

GUIDE TO NEW YORK EVIDENCE
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12.01. Preservation of Error for Appellate Review

(1) In general

(a) A party has the right to object to the introduction of evidence either in limine, before the evidence is offered for introduction in the presence of the trier of fact, or in the presence of the trier of fact at the time the evidence is offered.

(b) An objection that specifies the ground for the objection is known as a “specific objection.” An objection that does not specify the ground for the objection is known as a “general objection.”

(c) The failure to make a timely and proper objection to a ruling normally precludes appellate review of a claimed error in the ruling as a question of law.

(2) Making a timely and proper objection

(a) To preserve a specific error in the introduction of evidence as a question of law for appellate review, a party must timely object to the ruling admitting the evidence and state a specific ground for the objection, unless it was apparent to the court from the context. An objection is timely when the objection was raised by the party claiming error at a time when it is apparent the purported error occurred, or

at the time of a ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing a ruling or instruction.

(b) To preserve a specific error in the exclusion of evidence as a question of law for appellate review, a party must have informed the court of the substance of the evidence by an offer of proof, unless the substance is apparent to the court from the context. The court may specify the form of the offer of proof.

(c) An objection that does not state a specific ground for the objection (i.e. a “general objection”) preserves for appellate review only the question whether the evidence objected to is inherently incompetent, that is, it would not have been admissible for any purpose.

(d) An objection that is sustained and followed by a curative instruction to which there is no objection does not preserve the purported prior error for appellate review as a question of law.

(e) A party who fails to make a timely objection cannot rely on an objection to the purported error by another party to the action to preserve the error as a question of law for appellate review.

(3) In a jury trial, to the extent practicable, the court must ensure that the proceedings are conducted to prevent evidence which should not be admitted from coming to the jury’s attention, and the court must take appropriate steps to cure any reference to inadmissible evidence.

(4) Before the commencement of a trial, a court must make any pre-trial evidentiary rulings required by statute, court rule, or judicial decision and may, in its discretion, request or entertain a motion to determine the admissibility of evidence reasonably anticipated to be offered at trial.

(5) An intermediate appellate court may review an error as a matter of discretion in the interest of justice in the absence of an objection.

(6) A mode of proceedings error is reviewable as a question of law in the absence of an objection.

Note

Subdivision (1). Subdivision (1) restates the traditional role of the parties in the litigation to make objections to offered evidence in order to preclude its admission. (*See People v Lawrence*, 64 NY2d 200, 206 [1984] [“Generally, parties to litigation, even parties to a criminal prosecution, may adopt their own rules at trial by the simple expedient of failing to object to evidence offered or to except to instructions given the jury”]; *Matter of Findlay*, 253 NY 1, 11 [1930] [“Whatever was received . . . was without objection and exception, and must, therefore, be considered, whether competent or incompetent”].)

Subdivision (2). Subdivision (2) sets forth the general rules for preserving appellate review of a claimed evidentiary error as a matter of law.

The rules are derived from CPLR 4017, CPLR 5501 (a) (3), and CPL 470.05 (2).

CPLR 4017 provides:

“Formal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501.”

CPLR 5501 (a) (3) provides:

“An appeal from a final judgment brings up for review: . . . any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant.”

CPL 470.05 (2) provides:

“For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest need not be in the form of an ‘exception’ but is sufficient if

the party made his position with respect to the ruling or instruction known to the court, or if in response to a protest by a party, the court expressly decided the question raised on appeal. In addition, a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered."

These provisions apply to objections made on constitutional as well as non-constitutional grounds. (See *People v Grant*, 7 NY3d 421, 423 [2006].)

Subdivision (2) (a) provides that, to preserve for appeal an argument that evidence was as a matter of law erroneously admitted, a party must timely object and state the specific ground for the objection. (See e.g. *People v Jackson*, 29 NY3d 18, 23 [2017]; *People v Cantave*, 21 NY3d 374, 378 [2013]; *Parkhurst v Berdell*, 110 NY 386, 393 [1888].) A specific ground for the objection need not be stated, however, when the specific ground is apparent from the context. (See *People v Riback*, 13 NY3d 416, 420 [2009] [Court held that claimed error with respect to the expert's testimony on the meaning of "sexual fetish" and "pedophilia" was preserved because, although the defense objections were "general in nature," the "judge's rulings only make sense as a response to arguments that [the expert's] testimony about 'sexual fetish' and 'pedophilia' would not be helpful to the jury and was potentially very prejudicial"].) The Court of Appeals has also noted that when the requisite specificity is not present, the claimed error is nonetheless preserved if it "was expressly decided by that court." (*People v Prado*, 4 NY3d 725, 726 [2004]); see also *People v Feingold*, 7 NY3d 288, 290 [2006].)

As explained by former Chief Judge Judith Kaye in *People v Hawkins* (11 NY3d 484, 492 - 493 [2008]):

"Sound reasons underlie this preservation requirement. As we stated in [*People v*] *Gray* [86 NY2d 10 (1995)], a specific motion brings the claim to the trial court's attention, alerting all parties in a timely fashion to any alleged deficiency in the evidence, thereby advancing both the truth-seeking purpose of the trial and the goal of swift and final determination of guilt or nonguilt of a defendant (86 NY2d at 20-21). . . .

"Viewing the preservation requirement in the context of the individual trial, it is defense counsel who is charged with the single-minded, zealous representation of the client and thus, of all the trial participants, it is defense counsel who best knows the argument to be advanced on the client's behalf. Viewing the preservation requirement systemically, intermediate appellate court review is potentially comprehensive, including not only law questions but also fact issues and the interest of justice. This Court's second level of review—"to authoritatively declare and settle the law uniformly throughout the state"—is best accomplished when the

Court determines legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court.”

The definition of when an objection is timely is drawn from CPL 470.05 (2); *People v Cantave* (21 NY3d at 378 [2013]); *Parkhurst v Berdell* (110 NY 386, 393 [1888] [The defendant could not lie by, tacitly consent to the examination [of a witness], and take his chances as to the evidence [adduced], and, when it proved unsatisfactory to him, [by a motion to strike the testimony] complain of its admissibility. But if the objection to the evidence had been timely, it would not have been available”]); and *Quin v Lloyd* (41 NY 349, 354 [1869] [“A party against whom a witness is called and examined, cannot lie by and speculate on the chances, first learn what the witness testifies, and then when he finds the testimony unsatisfactory, object either to the competency of the witness or to the form or substance of the testimony”]).

Subdivision (2) (b) provides that an offer of proof must be made to preserve for appeal an argument that evidence was as a matter of law erroneously excluded, unless the substance of the evidence was apparent to the court from its context. The Court of Appeals has recognized that offers of proof may be made orally by counsel (*see People v Williams*, 6 NY2d 18, 22-24 [1959]) or by question and answer form (*see Lehigh Stove & Mfg. Co. v Colby*, 120 NY 640, 641 [1890]). Regardless of the form, an offer of proof must be clear and unambiguous. (*Daniels v Patterson*, 3 NY 47, 51 [1849] [“Before a party excepts on account of the rejection of evidence, he should make the offer in such plain and unequivocal terms as to leave no room for debate about what was intended. If he fail to do so, and leave the offer fairly open to two constructions, he has no right to insist, in a court of review, upon that construction which is most favorable to himself, unless it appears that it was so understood by the court which rejected the evidence”].)

Subdivision (2) (c) is derived from *People v Vidal* (26 NY2d 249, 254 [1970]) which held that: “A general objection, in the usual course, is to no avail when overruled if not followed by a specific objection directing the court, and the adversary, to the particular infirmity of the evidence. . . . To this there is the general exception, that if the proffered evidence is inherently incompetent, that is, there appears, without more, no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to be sufficient.”

Denying defense counsel “an opportunity for specification or enlargement of [an] objection” may constitute a denial of a fair trial and accordingly warrant reversal of the judgment. (*People v De Jesus*, 42 NY2d 519, 526 [1977].)

Subdivision (2) (d) restates well-settled law. (*See e.g. People v Santiago*, 52 NY2d 865, 866 [1981] [“if defendant was of the view that the curative instructions which were given were insufficient, he should have immediately made an application seeking further or more complete instructions. In the absence of such an application, he may not assert the inadequacy of such instructions as error on appeal”]; *People v Broady*, 5 NY2d 500, 514 - 515 [1959] [the “defense attorney’s objection was sustained, the jury was instructed to disregard the statement, and the defense attorney not only failed to move for a mistrial but apparently acquiesced in the court’s handling of matter”]; *People v Berg*, 59 NY2d 294, 299 - 300 [1983] [“the court’s careful curative

instruction . . . was sufficient to dispel . . . an unwarranted inference. The importance, as well as the effect, of curative instructions in such a case cannot be underestimated, as we depend, for the integrity of the jury system itself, upon the willingness of jurors to follow the court’s instructions in such matters”].)

Subdivision (2) (e). Given that parties to the same action may have different tactical and strategic reasons for not objecting to a purported error, a party who remains silent in the face of a purported error cannot rely on the objection of another party to preserve the error as a question of law for appellate review. (*People v Buckley*, 75 NY2d 843 [1990] [“Defendant cannot rely on the request of a codefendant to preserve the claimed charge error”]; *People v Cantave*, 21 NY3d 374, 378 [2013] [an issue is not preserved for appellate review, “notwithstanding a defendant’s failure to expressly present the matter to the trial court, merely because another party or codefendant protested or objected”]; *People v Bailey*, 32 NY3d 70, 78 - 79 [2018] [“counsel’s failure to join another codefendant’s request for a *Buford* inquiry after the court denied the mistrial motion makes plain the singular course set by counsel”].)

Subdivision (3). Subdivision (3) is derived from *People v Ventimiglia* (50 NY2d 350, 362 [1981]) where the Court of Appeals expressed concern about a jury hearing evidence that the court then rules to be inadmissible and urged that steps be taken to minimize that possibility.

Subdivision (4). Subdivision (4) recognizes that the law, or a court in its discretion may require some motions to determine evidentiary issues at a trial be made before a trial commences. (*See e.g. People v Sandoval*, 34 NY2d 371, 375 [1974] [admissibility of defendant’s prior convictions for impeachment purposes]; *see also Ventimiglia*, 52 NY2d at 362 [recommending a determination of the admissibility of uncharged crimes before trial or “just before the witness testifies”].) While there is no general statutory authority granted to a court to hear such motions in limine, Court of Appeals decisions have not only upheld their use, but also encouraged the practice. (*See e.g. People v Brewer*, 28 NY3d 271, 276 n 1 [2016]; *Coopersmith v Gold*, 89 NY2d 957, 958 - 959 [1997].)

Subdivision (5) states the broad power of an intermediate appellate court in both criminal and civil cases to review a claimed error, in the absence of an objection in the “interest of justice.” (*See CPL 470.15 [3] [c]; [6] [a]; People v Patterson*, 39 NY2d 288, 295 [1976], *affd* 432 US 197 [1977]; CPLR 4404 [a]; *Hecker v State of New York*, 20 NY3d 1087 [2013]; *Morency v Horizon Transp. Servs., Inc.*, 139 AD3d 1021 [2d Dept 2016].) The Court of Appeals, on the other hand, does not possess the power to review in the “interest of justice” and accordingly may not review an issue to which no objection was made, or the objection was not timely or otherwise properly made, unless a “mode of proceedings” claimed error is present. (*See e.g. People v Mack*, 27 NY3d 534, 540 - 541 [2016].)

Subdivision (6). This subdivision incorporates Court of Appeals decisional law where:

“in a very narrow category of cases, we have recognized so-called ‘mode of proceedings’ errors that go to the essential validity of the process and are so

fundamental that the entire trial is irreparably tainted (*see generally People v Agramonte*, 87 NY2d 765, 770 [1996]). Errors within this tightly circumscribed class are immune from the requirement of preservation. Outside the context described by these cases, however, we have repeatedly held that a court's failure to adhere to a statutorily or constitutionally grounded procedural protection does not relieve the defendant of the obligation to protest." (*People v Kelly*, 5 NY3d 116, 119-120 [2005]; *see also People v Silva*, 24 NY3d 294, 299 [2014].)

Kelly cites examples of those cases where the Court of Appeals declined to recognize a mode of proceedings error, namely: *Pierson v People* (79 NY 424 [1880] [involving a formal irregularity in drawing jurors]); *People v Gray* (86 NY2d 10 [1995] [allegation that the prosecution failed to prove each element of the crime charged]); *People v Webb* (78 NY2d 335 [1991] [failure to sequester the jury]); *People v Irizarry* (83 NY2d 557 [1994] [dual juries, with failure to seal the first jury's verdict until the second verdict was returned]); *People v Buford* (69 NY2d 290 [1987] [excusal of a sworn juror as "grossly unqualified"]); *People v Cosmo* (205 NY 91 [1912] [juror lacked property qualifications required by statute]). (*See generally People v Thomas*, 50 NY2d 467 [1980] [noting that, in many instances, constitutional rights are waived if not preserved]; *Kelly* at 116, n 2; Arthur Karger, *The Powers of the Court of Appeals* § 21:11 [3d ed rev 2005].)

Examples of what constitutes a mode of proceedings error include: a failure to share a note from a deliberating jury with the defense, which thereby deprives the defense of an opportunity to participate in the formation of a response (*People v O'Rama*, 78 NY2d 270 [1991]); an instruction to the jury that "expressly or at least unambiguously conveys to the jury that the defendant should have testified" (*People v Autry*, 75 NY2d 836, 839 [1990]); a "charge so deficient as to amount to no charge at all" (*People v Williams*, 50 NY2d 996, 998 [1980]); an instruction that improperly shifts the burden of proof to the defendant, without an instruction to the contrary included in the charge to the jury (*People v Patterson*, 39 NY2d 288 [1976]; *People v Thomas*, 50 NY2d 467, 472 [1980]); and "[w]ant of [a trial court's subject matter] jurisdiction is a basic defect, not a trial error; it may be raised at any time and can never be waived" (*People v Nicometi*, 12 NY2d 428, 431 [1963]).

12.05. Effect of Erroneous Rulings on Evidence

Error may not be predicated upon a ruling admitting or excluding evidence unless a substantial right of a party is affected and the requirements of law regarding a protest or objection have been satisfied.

Note

This section restates present law. (*See e.g.* CPLR 2002 [“An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced”]; CPL 470.05 [1] [“An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties”].)

For the rule on the preservation of an error for appellate review, see rule 12.01.