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The Motion In Limine: Pretrial Trump Card in Civil Litigation

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COMMENTARIES

THE MOTION *IN LIMINE:* PRETRIAL TRUMP CARD IN CIVIL LITIGATION

A motion *in limine*[1] is a motion made prior to trial[2] for the purpose of prohibiting opposing counsel from mentioning the existence of, alluding to, or offering evidence on matters so highly prejudicial to the moving party that a timely motion to strike or an instruction by the court to the jury to disregard the offending matter cannot overcome its prejudicial influence on the juror's minds.[3] The motion seeks a protective order[4] prohibiting the opposing party, counsel, and witnesses from mentioning or offering the offending evidence at trial without first requesting permission of the court out of the presence of the jury.[5] Though the motion *in limine* often embraces a prayer for the exclusion of the evidence itself,[6] strictly speaking, the motion operates on the premise that the mere asking of an improper question concerning the sensitive material in dispute in the presence of the jury will so

1. "On or at the threshold; at the very beginning; preliminarily." BLACK'S LAW DICTIONARY 896 (4th ed. rev. 1968). This broad definition means that virtually any motion made prior to the empaneling of the jury is a motion *in limine*. The following discussion, however, will use the term as it has been popularly described in practice, as set forth in the text accompanying notes 3-8 *infra*.

2. An appropriate time for the motion would be the pretrial conference, but the motion may be made any time prior to the empaneling of the jury. *See* Note, *The Motion* In Limine—*A Useful Procedural Device*, 35 MONT. L. REV. 362, 363 (1974); Note, *Pretrial Exclusionary Evidence Rulings*, 1967 WIS. L. REV. 738, 739, 745 (1967).

3. *E.g.*, Burrus v. Silhavy, 293 N.E.2d 794 (Ind. App. 1973); Bridges v. City of Richardson, 163 Tex. 292, 293, 354 S.W.2d 366, 367 (1962); Rothblatt & Leroy, *The Motion* In Liminie [sic] *in Criminal Trials: A Technique for Pretrial Exclusion of Prejudicial Evidence*, 60 KY. L.J. 611, 613-14 (1972). The authors distinguish two kinds of prohibitive motions *in limine:* "prohibitive-absolute," in which the prejudicial matter is found inadmissible at the outset and excluded throughout the trial, and "prohibitive-preliminary," which permits opposing counsel to offer the sensitive matter at trial out of the jury's presence for a de novo ruling. *Id.* at 615-16. *Cf.* Note, 1967 WIS. L. REV., *supra* note 2, at 755. Because it is the "prohibitive-preliminary" form, which is most often used and is preferred by courts and counsel, it is this form of the motion that will be discussed herein.

4. Note, 1967 WIS. L. REV., *supra* note 2, at 744. See Rothblatt & Leroy, *supra* note 3, at 615-17.

5. *E.g.*, Redding v. Ferguson, 501 S.W.2d 717, 722 (Tex. Civ. App. 1973); Davis, *Motions* In Limine, 15 CLEV.-MAR. L. REV. 255 (1966). This article also appears, with few alterations, in 5 WASHBURN L.J. 232 (1966) and as chapter 7 of A. CONE & V. LAWYER, THE ART OF PERSUASION IN LITIGATION (1966). Mr. Davis, who is a practicing attorney in Texas, sets forth an example of a motion *in limine* on which an order *in limine* would be based. A suggested sample form for a motion *in limine* adopted for Florida use, based primarily on Mr. Davis' example, appears in the Appendix to this commentary. Davis, *supra* at 255 n.1.

6. Purcell v. Zimbelman, 18 Ariz. App. 75, 85, 500 P.2d 335, 345 (1972) (dictum); Burdick v. York Oil Co., 364 S.W.2d 766, 770 (Tex. Civ. App. 1963). *Cf.* Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963). The motion is often, therefore, based on settled rules of evidence. *See* Davis, *supra* note 5, at 257-61; Note, 1967 WIS. L. REV., *supra* note 2, at 739, 751-52.

implant prejudice in the jurors' minds that the moving party will effectively be denied his right to a fair trial.[7] Necessarily, therefore, the protective order must embrace counsel's statements in voir dire, opening statement, and closing argument as well as the evidentiary phases of the trial.[8] Extensively used in Texas,[9] and adopted[10] or recognized expressly or impliedly[11] by a growing number of other jurisdictions, the motion *in limine* serves the salutary purpose of helping to reduce the possibility of reversible error at trial, thereby safeguarding the rights of both parties to a fair trial.[12]

While the expansive discovery procedures provided for by the Florida Rules of Civil Procedure[13] and the broad and flexible uses of the pretrial conference[14] should obviate the need for extensive employment of the *in limine* practice in Florida,[15] the very fact that Florida appellate decisions[16]

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7. The Texas supreme court expressed this idea succinctly in Bridges v. City of Richardson, 163 Tex. 292, 293, 354 S.W.2d 366, 367 (1962): "The purpose of the motion *in limine* to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit. It is the prejudicial effect of the question asked or the statements made in connection with the offer of evidence, not the prejudicial effect of the evidence itself, which a motion *in limine* is intended to reach." The motion is worded accordingly, *e.g.*, Burrus v. Silhavy, 293 N.E.2d 794, 796 (Ind. App. 1973); Davis, *supra* note 5, at 255 n.1.

8. *Cf.* Troxel v. Otto, 287 N.E.2d 791, 792-94 (Ind. App. 1972).

9. *E.g.*, Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331 (Tex. 1963); Bridges v. City of Richardson, 163 Tex. 292, 354 S.W.2d 366 (1962); Redding v. Ferguson, 501 S.W.2d 717 (Tex. Civ. App. 1973); Harlow v. Swift & Co., 491 S.W.2d 472 (Tex. Civ. App. 1973); McKellar v. Bracewell, 473 S.W.2d 542 (Tex. Civ. App. 1971); State v. Wheeler, 390 S.W.2d 339 (Tex. Civ. App. 1965).

10. Burrus v. Silhavy, 293 N.E.2d 794 (Ind. App. 1973).

11. Purcell v. Zimbelman, 18 Ariz. App. 75, 85, 500 P.2d 335, 345 (1972) (dictum in affirming the trial court's denial of defendant's motion *in limine* indicating the appellate court's decision impliedly recognized the motion as a valid pretrial procedural step); Sacramento & San Joaquin Drainage Dist. v. Reed, 215 Cal. App. 2d 60, 68, 29 Cal. Rptr. 847, 852 (Dist. Ct. App. 1963); Doyle v. City of New York, 281 App. Div. 821, 822, 119 N.Y.S.2d 71, 72 (1953). *Cf.* Cook v. Philadelphia Transp. Co., 414 Pa. 154, 156, 199 A.2d 446, 447-48 (1964); Crawford v. Hite, 176 Va. 69, 78, 10 S.E.2d 561, 564 (1940) (dictum). *Contra*, Bradford v. Birmingham Elec. Co., 227 Ala. 285, 287, 149 So. 729, 730 (1933).

12. Rothblatt & Leroy, *supra* note 3, at 635; Note, 1967 WIS. L. REV., *supra* note 2, at 742.

13. FLA. R. CIV. P. 1.280-.390.

14. FLA. R. CIV. P. 1.200. Informative amplification of the purposes, scope and fruits of the Florida pretrial conference appears in FLORIDA CIVIL PRACTICE BEFORE TRIAL, ch. 17 (Fla. Bar Continuing Legal Educ. Manual No. 11, 2d ed. 1969).

15. One experienced Florida attorney suggests that the combined use of extensive discovery procedures and the pretrial conference should render resort to the motion *in limine* unnecessary except in the most unusual circumstances. Mr. Mark Hulsey, a former president of the Florida Bar Association, stated that, in his experience, trial counsel on both sides, familiar with the requirements of the rules of evidence and the commands of ethics, will scrupulously avoid introduction of prejudicial matters in order to foreclose the possibilities of mistrial and reversible error. He expressed the opinion that matters addressed by a motion *in limine*, which he has not had occasion to use, are generally taken up at the pretrial conference and action taken therein included in the pretrial order. Interview with Mr. Mark Hulsey, Jr., in Gainesville, Fla., April 17, 1974. While in general

continue to reverse lower courts for allowing prejudicial error at trial shows that even these substantial pretrial safeguards may not always guarantee a trial free from harmful error.[17] Accordingly, this commentary, after examining the development and application of the motion *in limine* in other jurisdictions, will demonstrate how it may appropriately be employed by trial counsel in Florida civil litigation.[18]

BACKGROUND

Commentators agree[19] that the motion *in limine* made its first appearance in *Bradford v. Birmingham Electric Co.*, [20] a 1933 Alabama case wherein plaintiff, in an action for injuries she received while riding defendant's streetcar, attempted to obtain a pretrial order prohibiting defense counsel from offering testimonial evidence as to her character.[21] The trial court denied the motion, and was upheld on appeal by the Alabama supreme court, which flatly denied the existence of "a rule of law or of practice in this state"[22] that would permit the granting of such a motion. The court also justified its ruling on the logical ground that the trial court was in no position to assume counsel would attempt to introduce "illegal" evidence at trial.[23] Additionally, the court noted that the granting of such a motion prior to trial would run counter to solidly established trial procedure.[24] This latter justification is based on the traditional Anglo-American view of the trial as a self-contained, cohesive whole. To question the admissibility of evidence or attempt to prohibit its mention or production before trial, according to this line of reasoning, is to bifurcate the trial and to decide the issues in piecemeal

agreement with Mr. Hulsey as to the efficacy of the discovery and pretrial conference techniques to prevent injection of prejudicial matters at trial, Mr. Michael Bryant, a practicing attorney in Gainesville, Fla., acknowledged that situations could arise wherein the motion *in limine* could be useful. Mr. Bryant suggested that in circuits where civil dockets are crowded, or where the pretrial conference is conducted in a perfunctory fashion, the written motion seeking a specific protective order could be helpful. Interview with Mr. Michael L. Bryant, in Gainesville, Fla., April 15, 1974. The same reasoning applies in areas where the pretrial conference is not extensively used.

16. *E.g.*, Cook v. Eney, 277 So. 2d 848 (3d D.C.A. Fla. 1973); Walton v. Robert E. Haas Constr. Corp., 259 So. 2d 731 (3d D.C.A. Fla. 1972); Dade County v. Clarson, 240 So. 2d 828 (3d D.C.A. Fla. 1970); Carlton v. Johns, 194 So. 2d 670 (4th D.C.A. Fla. 1967); City of Coral Gables v. Jordan, 186 So. 2d 60 (3d D.C.A. Fla. 1966).

17. One major reason why the motion *in limine* is not used in Florida is that Florida lawyers are simply unaware of it. Interview with Hon. John J. Crews, Jr., Judge, Circuit Court for the Eighth Judicial Circuit, Florida, in Gainesville, Fla., April 17, 1974 [hereinafter cited as Crews Interview].

18. For a thoughtful and informative examination of the applicability of the motion *in limine* in criminal practice, much of which is germane to the present discussion, see Rothblatt & Leroy, *supra* note 3.

19. Rothblatt & Leroy, *supra* note 3, at 615; Note, 1967 WIS. L. REV., *supra* note 2, at 738.

20. 227 Ala. 285, 149 So. 729 (1933).

21. *Id.* at 287, 149 So. at 730.

22. *Id.*

23. *Id.*

24. *Id.*

fashion.[25] The reasoning and result of *Bradford*[26] were paralleled in a Kentucky decision.[27] The essential thrust of decisions refusing to recognize the validity of the motion *in limine* is that the trial court has no way of determining in advance of trial whether the allegedly prejudicial matters would in fact be prejudicial to the moving party when offered at trial.[28]

Despite its inauspicious beginning, the motion *in limine* survived because counsel recognized a continuing need to preclude injection of prejudicial matters into the trial in those cases where such matters could be anticipated and where a showing of the prejudicial effect could be demonstrated to the court *in limine*. Thus, the Virginia supreme court suggested its use as early as 1940 in a wrongful death action;[29] the California Third District Court of Appeal sanctioned it in a 1963 eminent domain proceeding;[30] and the Pennsylvania supreme court approved it in a 1964 personal injury action.[31]

Additionally, the *in limine* practice was specifically held to be "part of the procedural practice of Indiana"[32] in *Burrus v. Silhavy*.[33] In that personal injury action defendants filed a motion *in limine* seeking an order prohibiting mention by plaintiff, his counsel, or witnesses of a $7,000 payment made

25. The rapid growth of discovery procedures, the use of the pretrial conference, and pretrial motions to suppress illegally seized evidence in criminal cases demonstrate that this traditional view has lost much of its vitality. Note, 1967 WIS. L. REV., *supra* note 2, at 746-47.

26. In addition to the reasoning described in the text accompanying notes 23-25 *supra*, the *Bradford* court cited other reasons for affirming the verdict and judgment for defendant on the question of prejudice, which reappear in current appellate decisions examining the correctness of the trial court's decision in denying a motion *in limine*. After plaintiff's pretrial motion to exclude was denied, counsel for plaintiff "opened the door" at trial to the allegedly prejudicial matters by questioning plaintiff in detail about the nature of her acquaintance with the defense witness, who subsequently was questioned by defense counsel about the same subject. Moreover, after the defense testimony was given, plaintiff's counsel did not move to strike what he claimed on appeal were an objectionable question and answer. Under these circumstances the court refused to hold the question and responsive testimony reversible error. 227 Ala. at 288, 149 So. at 731.

27. Carrithers v. Jean's Ex'r. 259 Ky. 20, 22-23, 81 S.W.2d 857, 858 (1935).

28. This argument is still available, of course, to opposing counsel and is successfully employed where the moving party cannot show either that the evidence in question is excludable under the technical rules of evidence or that its prejudicial effect far outweighs any slight materiality it may have. *See, e.g.*, Purcell v. Zimbelman, 18 Ariz. App. 75, 85, 500 P.2d 335, 345 (1972). This argument is buttressed by the reasoning that should the offending matters be injected into the trial, counsel may resort to the existing "curative" measures of objecting to an offer of evidence or question by opposing counsel, moving to strike the offending material from the record, and requesting the court to instruct to disregard the prejudicial material. The underlying premise of the motion *in limine*, however, is that the circumstances of the particular case and the sensitive nature of the subject matter of the motion are such that these traditional safeguards would not be sufficient to eradicate the prejudice to the moving party. Davis, *supra* note 5, at 256. *See* Rothblatt & Leroy, *supra* note 3, at 613; Note, 1967 WIS. L. REV., *supra* note 2, at 740.

29. Crawford v. Hite, 176 Va. 69, 78, 10 S.E.2d 561, 564 (1940) (dictum).

30. Sacramento & San Joaquin Drainage Dist. v. Reed, 215 Cal. App. 2d 60, 66-68, 29 Cal. Rptr. 847, 852-53 (Dist. Ct. App. 1963).

31. Cook v. Philadelphia Transp. Co., 414 Pa. 154, 156, 199 A.2d 446, 447-48 (1964).

32. Burrus v. Silhavy, 293 N.E.2d 794 (Ind. App. 1973).

33. *Id.* at 798.

by a third-party insurance company to plaintiff prior to the trial, on the ground that the mere mention of the payment would be highly prejudicial to defendants' case.[34] The trial court granted the motion, and was affirmed by the Appellate Court of Indiana, which held:

> A "motion *in limine*" is a necessary adjunct to the trial court's inherent power to admit and exclude evidence. The trial court may issue protective orders against prejudicial questions or statements which could be uttered before a jury and thereby prevent a fair and impartial jury trial.[35]

AUTHORITY

The *Burrus* court noted that there was no statutory authority for the motion *in limine,* and that it was not mentioned in the Indiana Rules of Civil Procedure.[36] Counsel attempting its use will likely not find specific authorization for it in statutes or rules whether state or federal.[37] Nevertheless, it is convincingly argued by commentators[38] that the power to entertain motions *in limine* flows from the inherent power of the trial court to admit or exclude evidence. This reasoning was found persuasive by the *Burrus* court.[39] The power to grant or deny motions *in limine* is also said to arise under the general wording of subsection (6) of Federal Rule of Civil Procedure 16,[40] and those state rules modeled thereon,[41] which permit the trial court and counsel to consider "such other matters as may aid in the disposition of the action" during pretrial conference.[42] One commentator suggests that both the history of rule 16 and its permissive nature indicate that the pretrial conference was not intended to permit "coercive" rulings on such matters as are addressed by motions *in limine.*[43] Nevertheless, the commentator recognizes that trial courts regularly use the conference as a forum in which to rule on evidentiary issues, citing subsection (6) as "authority."[44] While

34. *Id.* at 795.
35. *Id.* at 797.
36. *Id.*
37. Davis, *supra* note 5, at 257. *Cf.* Rothblatt & Leroy, *supra* note 3, at 614; Note, 1967 WIS. L. REV., *supra* note 2, at 746.
38. Davis, *supra* note 5, at 257; Rothblatt & Leroy, *supra* note 3, at 615.
39. 293 N.E.2d at 797-98.
40. Rothblatt & Leroy, *supra* note 3, at 614.
41. *E.g.,* FLA. R. CIV. P. 1.200; TEX R. CIV. P. 166; WIS. STAT. §269.65 (1965).
42. The exact wording of FED. R. CIV. P. 116(6) is contained in the corresponding sections of the state rules, *cited* note 41 *supra. Cf.* FLORIDA CIVIL PRACTICE BEFORE TRIAL, Pretrial Conference §17.7 (Fla. Bar Continuing Legal Educ. Practice Manual No. 11, 2d ed. 1969).
43. Note, 1967 WIS. L. REV., *supra* note 2, at 748.
44. *Id.* at 749-50. Although the author suggests "legitimizing" the motion *in limine* by codification, *id.* at 750, it would appear that in making a motion *in limine,* counsel can persuasively argue for the existence of authority in the court to entertain and rule on the motion on the basis of the inherent power of the trial court, the "penumbra" of pretrial conference rules, and the growing body of case law recognizing the motion. See text accompanying notes 36-43 *supra.*

specific incorporation of the motion *in limine* into statutes or rules may be desirable to delineate the circumstances and parameters governing its use, it seems clear from the foregoing that such statutory approval is not necessary for its employment.[45]

THE DILEMMA

The tactical value of the motion *in limine* is illustrated by the trial attorney's dilemma when confronted with the introduction by opposing counsel or witnesses of prejudicial matter before the jury. For example, improper reference might be made to the issuance of a traffic ticket in connection with the automobile accident that is the subject matter of the litigation.[46] One alternative is to object and request the court to instruct the jury to disregard. As has been pointed out,[47] however, this tactic may serve to further implant the prejudice in the minds of the jurors rather than eradicate it,[48] especially because it is customary for the court to instruct the jury to disregard the offending material both at the time the objection is made and when the jury instructions are given.[49] Objection may also cause the jury, which cannot be expected to distinguish "legal relevancy" from "logical relevancy,"[50] to suspect that objecting counsel has something to hide.[51] The other alternative is for counsel to remain silent in the hope that failure to emphasize the sensitive matter will minimize its prejudicial effect.[52] But if counsel fails to make timely objection when the offensive matter is injected and subsequently suffers an adverse verdict, he will be deemed to have waived the right to raise the

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45. Circuit Judge, John J. Crews, Jr., of Gainesville, Florida, indicated he would entertain such a motion under the pretrial conference rule, FLA. R. CIV. P. 1.200. Crews Interview, *supra* note 17.

46. This actually happened in Walton v. Robert E. Haas Constr. Corp., 259 So. 2d 731 (3d D.C.A. Fla. 1972), and Riedel v. Driscoll, 124 So. 2d 42 (1st D.C.A. Fla. 1960), and is discussed in further detail in text accompanying notes 101-105 *infra*.

47. Davis, *supra* note 5, at 256; Note, 1967 WIS. L. REV., *supra* note 2, at 741. The courts often concur, *e.g.*, Sacramento & San Joaquin Drainage Dist. v. Reed, 215 Cal. App. 2d 60, 68, 29 Cal. Rptr. 847, 853 (Dist. Ct. App. 1963); Pensacola Transit Co. v. Denton, 119 So. 2d 296, 298 (1st D.C.A. Fla. 1960). *Cf.* Seaboard Air Line Ry. v. Smith, 53 Fla. 375, 43 So. 235 (1908) (instruction insufficient to cure prejudicial statement in closing argument). *Contra*, Tyus v. Apalachicola N.R.R., 130 So. 2d 580 (Fla. 1961); Wall v. Little, 102 Fla. 1015, 1018, 136 So. 676, 677 (1931).

48. This dilemma is vividly illustrated by Compania Dominicana de Aviacion v. Knapp, 251 So. 2d 18 (3d D.C.A. Fla. 1971), where, after a witness for plaintiff volunteered improper testimony concerning insurance payments, *plaintiff's* counsel requested the court out of the jury's presence to strike the testimony and instruct the jury to disregard it. Fearing that such action would serve only to further implant the damaging evidence into the jurors' minds, defense counsel objected, and the trial court said nothing further about it. On appeal from an adverse verdict, defendant contended unsuccessfully that the testimony constituted reversible error. *Id.* at 20.

49. Note, 1967 WIS. L. REV., *supra* note 2, at 741 & n.24.

50. Rothblatt & Leroy, *supra* note 3, at 622.

51. Davis, *supra* note 5, at 256.

52. Rothblatt & Leroy, *supra* note 3, at 613.

issue of prejudicial error on appeal.[53] Even if counsel does make timely objection to the mention of offer of prejudicial matter at trial, he may yet fail on appeal by reason of the harmless error rule,[54] which embodies the view that a litigant has a right to a trial free from harmful or reversible error, but not necessarily devoid of any error.[55]

THE SOLUTION

It is precisely this dilemma that the motion *in limine* eliminates. If the motion is granted and a protective order issued pursuant thereto,[56] the opposing party, counsel, and witnesses are placed on formal notice not to make any allusion to the sensitive subject matter[57] without first seeking the express permission of the court out of the presence and hearing of the jury.[58] Moving counsel therefore eliminates *ab initio* the need either to object to improper questions or remarks or to move to strike prejudicial material and request an instruction to the jury to disregard after the offending matter has already been heard.[59] That the order *in limine* effectively prevents introduction of prejudicial material into the trial is shown by the relative paucity of cases concerning alleged violations of the order *in limine*. The holdings of these few cases indicate that violation of the order is committed on pain of mistrial or reversible error.[60]

The motion *in limine*, particularly where accompanied by a memorandum or brief on a complex or unsettled area of law, provides the court an opportunity to give more protracted and studied consideration to the possibility of prejudice being injected into the trial.[61] Such an opportunity is normally

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53. *Id. See, e.g.*, McKinney Supply Co. v. Orovitz, 96 So. 2d 209, 211 (Fla. 1957); Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963); Crawford v. Hite, 176 Va. 69, 78, 10 S.E.2d 561, 564 (1940) (dictum).

54. *E.g.*, Stecher v. Pomeroy, 253 So. 2d 421 (Fla. 1971); Futch v. Josey, 263 So. 2d 240 (2d D.C.A. Fla. 1972), *cause dismissed*, 279 So. 2d 881 (Fla. 1973).

55. *See, e.g.*, Compania Dominicana de Aviacion v. Knapp, 251 So. 2d 18 (3d D.C.A. Fla. 1971).

56. See note 2 *supra*.

57. *E.g.*, Redding v. Ferguson, 501 S.W.2d 717, 722 (Tex. Civ. App. 1973). *Cf.* Sacramento & San Joaquin Drainage Dist. v. Reed, 214 Cal. App. 2d 60, 66-68, 29 Cal. Rptr. 847, 852-53 (Dist. Ct. App. 1963); see Appendix.

58. *Id.*

59. Davis, *supra* note 5, at 256.

60. MAPCO, Inc. v. Holt, 476 S.W.2d 70, 75-76 (Tex. Civ. App. 1971); Burdick v. York Oil Co., 364 S.W.2d 766, 770 (Tex. Civ. App. 1963). On the other hand, a witness' indirect and fleeting reference to matters prohibited by the order granting a motion *in limine* had been held insufficiently violative of the order to constitute reversible error. Harlow v. Swift & Co., 491 S.W.2d 472, 477 (Tex. Civ. App. 1973). Obviously, if a party who has obtained an order *in limine* proceeds to mention and offer evidence concerning the allegedly prejudicial matters at trial, then the door is open for opposing counsel to discuss and introduce evidence previously excluded by the order. *See* Royal v. Cameron, 382 S.W.2d 335, 340-41 (Tex. Civ. App. 1964); Bradford v. Birmingham Elec. Co., 227 Ala. 285, 149 So. 729 (1933); note 26 *supra*.

61. See Davis, *supra* note 5, at 256.

unavailable in the charged atmosphere of a trial in which the court is required to make decisions rapidly and often without adequate time to reflect.[62] Further, the granting of the motion can never be reversible error because opposing counsel may at trial, out of the jury's presence, again request the court to permit admission of the sensitive matter.[63] If the court still agrees with moving counsel that the subject matter of the motion *in limine* would be prejudicial and excludes it, it is the exclusion of the evidence that forms the basis for appeal.[64]

Similarly, the denial of a motion *in limine* is not reversible error[65] because the allegedly prejudicial matters must in fact be mentioned or introduced as evidence before they can be said to have influenced a jury to any degree. Further, the disputed matter must be shown to be so prejudicial to the affected party as to constitute reversible error.[66] Clearly the burden to demonstrate to the trial court that the matters sought to be prohibited from offer or mention are prejudicial is on the party making the motion.[67] Denial of the motion, therefore, indicates only that the moving party failed to meet this burden, and a survey of decisions discussing the motion *in limine* shows that this is often the case.[68] It follows that in the event a party's motion *in limine* is denied, he will be expected to resort to normal "curative" procedures such as objection or motion to strike, if the offending matters are brought to the jury's attention.[69] From the foregoing it should be clear that the burden on the moving party constitutes a limitation on the use of the motion *in limine* and renders less likely the possibility of its abuse.[70]

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62. Mr. Davis suggests that for this reason the court will be more inclined to grant the motion in the pretrial milieu. *Id.*

63. *Id.* at 257.

64. *Id.*

65. Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963). *But see* Doyle v. City of New York, 281 App. Div. 821, 119 N.Y.S.2d 71 (1953), and text accompanying notes 77-78 *infra.*

66. Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963).

67. Rothblatt & Leroy, *supra* note 3, at 621-24. *Cf.* Note, 1967 WIS. L. REV., *supra* note 2, at 742.

68. *E.g.,* Purcell v. Zimbelman, 18 Ariz. App. 75, 85, 500 P.2d 335, 345 (1972). *Cf.* McKellar v. Bracewell, 473 S.W.2d 542, 546 (Tex. Civ. App. 1971); City of Wichita Falls v. Jones, 456 S.W.2d 148, 150 (Tex. Civ. App. 1970) (plaintiff's motion *in limine* denied in part); Export Ins. Co. v. Johnson, 401 S.W.2d 324, 325 (Tex. Civ. App. 1966).

69. Hartford Accident & Indem. Co. v. McCardell, 369 S.W.2d 331, 335 (Tex. 1963); City of Wichita Falls v. Jones, 456 S.W.2d 148 (Tex. Civ. App. 1970). *But see* Rothblatt & Leroy, *supra* note 3, at 618, wherein the authors suggest that denial of the motion puts counsel in a position to argue on appeal that the trial court tainted the trial at the outset by impliedly permitting opposing counsel to "parade prejudice in front of the jury." The cases cited above, however, suggest that appellate courts will find this argument persuasive only if moving counsel objected to the prejudicial matter when it was mentioned or introduced at trial.

70. Moreover, the effective use of the pretrial conference and the resulting pretrial order should limit the need for the formal use of the motion in most cases. Crews Interview, *supra* note 17. Obviously, a "shotgun" approach in using the motion *in limine* would dilute its effectiveness by making it vulnerable to arguments that it is being used to restrict unduly issues that should be the legitimate subject of evidentiary inquiry at trial. *See* Rothblatt & Leroy, *supra* note 3, at 619. For these reasons the motion *in limine*

APPLICATION

The motion *in limine* attacks two general groups of prejudicial materials. The first group includes matters excludable at trial under established technical rules of evidence such as the hearsay rule, best evidence rule, "collateral source" rule, and rules pertaining to privilege.[71] Thus, in *Burdick v. York Oil Co.*[72] plaintiff in a personal injury action successfully filed a motion *in limine* to exclude mention or offer of records of the Veterans Administration, basing the motion on privilege.[73] Defense counsel's willful disregard of the order granting the motion, evidenced by his constant reference to the excluded records both in cross-examination and final argument,[74] was held reversible error on appeal. In *Doyle v. City of New York*[75] the court held it prejudicial and reversible error for the trial court not to grant plaintiff's pretrial motion, based on the hearsay rule, to exclude part of a hospital record containing a patient's history. The error was compounded in that defense counsel, through constant allusion at trial to the sensitive history, deliberately intended to influence the jury into believing plaintiff was a chronic alcoholic and drug addict; and that he was intoxicated at the time of the accident.[76] The defendants in *Burrus v. Silhavy*[77] successfully moved the court *in limine* to prohibit mention or offer at trial of a $7,000 prepayment of insurance to plaintiff on the ground of immateriality.[78] In *Cook v. Philadelphia Transit Co.*[79] plaintiff, struck by defendant's bus at 2:00 a.m. in the vicinity of an establishment with the "wild cognomen" of "Crazy Bar,"[80] obtained a pretrial order prohibiting defense counsel from mentioning that "image-creating sobriquet"[81] in the presence of the jury. Although the report of the case does not set forth the contents of plaintiff's motion, it appears from Judge Musmanno's entertaining but solid opinion that it was based on grounds of immateriality and irrelevance.[82]

If the trial court opines that the material sought to be excluded by a motion *in limine* may in fact be admissible under the rules of evidence, or that it is impossible to determine in advance of trial that the materials would be prejudicial or inadmissible,[83] it will properly deny the motion, leaving the

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should be regarded, as the title of this commentary suggests, as a procedural "trump card" to be employed in special situations where the likelihood of introduction of prejudicial matter at trial can be demonstrated positively.

71. Rothblatt & Leroy, *supra* note 3, at 621; Note, 1967 WIS. L. REV., *supra* note 2, at 751; *cf.* Davis, *supra* note 5, at 257-58.

72. 364 S.W.2d 766 (Tex. Civ. App. 1963).

73. *Id.* at 767.

74. *Id.* at 768-69.

75. 281 App. Div. 821, 119 N.Y.S.2d 71 (1953).

76. *Id.* at 822, 119 N.Y.S.2d at 72.

77. 293 N.E.2d 794 (1973).

78. *Id.* at 796.

79. 414 Pa. 154, 199 A.2d 446 (1964).

80. *Id.* at 158, 199 A.2d at 448.

81. *Id.* at 159, 199 A.2d at 448.

82. *Id.* at 156-60, 199 A.2d at 447-49. *But see* text accompanying note 93 *infra.*

83. This was the case in Purcell v. Zimbelman, 18 Ariz. App. 75, 500 P.2d 335 (1972),

burden on the moving party to make timely objection if the allegedly prejudicial matters are subsequently introduced at trial.[84] If counsel foresees that such would be the case, then the motion *in limine* should be directed toward the second group of evidentiary matters within its ambit, that is, material "the minor relevance of which is outweighed by its potentially prejudicial effect on the jury".[85] The basis for making the motion to prevent introduction of matters of this nature at trial is that whatever tangential relevance the objectionable material may have, its probative value with respect to the material issues of the case is far outbalanced by its prejudicial influence.[86] For example, the defendant in *State v. Wheeler*,[87] a Texas eminent domain action, obtained an order *in limine* preventing plaintiff from mentioning the potentially prejudicial fact that the defendant-condemnee had purchased the property in question for the sole purpose of speculation.[88] In *Harlow v. Swift & Co.*,[89] a breach of warranty action, plaintiff-buyer successfully moved the court *in limine* to prohibit defendant-seller from making any reference to any other litigation by plaintiff against other feed companies.[90] And in *Huff v. New York Central R.R.*,[91] an Ohio wrongful death action, the trial court excluded *in limine* any reference at trial to a letter from decedent's daughter to the President of the United States describing the crossing where her father had been killed as a "death trap," and to the subsequent installation of blinkers and other equipment at the crossing.[92]

The foregoing examples are presented only to indicate both the broad variety of actions and kinds of evidence with respect to which the motion *in limine* may be employed effectively in a manner advantageous to both sides in civil litigation. On occasion, the prejudicial matters sought to be prohibited may not seem to fit conveniently into one of the two classes of evidence mentioned above,[93] but careful drafting and a convincing demonstration of the prejudicial effect of the objectionable matter should suffice to obtain the desired order. Among the matters suggested by commentators as amenable to the motion *in limine* are the status of a party or witness,[94] pen-

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a medical malpractice action wherein the trial court denied defendant doctor's motion *in limine* seeking to prohibit reference by plaintiff's counsel to previous malpractice actions against defendant based on similar factual circumstances.

84. *Id.* at 85, 500 P.2d at 345.

85. Davis, *supra* note 5, at 258; Rothblatt & Leroy, *supra* note 3, at 622; Note, 1967 WIS. L. REV., *supra* note 2, at 753-54. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 319 (1954).

86. *See* Davis, *supra* note 5, at 256; Rothblatt & Leroy, *supra* note 3, at 622.

87. 390 S.W.2d 339 (Tex. Civ. App. 1965).

88. *Id.* at 342.

89. 491 S.W.2d 472 (Tex. Civ. App. 1973).

90. *Id.* at 477.

91. *Reported in* 12 DEFENSE L.J. 310, *aff'd without reaching question*, 116 Ohio App. 32, 186 N.E.2d 478 (1961).

92. *Id.*

93. *E.g.*, Cook v. Philadelphia Transit Co., 414 Pa. 154, 199 A.2d 446 (1964), discussed in text accompanying notes 79-82 *supra*.

94. Such as drug or alcohol addiction, marital status, or economic status. Rothblatt & Leroy, *supra* note 3, at 625.

sions and other payments made to injured parties,[95] criminal convictions,[96] prior suits or settlements,[97] and, in some instances, opinions of investigating officers.[98] This list is by no means exclusive; in theory, at least the motion *in limine* should be available to block the introduction before the jury, by whatever means and at whatever stage of the trial—of any highly prejudicial matter involved in a particular action. Its application is limited only by the ingenuity of counsel.

USE OF THE MOTION *In Limine* IN FLORIDA

As indicated at the outset of this commentary,[99] wide-scale use of the motion *in limine* in Florida[100] is likely unnecessary due to diligent and extensive use of discovery procedures and the pretrial conference. Situations may arise, however, when counsel will be confronted with the likelihood of unfairly prejudicial matters being introduced at trial. In these instances the additional protections afforded by the motion *in limine* are desirable. To illustrate potential areas of application of the motion in Florida, the following brief survey of selected Florida cases shows instances in which the motion could have been employed effectively.

In *Riedel v. Driscoll*,[101] a personal injury action arising out of an automobile accident, a question about the instructions arose among the jurors after the jury had retired. After the jury had returned for additional instructions, one juror asked the court whether defendant had been given a traffic ticket in connection with the accident. After stating that "what happened in the traffic court in Daytona Beach is of no concern to the jury in trying this case,"[102] the court, still in the presence of the jury, inquired whether counsel agreed. Defense counsel replied, "yes," but counsel for the plaintiff replied, "Unfortunately yes, Your Honor."[103] Defense counsel's prompt motion for a mistrial was denied, but the First District Court of Appeal reversed the subsequent verdict and judgment for plaintiff and remanded the case for a new trial.[104] In this case a motion *in limine* granted to defendant would in

95. Davis, *supra* note 5, at 257-58.
96. *Id.* at 259.
97. *Id.* at 260.
98. *Id.*
99. See notes 13-16 *supra* and accompanying text.
100. Authority for the use of the motion *in limine* in Florida is set forth in the general discussion of the subject in the text accompanying notes 36-45 *supra*. *Cf.* Johnny Roberts, Inc. v. Owens, 168 So. 2d 89, 92 (2d D.C.A. Fla. 1964) (dictum). Decisional support for use of the motion is found in the cases cited in notes 9-11 *supra*.
101. 124 So. 2d 42 (1st D.C.A. Fla. 1960).
102. *Id.* at 47.
103. *Id.*
104. *Id.* at 48. A factual parallel to *Riedel* occurred in Walton v. Robert E. Haas Constr. Corp., 259 So. 2d 731 (3d D.C.A. Fla. 1972), a personal injury action wherein defense counsel, in cross examining the investigating police officer, asked if he had issued a traffic ticket to one of the plaintiffs after the automobile accident in question. Plaintiff's objection was sustained, and the jury was instructed to disregard the question, but plaintiff's motion for a mistrial was denied. Citing *Riedel, inter alia,* the Third District Court of Appeal held

all likelihood have prevented the reversible error. First, having granted an order prohibiting any mention or offer of evidence pertaining to the issuance counsel the question that prompted the reversible error. Second, even if the court had asked the question, it seems probable that plaintiff's counsel, under the onus of the *in limine* order, would have refrained from making his prejudicial remark.[105]

In *Cook v. Eney*,[106] a 1973 medical malpractice action, counsel for the defendant questioned plaintiff in cross-examination about plaintiff's receipt of workmen's compensation and Social Security benefits. Reversing a verdict and judgment for defendant, the Third District Court of Appeal found such questions and answers prejudicial to plaintiff and remanded the action for a new trial.[107] Clearly, a motion *in limine* introduced at the pretrial conference would have eliminated the subsequent harmful error at the trial of the case and avoided the need for a new trial.

In *Perper v. Edell*,[108] wherein plaintiff sued for a substantial real estate commission based upon a verbal listing contract allegedly made with defendant, defendant introduced at trial over the objection of plaintiff the expert testimony of two doctors to the effect that defendant was a "mental case," "psychotic," or "insane" at the time of the transaction.[109] The Florida supreme court, on appeal by plaintiff from an adverse verdict, found prejudicial error and remanded the cause for a new trial. *Perper* was decided in 1949, long before the incorporation of extensive discovery procedures, the pretrial conference, and rules relating to expert witnesses into the Florida Rules of Civil Procedures; conceivably, thorough use of these pretrial safeguards would have prevented introduction of the inflammatory testimony in that case. Still, it is exactly the kind of evidence described in the second group of matters subject to a motion *in limine*[110] that was prejudicially introduced at trial in *Perper*. The court in that case enunciated precisely the reason that employment of the motion *in limine* would have been appropriate when, speaking through Justice Roberts, it said:

> Even if we concede its [the testimony of the doctors] relevancy . . . its probative force is still conjectural and remote. We conceive the rule to be that, if the introduction of the evidence tends in actual operation to produce a confusion in the minds of the jurors in excess of the legitimate probative effect of such evidence—if it tends to obscure rather than illuminate the true issue before the jury—then such evidence should be excluded.[111]

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that the question was so highly prejudicial that "there was no possibility of erasing its effects from the minds of the jury" and that the failure of the trial court to grant plaintiff's motion for a mistrial was reversible error. *Id.* at 734.

105. For these reasons, it seems logical that employment of a motion *in limine* by plaintiff's counsel would have had a similar effect in Walton v. Robert E. Haas Constr. Corp., 205 So. 2d 731 (3d D.C.A. Fla. 1960), discussed in note 104 *supra*. See Appendix.

106. 277 So. 2d 848 (3d D.C.A. Fla. 1973).

107. *Id.* at 849-50.

108. 44 So. 2d 78 (Fla. 1949).

109. *Id.* at 80.

110. See text accompanying notes 85-91 *supra*.

111. 44 So. 2d at 80. *See* C. McCORMICK, *supra* note 85, at 319-20.

In two very similar personal injury cases, *City of Coral Gables v. Jordan*[112] and *Dade County v. Clarson*,[113] the Third District Court of Appeal found prejudicial and reversible error where counsel for plaintiffs elicited from witnesses on direct examination the information that they had previously settled claims with the defendants prior to trial.[114] The court in *Jordan* analogized the situation at bar to the commands of Florida Statutes, section 768.041,[115] which prohibits revelation to the jury of settlement by the plaintiff with one of several tortfeasors: "It would seem just as damaging to a fair trial to permit the injured party to reveal to the jury that the alleged tortfeasor had settled with another party in the same accident."[116] Had the defendants in *Jordan* and *Clarson* filed motions *in limine* seeking prohibition of any reference to the settled claims, it appears likely that granting the motions would have foreclosed the prejudicial error that ultimately forced the retrial of those cases. Similarly, the reasoning of the court outlined above suggests that a plaintiff could employ the motion in an action against remaining tortfeasors to prohibit mention by the defense of prior settlement with one or more tortfeasors no longer parties to the action.[117]

The complex line of Florida cases[118] dealing with the recurring problem of the mention at trial of the limits of liability insurance policies points to another area where the motion *in limine* could be used. A thorough discussion of this broad issue, a subject of continual debate in the Florida courts,[119] is beyond the scope of the present inquiry, but the tortuous history of *Futch v. Josey*[120] serves as an example. At the trial of this personal injury action, one defendant insurance company voluntarily introduced into evidence the $10,000 policy limit for its insured defendant. Then, at the request of plaintiff, the second defendant insurance company was required, over its objection, to introduce the policy limit on its insured defendant, which was $250,000. The verdict for plaintiff exceeded $143,000. The Second District Court of Appeal held that introduction of the policy limits was prejudicial error,[121] but on certiorari the Florida supreme court, citing *Stecher v.*

112. 186 So. 2d 60 (3d D.C.A.), *aff'd*, 191 So. 2d 38 (Fla. 1966).

113. 240 So. 2d 828 (3d D.C.A. Fla. 1970).

114. Dade County v. Clarson, 240 So. 2d 828, 829 (3d D.C.A. Fla. 1970); City of Coral Gables v. Jordan, 186 So. 2d 60, 62 (3d D.C.A. Fla. 1966).

115. Formerly Fla. Stat. §54.28 (1965). The wording of § (3) of both statutes is exactly the same: "The fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury."

116. 186 So. 2d at 62.

117. *Id.*

118. *E.g.*, Josey v. Futch, 254 So. 2d 786 (Fla. 1971); Stecher v. Pomeroy, 253 So. 2d 421 (Fla. 1971); Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970); Stella v. Craine, 281 So. 2d 584 (4th D.C.A. Fla. 1973). *Cf.* Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969); Compania Dominicana de Aviacion v. Knapp, 251 So. 2d 18 (3d D.C.A. Fla. 1971).

119. *Compare* the partly dissenting opinions of Justice Boyd and Chief Justice Ervin in Beta Eta House Corp. v. Gregory, 237 So. 2d 163, 166-69 (Fla. 1970), *with* Stecher v. Pomeroy, 253 So. 2d 421 (Fla. 1971).

120. 247 So. 2d 491 (2d D.C.A.), *remanded for clarification*, 254 So. 2d 786 (Fla. 1971), *returned*, 263 So. 2d 241 (2d D.C.A. 1972), *cause dismissed*, 279 So. 2d 881 (Fla. 1973).

121. 247 So. 2d at 492-93.

Pomeroy,[122] pointed out that it had abandoned the pre-*Stecher* rule that mention of policy limits was prejudicial error as a matter of law.[123] The *Stecher* decision had adopted the position that the "question of harmful error in relation to mention of insurance policy limits [is] a factual question to be determined by a review of the facts in each case."[124] Accordingly, the supreme court returned the *Futch* case to the court of appeal for clarification of whether harmful error was in fact committed at trial.[125] On remand, the Second District Court of Appeal reconsidered its previous opinion, and in view of both the doctrine promulgated in *Stecher* and the reasonableness of the verdict for the seriously injured plaintiff, the court concluded it could not find that the jury had been prejudicially influenced by the policy limits in assessing damages.[126]

It is not clear from *Stecher* and *Futch* whether the supreme court now expressly authorizes deliberate introduction of liability insurance policy limits at trial, in which case the motion *in limine* would be unavailable, or whether it will merely tolerate certain inadvertent references to such policy limits. It is clear, however, that the employment of the motion by defendants in *Futch* could have averted costly and extended litigation because the sole point on appeal was the question of whether the mention of the policy limits constituted harmful error. Granting the motion by separate order *in limine* or by incorporating it into the pretrial order would have foreclosed *ab initio* the introduction at trial of error that was the subject of appellate litigation consuming two years and considerable cost.

The foregoing sampling of Florida cases is hardly a complete compendium of instances in which the motion *in limine* could be employed effectively in Florida civil litigation.[127] It is presented simply to give practitioners a feel

122. 253 So. 2d 421 (Fla. 1971).

123. 254 So. 2d at 787.

124. *Id.*

125. *Id.*

126. 263 So. 2d at 241. This reasoning parallels that forcibly advanced in the dissenting opinions in Beta Eta House Corp. v. Gregory, 237 So. 2d 163, 166-69 (Fla. 1970). If it is true, as these opinions suggest, that juries are no longer prejudiced by the mention of insurance (and, in the present context, by the limits of the policy), then it would seem that juries have changed significantly since the well-known University of Chicago jury project of the late 1950's, where, as part of a broad study of juries, three series of mock personal injury trials were conducted, identical in every respect except the issue of insurance. In the first series of trials defendant disclosed he had no insurance; in the second he revealed he had insurance, but nothing further was said about it; in the third series, after his disclosure of the existence of insurance, his counsel objected, and the court instructed the jury to disregard the issue of insurance. The average amounts of damages awarded by the jury increased in proportion to the mention of insurance at trial, from $33,000 in the first series to $46,000 in the third. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753-54 (1959).

127. Space limitations preclude discussion of the following cases, examination of which will suggest motions *in limine* could have been utilized effectively in each case by the complaining parties to preclude the necessity for their objecting at trial to the prejudicial matter and then being forced to argue harmful error on appeal: Tyus v. Apalachicola N.R.R., 130 So. 2d 580, 588 (Fla. 1966) (O'Connell, J., dissenting); Luster v. Moore, 78 So. 2d 87 (Fla. 1955); Carls Markets v. Meyer, 69 So. 2d 789 (Fla. 1953); Florida East Coast

for the breadth of the types of actions and the kinds of prejudicial matters that could properly be made the subject of this unusual procedural device.[128]

CONCLUSION

As long as there are jury trials and lawyers to try them, there will always be the possibility of prejudicial material being injected into the proceedings so that the offended party is denied a fair trial. The development and use in recent years of substantial pretrial procedural safeguards, coupled with the efforts of most counsel to avoid prejudicial error, make it unlikely that situations will often arise in Florida necessitating additional pretrial measures to block the mention or offer of prejudicial matters.[129] Where such occasions arise, however, counsel may find resort to the motion *in limine* helpful. Its potentially wide application and its availability to both sides in civil litigation serve the purpose of assisting courts and counsel in further reducing the possibility of harmful error at trial.

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Ry. v. Young, 104 Fla. 541, 140 So. 467 (1932); Green v. The Jesters, 199 So. 785 (1st D.C.A. Fla. 1967); Carlton v. Johns, 194 So. 2d 670 (4th D.C.A. Fla. 1967); Johnny Roberts, Inc. v. Owens, 168 So. 2d 89 (2d D.C.A. 1964), *cert. denied*, 173 So. 2d 147 (Fla. 1965); Pensacola Transit Co. v. Denton, 119 So. 2d 296 (1st D.C.A. Fla. 1960).

128. See notes 93-97 *supra* and accompanying text.

129. See note 15 *supra*.

APPENDIX

SUGGESTED FORM OF MOTION *In Limine* FOR USE IN FLORIDA

(Plaintiff/Defendant), before trial and selection of a jury, moves the court *in limine* to instruct the (defendant/plaintiff) and all its counsel and witnesses as set forth below on the following grounds:

1. Since it is immaterial to this suit whether or not:
   (a) (Plaintiff/Defendant) had a driver's license on the occasion in question;
   (b) (Plaintiff/Defendant) was issued a traffic citation as a result of the automobile accident in question;
   (c) (Plaintiff/Defendant) has ever been convicted of the offense of driving while intoxicated;
   (d) (Defendant/Plaintiff) was not issued a traffic citation as a result of the automobile accident in question;

the (defendant/plaintiff) is precluded from using any pleading, testimony, remarks, questions, or arguments that might inform the jury of such facts.

2. Were any of the above facts made known to the jury, it would be highly improper and prejudicial to (plaintiff/defendant), even though the Court were to sustain an objection or motion to strike and instruct the jury not to consider such facts for any purpose. In all probability any such attempt on the part of (defendant/plaintiff), its counsel, or witnesses, would result in a costly mistrial.