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NEW YORK

OBJECTIONS

Helen E. Freedman

New York Objections

By Justice Helen E. Freedman

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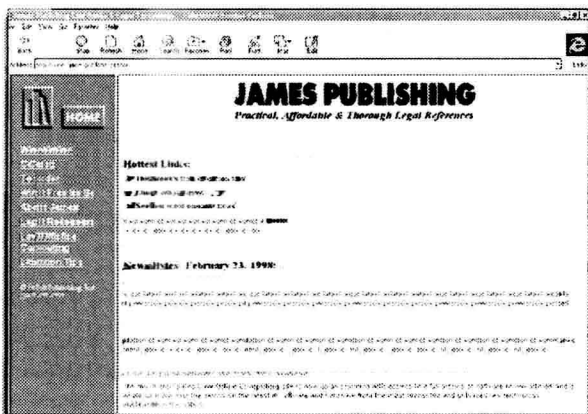
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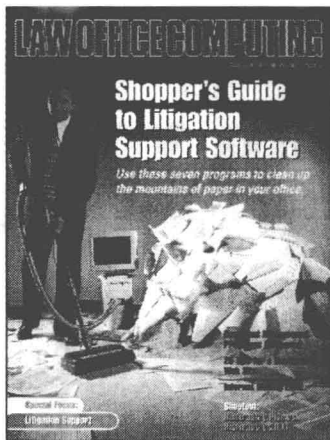
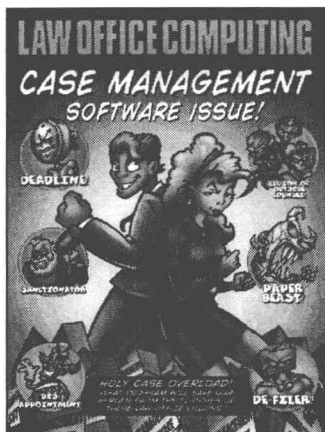
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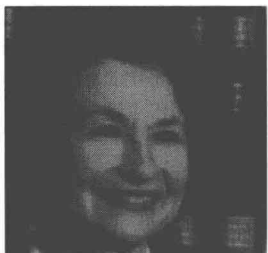
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Helen E. Freedman has served as a trial judge since 1979, and in 1998 she received the Judicial Excellence Award of the State Trial Judges Conference of the American Bar Association. She currently serves on the Appellate Term of the First Department of the New York State Supreme Court, and as Mass Torts Judge in charge of all New York City asbestos personal injury and New York State sili-

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Justice Freedman has lectured extensively on trial practice, ADR, mass torts, and medical malpractice at law schools, CLE and bar association programs, and judicial seminars. She has written articles on trial practice, medical malpractice, and mass torts. Justice Freedman was a Vice President of the Association of the Bar of the City of New York, and Chair of the Special Committee on Medical Malpractice. She has also served as the President of the New York State Association of Women Judges.

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— Helen E. Freedman

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I. INTRODUCTION

§ 1:10 SCOPE OF CHAPTER

This chapter discusses the general types of evidence, and the role of objections in admissibility of evidence. For the types of evidence, see § 1:30; for the presentation and admissibility of evidence, see § 1:40.

The chapter also discusses the use of objections in general, including:

- The purpose of objections. See § 1:50.
- The timing of objections. See § 1:160.

- The proper form for objections. See § 1:150.
- The procedure for objecting. See §§ 1:130 et seq.
- How to proceed when the trial court sustains an objection made against you. See § 1:260.

In addition, the chapter discusses other procedures related to objections, including:

- Offers of proof. See §§ 1:330 et seq.
- Limiting and curative instructions. See §§ 1:380 et seq.
- Motions to strike. See §§ 1:360 et seq.
- Motions in limine. See §§ 1:270 et seq.
- Motions for mistrial. See §§ 1:410 et seq.

Individual chapters of this book deal with specific objections, and discuss how to use and respond to particular objections in specific circumstances.

§ 1:20 APPLICABLE RULES

In trying a case, counsel must follow the rules of procedure and evidence as set forth in CPLR Articles 40-45; the rules of court, as set forth in 22 NYCRR 200.1 et seq.; and the rules of the particular trial courts themselves. Counsel must also obey the state and federal constitutions, and must comport themselves properly. 22 NYCRR § 1200.37(C), NY St CPR DR 7-106; NY Ct Rules §§ 604.1, 700.2 et seq. (Rules of Appellate Divisions); for attorney conduct, see Ch. 18.

Trial court judges are also required to follow procedure and evidentiary rules, to obey state and federal constitutions, and to act appropriately. NY Ct Rules § 100.3; 22 NYCRR §§ 100.3(B), 700.2; for judicial conduct, see Ch. 17.

§ 1:30 TYPES OF EVIDENCE

Evidence may be categorized as : testimonial, documentary, real, and demonstrative.

Testimonial evidence is direct testimony by a trial witness. Witnesses may be either percipient witnesses or expert witnesses. For witness examination, see Ch. 15; for witness competence, see Ch. 14; for expert witness examination, see Ch. 16.

Documentary evidence is a document or writing offered into evidence either to prove its contents or because it relates to the testimony of a witness. For documentary evidence, see Ch. 11.

Real evidence is actual evidence from the event at issue. For real evidence, see Ch. 9.

Demonstrative evidence is a visual aid for use in the courtroom. It is evidence used to explain or illustrate other evidence. It is distinct from real evidence in that it is not actual evidence from the event at issue. For demonstrative evidence, see Ch. 13.

§ 1:40 PRESENTATION AND ADMISSIBILITY OF EVIDENCE

Generally, court rules, statutes, and custom provide a wide degree of latitude in allowing parties to present at trial whatever evidence is relevant and probative to establishing their cases.

Normally, the only limit on the evidence a party may introduce comes as a result of an objection by another party to admission of that evidence. *See People v. Mezon*, 80 N.Y.2d 155, 603 N.E.2d 943, 589 N.Y.S.2d 838 (1992) (parties to litigation may adopt their own rules by simple expedient of failing to object to evidence); CPLR 4017 (failure to object as prescribed in CPLR 4017 and 4110-b may restrict review on appeal under CPLR 5501). Objections may be based on one or more of a variety of grounds. For common bases of objection, see § 1:170; for general procedure for objecting, see § 1:150.

After a party presents direct evidence through a witness, the opposing party has the right to cross-examine the witness on any disputed fact. *Friedel v. Board of Regents of University of the State of New York*, 296 N.Y. 347, 73 N.E.2d 545 (1947); *Hill v. Arnold*, 226 A.D.2d 232, 640 N.Y.S.2d 892 (1st Dept. 1996) (cross-examination of adverse witness is matter of right in every trial of disputed issue of fact). The purpose of cross-examination is to test the reliability and veracity of the testimony given on direct examination. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Graves v. American Express*, 175 Misc.2d 285, 669 N.Y.S.2d 463 (2d Dept. 1997).

II. OBJECTIONS

A. PRINCIPLES

§ 1:50 PURPOSE

Once an objection is raised, the judge will either sustain it (ruling the evidence inadmissible), or overrule it (admitting the evidence). For tactics after objection has been sustained or overruled, see §§ 1:250-1:260.

Thus, objections have two primary purposes:

- They prevent the trier of fact (the judge in a bench trial, the jury in a jury trial) from hearing or considering inadmissible or improper matter.
- They preserve the record for purposes of appeal. See CPLR 4017, 4110-b, 5501; CPL §§ 47.05, 47.15.

Objections may also serve tactical purposes:

- They can interrupt or disrupt the flow of evidence, diverting attention from or lessening the impact of damaging testimony or evidence. If you are on the receiving end of such tactical objections, you may be forced to restructure your presentation of evidence, or to enlist the court's aid in regaining control over your case.
- They can provide a witness with a "time out." For example, objecting during cross-examination of your own witness may give the witness a break if he or she has become flustered or confused.

§ 1:60 ADMISSION OF IMPROPER EVIDENCE

A trial court may preclude admission of improper evidence on its own motion, and must do so to prevent fundamental error. *People v. Robinson*, 36 N.Y.2d 224, 367 N.Y.S.2d 208 (1975). However, courts generally receive all evidence presented unless the evidence is objected to by a party. Thus, by simply failing to object, parties may adopt their own rules of evidence. *People v. Mezon*, 80 N.Y.2d 155, 603 N.E.2d 943, 589 N.Y.S.2d 838 (1992); *Horton v. Smith*, 51 N.Y.2d 798, 433 N.Y.S.2d 92 (1980).

Once evidence is admitted, the jury is entitled to consider it, even though the court erred in admitting it. *Forrester v. Port Authority of New York and New Jersey*, 166 A.D.2d 181, 564 N.Y.S.2d 85 (1st Dept. 1990) (failure to object to admission of hearsay evidence concerning receipt of design award in personal injury case constitutes waiver of objection); *Brooklyn Union Gas Co. v. Arrao*, 100 A.D.2d 949, 475 N.Y.S.2d 88 (2d Dept. 1984) (hearsay admitted without objection may be considered in civil action for money owed).

§ 1:70 PRESERVING RECORD FOR APPEAL

Appeal from a final judgment brings up for review [CPLR 5501(a)(4), (5)]:

- Any ruling to which the appellant objected or had no opportunity to object.

- A ruling that was a refusal or failure by the court to act as requested by the appellant.
- A charge to the jury, or a failure or refusal to charge as requested by the appellant, to which the appellant objected or excepted.
- A remark made by the judge to which the appellant objected.

However, to preserve the record for appeal, counsel must object to the statement, action, question, or response by the court, by opposing counsel, or by a witness that violates a procedural, substantive, or evidentiary rule. *People v. Gray*, 86 N.Y.2d 10, 629 N.Y.S.2d 173 (1995); *Northville Industries Corp. v. Mystic Bulk Carriers, Inc.*, 225 A.D.2d 499, 639 N.Y.S.2d 810 (1st Dept. 1996). In addition, when a party requests or the court makes a ruling or order, the party must make known to the court the action the party requests the court to take, and must indicate to the court any objection the party has to the court's action. CPLR 4017.

If counsel fails to make a timely objection, the evidence is presumed unobjectionable, and counsel is deemed to have waived any alleged error. *Horton v. Smith*, 51 N.Y.2d 798, 433 N.Y.S.2d 92 (1980); *People v. Johnson*, 224 A.D.2d 635, 639 N.Y.S.2d 407 (2d Dept. 1996) (CPL § 470.05 requires objection to preserve error in criminal cases).

An intermediate appellate court may, on occasion, exercise its power to review unpreserved error in the interest of justice. *Martin v. City of Cohoes*, 37 N.Y.2d 162, 371 N.Y.S.2d 687 (1975); see CPL § 47.15. However, the exercise of such discretion is comparatively rare in civil cases. As a result, counsel should not rely on such discretionary review. The Court of Appeals is restricted to reviewing questions of law. N.Y. Const. art. VI, § 3. It thus does not have the same discretion as appellate divisions do to review unpreserved error. *People v. Gray*, 86 N.Y.2d 10, 629 N.Y.S.2d 173 (1995); *People v. Robinson*, 36 N.Y.2d 224, 367 N.Y.S.2d 208 (1975).

Similarly, failure to object or except to the giving or failure to give jury instructions may result in restricted appellate review. CPLR 4017, 5501(a) (3), (4); CPL §§ 47.05, 47.15; for objections to jury charge or instructions, see § 1:230; for application of harmless error rule, see §§ 1:90-1:100.

§ 1:80 FUNDAMENTAL ERROR

Notwithstanding the basic rule that testimony or evidence received without objection is not preserved for appellate review, an appellate court may, in the exercise of its discretion, find the error so fundamental as to warrant review in the interest of justice. Appellate courts have used the concept of fundamental error to review the following issues, despite a party's failure to preserve the error through proper objection:

- Constitutional safeguards. *People v. Robinson*, 36 N.Y.2d 224, 367 N.Y.S.2d 208 (1975) (affirming a reversal in a murder case, on the ground that the Court of Appeals had no power to review unpreserved errors of law or fact but that the appellate division had such power; dissent says Court of Appeals may review fundamental error in the interests of justice where constitutional issues are involved).
- Giving of assumption of the risk and comparative negligence instructions. *Graham v. Murphy*, 135 A.D.2d 326, 525 N.Y.S.2d 414 (3d Dept. 1988) (error to instruct jury that assumption of risk was defense or that there was sufficient evidence to find comparative negligence in personal injury action in which plaintiff was injured after falling over tree stump while running away from dog that had bitten him).
- Absence of contributory negligence instruction. *Binder v. Supermarkets General Corp.*, 49 A.D.2d 562, 370 N.Y.S.2d 184 (2d Dept. 1975) (error in not charging that contributory negligence would bar plaintiff's claim as to some or all defendants in personal injury action so fundamental that review was mandated in interests of justice).
- Valuation of property. *Alexander v. State of New York*, 36 A.D.2d 777, 319 N.Y.S.2d 219 (3d Dept. 1971) (error in arriving at market value of property so fundamental appellate division could reverse judgment and grant new trial).

§ 1:90 HARMLESS ERROR IN CIVIL CASES

A trial court judge's erroneous ruling must be disregarded if it does not prejudice a substantial right of a party. CPLR 2002. Thus, appellate courts often deem erroneous evidentiary rulings as harmless, and not grounds for reversal, particularly where the appellate court determines the outcome would have been the same even if the court had made the correct ruling. *People v. Watkins*, 229 A.D.2d 957, 645 N.Y.S.2d 383 (4th Dept. 1996); *Coopersmith v. Gold*, 223 A.D.2d 572, 636 N.Y.S.2d 399 (2d Dept. 1996), aff'd 89 N.Y.2d 957, 655 N.Y.S.2d