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NOTES AND COMMENTS

CIVIL PROCEDURE—NEW MEXICO'S RECOGNITION OF THE MOTION *IN LIMINE*

Trial lawyers have long recognized that cases can be won by using shrewd questions and statements to inject prejudice into the minds of jurors.¹ Even if opposing counsel successfully objects to the prejudicial matter, he runs the risk that the jury, unfamiliar with the rules of evidence, will look upon the objection as a suppression of the facts.² Counsel may also request that the court admonish the jury to disregard the prejudicial questions or statements, but such "curative" instructions are considered unrealistic and ineffective by many commentators.³ In recent years a procedural device has developed that allows counsel to avoid this dilemma in a number of cases: the motion *in limine*. In general, the object of this motion is to obtain a preliminary court order excluding references to particular prejudicial matters at trial before such matters are actually mentioned in the presence of the jury. Last year, in the case of *Proper v. Mowry*,⁴ the New Mexico Court of Appeals approved the use of the motion *in limine* in civil cases.⁵

Introduction: Proper v. Mowry

The case arose out of a verbal confrontation that took place at a doctors' staff meeting. Dr. Proper sued Dr. Mowry for slander, claiming that statements made by the latter at the meeting had damaged his reputation in the medical community.⁶ During a pretrial

1. A case highlighting this problem is *Carabba v. Anacortes School Dist. No. 103*, 72 Wash. 2d 939, 435 P.2d 936 (1967), wherein, among other things, defense counsel tried to bring out the contents of a letter which in effect showed that plaintiff's mother had a dubious opinion of the merits of the plaintiff's case.

2. C. McCormick, *Handbook of the Law of Evidence* § 52 (2d ed. 1972).

3. J. Frank, *Courts on Trial* 111 (1949). For the opposite view, see *State v. Valdez*, 83 N.M. 632, 495 P.2d 1079 (Ct. App.), *aff'd*, 83 N.M. 741, 497 P.2d 743 (1972).

4. 90 N.M. 710, 568 P.2d 236 (Ct. App. 1977). The New Mexico Supreme Court has not been asked to review the decision.

5. The motion *in limine* can and is employed in criminal as well as civil cases. This writer could find no reported New Mexico case explicitly approving the use of *in limine* procedure in criminal cases to exclude anticipated prejudicial evidence. However, discussions with local attorneys indicate that such motions are made in New Mexico; it is believed that the authority to hear and decide these motions is within the inherent power of the trial judge. Statutory authority for *in limine* procedure also arguably exists in N.M. Stat. Ann. § 41-23-18 (Supp. 1975), which provides for pretrial motions to suppress illegally seized evidence, confessions, admissions, "or other evidence" that may "aggrieve" the defendant.

6. *Proper v. Mowry*, 90 N.M. at 712, 716, 568 P.2d at 238, 242.

conference held more than a month before trial, defendant's attorney made it clear that he intended to make statements in his opening presentation to the jury which plaintiff considered prejudicial.⁷ Two days before trial, plaintiff filed a motion *in limine* asking the court to order the defendant to refrain from mentioning in his opening statement that subsequent to the staff meeting quarrel plaintiff's privileges at local hospitals were suspended for his failure to keep charts up to date and that a charge had been filed against the plaintiff with the grievance committee of the County Medical Society alleging that he had charged excessive fees. The motion was heard in the court's chambers the morning of the trial. The court asked the defendant to make a record of the things he intended to bring out in his opening statement and then partially granted plaintiff's motion.⁸ The court ordered the defendant not to mention the subject of excessive fees and the grievance committee proceedings, but allowed defendant, over objection, to state generally that plaintiff's record keeping was not up to community standards, that plaintiff charged fees that insurance companies would not reimburse for patients, and that plaintiff over-utilized diagnostic procedures. When the defendant touched on the relation of the authorized subjects to the issue of damages in his opening statement, plaintiff moved for a mistrial. The motion was denied and the jury later returned a verdict for the defendant.⁹

One appeal one of the plaintiff's claims was that the trial court had erred by partially denying his motion *in limine*.¹⁰ Neither the appellant nor the appellee addressed the question of whether or not the trial court had the authority to entertain motions *in limine* under the New Mexico Rules of Civil Procedure. After chiding the attorneys in the case for failing to discuss the issue in their briefs,¹¹ the court of appeals held that the trial court had the "inherent power to hear and determine plaintiff's 'motion in limine'."¹² *In limine* procedure was said to be further authorized by Rule 16(6) of the New Mexico Rules of Civil Procedure¹³ which permits the court to consider prior to trial "such other matters as may aid in the disposition of the action."¹⁴ The court of appeals also indicated that the

7. *Id.* at 713, 568 P.2d at 239.

8. *Id.* at 712, 568 P.2d at 238.

9. *Id.* at 713, 568 P.2d at 239.

10. Plaintiff-Appellant's Brief-in-Chief at ____.

11. 90 N.M. at 713, 568 P.2d at 239.

12. *Id.* at 715, 568 P.2d at 241.

13. N.M. Stat. Ann. § 21-1-1(16)(6) (Repl. 1970). The rule is identical to Rule 16(6) of the Federal Rules of Civil Procedure.

14. 90 N.M. at 713, 568 P.2d at 239 (quoting Rule 16(6)).

trial court's ruling on the plaintiff's motion *in limine* was not improper, for an order issued in response to a motion *in limine* cannot, in itself, be reversible error.¹⁵

Development of In Limine Procedure

The motion *in limine* is of such recent origin that legal dictionaries have not yet comprehensively defined it. The most they indicate is that the phrase "in limine" is of Latin derivation and means "[o]n or at the threshold; at the very beginning; preliminarily."¹⁶ The cases and the commentators have also failed to develop a uniform definition of the motion *in limine*.¹⁷ One of the broadest definitions of the motion is as follows: a request for an order which is made either before trial or at trial and out of the presence of the jury to prohibit the opposing party, his counsel, and witnesses from making any reference before the jury to certain evidence the mere mention of which would be prejudicial to the moving party.¹⁸ The motion has been used by both plaintiffs and defendants and in both civil and criminal cases. It has been used to prevent counsel from referring to prejudicial evidence in his voir dire examination of the jurors and in his opening statement.¹⁹ It is also widely used to prohibit counsel from asking questions or making statements in connection with the offer of evidence of questionable admissibility until the admissibility of the evidence can be determined during the course of the trial out of the presence of the jury.²⁰ In the last case, it is said that the motion is intended to guard against the prejudicial effect of the questions asked or the statements made rather than the prejudicial effect of the evidence.²¹

The motion *in limine* was unknown at English common law.²² Some commentators believe that the motion may be derived from the motion to suppress used in criminal cases to exclude illegally seized evidence.²³ It may also be related to the motion to strike allegations, prejudicial or otherwise, from the pleadings.²⁴ The landmark American case attempting, albeit unsuccessfully, to use a

15. *Id.* at 715, 568 P.2d at 341.

16. Black's Law Dictionary 896 (4th ed. rev. 1968).

17. Nor have they been able to find a uniform name for the motion. It has been referred to as a motion ad limine, a motion to exclude, and a motion to limit evidence. See, Comment, *Motion In Limine*, 29 Ark. L. Rev. 215, 221-22 (1975-76).

18. See *Burrus v. Silhavy*, 155 Ind. App. 558, 293 N.E.2d 794 (1973).

19. *Mead v. Scott*, 256 Iowa 1257, 130 N.W.2d 641 (1964).

20. *Twyford v. Weber*, 220 N.W.2d 919 (Iowa 1974).

21. *Bridges v. City of Richardson*, 163 Tex. 292, ____, 354 S.W.2d 366, 367 (1962).

22. Comment, *Motion in Limine*, *supra* note 17, at 220.

23. Annot., 63 A.L.R.3d 311, 315 (1975); Annot., 94 A.L.R. 1087, 1090 (1964).

24. Annot., 63 A.L.R.3d, *supra* note 23, at 315.

pretrial motion to exclude prejudicial matter was *Bradford v. Birmingham Electric Co.*²⁵ In a suit for personal injuries allegedly sustained by the plaintiff while a passenger on defendant's streetcar, plaintiff filed a motion asking the court to ascertain whether the defendant intended to offer certain testimony relating to the personal life and character of the plaintiff and to "inform and admonish" the defendant not to offer the evidence at trial. The Alabama Supreme Court upheld the trial court's refusal to make the pretrial order, saying that to sustain the motion would be violative of all precedent and an unwarranted judicial usurpation of authority. The court further remarked that it would not "arrogate to itself the prerogative of requiring counsel to inform it as to what evidence he will or will not offer in his client's behalf" or "instruct" an attorney as to what evidence he may introduce at trial.²⁶

The *Birmingham* court's hostility toward the motion *in limine* was obviously part of the court's general hostility toward pretrial procedure. The early common law tradition viewed the trial as a cohesive proceeding conducted entirely before the judge and jury.²⁷ It was the function of the parties to the case to frame the controversy and lay it before the court for decision; the judge was not to concern himself with what was brought forward by the parties.²⁸ Pretrial procedures were clearly disapproved. However, the increased volume and complexity of modern day litigation has made it necessary to develop certain procedural devices to shorten the time and expense of trial.²⁹ Pretrial conferences, summary judgment, and discovery have come into favor in federal and state courts.³⁰ Adoption of the motion *in limine* has followed—but at a dogtrot—the development of other pretrial techniques. The motion is now expressly recognized in federal courts,³¹ and in Alaska, Arizona, California, Colorado, Indiana, Iowa, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, Texas, Virginia, and Washington.³²

The authority in the federal courts for the use of the motion *in limine* is found in Rule 16 of the Federal Rules of Civil Procedure.

25. 227 Ala. 285, 149 So. 729 (1933).

26. *Id.* at _____, 149 So. at 730.

27. Annot., 63 A.L.R.3d, *supra* note 23, at 314.

28. Sunderland, *The Theory and Practice of Pre-Trial Procedure*, 36 Mich. L. Rev. 215 (1937).

29. *Id.* at 226.

30. Annot., 63 A.L.R.3d, *supra* note 23 at 315-16.

31. *See, e.g.*, *United States v. Fishel*, 324 F. Supp. 429 (D.C.N.Y. 1971); *Aley v. Great Atlantic & Pacific Tea Co.*, 211 F. Supp. 500 (W.D. Mo. 1962).

32. *See* Annot., 63 A.L.R.3d, *supra* note 23, at 311, for a partial compilation of the cases approving the motion.

Principally, Rule 16 allows the court in its discretion to direct the attorneys for the parties to appear before it prior to trial to consider simplification of issues, amendments to the pleadings, admissions of facts and documents, and limitation on the number of expert witnesses. In addition, Rule 16 has a catch-all clause that allows the court to consider "such other matters as may aid in the disposition of the action."³³ *Aley v. Great Atlantic and Pacific Tea Co.*³⁴ discussed the relationship of Rule 16 to the exclusion of evidence by the use of pretrial motions. In an action for false arrest and false imprisonment, the plaintiff moved before trial to exclude testimony which related to prior occasions on which the plaintiff had been observed stealing merchandise from defendant's store. The court stated that it believed that the testimony was prejudicial and that it was advantageous to have reviewed it outside of the hearing of the jury. Pretrial consideration of the admissibility of the testimony also simplified the issues of the case. The pretrial motion was therefore found to be a proper subject for consideration under the catch-all clause of Rule 16.³⁵ The courts of states that have derived their rules of civil procedure from the federal rules have also indicated that the state equivalent of Rule 16 empowers courts to hear pretrial motions to exclude prejudicial matter.³⁶

State courts also frequently find the authority to entertain motions *in limine* in the trial court's inherent power to admit and exclude evidence.³⁷ It is the court's duty to ensure a fair and impartial administration of justice. Therefore, the inherent power to exclude evidence must extend to prejudicial questions and statements that could be made in the presence of the jury.³⁸ Federal criminal cases approving pretrial exclusion of prejudicial evidence do not point to any statutory authorization for the practice. Presumably, they also find the power to decide the motions in the inherent power of the court.³⁹

*Wallin v. Kinyon's Estate*⁴⁰ is a notable California case which

33. Fed. R. Civ. P. 16(6).

34. 211 F. Supp. 500 (W.D. Mo. 1962).

35. *Id.* at 503.

36. *Bradbeer v. Scott*, 193 Cal. App. 2d 575, 14 Cal. Rptr. 458 (1961); *Wallin v. Kinyon Estate*, 164 Mont. 160, 519 P.2d 1236 (1974).

37. *People v. Jackson*, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971); *Baldwin v. Inter City Contractors Serv. Inc.*, 156 Ind. App. 497, 297 N.E.2d 831 (1973); *Burrus v. Silhavy*, 155 Ind. App. 558, 293 N.W.2d 794 (1973); *State v. Johnson*, 183 N.W.2d 194 (Iowa 1971); *Wallin v. Kinyon Estate*, 164 Mont. 160, 519 P.2d 1236 (1974).

38. *Burrus v. Silhavy*, 155 Ind. App. 558, —, 293 N.E.2d 794, 795 (1973).

39. *See United States v. Palumbo*, 401 F.2d 270 (2d Cir.), *cert. denied*, 394 U.S. 497 (1968); *United States v. Fishel*, 324 F. Supp. 429 (D.C.N.Y. 1971).

40. 164 Mont. 160, 519 P.2d 1236 (1974).

cited both the inherent power principle and Rule 16 as bases of authority for the motion *in limine*. At the beginning of a jury trial a will proponent's motion to exclude certain prejudicial testimony was granted. The state supreme court held that the district court had the discretion to grant the motion. The court noted that the state equivalent of Rule 16(6) would authorize the use of the motion in the pretrial setting, but when, as in the case before the court, the motion was made at trial the inherent power of the court to admit or exclude evidence authorized the court to hear the motion.⁴¹

In most cases, the effect of granting a motion *in limine* is to add another procedural step to the traditional manner of introducing evidence. The order granting a motion *in limine* can take two forms: a prohibitive order in preliminary form or a prohibitive order in absolute form.⁴² The preliminary form of the order prohibits counsel from offering or mentioning anticipated prejudicial evidence in front of the jury unless the court's permission to disregard the order is first obtained in chambers. The absolute form of the order is a final ruling on the admissibility of the evidence and precludes counsel from later mentioning the evidence in any way.⁴³ Most cases favor the preliminary prohibition over the absolute prohibition.⁴⁴ Many authorities believe that the trial judge does not have enough of a complete view of the case to properly rule on the admission or exclusion of evidence before trial. Therefore, it is better for the court's order to leave open the possibility that the excluded evidence may be used if it becomes necessary and proper during trial.⁴⁵ The only instance in which the absolute prohibition is favored is where the court class for an evidentiary hearing on the motion and the movant makes a "clear showing" that the matters sought to be excluded from trial are prejudicial.⁴⁶

Courts are also wary of granting motions *in limine* that may be

41. *Id.* at _____, 519 P.2d at 1238.

42. Rothblatt & Leroy, *The Motion in Limine in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence*, 60 Ky. L.J. 611, 615 (1972).

43. *Id.* at 616. Rothblatt and Leroy also suggest a third form of the motion *in limine*, a pretrial motion asking to have contested evidence declared admissible, should be permissible, but no clear precedent exists for this form of the motion. *Id.* at 617. In *Rivera v. American Export Lines*, 13 F.R.D. 27 (S.D.N.Y. 1952), and *Volk v. Paramount Pictures, Inc.*, 91 F. Supp. 902 (D. Minn. 1950), the proponents of evidence obtained pretrial determinations of its admissibility, but the admission of the evidence in question was challenged for reasons other than prejudicial impact.

44. *See, e.g.*, *Baldwin v. Inter City Contractors Serv., Inc.*, 156 Ind. App. 497, 297 N.E.2d 831 (1973); *Twyford v. Weber*, *supra* at note 20.

45. Rothblatt & Leroy, *supra* note 43 at 614, 616.

46. *State v. Superior Court of Maricopa*, 108 Ariz. 396, _____, 499 P.2d 152, 153 (1972); *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974); *State v. Johnson*, 183 N.W.2d 194, 197 (Iowa 1971).

worded too broadly. The motion cannot aim to prohibit the mention of prejudicial matter in general; it must set forth with specificity the objectionable matter and the reasons that the movant thinks it is prejudicial.⁴⁷ The motion has been disapproved, for example, where it would result in choking off a party's entire defense, claim, or theory. In *Lewis v. Buena Vista Mutual Insurance Association*,⁴⁸ the plaintiff sued the insurer on an insurance policy that covered a house that had been destroyed by fire. The defendant filed an amendment to its answer averring that the plaintiff and others had committed arson. The plaintiff presented a motion *in limine* to prevent the defendant from referring to arson at trial. The appellate court reversed the sustaining of the motion because it did not believe that the motion was specific enough. The court indicated that the motion should not be used to cut off the defense of arson—even though it might be a tenuous one.⁴⁹ A similar result was reached in *State v. Court of County of Maricopa*.⁵⁰ In a prosecution for the murder of a child the defendants made an oral motion *in limine* to prohibit the medical examiner from testifying to any prior injuries that did not relate to the child's immediate cause of death. A special action was brought to vacate the order granting the motion. The appellate court dissolved the motion because it completely eliminated proof of one of the important theories of the prosecution's case—namely, that the prior assaults established motive, absence of mistake or accident, and malice.⁵¹

The cases agree that, although it may be error, neither the denial of nor refusal to rule on a motion *in limine* is, in itself, reversible error.⁵² Appellate complaints of error must be predicated on the actual introduction or mention of prejudicial evidence before the jury. To preserve the error for review counsel must object at trial when his opponent refers to the prejudicial matter.⁵³

An order in the absolute form granting a motion *in limine* may contain built-in reversible error because it prohibits the offer of the contested evidence under any circumstances—even if developments at

47. *Lewis v. Buena Vista Mut. Ins. Ass'n*, 183 N.W.2d 198, 201 (Iowa 1971).

48. *Id.*

49. *Id.*

50. 108 Ariz. 396, 499 P.2d 152 (1972).

51. *Id.* at ____, 499 P.2d at 155.

52. *City of Indianapolis ex rel. Dep't of Metrop. Dev. v. Heeter*, 355 N.E.2d 429 (Ind. Ct. App. 1976); *Twyford v. Weber*, 220 N.W.2d 919 (Iowa 1974); *State v. Garret*, 183 N.W.2d 652 (Iowa 1971); *Hartford Accident & Indem. Co. v. McCardell*, 369 S.W.2d 331 (Tex. 1963).

53. The cases cited in note 52, *supra*, all support this view, *but see State v. Smith*, 189 Wash. 422, 65 P.2d 1075 (1937).

trial show that the evidence is actually competent.⁵⁴ On the other hand, the granting of a motion *in limine* with a preliminary order is not reversible error. The exclusion of the evidence at trial is the basis for appeal. Most authorities state that to preserve the error for appeal the party that opposed the preliminary order should offer proof of the prohibited material again at trial.⁵⁵ According to the terms of the order this action must be done outside the hearing of the jury. The above procedure is favored because it creates a clear record for appeal, but an exception to the requirement of a subsequent offer of proof is recognized where the motion *in limine* was granted during an evidentiary hearing and nothing occurred at trial to change the posture of the parties in regard to the admissibility or inadmissibility of the evidence.⁵⁶

The authorities are divided on the question of whether it is reversible error for a party to violate an order by referring to prohibited matters at trial without having first obtained the court's permission to do so.⁵⁷ Some cases hold that a violation of the exclusionary ruling is not reversible error if the trial judge instructed the jury to disregard the prejudicial evidence or if the movant did not object to the violation of the order and ask for a curative instruction.⁵⁸ This result seems incorrect in view of the fact that the motion *in limine* was developed to obviate the necessity of objecting before the jury and because curative instructions are thought ineffective to remove prejudicial effects on the jury.⁵⁹ The better reasoned cases state that the violation of an exclusionary order—provided that the mention of the excluded matter was in fact prejudicial—is reversible error. This is true even if no curative instruction was asked for,⁶⁰ or, according to one case, even if the trial judge gave the curative instruction.⁶¹ Some of the cases in this last group may require the movant to object when the exclusionary order is violated but suggest that counsel could

54. Rothblatt & Leroy, *supra* note 42, at 616.

55. Twyford v. Weber, 220 N.W.2d 919, 923-24 (Iowa 1974); City of Corpus Christi v. Nemeck, 404 S.W.2d 834 (Tex. Ct. App. 1966); State v. Wheeler, 390 S.W.2d 339, 344 (Tex. Ct. App. 1965).

56. Twyford v. Weber, 220 N.W.2d 919, 924 (Iowa 1974); Gustofson v. Iowa Power & Light Co., 183 N.W.2d 213 (Iowa 1971).

57. However, the presentation of matters excluded by the court's order through suggestion, wording of a question, or by indirection is a violation of professional legal standards. Burdick v. York Oil Co., 364 S.W.2d 766, 770 (Tex. Ct. App. 1963).

58. See State v. Johnson, 183 N.W.2d 194 (Iowa 1971); Padgett v. State 364 S.W.2d 397 (Tex. Crim. 1963); Montgomery v. Vinzant, 297 S.W.2d 350 (Tex. Ct. App. 1956).

59. See Burrus v. Silhavy, 155 Ind. App. 558, 293 N.E.2d 794 (1973).

60. Osborn v. Lake Wash. School Dist., 1 Wash. App. 534, 462 P.2d 966 (1969); State v. Smith, 189 Wash. App. 534, 65 P.2d 1975 (1937).

61. Lapasinkas v. Quick, 17 Mich. App. 733, 170 N.W.2d 318 (1969).

object inobtrusively.⁶² Counsel could, for example, approach the bench and object on the record but out of the hearing of the jury.⁶³

Advantages of the Motion

The advantages of the motion *in limine* can be stated succinctly: its effect is to "shorten the trial, simplify the issues and reduce the possibilities of a mistrial."⁶⁴ The prime advantage of the motion was mentioned earlier. Use of the motion may avoid reversible error by isolating the jury from prejudice and replacing the unrealistic admonition to the jury to disregard prejudicial statements.⁶⁵ If the motion is presented before trial with a brief the trial judge will also be given the time to study the contested material outside the hurried atmosphere of the courtroom.⁶⁶ Finally, like the pretrial conference and other pretrial devices, the motion may save overall trial time by reducing the number of collateral issues in the case and preventing long delays and interruptions at trial over questions of admissibility. "Thus, during trial both judge and jury are able to concentrate upon the main dispute."⁶⁷

The New Mexico Version of the Motion

The court of appeals' handling of the two issues raised by the motion *in limine* granted in *Proper v. Mowry* is consistent with the cases in other jurisdictions. First, the court cited the two common sources of authority for the motion *in limine*.⁶⁸ As the motion in *Proper* was made before trial, it probably would have been sufficient for the court to state that the pretrial procedure in Rule 16(6)⁶⁹ of the New Mexico Rules of Civil Procedure covers the motion *in limine*. However, the court seemed to be desirous of emphasizing that it was adopting a broad definition of the motion. It stated that the motion is a written request "which is usually made before *or after the beginning of a jury trial* for a protective order against prejudicial questions and statements."⁷⁰ The court also expressly held

62. *Osborn v. Lake Wash. School Dist.*, 1 Wash. App. 534, ____, 462 P.2d 966, 969 (1969).

63. Rothblatt & Leroy, *supra* note 42, at 633.

64. *Burrus v. Silhavy*, 155 Ind. App., 588, ____, 293 N.E.2d 794, 795 (1973).

65. *Id.*

66. *Id.*; Comment, *Motion in Limine*, *supra* note 17, at 218.

67. Rothblatt & Leroy, *supra* note 42, at 634. *See also* Wallin v. Kinyon Estate, 164 Mont. 160, 519 P.2d 1236, 1238 (1974).

68. 90 N.M. at 713, 715, 568 P.2d at 239, 241.

69. N.M. Stat. Ann. § 21-1-1(16)(6) (Repl. 1970).

70. 90 N.M. at 714, 568 P.2d at 240 (quoting *Burrus v. Silhavy*, 155 Ind. App. 588, 293 N.E.2d 794 (1974), (emphasis added and that of the court omitted).

that the inherent power of the court to admit or exclude evidence authorized the trial court's granting of the motion in *Proper*.⁷¹ As was indicated earlier, other authorities believe that the inherent power theory empowers the court to hear and determine motions *in limine* made even after the start of the trial.⁷²

The court disposed of the second issue of whether it was error for the trial judge to partially deny the plaintiff's motion by applying the general rule that the denial of a motion *in limine* is not reversible error. Under the general rule error is not predicated on the denial of the motion but on the actual mention at trial of the things complained of in the motion. An objection at the time the prejudicial matters are referred to at trial is necessary to preserve the record for appellate review.⁷³ After it stated the general rule,⁷⁴ the *Proper* court properly reframed the issue: it looked at the questionable matters that were touched on in the defendant's opening statement to see if they were actually prejudicial and inadmissible under the rules of evidence.⁷⁵

The *Proper* opinion contains a miscellany of dicta. Since the court anticipated that motions *in limine* would be "filled hereafter in many cases," it believed that it was necessary "to tour the subject matter and establish guidelines."⁷⁶ It said, for example, that the wording of the motion should point out the objectionable matters with specificity and state why they are believed to be prejudicial.⁷⁷ The court also stated that the trial court has the right to take a motion *in limine* under advisement, reserving the right to rule upon the issue of admissibility when it arises at trial.⁷⁸ Since taking the motion under advisement has the same immediate effect as the outright denial of the motion, this view is consistent with the rule that the denial of a motion *in limine* is not reversible error. Finally, the court warned that an attorney's violation of an order granting a motion *in limine* by direct reference to excluded matters or insinuation would be a violation of professional legal standards and the attorney's duty to the court.⁷⁹

It is unclear whether the *Proper* court disapproved, as so many other courts have, of the use of prohibitive orders in the absolute

71. *Id.* at 715, 568 P.2d at 241.

72. See text accompanying notes 33-41, *supra*.

73. See text accompanying notes 52-53, *supra*.

74. 90 N.M. at 715, 568 P.2d at 241.

75. *Id.* at 715-16, 568 P.2d at 241-42.

76. *Id.* at 714, 568 P.2d at 240.

77. *Id.*

78. *Id.* at 715, 568 P.2d at 241.

79. *Id.* (quoting *Burdick v. York Oil Co.*, 364 S.W.2d 766, 770 (Tex. Ct. App. 1963)).

form to grant motions *in limine*. At one point the court stated that the order "should provide and advise counsel such ruling is without prejudice to the right to offer proof during the course of the trial, in the jury's absence, of those matters covered in the motion."⁸⁰ On the other hand, in its consideration of the reversible error issue the court spoke of orders "absolutely prohibitive in nature"⁸¹ without discussing whether they were giving approbation to such orders.

CONCLUSION

New Mexico has joined the steadily growing number of jurisdictions that recognize the motion *in limine*. In so doing it has provided the attorney with a valuable tool for preventing the jury from being influenced by prejudicial matters. In many cases it will increase the chances that the parties to a case will get a fair, error-free trial. However, overuse of the motion should be avoided. It should be used only when essential to exclude highly inflammatory matter.⁸² If used to exclude minor matters the motion could come into judicial disfavor.

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80. *Id.* (quoting *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974)).

81. 90 N.M. at 715, 568 P.2d at 241.

82. *See Lewis v. Buena Vista Ins. Ass'n*, 183 N.W.2d 198, 201 (Iowa 1971).