



1990

## Should a Motion in Limine or Similar Preliminary Motion Made in the Federal Court System Preserve Error on Appeal Without a Contemporaneous Objection?

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### Recommended Citation

Young, Catherine Murr (1990) "Should a Motion in Limine or Similar Preliminary Motion Made in the Federal Court System Preserve Error on Appeal Without a Contemporaneous Objection?," *Kentucky Law Journal*: Vol. 79: Iss. 1, Article 6.

Available at: <https://uknowledge.uky.edu/klj/vol79/iss1/6>

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# Should a Motion *in Limine* or Similar Preliminary Motion Made in the Federal Court System Preserve Error on Appeal Without a Contemporaneous Objection?

Imagine the following scenario:

There exists a hotly contested civil dispute in a district court of the United States. The defendant, anticipating his adversary's introduction of damaging evidence at trial, files a motion *in limine*<sup>1</sup> to exclude this evidence. The judge demes the motion and the trial subsequently begins. When the evidence is admitted at trial, the counsel for defendant fails to object to its admission, perhaps due to his misunderstanding of the law in that district or possibly due to neglect. Ultimately, a verdict is rendered for the plaintiff. The defendant appeals the verdict on the ground that the evidence should have been excluded because the court's denial of his motion *in limine* was improper.

Was the motion *in limine* sufficient to preserve the error for appeal, or was an objection required when the evidence was introduced at trial?

It is not difficult to imagine this scenario, as it is occurring with greater frequency in the federal court system.<sup>2</sup> Generally, courts hold that if a party making the motion *in limine* chooses not to testify at trial, thereby precluding the admission of the disputed evidence, no error is preserved for appeal because the evidence is not on the record.<sup>3</sup> However, where the evidence is introduced, there is discord among the circuits regarding the ne-

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<sup>1</sup> A motion *in limine* is a motion made by a party, prior to trial, seeking a protective order to exclude evidence. See BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

<sup>2</sup> Annotation, *Modern Status of Rules As to Use of Motion in Limine or Similar Preliminary Motion to Secure Exclusion of Prejudicial Evidence or Reference to Prejudicial Matters*, 63 A.L.R.3d 311 (1975).

<sup>3</sup> See, e.g., *Luce v. United States*, 469 U.S. 38, 43 (1984) (in order to raise and preserve for review a claim of improper impeachment by a prior conviction the defendant must testify).

cessity of an objection at trial after the denial of a motion *in limine*. Six circuits have ruled on the issue. The "general rule" among the Third,<sup>4</sup> Seventh,<sup>5</sup> and Ninth<sup>6</sup> Circuits is that an objection at trial is unnecessary after the denial of a motion *in limine*. These circuits have been fairly, but not completely, consistent in their approaches to this issue.<sup>7</sup> The Fifth,<sup>8</sup> Eighth,<sup>9</sup> and Eleventh<sup>10</sup> Circuits require a contemporaneous objection. These general rules do not provide continuity in and among the circuits but, rather, give rise to a precarious pit of conjecture into which even the most diligent counsel may fall.

The unsettled zone of speculation in which this area of the law now resides creates a derivative dilemma. Once a motion *in limine* is denied, the movant typically wishes to preserve the error for appeal. This can be assured by making a contemporaneous objection when the opposition introduces the evidence. However, in an effort to soften the impact of the evidence, the movant may desire to testify to it on direct.<sup>11</sup> May the movant testify to the disputed evidence on direct in an effort to soften its blow, or is he required to await his adversary's introduction of the evidence, in order to appeal its admission? Courts typically review as distinct cases those where the district court denied the motion *in limine* and the non-moving party offers the evidence at trial and those where the movant, employing trial strategy, offers the disputed evidence after the denial of his motion *in limine*.<sup>12</sup>

This Comment briefly reviews the trial strategy involved when utilizing the motion *in limine*. It analyzes two problems plaguing the use of the motion *in limine*. First, the conflict among the circuits that have addressed the sufficiency of a motion *in limine* to preserve error for appellate review is analyzed.<sup>13</sup> Second, the

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<sup>4</sup> See *infra* notes 24-31 and accompanying text.

<sup>5</sup> See *infra* notes 32-33 and accompanying text.

<sup>6</sup> See *infra* notes 34-41 and accompanying text.

<sup>7</sup> See, e.g., *United States v. Traylor*, 656 F.2d 1326 (9th Cir. 1981).

<sup>8</sup> See *infra* notes 43-51 and accompanying text.

<sup>9</sup> See *infra* notes 52-59 and accompanying text.

<sup>10</sup> See *infra* notes 60-65 and accompanying text.

<sup>11</sup> See *infra* notes 66-86 and accompanying text.

<sup>12</sup> See *Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649, 652 (9th Cir. 1980).

<sup>13</sup> The Third (see *infra* notes 24-31 and accompanying text), Seventh (see *infra* notes 32-33 and accompanying text), and Ninth (see *infra* notes 34-41 and accompanying text) Circuits are currently the only circuits that recognize a motion *in limine* as sufficient in and of itself to preserve the alleged error for appellate review. The Fifth (see *infra* notes 43-51

discord among those circuits that have ruled on whether a movant may offer the questioned evidence and subsequently appeal is addressed.<sup>14</sup> Finally, a solution to the precarious status of the motion *in limine* is offered.<sup>15</sup>

#### TRIAL STRATEGY AND THE MOTION *IN LIMINE*

Black's Law Dictionary defines "*in limine*" as "on or at the threshold; at the very beginning; preliminarily"<sup>16</sup> A motion *in limine* is made by a party in an effort to exclude prejudicial evidence from trial.<sup>17</sup> This motion accomplishes two primary purposes. First, the motion serves as a time-saving device, allowing the parties to gain rulings on motions prior to trial. Second, the motion reflects a deliberate consideration for the jury's perception of the trial proceeding.<sup>18</sup> This motion is made and decided before the trial begins, outside the presence of the jury.<sup>19</sup> It is commonly recognized that once evidence is introduced at trial, the damage is done and it is likely irrelevant that the court may subsequently sustain a party's objection.<sup>20</sup> It is difficult for a jury to ignore what it has already heard, despite strict admonishment by the court. In fact, objection to evidence in the jury's presence may only focus their attention on it.<sup>21</sup> If a motion *in limine* could preserve the objection for appeal, then trial strategy would be simplified. The attorney would not be required to object to the introduction of the evidence at trial, and the risk of amplifying the impact of the evidence is overcome.<sup>22</sup>

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and accompanying text), Eighth (*see infra* notes 52-59 and accompanying text), and Eleventh (*see infra* notes 60-65 and accompanying text) Circuits require a contemporaneous objection to preserve error for appellate review.

<sup>14</sup> *See infra* notes 66-86 and accompanying text.

<sup>15</sup> *See infra* notes 97-106 and accompanying text.

<sup>16</sup> BLACK'S LAW DICTIONARY 708 (5th ed. 1979).

<sup>17</sup> *See Luce v. United States*, 469 U.S. 38, 40 n.2 (1984).

<sup>18</sup> Annotation, *Sufficiency in Federal Court of Motion in Limine to Preserve for Appeal Objection to Evidence Absent Contemporaneous Objection at Trial*, 76 A.L.R. FED. 619, 622 (1986).

<sup>19</sup> *Id.* at 622.

<sup>20</sup> *Modern Status of Rules As to Use of Motion in Limine or Similar Preliminary Motion to Secure Exclusion of Prejudicial Evidence or Reference to Prejudicial Matters*, *supra* note 2, at 313.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

## I. CASES WHERE DISPUTED EVIDENCE WAS INTRODUCED BY AN INDIVIDUAL OTHER THAN MOVANT AND MOVANT FAILED TO OBJECT

### *A. Decisions in Circuits That Require No Contemporaneous Objections*

The Third, Seventh, and Ninth are the only circuits that have recognized a motion *in limine* as sufficient in and of itself to preserve the alleged error of a pre-trial evidentiary ruling, without a contemporaneous objection at trial.<sup>23</sup>

In 1985, the Third Circuit decided *American Home Assurance Co. v Sunshine Supermarket, Inc.*<sup>24</sup> In that case, an insurer filed suit seeking a declaration that it was not liable under a fire insurance policy. The insurer's motion *in limine*, requesting that evidence of arson be excluded, was denied by the court.<sup>25</sup> Subsequently, the insurer failed to object when the evidence was admitted at trial.<sup>26</sup> The court, reading Federal Rule of Evidence 103(a) (hereinafter "Rule 103")<sup>27</sup> in conjunction with Federal Rule of Civil Procedure 46 (hereinafter "Rule 46"),<sup>28</sup> found that under the circumstances a contemporaneous objection would have been in the nature of a formal exception, which is unnecessary under Rule

<sup>23</sup> See *infra* notes 24-41 and accompanying text.

<sup>24</sup> 753 F.2d 321 (3d Cir. 1985).

<sup>25</sup> *Id.* at 324.

<sup>26</sup> *Id.*

<sup>27</sup> FED. R. EVID. 103(a)(1) provides in relevant part:

Rule 103. RULINGS ON EVIDENCE

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground if objection, if the specific ground was not apparent from the context.

<sup>28</sup> FED. R. CIV. P. 46 provides in full:

Rule 46. EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

46.<sup>29</sup> The court reasoned that the district court's pre-trial ruling was a definitive oral ruling with no suggestion that it would be reconsidered at trial. An objection at trial would have been superfluous.<sup>30</sup> In the two cases presenting the issue to the Third Circuit since *American Home*, the court has held steadfastly to its opinion that a motion *in limine* preserves error for appellate review without an objection at trial.<sup>31</sup>

In *Thronson v. Meisels*, the Seventh Circuit articulated its general rule that an unsuccessful attempt to exclude certain evidence through a motion *in limine* is enough to preserve the issue for appeal.<sup>32</sup> The court unqualifiedly held that the pre-trial motion satisfied the timely objection requirement of Rule 103.<sup>33</sup>

In 1981, the Ninth Circuit first decided the sufficiency of a motion *in limine* as a basis for appellate review. In *United States v. Traylor*,<sup>34</sup> the court held that an objection at trial must be made to preserve error for review and that the denial of a party's motion *in limine* is an insufficient substitute.<sup>35</sup> However, although *Traylor* has not been expressly overruled by the Ninth Circuit, the opinion has been abandoned and overshadowed by the court's later decisions. In adopting the approaches of *Sheehy v. Southern Pac. Transp. Co.*<sup>36</sup> and *American Home*,<sup>37</sup> the Ninth Circuit in *Palmerin v. City of Riverside*<sup>38</sup> rejected the "invariable requirement that an

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<sup>29</sup> *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985) ("Rule 103(a), however, must be read in conjunction with Federal Rule of Civil Procedure 46 which states that formal exceptions are unnecessary.').

<sup>30</sup> *Id.* ("[T]he test is whether an objection at trial would have been more in the nature of a formal exception or in the nature of a timely objection calling the court's attention to a matter it need consider.').

<sup>31</sup> See *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1001 n.5 (3d Cir. 1988) ("The district court denied Westinghouse's motion and ruled that the evidence was admissible at the same time assuring counsel for Westinghouse that her objection was preserved.').; *United States v. Gambino*, 788 F.2d 938, 952 n.19 (3d Cir. 1986) ("The requirement that an objection be properly raised at trial, however, is not a rigid, mechanical rule blind to valid claims properly raised in pre- or post-trial proceedings.').

<sup>32</sup> 800 F.2d 136 (7th Cir. 1986).

<sup>33</sup> *Id.* at 142 ("By seeking, albeit unsuccessfully, to exclude the evidence by filing a motion *in limine* the Meisels have sufficiently preserved the issue for appeal.').; see also *Harris v. Davis*, 874 F.2d 461 (7th Cir. 1989) (In suit by prison inmate alleging cruel and unusual punishment, error was preserved through his motion *in limine* though he failed to object at trial to the admission of evidence regarding disciplinary action.).

<sup>34</sup> 656 F.2d 1326 (9th Cir. 1981).

<sup>35</sup> *Id.* at 1333 n.6.

<sup>36</sup> 631 F.2d 649 (9th Cir. 1980).

<sup>37</sup> 753 F.2d at 324-25.

<sup>38</sup> 794 F.2d 1409 (9th Cir. 1986).

objection that is the subject of an unsuccessful motion *in limine* must be renewed at trial."<sup>39</sup> The court further stated:

The substance of the objection to the admission of the guilty pleas was thoroughly explored during the hearing on the motion *in limine*. There was no hint that the ruling might be subject to reconsideration. Perhaps most important, there was nothing in the manner or context in which the guilty pleas were introduced at trial that was unforeseen or that cast any doubt on the applicability of the trial court's *in limine* ruling.<sup>40</sup>

Therefore, it appeared to be significant to the court that the evidence offered at trial mirrored the evidence discussed *in limine*.

In its decisions subsequent to *Palmerin*, the Ninth Circuit has reaffirmed its opinion that the denial of a motion *in limine* preserves error for appellate review.<sup>41</sup> The *Palmerin* decision now represents the general rule within that circuit.

### *B. Decisions in Circuits That Require Contemporaneous Objections*

The Fifth, Eighth, and Eleventh Circuits require a contemporaneous objection at trial to preserve error for appellate review after the denial of a motion *in limine*.<sup>42</sup>

In *Collins v Wayne Corp.*,<sup>43</sup> the Fifth Circuit articulated what has become the general view of that circuit, that a party who fails to object at trial may not challenge the admission of the evidence on appeal.<sup>44</sup> The court qualified its opinion by stating that motions *in limine* are frequently hypothetical and abstract, in anticipation of some unknown circumstance that may never develop at trial. If a party were to file numerous motions *in limine*, the court may

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<sup>39</sup> *Id.* at 1413.

<sup>40</sup> *Id.*

<sup>41</sup> See *United States v. Scott*, 859 F.2d 792 (9th Cir. 1988) (Although agreeing with its *Palmerin* decision, the court found that the motion *in limine* was insufficiently explored to preserve error for appellate review.); *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1370 (9th Cir. 1987) ("As long as a party properly raises an issue of law before the case goes to the jury, it need not include the issue in a motion for a directed verdict in order to preserve the question on appeal."); *United States v. 57.09 Acres of Land, More or Less, Etc.*, 757 F.2d 1025 (9th Cir. 1985) (Where the government objected to the court's allowing the jury to hear evidence regarding lease renewal and income, additional objections were unnecessary.).

<sup>42</sup> See *infra* notes 43-65 and accompanying text.

<sup>43</sup> 621 F.2d 777 (5th Cir. 1980).

<sup>44</sup> *Id.* at 784.

not pay close attention to each one.<sup>45</sup> It is necessary that the party object when the evidence sought to be excluded is about to be introduced so that the court may reconsider its pre-trial ruling in light of actual, rather than hypothetical, circumstances.<sup>46</sup>

In an expansive discussion of the issue, the Fifth Circuit stated:

Denial of a motion in limine rarely imposes a serious hardship on the requesting party, since the affected party can make a subsequent objection if the evidence is ever offered at trial. That later objection is the better time to evaluate the possible exclusion of testimony because it is at that time that the claims of prejudice and irrelevance move out of the abstract context of a motion in limine into the real world of an actual speaker and a specific statement.<sup>47</sup>

Although the Fifth Circuit generally requires an objection at trial to preserve an appeal, it does recognize an exception. In *Reyes v. Missouri Pac. R.R. Co.*,<sup>48</sup> the court stated that an objection must be made at trial, unless there exists a good reason not to do so.<sup>49</sup> In *Reyes* such a reason existed—a valid trial strategy of introducing the evidence to the jury on direct examination in an attempt to soften the blow of damaging information.<sup>50</sup> However, in a subsequent case, the court found that no valid reason for the plaintiffs' failure to object to the admission of evidence at trial existed because the plaintiff made no showing of good cause for not renewing the initial objection.<sup>51</sup>

Perhaps the Eighth Circuit is the most prolific with regard to decisions on whether denial of a pre-trial ruling is sufficient to preserve error for appellate review.<sup>52</sup> The Circuit first reviewed this

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* ("Motions in limine are frequently made in the abstract and in anticipation of some hypothetical circumstance that may not develop at trial.")

<sup>47</sup> *Rojas v. Richardson*, 703 F.2d 186, 188 (5th Cir. 1983).

<sup>48</sup> 589 F.2d 791, 793 n.2 (5th Cir. 1979); see *infra* note 79 and accompanying text.

<sup>49</sup> *Id.* at 793.

<sup>50</sup> *Id.* (Plaintiff's motion *in limine* to exclude evidence preserved the issue for appeal when he presented the disputed evidence to the jury during trial.)

<sup>51</sup> *Rojas v. Richardson*, 703 F.2d 186, 188 (5th Cir. 1983) (prior to trial, plaintiff unsuccessfully sought to exclude the use of the term "illegal alien"; for no apparent reason, plaintiff failed to object when the term was used by defendant's counsel during his closing argument).

<sup>52</sup> See, e.g., *United States v. Neumann*, 867 F.2d 1102, 1105 (8th Cir. 1989) (defendant failed to preserve for appeal his objection to evidence seized in a search, although he objected to the search and seizure in a pre-trial motion, where he failed to object to the admission of the evidence during trial); *United States v. Kandiel*, 865 F.2d 967, 972 (8th



issue in 1982, when it decided *Northwestern Flyers, Inc. v. Olson Bros. Mfg.*<sup>53</sup> Citing a Fifth Circuit decision,<sup>54</sup> the court found that when a defendant insurance company failed to interpose an objection at trial to evidence it sought to exclude prior to trial, it failed to preserve the alleged error for review<sup>55</sup>

In *Hale v. Firestone Tire & Rubber Co.*,<sup>56</sup> the court held that not only must the objection be renewed at trial but the contemporaneous objection must be upon the same grounds as those upon which the motion *in limine* was based. Prior to trial, Firestone sought to exclude evidence of certain remarks as conclusory and defamatory<sup>57</sup> However, when the motion *in limine* was renewed at trial, Firestone objected to the remarks because they were hearsay<sup>58</sup> Firestone preserved only its hearsay objection because the objection regarding the conclusory and defamatory character of the disputed remarks was not renewed at trial.<sup>59</sup>

Despite the Eleventh Circuit's recent entry into the fray, it appears that this circuit has developed a cogent general rule that an objection is required at trial to preserve an issue for appeal.<sup>60</sup>

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Cir. 1989) (appellant's objection to the admission of evidence regarding fingerprint cards in a pre-trial motion did not preserve appeal without a contemporaneous objection); *United States v. Roemgk*, 810 F.2d 809, 815 (8th Cir. 1987) (court of appeals reviewed disputed evidence regarding tax chuseling and pollution by third party because defendant objected at trial in addition to objecting in his motion *in limine*); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1118-19 (8th Cir. 1985) (Under special circumstances of this case, the court allowed an exception to its general rule and permitted motion *in limine* to preserve error for appellate review because motion had been fully briefed and argued.); *United States v. Robertson*, 706 F.2d 253, 255 n.2 (8th Cir. 1983) (defendant failed to preserve his objection to trial court's admission of his prior conviction for purposes of impeachment when he did not renew his objection at trial, despite his effort to exclude the conviction in his motion *in limine*); *Starr v. J. Hacker Co.*, 688 F.2d 78, 81 (8th Cir. 1982) (In products liability action for injuries caused by malfunctioning stripper plate in a die set, plaintiff's unsuccessful attempt, through his pre-trial motion, to exclude evidence of a third party's duty to make the die safe did not preserve error without a contemporaneous objection.).

<sup>53</sup> 679 F.2d 1264 (8th Cir. 1982) (following an airplane crash, financing agent sought to exclude evidence of a federal regulation in a suit against buyer for the balance of certain payments).

<sup>54</sup> *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980).

<sup>55</sup> *Northwestern Flyers, Inc. v. Olson Bros. Mfg.*, 679 F.2d 1264, 1275 n.27 (8th Cir. 1982).

<sup>56</sup> 756 F.2d 1322, 1333-34 (8th Cir. 1985).

<sup>57</sup> *Id.* at 1334.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1504 (11th Cir. 1985) (In an asbestos action brought by workers against an asbestos manufacturer, the manufacturer's pre-trial motion to exclude evidence of cancer among workers did not preserve the issue for appeal when there was no objection at trial as to the evidence.).

In *Hendrix v Raybestos-Manhattan, Inc.*, the court found compelling the fact that appellant had ample opportunity to object at trial to the admission of the evidence he sought earlier to exclude.<sup>61</sup>

The Eleventh Circuit subsequently adhered to its *Hendrix* opinion in *United States v Rutkowski*.<sup>62</sup> However, there exists one disturbing case decided prior to *Rutkowski* but less than one month after *Hendrix*.<sup>63</sup> In *United States v Kerr*, the court found that the defendant had objected at trial to the admission of evidence, but in a footnote the court stated that even if the defendant had not objected at trial, his objection to the evidence through his motion *in limine* would have been sufficient to preserve the error for appellate review.<sup>64</sup> Because of the Eleventh Circuit's more recent case following *Hendrix*,<sup>65</sup> it is unlikely that its dicta in *Kerr* will alter the course of its general rule. However, the inconsistency of *Kerr* compels one to be aware of its existence.

## II. CASES WHERE MOVANT INTRODUCES THE EVIDENCE AT TRIAL

When a party moves, prior to trial, to have certain evidence excluded and the district court judge denies the motion, in many instances the movant may be compelled to introduce the evidence himself.<sup>66</sup> Although ostensibly it seems foolhardy for the movant to unveil to the jury the very evidence he sought to exclude, it may in fact make good sense in the exercise of trial strategy.<sup>67</sup> When the movant introduces the evidence he sought to exclude, he is in a better position to minimize the effect it has upon the jury.<sup>68</sup> Alternatively, in criminal proceedings, for example, the movant may choose not to testify when he wishes at all costs to preclude the introduction of the damaging testimony and it cannot be introduced through anyone else.<sup>69</sup>

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<sup>61</sup> *Id.* at 1504.

<sup>62</sup> 814 F.2d 594, 598 (11th Cir. 1987) (defendant convicted of conspiracy to possess cocaine with intent to distribute was denied an appeal to the admission of fuel log, handwriting analysis, and expert testimony; although he objected to their admission prior to trial, he did not renew his objection).

<sup>63</sup> *United States v. Kerr*, 778 F.2d 690 (11th Cir. 1985).

<sup>64</sup> *Id.* at 698 n.8 ("As a general rule, an objection to the admission of evidence made through a motion *in limine* is preserved on appeal despite any failure to object to the evidence at trial, assuming that the trial court treated the motion in detail.").

<sup>65</sup> *United States v. Rutkowski*, 814 F.2d 594, 598 (11th Cir. 1987).

<sup>66</sup> *See Reyes v. Missouri Pac. R.R. Co.*, 589 F.2d 791 (5th Cir. 1979).

<sup>67</sup> *Id.* at 793 n.2.

<sup>68</sup> *Id.*

<sup>69</sup> Currently the circuits that have ruled on this issue are in complete agreement that

A split in authority exists among the circuits with regard to the preservation of error when the movant, whose motion *in limine* was denied, introduces the evidence at trial. The Eighth Circuit currently is the only circuit that precludes a movant's right to appeal the denial of his pre-trial motion when he introduces the evidence he previously sought to exclude. It has held steadfastly to this rule, which it first articulated in *United States v Cobb*.<sup>70</sup> In *Cobb*, the movant introduced evidence of a prior conviction on direct examination, although he had tried unsuccessfully to have that evidence excluded prior to trial through his motion *in limine*.<sup>71</sup> The court found that the movant waived his right to appeal the denial of his motion, stating that the motion *in limine* is tentative, and the appeal is conditioned upon the court's ruling on the evidence in light of the facts and circumstances developed at trial.<sup>72</sup> The court is necessarily precluded from ruling when the party seeking to exclude the evidence introduces it because the presenting party cannot object.<sup>73</sup> The court opined that the defendant "effectively cut off both the prosecutor's privilege to withhold the possibly prejudicial evidence and the court's opportunity to reconsider its preliminary ruling by voluntarily broaching the subject of the conviction on direct examination."<sup>74</sup> This rule has withstood the test of time in the Eighth Circuit, and subsequent decisions demonstrate that the Eighth Circuit will not allow a motion *in limine* to preserve error without an objection at trial.<sup>75</sup>

The Fifth, Seventh, and Ninth Circuits have held a motion *in limine* adequate to preserve error for appeal, even where the mov-

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a party's decision not to take the stand precludes him from challenging the trial court's denial of his motion *in limine* to exclude certain evidence. See, e.g., *Virgin Islands v. Brathwaite*, 782 F.2d 399 (3d Cir. 1986); *United States v. Studnicka*, 777 F.2d 652 (11th Cir. 1985); *United States v. Wolfe*, 766 F.2d 1525 (11th Cir. 1985).

<sup>70</sup> 588 F.2d 607, 612-13 (8th Cir. 1978).

<sup>71</sup> *Id.* at 613.

<sup>72</sup> *Id.* at 612.

<sup>73</sup> *Id.* at 613.

<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., *United States v. Dahlin*, 734 F.2d 393, 396 (8th Cir. 1984) (disclosure in defense counsel's opening statements of defendant's prior conviction was deemed a waiver of appeal of defendant's unsuccessful attempt to exclude conviction prior to trial); *United States v. Johnson*, 720 F.2d 519 (8th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984) (defendant who made motion *in limine* to preclude direct examination on the basis of certain prior criminal convictions but who did not object when prosecutor sought to introduce the evidence to impeach defendant failed to preserve the issue for review); *United States v. Key*, 717 F.2d 1206 (8th Cir. 1983) (defendant's testimony on direct examination of prior convictions prevented defendant's alleging error on advance ruling by court regarding the admissibility of evidence).

ant offers the disputed evidence at trial.<sup>76</sup> Each of these circuits has relied principally upon Rule 103, which requires that a timely objection to the admission of evidence be made to preserve the issue for appeal.<sup>77</sup> Because of the precarious position the denial of a motion *in limine* creates for the movant, these circuits have found Rule 103's timely objection requirement is satisfied by the motion *in limine* without an objection at trial.<sup>78</sup>

In *Reyes v. Missouri Pac. R.R. Co.*, the Fifth Circuit was deeply disturbed by the defendant's unenviable position. "[H]e had no choice but to elicit [the] information on direct examination in an effort to ameliorate its prejudicial effect."<sup>79</sup> The Seventh Circuit also was plagued by these concerns.<sup>80</sup> Relying upon Rule 103, the court found that when a movant's motion *in limine* to exclude records was denied, his placing the entire contents of those records into evidence did not preclude his right to appeal the issue.<sup>81</sup> In direct contradiction of *Cobb*, the Seventh Circuit stated that the movant is entitled to treat the ruling on the pre-trial motion as the law of the case so that admission of the evidence he sought to exclude is not a waiver of his right to appeal the ruling.<sup>82</sup> The Ninth Circuit employed a rationale similar to that employed by the Fifth and Seventh Circuits when ruling on the movant's preservation of error.<sup>83</sup>

One district court has ruled upon this issue.<sup>84</sup> In *United States v. Muscato*, the Eastern District of New York held that the defendant was entitled to rely on his motion *in limine*, and his introduction of the testimony in question on cross-examination did not preclude his right to appeal.<sup>85</sup> Relying on Rule 103 and the *Reyes* decision, the court stated, "[a] timely and specific objection in limine never withdrawn sufficiently preserves the issue."<sup>86</sup>

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<sup>76</sup> See *infra* notes 79-83 and accompanying text.

<sup>77</sup> *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985); see *supra* text accompanying note 30.

<sup>78</sup> See *infra* notes 79-83 and accompanying text.

<sup>79</sup> 589 F.2d at 793 n.2.

<sup>80</sup> See *Cook v. Hoppin*, 783 F.2d 684, 691 n.2 (7th Cir. 1986).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See *Sheehy v. S. Pac. Transp. Co.*, 631 F.2d 649, 652, 653 (9th Cir. 1980).

<sup>84</sup> *United States v. Muscato*, 534 F. Supp. 969 (E.D.N.Y. 1982).

<sup>85</sup> *Id.* at:973.

<sup>86</sup> *Id.*

## THE BENEFITS OF A GENERAL RULE

The unsettled law that exists among the circuits in the federal court system and the inconsistencies within those circuits create an arena of speculation into which counsel for the movant is forced to enter.<sup>87</sup> Such an arena may be fraught with disastrous consequences if the movant's attorney is unfamiliar with all of the rulings in the circuit or is unable to predict with accuracy how the circuit will rule in its next opinion. Counsel treads on especially dangerous ground in those circuits that have not yet decided this issue, where no amount of research will indicate in which direction the circuit will rule.

One might ask why a general rule is required with regard to this issue while so many other facets of the law remain unsettled in the federal circuits. Quite simply, the repercussions may be calamitous for the movant and his attorney if the attorney miscalculates or misunderstands a given circuit's rulings on the sufficiency of a motion *in limine*'s ability to preserve an error for appeal. For example, if in a given case in the Ninth Circuit, counsel for the movant were to rely on that circuit's most recent opinions foregoing the necessity of an objection at trial<sup>88</sup> and make no contemporaneous objection, he would be precluding his client's right to appeal the specific issue if the court chose to rely on *Traylor*,<sup>89</sup> which requires an objection at trial. It is not difficult to understand the catastrophe that the foreclosure of an appeal may mean for the client or the potential malpractice liability for the well-meaning, or even negligent, attorney.

The primary benefit of a general rule is predictability. The rule serves to inform the parties and the court as to the status of the motion *in limine* and whether there is a need for a renewed objection. Much of the guesswork and even deliberate, well-researched predictions made by the movant's counsel are eliminated in favor of an enlightened proceeding with minimal risks to the client.

Adherence to the philosophy behind the Federal Rules of Civil Procedure (hereinafter "Federal Rules") requires conformity among the circuits regarding this issue. In enacting the Process Act of 1789, a forerunner to the Federal Rules, it was Congress' intent

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<sup>87</sup> See *supra* notes 26-86 and accompanying text.

<sup>88</sup> See *supra* notes 34-41 and accompanying text.

<sup>89</sup> *United States v. Traylor*, 656 F.2d 1326 (9th Cir. 1981).

“to create uniformity of procedure within each state.”<sup>90</sup> A general rule with regard to the status of the motion *in limine* would be consistent with the purpose behind the Federal Rules. Furthermore, it is in the public interest that there be uniformity of procedure among the appellate courts.<sup>91</sup> This uniformity can “only come from concerted action, not from intermittent changes in individual circuit rules.”<sup>92</sup> It is necessary that there be cohesion and predictability of procedure among the circuits in deciding the impact of a denial of a motion *in limine*, and a general rule would provide those benefits.

Repeated objections in the presence of the jury, when a motion *in limine* would suffice, oftentimes serve only to draw excessive attention to the offending evidence.<sup>93</sup> It is generally understood that it is imperative to keep objections to a minimum:

Often your objection will serve to call special attention of the jury as well as the court to the unfavorable evidence you seek to exclude, thus tending to emphasize its significance. Natural curiosity will cause a juror to speculate privately and perhaps also to share the speculations with other jurors regarding the excluded matter. Frequently the question will have given enough of a clue that jurors surmise the nature of the excluded evidence. They may even surmise something worse than the excluded evidence.<sup>94</sup>

Additionally, if the attorney has made numerous motions prior to trial to exclude certain evidence and is then forced to renew his objections at trial, it is possible that he may forego some valid objections out of legitimate concern for the perceptions of the jury<sup>95</sup>

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<sup>90</sup> 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2471 (1971) (citations omitted) (“If the court takes action contrary to that requested by a party or overrules his objection, it is no longer necessary for the lawyer to go through the ritual of noting his exception [T]o do so is unnecessary and may even be improper.”); see also *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985) (“Under these circumstances [the court having given no indication that its pre-trial oral ruling would be reconsidered at trial], requiring an objection when the evidence was introduced at trial would have been in the nature of a formal exception and, thus, unnecessary under Rule 46.”).

<sup>91</sup> 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3945 (1977).

<sup>92</sup> *Id.*

<sup>93</sup> Annotation, *supra* note 2, at 313.

<sup>94</sup> R. KEETON, TRIAL TACTICS AND METHODS 167 (1973).

<sup>95</sup> See *supra* notes 18-21 and accompanying text.

A consistent rule with regard to the sufficiency of a motion *in limine* to preserve error for appellate review also would resolve the dilemma in those cases where the movant testifies to the disputed evidence.<sup>96</sup> The decision of whether or not a client is to testify is a very serious one. It is necessary that the party making the decision be apprised of all of the necessary facts in order to make a fully informed decision. A general rule would supply the needed information.

Furthermore, the objections made at trial would be reduced to a minimum by a general rule. Only very necessary objections need be made by the movant at trial, which reduces the length and complexity of the trial. It is also unlikely that an attorney representing the movant will forget or neglect to object at trial in those instances when he has been specifically forewarned by the court that it is necessary to do so. The moving party is apprised of exactly what actions must be taken to preserve the issue for appeal.

When the movant considers introducing evidence he sought earlier to exclude, he is relieved of the burden of deciding whether to mitigate the impact by introducing it himself or assure the preservation of his appeal by letting the opposition introduce the evidence. A general rule would allow the movant to introduce the evidence and to preserve the issue for appeal. Finally, when a party is deciding whether or not he should offer the evidence, he may do so without conjecture, weighing the pros and cons of his testimony. The movant may determine the impact of the evidence to the greatest extent possible, eliminating unnecessary supposition.

#### A GENERAL RULE

Ostensibly it would appear that a rule requiring in all instances an objection during trial to preserve error for appellate review should be required. However, such an arrangement would circumvent Rule 46's elimination of the exception as a necessity for appellate review.<sup>97</sup> A rigid rule that demands an objection at trial when a motion *in limine* has been denied, regardless of the motion's substance or its exploration by the court, would be in the nature of an exception and contrary to the purpose of Rule 46, which is to abolish burdensome formalities.<sup>98</sup> Neither would a general rule

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<sup>96</sup> See *supra* notes 66-85 and accompanying text.

<sup>97</sup> See *supra* note 28.

<sup>98</sup> 9<sup>1</sup> C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2471 (1971).

be workable that mandates that all pre-trial motions to exclude evidence preserve error for appellate review. This system would deprive a trial judge of his discretion to require an objection in those instances where the motion *in limine* is vague or undefined. In those cases, Rule 103's requirement of a timely objection would be circumvented were the judge not allowed to require a specific objection.<sup>99</sup>

For the foregoing reasons, the articulation of a consistent rule is required in the federal court system. The circuits typically have cited to the specificity of the motion and the depth of its exploration by the trial court when determining whether a renewed objection is required when a motion *in limine* has been denied.<sup>100</sup> The thoroughness of a pre-trial motion, however, is entirely too subjective an indicium upon which to base a general rule. The divisiveness among the circuits on this issue indicates that what one court may deem sufficiently explicit in a pre-trial motion, another court may deem insufficient.<sup>101</sup> For counsel to predict a given circuit's determination as to the explicitness of a pre-trial motion is to require telepathic powers.

Quite simply, the missing link in this dilemma is communication. Because a flat per se rule among the circuits is unworkable and likely violative of the Federal Rules,<sup>102</sup> an "informed disuniformity" among the circuits is the only valid solution. Inclusive in the pre-trial proceeding should be a determination by the court as to the specificity of the motion *in limine* and whether a renewed objection is required to preserve the issue for appeal. This determination should then be communicated to all parties to the action.

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<sup>99</sup> See *supra* note 27.

<sup>100</sup> See, e.g., *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986) ("[W]here the substance of an objection has been thoroughly explored during the hearing on the motion *in limine*, and the trial court's ruling permitting introduction of evidence was explicit and definitive, no further action is required to preserve for appeal the issue of admissibility of that evidence."); *Sprynczynatyk v. General Motors Corp.*, 771 F.2d 1112, 1118-19 (8th Cir. 1985) ("It was not a typical motion *in limine* situation where a hypothetical question is posed whose nature and relevance is unclear before trial. The matter was fully briefed and argued.").

<sup>101</sup> Compare *United States v. 57.09 Acres of Land, More or Less, Etc.*, 757 F.2d 1025, 1027 (9th Cir. 1985) (where government's objection to testimony and jury instructions in a pre-trial hearing preserved its right to appeal these issues without an objection at trial) with *Collins v. Wayne Corp.*, 621 F.2d 777, 783-84 (5th Cir. 1980) (where the party was denied its motion *in limine* to prevent cross-examination of certain witnesses and then neglected to object during the cross-examination at trial, the party was precluded from appealing this issue).

<sup>102</sup> See *supra* notes 97-99 and accompanying text.



This process lends predictability to the specific proceeding and eliminates much of the risky guesswork. The movant is fully informed as to the necessity of objecting at trial and contemporaneous objections are kept to a minimum. If an attorney fails to object after having been warned by the court, he may not complain on appeal. The judge's discretion regarding the necessity of a contemporaneous objection should be treated by the appellate court as a finding of fact and accorded the same high degree of deference. Although this rule of pre-trial communication will be uniform among the circuits, the determination of whether an objection at trial is needed is within the discretion of each trial judge and thus the "informed disuniformity."

The issue of whether a motion *in limine* preserves error for review likely will be resolved only through an amendment to the Federal Rules. Currently, courts are struggling with the contradictory implications of Rule 103's timely objection requirement and Rule 46's elimination of the exception.<sup>103</sup> A definitive rule requiring a judge to evaluate a pre-trial motion's validity to preserve error and to communicate his determination to the parties prior to trial would eliminate many of the confused and misguided interpretations existing in the federal circuits today.

With regard to evidence offered by the movant to which he objected prior to trial, the moving party should be permitted an appeal. The precarious position into which a movant is placed under the circumstances compels such a rule.<sup>104</sup> Currently in the Eighth Circuit, for example, a party whose motion *in limine* has been denied must decide either to introduce the evidence in the least prejudicial manner and forego his appeal, or allow the opposing party to introduce the evidence and thereby preserve his appeal.<sup>105</sup> It is clearly an unnecessary dilemma and one that is easily remedied if the movant is allowed to introduce his evidence and simultaneously preserve his appeal.<sup>106</sup> This general rule does not require the moving party to alert the court during the pre-trial proceeding as to the sufficiency of the pre-trial motion to preserve the error. The concession is afforded automatically to the party if and when he chooses to introduce the evidence.

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<sup>103</sup> See *supra* notes 27-29.

<sup>104</sup> See *supra* notes 87-92 and accompanying text.

<sup>105</sup> See, e.g., *United States v. Johnson*, 720 F.2d 519 (8th Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984).

<sup>106</sup> See *supra* notes 77-83.

## CONCLUSION

Currently, the federal circuits are in a state of flux, with some circuits finding a motion *in limine* sufficient to preserve an issue for appeal,<sup>107</sup> while others do not.<sup>108</sup> Within these circuits, courts often analyze the sufficiency of the motion in terms of its specificity and depth of exploration by the trial court.<sup>109</sup> Clearly, these subjective distinctions are inconsistent with the best interests of the parties to the action and the public at large.

The differences among the circuits illustrate the need for a coherent rule in the federal court system. Essentially, if the evidence the movant seeks unsuccessfully to exclude prior to trial is to be offered by his opponent, the court has discretion to require a renewed objection to preserve the issue for appeal. If it does so require, this must be communicated to both parties. If the evidence is to be admitted by the movant, then the court has no discretion and the movant is always permitted an appeal.

A general rule that lends consistent treatment to the status of the motion *in limine* creates an informed atmosphere in which to practice law. Communication prior to trial, between the court and the parties, helps to eliminate some of the unnecessary risk and guesswork that has become increasingly inherent to appellate practice.

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<sup>107</sup> See *supra* notes 26-41 and accompanying text.

<sup>108</sup> See *supra* notes 43-65 and accompanying text.

<sup>109</sup> See *supra* note 100.

