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Henry B. Rothblatt
Rothblatt, Rothblatt, Seijas & Peskin

David H. Leroy
Rothblatt, Rothblatt, Seijas & Peskin

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By
HENRY B. ROTHBLATT*
AND
DAVID H. LEROY**

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* Chairman of the Criminal Law Section, American Trial Lawyers Association. Co-Author with F. Lee Bailey of the Criminal Law Series, published by Lawyers Co-operative Publishing Company. Mr. Rothblatt writes a nationally syndicated column for the Los Angeles Times Syndicate, "Readers Courtroom." He is a partner in the firm of Rothblatt, Rothblatt, Seijas, and Peskin in New York City. Member of the New York and California Bars.

** J.D. University of Idaho (1971). Currently completing LL.M. degree requirements in Trial Practice and Procedure at New York University. Mr. Leroy is affiliated with the criminal trial firm of Rothblatt, Rothblatt, Seijas, and Peskin in New York City.

INTRODUCTION

Prejudice implanted or stimulated in the minds of jurors wins criminal trials. To the extent of their personal feelings about its effectiveness and ethics, both prosecutor and defense counsel use it.[1]

> The observing juror soon learns that the influence of prejudice must be given attention in every trial at law. It is always present. It is in the jury and must all the time be considered by the jury as affecting in some degree every participant in trial. Any element of proof may be affected by prejudice. This influence must be guarded against by all who give testimony and all who hear testimony. . . .
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> Experience teaches that not every case is decided on the evidence. Prejudice may be a thirteenth juror that controls the decision. . . . *Next to perjury, prejudice, as taken advantage of by the unworthy and as fostered and utilized where bad legal methods prevail, is the main cause of miscarriages of justice.*[2] [emphasis added].

Unfortunately, the destructive forces of prejudice are easily activated. The sophisticated trial attorney can pose questions with such suggestive language and intonation that the jury is prejudicially impressed despite any answer a witness might give.[3] Even knowing that certain evidence or testimony will probably be excluded by the court, an attorney may be inclined to use it. He can reveal its existence to the jury in such a fashion that the offer itself foreshadows the injurious content.[4] In either instance opposing counsel is faced with a tactical dilemma. If he objects to the proceedings then he may only fix the jury's rapt attention upon the material which he seeks to obliterate from the record and their minds. Once aroused, the jurors may form the impression that objecting counsel's client has something to hide as it appears that he is attempting to prevent them from obtaining full infor-

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[1] *See generally* Armstrong, *Objections to Evidence in Jury Trials: A Multiple Review*, 23 TENN. L. REV. 943 (1955) [hereinafter cited as Armstrong]; Note, *Improper Argument to Juries in Civil Cases*, 43 MINN. L. REV. 545 (1959).

[2] A. OSBORN, THE MIND OF THE JUROR, 87, 92 (1937).

[3] Annot., 109 A.L.R. 1089 (1937).

[4] Love, *Pretrial Exclusionary Evidence Ruling*, 1967 WIS. L. REV. 738 [hereinafter cited as Love].

mation and considering evidence which seems logically pertinent.[5]

The traditional "curative" actions taken by the trial judge are not only ineffective and unrealistic, but may actually aggravate the potential harm.[6] Like the objection, a favorable ruling may further emphasize the sensitive inferences. When the court sustains counsel's objection, instructions to disregard the evidence and not to draw inferences or speculate about the content of excluded exhibits are typically given both at the time of the ruling and at the conclusion of the case. For the juror who is anything less than a mental gymnast, these repetitive admonitions may further entrench the prejudicial content of the non-evidence.[7] On the other hand, an attorney may elect to avoid heightening the significance of the injurious material by not objecting at all. However, then the issue of prejudice may be waived and lost for appeal purposes by the failure to offer timely resistence in the trial court.[8] Thus, whether counsel actively resists or passively ignores prejudicial issues as they are raised before the jury, his client may suffer irreparable legal injury. The "motion in liminie" offers some potential for encouraging just jury deliberations by isolating prejudice in criminal trials. Because the burden of proof falls primarily on the state in criminal matters, the major advantage in employing motions in liminie will devolve to defense counsel. Yet in many instances, the prosecutor too will be able to employ this new technique.

I. MOTION IN LIMINIE DEFINED

The motion in liminie is a procedural device which requests a pretrial order enjoining opposing counsel from using certain prejudicial evidence in front of the jury at a later trial. Although it is also referred to as a "motion to exclude" and a "motion to suppress", this motion should be distinguished from certain other well established pretrial procedures which assert that items of evidence or confessions were illegally obtained and therefore inadmissable at trial under constitutional doctrines. The true

[5] I. GOLDSTEIN, TRIAL TECHNIQUE, § 422, at 355 (1935); Davis, *The Motion In Liminie—A Neglected Trial Technique*, 5 WASHBURN L.J. 232, 233 (1963) [hereinafter cited as Davis] and 15 CLEV.-MAR. L. REV. 255, 256 (1966).

[6] Armstrong, *supra* note 1, at 555-60.

[7] *Id.* at 558-59; Rice v. United States, 149 F.2d 601, 604 (10th Cir. 1945).

[8] Armstrong, *supra* note 1, at 560-61.

motion in liminie requests only an evidentiary ruling that the characteristics of a particular piece of evidence give it potentially inflamatory aspects which appear to outweigh whatever materiality it could have at trial. Because of the existence of this severe possibility of irreparable prejudice, the court is generally requested to order that the evidence should not be offered at trial in the presence of the jury, without first obtaining the judge's permission. The motion therefore becomes a procedural device for insulating the jury from the very mention of prejudicial topics.

II. SOURCES OF AUTHORITY

Initially, counsel must consider that the concept of entertaining evidentiary rulings prior to the beginning of trial runs, somewhat counter to traditional Anglo-American legal thought.[9] Any objection made at a point prior to the time that evidence is actually offered during trial is widely regarded as premature. Some authorities feel that only at trial does the judge have a sufficient view of the entire case to properly rule on the admission or exclusion of evidence. Therefore, in urging the adoption of a novel procedural technique, counsel should be prepared to cite authority which validates the concept of pretrial exclusionary rulings. To date no jurisdiction has adopted an express statute or rule recognizing motions in liminie. However, it can be argued that the general catchall provisions of rules authorizing pretrial conferences and orders contemplate the type of "coercive rulings" required by a motion in liminie. Federal Rule of Civil Procedure 16 and its progeny can be so construed.[10] Counsel should check the statutes and rules of his own jurisdiction for like support.

Even those courts which have held that their own comprehensive statutory scheme prohibits considering motions in liminie on certain matters, have recognized that a judge has the inherent and discretionary power to consider some pretrial evidentiary exclusions.[11] This will be the basic argument in most situations. *The power to consider a motion in liminie and make*

[9] Herr, *The Evidence Ruling at Pretrial in the Federal Courts*, 54 CAL. L. REV. 1016, 1022 (1966) [hereinafter cited as Herr].

[10] *Id.* at 1017-22; *but see* Love, *supra* note 4, at 748-50.

[11] State v. Hawthorne, 228 A.2d 682, 688 (N.J. 1967).

pretrial exclusionary rulings is inherent in the judge's authority to admit or exclude evidence and to take such precautions as are necessary to afford a fair jury trial to all parties.[12] In addition those rationales that have been used to justify judicial innovation and rulings in pretrial conferences, motions for summary judgment, and motions to suppress can be used to legitimize the in liminie process.[13]

Counsel can also make persuasive arguments from the limited body of case law precedents which have developed. Although counsel's motion in liminie was rejected therein, the landmark "attempt" appears to be *Bradford v. Birmingham Electric Company.*[14] The earliest reported criminal motion in liminie seems to be the defense maneuver in *State v. Smith.*[15] Some of the criminal precedents are referred to in the several law review discussions on motions in liminie and in an annotation,[16] and most of them are collected later in this article. Even the unfavorable decisions should be of use to inventive counsel, because in some instances the motion in liminie was rejected on grounds that careful drafting and proper argument might overcome.

III. TYPES OF MOTIONS IN LIMINIE

Depending upon the language used and the type of pre-trial order sought from the court, a motion in liminie may be either "prohibitive-absolute," "prohibitive-preliminary," or "permissive."

A. *The Prohibitive Order*

It is the "prohibitive order" which is best developed and most used in criminal matters. Basically, with this device the attorney seeks a court order prohibiting the offering of certain prejudicial evidence to the jury.

Counsel may ask the judge to make the pretrial exclusion in either "absolute" or a "preliminary" form. The preliminary order

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[12] Davis, *supra* note 5, at 234 and 15 CLEV.-MAR. L. REV., *supra* note 5, at 257; Kromzer, *Advantages to be Gained by Trial Motions for the Plaintiff* 6 So. TEX. L.J. 178, 179 (1963) [hereinafter cited as Kromzer]; *see generally* MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, Title 6, Relevancy and Its Counterweights: Time, Prejudice, Confusion, and Surprise, at 314-343 (1954).

[13] *See* Love, *supra* note 4, at 746.

[14] 149 So. 729 (Ala. 1933).

[15] 65 P.2d 1075 (Wash. 1937).

[16] Annot., 94 A.L.R.2d 1087 (1963).

states that a party is prohibited from making or discussing the prejudicial proof in front of the jury, but may still offer the evidence at trial if the matter is brought up first with the court in chambers. The absolute order prohibits a party from offering or mentioning the offending evidence at trial in any way. It is, in fact and in effect, a final ruling of "inadmissability." Model drafts for both absolute and preliminary types of prohibitive motions in liminie are included in the appendix as Forms 1 and 2, respectively.

Most proponents of the motion in liminie favor the use of the preliminary prohibition rather than the final order.[17] As many judges are still reluctant to make pre-trial evidence rulings that are not specifically sanctioned by rule or statute, the tentative phraseology makes the preliminary motion more palatable. It also appeals to the judicial sense of fairness to leave open the possibility that prejudicial evidence may be used if it becomes proper and necessary during the trial to re-establish an equality of advantage with the jury. But most importantly, the use of a preliminary order prevents the creation of built-in reversable error. If the evidence which is excluded on pretrial motion as "prejudicial" later becomes legally relevant and material, then the party who originally wanted to use it may have an automatic ground for appeal built into his case, whereas a final order prohibits him from offering his evidence under any circumstances.[18] However, if the order is only "preliminary", the same party must take affirmative steps to argue that the once "prejudicial" evidence is now relevant and to make an offer to the court outside the jury's presence in order to preserve his grounds for appeal.

The preliminary order has minor drawbacks, however. The preliminary order, because of its tentative nature, may be viewed as an improper, advisory opinion in those jurisdictions which prohibit the judiciary from ruling on all but final questions. Where the preliminary order is employed, a party who urges the use of the suspect evidence has both the opportunity to advance his arguments twice, and the opportunity to strengthen his second presentation by additional research and strategy before trial. Despite these disadvantages, the "preliminary" form is

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17 Kromzer, *supra* note 12, at 185-186.
18 *Id.*

clearly the more advantageous type of prohibitive motion in liminie.

B. *The Permissive Order*

There is no reported precedent for a pretrial motion which would have contested evidence declared "admissible".[19] Nevertheless, the motion in liminie procedure easily lends itself to the prosecutor or defendant who wishes to avoid committing reversable error at trial by submitting a possible prejudicial strategy or piece of evidence to prior judicial scrutiny. In this way, the moving party can avoid allegations of surprise and formally seek court advice on how a delicate issue might best be controlled at trial to avoid both mistrial and new trial on appeal. An example of the "permissive" type of motion in liminie will be found in the Appendix, as Form 3.

IV. MOTION IN LIMINIE OBJECTIVES

The proper use of a motion in liminie contemplates the achievement and interrelation of five objectives:

A. *Isolation of the Prejudicial Evidence From the Jury*

First, and foremost, the motion must be employed to accomplish the primary purpose of preserving neutrality in the mental processes of the jury by preventing any trial references to the injurious material. Counsel should anticipate prejudice in as many areas and by as many tactics as can possibly damage his position, and make his attempts to suppress correspondingly.

B. *Maximum Discovery*

The motion in liminie can be used as a probe to determine the specifics of any part of opposing counsel's case that can be hypothecated to contain potentially prejudicial evidence. By directing a pretrial prejudice attack toward a sensitive area, an adversary can be forced to disclose not only what evidence he has, but also the rationales and theories upon which he intends to proceed at trial to make that evidence material and relevant to his case.

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[19] Herr, *supra* note 9, at 1024.

C. *Force Opponent Elections*

Because the opportunity to present certain evidence during trial may be foreclosed by a motion in liminie, the opposing attorney is forced to make evaluations and elections. Depending upon the strength of his entire case, a decision not to resist the motion and not to use the prejudicial evidence at trial may spring from a sense of "fair play". Or the attorney may become so aggressive and insistent about his right to use the prejudicial evidence, that he commits reversable error at trial with material that he otherwise might not have offered. Any explanation of the basis and relevancy for which the contested evidence will be offered can be considered a limiting commitment, regardless of which way the judge rules on the pretrial motion. Any use of that evidence for other purposes by the opposition will give counsel an opportunity to advance the argument of unfair surprise, and a chance to re-present his contentions of prejudice.

D. *Preserve Record for Appeal*

Again, whichever way the court rules, the attorney urging prejudice is in a much stronger position when he initiates his resistence through pretrial motion in liminie. A favorable prohibitive order will indicate that a trial level judge felt that the evidence was so strongly inflamatory that its very mention should have been suppressed to insure fairness at trial. Any direct or indirect violation of the order thus becomes more persuasively reversable error. Or if his motion was denied, counsel can argue that the trial was tainted from the start by the implicit permission of the trial judge to parade prejudice in front of the jury. That a potential for prejudice should be recognized well before the trial began further strengthens the position that it should be regarded as reversable error.

E. *Obtain Favorable Guilty Plea Offers*

Both the prosecution and defense can use success in a motion in liminie to persuade the opposition to accede to a guilty plea on terms more favorable than the prevailing party might otherwise be able to demand before trial. The defendant who knows that prejudicial evidence will probably be offered against him will consider pleading to a higher than normal sentence to avoid unfavorable jury reactions at a trial. The defendant who has

successfully shown the prosecution that some of the state's evidence may be inadmissibly prejudicial is in a strong position to demand favorable plea bargaining terms.

V. STRATEGY IN OFFERING

Keeping in mind his basic objectives, the attorney should isolate the potential prejudicial issues that he may face under the facts of his case. A shotgun approach is not advised. The motion has the greatest chance of success if it attacks a limited number of items, all of which would be reasonably prejudicial and not merely harmful to the case. Unless the movant can show a reasonable basis which compels this unusual pretrial ruling, it is the feeling of experienced trial attorneys that the judge will be inclined to reject the motion.[20] To include items of evidence that will not truly create prejudice if offered will give opposing counsel additional ammunition for his argument that trial evidence should not be restricted by a pretrial ruling. In cases where a large number of potentially prejudicial issues exist, the attorney may wish to include in his motion only the most complex, and those which present the greatest threat of causing delay during trial. Only issues which must be decided before trial to preserve the essential fairness of the proceedings should be raised by motion in liminie.[21]

Counsel should also consider whether the peculiar circumstances of his case make "permissive" or "absolute" forms of the motion more desirable than the typically sought "preliminary-prohibitive" order. If he has evidence which emphatically refutes the opposition's prejudicial material or places it in a proper perspective, the attorney may wish to seek a "permissive" order from the court to allow his offer if the opposition introduces its evidence at trial. If the attorney is convinced that any oral objection whatsoever to the prejudicial material will condemn his cause before the jury, he may wish to move for an order in "absolute" form. Counsel may then gamble by relying on built-in error if his motion is denied. However, absent any special circumstances, the "preliminary-prohibitive" order should be sought.

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[20] Kromzer, *supra* note 12, at 185.
[21] *Id.* at 185; Love, *supra* note 4, at 751.

The attorney must also be very careful in drafting the language of the motion and order. The terminology must be general enough to prohibit the opposing party from invoking the same prejudice in a roundabout manner, yet at the same time specific enough to warn the opposition of tactics and references which will not be permitted.[22] However, it is not necessary that the order be overly formal or all inclusive to be used as the basis for an appeal.

Counsel should also be careful not to strengthen the case against himself by indiscreet use of the motion in liminie. Overbroad attacks may suggest the availability of types of evidence that the opposition had not previously contemplated using or understood to be available. Opposing counsel may feel compelled to resist the motion and thereby commit himself to use evidence at trial that he otherwise would not have presented. The attorney should also avoid the tendency to neglect other well established pretrial motions which ultimately may be of greater value to the client's cause if properly pursued.

The timing of the offer of a motion in liminie can be important in advancing counsel's cause. The motion in liminie should be presented as part of a coordinated pattern of preliminary maneuvers, and might be combined with one or more other pretrial motions. However, care must be taken to preserve the idea that the threat of prejudice is so significant that it merits the court's separate and well-considered pretrial ruling. A motion offered well before trial may catch the opposition off-guard and relatively unprepared to argue that a particular piece of evidence is relevant and necessary to its case. A "preliminary" motion offered too early may give opposing counsel more than enough time to research and restructure his case in such a way that the once "prejudicial evidence" can be given a posture of legal relevancy which requires its admission. For the attorney who is interested in obtaining a favorable guilty plea opportunity, the motion should be offered or threatened at the time when the attorney would ordinarily begin negotiation.

Where it appears to counsel before trial that his motion in liminie is about to be rejected by the judge, he may suggest several

[22] State v. Morgan, 73 P.2d 745 (Wash. 1937); Bridge v. City of Richardson, 349 S.W.2d 644 (Tex. Civ. 1961), *aff'd*, 354 S.W.2d 366 (Tex. 1962).

alternatives to the court. If the court feels compelled to deny the motion, counsel might request that it be done without prejudice to represent it at a later time. Or if the court seems to be unimpressed with the need for making pretrial evidentiary rulings, counsel might ask the trial judge to defer a ruling until trial, subject to the stipulation that the evidence shall then be first presented outside the jury's presence. The moving attorney could also request that if the motion is denied, opposing counsel be required to submit a list of proposed questions in the sensitive area so that the prejudice and surprise might be fairly answered at trial.

VI. INITIAL SHOWING REQUIRED

Counsel must consider the type of evidence he seeks to exclude by a "prohibitive" motion in liminie and place it into one of two classes.

Material That Would Be Inadmissable At Trial Under Established Rules Of Evidence, And The Mere Offer Of Which Before The Jury Will Create Prejudice

The attorney in this situation is facing tangible evidence or testimony which clearly would be inadmissable if offered during trial under evidentiary rules such as those on hearsay, best evidence, or privileged communications. But he cannot wait until trial to voice his objection if he wishes to avoid poisoning the jurors' minds with the prejudice. Counsel must direct the court's attention to a particular rule of evidence under which the suspect material would be inadmissable at trial for the particular purpose opposing counsel intends to use it. Any exclusionary rule recognized in the jurisdiction can be used. Then counsel must show that the prejudice which naturally flows from the mere mention of this evidence requires that an initial ruling on its admissability be made away from the jury. Because the rules of evidence are relatively fixed, the attorney can argue that the judge's ruling will not generally be affected by the circumstances of the trial, as a definite rule requiring the exclusion of the evidence. Little or no balancing of interests is involved. All counsel requests is an ordinary exclusionary ruling based solely on established rules of evidence, but made in advance of trial to eliminate a potentially unfair situation.

Material, The Minor Relevance Of Which Is Outweighed By Its Potentially Prejudicial Effect On The Jury

"Logical relevancy" means that an item of evidence tends to establish a proposition for which it is offered to prove.[23] But at trial the judge must be concerned with the overall "legal relevancy" of a particular piece of evidence. It must have sufficient probative value to shed some light on the subjects under inquiry and be *prima facie* admissible.[24] To the extent possible, counsel should argue that the prejudicial evidence is not relevant to any material issues in the case and should therefore be excluded. However, most of the prejudicial evidence that counsel is able to anticipate during the pretrial stages will probably have some logical and legal relevance.

> But relevance is not always enough. There may remain the question, is its value worth what it costs? There are several counterbalancing factors which may move the court to exclude relevant circumstantial evidence if they outweigh its probative value. In order of their importance, they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility, or sympathy. Second, the probability that the proof and answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter proof will consume an undue amount of time. Fourth, the danger of unfair surprise to the opponent when, having no reasonable ground to anticipate this development of the proof, he would be unprepared to meet it.[25]

Counsel should concentrate his attack in those areas. Obviously, the trial judge will always be in the best position to balance the intangibles of probative value and prejudice as they exist at the point in time when the evidence is finally offered. Therefore the attorney in making a motion in liminie must argue that the probable dangers of the evidence he seeks to exclude will outweigh its probative value in *every circumstance* which might develop at trial. Although this balancing is done of necessity on

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[23] MCCORMICK, *supra* note 12, at 315.
[24] *Id.* at 319.
[25] *Id.* at 319-320 (footnotes omitted).

a case by case, item by item basis, there are certain areas in which litigation has developed firm rules of precedent regarding the relevance of prejudicial evidence.[26] Where these decisions hold certain types of evidence inadmissable in a given situation, they may be used in the same fashion as are the formal exclusionary rules of evidence for the first type of material. Outside their controlling jurisdictions these rulings can be cited as persuasive authority in such matters as proof of character, other crimes, personal habits, or prior convictions.

An explanation of the following elements should be made in support of every motion in liminie:

(1) Reasons that indicate that the case is ready for and will be proceeding to trial.

(2) What the basic, relevant issues will be judging from the general nature and specific circumstances of the case.

(3) That opposing counsel's conduct to date and other discovered facts suggest that it is eminently probable, not merely speculative, that a presentation of the contested evidence at trial is intended.

(4) What specific content, items, and inferences are sought to be excluded, and the specific ways in which any reference will inflame the passion, prejudice, hostility, sympathy or illogic of the jury, cause confusion, or consume an inordinate amount of time.

(5) The respects in which this foreseeable jury reaction will result to the detriment of the moving party's right to a fair trial.

(6) That the certain matter or testimony is:

(a) Inadmissible under the exclusionary rules of evidence and to permit its offer at trial will raise the specified prejudice; or

(b) Of such minor legal relevance that the jury prejudice it will create either outweighs its probative value or places it in a class of prejudicial evidence that has been ruled generally inadmissable by the courts.

(7) That to delay hearing the objection until the contested matter is mentioned, shown, or offered in front of the jury would

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[26] *Id.* at 320; Love, *supra* note 4, at 752.

permit the prejudicial effects to be felt by the jurors and endanger a fair trial.

(8) That therefore, the granting of the movant's motion in liminie, to absolutely exclude the evidence, or preliminarily require that any offer be brought up first with the court alone, is an appropriate method of preserving the fairness of the trial and isolating the jury from prejudice.

If counsel is seeking a "permissive" order to have the court endorse and control what might otherwise be a reversably improper procedure which he contemplates making at trial, his arguments will be similar. He should outline the specific tactic that he wishes to employ and explain the reasons that compel its use. The attorney should then cite whatever rules or precedents hold that the procedure he proposes is improper, and examine the rationales behind them. Even if no rules exist, counsel should examine the sources of potential prejudice to the opposition and suggest how the injurious features might be minimized. Summarizing his contention that the particular need in this case for the unusual evidence or procedure outweighs the reasons requiring exclusion in ordinary circumstances, the attorney should plead that fairness demands that he be permitted to employ his tactic under court-supervised conditions.

VII. POSSIBLE EXCLUSIONARY AREAS IN CRIMINAL TRIALS

Most of the recent development which motion in liminie practice has experienced has been confined to the field of civil practice. But by analogy from those cases, and from the few criminal precedents, the attorney can observe certain areas in which motions in liminie are appropriate. Although the holdings in some of the cases have been against using pretrial exclusions, other cases have endorsed the practice as appropriately suited to the needs of modern criminal justice. The following is a checklist of exclusionary areas toward which the motion in liminie and related motions might be directed in criminal trials, with both favorable and unfavorable criminal precedent noted where applicable. A few civil cases are also included. The guideline is not offered or intended as all-inclusive. Only the inventiveness of counsel will limit the number of areas in which the motion in liminie may be legitimately applied.

A. *Pleadings*

The defendant can move to expunge unnecessary allegations in the indictment or complaint which might permit the admission of improper evidence. In a civil case, *Morico v. Cox*,[27] the failure of the trial court to expunge was not regarded as reversible error.

B. *Status of Defendant or Witness*

1. *Drug addiction, alcoholism, violence, or personal habits*—Where unrelated to the trial issues or a witnesses' ability to perceive and testify, a motion in liminie can prevent the introduction of these prejudicial distractions. In the civil case of *Doyle v. City of New York*,[28] counsel moved to exclude that part of a hospital record which attributed a drug and alcohol history to the plaintiff and was based solely on hearsay. Though the motion was presumably made at trial and not "in liminie," the reviewing court held that the judge's refusal to grant the proper motion coupled with opposing counsel's continued prejudicial insinuations about the plaintiff's supposed status constituted reversible error.

2. *Marital, economic, or health status*—In *State v. Flett*,[29] the trial court committed no error in refusing to grant the defendant's motion to prevent testimony on her marital indiscretions from being heard by the jury, where she was charged with killing her husband. However, when the district attorney proved remote acts of indiscretion unrelated to the murder issue, the conviction was reversed.

3. *Military release status—State v. Smith*,[30] reports the earliest successful use of a motion in liminie at trial in a criminal case. Just after the defendant had completed his direct testimony on the stand, but before cross-examination had begun, defense counsel informed the court in the absence of the jury that the defendant had received a less than honorable discharge from the Marine Corps. Stating that he believed the prosecutor improperly intended to examine the defendant about that fact, counsel then moved that the court direct the state to make an offer of proof thereon outside the presence of the jury if that line of questioning was to be pursued. The court so ordered after argument. The

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[27] 56 A.2d 522 (Conn. 1947).
[28] 119 N.Y.S.2d 71 (1953).
[29] 380 P.2d 634 (Ore. 1963); Annot., 94 A.L.R.2d 1082 (1963).
[30] 65 P.2d 1075 (Wash. 1937).

jury was allowed to return and without making any offer the prosecutor proceeded to ask a question which elicited the forbidden information. Defense counsel did not object, move to strike, or request a jury instruction to disregard. On appeal with five of nine judges concurring in the result, the court stated:

> In propounding the question, counsel clearly violated the ruling of the court theretofore made. The question was highly prejudicial and of such a nature that the prejudice largely consists in the mere asking of the question. The fact that the question was not objected to is not controlling. It may well be that an objection to such a question, even though sustained, is more damaging to a defendant's case than almost any answer could be. Neither under the circumstances shown by this record was a motion to strike the answer and instruct the jury to disregard the same necessary. In any event, in view of the deliberate disregard by counsel, of the court's ruling, prejudice must be presumed, and appellant's motion for a new trial should have been granted.[31]

4. *Race, religion*—Motions in liminie in this area might be coordinated with other procedural techniques recommended by Charles R. Garry.[32]

C. *Criminal Involvement of Defendant or Witnesses*

To the extent that they are not related to the offense on trial, demonstrative of a common scheme, design, technique or pattern of crime, or reflective of a witness's ability to perceive and recollect, the following might also be attacked by motion in liminie.

1. *Arrests not resulting in conviction*—In a grand larceny trial, *State v. Morgan*,[33] the defense attorney requested outside the jury's presence that the prosecutor be required to advise the court in advance as to any questions which he intended to ask or testimony which he intended to offer relating to the defendant's previous arrests. Especially where counsel's request was very vague, indefinite and general in nature, a denial of the motion

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[31] *Id.* at 1078.

[32] Mr. Garry's recommendations appear in the 1969 National Lawyers Guild publication, MINIMIZING RACISM IN JURY TRIAL.

[33] 73 P.2d 745 (Wash. 1937).

in advance of the actual offering of the evidence at trial was held to be within the sound discretion of the judge.

2. *Felony charges upon which no true bill is returned*—In a Texas case, *Padgett v. State*,[34] the prosecutor produced testimony which tended to implicate the defendant in crimes more serious than the intoxicating driving with which he was charged. Despite the fact that the court ruled before trial upon a motion in liminie that no allusions to any matter upon which the defendant was not indicted or convicted should be made at trial, the state's acts were harmless error when the defense attorney revealed to the trial jurors that a grand jury had refused to return a true bill on the other offenses.

3. *Indictments pending against a witness*—No error was found where the state obtained an order by pretrial motion in liminie prohibiting defense counsel from asking a state witness any questions about federal indictments pending against him, without first approaching the subject outside of the jury's hearing. The defense counsel conducted an examination before the court alone as to promises of aid and assistance on the federal case by the state district attorney in exchange for his testimony against the defendant. When the witness denied all allegations, the topics discussed in the examination were held properly kept from the jury's attention in *Scarborough v. State*.[35]

4. *Prior convictions*—A motion in liminie to prevent the raising of a conviction so remote in time (7 years and 3 months) as to be unenlightening and prejudicial was rejected in *Arrington v. State*.[36] In *United States v. Palumbo*,[37] the defendant advised the trial court of five earlier convictions and requested an order preventing the prosecutor's use of them at trial arguing that they were unrelated to credibility and too remote in time. When the court ruled that his prior record would be admissible, the defendant elected not to take the stand. The United States Second Circuit Court of Appeals, in affirming the conviction, stated that a judge might prevent prior conviction testimony if he finds that

[34] 364 S.W.2d 397 (Tex. 1963).
[35] 344 S.W.2d 886 (Tex. 1961).
[36] 296 S.W.2d 537 (Tex. 1956).
[37] 401 F.2d 270 (2d Cir. 1968).

a substantial chance of unfair prejudice outweighs a slight reflection on the defendant's credibility.

A county court in *State v. Hawthorne*,[38] concluded that the suppression of remote convictions was proper and that a motion in liminie before trial was the preferable mode of raising the issue. However, the New Jersey Supreme Court, in the same case[39] disagreed. Rejecting the earlier view that the New Jersey statutory scheme permitted the discretionary rejection of such testimony, the court stated that evidence of prior convictions could not be subject to an objection determined in advance of trial. However, the appellate court did recognize that under some circumstances a motion in liminie might be directed at a judge's discretion before trial, although the alternative procedure of simply discussing an offer of proof after dismissing the jury was the ordinary and desirable practice.

5. *Prior payment of fine, forfeiture of bond.*

6. *Prior similar criminal acts*—In *Johns v. State*,[40] the defendant offered a pretrial motion to preclude the state from offering evidence of any acts of intercourse occurring prior to the incident of statutory rape on trial. The court held that a trial judge properly refused to rule on the motion, because he had no way of knowing whether the evidence would be admissable at trial. The court also felt that the state had the right to prove its case in any manner which was proper under the rules of trial, and that the defendant should not be allowed to control the manner or method of proof made by the prosecution. The Oregon Supreme Court in *State v. Flett*,[41] held that the denial of a motion in liminie which sought to prevent evidence of prior adulterous contacts was within the trial court's discretion, but reversed a murder conviction when the state went too far in proving remote acts of marital indiscretion unrelated to the crime on trial.

D. *Events Contemporaneous in Time With the Crime Charged*

1. *Acts related in time, but not part of the res gestae—Johns v. State*,[42] on the ground that evidentiary evaluations could not

[38] 218 A.2d 430 (N.J. 1966).
[39] 228 A.2d 682 (N.J. 1967).
[40] 236 S.W.2d 820 (Tex. 1951).
[41] 380 P.2d 634 (Ore. 1963).
[42] 236 S.W.2d 820 (Tex. 1951).

properly be made before trial and that other acts were inseparable from the crime charged, held that a motion in liminie seeking to prevent the admission of evidence of acts of perversion not part of the statutory rape *res gestae* was properly denied.

2. *Acts of persons other than the defendant*—Counsel might be able to shield his defendant from trial references to acts with prejudicial overtones committed by other perpetrators through a properly drawn motion in liminie.

3. *Acts committed upon persons not the complainant in the charge on trial*—The defendant in *Bills v. State*,[43] was charged with committing sodomy upon a young boy. The Texas court denied his pretrial motion to prevent testimony about similar acts perpetrated upon two other boys at the same time. A majority of the appellate court found no reversible error, as the acts were all bound into the *res gestae* of the crime, and as the court felt that a motion in liminie was not the proper mode of seeking exclusion in this instance.

E. *Tangible Evidence*

1. *Property unrelated to the crime charged but found on the defendant's person*—In *Arrington v. State*,[44] defendant moved in liminie to exclude tools, shotgun, shells, and miscellaneous items found in the trunk of his car but not listed in the indictment upon which he was being tried. He urged that such evidence prejudiced him by giving the jury an impression that he was a thief "generally." The Texas court held no error flowed from the denial of the request, as the "motion to suppress" is not recognized in Texas criminal procedure, and as the defendant did not request a motion to strike or any curative jury instructions.

Although *Gasaway v. State*,[45] concerned a motion to suppress based on an illegal search, instead of a true motion in liminie, it is instructive on the prejudicial aspects of tangible evidence. The defendant's pretrial motion to suppress evidence obtained in an automobile search by police was denied. At trial the defense unsuccessfully objected to certain oral testimony and to the physical display of the contested articles on a table in front of the

[43] 327 S.W.2d 751 (Tex. 1959).
[44] 296 S.W.2d 537 (Tex. 1956).
[45] 231 N.E.2d 513 (Ind. 1967).

jury. Later during the trial, the court reversed itself suppressing the tangible evidence, but allowing the case to go to the jury without the curative instructions requested by the defendant. Reversing the conviction and remanding for a new trial, the Supreme Court held that the consideration of such matters at a pretrial hearing was much preferable to the unsatisfactory situation which had developed in front of the jury.

2. *Property not connected to the defendant*—In *State v. Schleicher*,[46] the Missouri court said in *dicta* that on a proper pretrial motion stolen property which had no demonstrated connection with a particular defendant should be excluded as evidence against him in any later trial.

3. *Incomplete evidence*—The Federal District Court for the Southern District of New York in *United States v. Fishel*,[47] considered a situation in which two or three separate tape recordings of the defendant's alleged bribery attempt conversations had been misplaced. The defendant moved in liminie to prevent the government from placing the one remaining tape into evidence at trial. Agreeing that the jury was likely to be prejudiced against arguments urging an entrapment defense if they were permitted to hear only the remaining tape, the court felt compelled to exclude the evidence to preserve the defendant's right to a fair trial.

4. *Hearsay evidence*—That portion of a hospital record based on hearsay statements about a plaintiff's history of alcoholism and drug addiction was prejudicially admitted over defendant's motion in the civil case of *Doyle v. City of New York*.[48]

5. *Statements of the defendant or a witness*—An attempt by pretrial motion to exclude statements made by the defendant to police and an assistant prosecutor was rejected in *People v. Simpkins*,[49] where no constitutional issues of illegal search and seizure or voluntariness were raised.

F. *Procedural Events*

1. *To prevent the calling of certain witnesses—Whan v.*

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[46] 438 S.W.2d 258 (Mo. 1969).
[47] 324 F.Supp. 429 (S.D.N.Y. 1971).
[48] 119 N.Y.S.2d 71 (1953).
[49] 243 N.Y.S.2d 839 (1963).

State[50] was a murder prosecution in which the defense requested that the victim's wife be called and examined first outside the presence of the jury. The defendant argued that he should be spared the prejudice and sympathy that the woman's crippled condition and inability to walk unassisted would create if she proved to have no material and relevant testimony. Despite counsel's contentions that she did not witness the crime and her presence could only inflame the jury, the reviewing court held that the motion was properly denied where she identified three of the decedent's personal belongings. A concurring judge felt this testimony was "irrelevant, immaterial, and possibly inflamatory" but insufficient alone to require a reversal of the conviction.

In *Ortega v. State*,[51] the Texas trial court's refusal to grant a motion to exclude certain witness testimony or to limit the number of witnesses against the defendant at the punishment stage of trial, was proper where the court also prevented the jury from hearing any reference to other offenses committed by the accused.

2. *To prevent any reference to press publicized matters*—An unofficial report of *Huff v. N. Y. Cent. R.R.*,[52] states that the court made a pretrial order prohibiting counsel for either party from mentioning during trial any of certain extraneous matters that had received great publicity in the media and were potentially prejudicial to the defendant.

3. *To exclude the public from trial on motion*—Where the defendant believes that the presence of the public press reporting of the evidence adduced might have a coercive effect on the jury or otherwise hamper his right to a fair trial, a motion in liminie waiving the constitutional right to a public trial and requesting a closed hearing should be proper.

4. *To permit the employment of unusual tactics*—Requesting court control and advice to permit unusual but necessary procedures while minimizing the chance of mistrial or reversal, is the proper scope of the "permissive" motion in liminie.

VIII. THE EFFECT OF GRANTING OR DENYING THE MOTION

The courts are also divided about the procedural effects of a

[50] 438 S.W.2d 918 (Tex. 1969).
[51] 462 S.W.2d 296 (Tex. 1970).
[52] 186 N.E.2d 478 (Ohio 1961); discussed in 12 DEFENSE L.J. 310 (1963).

motion in liminie. It is clear, however, that regardless of whether a motion in liminie is made or not made, granted or denied, worded too broadly or too narrowly, a timely and specific trial objection will preserve any evidentiary issue for appeal. But where a party fails to make either a pretrial or at-trial objection to certain evidence he may be deemed to have waived the right to object.[53] If a "preliminary" order has been granted, then opposing counsel has the right to attempt to bring in the excluded evidence, so long as he makes his offer before the court alone. If the order which has been granted is in "absolute" form, then counsel may not offer or allude to the evidence in any manner during trial. When either type of motion in liminie is granted it may be reversible error for the court to disregard its own order and to permit reference to or introduction of the excluded evidence in the jury's presence.[54] The presentation of excluded matters to the jury directly, by suggestion, by the wording of a question, or other indirection is a violation of professional legal standards.[55]

Under one view the judge must take such affirmative action on his own initiative as is necessary to preserve the effect of his pretrial ruling.[56] Another view suggests that it is incumbent upon the movant to object at trial if the opposing party attempts to obviate the order.[57] In some circumstances a court may overrule the pretrial exclusionary order and permit the objectionable matter into evidence at trial.[58] Counsel must also be careful that he does not waive his objections or cure reversible error by elicting testimony or producing evidence which eliminates the prejudice created by the violation of the court order.[59] The attorney may also open the door to admitting evidence excluded by pretrial order if he himself makes any remarks alluding to the missing evidence and thereby creates the counter-prejudicial impression that the opposition may be hiding evidence.[60]

Should it become apparent during trial that opposing counsel

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53 Henry v. State, 198 So.2d 213 (Miss. 1967).
54 State v. Smith, 65 P.2d 1075 (Wash. 1937).
55 Burdick v. York Oil Company, 364 S.W.2d 766 (Tex. 1963).
56 *Id.* at 770.
57 Padgett v. State, 364 S.W.2d 397 (Tex. 1963).
58 *Id.* at 400.
59 *Id.*
60 United States v. Fishel, 324 F.Supp. 429 (S.D.N.Y. 1971).

is attempting to touch upon the forbidden subjects in the jury's presence, the soundest tactic is for counsel to approach the bench and object on the record but out of the jury's hearing. By protesting immediately and requesting that the offending attorney be admonished, counsel not only preserves the maximum effect of his pretrial order, but also insures his rights on appeal. If it becomes apparent that evidence excluded by an absolute pretrial order has become legally relevant and material, counsel should evaluate the desirability of requesting that the court reverse itself to prevent the possibility of built-in reversible error on appeal for the opposition. This procedure is not necessary if counsel has had a preliminary form of motion granted, as the opposition is required to take the initiative to re-offer the evidence at trial and has no automatic error.

The denial of a motion in liminie of either prohibitive type forces counsel to object at trial when the opponent again begins to refer to the prejudicial material. This objection, too, should be made unobstrusively and immediately at the bench on the record, but in a voice inaudible to those in the jury box. Courts have suggested that the attorney whose motion in liminie has been denied should not be required to object at trial to preserve his rights on appeal.[61] However, counsel ordinarily cannot afford to remain silent and take the risk that an appellate court will rule that a renewal of his objection was required to avoid waiving the issue of prejudice on appeal.[62] Objections should be entered at appropriate opportunities as necessary to preserve the record while drawing as little jury attention to the sensitive subject as possible.

IX. DISADVANTAGES OF MOTIONS IN LIMINE

The practice of employing motions in liminie is not without some drawbacks. It can be argued that the pretrial consideration of evidence questions makes efficient and just criminal adjudication more difficult. First, rulings in liminie can never be totally accurate in balancing the probative and prejudicial values of a piece of evidence which is best evaluated in the total trial context. The criminal trial becomes more "piecemeal" because of an in-

[61] State v. Smith, 65 P.2d 1075 (Wash. 1937).
[62] Jackson v. State, 133 S.E.2d 436 (Ga. 1963).

crease in the number of separate issues being considered at different times. This may lead to an increase in the overall time required to try a given case, where evidentiary issues that may not even arise at trial are given extensive pretrial scrutiny. In cases where the court's pretrial ruling was improper and prevented an attorney from developing evidence which later became material and relevant, the absolute motion in liminie may lead to built-in error and an increase of new trials on appeal.

The use of motions in liminie also present some minor conflicts with various theoretical concepts of criminal justice administration. To decide certain prejudicial questions in advance, the court may be required to assume that an attorney would try to present illegal, incompetent, and irrelevant material to a jury in an inflamatory manner. The juristically-innovated motion in liminie may be regarded as a judicial encroachment on the power of the legislature in certain states where it is not found within a comprehensive and express statutory delineation of pretrial procedures. The revealing of sensitive matters of the opposition's evidence well before trial could lead to fraud in the fabrication of countering testimony.

Finally, the attorney himself should have some second thoughts about the motion. Counsel's indiscriminate use of the technique could damage his own case by suggesting proof that opposing counsel had not considered. If the attorney does not then prevail on his motion he has only succeeded in strengthening the case against himself. By relying on novel rather than tested procedures, counsel may suffer an inadvertent forfeiture of his client's right through minor oversights or unfavorable appellate review.

X. ADVANTAGES OF MOTIONS IN LIMINIE

The advantages of motion in liminie practice are significant and persuasive. The pretrial consideration of prejudicial evidence problems speeds, simplifies, and purifies the process of obtaining just criminal verdicts. As the trend favoring other pretrial discovery and proceedings suggests, the concept of a bifurcated trial may save time overall by minimizing the consideration of collateral issues and preventing extensive delays during trial. Thus, during trial both judge and jury are able to concentrate upon the main dispute. Because it refines the actual trial issues

and prevents the parading of prejudice before the jury, a motion in liminie might also cut overall judicial involvement by eliminating a significant number of reversible error situations which might otherwise compel mistrials and new trials on appeal. Any increase in the time spent on an individual case may be well invested as it could mean a more careful consideration of complex issues.

Perhaps more importantly, the pretrial ruling replaces the ineffective, unrealistic and psychologically invalid admonitions to the jury. It offers a simple and completely efficacious method of preserving fair trials by isolating the jury from prejudicial inferences. The motion in liminie takes account of human nature and basic psychology. It assumes that a fair trial should not be sacrificed to empty formalism. Because a party is not required to object to the airing of evidence which seems logically relevant to the jurors, he does not suffer from appearing to be hiding the truth. Counsel is not forced to choose between permitting a prejudice to be planted by opposing counsel or stimulating it by his own objections. If granted, a motion in liminie preserves judicial fairness even as to those issues of prejudice which may not amount to reversible error because it keeps minor as well as major improprieties from being considered by the jury. Where the motion in liminie is used, every party can obtain a better idea of the sensitive aspect of testimony that may be offered against him and can better prepare to place it in proper perspective by introducing countering evidence. If a motion in liminie is used, counsel is better able to describe the extent to which prejudice may have influenced the outcome because he has formal pretrial proceedings, as well as the trial record, from which to document his allegations. Thus, the motion in liminie can do much to enhance the quality of justice in both trial and appellate courts. The motion in liminie will be an effective device for removing the spectre of prejudice from the jury box if criminal practitioners will encourage its appropriate use and orderly development.

APPENDIX

Form 1. *Prohibitive Absolute Motion in Liminie*

COMES NOW THE DISTRICT ATTORNEY IN THE ABOVE ENTITLED CASE AND MOVES THE COURT IN LIMINIE for

an order instructing the Defendant to refrain absolutely from making any direct or indirect reference whatsoever in person, by counsel, or through witnesses, to the specified evidence or defenses on the following grounds:

1. The case has now been set for trial.
2. According to the indictment the trial will involve a determination of these basic issues:
3. The State is informed, believes and hence alleges that at said trial the Defendant will attempt to introduce evidence, make reference to, or otherwise leave the jury with the impression that. . . .
4. It is immaterial and unnecessary to the disposition of this case and contrary to the defenses recognized by law in this state to permit such evidence or inference and would be highly prejudicial to the State in the minds of the jury in that . . . .
5. An ordinary objection during the course of trial even if sustained with proper instructions to the jury will not remove such effect in view of . . . .

WHEREFORE THE STATE PRAYS this Court to exercise its discretion and make an order ABSOLUTELY PROHIBITING said offer, or reference.

Form 2. *Prohibitive Preliminary Motion in Liminie*

COMES NOW THE DEFENDANT IN THE ABOVE ENTITLED CASE AND MOVES THE COURT IN LIMINIE for an order instructing the District Attorney, his representatives and witnesses to refrain from making any direct or indirect mention whatsoever at trial before the jury of the matters hereinafter set forth without first obtaining permission from the Court outside the presence and hearing of the jury.

This Motion is made upon the following grounds:

1. The case has now been set for trial.
2. According to the indictment the trial will involve a determination of these basic issues:
3. The Defendant is informed, believes and hence alleges that at said trial the State will attempt to introduce evidence, make reference to, or otherwise leave the jury with the impression that . . . .
4. It is immaterial and unnecessary to the disposition of this case and contrary to the law of this state to permit such evidence or inference and would be highly prejudicial to the State in the minds of the jury in that . . . .
5. An ordinary objection during the course of trial even if sustained with proper instructions to the jury will not remove such effect in view of . . . .

WHEREFORE THE DEFENDANT PRAYS that the Court exercise its inherent power over the conduct of trials and order the District Attorney not to elicit testimony respecting, mentioning, or referring to the above matters without securing prior clearance from the Court.

Form 3. *Permissive Motion in Liminie*

COMES NOW THE DEFENDANT IN THE ABOVE ENTITLED CASE AND MOVES THE COURT FOR AN ORDER IN LIMINIE OR IN THE ALTERNATIVE FOR AN ORDER SEVERING TRIALS.

This Motion is made upon the following grounds:

1. The case has now been set for a joint trial of two defendants.
2. This Defendant has pled not guilty and intends to take the stand at trial, but the co-defendant has a long criminal record and it is anticipated that he will invoke his privilege against self-incrimination.
3. To help avoid any such prejudicial speculation as the jurors might make, this Defendant intends to comment upon the co-defendant's failure to take the stand.

WHEREFORE the Court is requested to rule in liminie if the Defendant will be permitted to use the stated procedure, and under what conditions, OR in the alternative is requested to sever the two trials to avoid undue prejudice in the minds of the jurors to either Defendant.