Basics in Preserving the Record on Unfavorable Evidentiary Rulings

By Adam J. Sheppard

Appellate courts are reluctant to reverse a judgment based on an evidentiary ruling. *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1310 (10th Cir. 1990) [login required]. For one thing, such rulings are reviewed under the deferential abuse-of-discretion standard. *Old Republic Ins. Co. v. Emp'rs Reinsurance. Corp.*, 144 F.3d 1077, 1082 (7th Cir. 1998) [login required]. Second, it is difficult to convince an appellate court that an evidentiary ruling may have substantially affected the outcome of the case—i.e., that it is not a "harmless" error. Third, appellate courts will deny a claim of error where the appellant failed to properly preserve the argument in the trial court.

Federal Rule of Evidence 103

Many states have their own rules of evidence—practitioners should consult their local rules—but Federal Rule of Evidence 103 is reflective of general principles surrounding claims of evidentiary errors. The rule provides:

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.

Fed. R. Evid. 103(a).

Objecting

The first step to preserving a claim of error is "timely" objecting or moving to strike. *See* Fed. R. Evid. 103(a). An objection will be considered timely if it is made when the ground for the objection first becomes apparent. *United States v. Gibbs*, 739 F.2d 838, 849 (3d Cir. 1984) [login required]; *United States v. Kanovsky*, 618 F.2d 229, 231 (2d Cir. 1980). To that end, it is advisable to raise all foreseeable objections in amotion in limine. (Motions in limineare also favored because they obviate the need for lengthy sidebars during trial, which may irritate juries and judges.)

Pursuant to Federal Rule of Evidence 103(b), if a party raises an objection in a motion in limineand the judge "definitively rules" on that motion "on the record," then the party need not

renew the objection at trial. Fed. R. Evid. 103(b). A "definitive ruling" forecloses the possibility that the evidence will be admitted at trial. *See* Long v. Fairbank Reconstruction Corp., 701 F.3d 1, 4 (1st Cir. 2012) [login required]. If a judge provisionally or tentatively grants or denies a motion in limine, that is not a "definitive ruling." *See* Walden v. Georgia-Pacific Corp., 126 F.3d 506, 517–20 (3d Cir. 1997) [login required]. In that situation, a party must renew the objection at trial when the evidence is offered.

For issues not addressed in motions in limine, objections must still be made before the objectionable testimony is given. "'An objection to a question, made after an answer is given, is not timely and will not preserve the issue for review.'" *Roper v. State*, 695 So. 2d 244, 246 (Ala. Crim. App. 1996) [login required], *cert. denied*, 695 So. 2d 249 (Ala.1997) [login required] (citations omitted); *see also Sanders v. Ahmed*, 364 S.W.3d 195, 207 (Mo. 2012) ("A party should make any objection to the trial process at the earliest opportunity to allow the other party to correct the problem without undue expense or prejudice."); *Glover v. State*, 956 S.W.2d 146, 147 (Tex. Ct. App. 1997) [login required] (because the ground for the objection was apparent at the time that the question was asked, the appellant's objection, made after the answer was given, was untimely).

In those instances where the witness answers before you have had time to object, immediately move to strike the answer and request the judge to instruct the jury to disregard the evidence. *See* Fed. R. Evid. 103(a) (authorizing motions to strike); *Trachta v. Iowa State Highway Comm'n*, 86 N.W.2d 849, 854 (Iowa 1957) [login required] (motion to strike was timely "for it was made as soon as convenient following the witness's voluntary statements subsequent to answering a proper question"). If the judge declines to strike the testimony, consider requesting a "limiting instruction"—i.e., an instruction to the jury to consider the evidence for a particular, limited purpose. *See* Fed. R. Evid. 105. It is incumbent on the party who wants the limiting instruction to request it. A judge has no obligation to sua sponteissue a limiting instruction. *See, e.g.*, *United States v. Aranda*, 963 F.2d 211, 216 (8th Cir. 1992) [login required] (if a party fails to request a limiting instruction at trial, it cannot claim on appeal that the judge erred in failing to issue one).

Specifying the Basis of Your Objection

Objections must not only be timely; they must be specific. Fed. R. Evid. 103. The requisite level of specificity is that which adequately apprises the court of the true basis of the objection. *United States v. Parodi,* 703 F.2d 768, 783 (4th Cir. 1983) (citation omitted). A general objection such as "I am going to object to that, Judge" is insufficient. *See Owen v. Patton*, 925 F.2d 1111, 1114 (8th Cir. 1991).

Sound trial strategy is to state the word "objection," followed by a concise description of your objection—e.g., "objection, hearsay" or "objection, assumes facts not in evidence." So-called speaking objections—the attorney elaborates on the basis of the objection in front of the jury, often in an argumentative fashion—are disfavored. *See, e.g., United States v. Dunn*, Nos. 11-3255, 11-3257, 11-3258, and 11-3318, 2013 WL 3779581, at *10 (8th Cir. July 22, 2013). If you

believe that the judge needs additional information before ruling on your objection, ask to approach in side-bar.

On some occasions, there may be more than one basis for an objection. For example, the evidence might be hearsay and it might also constitute improper proof of other crimes. In that instance, it is important to state each ground for your objection. "The specific ground for reversal of an evidentiary ruling on appeal must also be the same as that raised at trial." *United States v. Taylor*, 800 F.2d 1012, 1017 (10th Cir. 1986) [login required]. A party cannot object at trial on one ground but use a different ground to attack the same evidence on appeal. *United States v. Laughlin*, 772 F.2d 1382, 1391–92 (7th Cir. 1985) [login required] (defendant's objection at trial that certain photographs were not relevant, or alternatively were more prejudicial than probative, did not preserve for appeal the separate issue of whether the photographs constituted proof of other crimes). Thus, if there are multiples grounds for an objection, it is better to favor inclusiveness.

Excluding Evidence

The above paragraphs deal with objecting to the other party's evidence. There are separate procedures for preserving the record when the trial court has refused to admit your evidence. Federal Rule of Evidence 103 provides: "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." Fed. R. Evid. 103(a)(2). An offer of proof puts on the record—outside the presence of the jury—the substance of the proposed evidence. Federal Rule of Evidence 103 does not prescribe a particular form for offers of proof. In general, an offer of proof must "first, describe the evidence and what it tends to show and, second, identify the grounds for admitting the evidence." *United States v. Vazquez-Botet*, 532 F.3d 37, 51 (1st Cir. 2008). Sometimes an offer of proof involves a question-and-answer session with a witness, on the record, but outside the presence of the jury. *E.g.*, *United States v. Adams*, 271 F.3d 1236 (10th Cir. 2001) [login required]. In that scenario, the proponent of the evidence asks questions to which the objections were already sustained. In many situations, judges prefer a "narrative" offer of proof—counsel summarizes what the evidence would show if admitted. *E.g.*, *United States v. Janusz*, 135 F.3d 1319, 1323 (10th Cir. 1998) [login required]. Where counsel can only speculate as to what a witness would say, the offer of proof is inadequate to preserve the issue on appeal. *E.g.*, *People v. Slaughter*, 371 N.E.2d 666, 673 (Ill. App. Ct. 1977) [login required]. The offer of proof must be detailed, not conclusory, and not based on conjecture. *See id.*

Post-Trial Motions

In addition to making timely and proper objections at trial, raise all alleged evidentiary errors in a post-trial motion. Several jurisdictions hold that issues not raised at trial *and* in post-trial motions are waived for purposes of appeal. *See, e.g.*, *People v. Enoch*, 522 N.E.2d 1124, 1130 (Ill. 1988) [login required]; *Hopper v. M & B Builders, Inc.*, 583 S.E.2d 533, 535–37 (Ga. Ct. App. 2003) [login required]. The most important thing to do when contesting an evidentiary ruling in a post-trial motion is to establish how the error affected a "substantial right" of a party. *See* Fed. R. Evid. 103(a). An evidentiary ruling affects a "substantial right" only if it is likely to

affect the outcome of a case. *Ricketts v. City of Hartford*, 74 F.3d 1397, 1412 (2d Cir. 1992) [login required]. Appellate courts will not grant relief based on mere "harmless" errors. *E.g.*, *United States v. Cerro*, 775 F.2d 908, 916 (7th Cir. 1985) [login required] (harmless error analysis applies to erroneous exclusion, as well as to erroneous admission, of evidence).

Conclusion

Trial judges have discretion in deciding the admissibility of evidence, and practitioners will undoubtedly encounter adverse evidentiary rulings. To properly preserve those issues for review, you should follow five steps: (1) timely object or move to strike the evidence; (2) state a specific ground for the objection; (3) request a limiting instruction if appropriate; (4) if the ruling is one excluding your evidence, make a detailed offer of proof on the record; and (5) file a post-trial motion that demonstrates how the ruling substantially affected the outcome of the case. By following those steps, you will at least have preserved the issue for review.

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