SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE

NOTICE OF PROPOSED RULEMAKING

Proposed Amendment of Pa.R.E. 103 and 802

The Committee on Rules of Evidence is considering proposing to the Supreme Court of Pennsylvania the amendment of Pennsylvania Rule of Evidence 103 concerning the preservation of claims of error and Rule 802 concerning hearsay. Pursuant to Pa.R.J.A. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any report accompanying this proposal was prepared by the Committee to indicate the rationale for the proposed rulemaking. It will neither constitute a part of the rules nor be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by January 23, 2023. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

By the Committee on Rules of Evidence,

Sara E. Jacobson, Chair

Rule 103. Rulings on Evidence.

(a) **[Preserving a] Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only:

(1) if the ruling admits evidence, a party, on the record:

(A) makes a timely objection, motion to strike, or motion *in limine*; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof **on the record**, unless the substance was apparent from the context.

(b) **[Not Needing to Renew an Objection or Offer of Proof] Preservation of Claim of Error. [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.] To preserve a claim of error for appeal, the court must rule definitively on the record either before or at trial. If the court does not, then the party must renew the objection or offer of proof pursuant to subdivision (a) and obtain a ruling to preserve a claim of error for appeal. Once the court rules definitively on the record, a party need not renew an objection or offer of proof.**

(c) **Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) **Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

Comment: Pa.R.E. 103(a) differs from F.R.E. 103(a). The Federal Rule says, "A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party…." In Pennsylvania criminal cases, the accused is entitled to relief for an erroneous ruling unless the court finds beyond a reasonable doubt that the error is harmless. *See Commonwealth v. Story*, **[476 Pa. 391,]** 383 A.2d 155 (**Pa.** 1978). Civil cases are governed by Pa.R.C**iv**.P. **[No.]** 126 which permits the court to disregard

an erroneous ruling "which does not affect the substantial rights of the parties." Pa.R.E. 103(a) is consistent with Pennsylvania law.

Pa.R.E. 103(a)(1) specifically refers to motions *in limine*. These motions are not mentioned in the Federal rule. Motions *in limine* permit the trial court to make rulings on evidence prior to trial or at trial but before the evidence is offered. Such motions can expedite the trial and assist in producing just determinations. **Subdivision (a)(2) also differs from F.R.E. 103(a)(2) insofar as it clarifies that an offer of proof must be on the record.**

[Pa.R.E. 103(b), (c) and (d) are identical to F.R.E. 103(b), (c) and (d).]

Pa.R.E. 103(b) differs from F.R.E. 103(b) insofar as it unambiguously requires the court to rule definitively on the record to preserve a claim of error for appeal. When an objection comes in the form of a motion *in limine* before trial, a court's definitive ruling is final. If the court's ruling is tentative, deferred, or denied without prejudice, there is no definitive ruling on the objection. When an evidentiary ruling is tentative, deferred, or denied without prejudice, the objecting party must renew its objection at trial to preserve a claim of error for appeal. *See, e.g., Blumer v. Ford Motor Co*., 20 A.3d 1222, 1232 (Pa. Super. 2011).

Pa.R.E. 103(c) and (d) are identical to F.R.E. 103(c) and (d).

F.R.E. 103(e) permits a court to "take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." This **[paragraph]** **subdivision** has not been adopted because it is inconsistent with Pa.R.E. 103(a) and Pennsylvania law. *See Commonwealth v. Clair*, **[458 Pa. 418,]** 326 A.2d 272 (**Pa.** 1974); *Dilliplaine v. Lehigh Valley Trust Co.*, **[457 Pa. 255,]** 322 A.2d 114 (**Pa.** 1974).

[Official Note: Adopted May 8, 1998, effective October 1, 1998; amended November 2, 2001, effective January 1, 2002; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports: **Final Report explaining the November 2, 2001 amendments to paragraph (a) published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001). Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).]**

Rule 802. The Rule Against Hearsay.

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute.

Comment**:** Pa.R.E. 802 differs from F.R.E. 802 in that it refers to other rules prescribed by the Pennsylvania Supreme Court, and to statutes in general, rather than federal statutes.

Often, hearsay will be admissible under an exception provided by these rules. **In addition, unobjected to hearsay is admissible as substantive evidence. *See, e.g.*, *Jones v. Spidle*, 286 A.2d 366, 367 (Pa. 1971) ("It is well established that hearsay evidence, admitted without objection, is accorded the same weight as evidence legally admissible as long as it is relevant and material to the issues in question."); *see also* Pa.R.E. 103 (Rulings on Evidence).**

The organization of the Pennsylvania Rules of Evidence generally follows the organization of the Federal Rules of Evidence, but the Pennsylvania Rules' organization of the exceptions to the hearsay rule is somewhat different than the federal organization. There are three rules which contain the exceptions: **1)** Pa.R.E. 803 Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant is Available as a Witness**[,]; 2)** Pa.R.E. 803.1 Exceptions to the Rule Against Hearsay—Testimony of Declarant Necessary**[, and]; and 3)** Pa.R.E. 804 Exceptions to the Rule Against Hearsay—When the Declarant is Unavailable as a Witness.

On occasion, hearsay may be admitted pursuant to another rule promulgated by the Pennsylvania Supreme Court. For example, in civil cases, all or part of a deposition may be admitted pursuant to Pa.R.C**iv**.P. **[No.]** 4020, or a video deposition of an expert witness may be admitted pursuant to Pa.R.C**iv**.P. **[No.]** 4017.1(g). In preliminary hearings in criminal cases, the court may consider hearsay evidence pursuant to Pa.R.Crim.P. 542(E) and 1003(E). In criminal trials, Pa.R.Crim.P. 574 provides a procedure for the admission of forensic laboratory reports supported by a certification.

Also, hearsay may be admitted pursuant to a state statute. Examples include:

1. A public record may be admitted pursuant to 42 Pa.C.S. § 6104. *See* Comment to Pa.R.E. 803(8).

2. A record of vital statistics may be admitted pursuant to 35 P.S. § 450.810. *See* Comment to Pa.R.E. 803(9) (Not Adopted).

3. In a civil case, a deposition of a licensed physician may be admitted pursuant to 42 Pa.C.S. § 5936.

4. In a criminal case, a deposition of a witness may be admitted pursuant to 42 Pa.C.S. § 5919.

5. In a criminal or civil case, an out-of-court statement of a witness **[12]** **16** years of age or younger, describing certain kinds of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5985.1.

6. In a dependency hearing, an out-of-court statement of a witness under **[16]** **18** years of age, describing certain types of sexual abuse, may be admitted pursuant to 42 Pa.C.S. § 5986.

7. In a criminal or civil case, an out-of-court statement of a witness with an intellectual disability or autism, describing certain kinds of criminal offenses, may be admitted pursuant to 42 Pa.C.S. § 5993.

[7.] **8.** In a prosecution for speeding under the Pennsylvania Vehicle Code, a certificate of accuracy of an electronic speed timing device (radar) from a calibration and testing station appointed by the Pennsylvania Department of Motor Vehicles may be admitted pursuant to 75 Pa.C.S. § 3368(d).

On rare occasion, hearsay may be admitted pursuant to a federal statute. For example, when a person brings a civil action, in either federal or state court, against a common carrier to enforce an order of the Interstate Commerce Commission requiring the payment of damages, the findings and order of the Commission may be introduced as evidence of the facts stated in them. 49 U.S.C. § 11704(d)(1).

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[Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; Comment revised March 10, 2000, effective immediately; Comment revised March 29, 2001, effective April 1, 2001; rescinded and replaced January 17, 2013, effective March 18, 2013; Comment revised February 19, 2014, effective April 1, 2014; Comment revised November 9, 2016, effective January 1, 2017.

***Committee Explanatory Reports*: Final Report explaining the March 23, 1999 technical revisions to the Comment published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999). Final Report explaining the March 10, 2000 changes updating the seventh paragraph of the Comment published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000). Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001). Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013). Final Report explaining the**

February 19, 2014 revision of the Comment published with the Court's Order at 44 Pa.B. 1309 (March 8, 2014). Final Report explaining the November 9, 2016 revision of the Comment published with the Court's Order at 46 Pa.B. 7438 (November 26, 2016).]

SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE

Publication Report

Proposed Amendment of Pa.R.E. 103 and 802

The Committee on Rules of Evidence has studied the interplay between the procedural steps set forth in subdivisions (a) and (b) of Pa.R.E. 103 and the judicial practice of deferring an evidentiary ruling. Often, rulings are contemporaneous with the offering of evidence and resulting objection. In those circumstances, subdivisions (a) and (b) set forth the procedure to claim and preserve an allegedly erroneous evidentiary ruling.

However, there are occasions where a party may seek an evidentiary ruling prior to trial or at trial before evidence is offered using a motion *in limine*. *See* Pa.R.E. 103, Comment at ¶ 2. A motion *in limine* can be beneficial because it allows the parties to better prepare for trial, informs the judge, and avoids delays during trial. Further, a ruling prior to the offering of evidence is consonant with the imperative that inadmissible evidence not be suggested to the jury through opening statements or witness examination. *See* Pa.R.E. 103(d).

Of course, there may be times when a party raises a claim in a motion *in limine* prior to trial but admissibility cannot be determined until other contextual evidence is heard at trial. *See also* Pa.R.E. 404, Comment at ¶ 8 (discussing purpose of pre-trial notice of evidence of other crimes, wrongs, or acts even though the ruling is postponed until trial). Yet, the application of Pa.R.E. 103(b) has required an eventual ruling on the claim contained in the motion *in limine* to preserve the claim for appellate review. *See, e.g.*, *Blumer v. Ford Motor Co*., 20 A.3d 1222 (Pa. Super. 2011). In other words, seeking a ruling without obtaining a ruling does not preserve an issue.

In those circumstance, a common practice has been to defer ruling on a motion *in limine* until trial. It was through this practice that the Committee evaluated subdivisions (a) and (b). The Committee observed that subdivision (a) is titled "preserving a claim of error," but the subdivision does not state that the court must rule on the claim contained within an objection or motion *in limine*. It is only in subdivision (b) where there is mention of "the court rul[ing] definitively on the record." To close this potential "waiver trap," the Committee wishes to clarify what a party needs to do to raise a claim of error and what the court must do for the claim to be preserved for appellate review.

Accordingly, the Committee proposes removing "Preserving a" from the title of subdivision (a) and clarifying that the proffer in subdivision (a)(2) be "on the record" by adding that phrase to the rule text. Subdivision (b) would be re-titled to state "Preserving

a Claim" to emphasize that the court must rule on the claim to preserve it for appellate review.

Additionally, the current rule text within subdivision (b) would be replaced. The first sentence of the proposed new rule text would state unambiguously that the court must definitively rule on the record to preserve a claim of error. The second sentence would indicate that, if the court does not definitively rule on the objection, then a party must renew an objection or offer of proof to preserve a claim of error. This sentence is intended to address the situation in *Blumer v. Ford Motor Co*.; a reference to that case would also be contained in the Comment. While the requirement of this sentence may seem implicit, it is intended to provide a basis for counsel to renew an objection and prompt the court to rule. *See, e.g., Keffer v. Bob Nolan's Auto Serv., Inc.*, 59 A.3d 621, 657-58 (Pa. Super. 2012) ("When the trial court overlooks or fails to rule on an issue, the party seeking the court's ruling must remind the court that it has not ruled and obtain a definitive ruling on the issue."). The final sentence regarding unnecessary renewed objections to definitive rulings was retained in essence from the current text.

Anecdotally, the Committee has learned of another practice when a motion *in limine* cannot be determined prior to trial. That practice is to deny the motion *in limine* without prejudice to raise the claim again at trial when the evidence is offered. While that practice might appear to permit the parties to claim and preserve any evidentiary errors at the time of offering, a denial without prejudice is not intended to be definitive as to the claim itself. *Accord Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1297 (11th Cir. 2021). To inform readers, the Committee proposes adding cautionary language within the Comment.

The Committee next considered the applicability of Pa.R.E. 103 and the operation of the Rules of Evidence, specifically Article VIII concerning hearsay. Pa.R.E. 802 states: "Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Pennsylvania Supreme Court, or by statute." Yet, the hearsay exceptions found in the rules, see Pa.R.E. 803, 803.1, and 804, apply only if there is a claim of error pursuant to Pa.R.E. 103(a). When no claim is asserted, then the unobjected to hearsay is admissible as substantive evidence regardless of any exception.

While the admissibility of unobjected to hearsay may be readily apparent to experienced practitioners, the language of Pa.R.E. 802 suggests all hearsay, even that unobjected to, must meet an exception. The Committee proposes adding a statement to the Comment to Pa.R.E. 802, together with a case citation, clarifying that unobjected to hearsay is admissible regardless of exception. The statement is intended to confirm that even rank hearsay may be admissible if the opponent does not object. Additionally, the statutory hearsay exceptions have been updated.

All comments, concerns, and suggestions concerning this proposal are welcome.