Three More Lives: How to Keep Issues of Law Alive at Trial

by David S. Coale[1] & Chrysta Castañeda[2]

"A cat has nine lives." A trial lawyer may not have nine lives, but a successful one will be persistent and have a keen eye for chances to revisit adverse rulings.

This article begins on the eve of trial in state court. Summary judgments have been denied, *Robinson* rulings have been made, and openings start in days. Are key legal issues really "on hold" until after the presentation of evidence at trial? Or does a trial lawyer have more "lives" in which to advocate a promising legal argument to the court?

Three devices offer hope for the enterprising advocate – (1) a well-crafted motion in limine; (2) a request for a pretrial ruling under Tex. R. Civ. P. 166; and (3) strategic submissions and objections about the jury charge. Each of these procedural tools, especially when used in concert with one another, gives a trial lawyer a way to continue making – and even refine – an important legal argument.

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[1] Partner, Lynn Pinker Cox & Hurst LLP, Dallas.
[2] Partner, The Castañeda Firm, Dallas.

1. Motion in Limine

The two basic rules for motions in limine are well-known. First, the recognized purpose of a motion in limine it is to keep the jury from hearing prejudicial material before the court rules on its admissibility.[3] And second, a motion in limine is not required to preserve evidentiary error, and in fact, a ruling on a motion in limine does not ordinarily preserve such error.[4]

Within those broad boundaries, a trial court has a great deal of discretion. Many times, the court has no real reason to exercise its discretion, aside of a "form" order in limine that addresses housekeeping matters about the presentation of evidence, such as references to discovery rulings, offers to stipulate to facts, etc. But in the right case, a discrete legal issue may be a compelling subject for an order in limine, such as:

- In a contract dispute, one side characterizes a witness's testimony about the parties' agreement as inadmissible "parol" evidence, while the other calls it evidence of commercial context. The trial judge will want to carefully monitor the admissibility of such testimony, and will likely want to defer ruling until trial is underway and the presentation of other evidence has begun.

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[3] *E.g., Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963).

[4] *See, e.g., Bridges v. City of Richardson*, 354 S.W.2d 366, 367-68 (Tex. 1962).

- In a case where the damages model is disputed, while the trial judge may have overruled a *Robinson* challenge to the relevant expert, part of the ruling may be affected by what fact evidence is elicited from other witnesses. An order in limine could be an attractive way to maintain focus on that important part of the overall ruling about the admissibility of the expert's testimony.

In situations like these, a well-crafted motion in limine can not only keep an important legal issue in play, but also refine and focus the issue – potentially making it more attractive as a basis for decision.

2. Rule 166 Rulings

Tex. R. Civ. P. 166 is familiar to most trial lawyers as the authority for a pretrial scheduling order. But its scope is broader; in addition to pretrial scheduling, the rule says that the court may require a pretrial conference about:

> (e) Contested issues of fact and the simplification of the issues;
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> . . .
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> (g) The identification of legal matters to be ruled on or decided by the court; [and]
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> . . .
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> (j) Agreed applicable propositions of law and contested

issues of law;

as well as "[s]uch other matters as may aid in the disposition of the action." After conducting such a conference, the rule goes on to say that:

> The court shall make an order which recites the action taken at the pretrial conference, the amendments allowed to the pleadings, the time within which same may be filed, and the agreements made by the parties as to any of the matters considered, ***and which limits the issues for trial*** to those not disposed of by admissions, agreements of counsel, or rulings of the court; and such order when issued shall control the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

(emphasis added). In other words, the text of the rule appears to contain a broad grant of authority to rule on legal matters before trial.

Cases applying Rule 166 have limited its scope in that area. For example, in *Unitrust, Inc v. Jet Fleet Corp.*, the Dallas Court of Appeals observed:

> A dismissal, when issues are disputed, without affording the parties a right to a full trial on the merits, should only be ordered if the summary judgment procedure is

> invoked or if the parties come to an agreement on the issues. Although dismissal at pre-trial is allowed in certain limited situations where only a legal question remains, the appropriate procedure for summarily disposing of a case is by a summary judgment hearing ... We doubt the propriety of any other method of disposing of such a case.[5]

And similarly, in *Martin v. Doshos I, Ltd.*, the San Antonio Court of Appeals held:

> Dismissal at pre-trial is allowed in limited situations where determination of a legal question is dispositive of a case in its entirety. In this limited circumstance, the court may dismiss a case following a pre-trial hearing; however, such procedure is not favored.[6]

Nevertheless, the terms of the Rule are available for interpretation and advocacy. If invoked and used strategically, they can help provide an important "last minute" review of a key legal issue before trial begins.

3. Jury Submissions

Tex. R. Civ. P. 278 says: "The court shall submit the questions, instructions and definitions in the form provided by

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[5] 673 S.W.2d 619, 623 (Tex. App.—Dallas 1984, no writ) (citations omitted).

[6] 2 S.W.3d 350, 355 (Tex. App.—San Antonio—1999, pet. denied) (citations omitted).

Rule 277, which are raised by the ***written pleadings and the evidence***." (emphasis added). And because it is well-settled that an objection to the legal sufficiency of the evidence to support a jury submission preserves that objection,[7] it is common for a trial court to receive such objections as it prepares and finalizes the jury charge.

As with a motion in limine, "boilerplate" objections to legal sufficiency are commonly made – and just as commonly, denied. But in the right case, the specific focus of a sufficiency challenge may have changed from what was anticipated before trial.

Factually, a witness may have testified in an unexpected way or evidentiary rulings may have significantly affected the proof. And legally, the process of having to finalize a proper charge may help isolate and clarify the relevant issues, such as:

- Should every defendant in fact be submitted on each cause of action alleged? Or does the drafting of the charge show that different defendants had distinct legal obligations?
- Are the elements of damage materially different for different causes of action?
- When viewed "on the printed page," are particular legal theories redundant of one another, and thus potentially inappropriate for submission one-by-one?

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[7] *See, e.g., T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).

- When a proposed broad-form question must be "granulated" to conform with the Texas Supreme Court's guidance in the *Casteel*[8] line of cases, does that highlight a problem with the viability of a particular claim or damages theory?

The informal charge conference may also simply offer a different psychological environment in which to evaluate the issues – perhaps even the first opportunity in a busy trial for a candid discussion among the parties and the trial judge.

In sum, a persistent trial lawyer, who has not prevailed on an important question of law before trial, still has tools available for further advocacy. Strategic use of motions in limine, the Rule 166 conference process, and jury charge objections can help that lawyer keep the legal question, while also refining it and adapting it to the evidence as actually submitted at trial.

[8] *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).