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Pretrial Exclusionary Evidence Rulings

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NOTES

PRETRIAL EXCLUSIONARY EVIDENCE RULINGS

Exclusionary rules of evidence developed in the Anglo-American legal tradition as a means of controlling the trial jury.¹ Judicial distrust of the jury's ability to appraise misleading or prejudicial evidence prompted the adoption of a procedure whereby such proffered evidence can be excluded upon objection by opposing counsel.² Under this procedure, counsel is obliged to wait until his opponent has offered or requested the evidence before challenging its admissibility.³ But the offer often suggests the content of the exhibit, and the questions asked frequently foreshadow the anticipated answers. To erase the prejudicial effect of such offers or requests, the jury is frequently instructed not to draw any inferences from the questions asked nor to speculate about the content of the excluded exhibits.⁴ Although the futility of such instructions soon became apparent, the courts have persistently held that objections made at the trial prior to the offer of evidence are premature.⁵

The first attempt to challenge the inflexibility of this established procedure by means of a *pretrial* motion to exclude was apparently made in *Bradford v. Birmingham Electric Company*⁶ in 1933.⁷

¹ Although trial by jury is now used infrequently in England, it has retained much of its importance in the United States. J. FRANK, COURTS ON TRIAL 109 (1949).

Thayer's assertion in F. THAYER, PRELIMINARY TREATISE ON EVIDENCE 266 (1898) that the English law of evidence is the "child of the jury system" has been challenged by Morgan, who suggests that our exclusionary rules of evidence are the result of "several factors . . . judicial distrust of the jury" being but one of them. Morgan, *The Jury and the Exclusionary Rules of Evidence*, 4 U. CHI. L. REV. 247, 258 (1936). Nevertheless, "while some doubt has been cast on the thesis that the inception of evidentiary rules in most cases corresponds with the emergence of the jury as an established fact-finding body, the continued vitality of the jury is certainly the principal justification for their retention today." Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 397 (1954); J. FRANK, *supra* at 123.

² C. McCORMICK, EVIDENCE § 52, at 115 (1954).

³ See *Hanson v. Milwaukee Mechanics' Mut. Ins. Co.*, 45 Wis. 321, 322-23 (1878); C. McCORMICK, *supra* note 2, § 52, at 115; 1 J. WIGMORE, EVIDENCE § 18, at 323 (3d ed. 1940); 88 C.J.S. *Trial* § 119 (1955).

⁴ C. McCORMICK, *supra* note 2, § 52, at 116.

⁵ "[A] general objection was made . . . before the witness had given any testimony. This was not the time to raise such an objection . . . Courts, in ruling on the admission of evidence, are expected to pass upon particular matter offered, and not to decide abstract propositions in advance of any offer." *Missouri, K. & T. Ry. v. Johnson*, 95 Tex. 409, 410, 67 S.W. 768, 769 (1901).

⁶ 227 Ala. 285, 149 So. 729 (1933). The trial court's dismissal of the motion was upheld on appeal on the grounds that "there is no rule of law or practice in this state which authorized the procedure called for by plaintiff's said motion." *Id.* at 287, 149 So. at 730.

Since then, requests for pretrial evidence rulings have been made with increasing frequency in both civil and criminal litigation.⁸ It is perhaps characteristic of the motion's infancy that it has not yet received a name by which it is universally known.⁹ However, because its function is to prohibit opposing counsel from offering or requesting allegedly improper evidence in the presence of the jury,¹⁰ it will be called a "motion to exclude" for purposes of this note. A motion to exclude may be presented at any time prior to the offer of evidence, but only those motions that are filed for a separate pretrial hearing or submitted during a pretrial conference will be discussed herein.¹¹ The motion to exclude typically requests both a binding court order prohibiting the communication of the evidence to the jury and a determination of admissibility. The court's order is always made at the time the motion is presented, but the admissibility determination may be postponed until the time of the trial, provided that the evidence is offered out of the hearing of the jury.¹²

Although the pretrial motion to exclude is now being used with increasing frequency in both state and federal litigation,¹³ the full potential of this novel procedural device has not yet been devel-

⁷ Annot., 94 A.L.R.2d 1087, 1091 (1964). *Weeks v. United States*, 232 U.S. 383 (1914) and *Segurola v. United States*, 275 U.S. 106, 111 (1927) established the pretrial motion to suppress evidence seized in violation of the fourth amendment right of privacy. Many states followed suit. Because this pretrial motion to suppress illegally seized evidence has a special history and is often governed by specific rules or statutes, it ought not to be confused with the pretrial motion to exclude, which is the subject of this note.

⁸ Annot., 94 A.L.R.2d 1087, 1088 (1964).

⁹ In Texas, pretrial exclusionary procedures are referred to as "motions in limine." Davis, *The Motion in Limine—A Neglected Trial Technique*, 5 WASHBURN L.J. 232 (1966). Elsewhere, they are variously referred to as "motions ad limine," "motions to suppress," and "motions to exclude." Annot., 94 A.L.R.2d 1087, 1090 (1964); Kromzer, *Advantages to Be Gained by Trial Motions for the Plaintiff*, 6 S. Tex. L.J. 179 (1963).

¹⁰ *Bridges v. Richardson*, 163 Tex. 292, 354 S.W.2d 366 (1962); Annot., 94 A.L.R.2d 1087, 1099 (1964); Davis, *supra* note 9, at 232.

¹¹ Annot., 94 A.L.R.2d 1087, 1088-89 (1964).

This note will focus upon motions to exclude noticed prior to the trial because it is these motions which present special procedural problems. However, those sections of the note dealing with value and legitimacy relate with equal force to motions to exclude presented during the trial. If the admissibility determination hinges upon the circumstances of the trial, it may be preferable to notice the motion after the trial has begun.

¹² Kromzer, *supra* note 9, at 185-86.

¹³ Of the state and federal cases discovered by this author, 23 were decided between 1960 and 1966. How many pretrial evidence rulings are either buried in the cases or unreported must remain a matter for speculation. Because no reference could be found to the pretrial motion to exclude in Wisconsin appellate decisions, a questionnaire was sent to 90 practitioners located throughout the state in an effort to determine whether the motion had actually been incorporated into Wisconsin practice. Of the 23 replies received, 10 reported utilization of the motion.

oped.¹⁴ Consequently, the initial sections of this note will be devoted to a consideration of the motion's value and legitimacy. Subsequent sections will concentrate upon the types of evidence issues which can profitably be determined prior to trial and the procedural effect of incorporating exclusionary evidence rulings into pretrial practice.

I. THE VALUE OF PRETRIAL EVIDENCE RULINGS IN PROMOTING FAIR AND EFFICIENT JURY TRIALS

As was noted in the introductory comments, the traditional exclusionary rules of evidence developed largely as a result of judicial concern for the litigants' right to a fair and impartial jury trial. But the courts' insistence that objections be made following the offer of evidence has prevented these rules from fully accomplishing their avowed purpose. This can perhaps best be illustrated by reference to the not uncommon practice of posing prejudicial questions.¹⁵ Under the traditional exclusionary procedure, a shrewd trial lawyer can phrase his inquiry so that the prejudice consists largely in the presentation of the question.¹⁶ Opposing counsel is then placed in a most perplexing position. If he objects, it will call the jury's attention to the improper evidence and create the impression that his client has something to hide.¹⁷ On the other hand, if he remains silent, he will waive his objection for purposes of appeal.¹⁸ Consequently, if he thinks that he can get a

¹⁴ Legal commentators have generally approved pretrial evidence rulings, but without amplified discussion. Moore states simply that the pretrial judge may rule on the admissibility of evidence. 3 J. MOORE, *FEDERAL PRACTICE* ¶ 16.16 (2d ed. 1948). McCormick says only that a pretrial conference would be an appropriate time to obtain a "tentative ruling" on certain evidence questions. C. MCCORMICK, *supra* note 2, § 152, at 320 n.29. Several full-length discussions of the pretrial motion to exclude have recently appeared in legal periodicals. See, e.g., Davis, *supra* note 9; Kromzer, *supra* note 9; Comment, *The Evidence Ruling at Pretrial in the Federal Courts*, 54 CALIF. L. REV. 1016 (1966).

¹⁵ Annot., 109 A.L.R. 1089 (1937); Davis, *supra* note 9, at 233.

¹⁶ *State v. Smith*, 189 Wash. 422, 428, 65 P.2d 1075, 1078 (1937); 3 J. WIGMORE, *supra* note 3, ¶ 1808, at 276; Davis, *supra* note 9, at 233; 19 LA. L. REV. 881, 883 (1959).

¹⁷ C. MCCORMICK, *supra* note 2, § 52, at 121; Annot., 109 A.L.R. 1089, 1091 (1937); Armstrong, *Objections to Evidence in Jury Trials: A Multiple Review*, 23 TENN. L. REV. 943, 945-47 (1955); Note, *Improper Argument to Juries in Civil Cases*, 43 MINN. L. REV. 545, 561-62 (1959).

¹⁸ J. CONWAY, *WISCONSIN AND FEDERAL CIVIL PROCEDURE* §§ 53.08, 74.10 (1966); C. MCCORMICK, *supra* note 2, § 52, at 115. E.g., *Beijer v. Beijer*, 11 Wis. 2d 207, 105 N.W.2d 348 (1960). "Appeal will lie without objection being raised only to prevent a miscarriage of justice or where the prejudice could not have been cured by any action of the trial court." Note, *Misconduct of Judges and Attorneys During Trial: Informal Sanctions*, 49 IOWA L. REV. 531, 543 (1964). Under Wis. STAT. § 251.09 (1965), for example, the supreme court may in its discretion reverse the judgment appealed from and order a new trial in the interests of justice even though proper objections were not made at the trial. *Weggeman v. Seven-Up Bottling Co.*, 5 Wis. 2d 503, 93 N.W.2d 467 (1958).

favorable ruling, he will ordinarily voice an objection.¹⁹ Yet even if counsel's objection is sustained, the improper question will rarely be so prejudicial as to provide grounds for a new trial or a reversal.²⁰ Therefore, he will have to rely upon the trial court's application of "curative measures" to remove the harm done.²¹ And while the use of these "curative measures" can perhaps be justified in terms of judicial economy,²² its effectiveness in removing the prejudicial impact of an improper question is subject to serious doubt.²³ In fact, it has been shown that the repetition of the improper evidence necessitated by the application of these curative measures may serve to implant the evidence even more firmly in the minds of the jurors.²⁴

¹⁹ C. McCORMICK, *supra* note 2, § 52, at 122; I. GOLDSTEIN, *TRIAL TECHNIQUE* § 422 (1935).

²⁰ "The cases bear much intrinsic evidence of the fact that trial courts are slow to set aside verdicts because of misconduct of counsel in examination of witnesses." Annot., 109 A.L.R. 1089, 1096 (1937).

²¹ Walzer, *Misconduct of an Attorney During Trial*, 7 PRAC. LAW. 92, 97-98 (1961).

The following curative measures are frequently utilized: (1) sustained objection and motion to strike; (2) instruction to disregard; (3) reprimand of offending counsel; and (4) withdrawal of improper argument. C. McCORMICK, *supra* note 2, § 52, at 115; Note, *supra* note 17, at 549.

²² Since it is virtually impossible to conduct an errorless trial, curative measures are currently utilized to reduce the number of appeals taken from evidence rulings. Gibbs, *Prejudicial Error: Admissions and Exclusions of Evidence in the Federal Courts*, 3 VILL. L. REV. 48, 50 (1957).

²³ The effectiveness of curative measures is based upon the presumption that juries do what judges tell them to do. However, proponents of the "realistic theory" have challenged the validity of this presumption: "[O]ften the jury are neither able to, nor do they attempt to, apply the instruction of the court." J. FRANK, *supra* note 1, at 111.

Assuming that the jurors are able to erase the evidence from their minds, they will often not be interested in performing the intellectual surgery entailed in disregarding that which they have just heard. *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 671 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963); *Sacramento & San Joaquin Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 68, 29 Cal. Rptr. 847, 853 (1963), *modified*, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963); C. McCORMICK, *supra* note 2, § 53, at 123.

²⁴ *Rice v. United States*, 149 F.2d 601, 604 (10th Cir. 1945) (repeated instructions to disregard which "emphasized, stressed, and [gave] prominence" to prejudicial evidence were held grounds for reversal on appeal).

The results of the Jury Project of the University of Chicago Law School provide some evidence that instructions to disregard sensitize the jury to the excluded evidence. Where defendant disclosed that he had insurance and no objection was made, the average award was \$37,000; where defendant's disclosure was followed by an objection and an instruction to disregard, the average award rose to \$46,000. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1959). Moreover, instructions to disregard are normally given twice. A specific instruction is given immediately after the objectionable evidence is offered; a general charge for the jury "to disregard all [stricken] testimony" is then given at the close of the case. WIS. J.I.—CIVIL INST. No. 130 (1960).

Pretrial evidence rulings provide a much more effective means of protecting the litigant's right to an impartial jury trial. If a pretrial motion to exclude is granted, the court will order opposing counsel to make no reference to the evidence at the trial within the hearing of the jury.²⁵ This virtually eliminates the danger that the evidence will be introduced under the guise of a question propounded to a witness.²⁶ It also eliminates the necessity of relying upon curative measures to safeguard the parties against the prejudicial impact that a submission of improper evidence may have upon the jury.²⁷

Nevertheless, the utility of the pretrial motion to exclude is subject to certain important limitations. For example, the moving party must show that he has reason to believe that improper evidence will in fact be offered.²⁸ Furthermore, the motion is effective only when the issue of admissibility can reasonably be determined prior to the offer of evidence at the trial.²⁹ And lastly, the pretrial order is binding only upon the opposing party and his counsel, making it possible for an unsuspecting witness to volunteer the informa-

²⁵ The following are exemplary of the prohibitive clauses frequently found in pretrial motions to exclude:

"Wherefore, plaintiff prays that this court . . . order and instruct defendant and his counsel not to elicit testimony respecting, mention, or refer to, either directly or indirectly . . . [the evidence in question]." Annot., 94 A.L.R.2d 1087, 1099 (1964).

"Wherefore, plaintiff respectfully requests the court to instruct the defendant and all its counsel not to mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly, any of the above mentioned facts, without first obtaining permission of the court outside the presence and hearing of the jury" Davis, *supra* note 9, at 232 n.1.

²⁶ E.g., *Burdick v. York Oil Co.*, 364 S.W.2d 766 (Tex. Civ. App. 1963) (violation of preliminary exclusionary ruling held grounds for reversal on appeal).

²⁷ Davis, *supra* note 9, at 233; Kromzer, *supra* note 9, at 179; Comment, *supra* note 14, at 1029.

²⁸ Annot., 94 A.L.R.2d 1087, 1098-99 (1964); see, e.g., the following excerpt from a pretrial motion filed in *Popp v. Western Cas. & Sur. Co.*, No. 329878 (Cir. Ct., Milwaukee Co., Branch 8, filed April 16, 1965): "[D]efendants are aware of said facts hereinbefore set forth, by virtue of deposition taken on the plaintiff, and further, . . . counsel for the defendants has indicated to your affiant that he intends to ask questions relating to the marital status of the plaintiff" Failure to make such an allegation may prompt the court to deny the motion to exclude on the grounds that it will not assume "that an attorney licensed to practice before it would offer illegal or incompetent testimony." *Bradford v. Birmingham Elec. Co.*, 227 Ala. 285, 287, 149 So. 729, 730 (1933). For a suggestion that expanded pretrial discovery techniques may aid counsel in anticipating his opponent's offer of inadmissible evidence see *Sacramento & San Joaquin Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 68, 29 Cal. Rptr. 847, 853, *modified*, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963).

²⁹ *LeRoy v. Sabena Belgian World Air Lines*, 344 F.2d 266, 274 (2d Cir. 1965), *cert. denied*, 382 U.S. 878 (1965); Kromzer, *supra* note 9, at 183; Comment, *supra* note 14, at 1032-33.

tion in response to a perfectly innocuous question.³⁰

In spite of these limitations, pretrial exclusionary evidence rulings are effective in reducing the harmful impact of prejudicial evidence. Unless the court makes a pretrial exclusionary order, there is very little to deter counsel from offering some evidence at the trial in such a way that it will have an improper influence upon the jury. Of course, it is unethical to offer evidence which counsel "knows the court should reject in order to get the same before the jury."³¹ And no question of doubtful propriety should be asked without first obtaining a ruling out of the hearing of the jury.³² But it is generally recognized that ethics are more a matter of good practice than of strict enforcement.³³ And since severe sanctions are rarely imposed by the trial court, there is little to deter an experienced lawyer from gambling on the application of "curative measures" to erase the prejudicial effect of his improper offer of evidence.³⁴ Tactically, it is a risk worth taking, for only when the evidence is highly prejudicial will the courts order a mistrial, new trial, or reversal on appeal.³⁵

³⁰ Comment, *supra* note 14, at 1033.

³¹ ABA CANONS OF PROFESSIONAL ETHICS No. 22.

³² In the Code of Trial Conduct promulgated by the American College of Trial Lawyers, the following provisions deal with the introduction of inadmissible evidence:

15 COURTROOM CONDUCT.

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 (d) A lawyer should not include in the content of any question the suggestion of any matter which is obviously inadmissible.

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 (g) In all cases in which there is any doubt about the propriety of any disclosure to the jury, requests should be made for leave to approach the bench and to obtain a ruling out of the jury's hearing, either by making an offer of proof or by propounding the question and obtaining an immediate ruling.

43 A.B.A.J. 223, 226 (1957).

³³ Walzer, *Conduct of the Attorney During Trial*, 7 PRAC. LAW. 60 (1961). Usually disbarment or contempt proceedings are brought only after the court has repeatedly warned the offender and he has ignored the court's ruling. Libby, *Misconduct of the Trial Attorney*, 10 CLEV.-MAR. L. REV. 439, 440 (1961).

Generally speaking, the organized bar is not prepared to invoke self-discipline in this area. For example, the McCracken survey showed that in eight of the twenty-five states reporting, it is common practice for lawyers to offer evidence which they know will be rejected. McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399, 409 (1951). See generally V. COUNTRYMAN & T. FINMAN, *THE LAWYER IN MODERN SOCIETY* 238-43 (1966); O. PHILLIPS & P. MCCOY, *CONDUCT OF JUDGES AND LAWYERS* 59-129 (1952).

³⁴ Annot., 109 A.L.R. 1089 (1937); Note, *supra* note 17, at 564; see note 21 *supra* and accompanying text.

³⁵ Note, *supra* note 17, at 563-64. Although counsel who makes an offer of inadmissible evidence runs the risk of having a judgment for his client reversed, it is doubtful that even the possibility of a reversal is a sufficient deterrent to such conduct. V. COUNTRYMAN & T. FINMAN, *supra* note 33, at 243.

Once a pretrial motion to exclude has been granted, the moving party has a binding court order instructing opposing counsel to make no reference to the excluded evidence within the hearing of the jury.³⁶ The court has an obligation to enforce this order.³⁷ Therefore, if reference is made to the forbidden evidence, not only is the risk of a mistrial, new trial, or reversal greatly increased,³⁸ but counsel himself faces the threat of a reprimand or contempt citation.³⁹ Consequently, the pretrial evidence ruling provides an effective means of deterring counsel from offering improper evidence because it warns him in advance that the court will not only exclude his offer of evidence at the trial, but may also use it as a basis for a new trial or a contempt order.

Opponents of the pretrial motion to exclude have suggested that the motion will increase the total amount of time devoted to evidentiary rulings because it will encourage litigants to make a greater number of objections,⁴⁰ particularly to evidence which may never be offered.⁴¹ Although this criticism deserves consideration, it must be placed in its proper perspective. In the first place, the frequency with which the motion can be used is automatically subject to one important limitation: Pretrial evidence rulings can be requested only when counsel can establish reason to believe that the evidence will in fact be offered at the trial.⁴² Beyond that, excessive use of the motion will have to be curbed by self-imposed standards of moderation.⁴³ In the second place, pretrial evidence rulings frequently reduce, rather than increase, the

³⁶ Davis, *supra* note 9, at 232; Annot., 94 A.L.R.2d 1087, 1099 (1964).

³⁷ "There is a duty upon the court to rule decisively. . . . [The judge] must enforce his [pretrial evidence] rulings. Violations of a court's solemn rulings should 'lead to serious consequences.'" Burdick v. York Oil Co., 364 S.W.2d 766, 770 (Tex. Civ. App. 1963); Kromzer, *supra* note 9, at 181-82.

³⁸ Kromzer, *supra* note 9, at 181-82.

The pretrial evidence ruling can also serve to "enhance harm" under the harmless error rules. *Id.* at 179; e.g., Roosth & Genecov Prod. Co. v. White, 152 Tex. 619, 629, 262 S.W.2d 99, 104 (1953).

³⁹ "The presentation of excluded matter to the jury by suggestion, by the wording of a question, or by indirection, violates professional standards and counsel's duty to the court." Burdick v. York Oil Co., 364 S.W.2d 766, 770 (Tex. Civ. App. 1963); Walzer, *supra* note 21, at 97. Although the court will not normally punish counsel for a spontaneous injection of known "legally irrelevant" matters, when it has made a preliminary exclusionary ruling, it will quite often chastise offending counsel openly in the presence of the jury. Kromzer, *supra* note 9, at 182.

⁴⁰ "Removal of the inhibiting factor of fear of alienating jury or judge will result in a multiplication of objections to evidence." Comment, *supra* note 14, at 1031.

⁴¹ Parmelee Transp. Co. v. Keeshin, 3 Fed. Rules Serv. 2d 16.261, Case 1 (N.D. Ill. 1960); Johns v. State, 155 Tex. Crim. 503, 236 S.W.2d 820 (1951).

⁴² See note 28 *supra* and accompanying text.

⁴³ "The writer feels that only those matters which are very damaging to one's case, and which are clearly inadmissible should be urged. In this way the trial court is not reluctant to pass on a limited number of problems." Kromzer, *supra* note 9, at 185.

total amount of time spent in litigation.⁴⁴ For example, the motion can be employed to prevent the introduction of time-consuming or diversionary collateral evidence.⁴⁵ It can be used to decrease the number of interruptions at the trial for objections and disputes concerning admissibility.⁴⁶ It may also serve to decrease the number of mistrials, new trials, and reversals based upon the introduction of prejudicial evidence.⁴⁷ Finally, should an increased amount of time be spent in resolving a particular dispute, this will often merely reflect the fact that the court gave more careful consideration to the evidence problems presented by the motion to exclude, requesting the submission of briefs and researching difficult admissibility issues before delivering the pretrial exclusionary ruling.⁴⁸

In certain instances, then, the pretrial motion to exclude may prolong the total time devoted to evidentiary problems. Generally speaking, however, it will ensure the swifter, smoother resolution of possible conflicts at the trial, thereby satisfying the current demands for efficiency and economy in judicial administration. Moreover, in those instances when the pretrial motion does delay the disposition of the case, the litigants should be more than compensated by the improvement in both the quality of the evidentiary rulings and the effectiveness of the court's enforcement of their right to an impartial jury trial.

II. THE LEGITIMACY OF PRETRIAL EVIDENCE RULINGS

Pretrial exclusionary evidence rulings may be made at a separate hearing prior to trial or at the pretrial conference. In either setting, the legitimacy of the pretrial motion to exclude has frequently been challenged on the grounds that it calls for a piecemeal determination of matters going to the merits of the case. An additional problem has arisen as to the authority of the judge to make coercive evidence rulings in the consensual atmosphere of the pretrial conference.

The practice of objecting at the trial originated in the Anglo-American tradition that each litigant should have his "day in

⁴⁴ Comment, *supra* note 14, at 1017. "A factor seldom mentioned in the discussion of the reduction of court time and litigant expense which the pretrial evidence ruling may effect is the impetus such rulings may give to out of court settlement . . ." *Id.* at 1030.

⁴⁵ *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 669-70 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963).

⁴⁶ Davis, *supra* note 9, at 233; Kromzer, *supra* note 9, at 181; Comment, *supra* note 14, at 1029-30.

⁴⁷ Assuming that the court's order will not often be violated (which would tend to increase the number of new trials and reversals), pretrial evidence rulings will help to eliminate: (1) challenges to the effectiveness of curative measures taken by the trial court; and (2) new trials and reversals based upon the introduction of incurably prejudicial evidence.

⁴⁸ Annot., 94 A.L.R.2d 1087, 1092 (1964); Davis, *supra* note 9, at 233.

court"; that his trial should be conducted cohesively from start to finish in the presence of the court and jury, each performing its respective function.⁴⁹ In keeping with this tradition, several courts have refused to recognize the legitimacy of the pretrial motion to exclude, asserting that "there is no occasion, prior to trial, to seek test rulings . . . upon questions of admissibility."⁵⁰ However, crowded court calendars and the growing complexities of contemporary litigation have necessitated the development of a variety of pretrial procedures designed to speed and simplify the course of justice and to ensure the litigants an impartial jury trial.⁵¹ Noteworthy among these have been the pretrial conference,⁵² the motion for summary judgment,⁵³ and the motion to suppress illegally seized evidence.⁵⁴ Clearly, such procedural innovations have made serious inroads into the doctrine that matters concerning the merits of a case should not be decided piecemeal prior to the time of the trial.⁵⁵ Therefore, by way of analogy, they have provided an important precedent which has greatly facilitated the recent recognition of the legitimacy of the pretrial motion to exclude.⁵⁶

Although an increasing number of courts now do recognize the motion's legitimacy, there are still no state or federal statutes which expressly create a pretrial procedure for excluding inadmissible evidence.⁵⁷ Consequently, the authority for making such pretrial rulings at formal hearings has been held to proceed from the trial

⁴⁹ Annot., 94 A.L.R.2d 1087, 1089 (1964); see note 1 *supra* and accompanying text.

⁵⁰ *State v. Flett*, 234 Ore. 124, 129-30, 380 P.2d 634, 637 (1963). *E.g.*, *Bradford v. Birmingham Elec. Co.*, 227 Ala. 285, 287, 149 So. 729, 730 (1933); *Nielsen v. Brown*, 232 Ore. 426, 430, 374 P.2d 896, 898 (1962); *Padgett v. State*, 364 S.W.2d 397 (Tex. Crim. 1963); *Bills v. State*, 168 Tex. Crim. 369, 327 S.W.2d 751 (1959); *Arrington v. State*, 164 Tex. Crim. 20, 21, 296 S.W.2d 537, 539 (1956); *Johns v. State*, 155 Tex. Crim. 503, 506, 236 S.W.2d 820, 822 (1951).

⁵¹ *H. NIMS, PRE-TRIAL 3-12* (1950); Annot., 94 A.L.R.2d 1087, 1089 (1964).

⁵² *FED. R. CIV. P. 16*; *WIS. STAT. § 269.65* (1965). The pretrial conference has been adopted in some form by forty-four states.

⁵³ *FED. R. CIV. P. 56*; *WIS. STAT. § 270.635* (1965).

⁵⁴ *FED. R. CRIM. P. 41(e)*; *WIS. STAT. § 955.09(3)* (1965). The purpose of this motion is "to prevent interruptions and delays in a trial, brought about by attacks on the legality of searches and evidence seized thereby." *Rodgers v. United States*, 158 F. Supp. 670, 677 (S.D. Cal. 1958), *aff'd*, 267 F.2d 79 (9th Cir. 1959); see note 7 *supra*. The motion permits the issue of legality to be decided without the jury hearing an account of "the embarrassing facts" leading to the search and seizure. Note, 44 *CALIF. L. REV.* 164, 166 (1956); cf. *ILL. REV. STAT. ch. 38, § 114-11* (1965), which provides for a pretrial motion to suppress involuntary confessions.

⁵⁵ Annot., 94 A.L.R.2d 1087, 1092 (1964).

⁵⁶ See *Sacramento & San Joaquin Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 68, 29 Cal. Rptr. 847, 852-53, *modified*, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963); Comment, *supra* note 14, at 1023-24.

⁵⁷ *Davis, supra* note 9, at 234. It should be noted, however, that there are broad statutory provisions in some jurisdictions authorizing the use of

court's inherent power to admit or exclude evidence.⁵⁸ This has inevitably led to a lack of uniformity in the adoption of the motion. In some jurisdictions, for example, the courts have conclusively established the legitimacy of the pretrial motion to exclude.⁵⁹ In others, it has been left within the trial court's discretion to determine in each case whether it will recognize the motion's validity.⁶⁰ Similarly, some courts rule on the admissibility of the evidence when the motion is first presented,⁶¹ while others postpone the evidence ruling until the time of the trial, ordering counsel to present the evidence first to the court out of the hearing of the jury.⁶²

Statutory codification would not only promote uniformity in the adoption of the pretrial motion to exclude, but would also completely eliminate current doubts concerning the legitimacy of this pretrial technique. No longer would it be within the court's discretion to accept or reject the motion on a case by case basis. Rather, if the admissibility issue is clearly capable of determination prior to the trial, the court would be required to rule decisively on the motion at the time of its presentation. If, on the other hand, there are

pretrial motions to raise "any defense or objection which is capable of determination without the trial of the general issue." WIS. STAT. § 955.09 (1965); Platz, *The 1949 Revision of the Wisconsin Code of Criminal Procedure*, 1950 WIS. L. REV. 28, 46-48. Arguably, such statutes encompass pretrial motions to exclude inadmissible evidence.

⁵⁸ Davis, *supra* note 9, at 234; Kromzer, *supra* note 9, at 179.

⁵⁹ *E.g.*, Sacramento & San Joaquin Drainage Dist. v. Reed, 215 Cal. App. 2d 60, 68, 29 Cal. Rptr. 847, 852-53 (1963), *modified*, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963); Bradbeer v. Scott, 193 Cal. App. 2d 575, 577, 14 Cal. Rptr. 458, 459 (1961); State v. Hawthorne, 90 N.J. Super. 545, 549, 218 A.2d 430, 432 (1966); State v. Baker Bros. Nursery, 366 S.W.2d 212, 214 (Tex. 1963); Burdick v. York Oil Co., 364 S.W.2d 766 (Tex. Civ. App. 1963). Unlike the Texas civil courts, the Texas Court of Criminal Appeals does not recognize the legitimacy of the pretrial motion to exclude, apparently because it has confused it with the motion to suppress, which is not recognized in Texas. In the only case which distinguishes between the two motions, the court did uphold the trial court's pretrial exclusionary evidence ruling. Scarborough v. State, 171 Tex. Crim. 83, 87, 344 S.W.2d 886, 889 (1961). In other jurisdictions, the courts have recommended the utilization of the motion to exclude. Radmacher v. Cardinal, 264 Minn. 72, 78, 117 N.W.2d 738, 742 (1962); O'Neil v. Kappesser, 243 N.Y.S.2d 712, 714, (Sup. Ct. 1963); Crawford v. Hite, 176 Va. 69, 10 S.E.2d 561 (1940).

⁶⁰ *E.g.*, Cook v. Philadelphia Transp. Co., 414 Pa. 154, 160, 199 A.2d 446, 449 (1964); State v. Morgan, 192 Wash. 425, 430, 73 P.2d 745, 747 (1937).

⁶¹ *E.g.*, Sacramento & San Joaquin Drainage Dist. v. Reed, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963), *modified* 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963); Jackson v. State, 108 Ga. App. 529, 133 S.E.2d 436 (1963); State v. Hawthorne, 90 N.J. Super. 545, 218 A.2d 430 (1966); Huff v. New York Cent. R.R., 12 DEFENSE L.J. 310 (1963), *aff'd on other grounds*, 116 Ohio App. 32, 186 N.E.2d 478 (1961); Cook v. Philadelphia Transp. Co., 414 Pa. 154, 199 A.2d 446 (1964); *see* Kromzer, *supra* note 9, at 185.

⁶² *E.g.*, McClintock v. Travelers Ins. Co., 393 S.W.2d 421 (Tex. Civ. App. 1965); Burdick v. York Oil Co., 364 S.W.2d 766 (Tex. Civ. App. 1963); Scarborough v. State, 171 Tex. Crim. 83, 344 S.W.2d 886 (1961); *see* Kromzer, *supra* note 9, at 185.

certain admissibility issues which will not admit of pretrial determination, the statute should give the judge a certain amount of discretion (1) to dismiss the motion without prejudice to the moving party, or (2) to defer his ruling until the time of the trial, subject to the stipulation that the evidence be presented first to the court out of the hearing of the jury.⁶³ The latter procedure would provide greater protection to the moving party, for it would prohibit the indirect disclosure of the evidence to the jury before an admissibility determination had been made. This, in turn, would eliminate the necessity for requesting the application of curative measures following the rejection of the evidence at the trial.

When the motion to exclude is presented for determination at a pretrial conference (as opposed to a separate hearing on the motion), questions arise concerning the power of the judge to make exclusionary evidence rulings. To be legitimate, pretrial conference rulings must fall within the ambit of authority conferred upon the court by Federal Rule 16 or by similarly-worded state statutes.⁶⁴ In other words, the pretrial judge must be empowered to rule coercively on questions of law presented by one party to the action. However, the history of the formulation and adoption of Federal Rule 16 suggests that the power of the judge at pretrial was not meant to be coercive.⁶⁵ The rule itself is cast in consensual terms. Moreover, many legal commentators have insisted that pretrial is not to serve as a substitute for the trial,⁶⁶ that the conference is to

⁶³ *E.g.*, WIS. STAT. § 955.09 (1965), which provides for a pretrial motion to raise any defense or objection which is capable of determination without the trial of the general issue. It also provides that "the motion shall be determined before trial . . . unless the court orders that it be deferred for determination at such trial." *Id.* § 955.09(5).

⁶⁴ Comment, *supra* note 14, at 1017; see 1B J. MOORE, FEDERAL PRACTICE ¶ 501(2) (2d ed. 1960). WIS. STAT. § 269.65 (1965) is an excellent example of a state statute containing virtually the same wording as Federal Rule 16, which provides:

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

⁶⁵ The first draft of the rule provided that the court, upon motion of any party or upon its own motion, could exclude from the trial any issue as to which it found there was no substantial dispute. The provision was subsequently dropped. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 471 n.1 (rev. ed. C. Wright 1960).

⁶⁶ H. NIMS, *supra* note 51, at 153-54; Clark, *Summary and Conclusion to an Understanding Use of Pre-Trial*, 29 F.R.D. 454, 461 (1962); Louisell,

be "informational and factual," not "legal and coercive."⁶⁷ As for the pretrial judge's specific ability to rule coercively on the admissibility of evidence, Federal Rule 16 merely authorizes the court "to consider . . . [t]he possibility of obtaining admissions of fact and documents which will avoid unnecessary proof." It would therefore appear that pretrial conferences were designed solely: (1) to procure the presentation and identification of papers, documentary evidence, and exhibits which the parties propose to offer at the trial; and (2) to obtain agreements as to the reception of documents in evidence and as to specific material facts which are not in dispute.⁶⁸

Nonetheless, since pretrial's inception, judges have been ruling coercively on questions of law.⁶⁹ Normally, they cite the catchall clause ("such other matters as may aid in the disposition of the action") as authority for their actions.⁷⁰ It is maintained that such rulings will advance the overriding purpose of the pretrial conference, which is to promote the swift resolution of the case.⁷¹ In keeping with this concern for economy in judicial administration, pretrial judges will usually decide motions pending at the time of the conference if they have been authorized for pretrial determination by procedural rules or statutes.⁷² They will also rule on statutory

Discovery and Pretrial Under the Minnesota Rules, 36 MINN. L. REV. 633, 664 (1952). *E.g.*, *Lynn v. Smith*, 281 F.2d 501, 506 (3rd Cir. 1960); *Klitzke v. Herm*, 242 Wis. 456, 463, 8 N.W.2d 400, 403 (1943). These authorities warn against transferring to the pretrial judge the traditional jury function of resolving factual issues.

⁶⁷ Clark, *supra* note 66, at 456.

⁶⁸ 88 C.J.S. *Trial* § 17(2) (1955); *Louisell*, *supra* note 66, at 666; *Ryan & Wickhem*, *Pre-Trial Practice in Wisconsin Courts*, 1954 WIS. L. REV. 5, 14, 30.

⁶⁹ 3 J. MOORE, *FEDERAL PRACTICE* ¶ 16.16, at 1121-22 (2d ed. 1960); *H. NIMS*, *supra* note 51, at 141; *Comment*, *supra* note 14, at 1018; 72 *YALE L.J.* 383, 386-91 (1962).

⁷⁰ *Berger v. Brannan*, 172 F.2d 241, 243 (10th Cir. 1949), *cert. denied*, 337 U.S. 941 (1949); *Hertz v. Graham*, 23 F.R.D. 17, 19 (S.D.N.Y. 1958); *Penn v. Auto. Ins. Co.*, 27 F. Supp. 337 (D. Ore. 1939); *Edenfield v. Crisp*, 186 So. 2d 545, 549 (Fla. Dist. Ct. App. 1966). "[The catch-all clause] . . . is all-inclusive and of great importance, for within its reach almost anything may be considered and become the subject of decisive action." *Delehant*, *The Pre-trial Conference in Practical Employment: Its Scope and Technique*, 28 NEB. L. REV. 1, 23 (1948).

⁷¹ *Louisell*, *supra* note 66, at 663; 72 *YALE L.J.* 383, 386, 391 (1962).

⁷² 3 J. MOORE, *FEDERAL PRACTICE* ¶ 16.09, at 1114 (2d ed. 1960); *Kincaid*, *A Judge's Handbook of Pretrial Procedure*, 17 F.R.D. 439, 442 (1955); *Comment*, *supra* note 14, at 1018-19. The motions most commonly pending are the motion to dismiss and the motion for summary judgment. *H. NIMS*, *supra* note 51, at 132, 140, 153-54. It is not uncommon for the rules of practice to provide that motions made after notice of the pretrial conference or pending at the time of the conference may be heard by the pretrial judge. *Louisell*, *supra* note 66, at 663 & n.102; *Comment*, *supra* note 14, at 1019 n.13. However, the practice of hearing motions at the conference has been criticized for destroying the desired informal atmosphere of voluntary cooperation. *Delehant*, *supra* note 70, at 25; 72 *YALE L.J.* 383, 391 (1962).

motions which are noticed for the first time at the pretrial conference, provided that the opposing party is not taken by surprise.⁷³ And finally, they will occasionally make coercive determinations on questions of law which have not been authorized by statute for pretrial determination, but which they feel will "aid in the disposition of the action."⁷⁴

In light of the above precedent, if the pretrial motion to exclude were legitimated by statutory codification, and particularly if an exclusionary motion were pending at the time of the pretrial conference, the court would undoubtedly have the authority to make a binding order. On the other hand, if there were no statute authorizing the pretrial determination of evidence questions, the court might be reluctant to issue a coercive exclusionary evidence ruling solely on the basis of its authority under the catchall clause. Strictly speaking, moreover, the catchall clause does not empower the court to make any type of coercive evidence ruling. Federal Rule 16 merely permits the court to *consider* such other matters as may aid in the disposition of the action. Therefore, it might be desirable to amend Federal Rule 16 and similarly-worded state statutes in the following manner: "to consider [and determine] . . . (6) Such other matters [including questions of evidence, raised on the motion of any party or by the court] as may aid in the disposition of the action."⁷⁵ While such an amendment would merely restate existing law in many jurisdictions, it would nevertheless serve an important function by expressly empowering the court to rule on pretrial motions to exclude inadmissible evidence.

⁷³ J. CONWAY, *supra* note 18, § 30.01; H. NIMS, *supra* note 51, at 132, 140-41; Louisell, *supra* note 66, at 663; Comment, *supra* note 14, at 1020-21; 72 YALE L.J. 383, 387-91 (1962).

⁷⁴ 3 J. MOORE, FEDERAL PRACTICE ¶ 16.16, at 1121-23 (2d ed. 1960); H. NIMS, *supra* note 51, at 122; Griffis, *Preparation of a Personal Injury Case for Pretrial Conference*, 29 F.R.D. 330, 343 (1962); Kincaid, *supra* note 72, at 442, 447; Comment, *supra* note 14, at 1020-21. There are several state and federal cases in which pretrial evidence questions have been authorized for determination at the pretrial conference. *E.g.*, *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963); *Berger v. Brannan*, 172 F.2d 241, 243 (10th Cir. 1949), *cert. denied*, 337 U.S. 941 (1949); *Parmelee Transp. Co. v. Keeshin*, 3 Fed. Rules Serv. 2d 16.261, Case 1 (N.D. Ill. 1960); *Hertz v. Graham*, 23 F.R.D. 17 (S.D.N.Y. 1958); *Ulrich v. Ethyl Gasoline Corp.*, 2 F.R.D. 357 (W.D. Ky. 1942); *Penn. v. Auto. Ins. Co.*, 27 F. Supp. 337 (D. Ore. 1939); *Bradbeer v. Scott*, 193 Cal. App. 2d 575, 14 Cal. Rptr. 458 (1961); *Edenfield v. Crisp*, 186 So. 2d 545 (Fla. Dist. Ct. App. 1966).

⁷⁵ See FLA. R. CIV. P. 1.16 for use of the phrase "consider and determine." In construing this statute, the court in *Collier v. McKesson*, 121 So. 2d 673, 675 (Fla. Dist. Ct. App. 1960), held that the pretrial judge should "specify by order . . . any preliminary rulings on matters of law relating to the case and as to the competency and admissibility of evidence . . ."

III. EVIDENCE ISSUES AMENABLE TO PRETRIAL EXCLUSIONARY RULINGS

There is no theoretical limit to the types of evidence issues which can profitably be determined prior to the trial.⁷⁶ From a purely practical standpoint, of course, the power of the judge to make pretrial evidence rulings is necessarily limited by his inability to foresee all the circumstances of the trial.⁷⁷ If a relevancy decision calls for the balancing of probative factors which must be weighed in the context of the trial, for example, the court will not be able to make a satisfactory pretrial admissibility determination.⁷⁸ Similarly, if the evidence question involves the determination of controverted issues of fact which must be considered again at the trial, the court may not want to require a pretrial presentation of proof.⁷⁹ But even when these practical limitations are taken into account, there still remains a broad range of evidentiary items whose direct or indirect communication to the jury can be effectively prohibited by utilizing the pretrial motion to exclude. It is therefore important to note that excessive use of the motion tends to foster a doctrine of judicial restraint in granting the moving party's request.⁸⁰ Thus the motion should be reserved for complex admissibility issues that will benefit by careful pretrial deliberation, for evidence rulings which will definitely eliminate interruptions and delay during the trial, and for exclusionary rulings that will protect the litigant's right to a fair and impartial jury trial.⁸¹ Examining the cases in which pretrial motions to exclude have been utilized in accordance with the above criteria, one can distinguish three general classes of admissibility issues which seem particularly appropriate for pretrial determination.

The first of these classes is composed of those admissibility issues which can be determined by applying technical exclusionary evidence rules, such as the hearsay rule, the original documents rule, the rules relating to the competency of witnesses, and the rules governing the privileges of parties and witnesses.⁸² The issues presented are often difficult, but they are nevertheless governed by well-defined standards which are not normally affected by the circumstances of the trial.⁸³ Courts have, therefore, issued

⁷⁶ Davis, *supra* note 9, at 234.

⁷⁷ LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266, 274 (2d Cir. 1965), *cert. denied*, 382 U.S. 878 (1965).

⁷⁸ State v. Flett, 234 Ore. 124, 129-30, 380 P.2d 634, 637 (1963); Johns v. State, 155 Tex. Crim. 503, 506-07, 236 S.W.2d 820, 822 (1951).

⁷⁹ See note 83 *infra*.

⁸⁰ Cook v. Philadelphia Transp. Co., 414 Pa. 154, 160, 199 A.2d 446, 449 (1964); Kromzer, *supra* note 9, at 183, 187.

⁸¹ See pp. 743-45 *supra*.

⁸² For a suggestion that this is the only type of admissibility determination which can be made prior to trial see Comment, *supra* note 14, at 1032-38. A discussion of the distinction between relevancy questions and issues calling for the application of technical exclusionary rules can be found in C. McCORMICK, *supra* note 2, § 53, at 125.

⁸³ The application of a technical exclusionary rule may require the

pretrial evidence rulings concerning prior reported testimony,⁸⁴ depositions taken for prior cases,⁸⁵ business records,⁸⁶ records of claims brought under laws administered by the Veterans' Administration,⁸⁷ and Veterans' Administration percentage of disability ratings.⁸⁸ The pretrial presentation of such admissibility issues is particularly appropriate because it permits the court to give more careful consideration to the application of the complex exclusionary evidence rules involved.

An equally important function of the pretrial motion to exclude is to prohibit the introduction of evidence which will have a potentially prejudicial impact on the jury. Unfortunately, the determination of relevancy issues involves the balancing of probative values against probative dangers, not the application of technical exclusionary rules of evidence.⁸⁹ Since this process of balancing intangibles calls for a large measure of individual judgment, the decision is often said to come within the discretion of the trial judge, who is in the best position to evaluate the circumstances of the trial.⁹⁰ But in certain areas, the relevancy of particular types of evidence has been challenged so repeatedly that the court's leeway of discretion has hardened into binding rules of precedent.⁹¹ Because these rules are virtually as well-established as the technical

determination of a preliminary question of fact. C. McCORMICK, *supra* note 2, § 53, at 122. This determination is traditionally made by the judge, not the jury. *Id.* § 53, at 123. Nevertheless, because all other controverted issues of fact must be determined at the trial, the judge may prefer to postpone the presentation of proof on the preliminary question of fact until the time of the trial.

⁸⁴ *Hertz v. Graham*, 23 F.R.D. 17, 19 (S.D.N.Y. 1958); *Penn. v. Auto. Ins. Co.*, 27 F. Supp. 337 (D. Ore. 1939).

⁸⁵ *Hertz v. Graham*, 23 F.R.D. 17, 19 (S.D.N.Y. 1958).

⁸⁶ *LeRoy v. Sabena Belgian World Airlines*, 344 F.2d 266, 274 (2d Cir. 1965), *cert. denied*, 382 U.S. 878 (1965); *Fidelity & Cas. Co. v. Frank*, 227 F. Supp. 948, 949 (D. Conn. 1964) (advisory opinion instead of binding evidence ruling).

⁸⁷ *Burdick v. York Oil Co.*, 364 S.W.2d 766, 767, 770 (Tex. Civ. App. 1963).

⁸⁸ *Aetna Cas. & Sur. Co. v. Finney*, 346 S.W.2d 917, 918-19 (Tex. Civ. App. 1961). Opposing counsel claimed for the first time on appeal that the evidence excluded as hearsay should have been admitted during the trial for impeachment purposes. The court found his claim without merit because he had failed to make an offer of proof at the trial showing why the disability rating should no longer be excluded. Nevertheless, the case is illustrative of the complications which can arise when the circumstances of the trial make previously excluded evidence admissible for unforeseen reasons. One solution to this problem is suggested at pp. 756-57 *infra*.

⁸⁹ C. McCORMICK, *supra* note 2, §§ 53, 122. To determine relevancy, the probative worth of the evidence must be balanced against the dangers of (1) unduly arousing the jury's emotions of prejudice, hostility, or sympathy, (2) confusing, misleading, or distracting the jury, (3) consuming an undue amount of time, and (4) unfairly surprising the opponent. UNIFORM RULE OF EVIDENCE 45.

⁹⁰ UNIFORM RULE OF EVIDENCE 45.

⁹¹ C. McCORMICK, *supra* note 2, § 152, at 320.

exclusionary evidence rules, they are equally applicable to the pretrial determination of admissibility issues. Therefore, pretrial motions to exclude can be effectively directed against the introduction of proof of character, such as circumstantial evidence of the movant's conduct or state of mind,⁹² proof of other crimes,⁹³ and proof of personal habits.⁹⁴ It may also be directed against proof of similar happenings or transactions in jurisdictions where prior claims, suits, or settlements are inadmissible to prove that the movant is a chronic litigant,⁹⁵ or where prices paid on sales of comparable land are inadmissible in condemnation proceedings.⁹⁶ Matters falling within the collateral source rule, such as evidence that the defendant is protected by liability insurance and evidence of a spouse's remarriage in wrongful death actions, are illustrative of other types of evidence which have frequently been excluded by reason of established rules of precedent.⁹⁷

Even if these rules of precedent do not clearly govern, the court is still competent to make a third class of pretrial evidence rulings; whenever counsel can show that the probative danger of submitting the evidence far outweighs its probative value, the court is empowered to grant a pretrial motion to exclude. Thus, if there is a grave probability that the evidence in question will confuse or distract the jury or consume an undue amount of time, the court will frequently issue a pretrial exclusionary order.⁹⁸ Similarly, if the court can reduce the risk of surprise to the proponent of the evidence by warning him in advance that it will not be admitted and that he must introduce substitute evidence at the trial, a pretrial motion to exclude will customarily be granted.⁹⁹ Finally, if the

⁹² For example, female plaintiffs in personal injury suits may seek to exclude any reference to their illicit relationships with members of the opposite sex. *Bradford v. Birmingham Elec. Co.*, 227 Ala. 285, 149 So. 729 (1933) (motion denied because worded too vaguely); *Bradbeer v. Scott*, 193 Cal. App. 2d 575, 14 Cal. Rptr. 458 (1961) (motion granted).

⁹³ Proof of other crimes was excluded in *McClintock v. Travelers Ins. Co.*, 393 S.W.2d 421 (Tex. Civ. App. 1965) and *Scarborough v. State*, 171 Tex. Crim. 83, 344 S.W.2d 886 (1961). However, proof of other criminal acts was admitted in *Bills v. State*, 168 Tex. Crim. 369, 327 S.W.2d 751 (1959) (part of the *res gestae*) and in *Johns v. State*, 155 Tex. Crim. 503, 236 S.W.2d 820 (1951) (showed propensity for unnatural sexual relations with person concerned in crime on trial).

⁹⁴ *Davis*, *supra* note 9, at 235; *Kromzer*, *supra* note 9, at 183.

⁹⁵ *Davis*, *supra* note 9, at 236-37.

⁹⁶ *United States v. Certain Tracts of Land*, 57 F. Supp. 739 (S.D. Cal. 1944).

⁹⁷ *Davis*, *supra* note 9, at 234; *Kromzer*, *supra* note 9, at 183.

⁹⁸ *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 669 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963). "[A]n excursion into each of these . . . matters . . . would result in a tremendous proliferation of proof which would literally overwhelm the jury with diversionary facts and extend the trial interminably." *Id.* at 670.

⁹⁹ In condemnation proceedings, the condemnor's motion to exclude is frequently granted on the theory that it will permit the condemnee to

prejudicial impact of submitting the evidence to the jury far outweighs its potential probative worth, the court will normally prohibit its introduction at the trial.¹⁰⁰ Borderline cases will inevitably arise, however. If counsel anticipates that the court will be reluctant to make a pretrial admissibility determination, he may simply want to request an order prohibiting the communication of the evidence to the jury.¹⁰¹ This will permit the court to postpone its admissibility determination until all the probative factors can be weighed in the context of the trial.

IV. THE PROCEDURAL EFFECT OF THE PRETRIAL MOTION TO EXCLUDE

The potential utility of the pretrial motion to exclude cannot be fully developed unless proper recognition is given to the grant or denial of the motion in subsequent proceedings.¹⁰² It is therefore

prepare a more accurate valuation of his severance damages. *Sacramento & San Joaquin Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 68, 29 Cal. Rptr. 847, 852-53 (1963), *modified*, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963); *State v. Baker Bros. Nursery*, 366 S.W.2d 212 (Tex. 1963). "The motion to exclude adopted in this case . . . reduces the surprise factor. It is calculated to iron out a disputed issue . . . before the actual expression of value opinions." *Sacramento & San Joaquin Drainage Dist. v. Reed*, *supra* at 68, 29 Cal. Rptr. at 853.

¹⁰⁰ *Huff v. New York Cent. R.R.*, 12 DEFENSE L.J. 310 (1963), *aff'd on other grounds*, 116 Ohio App. 32, 186 N.E.2d 478 (1961) (references to publicity received by daughter of deceased whose letter to president resulted in the installation of improved signals at crossing where her father had been killed); *Cook v. Philadelphia Transp. Co.*, 414 Pa. 154, 199 A.2d 446 (1964) (evidence suggesting that plaintiff in personal injury action was inebriated was excluded when there was no proof of intoxication).

A striking development in this area has been the use of the motion to exclude prior convictions or acts of misconduct which might be referred to in attempting to impeach the defendant in a criminal suit who wants to testify in his own behalf. *State v. Hawthorne*, 90 N.J. Super. 545, 218 A.2d 430 (1966) (previous convictions for robbery and theft excluded from action for assault and battery); *State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937) (desertion from Marines excluded from action for assault); *Gourley, Effective Pretrial Must Be the Beginning of Trial*, 28 F.R.D. 165 (1961) (discusses defendant in civil suit).

¹⁰¹ See p. 755 *infra* for a more complete discussion of the preliminary motion to exclude. This use of the motion should not be abused, however. See notes 43 & 80 *supra*.

¹⁰² Unless the pretrial motion to exclude is properly drafted, it cannot possibly have the desired effect at the trial or on appeal. Therefore, a few cautionary words would seem to be in order concerning the motion's form and content. Above all, the motion must be worded precisely. The issues should be clearly defined, for otherwise the court will not be able to rule on the admissibility of the evidence. Allegations must be made concerning counsel's reasons for believing that the evidence will be offered and his reasons for believing that the evidence is inadmissible. A statement should be included explaining why an ordinary objection during the trial would not be adequate. And finally, to prevent the motion from resulting in an easily-evaded order, the evidence should be particularized and opposing counsel and his client should be instructed not to make any direct or indirect references to the evidence or to the granting of the motion. For

important to note that the courts have not been at all consistent in determining the procedural effect of pretrial exclusionary evidence rulings. Perhaps the current lack of uniformity can be attributed to the dual function performed by the pretrial motion to exclude. The motion (which may be filed for a separate hearing¹⁰³ or noticed initially at a pretrial conference¹⁰⁴) seeks both an admissibility determination and a binding court order prohibiting the communication of the evidence to the jury. If a preliminary motion to exclude is filed, only a binding court order is requested prior to the trial. The proponent of the evidence is thereby instructed to make his offer of proof to the court out of the hearing of the jury, and the admissibility determination is postponed until the time of the trial.¹⁰⁵ When an absolute motion to exclude is brought, however, the admissibility determination is sought in advance of trial and then, if the evidence is ruled inadmissible, a binding court order is requested.¹⁰⁶

sample drafts of pretrial exclusionary motions, see *Aetna Cas. & Sur. Co. v. Finney*, 346 S.W.2d 917, 918 (Tex. Civ. App. 1961); Annot., 94 A.L.R.2d 1087, 1098-99 (1964); *Davis*, *supra* note 9, at 232.

¹⁰³ *E.g.*, *Sacramento & San Joaquin Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 29 Cal. Rptr. 847 (1963), *modified*, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963); *Burdick v. York Oil Co.*, 364 S.W.2d 766 (Tex. Civ. App. 1963).

If the motion calls for a complex or relatively unprecedented decision, it is best to file it a few weeks in advance of the trial, thereby permitting the judge to request the submission of briefs and to carefully research his ruling. On the other hand, if the motion involves the application of well-settled rules or the balancing of probative values and dangers, a formal hearing may be requested just prior to the *voir dire* examination. See *Kromzer*, *supra* note 9, at 182-84.

¹⁰⁴ *E.g.*, *Ulrich v. Ethyl Gasoline Corp.*, 2 F.R.D. 357 (W.D. Ky. 1942); *Bradbeer v. Scott*, 193 Cal. App. 2d 575, 14 Cal. Rptr. 458 (1961).

It is frequently stated that if a pretrial conference is held, all before-trial motions should be noticed prior to or during the conference. *Kromzer*, *supra* note 9, at 183; *Parnell, Preparation for Trial*, 39 WIS. BAR BULL. 12, 20 (1966). The motion to exclude may be raised for the first time during the conference. But if it is known in advance that a motion to exclude will be raised at the conference, a request for the exclusionary ruling should be noticed in the pretrial statement which is required in many jurisdictions by the local rules of practice. Comment, *supra* note 14, at 1046. This is particularly important when the issues presented by the motion are complex, for it enables the judge and opposing counsel to prepare themselves in advance. See *Ryan & Wickhem*, *supra* note 68, at 14.

When an evidence question is considered at the pretrial conference, both parties should request a written record of at least that portion of the conference covering the introduction and discussion of the motion in order to preserve error for appeal purposes. See *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963); *Zelof v. Capital City Transfer, Inc.*, 29 Wis. 2d 384, 139 N.W.2d 1 (1966); Comment, *supra* note 14, at 1047. If the motion is granted, the moving party should then take steps to have the exclusionary ruling incorporated into the pretrial order. *H. NIMS*, *supra* note 51, at 155-58.

¹⁰⁵ *Scarborough v. State*, 171 Tex. Crim. 83, 86-87, 344 S.W.2d 886, 889 (1961); *Davis*, *supra* note 9, at 233; *Kromzer*, *supra* note 9, at 185-86.

¹⁰⁶ *State v. Hawthorne*, 90 N.J. Super. 545, 218 A.2d 430 (1966); *Kromzer*, *supra* note 9, at 185-86.

If the pretrial motion to exclude is denied, whether preliminary or absolute, the proponent of the evidence may proceed to make his offer of proof in the presence of the jury.¹⁰⁷ The moving party will frequently respond by voicing an objection, particularly if the trial judge did not preside over the pretrial proceedings.¹⁰⁸ But such an objection should be required to preserve error for appeal purposes only when a preliminary motion is denied (*i.e.*, when the admissibility determination is postponed until the time of the trial¹⁰⁹) or when an absolute motion to exclude is denied and the moving party subsequently discovers new facts which make the evidence inadmissible.¹¹⁰ The requirement of an objection must be imposed in the latter case to prevent the moving party from remaining silent at the trial, waiting to take advantage of an inbuilt error on appeal.¹¹¹

If a preliminary motion to exclude is granted, the proponent of the evidence must present an offer of proof at the trial (out of the hearing of the jury) in order to obtain an appealable evidence ruling.¹¹² When an absolute motion to exclude is granted, however, the offer of proof has been made during the pretrial proceedings.¹¹³ The proponent is, therefore, not required to present a

¹⁰⁷ *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963); *Aetna Cas. & Sur. Co. v. Finney*, 346 S.W.2d 917, 919 (Tex. Civ. App. 1961); *Alamo Express, Inc. v. Wafer*, 333 S.W.2d 651, 652 (Tex. Civ. App. 1960); *Davis*, *supra* note 9, at 233-34; *Kromzer*, *supra* note 9, at 186.

¹⁰⁸ See Comment, *supra* note 14, at 1048-49 for a discussion of the problems which arise when the same judge does not preside over the trial and pretrial proceedings.

¹⁰⁹ *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963); *Davis*, *supra* note 9, at 233-34; *Kromzer*, *supra* note 9, at 186.

¹¹⁰ The authorities are divided concerning the need for the moving party to reobject when an absolute motion to exclude is denied if no new circumstances have arisen which would make the evidence inadmissible. For example, in *Sacramento & San Joaquin Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 68, 29 Cal. Rptr. 847, 852-53 (1963), *modified*, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963), no reobjection was required, but in *Jackson v. State*, 108 Ga. App. 529, 530, 133 S.E.2d 436, 437 (1963), the court held that the moving party waived his objection by failing to renew it at the trial. The better decisions would seem to be those which do not require a reobjection, particularly since no reobjection is required under the traditional rules of evidence following the court's refusal to sustain an objection. *J. CONWAY*, *supra* note 18, § 74.10; *C. McCORMICK*, *supra* note 2, § 52, at 120. The court has clearly indicated its position, and subsequent objections would therefore be futile, time-consuming, and possibly prejudicial. *Id.*

¹¹¹ For a discussion of the problems created by an inbuilt error on appeal, see *Kromzer*, *supra* note 9, at 186.

¹¹² *Burdick v. York Oil Co.*, 364 S.W.2d 766, 770 (Tex. Civ. App. 1963); *Scarborough v. State*, 171 Tex. Crim. 83, 86-87, 344 S.W.2d 886, 889 (1961); *Davis*, *supra* note 9, at 233-34. The moving party must voice his objection at the time the proponent makes his offer of proof. *Kromzer*, *supra* note 9, at 186.

¹¹³ *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 673-74 (9th Cir. 1963), *cert. denied*, 375 U.S. 922 (1963); *Aley v. Great*

second offer of proof at the trial unless new facts are subsequently discovered which would render the excluded evidence admissible, in which case the proponent must move for reconsideration of the pretrial exclusionary ruling out of the hearing of the jury.¹¹⁴ This permits the court to vacate the pretrial order, thereby protecting the legitimate interests of the proponent of the evidence without permitting him to claim error for the first time on appeal.¹¹⁵

Once a pretrial motion to exclude has been granted, the moving party has obtained a binding court order prohibiting the communication of the evidence to the jury.¹¹⁶ It is the court's responsibility to assume the initiative in compelling compliance with its order.¹¹⁷ Therefore, if the order is violated, the moving party should not be required to voice an objection in the presence of the jury.¹¹⁸ Instead, he should simply be expected to approach the bench to remind the court of the provisions of the pretrial order and to request the application of the appropriate sanctions.¹¹⁹ This will eliminate the risk of sensitizing the jury to the excluded evidence and, at the same time, will protect the moving party against charges that he has waived his objection for purposes of appeal.

V. CONCLUSION

The pretrial motion to exclude is a novel procedural device which is simultaneously capable of promoting fair and impartial jury trials, and efficiency and economy in judicial administration.

Atl. & Pac. Tea Co., 211 F. Supp. 500, 503 (W.D. Mo. 1962) (outlines procedure for making pretrial admissibility determination at pretrial conference); *Sacramento & San Joaquin Drainage Dist. v. Reed*, 215 Cal. App. 2d 60, 68, 29 Cal. Rptr. 847, 852-53 (1963), *modified*, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754 (1963); *State v. Hawthorne*, 90 N.J. Super. 545, 549, 218 A.2d 430, 432 (1966); Comment, *supra* note 14, at 1047.

¹¹⁴ See note 110 *supra*.

¹¹⁵ See Kromzer, *supra* note 9, at 186.

¹¹⁶ For a suggestion that the pretrial conference order can be so easily modified that it will not adequately protect the interests of the moving party see Comment, *supra* note 14, at 1041-46.

¹¹⁷ *Burdick v. York Oil Co.*, 364 S.W.2d 766, 770 (Tex. Civ. App. 1963); Kromzer, *supra* note 9, at 181-82.

¹¹⁸ *Bradbeer v. Scott*, 193 Cal. App. 2d 575, 14 Cal. Rptr. 458, 459 (1961); *McClintock v. Travelers Ins. Co.*, 393 S.W.2d 421, 423-24 (Tex. Civ. App. 1965); *State v. Smith*, 189 Wash. 422, 429, 65 P.2d 1075, 1078 (1937); see *Mixis v. Wisconsin Pub. Serv. Co.*, 26 Wis. 2d 488, 132 N.W.2d 769 (1965) (pre-voir dire conference objection to voir dire questions concerning insurance adequate to preserve claimed error on appeal). An objection will merely serve to call the jury's attention to the improperly submitted evidence. *Bradbeer v. Scott*, *supra* at 577, 14 Cal. Rptr. at 459.

¹¹⁹ To enforce its order, the court may impose direct sanctions (reprimand or contempt citation) or quasi-sanctions (mistrial or new trial). See p. 744 *supra*. A mistrial may be prejudicial to the interests of the moving party, however. *State v. Flett*, 234 Ore. 124, 129-30; 380 P.2d 634, 637 (1963); *Cook v. Philadelphia Transp. Co.*, 414 Pa. 154, 158, 199 A.2d 446, 448 (1964). Therefore, the threat of a mistrial should simply be retained as a sanction invocable at the moving party's option.

Although it is generally recognized that pretrial evidence rulings are an appropriate exercise of judicial power, statutory codification would eliminate any doubts concerning the legitimacy of the pretrial motion to exclude. The motion can be used most effectively when (1) the admissibility issue calls for the application of technical exclusionary rules of evidence or well-established rules of precedent, or (2) the probative danger of submitting the evidence far outweighs its probative value. Because the procedural effect of a grant or denial of the motion to exclude remains uncertain, the potential utility of the motion has not yet been fully developed.

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