Chapter Seven:

Preserving the Record

Edward G. O'Connor, Esquire
Patrick R. Kingsley, Esquire
Echert Seamans Cherin & Mellot
Pittsburgh

PRESERVING THE RECORD

I. THE IMPORTANCE OF PRESERVING THE RECORD.

Evidentiary rulings are seldom the basis for a reversal on appeal. Appellate courts are reluctant to reverse because of an error in admitting or excluding evidence, and sometimes actively search for a way to hold that a claim of error in an evidence ruling is barred. R. Keeton, Trial Tactics and Methods, 191 (1973). It is important, therefore, to preserve the record in the trial court to avoid giving the Appellate Court the opportunity to ignore your claim of error merely because of a technicality.

II. PRESERVING THE RECORD WHERE THE TRIAL COURT HAS LET IN YOUR OPPONENT'S EVIDENCE.

A. The Need to Object:

1. Preserving the Issue for Appeal.

   A failure to object to the admission of evidence ordinarily constitutes a waiver of the right to object to the admissibility or use of that evidence. Taylor v. Celotex Corp., 393 Pa. Super. 566, 574 A.2d 1084 (1990). If there is no objection, the court is not obligated to exclude improper evidence being offered. Errors in admitting evidence at trial are usually waived on appeal unless a proper, timely objection was made during the trial. Commonwealth v. Collins, 492 Pa. 405, 424 A.2d 1254 (1981).

   The rules of appellate procedure are meant to afford the trial judge an opportunity to correct any mistakes that have been made before these mistakes can be a basis of appeal. A litigator will not be allowed to ambush the trial judge by remaining silent at trial and voice an objection to the Appellate Court only after an unfavorable verdict or judgment is reached. Pa. R.A.P. 302(a).

2. Evidence Admitted Without Objection May Be Used for Any Reason.

   Where improper evidence is admitted without objection, it may be used by the fact finder for whatever probative value it may have, as though it was admissible. This is true even if the evidence is incompetent. It will be given its natural probative force as though it were competent. Carl v. Kurtz, 255 Pa. Super. 198, 386 A.2d 577 (1978); Castel v. Mitchell, 56 Pa. Commw. 64, 423 A.2d 1375 (1981).

3. No Exception Requirement.

In Pennsylvania, as in most jurisdictions, it is not necessary for the preservation of error that you except to the court's adverse ruling on your objection to evidence. An exception is granted automatically and a formal request for an exception is unnecessary. Pa. R.C.P. 227(a).

4. Waiver.

Be aware of the danger of inadvertently waiving an objection. There are a variety of ways an objection may be waived. An objection is waived if the objecting party has previously opened the door by introducing evidence of a similarly improper character. Lambert v. Polen, 346 Pa. 352, 30 A.2d 115 (1943). An objection to testimony may be waived by failing to object to similar testimony of other witnesses which is to the same effect as the evidence to which the current objection is made. Munley v. Northern Electric Street Railway Co., 253 Pa. 378, 98 A. 613 (1916). But you may ignore similar testimony that you believe to be harmless without waiving an objection to such testimony when it becomes harmful. Boscia v. Massaro, 365 Pa. Super. 271, 529 A.2d 504 (1987), allocatur denied, 517 Pa. 620, 538 A.2d 874 (1988). Where evidence is offered and admitted on condition that it be connected up with other evidence but the connecting evidence is not subsequently presented, any objection is waived and the issue is not preserved for appeal if opposing counsel fails to make a motion to strike the original objectionable evidence. Burkett v. Van Tine, 277 Pa. 567, 121 A. 498 (1923).

B. Timeliness of Objections:

1. Waiver Due to Untimeliness.

A party is precluded from review of an alleged error in post-trial motions and at the appellate level when he failed to raise the objection in a timely manner during trial. When evidence is offered and a timely objection is not made, the objection is deemed to have been waived. Commonwealth v. Washington, 274 Pa. Super. 560, 418 A.2d 548 (1980).

2. What Is Timely?

An objection to improper evidence should be made as soon as the ground for objection becomes apparent. Loughrey v. Pennsylvania R. Co., 284 Pa. 267, 131 A. 260 (1925). Normally, the proper time for a party to make an objection is after an improper question has been asked but before it has been answered. If the answer is too quick for normal response, counsel must move to strike the answer.

McCormick on Evidence, 127 (3d ed. 1984). Of course, an objection need not be made at the time the evidence is offered where its inadmissibility does not become apparent until later. Pauza v. Lehigh Valley Coal Co., 231 Pa. 577, 80 A. 1126 (1911).

This rule reflects the concern that a lawyer should not be permitted to withhold an objection as a strategic ploy. 2 J. Jeans, Sr., Litigation 785 (1986). A party may not withhold an objection in order to determine whether the response will be favorable or unfavorable and then object in the event that the testimony is unfavorable. Commonwealth v. Washington, 274 Pa. Super. 560, 418 A.2d 548 (1980).

3. Avoiding Waiver.

The right to object may not necessarily be lost by failing to make a timely objection. A waiver may be avoided by making an objection to the next repeated similar impropriety and connecting it with the former, thereby making an objection nunc pro tunc. This double objection should be followed immediately by motions to strike the matter not objected to earlier, and to instruct the jury to disregard it. Catalano, Making and Preserving the Record – Objections, in 6 Trials 12 (1967).

C. The Continuing Objection:

Opposing counsel may embark on a line of questioning you regard as objectionable in its entirety. An objection must be made to each and every question because a single objection to the first question is insufficient to preserve the matter for appellate review. Bell v. City of Philadelphia, 341 Pa. Super. 534, 491 A.2d 1386 (1985). If you do not make a new objection to each new question asked, even though it presents precisely the same legal question as a previous objection, it may be held that the error of the court, in overruling your sound objection, is harmless because essentially the same evidence was received elsewhere in the trial without objection. R. Keeton, Trial Tactics and Methods 192 (1973). The drawback in restating your objection in full after each question in a series is asked is that it consumes much of the court's time and may be perceived as an annoyance by the judge and/or jury. The practice of abbreviating the previous objection by saying "same objection" when each new question is asked is dangerous for it may result in a forfeiture of your valid objection, particularly if there is some reason for distinguishing between the questions. Id.

One method of dealing with this problem is by using a continuing objection. The litigator should state his objection in full when the first question of the series is asked. Then request of the court that it be

understood that you have the same objection to each other question that counsel asks on the same subject without the necessity of interposing objections to each question. This stipulation preserves your objection to the series of questions for appeal. Counsel should be careful not to overlook some other valid objection to a particular question in addition to the continuing objection. If opposing counsel begins some other line of questioning not subject to the running objection and then revisits the objection ble subject matter, it is advisable to inform the court that your running objection again applies. Id. at 193.

D. Specifying the Grounds for Your Objection:

1. Purpose.

Objections should be specific in nature to call to the attention of the court and counsel the precise reason for urging the objection, giving the court an opportunity to pass upon it specifically and counsel an opportunity to remedy the defect to which the objection is made.

2. A General Objection May Fail to Preserve the Issue for Appeal.

An objection which states no grounds or which states some conclusory grounds such as incompetency, irrelevancy or immateriality, is regarded as a general objection. If the court sustains your objection, you are in excellent shape. The court's ruling will be affirmed, if there is any proper basis for the exclusion of the evidence. However, if the court overrules your general objection, you preserve error only if you state a proper, legal basis. A general objection to the admission of evidence, without a particular ground being assigned, is insufficient for purposes of appellate review if the evidence or any part of it is proper for any purpose, even though it may be objectionable on many grounds or for many purposes. In Interest of Davis, 377 Pa. Super. 46, 546 A.2d 1149 (1988) aff'd sub nom. Commonwealth v. Davis, 526 Pa. 428, 586 A.2d 914 (1991). For example, where evidence is admissible in part and inadmissible in part, it is proper to overrule a general objection. Walker v. General Motors Corp., granted, 524 Pa. 611, 569 A.2d 1369, appeal dismissed, 526 Pa. 444, 587 A.2d 308 (1991). Where evidence is admissible for a limited purpose only, and incompetent for other purposes, a general objection to admissibility is insufficient. Commonwealth v. Loomis, 270 Pa. 254, 113 A. 428 (1921); Fisher v. Ruch, 12 Pa. Super. 240 (1900).

3. The Specification of Grounds for Objection Waives All Other Grounds.

In some situations, more than one legal ground may exist for excluding testimony. In that situation, it is advisable to give the court as many specific bases for your objection as you can think of at the time. Failure to specify a grounds for objection means that the ground is not preserved for appeal.

Where a specific objection is made to evidence at the trial, the party is generally limited on appeal to the specific objection to which he made, and he is not entitled to attack the validity of the evidence on any other ground. Estate of Hannis by Hannis v. Ashland State General Hosp., 123 Pa. Commw. 390, 554 A.2d 574, allocatur denied, 524 Pa. 632, 574 A.2d 73 (1989); Ebner v. Ewiak, 335 Pa. Super. 372, 484 A.2d 180 (1984). Specific objections to evidence impliedly waive all other grounds for objection to the evidence and may not be asserted post-trial for the first time. In Interest of Davis, 377 Pa. Super. 46, 546 A.2d 1149 (1988), aff'd sub nom. Commonwealth v. Davis, 526 Pa. 428, 586 A.2d 914 (1991); Holy Family College v. W.C.A.B. (Kycej), 84 Pa. Commw. 109, 479 A.2d 24 (1984). This is true regardless of whether there is a proper unstated ground for objection.

E. Forcing a Ruling on Your Objection:

Be certain to obtain the court's ruling for the purpose of preserving the error for appeal. Failure to obtain a ruling results in waiving any error on appeal. 9 Standard Pennsylvania Practice 2d 56.8 (1982). If the court admits evidence subject to an objection, thereby reserving its ruling on that objection, but later fails to rule on it, there can be no assignment of error on the basis of that objection. Boscia v. Massaro, 365 Pa. Super. 271, 529 A.2d 504 (1987), allocatur denied, 517 Pa. 620, 538 A.2d 874 (1988).

Normally, the court will rule on an objection as soon as it is made; however, the judge will sometimes neglect to do so simply through oversight. If you are confronted with a situation in which the witness is proceeding with an answer to the question after the judge has failed to respond to your objection, it is proper for you to interrupt the witness with a request that the witness be instructed to withhold an answer until the judge has ruled on your objection. R. Keeton, Trial Tactics and Methods 195 (1973). Specifically request a ruling. "Your Honor, is my objection sustained or overruled?" It is also advisable to stand when you initially object and remaining standing until the court rules.

F. Motions to Strike Evidence That Has Inadvertently Come In:

1. Preserving the Record by Moving to Strike Inadmissible Testimony.

If, despite your best efforts, inadmissible evidence has inadvertently come in, you must move to strike such evidence. Objectionable testimony remains in the record unless stricken and a party may not assign error based on the jury's consideration of it. Copozzi v. Antonoplos, 414 Pa. 565, 201 A.2d 420 (1964). Failure to move to strike objectionable testimony results in a waiver of the claim that the court erred in admitting such testimony. Martin v. Soblotney, 296 Pa. Super. 145, 442 A.2d 700 (1982), rev'd in part on other grounds, 502 Pa. 418, 466 A.2d 1022 (1983). Thus, admission of incompetent evidence is not a ground for reversal if no motion is made to have the answer stricken from the record. Gallagher v. Ing, 367 Pa. Super. 346, 532 A.2d 1179 (1987), allocatur denied, 519 Pa. 665, 548 A.2d 255 (1988).

2. Specify the Portion of Testimony To Be Stricken.

A motion to strike out testimony should specifically point out the objectionable portion. A general motion to strike out testimony will be denied if some portion of that testimony is proper. Boring v. Metropolitan Edison Co., 435 Pa. 513, 257 A.2d 565 (1969). The court will not sort out the evidence to strike only the objectionable portions. Righter v. Parry, 266 Pa. 373, 109 A. 917 (1920).

3. When the Motion to Strike Is Available.

A motion to strike testimony must be made when the improper evidence is admitted or as soon as its improper character is discovered. Jones v. Spidle, 446 Pa. 103, 286 A.2d 366 (1971). You cannot sit idly by during the introduction of evidence and then when the responses are not to your liking attempt to erase them from the record. Evans v. Otis Elevator Co., 403 Pa. 13, 168 A.2d 573 (1961). Thus, where testimony is received without objection, and no motion is made to strike the testimony before direct and cross-examination are essentially completed, the court may properly refuse to strike such testimony. Jones v. Spidle, 446 Pa. 103, 286 A.2d 366 (1971); Oko v. Krzyzanowski, 150 Pa. Super. 205, 27 A.2d 414 (1942).

If you have failed to make a timely and proper objection, you have lost your opportunity to move to strike improper testimony. If evidence has been introduced without objection, a motion to strike that evidence will be allowed only where the ground for objection was unknown and could not have been known with ordinary diligence at the time the evidence was received. Jones v. Spidle, 446 Pa. 103, 286 a.2d 366 (1971). This requirement is satisfied in several limited circumstances.

If an answer has been given to an objectionable question before an objection can be interposed, you should object to the question, move the court to strike that answer, and request the court to instruct the jury to disregard both the improper question and the answer. Catalano, Making and Preserving the Record – Objections, in 6 Trials 12 (1967). Such motion should also be made where a question has been asked and answered and the answer is objectionable on some ground not made apparent by the question. Hayward v. Diamond, 117 P.L.J. 211 (1969). An objectionable unresponsive answer to an unobjectionable question will be stricken upon a party's motion. Harriett v. Ballas, 383 Pa. 124, 117 A.2d 693 (1955). Where evidence is received subject to an objection and on the condition that its admissibility be established by connecting it with later evidence, but the later evidence is not forthcoming, a motion should be made to strike such evidence. DiPietro v. Great Atlantic & Pacific Tea Co., 315 Pa. 209, 173 A. 165 (1934); Burkett v. Van Tine, 277 Pa. 567, 121 A. 498 (1923). Where it comes out on cross-examination that the apparently competent testimony received without objection was actually incompetent, the court must strike the testimony on motion from the party. Pauza v. LeHigh Valley Coal Co., 231 Pa. 577, 80 A. 1126 (1911).

G. Motions to Disregard Evidence:

Once improper testimony has been received without objection, and the failure to object is inexcusable, a request to the court to instruct the jury to disregard the testimony is the only method of preserving error. Refusal to instruct the jury to disregard the testimony is the basis upon which error is assigned. Boring v. Metropolitan Edison Co, 435 Pa. 513, 257 A.2d 565 (1969).

III. PRESERVING THE RECORD FOR APPEAL WHERE THE TRIAL COURT HAS REFUSED TO ALLOW IN YOUR EVIDENCE.

A. Demand Grounds for the Objection Being Sustained Against You:

Where the court sustains a general objection against you, you have a right to know the specific ground upon which the court relied. At the bench, ask the trial judge to state the specific grounds for his ruling. If no specific grounds are stated for the objection and none are apparent from the context, then the objection is a general objection. If a general objection is sustained, the court's ruling will not be disturbed as long as there is at least one ground to support the objection, even though the evidence may be admissible for many legitimate purposes. See II. D.2, supra.

B. Make an Offer of Proof:

1. Preserving the Record by Making an Offer of Proof.

In an event the trial court sustains an objection against you precluding the introduction of testimony, it is usually necessary to make an offer of proof. The purpose of the offer of proof is to make it known to the trial and appellate court the substance of the excluded evidence. In the absence of such an offer, it is impossible to determine whether error was committed by the ruling and whether the error was harmful. Williamson v. Philadelphia Transp. Co., 244 Pa. Super 492, 368 A.2d 1292 (1976). The offer will create a record so that the reviewing court will know what the excluded evidence was and will be able to determine if the exclusion was improper and if so, whether the improper exclusion constituted reversible error. Dean Witter Reynolds, Inc. v. Genteel, 346 denied, 514 Pa. 635, 522 A.2d 1105, allocatur denied, 514 Pa. 639, 523 A.2d 346 (1987). Failure to make an offer constitutes a waiver of that ground for relief on appeal. Pa. R.C.P. 227.1(b); Commonwealth v. Peterson, 271 Pa. Super. 92, 412 A.2d 590 (1979).

2. When.

It is usually advisable to make the offer of proof immediately after the objection against you has been sustained. Although the offer of proof can be made at any time, postponing the offer creates the danger that it will slip your mind.

3. It Is Error for the Trial Court To Refuse Your Offer of Proof.

Where an objection has been sustained, preventing the introduction of certain testimony, it is ordinarily error for the trial court to refuse to permit counsel to make an offer of proof as to the content of that testimony. Philadelphia Record Co. v. Sweet, 124 Pa. Super. 414, 188 A. 631 (1936).

4. Statement of the Purpose for Which the Evidence Is Offered.

An offer of proof must contain a statement of the purpose for which the evidence is offered in order to preserve error. A trial judge cannot be reversed for failing to admit evidence where the offer of proof does not contain a statement indicating the purpose to be accomplished by the admission of the evidence. Germantown Dairy Co. v. McCallum, 223 Pa. 554, 72 A. 885 (1909); Societa Palmolese di Protezione E Beneficienza v. Maiale, 143 Pa. Super. 403, 17 A.2d 925 (1941). This statement must be sufficiently detailed to allow the trial judge to perceive its

relevancy. Bascelli v. Randy, Inc., 339 Pa. Super. 254, 488 A.2d 1110 (1985).

5. Offer Only Admissible Evidence.

An offer of proof that contains the offer of any inadmissible evidence taints the entire offer and the trial court cannot be found to have committed error by sustaining the objection to it. Purcell v. Metropolitan Life Ins. Co., 336 Pa. 588, 10 A.2d 442 (1940). The court is not required to sort through the offer separating the admissible from the inadmissible and accepting the offer of proof only as to the admissible evidence.

6. Make the Offer of Proof Outside the Jury's Hearing.

Usually the offer of proof should be made out of the hearing of the jury. If in making an offer of proof inadmissible evidence is inadvertently heard by the jury, it may give rise to reversible error. This would contaminate the record in the event that a verdict was returned in your favor. Avoid this risk by making the offer of proof outside the jury's presence.

7. Making an Offer of Proof Using the Interrogatory Form is Preferable to Using the Narrative Form.

Making an offer of proof using the interrogatory form involves dismissing the jury and proceeding with the direct examination using the questions to which objections have been sustained. This ensures the reviewing court will have a verbatim transcript of the testimony the trial court excluded. The narrative form of offering proof involves counsel simply narrating what the intended testimony would have contained. The narrative form of offering proof involves counsel simply narrating what the intended testimony would have contained. The narrative form offers the advantage of simplicity and promptness; however, it may fail to demonstrate the offer's quality as relevant and material and may not be accurate.

IV. PRESERVING THE RECORD WHERE THE TRIAL JUDGE HAS IMPROPERLY RULED IN YOUR FAVOR.

It is not a windfall for the trial judge to improperly overrule an objection and allow you to introduce inadmissible evidence which is outcome determinative. If you proceed with the questioning, you will be introducing reversible error into the record. If a verdict were to be returned in your favor, it would be worthless because it could be successfully challenged on appeal. In this rare instance, it is wise to withdraw your question.

V. KEEPING THE EXAMINATION ON THE RECORD.

A. The Need to Make the Record:

It is your duty to preserve issues for appeal by ensuring that they appear in the record. A reviewing court will not ordinarily consider error which does not appear in the record. Vernon v. Stash, 367 Pa. Super. 36, 532 A.2d 441 (1987).

B. The Judges' Rulings:

Some judges make it a practice to discuss an objection at the bench without the court reporter. It is necessary for you to make sure that such exchanges are part of the record to preserve the issue for appeal in the event of an adverse ruling. Similarly, if the judge makes a ruling in chambers, the ruling must be preserved on the record and the lawyer against whom the ruling is made must request that the court reporter be summoned and the record of the court's action be preserved.

C. The Responses of Witnesses:

You should read all nonverbal gestures of the witness into the record. "Let the record show the witness nodded his head 'yes'"; "Let the record show the witness has pointed to the defendant." Then ask the witness to answer in words. Translate slang expressions into clear answers. If the witness answers "uh huh" ask "do you mean 'yes'"? If a witness gestures or makes reference to a document such as a picture or a map indicating "here" or "this" be sure to incorporate the document into the record, marked and initialed by the witness.

D. Outbursts in Court During the Examination:

Any prejudicial remark, act or omission by anyone in the courtroom during the trial should be noted in the record. This might go unnoticed by the court reporter and not become part of the record without your bringing it to the court's attention. For example, a member of the audience sitting in the courtroom may say loudly enough for the jury to hear "I can tell he's lying."

E. The Acts of the Judge or Opposing Counsel:

The improper act of any person in the courtroom should be described for the record. For example, if the judge or opposing counsel were to roll their eyes during direct examination, or opposing counsel were to wink at a juror, that fact should be reflected in the record. Of course, you should also immediately object to any misconduct.

VI. POST-TRIAL MOTIONS.

In addition to making a proper and timely objection, you must also make a post-trial motion to preserve error. Alleged errors not advanced in a post-trial motion are waived and will not be considered on appeal. Pa. R.C.P. 1905(b); Pa. R.C.P. 227.1(b)(2); Melvin v. Melvin, 398 Pa. Super. 1, 580 A.2d 811 (1990). Korn v. Consolidated Rail Corp., 355 Pa. Super. 170, 512 A.2d 1266 (1986).