



MINNESOTA JUDICIAL TRAINING UPDATE



EVIDENTIARY RULINGS – PRESERVING THE RECORD 5 RULES EVERY JUDGE (and Attorney) MUST KNOW

FOCUS OF THIS UPDATE: You are upset at your judge’s evidentiary ruling(s). You are convinced the court’s legal analysis is seriously flawed and you believe you could win on appeal. Preserving the court record is one of the fundamental duties of all judges and attorneys. However, winning an appeal by arguing evidentiary error is exceedingly hard to do. This Update will focus on the 5 most important rules that attorneys and judges must follow in order to preserve an evidentiary ruling for appeal. **Note:** Unlike the rules of evidence, these rules are not codified in any one place, but are derived from various judicial doctrines and decisions.

RULE 1 – All evidentiary questions MUST first be presented to the trial court. This means the evidence must be “offered” and must be “objected” to.

The failure to offer evidence is the first, but fatal, step to precluding any consideration of the evidence on appeal. The failure to object has the same fatal effect. No issue not raised before the trial court will be considered on appeal. See Minn. R. Evid. 103; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

RULE 2 – The evidence “offer” and “objection” MUST be on the record.

This rule may seem obvious, but numerous evidentiary issues evaporate before an appeal can be filed because they were not made on the record. This typically occurs when the offer or objection was made during a bench conference or in chambers, but was never placed on the record. If it is not made on the record, it will not be part of the appeal. See Minn. R. Evid. 103(a)(1); *Hunt v. Regents of University of Minnesota*, 460 N.W.2d 28, 32 (Minn. 1990).

RULE 3 – Exclusion of evidence should be made the subject of an “offer of proof.” The “offer of proof” must also be on the record.

An offer of proof must be made to challenge on appeal a trial court’s exclusion of evidence. Minn. R. Evid. 103(a)(2). The only exception to this rule is if the substance of the excluded evidence is apparent from the context within which the question was asked.

Judicial Best Practice: In addition to the fact that an offer of proof is required to preserve an issue for appeal, more than once, an offer of proof has allowed the trial judge to understand the importance of the evidence or otherwise convince the trial judge to change the decision and to admit the evidence.

RULE 4 – The evidentiary question MUST be ruled on by the trial court, and the court’s ruling MUST be on the record.

It is not enough to object to evidence or to make an offer of proof. The court MUST make a ruling and the parties have an absolute right to insist on a ruling. It is the responsibility of the party objecting to the evidence to make sure the judge actually rules on the objection. The party making an objection should also be sure that the court reporter is present when the ruling is made or, if not present, that the matter is placed on the record at a later point when the reporter is present.

RULE 5 – In civil cases any evidentiary error MUST be made a ground of a motion for a new trial or it will not be reviewed on appeal.

Any question about the admission or rejection of evidence MUST be brought before the trial court in a motion for a new trial. The motion for a new trial is mandatory if appellate review of an evidentiary question is sought. This rule is crucially important. There is a significant difference in the scope of appellate review that applies when the appeal is taken directly from a judgment entered following trial (i.e. no motion for a new trial) versus an appeal taken from an order denying a motion for a new trial. For example:

Scope of Review on Appeal

Appeal from Judgment Entered Following Trial (No Motion for New Trial ever Filed)	Appeal from an Order Denying a Motion for New Trial (Required for Evidentiary Issues)
<ol style="list-style-type: none"> 1) Without a motion for a new trial, appellate review is limited to two narrow issues: <ol style="list-style-type: none"> a) Whether the evidence supports the findings of fact, and b) Whether the findings support the conclusions of law and judgment. 2) Other matters arising during trial, including evidentiary rulings, are NOT reviewable. 	<ol style="list-style-type: none"> 1) The appeal from a denial of a motion for a new trial allows review of ALL matters raised in the motion, including evidentiary rulings. 2) The evidentiary error, whether it regards the admission or exclusion of evidence must be specifically included in, and made part of the motion for a new trial.

WHAT IF THE RECORD IS WRONG – CORRECTION OR AMENDMENT OF THE RECORD

The failure to have an evidentiary issue preserved on the record can be remedied by submitting the question of the accuracy of the record to the trial court. See Minn. R. Civ. App. P. 110.05; *Midway Nat. Bank of St. Paul v. Bollmeier*, 474 N.W.2d 335, 339-40 (Minn. 1991). Error in the record can be corrected by stipulation of the parties, motion to the trial court, or motion to the appellate court.

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