D. THE TRIAL PROCESS

1. Stages of a Trial

Generally a trial proceeds along the following steps: Jury selection ("voir dire" of jurors); Opening statement of plaintiff (or prosecutor); Opening statement of defendant; Case-in-chief of plaintiff (or prosecutor); Case-in-chief of defendant; Case-in-rebuttal of plaintiff (or prosecutor); Case-in-rebuttal of defendant (sometimes called case-in-rejoinder); Closing argument of plaintiff (or prosecutor); Closing argument of defendant; Rebuttal argument of plaintiff (or prosecutor); Jury instructions; Jury deliberation; Verdict and entry of judgment; Post-trial motions; Appellate review.

2. Discretion to Control or Alter Order of Proceedings

Under FRE 611(a), the trial judge can control or alter the order of presenting evidence. For example, he can require a party to prove one point before going on to second point that depends on the first point, or can allow a party to prove the second point first. And the judge can allow a party to reopen its case-in-chief if something was omitted, or can refuse to allow a party to do so if it appears that there was no good reason for the omission or that the party is purposefully abusing the system. Often the discovery of new evidence that could not have been obtained earlier justifies reopening a case, as does the need to respond to some particular point proved by the opponent after the case-in-chief was completed.

3. Motions in Limine

A motion *in limine* (literally "at the threshold") is a motion seeking a court ruling to exclude (or sometimes to admit) anticipated evidence. Usually the motion is filed and heard before trial, but sometimes it is filed during trial in anticipation that objectionable evidence will be offered later. The purpose of a motion *in limine* is to obtain an advance ruling so jurors are not exposed to potentially inadmissible evidence and litigants can plan trial strategy. Raising the issue in advance also allows parties to brief it more thoroughly. Courts are sometimes reluctant to make evidentiary rulings in advance, however, because the admissibility of the challenged evidence may depend on what issues are raised and what other evidence is admitted at trial–in short, the judge may need to see the fuller context that trial will provide, and may for that reason feel unready to rule on the matter in a preliminary motion.

4. Sidebars

A sidebar conference is one in which attorneys approach the bench and confer with the judge outside the hearing of the jury. FRE 103(c) requires that

steps be taken to prevent the jury from being exposed to inadmissible evidence, and a sidebar is one way to achieve this objective.

5. Conference in Chambers

Sometimes evidence issues are raised with the judge at a conference in chambers. Such a conference ensures that the discussion cannot be overheard by jurors. This setting is also better adapted to the task of making a verbatim record (with the court reporter present) than is a sidebar conference. If there is to be an extended presentation or argument about an evidentiary issue, however, the judge may prefer that it be done in the courtroom during a recess with the jury excused. Often judges prefer, for example, for offers of proof to be made in court rather than in chambers, again with a court reporter present and a full record being made, in a public setting and with all the usual formalities in place.

E. PRELIMINARY QUESTIONS AFFECTING ADMISSIBILITY

Sometimes admissibility cannot be determined until a preliminary question is resolved. For example, a witness cannot give an opinion as an expert until the court makes a preliminary determination that she is a qualified expert on the matter. And an out-of-court statement is not admissible under the "excited utterance" exception in FRE 803(2) until the court makes the preliminary determination that the utterance was made in a state of excitement.

1. Judicial "Minihearings"

Often courts conduct "minihearings" during trial to decide preliminary questions that determine whether evidence is admissible.

2. Most Preliminary Questions are for the Court Under FRE 104(a)

a. Types of preliminary questions for the judge

Under FRE 104(a), the judge decides qualifications of a witness (whether one is competent to testify and whether one qualifies as an expert), the existence of a privilege, and questions of admissibility generally.

b. Rules of Evidence do not apply

When the preliminary question is for the judge under FRE 104(a), the Rules of Evidence do not apply, except for privilege rules. Inadmissible evidence, such as hearsay affidavits, may be presented.

☛ Examples and Analysis

Baxter's conviction for armed robbery of a liquor store is reversed on appeal and sent back for a new trial. At the second trial, the prosecutor offers a transcript of

testimony given by Rudy (liquor store clerk) at the first trial. The prosecutor claims that since the first trial Rudy has disappeared and cannot be found. The prosecutor submits affidavits from two different investigators describing their extensive but futile efforts to locate Rudy.

Under the former testimony exception to the hearsay doctrine that is found in FRE 804(b)(1), testimony given in Baxter's first trial is admissible in Baxter's second trial only if the declarant is shown to be unavailable. (Otherwise he would be expected to appear in person at the second trial and testify again, presumably repeating much of what he said the first time.) Under FRE 804(a)(5), a declarant is "unavailable" if the party offering what he said in another trial can show that despite all reasonable efforts he is unable to locate the declarant or procure his attendance. It is for the court to decide the preliminary question whether Rudy is unavailable. If the judge decides that he is unavailable, the hearsay statement (Rudy's former testimony) may be admitted (there are other requirements that must be satisfied). If the judge decides that Rudy is not unavailable, his former testimony will likely not be admitted because it doesn't fit the former testimony exception. It is proper for the court to consider inadmissible evidence, such as affidavits by investigators or statements by the prosecutor, in deciding this preliminary question, even though the former would be excluded as hearsay and the latter would not constitute "evidence" if the setting was the trial itself, as opposed to a hearing under FRE 104(a).

c. Burden of persuasion on proponent

The burden of producing evidence and persuading the court on a preliminary question rests on the proponent of the evidence. Thus the burden is on the prosecutor in the above example to establish Rudy's unavailability because it is the prosecutor who seeks to introduce Rudy's former testimony.

There is one important exception to this general rule: A party seeking to exclude evidence under a claim of privilege bears the burden of producing evidence and persuading the court that the privilege applies. In other words, here is an instance in which the objecting party bears the burdens of production and persuasion, rather than the proponent who offers the evidence. **[See Ch. 14, Sec. B9c]**

d. Preponderance standard

Preliminary questions for the court under FRE 104(a) are generally decided by a preponderance of the evidence standard. See *Bourjaily v. United States*, 483 U.S. 171 (1987).

e. Jury may be excluded

"Minihearings" on preliminary questions are sometimes conducted in the presence of the jury and sometimes outside their presence. FRE 103(c) requires that the minihearing be conducted outside the presence of the jury when necessary to prevent inadmissible evidence from being suggested to the jury. FRE 104(c) requires that hearings on the admissibility of challenged confessions shall in all cases be conducted out of the hearing of the jury because of the prejudice that would result from a jury hearing about a confession that is ultimately ruled inadmissible.

f. Even when court decides in favor of admissibility, opposing party may challenge evidence

If the court decides preliminary questions relating to admissibility in favor of the proponent (the offering party), the evidence is then admitted. Under FRE 103(e), however, the opponent is still entitled to introduce evidence relevant to weight or credibility. By way of illustration, even if the court allows Rudy's former testimony in the preceding example (after finding him to be "unavailable"), Baxter can still introduce evidence attacking Rudy's credibility (see FRE 806) and can urge the jury to disregard his testimony totally. Baxter can even argue that the prosecutor could have produced Rudy if greater efforts had been made to do so.

3. Preliminary Questions for the Jury Under FRE 104(b)

Some preliminary questions are for the jury under FRE 104(b), although it is more accurate to recognize that both the judge and the jury have a role under FRE 104(b).

a. FRE 104(b) questions

When the relevance of evidence depends on a preliminary question of fact, the jury ultimately determines the preliminary question. Thus the jury decides whether a witness has personal knowledge under FRE 602. The jury also decides whether an exhibit or other evidence is authentic under FRE 901. Both these matters are preliminary questions covered by FRE 104(b).

☛ Example and Analysis

While driving home from a tavern, Raymond collides with a car driven by Ethel. She suffers severe injuries and sues Raymond for damages. At trial, as proof that

Raymond was driving while intoxicated, Ethel offers what she describes as a letter written by Raymond to his girlfriend that contains the following statement: "I was really smashed driving home last night and ran into some old lady. Hurt her pretty bad."

Before Ethel can introduce this letter as an admission by Raymond, the preliminary question that must be answered is whether it was actually written by Raymond. If it is a forgery (or was written by some other Raymond about some other accident), it is irrelevant. In the words of FRE 104(b), the relevancy of this letter "depends on whether a fact exists," meaning a finding that the letter was in fact written by Raymond. The *jury* ultimately determines whether this letter is authentic. If the jury finds it to be authentic, the letter may be admitted and given whatever weight the jury deems appropriate. If the jury finds the letter not to be authentic, the letter should be disregarded as irrelevant in the case, and an instruction to this effect would normally be given.

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b. Role of judge under FRE 104(b)

Although the jury makes the *ultimate* decision whether the letter is authentic, the judge has an important screening function to perform: Under FRE 104(b), the judge decides whether there is **sufficient** evidence to support a **jury finding** that the letter is authentic. This function differs from what the judge does under FRE 104(a), where he simply decides whether a fact is established by a **preponderance** of the evidence. Thus in the example above, Ethel must lay a foundation for the letter (meaning that she "authenticates" it): If she offers enough evidence to enable a jury reasonably to decide that the letter was written by Raymond, then the court admits the letter (absent some other reason for excluding it) and asks the jury to resolve this question finally. Laying a foundation means producing sufficient evidence (such as handwriting identification) to allow a reasonable jury to find the letter to be authentic. See Chapter 12.

c. Opponent may introduce rebutting evidence

Even if the court finds that the offering party has offered enough evidence of authenticity under FRE 104(b), the opponent can offer rebutting evidence. If Ethel's evidence that Raymond wrote the letter is sufficient, for example, Raymond can still introduce evidence that he did not write the letter (it is a forgery, or some other Raymond wrote it) and urge the jury to disregard it. See FRE 104(e). After hearing the evidence for and against authenticity, the jury ultimately decides whether the letter is genuine.

F. MAKING A RECORD

To preserve for review any error in ruling on evidence matters, the party claiming error must make a proper record. In the case of error in admitting evidence, a proper objection must be made. In the case of error in excluding evidence, an offer of proof must be made. Absent proper objection or offer of proof, error is considered waived.

1. Objecting to Evidence

To protect the right to urge error on appeal, a party who wishes to exclude evidence offered by the other side ordinarily must object.

a. Mechanics

To be adequate, an objection must satisfy two important criteria.

i. Timely

The objection must be timely, which means it must normally be stated after the question but before the answer. If the witness "jumps the gun" and answers before the opposing party has a reasonable opportunity to object, an objection after the answer will still be considered timely.

ii. Ground

The objection must state a specific ground, unless the ground is apparent from the context. The trite and threadworn objection that evidence is "irrelevant, immaterial, and incompetent" should be avoided because it is a "general objection" that is inadequate to preserve a more specific point (like "hearsay") for review.

b. Limits

An objection advanced on one ground preserves a claim of error only on that ground. Thus a "hearsay" objection preserves a claim of error in admitting evidence if it amounts to hearsay, but does not preserve a claim that admitting the evidence violated the rule against using character to prove conduct. Of course a party can object on more than one ground.

c. Identify objectionable evidence

Usually context makes clear what evidence a party objects to. In the event of doubt, the objecting party must specify and explain to the court which evidence is the target of the objection. If a party objects to a

question that is detailed or elaborate, or objects to a large body of material, and if the objection relates only to part of the question or the body of material, the objecting party must tell the judge what part is objectionable.

2. Reasons for Requiring Objections

There are three reasons to require objections.

a. Inform court

First, objections help the trial judge play her role in applying the Rules of Evidence by calling her attention to the evidence in question and alerting her to the rule or principle involved in deciding whether to admit or exclude.

b. Alert offering party

Second, objections help the offering party make whatever adjustments may be necessary to present competent proof.

c. Finality and fair chances

Third, requiring timely objections helps ensure that parties have reasonable but not endless chances to protect their interests. If objections were not required at trial and could still be advanced on appeal, many more undetected errors would be made at trial and many more appeals could be taken. The thought is that taking this course would give parties *more* protections than warranted, and at far higher cost to the system because litigation would drag on far longer and produce less finality than it does now.

3. Motion to Strike

Where a witness replies to an improper question before objection can be made (or gives an improper response to a proper question), a party can preserve the error by moving to strike the answer. Even if the motion is granted, the answer is not actually "stricken" from the court reporter's transcript. "Striking" the evidence merely means that the judge and jury are not to consider it in deciding the case. In jury cases, normally a motion to strike is accompanied by a request for an instruction advising the jury not to consider the evidence.

4. Offer of Proof

If the judge errs in *sustaining* an objection, the proponent of the evidence must make an offer of proof to preserve the claim of error. An offer of proof is unnecessary only when the substance of the evidence is apparent from the context.

a. Making of offer

An offer of proof involves showing on the record the substance of the evidence. In this way the excluded evidence becomes part of the trial transcript even though the jury does not hear it.

b. Reasons for requiring an offer of proof

Offers of proof are required for the same three reasons as objections. First, offers of proof help the trial judge understand the nature of the evidence issue, so she can rule properly on the issue at hand. Second, an offer of proof helps the objecting party more accurately formulate her position on the evidence issue at hand. Third, requiring an offer of proof helps accord to the offering party an adequate opportunity to make her case, without introducing into the system the added costs that would come if cases could be retried even if the offering party did *not* take the step of explaining with some care the matter being offered. There is yet another reason to require offers of proof, which is that in the absence of an offer the reviewing court would have a hard time knowing what was being kept out, and would as a practical matter be unable to appraise claims of error (unable to figure out whether excluding the evidence likely affected the result).

c. Form of offer

There are two traditional ways to make an offer of proof. One is for the attorney offering the evidence simply to state for the record the substance of the excluded evidence (what he believes the witness would have said if allowed to answer the question, for example). The second method is to make the offer of proof in question-and-answer form by posing the excluded questions to the witness and allowing the witness to answer. The trial judge has discretion to require the offer to be made in this form.

d. Normally made outside presence of jury

Almost always an offer of proof is made outside the presence of the jury. The court reporter must be present to take down the offer for the record. If the offer goes only to a preliminary question that does not cause prejudice (such as whether a hearsay declarant is unavailable, which can be determined without revealing what she has said), the offer can be made in the presence of the jury.

5. "Exceptions" to Judge's Ruling No Longer Required

In an earlier era, it was necessary to file "exceptions" to a trial judge's rulings on evidentiary matters to take an appeal from them—"Your Honor, I request

an exception to that ruling." The requirement of filing exceptions has been abolished by modern procedural codes. See FRCP 46.

G. LIMITED ADMISSIBILITY

1. Purpose for Which Evidence Offered

There are often many purposes for which evidence might be offered, and evidence admitted without objection or limitation can normally be considered for any relevant purpose. But often evidence is admissible for some purposes and inadmissible for others, or admissible against one party but inadmissible against others.

2. Proponent Can Be Required to Specify Purpose

When evidence is admissible for some uses but not others, the proponent can be required to specify the purpose for which it is being offered. Then the court can decide whether an objection should be sustained or whether a limiting instruction is necessary.

3. Limiting Instruction

Where evidence is admissible for only limited purposes, or against fewer than all parties, an opponent on request is entitled to a limiting instruction under FRE 105. Such an instruction restricts the evidence "to its proper scope." Because such an instruction may be ineffective, and might even be counterproductive in suggesting a purpose that the jury might never consider if it were not mentioned, usually such instructions are given only if the opposing party requests.

4. Alternatives to Limiting Instruction

a. Exclusion

Sometimes the permissible use of the evidence is *de minimus* in comparison to the danger of its misuse by the jury for an impermissible purpose. In such cases, the court has discretion to exclude the evidence entirely under FRE 403.

b. Redaction

In some cases, particularly involving writings, the objectionable portion of the evidence can be redacted (by excising it or covering it up) so the jury will not see it or use it for the forbidden purpose.

c. Separate trials

In some cases where evidence is admissible against one defendant but not others, the danger of misuse is so great that a jury instruction is

inadequate and separate trials are required. See *Bruton v. United States*, 391 U.S. 123 (1968) (admitting a statement by one defendant in a criminal case that incriminates another defendant by name is constitutional error under Confrontation Clause of Sixth Amendment where the statement is admissible against the declarant but not against the other defendant incriminated by name in the statement; limiting instruction is not adequate to protect constitutional rights of codefendant, as jury is not likely to follow the instruction).