

# To Renew or Not to Renew: Preserving Objections to Evidentiary Rulings

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Under Florida's Evidence Code, "[i]f a court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or make an offer of proof to preserve a claim of error for appeal." § 90.104, Fla. Stat. This seems straightforward, except how can you be certain whether the ruling you received is "definitive"? If you need to renew your objection to an in limine ruling or make a proffer and do not, the issue will not be preserved for appeal. If you do not need to renew your objection at trial and do so, you could unnecessarily irritate jurors with objections.

Before Florida enacted this rule in 2003, obtaining an in limine ruling was not sufficient to preserve an error for review. A specific, contemporaneous objection still had to be made when the evidence was offered during trial. Yet, even then, if an issue was raised before trial and again in the early stages of trial, and the trial court had made its decision clear, a party did not need to renew its objection each time the evidence arose if doing so would have been "obviously futile." Now, if a ruling is definitive before trial, it need not be raised at all during trial—unless, of course, it is strategically advantageous to do so.

When faced with a motion in limine and limited understanding of the facts and issues in a case, a trial court may defer ruling on a motion or issue a ruling but indicate a willingness to reconsider its ruling. Such actions are not "definitive" within the meaning of section 90.104, and do not preserve an issue for appeal. In such situations, you must renew your evidentiary objection at the appropriate time during trial. If you were seeking to exclude evidence, you must object when your opponent seeks to introduce it. If you were seeking to introduce evidence, you must make a proffer. Indeed, the trial court could change its mind as the case unfolds. It is important to be sure to obtain a ruling on your renewed objection for preservation purposes.

Whether the court's pretrial in limine ruling is definitive may turn on precisely what the court said. For example, in one case, the trial court denied a plaintiff's motion in limine to exclude "all references" to a prior personal injury lawsuit. In doing so, the court explained that some references to the prior suit might be relevant *depending on the context*. The court then indicated that it would be open to renewed objections if counsel believed any particular questions were irrelevant and that it would "make a ruling at that time." Counsel, believing the initial ruling was definitive, did not renew its objections during trial. On appeal, the district court recognized that some of the testimony procured about the prior lawsuit was absolutely irrelevant. However, it concluded that the issue had not been preserved because the trial court's ruling, with its recognition that the issue was context dependent, was not definitive. As such, plaintiff's counsel needed to object "on a question-by-question basis to preserve the matter for appellate review." *Williams v. Lowe's Home Ctrs, Inc.*, 973 So. 2d 1180, 1185 (Fla. 5th DCA 2008).

If the trial court makes a definitive ruling on the record before trial, further objections become unnecessary. This includes not only objecting to the introduction of particular evidence, but also objecting to closing arguments referring to that evidence. A definitive evidentiary ruling, however, does not alleviate the need to move for a mistrial if a comment made during trial is so prejudicial that doing so would be proper. It also does not preclude you from introducing evidence you sought to exclude in an effort to minimize its prejudicial impact.

Even if you received an undoubtedly definitive ruling, you may be left wondering whether you should make an offer of proof. Although section 90.104 does not require a proffer to preserve a court's definitive ruling excluding certain evidence from trial, doing so may still be valuable. Because of the deference that appellate courts afford trial courts with regard to evidentiary rulings, an appellate court will likely affirm the exclusion of evidence in the absence of a proffer unless the transcript from the motion in limine hearing makes clear the specific evidence being excluded and its intended purpose. Additionally, even though you may have made clear to the judge the value of introducing certain

evidence at the motion in limine hearing, a proffer at a later time during the trial may prove useful because, as the Fifth District aptly put it, “[t]he ‘shifting sands’ of trial may cause a judge to rethink an earlier evidentiary ruling based on a matured understanding of the case.” *Spindler v. Brito-Deforge*, 762 So. 2d 963, 964 (Fla. 5th DCA 2000).

Indeed, because of these “shifting sands,” a definitive in limine ruling may cease to be definitive if the evidence introduced at trial materially differs from the pre-trial representations made to the court when it ruled on the motion. Counsel of a party whose motion in limine was denied must therefore pay close attention during trial to whether the evidence on the issue mirrors what opposing counsel told the trial court it would be. If the evidence deviates from the pre-trial representations, you must renew your objection to preserve the issue for appeal.

If you are unclear as to whether a judge’s evidentiary ruling is definitive, and do not wish to impede the flow of trial with repeated objections, you may wish to consider requesting a standing objection. This would not solve preservation difficulties that could arise from the “shifting sands” of trial, but it could resolve other uncertainties as to your need to renew an objection. Without a standing objection, it would be wise to renew your objection or proffer at the appropriate time during trial to alleviate any doubt.

Finally, if the opposing party successfully excludes your presentation of evidence through a definitive in limine ruling, but then introduces evidence at trial that opens the door to such evidence, you must object to the presentation of such evidence to claim error. You may also be able at that point to introduce your evidence despite the judge’s earlier ruling. Indeed, refusing to allow your evidence based on an earlier ruling in such a situation could be reversible error.

The renewal rule of section 90.104, Florida Statutes, was intended to assist trial counsel who, despite obtaining an unequivocal evidentiary ruling from the court, inadvertently waived an issue for appeal by not timely renewing the objection during trial. Of course, it only achieves that purpose if trial counsel knows whether the court has issued a “definitive” ruling. Having appellate counsel present at your trial, who are well-versed in the case law as to what constitutes a definitive ruling, can help ensure your issues are preserved for appeal.

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