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Preservation of Error at Trial

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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 Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963), *superseded by statute on other grounds*; *Bridges v. City of Richardson*, 163 Tex. 292, 293, 354 S.W.2d 366, 367-68 (1962).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.

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