In the heat of trial, the preservation of issues for appeal frequently takes a backseat to the day-to-day exigencies of preparing witnesses, examination outlines, and motions in limine. All too often, attorneys resort to tracking perceived errors and trusting that an incorrect decision will be rectified on appeal. And all too often they are met with the harsh rule of waiver on the steps to the Court of Appeals. Stung by waiver once, trial counsel may overlearn from their mistakes. Sacrificing rhythm, resources and their rapport with the trial judge, they may press objections or motions they know the court will reject, even after the issue has already been adequately preserved. This article serves as a guide to attorneys practicing in federal court who need quick answers to the what, how, and when questions of preservation.

The general rule is that appellate courts consider only evidence, objections and legal arguments that have been presented in the first instance to the trial court.1 There are many footnotes to this rule, however, the most important of which deal with timing—objections or motions could still lead to waiver if not made at the right juncture. Adding to the complexity are judicial discretion and varying procedures in bench and jury trials.

The discussion below is divided into two categories: evidentiary rulings and legal arguments. It progresses, roughly, as a trial does, from pretrial motions to the presentation of evidence at trial and legal arguments made during and after trial.

Evidentiary Rulings

A. Motions in limine. Motions in limine are an increasingly popular tool to limit the evidence that can be introduced at trial. Until a 2000 amendment to Rule 103 of Federal Rules of Evidence, it was unclear whether an argument made in a motion in limine or in opposition would be preserved for appeal if the losing party failed to make a contemporaneous objection during trial, at the time the evidence was presented or could have been presented had the motion not been granted.2 That uncertainty has been resolved. The rule now states: “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.”3 But there are still traps for the unwary. The first question is what qualifies as a definitive ruling. Judges may offer preliminary views or provisional rulings on pretrial motions, particularly in bench trials; these are not definitive rulings and thus will not preserve the issue, absent further objection.4 For instance, one trial judge limited a defendant from entering a subject area on cross-examination, but noted that if proper foundation were laid at trial, he would revisit his ruling.5 The defendant did not attempt to establish foundation at trial and challenged the ruling on appeal.6 The U.S. Court of Appeals for the Eighth Circuit deemed the ruling definitive only for purposes of the voir dire and opening statements.7 As this and other examples illustrate, if there is any doubt as to the definitiveness of the ruling, the onus is on counsel to ask the court for clarification.8

Preservation issues may still arise on appeal even after the trial court has made a definitive ruling on an evidentiary motion or objection. First, a denial of a motion in limine allows admission of evidence only if a proper foundation is laid. Thus, if foundation is lacking, an objection to it must be raised at trial.9 Second, if the court or the opposing party appears to violate a definitive ruling, an objection must be renewed.10 Failure to do so, even if it does not result in waiver, may lower the already deferential standard of review that appellate courts use in reviewing evidentiary rulings.11 Finally, if material facts and circumstances have changed since the definitive ruling, the changes must be brought to the attention of the trial court before they may be relied upon in an appeal.
B. Objections to the exclusion and inclusion of evidence at trial. A party must, of course, offer all of its evidence at trial; it cannot wait until an appeal to cover new terrain. But it’s not enough, for preservation purposes, to simply offer evidence at trial over an objection. An appellate court will review a ruling sustaining the objection only if the evidence had been accompanied by an offer of proof. Put differently, an erroneous exclusion of evidence is waived on appeal if the record, explicitly or through context, does not reveal the substance of the evidence. An offer of proof must satisfy three objectives:

1. Covering each ground of admissibility that will be raised on appeal;
2. Explaining what counsel expects to prove by the excluded evidence; and
3. Giving the trial court contemporaneous knowledge of the proposed evidence.

A party seeking exclusion of evidence must remember that a trial objection, to be preserved for appellate review, must be specific and timely. An objection is untimely if an objectionable question is asked but the opposing party waits to hear the answer. And unless it is apparent from context, neither an overruled general objection, nor an overruled specific objection on the wrong ground, generally preserves the issue for appeal.

Legal Arguments

Legal arguments, like evidence, must be presented in the first instance to the trial court. Appellate courts retain “broad discretion” to consider legal arguments not raised below. And the exercise of this discretion is particularly appropriate when an argument presents a “pure question of law.”

When an argument is tied to evidence, however, a federal appellate court may be powerless to hear it if it was not adequately presented below. Thus, in a case that goes to trial, a motion for summary judgment for substantive sufficiency cannot be the last place where a party raises a legal argument it intends to assert on appeal, unless that argument is a pure question of law, completely detached from any evidence. The motion, the U.S. Supreme Court has recently explained, serves only to predict what evidence would come in; after trial begins, the focus shifts on to the evidence presented. The court held that in a jury trial, these arguments must be pressed again, following the presentation of all the evidence. This holding almost certainly applies in bench trials.

Jury and bench trials do present some diverging principles of preservation. To preserve a challenge to the sufficiency of the evidence in a jury trial, counsel must move for a pre-verdict motion for judgment as a matter of law and re-assert that motion after the jury returns its verdict. Failure to do so results in waiver on appeal.

While this two-step process is not a concern in bench trials, there are other wrinkles to remember. Parties can move for a Rule 52(c) motion for a judgment on partial findings, provided that the opposing side has been fully heard on its claim or a defense. But unlike a pre-verdict motion for judgment, a Rule 52(c) motion is not a prerequisite for appealing the court’s findings based on insufficiency of the evidence supporting the court’s conclusions.

Indeed, in many cases there may be little benefit to filing such a motion. Trial judges may (and often do) reserve ruling on it and allow the trial to proceed. When the moving party puts on additional evidence on the issue raised in the motion, it waives its right to appeal the trial court’s denial of, or failure to rule on, the motion. Even the trial judge, after reserving her decision, may ultimately deny the motion on the same waiver principle. Against the almost inevitable prospect of waiver and small chance of success, practitioners should weigh the risk of providing a roadmap to the opposing side on issues to cover in rebuttal. If a litigant is sure that her adversary has not met the burden of proving a claim or defense, and she cannot secure an immediate favorable ruling from the court, she may consider taking a judgment against her and make her case to the appellate court.

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Endnotes:

1. Art of Advocacy: Appeals, Chapter 4 (Matthew Bender 2011).
2. See Fed. R. Evid. 103(b); see also Notes of Advisory Committee to Rule 103 (noting the split of authority).
3. Fed. R. Evid. 103(b).
4. See Notes of Advisory Committee to Rule 103.
5. United States v. Parish, 606 F.3d 480, 484-85 (8th Cir. 2010); see also Adkins v. Mireles, 526 F.3d 531, 542-43 (9th Cir. 2008); Jenkins v. Keating, 147 F.3d 577, 582 (7th Cir. 1998) (collecting cases).
6. Id. at 485.
7. Id. at 485-86.
8. See also Walden v. Georgia-Pacific, 126 F.3d 506, 520 (3d Cir. 1997).


10. See, e.g., United States Aviation Underwriters v. Olympia Wings, 896 F.2d 949, 956 (5th Cir. 1990) (“[O]bjection is required to preserve error when an opponent, or the court itself, violates a motion in limine that was granted”).

11. See, e.g., United States v. Roenigk, 810 F.2d 809, 815 (8th Cir. 1987) (where the defendant failed to object at trial when the court permitted admission of evidence despite a contrary ruling on a motion in limine, review for plain error, rather than for abuse of discretion, was warranted).

12. See Notes of Advisory Committee to Rule 103 (“[If the] relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike”).


15. Id.

16. Weinstein & Berger, supra note 14, at §103.10 (citing United States v. Heinemann, 801 F. 2d 86, 96 (2d Cir. 1986) (defendant did not object to testimony regarding product line of business partnership in which he was involved, and his later objection to admission of checks concerning partnership failed to satisfy rule's requirement of timely objection stating specific ground, so issue was not preserved for appeal)). Note, however, that an appellate court may review a ruling on an objection not made properly at trial if the error constituted plain error and the objection was not strategically withheld. Id. at §103.13.

17. Id. at §103.11 (citing United States v. Armend-Sarmiento, 545 F.2d 785, 795 (2d Cir. 1976) (defendant who is “fully aware of the response which a question is bound to elicit” should object when the question is asked, and not hope to invite error; since defendant remained silent, finding reversible error in denial of confrontation right would be “most inappropriate”)).

18. Id. at §103.12[3] (“The right to claim error on appeal is not preserved by a correctly overruled specific objection in the trial court if the objection is based on a different ground than the argument on appeal”) and §130.12[4] (“If a party makes a general objection when a specific objection is needed and the objection is overruled, the party is precluded from asserting the proper objection on appeal. The time to have focused attention on the true objection was in the trial court, when there might have been a chance to cure the objection.”) (citing United States v. Mennuti, 679 F.2d 1032, 1036 (2d Cir. 1982) (defendant was barred from asserting on appeal that testimony should have been excluded under Fed. R. Evid. 608 because objection below was based solely on Fed. R. Evid. 403) and United States v. Hutcher, 622 F.2d 1083, 1087 (2d Cir. 1980) (mere statement of objection without stating grounds was insufficient to preserve error, since specific ground was not apparent)).

19. Singleton v. Wulff, 428 U.S. 106, 120-21 (1976) (“The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases”); see also Art of Advocacy: Appeals, Ch. 4.


21. Id.

22. See Ortiz v. Jordan, 131 S.Ct. 884 (2011); Chemetall GmbH v. ZR Energy, 320 F.3d 714, 718-19 (7th Cir. 2003); Rothstein v. Carriere, 373 F.3d 275, 284 (2d Cir. 2004) (citing Chemetall and holding that “where the trial court's denial of a summary judgment motion is not based on the sufficiency of the evidence, but on a question of law, the rationale behind Rule 50 [of requiring it be made to preserve a challenge to the sufficiency of the evidence] does not apply, and the need for such an objection is absent”); see also Ortiz, 131 S.Ct. at 892 (declining to address the question of whether purely legal issues capable of resolution without reference to any facts need to be preserved by a Rule 50 motion).

23. Ortiz, 131 S. Ct. 884.

24. See, e.g., Bank One v. Echo Acceptance, 380 Fed. Appx. 513, 517-18 (6th Cir. 2010) (discussing the principle following a bench trial, and noting the pure legal issue exception to the general unavailability of an appeal of a denial of summary judgment, finding the exception “even more appropriate” in a bench trial); see also Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1115 (9th Cir. 1987) (finding plaintiffs to have waived their constitutional claims because they were not pressed in post-trial briefs following a bench trial).

25. See Fed. R. Civ. P. 50(a) & (b).

27. See, e.g., Colonial Penn Ins. v. Mkt. Planners Ins. Agency, 157 F.3d 1032, 1036-37 (5th Cir. 1998) (“We see no reason why Whited, following a bench trial, cannot argue now for the first time that the court’s findings were clearly erroneous or that they cannot support the judgment”).

28. See Gaffney v. Riverboat Servs. of Indiana, 451 F.3d 424, 451 n.29 (7th Cir. 2006) (rejecting defendant’s argument the lower court erred in not entering judgment in its favor at the close of plaintiffs’ case-in-chief or that the record should be evaluated as it stood at the close of plaintiffs’ case); Northeast Drilling v. Inner Space Servs., 243 F.3d 25, 37 (1st Cir. 2001) (applying the rule where district court denied the Rule 52(c) motion); Duval v. Midwest Auto City, 578 F.2d 721, 723-24 (8th Cir. 1978) (where ruling on the motion was reserved and defendants proceeded to their proof, observing that: “Under the circumstances here presented, defendants are foreclosed from raising any issue concerning the sufficiency of the evidence as it stood at the close of plaintiffs’ case. If a defendant, after moving for involuntary dismissal at the close of the plaintiff’s case, introduces evidence in his own behalf, his right to a judgment of dismissal is thereby waived”); SEC v. Razmilovic, 822 F. Supp. 2d 234, 257-58 (E.D.N.Y. 2011) (“[W]here a party introduces evidence on his own behalf after he has moved for relief under Rule 52(c), he waives his right to relief under Rule 52(c)”); see also New York State Elec. & Gas v. Secretary of Labor, 88 F.3d 98, 108 (2d Cir. 1996) (applying the same rule in a review of an administrative agency proceeding).

Note that much of the case law developed under the Rule 52(c) predecessor, Rule 41(b). That authority remains relevant for the amended Rule. See Wright, et al., 9C Federal Practice & Procedure, §2573.1 (3d ed 2008).

29. See, e.g., E.F. Hutton Group v. U.S. Postal Service, 723 F. Supp. 951, 962 (S.D.N.Y. 1989) (defendant’s motion to dismiss at the end of plaintiff’s case in a bench trial, construed as a motion under Rule 41(b) (predecessor to 52(c)), denied because defendant later elicited evidence from its own witnesses that could establish its liability, and “[b]y doing so it waived its right to have the court consider the sufficiency of plaintiffs’ evidence standing alone”).

30. See, e.g., D.P. Apparel v. Roadway Express, 736 F.2d 1, 3-4 (1st Cir. 1984) (noting that granting the motion is appropriate only in “rare and exceptional cases”).

31. See Duval v. Midwest Auto City, 578 F.2d 721, 724 (8th Cir. 1978) (“If defendants wished to challenge this decision, their avenue for doing so was to refuse to offer their evidence, accept a judgment for plaintiffs, and appeal it on the ground that plaintiffs’ evidence was insufficient.”) (quoting Wealdon v. Schwey, 482 F.2d 550 (5th Cir. 1973); duPont v. Southern Nat’l Bank of Houston, Texas, 771 F.2d 874, 881 (5th Cir. 1985) (noting that a defendant has two alternatives when his motion is denied: “[H]e can either proceed to present his evidence, or he can stand on his motion and bring an appeal. He cannot, however, do both. By presenting evidence, a defendant waives his right to appeal from the denial of his motion to dismiss; by appealing the motion to dismiss, he waives his right to present evidence should his appeal be denied”).

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