ERROR PRESERVATION FOR EVIDENTIARY RULINGS

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A trial court's rulings on the admissibility of evidence are committed to the court's sound discretion. *Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 234 (Tex. 2007). "An appellate court must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling." *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Error in admitting or excluding evidence is reversible only if it "affects a substantial right of the party." Tex. R. Evid. 103(a) ("TRE"). The erroneous admission of evidence is "harmless unless the error probably (though not necessarily) caused rendition of an improper judgment." *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008). But in order to reach the issue of whether evidentiary error was reversible you must, in the trial court, have preserved the right to complain on appeal. *McInnes v. Yamaha Motor Corp.*, U.S.A., 673 S.W.2d 185, 187 (Tex. 1984). This article is about error preservation for evidentiary rulings.

Preserving Error Generally. General rules for preserving error are set out in Texas. R. App. P. 31 ("TRAP"). TRAP 33.1(a)(1) says that the appellate "record must show that . . . the complaint was made to the trial court by a timely request, objection, or motion . . . ." TRAP 33.1(a)(1)(A) further requires that the request, objection, or motion state the grounds for the desired ruling "with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context . . . ." TRAP 33.1(a)(1)(B) says that the request, objection or motion must comply with the Texas Rules of Evidence and the Texas Rules of Civil and Appellate Procedure. TRAP 33.1(a)(2) requires that the party secure a ruling from the court, "either expressly or implicitly," and, if the court refuses to rule that the complaining party objected to the refusal.

Preserving Evidentiary Complaints. More particular requirements for preserving error for evidentiary rulings are contained in TRE 103. TRE 103(a)(1) requires that a timely objection or motion to strike appear in the appellate record, stating the specific ground of objection, if the specific ground was not apparent from the context. TRE 103(a)(2) requires a party who wishes to complain about the exclusion of evidence, to make the substance of the evidence known to the trial court by offer of proof. TRE 103(b) requires the court to permit the offering party as soon as practicable, but before the court's charge is read to the jury, to make its offer of proof outside the presence of the jury. TRE 103(b) also provides that the court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. Under TRE 103 (c), the court may, or at request of a party shall, direct the making of an offer in question-and-answer form.

Evidence Improperly Admitted. TRE 103(a)(1) requires a timely objection or motion to strike. It also requires that the specific ground for the objection be stated, if it is not apparent from the context. Case law requires that the objection overruled by the judge, and that the ruling must be reflected in the appellate record.

Timely. To be timely, ordinarily an objection must be made before the evidence is admitted. For example, "[t]o preserve a complaint that an expert's testimony is unreliable, a party must object to the testimony before trial or when it is offered." *Guadalupe–Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002). "The party's objection must be timely and specific and made at the earliest possible opportunity." *In Interest of M.G.N.*, No. 04–12–00108–CV, *8 (Tex. App.–San Antonio, March 30, 2016, n.p.h.). However, in *Beall v. Ditmore*, 687 S.W.2d 791 (Tex. App.--El Paso 1993, writ denied) a "one question delay" in making an objection, to avoid calling attention to plaintiff's reference to insurance and thereby aggravating the harm, was held to be acceptable. In *Keene Corp. v. Rogers*, 863 S.W.2d 168, 178 (Tex. App.--Texarkana 1993, no writ), the trial court permitted a party to object to an exhibit after it was admitted, and the objection was considered timely. If an objection is made to evidence that was previously admitted without objection, that objection comes too late. *Port Terminal R.R. Assn. v. Richardson*, 808 S.W.2d 501 (Tex. App.--Houston [14th Dist.] 1991, writ denied). It is possible to object too early. In *Bushell v. Dean*, 803 S.W.2d 711 (Tex. 1991), an objection made to the entirety of expert's testimony at outset did not preserve error where trial court asked counsel to reurge later and he failed to.

Specific Ground. TRE 103(a)(1) requires that an objection to the admission of evidence state a specific ground. This applies to both oral and documentary evidence. *Brown & Root v. Haddad*, 180 S.W.2d 339 (Tex. 1944). An objection that the evidence was "irrelevant and immaterial and prejudicial" is too general to preserve error. *Peerless Oil & Gas v. TEAS*, 158 S.W.2d 758, 759 (Tex. 1942). Global objections, profuse objections, or those that are overly general or spurious in nature, preserve no error. *Smith v. Christley*, 755 S.W.2d 525 (Tex. App.--Houston [14th Dist.] 1988, writ denied). An objection that names a particular rule of evidence meets the specificity requirement. *Burleson v. Finley*, 581 S.W.2d 304 (Tex. Civ. App.--Austin 1979, writ ref'd n.r.e.).

Ruling. An objection must be overruled in order to complain on appeal. *Perez v. Baker Packers*, 694 S.W.2d 138, 141 (Tex. App.--Houston [14th Dist.] 1985, writ ref'd n.r.e.). "Let's move on counsel" is not a ruling. Ordinarily a party making an objection to the admission of evidence is entitled to an immediate ruling admitting or excluding the evidence. *Thomas v. Atlanta Lumber Co.*, 360 S.W.2d 445 (Tex. Civ. App.--Texarkana 1962, no writ). If the court refuses to rule, the aggrieved party must object to the failure to rule. TRE 33.1(a)(2)(B).

In the Record. The appellate record must show the trial court committing error. *Petitt v. Laware*, 715 S.W.2d 688 (Tex. App.--Houston [1st Dist.] 1986, writ ref'd n.r.e.). Otherwise, the appellate court must presume that the trial court's ruling was correct and supported by the omitted portions of the record. *Christiansen v. Prezelski*, 782 S.W.2d 842 (Tex. 1990). *See also J-IV Investments v. David Lynn Mach., Inc.*, 784 S.W.2d 106 (Tex. App.--Dallas 1990, no writ). An unreported discussion with the judge at the bench or in chambers preserves no error.

A Valid Objection. An evidentiary objection must, of course, be valid to constitute error. *See Alexander Shren-Yee Cheng v. Zhaoya Wang*, 315 S.W.3d 668, 672 (Tex. App.–Dallas 2010, no pet.).

Objections Must Match. The complaint raised on appeal must be the same as that presented to the trial court. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002); *Commonwealth Lloyd's*

Ins. Co. v. Thomas, 825 S.W.2d 135 (Tex. App.--Dallas 1992), *agreed motion to dismiss and vacate granted*, 843 S.W.2d 486 (1993).

Moving to Strike. When the inadmissibility of evidence does not become apparent until after it has been admitted into evidence, the aggrieved party should object as soon as practicable and move to strike. *Beall v. Ditmore*, 867 S.W.2d 791, 794 (Tex. App.–El Paso 1993, writ denied) (non-responsive answer); *Walgreen-Texas Co. v. Shivers*, 169 S.W.2d 271 (Tex. Civ. App.--Beaumont 1943, writ ref'd w.o.m.) (volunteered statement of a witness); *Heidelberg v. State*, 36 S.W.3d 668, 673 (Tex. App.–Houston [14th Dist.] 2001, not pet.) (where admission of evidence was contingent on laying further foundation that never occurred). The court may strike testimony on its own motion. *Aquamarine Associates v. Burton Shipyard, Inc.*, 645 S.W.2d 477 (Tex. App.--Beaumont 1982), *rev'd on other grounds*, 659 S.W.2d 820 (1983). Where the trial court sustains an objection to testimony that the jury heard, no adverse ruling has occurred unless the party requests an instruction to disregard which the court denies. *Prudential Ins. Co. of America v. Uribe*, 595 S.W.2d 554 (Tex. Civ. App.--San Antonio 1979, writ ref'd n.r.e.).

Ordinarily, a motion to strike objectionable testimony must be made at the time the testimony is given, if the objection to the testimony is then apparent. *Magnolia Petroleum Co. v. Johnson*, 176 S.W.2d 774 (Tex. Civ. App.--Fort Worth 1944, no writ). Where subsequent testimony renders previous testimony inadmissible, the party who objected to the original admission of prior testimony must renew the objection or move to strike, and failure to do so waives the error. *F. W. Woolworth Co. v. Ellison*, 232 S.W.2d 857 (Tex. Civ. App.--Eastland 1950, no writ). Where the trial court overrules the objection to testimony "for the present," the objecting party may move to exclude the objectionable evidence at any point before the cause is submitted to the jury, and must do so to preserve error. *Johnson v. Hodges*, 121 S.W.2d 371 (Tex. Civ. App.--Fort Worth 1938, writ dism'd). The objecting party cannot ask a question, gambling on the answer, and then move to strike when the testimony turns out to be unfavorable. *Internat'l Brotherhood of Boiler Makers v. Rodriguez*, 193 S.W.2d 835 (Tex. Civ. App.--El Paso 1945, writ dism'd).

Evidence Improperly Excluded. To preserve error for the wrongful exclusion of evidence, the appellate record must show that the evidence was offered and excluded. *McInnes v. Yamaha Motor Corp., U.S.A.*, 673 S.W.2d 185, 187 (Tex. 1984). TRE 103(a)(2) requires that the offering party show the substance of the excluded evidence by making an offer of proof (in older cases called a "informal bill of exception"). TRE 103(b) requires that the offer of proof be made "as soon as practicable, but before the court's charge is read to the jury." The rule does not give a deadline for an offer of proof in a non-jury trial. Presumably it is anytime before judgment is rendered. When a party has made an offer of proof, TRE 103(c) permits the court to make any statement about the character or form of the evidence, the objection made, and the ruling thereon. Under TRE 103(c), upon request of a party, the court must require the offer of proof to be in question-and-answer form. "[A]n offer of proof must show the nature of the evidence specifically enough so that the reviewing court can determine its admissibility." *PNS Stores, Inc. v. Munguia*, No. 14-14-00319-CV, at *4 (Tex. App.–Houston [14th Dist.] Jan. 12, 2016, no pet.). "[W]ithout an offer of proof, we can never determine whether exclusion of the evidence was harmful." *Quiroz v. Llamas-Soforo*, 483 S.W.3d 710, 722 (Tex. App.–El Paso 2016, n.p.h.)." Does the trial judge have to listen to the offer of proof? Does the proponent need to reoffer the evidence when concluding the offer of proof? Where exhibits have been marked but excluded, does the proponent need to

make a formal offer of proof of the excluded exhibits? The answer to these questions is "better safe than sorry."

Special Considerations. There are a variety of other important points on preserving evidentiary error that merit discussion.

Preliminary Rulings on Admissibility. Under TRE 104, a party can secure a ruling on the admissibility of evidence in advance of its being offered before a jury. TRE 104(a) requires the court to decide preliminary questions about whether a witness is qualified to testify, privileges, and the admissibility of evidence. Under TRE 104(b), where the relevance of evidence depends upon a particular fact, the proponent must introduce prima facie evidence of the fact (that is, evidence sufficient to support a finding that the fact does exist). The court is permitted to allow the evidence to be received on the condition that the underlying fact will be proved later. *Id.* Under TRE 103(b), when a court hears an objection outside the presence of the jury and rules evidence admissible, the party does not need to restate the objection in the presence of the jury in order to preserve error. Local rules and discovery control orders sometimes establish pretrial deadlines to file challenges of experts' reliability under *E. I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

Motion in Limine. An order granting or denying a motion in limine is not a ruling admitting or excluding evidence, and it preserves no error. *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917, 920 n. 3 (Tex. 2015) (in dicta). "If a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were in fact asked or offered . . . and an objection is made . . . ." *Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963). Where a motion in limine has been granted, the party must, during trial, ask the court for permission to offer the evidence, and if permission is denied make an offer of proof.

Evidence Admissible Only in Part. When only part of an exhibit is admissible, the opposing party must object specifically to the inadmissible portion. If the objection is sustained but the exhibit is admitted anyway, then the opposing party must request a jury instruction limiting the jury to the admissible portion. *Brazos Graphics, Inc. v. Arvin Industries, Inc.*, 547 S.W.2d 240 (Tex. Civ. App.--Waco 1978), *writ ref'd n.r.e.*, 586 S.W.2d 841 (1979). If the court orders part of an exhibit to be redacted, the party offering the exhibit has the duty to ensure proper redaction. *American Gen. Fire & Cas. Co. v. McInnis Book Store, Inc.*, 860 S.W.2d 484, 487-88 (Tex. App.--Corpus Christi 1993, no writ). The court has discretion in deciding which party should differentiate the objectionable from the non-objectionable parts of the evidence. *Hurtado v. TEIA*, 563 S.W.2d 360 (Tex. Civ. App.--San Antonio), *rev'd on other grounds*, 574 S.W.2d 536 (1978). Where a chart was partly admissible and partly not, an objection to the chart as a whole did not preserve error. *Speier v. Webster College*, 616 S.W.2d 617 (Tex. 1981). Where the question calls for an answer that is partly admissible and partly not, the objecting party must point out the admissible from the inadmissible and direct objections specifically to that part that is inadmissible. *Lade v. Keller*, 615 S.W.2d 916 (Tex. Civ. App.--Tyler 1981, no writ). The overruling of an objection to or motion to strike testimony as a whole is not error, where part of such testimony is admissible. *Dabney v. Keene*, 195 S.W.2d 682 (Tex. Civ. App.--El Paso 1946, writ ref'd n.r.e.). This reflects a general rule that where evidence is admissible for one purpose but not another is excluded, the proponent must re-offer the evidence for the limited purpose that is admissible or else error is waived. TRE

105(b)(2). If evidence is admitted for a limited purpose, the opponent must request a jury instruction "restricting the evidence to its proper scope" or else error for admitting the evidence is waived. TRE 105(b)(1).

Multiple Party Trials. Preserving error in multiparty trials is governed by case law and by TRE 105. In trials involving multiple defendants, each defendant must make its own objection to evidence to preserve error. *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App.--Corpus Christi 1990, no writ). If evidence is admitted against some parties and not other parties, those other parties must request a limiting instruction or else error is not preserved. TRE 105(b)(1). If evidence is admissible against only some parties, and an offer against all parties is rejected by the court, to preserve error the proponent must re-offer the evidence against only the parties for whom it is admissible. TRE 105(b)(2). One party must join in another party's offer of proof to use that proof on appeal. *Howard v. Phillips*, 728 S.W.2d 448, 451 (Tex. App.--Fort Worth 1987, no writ). Where the testimony of a witness is objectionable as to one party and not others, each of the other parties should ask for a running objection to the testimony and an instruction to the jury to disregard the evidence as to that party.

Voluminous Records. Where a party offers several items as a unit and the opponent simply objects to the whole offer, and parts of the offer are admissible, there is no error in overruling an objection that does not specify specific part to which valid objection could be made. *Ideal Mutual Ins. Co. v. Sullivan*, 678 S.W.2d 98 (Tex. App.--El Paso 1984, writ dism'd). However, in preserving error for admitting voluminous records, an opponent was not required to examine each of the 280 pages and segregate the inadmissible items from the admissible items. *Hurtado v. TEIA*, 563 S.W.2d 360 (Tex. Civ. App.--San Antonio), *rev'd on other grounds*, 574 S.W.2d 536 (1978).

Evidence Admissible For Particular Purposes. Where evidence is admissible for one purpose but not for another, it may be admitted for the purpose for which it is competent. The court must upon motion of a party instruct the jury to consider the evidence only for its proper purposes; in the absence of such a motion, the right to complain of the improper purpose is waived. *Bristol-Myers Co. v. Gonzales*, 548 S.W.2d 416 (Tex. Civ. App.--Corpus Christi), *rev'd on other grounds*, 561 S.W.2d 801 (1976).

Repeated Offers of Inadmissible Evidence. Where the same evidence is offered multiple times, the opponent must object each time the evidence is offered. *Celotex Corp. v. Tate*, 797 S.W.2d 197 (Tex. App.--Corpus Christi 1990, no writ). "[T]he admission of testimony is deemed harmless if the objecting party subsequently permits the same or similar evidence to be introduced without objection." *Richardson v. Green*, 677 S.W.2d 497, 501 (Tex. 1984).

Running Objection. TRCP 610(a) allows the court to control the mode of interrogating witnesses in order to avoid the needless consumption of time. The court can grant a running objection to forthcoming testimony, including testimony from more than one witness. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 907 (Tex. 2004). However, a running objection will preserve error if it "clearly identifie[s] the source and specific subject matter of the expected objectionable evidence prior to its disclosure to the jury . . . ." *Id*. "A running objection is required to be specific and unambiguous." *Id.*

Opening the Door. Failure to object to the opposing party's eliciting testimony on immaterial or extraneous matters does not "open the door" to cross-examination by the party failing to object. *Texas & N.O. R.R. Co. v. Barham*, 204 S.W.2d 205 (Tex. Civ. App.--Waco 1947, no writ).

Objection Not Required. Incompetent evidence, even when submitted without objection, has no probative force and will not support a judgment. *Aetna Ins. Co. v. Klein*, 325 S.W.2d 376 (Tex. 1959). "An objection to a defect in the substance of an affidavit may be raised for the first time on appeal." *In re Longoria*, 470 S.W.3d 616, 631 (Tex. App.–Houston [14th Dist.] 2015, orig. proceeding). The parol evidence rule is a rule of substantive law, and inadmissible parol evidence, whether objected to or not, is without probative force and will not support any finding. *Huddleston v. Ferguson*, 564 S.W.2d 448 (Tex. Civ. App.--Amarillo 1978, no writ). Pleadings, including sworn pleadings and exhibits attached thereto, do not constitute evidence, even when introduced without objection. *Blackwell v. Chapman*, 492 S.W.2d 657 (Tex. Civ. App.--El Paso 1973, no writ).