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Procedure For Admitting and Excluding Evidence

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THE PROCEDURE FOR ADMITTING AND EXCLUDING EVIDENCE

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The procedure for admitting and excluding evidence at trial plays a critical role in criminal litigation. If a record is not made at trial, there will be no basis for an appeal. Article I of the Ohio Rules of Evidence governs this area of law. Rule 103 covers rulings on evidence. Rule 104 governs preliminary question of admissibility. Rule 105 codifies the concept of limited admissibility.

RULE 103: RULINGS ON EVIDENCE

Ohio Evidence Rule 103 specifies the procedures relating to rulings on evidentiary issues. It covers such matters as plain and harmless error, objections, offers of proof, and out-of-court hearings.

Harmless Error

Rule 103(A) provides that a case will not be reversed on appeal because of an erroneous evidentiary ruling unless the ruling involves a "substantial right" and the other procedural requirements of Rule 103, such as timely objection, have been satisfied. The term "substantial right" is not defined in the rule, but the Staff Note indicates that the term refers to the harmless error doctrine. The Criminal Rules contain a provision on harmless error. Crim. R. 52(A) reads: "Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." *See* 2 Schroeder-Katz, Criminal Law, Crim. R. 52. *See also* Ohio App. R. 12(B) (effect of prejudicial error).

In criminal trials, errors involving federal constitutional rights must be judged by the federal standard. Under this standard, the state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). *See generally*, 8B Moore's Federal Practice Ch. 52 (1987); Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. Pa. L. Rev. 15 (1976); Saltzburg, *The Harm of Harmless Error*, 59 Va. L. Rev. 988 (1973).

The Ohio Supreme Court has extended application of the federal "beyond a reasonable doubt" standard to a review of nonconstitutional errors in criminal cases. In State v. Bayless, 48 Ohio St.2d 73, 357 N.E.2d 1035 (1976), *vacated on other grounds*, 438 U.S. 911 (1978), the Supreme Court wrote:

> Error in the admission of evidence in criminal proceedings is harmless if there is no reasonable possibility that the evidence may have contributed to the accused's conviction. In order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *Id.* (syllabus, para. 7).

Accord, State v. Gilmore, 28 Ohio St.3d 190, 193, 503 N.E.2d 147 (1986) (hearsay); State v. Rahman, 23 Ohio St.3d 146, 151, 492 N.E.2d 401 (1986) (privileged testimony); State v. Mann, 19 Ohio St.3d 34, 40, 482 N.E.2d 592 (1985) ("other-act" evidence).

The Supreme Court has recognized a difference between bench and jury trial cases for purposes of applying the harmless error doctrine. In State v. Eubank, 60 Ohio St.2d 183, 398 N.E.2d 567(1979), the Court stated that in determining whether error has been harmless "we may give weight to the fact that the error occurred in a trial to the court, rather than in a jury trial . . . . Indeed, a judge is presumed to consider only the relevant, material and competent evidence in arriving at a judgment, unless the contrary affirmatively appears from the record." *Id.* at 187. *See also* State v. White, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968); State v. Austin, 52 Ohio App.2d 59, 70, 368 N.E.2d 59 (1976).

Objections

Rule 103(A)(1) requires that an objection or motion to strike be made in order to preserve a challenge to the admissibility of evidence. This rule serves several purposes. First, the objection alerts the trial court to the nature of the claim of error, thus facilitating a ruling on the objection and providing an opportunity for corrective action. Second, it affords opposing counsel an opportunity to take corrective measures. For example, opposing counsel, in response to an objection, might be able to rephrase the question in unobjectionable terms or might withdraw the question and present unobjectionable evidence through another witness.

A failure to object or to move to strike is considered to

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be a waiver of the objection, and the issue will not be reviewed on appeal. *See* State v. Draggo, 65 Ohio St.2d 88, 418 N.E.2d 1343 (1981); State v. Williams, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977), *vacated on other grounds*, 438 U.S. 911 (1978); State v. Lane, 49 Ohio St.2d 77, 358 N.E.2d 1081 (1976), *vacated on other grounds*, 438 U.S. 911 (1978). Withdrawal of an objection also constitutes a waiver. *See* Heldman v. Uniroyal, Inc., 53 Ohio App.2d 21, 32, 371 N.E.2d 557 (1977). Moreover, where a court fails to rule on an objection, it will be presumed that the court overruled the objection. Kane v. Ford Motor Co., 17 Ohio App.3d 111, 112, 477 N.E.2d 662 (1984).

In Brady v. Stafford, 115 Ohio St. 67, 152 N.E. 188 (1926), the Supreme Court recognized the efficacy of "continuing objections," thereby removing the need to object repeatedly to a line of testimony after an adverse ruling on an earlier objection:

> Where there has been a sufficient and specific objection to the admission of testimony concerning a conversation, which is overruled . . ., it is not necessary to repeat the objection whenever testimony of the same class is offered as to the same conversation in order that the admission of such testimony may be urged as a ground of error in a reviewing court. *Id.* (syllabus, para.2).

See also McCormick, Evidence § 52 (3d ed. 1984). Caution, however, demands periodic statements that the prior objection still pertains; otherwise, counsel runs the risk that an appellate court may construe a continuing failure to object as a waiver.

Another consequence of failing to object is that the admitted evidence becomes part of the record of trial and may be considered by the trier of fact, by the trial court in ruling on motions, and by a reviewing court. *See* State v. Petro, 148 Ohio St. 473, 76 N.E.2d 355 (1947); Hastings v. Bonner, 578 F.2d 136, 142-43 (5th Cir. 1978); United States v. Johnson, 577 F.2d 1304, 1312 (5th Cir. 1978); United States v. Jamerson, 549 F.2d 1263, 1266-67 (9th Cir. 1977); McCormick, Evidence § 54 (3d ed. 1984).

Timeliness of Objection

Rule 103(A)(1) requires that objections be timely. If a question is improper, an objection should be made immediately. *See* Gates v. Dills, 13 Ohio App.2d 163, 164, 234 N.E.2d 604 (1967) ("Ordinarily, an objection to incompetent and improper testimony must be made with reasonable promptness."); *accord*, Powell v. Turner, 16 Ohio App.3d 404, 407, 476 N.E.2d 368 (1984); State v. Stearns, 7 Ohio App.3d 11, 15, 454 N.E.2d 139 (1982); State v. McDonald, 25 Ohio App.2d 6, 11, 265 N.E.2d 793 (1970). The rationale for this rule is that counsel should not be permitted to wait and see whether the answer is favorable before raising an objection. *See* McCormick, Evidence § 52 (3d ed. 1984).

In some instances, however, a question's tendency to elicit an objectionable response will not become apparent until the response is given. In such cases, a motion to strike is required. Johnson v. English, 5 Ohio App.2d 109, 214 N.E.2d 254 (1966). Moreover, if a trial court conditionally admits evidence subject to its being "connected up" later in the trial, a motion to strike is required to remove the evidence from jury consideration in the event the "connecting up" evidence is never introduced. If a motion to strike is granted, the court should instruct the jury to disregard the evidence. *See* Logan v. Cleveland Railway Co., 107 Ohio St. 211, 140 N.E. 652 (1923); Ohio Jury Instructions § 5.20 and 405.10.

For some purposes, "timeliness" requires that an objection be made prior to trial. For example, objections based on violations of constitutional rights must often be made in the form of pretrial motions to suppress. Crim. R. 12(B)(3) provides that "[m]otions to suppress evidence, including but not limited to statements and identification testimony, on the ground that it was illegally obtained" must be raised prior to trial.

Specificity

Rule 103 requires specific objections; that is, a statement of the grounds upon which the objection is based must accompany the objection unless the grounds are apparent from the context. Statements such as "I object," "Objection, inadmissible," and "Objection, incompetent" are general objections. Objections on the ground that evidence is "incompetent, irrelevant, and immaterial" are also considered general objections. *See* McCormick, Evidence § 52 (3d ed. 1984).

All grounds for objection should be specified at the time the objection is made. "The general rule regarding specific objections is that one who has made specific objections to the admission of evidence thereby waives all other objections and cannot assert such others in the appellate court." Johnson v. English, 5 Ohio App.2d 109, 113, 214 N.E.2d 254 (1966). *See also* Kent v. State, 42 Ohio St. 426, 430 (1884); Gschwind v. Viers, 21 Ohio App. 124, 152 N.E. 911 (1925).

The specificity requirement further demands that counsel indicate which particular portion of evidence is objectionable. This aspect of the specificity requirement is rarely important with testimonial evidence but arises frequently with respect to documentary evidence. Where only part of a document is objectionable, counsel must specify the objectionable parts. *See* Carson v. Metropolitan Life Ins. Co., 156 Ohio St. 104, 111, 100 N.E.2d 197 (1951); State v. Fox, 133 Ohio St. 154, 161-62, 12 N.E.2d 413 (1938) ("Whenever evidence is offered which is only partially objectionable, the complaining party must point out the objectionable portion specifically.").

Offers of Proof

When evidence has been *excluded* by a ruling of the trial court, Rule 103(A)(2) requires an offer of proof in order to preserve the error for appeal. The rationale for this rule is obvious. Without an offer of proof in the trial record an appellate court cannot review the trial court's ruling. Thus, in Pokorny v. Local 310 International Hod Carriers, 35 Ohio App.2d 178, 300 N.E.2d 464 (1973), *reversed on other grounds,* 38 Ohio St.2d 177, 311 N.E.2d 866 (1974), the court held:

> When a court sustains objections to a question a statement must be made or proffered as to what the expected answer would be in order that a reviewing court can determine whether or not the action of the trial court is prejudicial; and in the absence of a proffer, the exclusion of evidence may not be assigned as error. *Id.* at 184.

See also State v. Grubb, 28 Ohio St.3d 199, 503 N.E.2d 142 (1986); State v. Hipkins, 69 Ohio St.2d 80, 430

N.E.2d 943 (1982); State v. Chapin, 67 Ohio St.2d 437, 424 N.E.2d 317 (1981). In addition, the rule requires counsel to articulate the theory of admissibility as well as the content of the excluded evidence. *See* Reese v. Mercury Marine Div., 793 F.2d 1416, 1421 (5th Cir. 1986).

A party cannot be precluded from making an offer of proof. "Counsel must be allowed to proffer excluded evidence. This is a prerequisite for appellate review on evidentiary rulings. . . . To exclude a proffer of evidence excluded on direct examination is reversible error." State v. Hartford, 21 Ohio App.3d 29, 30, 486 N.E.2d 131 (1984).

An offer of proof may take several forms. An offer of testimonial evidence typically takes the form of a statement by counsel as to the expected content of the excluded testimony. The court, however, may require or be asked to take the "offer" by an examination of the witness, including cross-examination. *See* Rule 103(B) (court "may direct the making of an offer in question and answer form."); Bolenbaugh v. State, 22 Ohio Abs. 268, 270 (App. 1936); Posttape Associates v. Eastman Kodak Co., 537 F.2d 751 (3d Cir. 1976). Excluded documentary evidence should be marked for identification and appended to the record of trial.

There are several exceptions to the offer of proof requirement. First, an offer is not necessary when the substance of the excluded evidence is "apparent from the context within which questions were asked." Rule 103(A)(2). *See* State v. Gilmore, 28 Ohio St.3d 190, 503 N.E.2d 147 (1986). Second, unlike Federal Rule 103, Rule 103(A)(2) provides that an "[o]ffer of proof is not necessary if evidence is excluded during cross-examination." Frequently, a cross-examiner, conducting a proper but exploratory examination, will be unable to state what the witness would have said if permitted to answer. In such cases, to require an offer of proof would be unfair. *See* Martin v. Elden, 32 Ohio St. 282 (1877); Burt v. State, 23 Ohio St. 394 (1872); State v. Debo, 8 Ohio App.2d 325, 222 N.E.2d 656 (1966). Finally, the offer of proof requirement is subject to the plain error doctrine.

Hearing of Jury

Rule 103(C) requires that discussions involving the admissibility of evidence be held outside the hearing of the jury whenever practicable. This requirement arises from a recognition that the underlying purpose of an exclusionary rule of evidence will be defeated if the jury is exposed to the excluded evidence through an offer of proof or by argument of counsel. The trial judge has discretion to require either a side-bar conference or an out-of-court hearing. In addition, evidentiary issues may be raised prior to trial, either at a pretrial conference (Crim. R. 17.1), or by means of a motion *in limine*.

Plain Error

Rule 103(D) recognizes the plain error doctrine, under which an appellate court may consider an evidentiary error despite a party's failure to make an objection, a motion to strike, or an offer of proof at trial. As the federal drafters noted, "the application of the plain error rule will be more likely with respect to the admission of evidence than to exclusion, since failure to comply with normal requirements of offers of proof is likely to produce a record which simply does not disclose the error." Advisory Committee's Note, Fed. R. Evid. 103.

The purpose of the plain error doctrine is to "safeguard the right of a defendant to a fair trial, notwithstanding his failure to object in timely fashion to error at that trial." State v. Wolery, 46 Ohio St.2d 316, 327, 348 N.E.2d 351 (1976), *cert. denied*, 429 U.S. 932 (1976). Crim. R. 52(B) specifically recognizes the plain error doctrine in criminal cases; it provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The plain error rule applies only to errors that affect substantial rights. Attempts to define the doctrine further have not been particularly helpful. *See* State v. Clayton, 62 Ohio St.2d 45, 47, 402 N.E.2d 1189 (1980), *cert. denied*, 449 U.S. 879 (1980) ("plain error is not easily or readily definable and . . . each case must be considered on its own facts."). In State v. Craft, 52 Ohio App.2d 1, 367 N.E.2d 1221 (1977), the court defined plain error to be:

> [O]bvious error prejudicial to a defendant, . . . which involves a matter of great public interest having substantial adverse impact on the integrity of and the public's confidence in judicial proceedings. The error must be obvious on the records, palpable, and fundamental, and in addition it must occur in exceptional circumstances where the appellate court acts in the public interest because error affects "the fairness, integrity or public reputation of judicial proceedings." *Id.* at 7.

See also Schade v. Carnegie Body Co., 70 Ohio St.2d 207, 209, 436 N.E.2d 1001 (1982) ("A 'plain error' is obvious and prejudicial . . . which, if permitted, would have a material adverse affect on the character and public confidence in judicial proceedings."); State v. Long, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978) (syllabus, para. 3) ("Notice of plain error. . . is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."); State v. Eiding, 57 Ohio App.2d 111, 385 N.E.2d 1332 (1978). *See generally* 2 Schroeder-Katz, Ohio Criminal Law, Crim. R. 52; 8B Moore's Federal Practice Ch. 52 (1987).

Motions in limine

Although neither the Ohio nor Federal Rule explicitly mentions motions *in limine*, the use of such motions to raise objections prior to trial is common. The trial court's authority to consider motions *in limine* under the Rules of Evidence is found in Rule 611(A), which recognizes the trial court's general authority to control the presentation of evidence. *See* Rich v. Quinn, 13 Ohio App.3d 102, 105, 468 N.E.2d 365 (1983) (court has inherent authority to entertain motions *in limine*).

In State v. Spahr, 47 Ohio App.2d 221, 353 N.E.2d 624 (1976), the court commented on the use of motions *in limine*:

> There is no provision under the rules or the statutes for a motion *in limine*. The request was no more and no less than an appeal to the trial court for a precautionary instruction to opposing counsel to avoid error or prejudice, such instruction to be effective until admissibility was resolved. Such a request lies in the inherent power and discretion of the trial judge to control the proceedings. *Id.* at 224.

In State v. Grubb, 28 Ohio St.3d 199, 503 N.E.2d 142

(1986), the Supreme Court wrote:

> Thus, a motion *in limine*, if granted, is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue. In virtually all circumstances finality does not attach when the motion is granted. Therefore, should circumstances subsequently develop at trial, the trial court is certainly at liberty ". . . to consider the admissibility of the disputed evidence in its actual context." *Id.* at 201-02.

Although a motion *in limine* is only a tentative ruling in Ohio, it serves an important function. The motion may prohibit opposing counsel from attempting to introduce the evidence or from referring to it in the opening statement until the court has ruled finally on its admissibility. *See* McCormick, Evidence § 52 (3d ed. 1984).

Several procedural issues relating to motions *in limine* have arisen. First, in order to preserve an evidentiary issue for appeal an objection or offer of proof must be made at trial. "At trial it is incumbent upon a defendant, who has been temporarily restricted from introducing evidence by virtue of a motion *in limine*, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." State v. Grubb, 28 Ohio St.3d 199, 503 N.E.2d 142 (1986) (syllabus, para. 2). *Accord,* State v. Maurer, 15 Ohio St.3d 239, 259-60, 473 N.E.2d 768 (1984).

Second, in some circumstances an *in limine* ruling in a criminal case may be appealed by the prosecution.

> Any motion, however labeled, which, if granted, restricts the state in the presentation of certain evidence and, thereby, renders the state's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed, is, in effect, a motion to suppress. The granting of such a motion is a final order and may be appealed pursuant to R.C. 2945.67 and Crim. R. 12(J). State v. Davidson, 17 Ohio St.3d 132, 477 N.E.2d 1141 (1985) (syllabus).

Accord, State v. Fewerwerker, 24 Ohio App.3d 27, 492 N.E.2d 873 (1985).

Third, the U.S. Supreme Court considered the effect of a motion *in limine* in Luce v. United States, 469 U.S. 38 (1984). During his trial for federal drug offenses, Luce moved *in limine* to prevent the prosecution from using a prior conviction to impeach him. His motion was based on Federal Rule 609(a). The trial court denied the motion but indicated that the nature of Luce's trial testimony might affect its ruling. Luce did not testify at trial. He was convicted and appealed.

On review, the Supreme Court ruled that Luce had failed to preserve the issue for appeal because he had not testified at trial: "We hold that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." *Id.* at 43. The Court set forth several reasons for its ruling. First, Federal Rule 609(a) requires the trial court to balance the probative value of the prior conviction for impeachment purposes against its prejudicial effect. Such an evaluation, in the Court's view, is impossible without knowing the precise nature of the defendant's testimony. Second, if the trial court's decision to admit the evidence is erroneous, an appellate court is handicapped in making the required harmless error determination without knowing the nature of the defendant's testimony.

RULE 104: PRELIMINARY QUESTIONS OF ADMISSIBILITY

Rule 104(A) follows the traditional practice of allocating to the trial court the responsibility for ruling on the admissibility of evidence. *See* Potter v. Baker, 162 Ohio St. 488, 500, 124 N.E.2d 140 (1955) ("It is elementary that the trial judge is to decide those questions of fact which must be decided in order to determine whether certain evidence is admissible."); Kornreich v. Industrial Fire Ins. Co., 132 Ohio St. 78, 86, 5 N.E.2d 153 (1936) ("The competency of a witness is a question for the court."). Rule 104(B), however, modifies this principle with respect to preliminary questions involving issues of conditional relevancy.

Pursuant to Rule 104(A), the trial court decides as a preliminary matter questions concerning the "qualification of a person to be a witness," including the competency of a witness under Rule 601 and the qualifications of an expert under Rule 702. *See* Wagenheim v. Alexander Grant & Co., 19 Ohio App.3d 7, 18, 482 N.E.2d 955 (1983) (expert witness). The court also decides the "existence of a privilege" under Rule 501. Finally, the court determines as a preliminary matter the "admissibility of evidence," for example, whether a statement is hearsay under Rule 801, and if an exception to the hearsay rule applies under Rules 803 and 804. *See* State v. Knight, 20 Ohio App.3d 289, 292, 485 N.E.2d 1064 (1984) (dying declaration); State v. Snowden, 7 Ohio App.3d 358, 361, 455 N.E.2d 1058 (1982) (excited utterance). In short, the "admissibility of evidence" language entrusts all decisions concerning the application of evidentiary rules exclusively to the trial court unless Rule 104(B) applies. *See generally* Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165 (1929); Maguire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 Harv. L. Rev. 392 (1927).

In some instances, a preliminary question concerning the admissibility of evidence requires either a factual determination or the application of a legal standard. In other instances, resolution of the admissibility question requires both. For example, the admissibility of statements falling within the hearsay exception for declarations against interest (Rule 804(B)(3)), depends upon the unavailability of the declarant—a question of fact if unavailability is based on the death of the declarant. Admissibility also depends upon whether the statement "possesses the required against-interest characteristics"—the application of a legal standard. Advisory Committee's Note, Fed. R. Evid. 104.

Application of Rules of Evidence

According to Rule 104(A) the trial court is "not bound by the rules of evidence except those with respect to privileges" when ruling on the admissibility of evidence. Several arguments have been offered in support of dispensing with evidentiary rules in this context. First, the rules of evidence are designed principally for jury

trials. McCormick writes: "Should the exclusionary law of evidence, 'the child of the jury system' in Thayer's phrase, be applied [in an admissibility] hearing before the judge? Sound sense backs the view that it should not, and that the judge should be empowered to hear any relevant evidence, including affidavits or other hearsay." McCormick, Evidence 136 n. 8 (3d ed. 1984). Second, practical considerations support suspension of the rules. "An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. Again, common practice calls for considering the testimony of a witness, particularly a child, in determining competency." Advisory Committee's Note, Fed. R. Evid. 104. *See generally* United States v. Raddatz, 447 U.S. 667, 679 (1980) ("At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial."); United States v. Matlock, 415 U.S. 164, 172-73(1974) ("[T]he rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence."); Maguire and Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility,* 36 Yale L. J. 1101 (1927).

Burden and Standard of Proof

Rule 104(A) provides that the trial court shall decide preliminary questions and that the rules of evidence, except those relating to privilege, are not applicable. The rule, however, does not specify who has the burden of proof on the preliminary question or what standard of proof is applicable. As a general rule, the party offering evidence has the burden of proof on preliminary issues. "The opponent merely invokes the law; . . . the proponent must make the evidence satisfy the law." 1 Wigmore, Evidence § 18, at 841 (Tillers rev. 1983). Also as a general rule, the preponderance standard is the standard of proof. *See* Bourjaily v. United States, 107 S.Ct. 2775, 2779 (1987). There are, however, exceptions in criminal cases. *See generally* Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 Stan. L. Rev. 271 (1975); 1 Louisell & Mueller, Federal Evidence § 35 (1977).

Conditional Relevancy

Rule 104(B), governing preliminary questions of conditional relevancy, operates as an exception to Rule 104(A). The drafters of the Federal Rules of Evidence explained conditional relevancy as follows:

> In some situations, the relevancy of an item of evidence, in the large sense, depends upon the existence of a particular preliminary fact. Thus when a spoken statement is relied upon to prove notice to X, it is without probative value unless X heard it. Or if a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labeled "conditional relevancy.". . . Advisory Committee's Note, Fed. R. Evid. 104.

If a preliminary question involves an issue of conditional relevancy, the trial court's function is limited. The court does not decide such questions exclusively or with finality, as is the case with preliminary questions under Rule 104(A). Rather, the trial court determines only if sufficient evidence has been introduced "to support a finding of the fulfillment of the condition." If this prima facie standard is satisfied, the evidence is admitted for the jury's consideration.

Rule 104(B) is a provision of general applicability. Several specific rules represent specialized applications of the concept of conditional relevancy. For example, in applying the firsthand knowledge rule, the trial court does not decide whether a witness has firsthand knowledge; the court decides only whether sufficient evidence has been introduced "to support a finding that [the witness] has personal knowledge of the matter." Rule 602. Similarly, when ruling on the authentication of a document, the trial court does not decide whether the proferred document is genuine; the court's decision is limited to determining whether there is "evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(A).

The allocation of functions between the court and jury which is embodied in the concept of conditional relevancy is based on the concern that entrusting preliminary questions exclusively to the court will interfere with the jury's proper role. The federal drafters commented: "If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries." Advisory Committee's Note, Fed. R. Evid. 104. Moreover, unlike rules of competence, such as the hearsay rule, there is little danger in permitting the jury to decide such issues. For example, if the jury finds that a document is not genuine or that a witness does not have firsthand knowledge, the jury will disregard the evidence.

Hearing of the Jury

Confessions. Rule 104(C), which requires the court to hold an out-of-court hearing when ruling on the admissibility of a confession, is constitutionally mandated as a result of the U.S. Supreme Court's decision in Jackson v. Denno, 378 U.S. 368 (1964). *See also* State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969), *reversed on other grounds*, 403 U.S. 947 (1971). This provision should be invoked rarely because Crim. R. 12(B)(3) requires that constitutional challenges to the admissibility of confessions be raised prior to trial by a motion to suppress. There is little likelihood that a confession will be introduced unexpectedly at trial because Crim. R. 12(D)(2) entitles the defense, upon request, to receive pretrial notice of the prosecutor's intention to introduce a confession as evidence in chief. *See* 2 Schroeder-Katz, Ohio Criminal Law, Crim. R. 12.

Rule 104(C) will more often be invoked where the prosecution does not intend to introduce a confession in its case in chief but attempts to use the confession as impeachment evidence. In this situation, Rule 104(C) requires an out-of-court hearing on the admissibility of the confession. Confessions obtained in violation of an accused's *Miranda* rights may be used for impeachment. *See* Oregon v. Haas, 420 U.S. 714 (1975); Harris v. New

York, 401 U.S. 222 (1971). Involuntary confessions, however, cannot be used for impeachment. *See* Mincey v. Arizona, 437 U.S. 385 (1978).

Other preliminary matters. Rule 104(C) provides that hearings "on other preliminary matters shall also be conducted out of the hearing of the jury when the interests of justice require." A similar provision is found in Rule 103(C). The latter provision, however, does not use the interests-of-justice standard; rather, it requires out-of-court hearings whenever "practicable."

See also Watkins v. Sowders, 449 U.S. 341 (1981) (an out-of-court hearing is not automatically required for determining the admissibility of identification evidence).

Testimony by the Accused

Scope of cross-examination. Rule 104(D) limits the scope of cross-examination when a criminal defendant testifies on a preliminary matter; such testimony does not subject the defendant "to cross-examination as to other issues in the case." "The limitation upon cross-examination is designed to encourage participation by the accused in the determination of preliminary matters. He may testify concerning them without exposing himself to cross-examination generally." Advisory Committee's Note, Fed. R. Evid. 104. A specific rule on cross-examination on preliminary matters was considered necessary because Rule 611(B) adopts the wide-open rule on scope of cross-examination in all other proceedings.

Subsequent use at trial. As both the Ohio Staff Note and federal Advisory Committee's Note indicate, Rule 104(D) does not address the issue of whether the accused's testimony on a preliminary matter can be used subsequently at trial. Both the Ohio and federal notes cite several decisions by the U.S. Supreme Court.

In Simmons v. United States, 390 U.S. 377 (1968), the Court held that suppression hearing testimony given by a defendant in order to establish standing to object to illegally seized evidence could not be used against the defendant at trial on the issue of guilt. *See also* Brown v. United States, 411 U.S. 223 (1973). Whether the *Simmons* rule extends to the impeachment use of suppression hearing testimony has not yet been decided; the Court specifically reserved that question in United States v. Salvucci, 448 U.S. 83 (1980). However, in Harris v. New York, 401 U.S. 222 (1971), the Court held that statements obtained in violation of *Miranda* could be used to impeach a defendant at trial. *See also* Oregon v. Haas, 420 U.S. 714 (1975). Similarly, the Court has permitted the impeachment use of evidence seized in violation of Fourth Amendment rights. *See* United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 62 (1954).

Weight and Credibility

Rule 104(E) provides: "This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility." The purpose of this provision is to make clear that a court's ruling on the admissibility of evidence does not curtail the right of a party to dispute the reliability of admitted evidence before the jury. For example, if the trial court determines, as a matter of constitutional law, that a confession is voluntary, the defendant may nevertheless introduce before the jury evidence challenging the reliability of the confession. The U.S. Supreme Court considered this issue in Crane v. Kentucky, 106 S.Ct. 2142 (1986). The defendant moved to suppress a confession on the grounds that it had been coerced. The trial court determined that the confession was voluntary and denied the motion. At trial, the defendant sought to introduce evidence concerning the psychological and physical environment in which the confession was obtained to show that it was unreliable. The trial court excluded the evidence because it related to the voluntariness issue.

On review, the Court reversed. Citing Federal Rule 104(e), the Court stated that the circumstances surrounding the taking of a confession may be relevant to two separate issues, one legal and one factual. The legal issue concerns the constitutional issue of voluntariness, which the court must decide. The factual issue concerns the reliability of the confession, an issue which the jury decides. According to the Court, the preclusion of evidence on the latter issue deprived the defendant of a fair trial:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment . . ., the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Id.* at 2146 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984).

See also State v. Wilson, 8 Ohio App.3d 216, 220, 456 N.E.2d 1287 (1982); State v. Cron, 14 Ohio App.2d 76, 236 N.E.2d 671 (1967).

RULE 105: LIMITED ADMISSIBILITY

Rule 105 recognizes the principle of limited admissibility:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request of a party, shall restrict the evidence to its proper scope and instruct the jury accordingly.

In many instances, an item of evidence can be used for multiple purposes. In some cases this is proper. For example, a party's prior inconsistent statement may be admitted for impeachment (Rule 613), as well as for substantive evidence as an admission (Rule 801(D)(2)(a)) Frequently, however, an item of evidence may be admissible for one purpose but inadmissible for another purpose. Evidence also may be admissible against one party, but not against another party. In such cases Rule 105 applies, and the court must, upon request, instruct the jury as to the limited purpose of the evidence. The rule does not preclude the trial court from giving such a limiting instruction *sua sponte*.

Rule 105 does not change prior Ohio law. In an early case, Harrington v. State, 19 Ohio St. 264 (1869), the Supreme Court noted that "[i]nstructions advising the jury of the object for which particular items of evidence are admitted, and cautioning them against being misled by their improper use, are certainly proper, and are often called for by the circumstances of the case. . ." *Id.* at 270. *See* Ohio Jury Instructions § 2.60, 5.90 and 402.60 (limited purpose evidence).

Rule 105 is written in mandatory language. Upon request, a limiting instruction must be given. Refusal to instruct is error. *See* United States v. Washington, 592

F.2d 680 (2d Cir. 1979).

The rule not only directs the court to give a limiting instruction upon request, it also requires the courts to "restrict the evidence to its proper scope." This phrase is not explained in the federal Advisory Committee's Note or in the Ohio Staff Note. One purpose of this phrase is to limit counsel's use of the evidence to its proper purpose during closing argument. *See* Drake v. Caterpillar Tractor Co., 15 Ohio St.3d 346, 348, 474 N.E.2d 291 (1984) (error for counsel to refer in closing argument to evidence admitted solely for impeachment as if such evidence were substantive); United States v. Gross, 511 F.2d 910, 919 (3d Cir. 1975), *cert. denied*, 423 U.S. 924 (1975). This provision would also apply to a bench trial, where the court is required to limit its use of the evidence to its proper purpose but where no instruction is given. *See* 21 Wright & Graham, Federal Practice and Procedure § 5067 (1977).

Timing of Instruction

A limiting instruction could be given either at the time the evidence is admitted or at the close of the case. In Barnett v. State, 104 Ohio St. 298, 135 N.E. 647 (1922), the Supreme Court held that a limiting instruction could be given at the time of admission or in the general charge. In Findlay Brewing Co. v. Bauer, 50 Ohio St. 560, 35 N.E. 55 (1893), the Court required the instruction to be given at the time evidence was received.

The language of Rule 105 seems to require that the instruction be given at the time evidence is introduced: *"When evidence. . . is admitted,* the court, upon request of a party, shall. . . instruct the jury. . ." (emphasis added) This interpretation is further supported by the rationale underlying Rule 105; the instruction will be more effective at the time the evidence is admitted. The federal cases, however, have not accepted this reading of the rule. *See* United States v. Weil, 561 F.2d 1109, 1111 (4th Cir. 1977); United States v. Papia, 560 F.2d 827, 839-40 (7th Cir. 1977); United States v. Campanale, 518 F.2d 352, 362 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

Failure to Request an Instruction

The failure of a party to request a limiting instruction has been held to constitute a waiver. *See* Agler v. Schine Theatrical Co., 59 Ohio App. 68, 17 N.E.2d 118 (1938). Not all of the Ohio cases, however, have applied the waiver rule. *See* Kroger Co. v. McCarty, 111 Ohio App. 362, 172 N.E.2d 463 (1960). Failure to request a limiting instruction should be considered a waiver, except in those instances in which the plain error rule applies (Rule 103(D)). *See* United States v. Liefer, 778 F.2d 1236, 1244 (7th Cir. 1985); United States v. Regner, 677 F.2d 754, 757 (9th Cir. 1982), *cert. denied*, 459 U.S. 911 (1982); United States v. Vitale, 596 F.2d 688, 689 (5th Cir. 1979), *cert. denied*, 444 U.S. 868 (1979); United States v. Sangrey, 586 F.2d 1312, 1315 (9th Cir. 1978); United States v. Sisto, 534 F.2d 616, 622-26 (5th Cir. 1976).

To support a finding of plain error despite counsel's failure to request a limiting instruction, an appellate court must determine that the trial court should have given the instruction *sua sponte,* or, at least, should have asked counsel whether an instruction was desired. In some situations, the failure to request a limiting instruction is a deliberate tactic employed to avoid overemphasizing adverse evidence. If competent counsel chooses this course of action, the plain error rule should not apply. *See* United States v. Bradshaw, 719 F.2d 907, 920 (7th Cir.1983) ("It appears to us that the defendant's attorney merely made a tactical decision in declining to ask that this statement be struck and a limiting instruction be given. Such a tactical decision should not increase the defendant's chances of obtaining a reversal."); United States v. Barnes, 586 F.2d 1052, 1059 (5th Cir. 1978) ("Counsel may refrain from requesting an instruction in order not to emphasize potentially damaging evidence. . .".

Evidence Admissible for One Purpose

In numerous situations an item of evidence may be admissible if offered for one purpose, but inadmissible if offered for another purpose. *See* United States v. Abel, 469 U.S. 45, 56 (1984) ("But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case."); State ex rel. Brown v. Dayton Malleable, Inc., 1 Ohio St.3d 151, 156, 438 N.E.2d 120 (1982) ("It is fundamental that evidence that is admissible for one purpose may be inadmissible for another purpose.").

The Rules of Evidence specifically address some of these issues. For example, Rule 404(B) provides that evidence of other crimes, wrongs, or acts may be admissible for several purposes, including proof of motive, opportunity, intent, or identity. Such evidence, however, "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." An instruction limiting such evidence to its proper purpose is appropriate. *See* Ohio Jury Instructions § 402.61 and 405.23.

The doctrine of limited admissibility applies to many situations which the Rules of Evidence do not explicitly address. For example, prior inconsistent statements are generally admissible only for the purpose of impeachment. (There is an exception for prior inconsistent statements that satisfy the requirements of Rule 801(D)(1)(a)). If offered for impeachment, the statement is relevant only because it was made and is inconsistent with in-court testimony, not because it was true. If the jury uses the statement for the truth of its content, the hearsay rule is violated. Accordingly, an instruction limiting the jury's use of prior inconsistent statements to impeachment is appropriate. *See* G. M. McKelvey Co. v. General Casualty Co, 166 Ohio St. 401, 405, 142 N.E.2d 854 (1957) (prior confession of testifying witness "admissible for only the purpose of impeachment of her testimony").

Similarly, evidence of prior convictions typically is admissible only for impeachment. *See* Rule 609. There is a danger, however, that when such evidence is introduced the jury might use it as character evidence on the merits of the case, especially if the witness is the accused in a criminal case. This latter use of prior conviction evidence is prohibited by Rule 404(A); hence, an instruction limiting the use of this type of evidence is appropriate. *See* State v. Murdock, 172 Ohio St. 221, 174 N.E.2d 543 (1961) (syllabus, para. 2) ("conviction of a witness for an offense. . . may be shown for the purpose of affecting his credibility"); Ohio Jury Instructions § 402.60 and 405.22.

Evidence Admissible Against One Party

Rule 105 provides that when an item of evidence is admissible against one party, but not against another party, a limiting instruction must be given upon request, directing the jury to use the evidence against the proper party. *See also* Ohio Jury Instructions § 405.40 (several defendants); Webb v. Grimm, 116 Ohio App. 63, 186 N.E.2d 739 (1961).

The U.S. Supreme Court held in Bruton v. United States, 391 U.S. 123 (1968), that a limiting instruction in a joint trial was insufficient to protect against improper jury use of one defendant's confession which implicated a codefendant. Once the Court concluded that there existed a "substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining the petitioner's guilt," it ruled that the defendant had been denied his Sixth Amendment right to confrontation because his right to cross-examine the codefendant about the statement had been foreclosed. *Id.* at 126. In subsequent decisions, the Court held *Bruton* applicable to state trials (*see* Roberts v. Russell, 392 U.S. 293 (1968)), and subject to the harmless error doctrine (*see* Harrington v. California, 395 U.S. 250 (1969)). *See also* State v. Moritz, 63 Ohio St.2d 150, 407 N.E.2d 1268 (1980); State v. Utsler, 21 Ohio App.2d 167, 255 N.E.2d 861 (1970); State v. Parsons, 18 Ohio App.2d 123, 123 n. 1, 247 N.E.2d 482, 483 n. 1 (1969).

There are several ways in which the *Bruton* issue can be obviated. First, separate trials avoid the problem raised in *Bruton*. If the codefendants have been properly joined for trial under Crim. R. 8(B), the proper remedy is a motion to sever for prejudice pursuant to Crim. R. 12(B)(5) and 14. The trial court has discretion to grant such a motion. If codefendants have been improperly joined under Crim. R. 8(B), the proper remedy is a motion for severance for misjoinder pursuant to Crim. R. 8 and 12(B)(2). In such cases, the defendant need not show prejudice, and the trial judge must sever. *See generally* 2 Schroeder-Katz, Ohio Criminal Law, Crim. R. 8 and Crim. R. 14.

Second, the prosecution can delete (redact) all references in the confession that relate to the codefendant. *See* Bruton v. United States, 391 U.S. 123, 134 n. 10 (1968); State v. Rosen, 151 Ohio St. 339, 342, 86 N.E.2d 24 (1949). Redaction, however, is not always effective. "There are, of course, instances in which such editing is not possible; the references to the codefendant may be so frequent or so closely interrelated with references to the maker's conduct that little would be left of the statement after editing." ABA Standards Relating to Joinder and Severance 38 (1967). The Supreme Court sanctioned the redaction procedure in Richardson v. Marsh, 107 S.Ct. 1702 (1987): "We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existence." *Id.* at 1709.

Third, the *Bruton* problem can be avoided, at least in some instances, if the codefendant testifies at trial. Under these circumstances the defendant has the opportunity to cross-examine the codefendant on the accuracy of the out-of-court statement, thereby obviating the confrontation issue. The Supreme Court took this position in Nelson v. O'Neil, 402 U.S. 622 (1971): "We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." *Id.* at 629-30. *See also* State v. Doherty, 56 Ohio App.2d 112, 381 N.E.2d 960 (1978).

The Court has decided several other *Bruton* issues. In Cruz v. New York, 107 S.Ct. 1714 (1987), the Court held that *Bruton* applied to "interlocking confessions." In Tennessee v. Street, 471 U.S. 409 (1985), the Court ruled that *Bruton* was not violated by the prosecution's use of an accomplice's statement in rebuttal.