrogation and sign a statement in order to gain approval of his interrogators, and *Shay,* 57 F.3d at 129-30, where the defendant claimed that his confession was the product of a mental disorder characterized by an extreme form of pathological lying. In this case, there simply is no question about the voluntariness of the confessions — and defendant's recantation that he lied in order to protect his girlfriend is precisely the type of explanation that a jury is capable of resolving without expert testimony. The offered testimony does little more than "vouch for the credibility of another witness" and thereby "encroaches upon the jury's vital and exclusive function to make credibility determinations." *Charley,* 189 F.3d at 1267. The judge was well within his discretion in determining that the evidence lacked relevance and would not "assist the trier of fact as required by Rule 702." *Id.*

C. Commerce Clause

Finally, Mr. Adams raises a facial challenge to 18 U.S.C. § 922(g)(1), claiming that enactment of the possession statute exceeded congressional power under the Commerce Clause. Citing *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), *United States v. Morrison,* 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), and *Jones v. United States,* 529 U.S. 848, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000), Mr. Adams claims that mere possession of a firearm does not "affect interstate commerce," and is therefore insufficient to meet the federal jurisdictional requirement. Aplt. Br. at 19-23. Our decision in *United States v. Dorris,* 236 F.3d 582 (10th Cir. 2000), resolved this issue and now forecloses Mr. Adams's facial challenge to the statute.

AFFIRMED.

1247*1247

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

[redacted],

Plaintiffs,

vs.

[redacted]

Defendants.

DEFENDANT'S MOTION REQUESTING
AN ORDER PROHIBITING SPEAKING OBJECTIONS WITH BRIEF IN SUPPORT

To ensure an orderly trial, the defendant and her counsel ask the Court to enter an Order prohibiting counsel from making speaking objections during trial:

1. This motion was prompted by the behavior of plaintiff's counsel in the video hearing [redacted] on December 9, 2020.
2. Virtually every "objection" by the plaintiff's counsel was a lengthy, disruptive speaking objection, some of which were tangentially related to the Rules of Evidence and others which had no evidentiary basis at all.
3. It quickly became apparent that the speaking objections and the behavior of counsel were designed to disrupt the defendant's evidentiary presentation, argue against the defendant's case during her presentation, and to argue with the Court. The Court noted at least once that the plaintiff's counsel was vigorously shaking his head after one of the Court's rulings on evidence.

4. As speaking objections are both unprofessional and obstructive, the defendant asks the Court to enter an order prohibiting counsel from engaging in speaking objections.

BRIEF

The Court has broad authority and power to ensure an orderly presentation at trial. "The trial judge has the responsibility of maintaining the due administration of justice in the courtroom." *Shipman v. State*, 1982 OK CR 3, ¶23, 639 P.2d 1248. Various courts have adopted rules concerning objections and argument. Judge Claire Eagan's Trial Rules in the federal Northern District of Oklahoma include a rule concerning a prohibition against addressing opposing counsel and the following rule:

> When you object in the presence of the jury, make your objection short and to the point. Do not argue the objection in the presence of the jury, and do not argue with the ruling of the Court in the presence of the jury. Do not make motions (e.g., motion for mistrial) in the presence of the jury. Bench conferences should be kept to a minimum.

Rogers County has rules to ensure appropriate and professional behavior by counsel in the courtroom, including, "(1) Arguments shall be addressed to the Court and not to opposing counsel." Rule 1.2 - Attorneys -- Behavior, 2007 Revised Court Rules, Northeast Judicial Administrative District. Other courts have adopted similar rules. The rationale for rules like these is readily apparent: to promote an orderly and fair trial and a fair ability of each side to present evidence, without exposing parties and attorneys who follow the rules to risk abuse by attorneys who will not follow those rules or behave professionally.

Objections are authorized by the Oklahoma Evidence Code as to rulings admitting or excluding evidence. Okla. Stat. tit. 12 § 2104. In contrast to valid evidentiary objections, speaking objections are a hallmark of professional misconduct. *See Brewer v. State*, 2006, OK CR 16, ¶ 9 and n. 7, 133 P.3d 892:

> ¶ 9 In proposition one, Appellant claims prosecutorial misconduct denied him a fair trial. We agree the record is replete with instances of misconduct by the prosecutor, as well as improper argument and conduct by the defense. This was an ugly brawl of a trial that went well beyond what could be considered professional.[7]
>
> [7.] Time after time, the trial judge instructed the parties to stop using "speaking objections." Her instructions were ignored.

"Speaking objections" are objections which are not based upon the rules of evidence and are intended to confuse or distract the factfinder or the witness, unfairly interrupt the other side's presentation of evidence, or to coach the witness responding to a question. Attorney Eric Guster, commenting on the George Zimmerman trial, defined speaking objections as follows:

> A speaking objection is an objection where the lawyer speaks a complete thought in an effort to either a) provide additional information to the jury that they should not have b) aggravate opposing counsel c) give additional information to the judge that they want the judge to know or d) all of the above at the same time. More than likely, it is "d," all of the above.[1]

Speaking objections are bad behavior and have been identified as misconduct warranting a new trial. *Teter v. Deck, M.D.*, 174 Wash.2d 207, 274 P.3d 336.

To ensure a speedy and orderly trial, the defendant respectfully asks the Court to prohibit speaking objections not based upon the rules of evidence or otherwise

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[1] Guster, E. (2013, July 2). George Zimmerman Trial: What Is A Speaking Objection? Retrieved from https://newsone.com/2625255/george-zimmerman-tria-speaking-objection/

improper during the overall context of the hearing. The defendant and his counsel ask that objections be made using the following format: Stand, address the Court, state "Objection" and the evidentiary basis for the objection (generally one word such as "relevance," "hearsay," or "argumentative,") then await a ruling.

Respectfully submitted,

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VERIFICATION

STATE OF OKLAHOMA)
) ss.
COUNTY OF TULSA)

Aaron D. Bundy, of lawful age, being first duly sworn, upon oath deposes and states: I am counsel for the above-named defendant; in accordance with Rule 4 (c) of Rules for the District Courts of Oklahoma, the proof will show and suffice until a hearing or stipulation can be provided that the contents, statements and allegations of the above and foregoing are true and correct to the best of my knowledge and belief.

Aaron D. Bundy

Subscribed and sworn to before me by Aaron Bundy this 14 day of January, 2021.

Notary public

VALENTINA SALDANA
Notary Public, State of Oklahoma
Commission # 19005521
My Commission Expires 05-31-2023

[Seal]

CERTIFICATE OF MAILING

I hereby certify that on the date of filing, I sent a true and correct filed copy of the above and foregoing by U.S. Mail, and or by facsimile or email to:

[redacted]
Counsel for the plaintiffs

Aaron Bundy