

Preserving Issues for Appeal

Objections During Trial

By Donald J. Martin, Esq.

"This objection was waived, because it was not preserved at trial." These are the words you never want to see in an appellate opinion in place of a discussion of your arguments. In this issue, I will explain how to preserve trial issues for appeal. I will discuss objections to the jury charge and to the verdict in a separate article.

Pennsylvania Rule of Appellate Procedure 302(a) provides that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Rule of Criminal Procedure provides that a ruling on an objection "has the effect of a sealed exception". Pennsylvania Rule of Civil Procedure 227.1(b)(1) provides that post-trial relief may not be granted, unless the grounds were raised in pre-trial proceedings, or by motion, objection, point for charge, offer of proof, or other appropriate method at trial. Pennsylvania Rule of Evidence 103 addresses the Court's rulings on evidence. Sub-section (a) provides that error may not be predicated on a ruling that omits or excludes evidence unless a timely objection, motion to strike, or motion in limine appears of record, stating the specific ground (if it is not apparent from the context¹). If the ruling excludes evidence, then its substance must be made known to the Court by offer of proof or motion in limine, (or be apparent from the context²).

These rules are consistent with Pennsylvania case law. An appellate court will not rule on the exclusion of evidence, unless an offer of proof has been made.³ The rule of waiver by failure to make a contemporaneous and specific objection is all but absolute.⁴ The reason for the requirement of a contemporaneous and specific objection or offer of proof is that it gives the trial court the opportunity to rule.⁵ However, once an objection has been made and ruled on, it need not be

renewed to preserve the claim of error.⁶

All this, from a practical standpoint, means your objection to inadmissible testimony must be made as soon as a question is asked that would likely lead to inadmissible evidence. If inadmissible testimony is given in response to a proper question, a motion to strike must be made immediately after the answer is given. If an objection to your question is sustained, you must ask to make an offer of proof, outside the hearing of the jury. The risk of delay is a finding of waiver. Thinking about the problem, and raising it for the first time after a break or the following day, often results in a finding of waiver.⁷

While Pennsylvania Rule of Evidence 103 and the cases in Note 6 hold that once an objection has been made and ruled upon, it need not be repeated, it is still a good idea to seek a "continuing objection" from the Court. While not required by the Rule, it may help prevent an appellate court from deciding, on its own motion, that an issue was waived by failure to object when the evidence was offered thereafter. Note this in the Statement of the Place of Raising and Preservation of Issues in your brief.

Now, suppose you have objected and your objection was overruled. Can you cross-examine on the point, or offer evidence to the contrary? At least when the cross-examination is preceded by a statement to the trial judge that you intend to preserve your objection, cross-examination on the issue is not a waiver.⁸ The offer of contrary evidence should also not be a waiver, but this is not clear in Pennsylvania.⁹ Because of the uncertainty, you must weigh, quickly, the likelihood of the court's ruling being reversed on appeal against the harm that is done by leaving the evidence unrebutted. Then, if you decide that contrary evidence is required, make a statement on this record that you are preserving your prior objec-

tion, offer the evidence, and hope.

When is a motion for mistrial required? Pennsylvania Rule of Criminal Procedure 605(B) provides that when an event prejudicial to the defendant occurs during trial, the defendant must move for a mistrial at that time. The same principle prevails in civil cases. A motion for mistrial must be made whenever prejudicial and inadmissible evidence comes to the attention of the jury.¹⁰ This can occur not just through testimony, but with a question which suggests an inadmissible answer.¹¹

A motion for mistrial is not required if the trial judge overrules the objection. That is because this is a futile motion: having overruled the objection, the trial court would obviously not grant a mistrial.¹²

An objection to the trial court's bias, or a request for recusal, must be made at the earliest possible moment, and not delayed until post-trial motions.¹³ There is a very limited exception to this rule stated in *Commonwealth v. Hammer*,¹⁴ where the objection could have a deleterious effect on the jury or the judge. In *Harman v. Borah*,¹⁵ the Supreme Court explained a contemporaneous objection is almost always required. The *Hammer* exception is construed narrowly. The party asserting it has the burden of demonstrating that making a timely objection would have been meaningless. "Meaningless" does not mean that the judge is likely to overrule the objection: more harm to the trial process is required. So, make the motion, then duck.¹⁶

In conclusion: object whenever inadmissible evidence that may hurt your case is offered; do so specifically; and give the right reason. If evidence you are offering has been excluded, make an offer of proof on the record. At least seek to do so, and, if refused, file a writ-

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Legislative Update

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ments; and resale of units.

The bills passed the House on June 24, 2003.

Home Improvement Contracts (HB 864)

This bill sponsored by Rep. Keith McCall, D-Carbon, provides for the regulation of home improvement contractors and for the registration of certain home improvement contractors. The bill was reported out of the House Appropriations Committee on June 16, 2003.

Landlord/ Tenant (SB 257 and HB 314)

HB 314, sponsored by Rep. Ron Miller, R-York, also amends the Landlord and Tenant Act by reducing the eviction time under the act from 21 days to 11 days. The bill was referred to the House Appropriations Committee on June 12, 2003.

SB 257, sponsored by Sen. Mike Waugh, is similar to the HB 314. The bill received second consideration in the Senate and was laid on the table on May 12, 2003.

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ten offer right away. Preserve the issue by motion for post-trial relief in cases in which those motions are required.

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ENDNOTES:

¹Don't rely on the exception. Always state the specific ground of your objection.

²See Note #1.

³E.g., *Romeo v. Manuel*, 703 A.2d 530, 533 (Pa. Super. 1997); *Philadelphia Record Co. v. Sweet*, 124 Pa. Super. 414, 188 A. 631, 632-633 (1936).

⁴*Commonwealth v. Corley*, 432 Pa. Super. 371, 638 A.2d 985, 990, allocatur denied, 538 Pa. 641, 647 A.2d 896 (1994); *Commonwealth v. Folino*, 293 Pa. Super. 347, 439 A.2d 145, 147-148 (1981).

⁵*Commonwealth v. Griffin*, 271 Pa. Super. 228, 412 A.2d 897, 901 (1979).

⁶Pa.R.Evid. 103(a); *Matter of Silverberg*, 459 Pa. 107, 327 A.2d 106, 108, n. 3 (1974); *Drum v. Shaul* Equipment and Supply Company, 787 A.2d 1050, 1055 (Pa. Super. 2001) allo-

catur denied, 569 Pa. 693, 803 A.2d 735 (2002).

⁷E.g., *Harman v. Borah*, 562 Pa. 455, 756 A.2d 1116 (2000).

⁸*Dougherty v. Allegheny County*, 370 Pa. 239, 88 A.2d 73 (1952).

⁹See discussion at Packer and Poulin, *Pennsylvania Evidence*, 2nd Ed. §126.

¹⁰While a trial judge is presumed capable of disregarding inadmissible evidence, e.g., *Commonwealth v. Galindes*, 786 A.2d 1004, 1014 (Pa. Super. 2001), it may help to move for a mistrial under the appropriate circumstances, if the case is tried before a judge alone. That evidence would have to be highly prejudicial.

¹¹*McMillen v. 84 Lumber, Inc.*, 538 Pa. 567, 649 A.2d 932 (1994); *Coffey v. Minwax Company, Inc.*, 764 A.2d 616 (Pa. Super. 2000); *Allied Electrical Supply Co. v. Roberts*, 797 A.2d 362 (Pa. Super.) allocatur denied, 570 Pa. 680, 808 A.2d 568 (2002).

¹²*Factor v. Bicycle Technology, Inc.*, 550 Pa. 500, 707 A.2d 504 (1998).

¹³*Harman v. Borah*, 562 Pa. 455, 756 A.2d 1116 (2000); *Crawford v. Crawford*, 429 Pa. Super. 155, 633 A.2d 155, 159-160 (1993).

¹⁴508 Pa. 88, 494 A.2d 1054 (1985), overruled on other grounds, *Commonwealth v. Grant*, Pa. 813 A.2d 726 (2002).

¹⁵562 Pa. 455, 756 A.2d 1116 (2000)

¹⁶756 A.2d at 1126.

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