UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

26th Annual Admiralty and Maritime Law Conference

September 29, 2017
South Texas College of Law
Houston, Texas

Preservation of Error at Trial

CHRISTINA CROZIER

POLLY FOHN

Christina Crozier
Polly Fohn
Haynes and Boone, LLP
1221 McKinney, Suite 2100
Houston, Texas 77010-2007
Christina.Crozier@haynesboone.com
Polly.Fohn@haynesboone.com
Telephone: (713) 547-2000
Telecopier: (713) 547-2600

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii
PRESERVATION OF ERROR AT TRIAL 1
I. INTRODUCTION 1
II. PRE-TRIAL 1
A. Motions in limine 1
1. Granted 1
2. Denied 1
3. Violation 2
B. Motion to exclude 2
III. TRIAL 2
A. Voir dire 2
1. Improper restriction of voir dire 2
2. Challenges for cause 2
a. Preserving error when a challenge for cause is denied 3
b. Preserving error when a challenge for cause is granted 3
3. Batson challenges 3
4. Statements about evidence during voir dire 3
B. Expert testimony 3
1. Admission of expert testimony 3
a. Trial objection necessary 3
b. Trial objection unnecessary 4
2. Excluded expert testimony 4
C. The admission and exclusion of evidence 4
1. Objecting to the evidence 4
a. The basics 4
b. Timeliness 4
c. Specificity 4
d. Running objections 4
e. Multiple parties 5
2. Preserving error when evidence is admitted on a limited or conditional basis 5
3. Preserving error when evidence is excluded 5
a. Offer of proof 5
b. Bill of exception 6
c. Limiting the offer 7
D. Matters outside the pleadings 7
1. Trial by consent 7
2. Pleading amendments 8

a. Obtaining an amendment 8
b. Opposing an amendment 8
E. Motion for directed verdict 9
1. Form and content 9
2. Timing 9
3. Written order 9
4. Reurging after a hung jury 9
F. The jury charge 10
1. Objection or written request? 10
a. Object 10
b. Make a written request 10
c. Do nothing 11
2. Preserving *Casteel* Error 11
3. Objecting to a Spoliation Instruction 11
G. Improper jury argument 11
H. Incomplete or defective verdicts 12
IV. Post-trial Preservation 12
A. The judgment 12
1. Motion for judgment on the verdict 12
2. Motion to disregard jury findings and enter judgment notwithstanding the verdict 13
a. Content 13
b. Specificity 13
c. Timing 13
B. Motion for New Trial 13
V. CONCLUSION 14

TABLE OF AUTHORITIES

CASES

In the Interest of A.M.,
418 S.W.3d 830 (Tex. App.—Dallas 2013, no pet.) 6

Allison v. Comm'n for Lawyer Discipline,
374 S.W.3d 520 (Tex. App.—Houston [14th Dist.] 2012, no pet.) 1

Another Attic, Ltd. v. Plains Builders, Inc.,
2010 WL 4941694 (Tex. App.—Amarillo 2010, no pet.) (mem. op.) 10

Arkoma Basin Exp. Co. v. FMF Assocs., *1990-A, Ltd.*,
249 S.W.3d 380 (Tex. 2008) 4, 9, 10, 13

Arvizu v. Estate of Puckett,
364 S.W.3d 273 (Tex. 2012) 12

Austin v. Weems,
337 S.W.3d 415 (Tex. App.—Houston [1st Dist.] 2011, no pet.) 2, 5

Batson v. Kentucky,
476 U.S. 79 (1986) 3

Bay Area Healthcare Grp., Ltd. v. McShane,
239 S.W.3d 231 (Tex. 2007) 4

BCY Water Supply Corp. v. Residential Invs., Inc.,
170 S.W.3d 596 (Tex. App.—Tyler 2005, pet. denied) 14

Beltran v. Brookshire Grocery Co.,
358 S.W.3d 263 (Tex. App.—Dallas 2011, pet. denied) 12

Bender v. S. Pac. Transp. Co.,
600 S.W.2d 257 (Tex. 1980) 12

Beutel v. Dallas Cty. Flood Control Dist., No. 1,
916 S.W.2d 685 (Tex. App.—Waco 1996, writ denied) 5

Bobbora v. Unitrin Ins. Servs.,
255 S.W.3d 331 (Tex. App.—Dallas 2008, no pet.) 4

Boyles v. Kerr,
855 S.W.2d 593 (Tex. 1993) 8

BP Am. Prod. Co. v. Red Deer Res., LLC,
15-0569, 2017 WL 1553112 (Tex. Apr. 28, 2017) 11

Bridges v. City of Richardson,
163 Tex. 292, 354 S.W.2d 366 (1962) 1

Bryan v. Watumull,
230 S.W.3d 503 (Tex. App.—Dallas 2007, pet. denied) 6, 7

Burbage v. Burbage,
447 S.W.3d 249 (Tex. 2014) 11

Capellen v. Capellen,
888 S.W.2d 539 (Tex. App.—El Paso 1994, writ denied) 12

Celotex Corp. v. Tate,
797 S.W.2d 197 (Tex. App.—Corpus Christi 1990, writ dism'd) 5

Chapman v. Olbrich,
217 S.W.3d 482 (Tex. App.—Houston [14th Dist.] 2006, no pet.) 6

Chavis v. Dir., State Worker's Comp. Div.,
924 S.W.2d 439 (Tex. App.—Beaumont 1996, no writ) 2

Citigroup Global Markets Realty Corp. v. Stewart Title Guaranty Co.,
417 S.W.3d 592 (Tex. App.—Houston [14th Dist.] 2013, no pet.) 2

City of Fort Worth v. Zimlich,
29 S.W.3d 62 (Tex. 2000) 7, 8

City of San Antonio v. Pollock,
284 S.W.3d 809 (Tex. 2009) 4

Clevenger v. Liberty Mut. Ins. Co.,
396 S.W.2d 174 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) 10

Comiskey v. FH Partners, LLC,
373 S.W.3d 620 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) 5

Commerce, Crowdus & Canton, Ltd. v. DKS Constr., Inc.,
776 S.W.2d 615 (Tex. App.—Dallas 1989, no writ) 5

Commonwealth Lloyd's Ins. v. Thomas,
825 S.W.2d 135 (Tex. App.—Dallas 1992, writ granted w.r.m.) 14

Compass Bank v. MFP Fin. Serv. Inc.,
152 S.W.3d 844 (Tex. App.—Dallas 2005, pet. denied) 7, 8

Cortez v. HCCI-San Antonio, Inc.,
159 S.W.3d 87 (Tex. 2005) 3

Crown Life Ins. Co. v. Casteel,
22 S.W.3d 378 (Tex. 2000) 11

Crowson v. Bowen,
320 S.W.3d 486 (Tex. App.—Fort Worth 2010, no pet.) 8

Dillard v. Broyles,
633 S.W.2d 636 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) 9

Dove v. Dir., State Emps. Workers' Comp. Div.,
857 S.W.2d 577 (Tex. App.—Houston [1st Dist.] 1993, writ denied) 2

Encina P'ship v. Corenergy, L.L.C.,
50 S.W.3d 66 (Tex. App.—Corpus Christi 2001, pet. denied) 10

In re Estate of Miller,
243 S.W.3d 831 (Tex. App.—Dallas 2008, no pet.) 6

Eun Bok Lee v. Ho Chang Lee,
411 S.W.3d 95 (Tex. App.—Houston [1st Dist.] 2013, no pet.) 7, 8

First Nat'l Bank of Beeville v. Fojtik,
775 S.W.2d 632 (Tex. 1989) 13

First Nat'l Collection Bureau, Inc. v. Walker,
348 S.W.3d 329 (Tex. App.—Dallas 2011, pet. denied) 4

Fletcher v. Minn. Mining & Mfg. Co.,
57 S.W.3d 602 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) 6

Fort Bend Cty. Drainage Dist. v. Sbrusch,
818 S.W.2d 392 (Tex. 1991) 13

Goode v. Shoukfeh,
943 S.W.2d 441 (Tex. 1997) 3

Greenberg Traurig of New York, P.C. v. Moody,
161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] 2004, no pet.) 2

Greenhalgh v. Service Lloyds Ins. Co.,
787 S.W.2d 938 (Tex. 1980) 8

Greenstein, Logan & Co. v. Burgess Mktg., Inc.,
744 S.W.2d 170 (Tex. App.—Waco 1987, writ denied) 9

Griffith v. Casteel,
313 S.W.2d 149 (Tex. Civ. App.—Houston 1958, writ ref'd n.r.e.) 7, 11

GTE Sw., Inc. v. Bruce,
998 S.W.2d 605 (Tex. 1999) 2

Gunn v. McCoy,
489 S.W.3d 75 (Tex. App.—Houston [14th Dist.] 2016, pet. filed) 4

H.O. Dyer, Inc. v. Steele,
489 S.W.2d 686 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ) 9

Hampden Corp. v. Remark, Inc.,
331 S.W.3d 489 (Tex. App.—Dallas 2010, pet. denied) 7, 8

Hardage v. Rouly,
349 S.W.2d 616 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.) 9

Harkey v. Tex. Emp'rs Ins. Ass'n,
208 S.W.2d 919 (Tex. 1948) 7, 8

Harris County Flood Control Dist. v. Roberts,
252 S.W.3d 667 (Tex. App.—Houston [14th Dist.] 2008, no pet.) 4

Hartford Accident & Indem. Co. v. McCardell,
369 S.W.2d 331 (Tex. 1963), *superseded by statute on other grounds* 1

Helping Hands Home Care, Inc. v. Homes Health of Tarrant Cty., Inc.,
393 S.W.3d 492 (Tex. App.—Dallas 2013, pet. denied) 13

Holland v. Wal-Mart Stores, Inc.,
1 S.W.3d 91 (Tex. 1999) 13

Hooks v. Samson Lone Star, L.P.,
457 S.W.3d 52 (Tex. 2015) 13

Horrocks v. Tex. Dep't of Transp.,
852 S.W.2d 498 (Tex. 1993) 14

Horton v. Horton,
965 S.W.2d 78 (Tex. App.—Fort Worth 1998, no pet.) 9

Huckaby v. A.G. Perry & Son, Inc.,
20 S.W.3d 194 (Tex. App.—Texarkana 2000, pet. denied) 2

Hyundai Motor Co. v. Vasquez,
189 S.W.3d 743 (Tex. 2006) 2, 3

Ingram v. Deere,
288 S.W.3d 886 (Tex. 2009) 7

In re the Interest of B.W.,
99 S.W.3d 757 (Tex. App.—Houston [1st Dist.] 2003, no pet.) 2

Johnson v. Garza,
884 S.W.2d 831 (Tex. App.—Austin 1994, writ denied) 1

JSC Neftegas-Impex v. Citibank, N.A.,
365 S.W.3d 387 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) 9

Katy Int'l Inc. v. Jinchun Jiang,
451 S.W.3d 74 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) 5

Kerr-McGee Corp. v. Helton,
134 S.W.3d 204 (Tex. App.—Amarillo 2002), *rev'd on other grounds by*, 133 S.W.3d 245 (Tex. 2004) 4

Keyes Helium Co. v. Regency Gas Servs., L.P.,
393 S.W.3d 858 (Tex. App.—Dallas 2012, no pet.) 9

Kia Motors Corp. v. Ruiz,
432 S.W.3d 865 (Tex. 2014) 4, 5

Kirschberg v. Lowe,
974 S.W.2d 844 (Tex. App.—San Antonio 1998, no pet.) 14

Latch v. Gratty, Inc.,
107 S.W.3d 543 (Tex. 2003) 7

Leaird's, Inc. v. Wrangler Inc.,
31 S.W.3d 688 (Tex. App.—Waco 2000, pet. denied) 5

Lerma v. Border Demolition & Envtl., Inc.,
459 S.W.3d 695 (Tex. App.—El Paso 2015, pet. denied) 11

Litton Indus. Prod., Inc. v. Gammage,
668 S.W.2d 319 (Tex. 1984) 13

Living Centers of Tex., Inc. v. Penalver,
256 S.W.3d 678 (Tex. 2008) 12

Lone Starr Multi-Theatres Ltd. v. Max Interests Ltd.,
365 S.W.3d 688 (Tex. App.—Houston [1st Dist.] 2011, no pet.) 6

Low v. Henry,
221 S.W.3d 609 (Tex. 2007) 5

Lundy v. Masson,
260 S.W.3d 482 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) 12

In Interest of M.G.N.,
491 S.W.3d 386 (Tex. App.—San Antonio 2016, pet. denied) 4

In re Marriage of Loftis,
40 S.W.3d 160 (Tex. App.—Texarkana 2001, no pet.) 9

McMillin v. State Farm Lloyds,
180 S.W.3d 183 (Tex. App.—Austin 2005, pet. denied) 3

Moeller v. Blanc,
276 S.W.3d 656 (Tex. App.—Dallas 2008, pet. denied) 3

Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.,
235 S.W.3d 695 (Tex. 2007) 11

Nelson v. Data Terminal Sys., Inc.,
762 S.W.2d 744 (Tex. App.—San Antonio 1989, writ denied) 10

Norfolk S. Ry. Co. v. Bailey,
92 S.W.3d 577 (Tex. App.—Austin 2002, no pet.) 1

Owens-Corning Fiberglas Corp. v. Keeton,
922 S.W.2d 658 (Tex. App.—Austin 1996, writ denied) 5

Phillips v. Bramlett,
288 S.W.3d 876 (Tex. 2009) 11, 12

Pierson v. Noon,
814 S.W.2d 506 (Tex. App.—Houston [14th Dist.] 1991, writ denied) 3

Pilgrim's Pride Corp. v. Smoak,
134 S.W.3d 880 (Tex. App.—Texarkana 2004, pet. denied) 4

Placencio v. Allied Indus. Int'l, Inc.,
724 S.W.2d 20 (Tex. 1987) 11

Pojar v. Cifre,
199 S.W.3d 317 (Tex. App.—Corpus Christi 2006, pet. denied) 1

Pool v. Ford Motor Co.,
715 S.W.2d 629 (Tex. 1986), *overruled on other grounds by Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000) 2

Porter v. Nemir,
900 S.W.2d 376 (Tex. App.—Austin 1995, no writ) 7

Pride Petroleum Serv., Inc. v. Criswell,
924 S.W.2d 720 (Tex. App.—El Paso 1996, writ denied) 9

Prudential Ins. Co. of Am. v. Fin. Review Serv., Inc.,
29 S.W.3d 74 (Tex. 2000) 9

Quiroz v. Llamas-Sofora,
483 S.W.3d 710 (Tex. App.—El Paso 2016, pet. abated) 1, 4

Ramos v. Frito-Lay, Inc.,
784 S.W.2d 667 (Tex. 1990) 11

Rhey v. Redic,
408 S.W.3d 440 (Tex. App.—El Paso 2013, no pet.) 12

Sage Street Assocs. v. Northdale Constr. Co.,
863 S.W.2d 438 (Tex. 1993) 7

Serv. Corp. Int'l v. Guerra,
348 S.W.3d 221 (Tex. 2011) 3, 4

Shows v. Man Engines & Components, Inc.,
364 S.W.3d 348 (Tex. App.—Houston [14th Dist.] 2012, pet. granted) 9

Sink v. Sink,
364 S.W.3d 340 (Tex. App.—Dallas 2012, no pet.) 6

Smith Detective Agency & Nightwatch Serv. Inc. v. Stanley Smith Sec., Inc.,
938 S.W.2d 743 (Tex. App.—Dallas 1996, writ denied) 8

Smith v. East,
411 S.W.3d 519 (Tex. App.—Austin 2013, pet. denied) 13

Smith v. Smith,
143 S.W.3d 206 (Tex. App.—Waco 2004, no pet.) 6

Solomon v. Steitler,
312 S.W.3d 46 (Tex. App.—Texarkana 2010, no pet.) 3

Soto v. S. Life & Health Ins. Co.,
776 S.W.2d 752 (Tex. App.—Corpus Christi 1989, no writ) 9

Sparks v. Booth,
232 S.W.3d 853 (Tex. App.—Dallas 2007, no pet.) 5

Standard Fire Ins. Co. v. Reese,
584 S.W.2d 835 (Tex. 1979) 12

State Bar of Texas v. Kilpatrick,
874 S.W.2d 656 (Tex. 1994) 8

State v. Wood Oil Distrib., Inc.,
751 S.W.2d 863 (Tex. 1988) 1

Stephenson v. LeBoeuf,
16 S.W.3d 829 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) 8, 9

Sunl Grp., Inc. v. Zhejiang Yongkang Top Imp. & Exp. Co.,
394 S.W.3d 812 (Tex. App.—Dallas 2013, no pet.) 4, 5

Sutphin v. Sutphin,
971 S.W.2d 739 (Tex. App.—Amarillo 1998, pet. denied) 3

Sw. Country Enters., Inc. v. Lucky Lady Oil Co.,
991 S.W.2d 490 (Tex. App.—Fort Worth 1999, pet. denied) 1

Tex. Comm'n on Human Rights v. Morrison,
381 S.W.3d 533 (Tex. 2012) 11

Tex. Employers' Ins. Ass'n v. Gutierrez,
795 S.W.2d 5 (Tex. App.—El Paso 1990, writ denied) 9

Tex. Indus., Inc. v. Vaughn,
919 S.W.2d 798 (Tex. App.—Houston [14th Dist.] 1996, writ denied) 8

Tex. Prop. & Cas. Guar. Ass'n v. Nat'l Am. Ins. Co.,
208 S.W.3d 523 (Tex. App.—Austin 2006, pet. denied) 5

THI of Tex. at Lubbock I, LLC v. Perea,
329 S.W.3d 548 (Tex. App.—Amarillo 2010, pet. denied) 8, 9

Thota v. Young,
366 S.W.3d 678 (Tex. 2012) 11

Trevino v. Tex. Dep't of Protective & Regulatory Servs.,
893 S.W.2d 243 (Tex. App.—Austin 1995, no writ) 1

United Scaffolding, Inc. v. Levine,
15-0921, 2017 WL 2839842 (Tex. June 30, 2017) 11

Urista v. Bed, Bath, & Beyond, Inc.,
245 S.W.3d 591 (Tex. App.—Houston [1st Dist.] 2007, no pet.) 3

Villegas v. Tex. Dep't of Transp.,
120 S.W.3d 26 (Tex. App.—San Antonio 2003, pet. denied) 5

Volkswagen of Am., Inc. v. Ramirez,
159 S.W.3d 897 (Tex. 2004) 4, 5

Wackenhut Corp. v. Gutierrez,
453 S.W.3d 917 (Tex. 2015) 10, 11

Walker v. Hitchcock Indep. Sch. Dist.,
2013 WL 3771302 (Tex. App.—Houston [1st Dist.] 2013, no pet.) 9

Watts v. Oliver,
396 S.W.3d 124 (Tex. App.—Houston [14th Dist.] 2013, no pet.) 6

Wimberly v. Contractors Bldg. Supply Co.,
2001 WL 893067 (Tex. App.—Corpus Christi 2001, pet. denied) (not designated for publication) 10

Wyler Indus. Works, Inc. v. Garcia,
999 S.W.2d 494 (Tex. App.—El Paso 1999, no pet.) 1

STATUTES AND RULES

TEX. R. APP. P. 33.1 10

TEX. R. APP. P. 33.1(a) 4

TEX. R. APP. P. 33.1(a)(2)(B) 4

TEX. R. APP. P. 33.2 6

TEX. R. APP. P. 33.2(a) 6

TEX. R. APP. P. 33.2(c)(2) 7

TEX. R. APP. P. 33.2(c)(2)(A)-(B) 7

TEX. R. APP. P. 33.2(c)(2)(C) 7

TEX. R. APP. P. 33.2(c)(3) 7

TEX R. CIV. P. 66 8

TEX. R. CIV. P. 67 7

TEX. R. CIV. P. 268 9

TEX. R. CIV. P. 272, 274 10

TEX. R. CIV. P. 274 ..... 10, 11

TEX. R. CIV. P. 276, 278 11

TEX. R. CIV. P. 279 13

TEX. R. CIV. P. 295 12

TEX. R. CIV. P. 301 13

TEX. R. CIV. P. 324 14

TEX. R. CIV. P. 329b(a) 14

TEX. R. EVID. 103 6

TEX. R. EVID. 103(a)(1) 2

TEX. R. EVID. 103(b) 6

TEX. R. EVID. 105(b)(1) 5

TEX. R. EVID. 105(b)(2) 7

SECONDARY SOURCES

Hon. David Keltner & Thomas Wright, *Getting the Charge Right and Charge Error Preservation*, 27th Annual Advanced Civil Appellate Practice Course (Sept. 2013) 10

Anne M. Johnson, *Translating a Jury Verdict into a Judgment*, 26th Annual Advanced Civil Appellate Practice Course (Sept. 2012) 13

8 DORSANEO TEXAS LITIGATION GUIDE § 121.04 (2014) 9

O'CONNOR'S TEXAS RULES, CIVIL TRIALS (2014) 9

PRESERVATION OF ERROR AT TRIAL

I. INTRODUCTION

In the midst of trial, preservation of error may often feel like a distraction. Yet, the moment the jury announces its verdict, and one side walks away unhappy and wondering what to do next, the question of whether error was preserved suddenly becomes everything.

This article was designed to be a simple guide to error preservation that can be included in a trial notebook. It includes step-by-step lists and tips for avoiding error preservation traps. You will probably know many of these rules already, but some are less obvious and apply to situations that arise unexpectedly. Having error preservation checklists on hand in these kinds of unexpected situations can be the difference between winning a future appeal and losing it.

II. PRE-TRIAL

A. Motions in limine

The purpose and effect of a motion in limine are frequently misunderstood.

"A motion in limine is a procedural device that allows parties to identify, prior to trial, certain evidentiary rulings that the court may be asked to make." *Allison v. Comm'n for Lawyer Discipline*, 374 S.W.3d 520, 526 (Tex. App.—Houston [14th Dist.] 2012, no pet.). The purpose of the motion is to prevent opposing counsel "from asking prejudicial questions or introducing prejudicial evidence before the jury without first asking the court's permission." *Id.* Thus, it is "designed solely to require an offering party to approach the bench and inquire into the admissibility of the evidence at issue before introducing that evidence to the jury." *Trevino v. Tex. Dep't of Protective & Regulatory Servs.*, 893 S.W.2d 243, 249 (Tex. App.—Austin 1995, no writ). For this reason, an order granting or denying a motion in limine is not a final ruling on the admissibility of the evidence at issue.

Because of its tentative nature, a ruling on a motion in limine does not preserve error for appeal. *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 866 (Tex. 1988); *Pojar v. Cifre*, 199 S.W.3d 317, 339 (Tex. App.—Corpus Christi 2006, pet. denied). Nor is a motion in limine a prerequisite to a complaint on appeal about the admission or exclusion of evidence. *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963), *superseded by statute on other grounds*; *Bridges v. City of Richardson*, 163 Tex. 292, 293, 354 S.W.2d 366, 367-68 (1962).

To preserve error on appeal, trial counsel must take several additional actions depending on how the trial court rules on the motion in limine.

1. Granted

If the trial court grants the opposing party's motion in limine, to preserve error in the exclusion of the evidence you must:

(1) approach the bench during trial,

(2) formally offer the evidence,

(3) obtain a ruling on its admissibility, and

(4) make an offer of proof, if necessary.

See Sw. Country Enters., Inc. v. Lucky Lady Oil Co., 991 S.W.2d 490, 493-94 (Tex. App.—Fort Worth 1999, pet. denied); *Wyler Indus. Works, Inc. v. Garcia*, 999 S.W.2d 494, 511-12 (Tex. App.—El Paso 1999, no pet.); *Johnson v. Garza*, 884 S.W.2d 831, 834 (Tex. App.—Austin 1994, writ denied).

Remember that if the trial court excludes your evidence during trial, you must also make an offer of proof so that the evidence will be included in the appellate record and the court of appeals may determine whether the exclusion of the evidence was harmful error. *See Quiroz v. Llamas-Sofora*, 483 S.W.3d 710, 722 (Tex. App.—El Paso 2016, pet. abated); *Sw. Country Enters.*, 991 S.W.2d at 493-94; *Wyler*, 999 S.W.2d at 511-12. The procedures for making an offer of proof are discussed in more detail in Part III.C.3.a of this paper.

2. Denied

If the trial court denies your motion in limine, to preserve error in the admission of the evidence at trial you must:

(1) make a timely objection at trial, and

(2) obtain a ruling on its admissibility.

Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963), *superseded by statute on other grounds*; *Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.—Austin 2002, no pet.). Again, if the evidence is admitted without objection, any error is waived on appeal regardless of whether the trial court signed an order prior to trial denying your motion in limine. *See GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 619 (Tex. 1999).

3. Violation

If opposing counsel violates an order granting a motion in limine, you must:

(1) make a timely objection,

(2) request a curative instruction, and

(3) if instructions to the jury could not eliminate the danger of unfair prejudice, move for a mistrial.

See Pool v. Ford Motor Co., 715 S.W.2d 629, 637 (Tex. 1986), *overruled on other grounds by Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000); *Citigroup Global Markets Realty Corp. v. Stewart Title Guaranty Co.*, 417 S.W.3d 592, 604 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Dove v. Dir., State Emps. Workers' Comp. Div.*, 857 S.W.2d 577, 580 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

In most cases, an instruction to the jury to disregard the prejudicial question or evidence will cure any error. Therefore, even after the trial court sustains your objection, the failure to ask the trial court to give the jury a curative instruction will usually result in waiver of any error. *See In re the Interest of B.W.*, 99 S.W.3d 757, 760 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Chavis v. Dir., State Worker's Comp. Div.*, 924 S.W.2d 439, 447 (Tex. App.—Beaumont 1996, no writ).

However, violations of an order on a motion in limine are considered "incurable if instructions to the jury could not eliminate the danger of prejudice." *Dove*, 857 S.W.2d at 580. In these circumstances, counsel need not request a curative instruction, but should instead move for a mistrial.

B. Motion to exclude

Unlike a motion in limine, which preserves nothing for review, a pretrial motion to exclude testimony can preserve a complaint about the admission of evidence. *See Austin v. Weems*, 337 S.W.3d 415, 421-22 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Greenberg Traurig of New York, P.C. v. Moody*, 161 S.W.3d 56, 91-93 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also* TEX. R. EVID. 103(a)(1). "A motion to exclude, in effect, accomplishes the same thing as a running objection: it eliminates the need to repeat the objection each time evidence is admitted on a topic." *Austin*, 337 S.W.3d at 422.

Care should be taken in crafting the scope of the motion to exclude, which should identify both: (1) the subject matter of the objectionable evidence, and (2) the source of the evidence. *Austin*, 337 S.W.3d at 422-25. For example, if a motion to exclude objects to the admission of opinion testimony, but not to written exhibits containing the same opinion, any error in the admission of the evidence may be waived on appeal. *See id.* at 418, 422-25 ("Mrs. Austin's motion to exclude only addressed the expert's opinion in his testimony and two of the five instances his opinion was expressed in the exhibits. She was required to object to each part of the exhibits that contained his opinion to preserve error on appeal."); *but see Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 204 (Tex. App.—Texarkana 2000, pet. denied) (interpreting the scope of a motion to exclude more broadly).

Finally, after preserving error through a pretrial motion to exclude, you should be careful not to inadvertently abandon your prior objection. "An objecting party who preserves error by obtaining a ruling outside the presence of the jury waives any benefit to their objection by affirmatively stating 'no objection' when the evidence is reoffered before the jury." *Austin*, 337 S.W.3d at 425.

III. TRIAL

A. Voir dire

Voir dire is one of the trickier areas for error preservation. Although the procedures for preserving error are well-established by the Supreme Court, those procedures are detailed and not particularly intuitive.

1. Improper restriction of voir dire

To preserve a complaint that a trial court improperly restricted the scope of voir dire, a party must timely alert the trial court as to the specific manner in which it intends to pursue the inquiry. *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 758 (Tex. 2006).

If the trial court determines that a proffered question's substance is confusing or seeks to elicit a pre-commitment from the jury, you must propose a different question or specific area of inquiry to preserve error on the desired line of inquiry. *Id.*

2. Challenges for cause

When challenging a juror for cause, you must show that the juror has a disqualifying bias. The test for disqualifying bias is whether the state of mind of the veniremember leads to the natural inference that he will not or did not act with impartiality. *Id.* at 751.

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: Preservation of Error at Trial

Also available as part of the eCourse
2017 Admiralty and Maritime Law eConference

First appeared as part of the conference materials for the
26th Annual Admiralty and Maritime Law Conference session
"Preserving Error and Navigating Appeals in State Court"