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Tips for Preserving the Record: The “Opening the Door” Opportunity and the Art of the Proffer

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Trial courts make evidentiary rulings both before and during trial, and trial lawyers should be alert to the opportunity to request the court to revisit its earlier rulings during the course of trial. *See Persaud v. State*, 755 So. 2d 150, 154 (Fla. 4th DCA 2000) (“Trials are fluid proceedings where evidentiary rulings are subject to change depending upon the state of the evidence presented at the time the court is asked to rule.”). In particular, if a party “opens the door” to earlier-excluded evidence, the trial court has a duty to reconsider its earlier evidentiary ruling upon motion by the other party. **The “Opening the Door” Opportunity**

As the Florida Supreme Court has explained, “the concept of ‘opening the door’ allows the admission of otherwise inadmissible testimony to ‘qualify, explain, or limit’ testimony or evidence previously admitted.” *Peterson v. State*, 94 So. 3d 514, 534 (Fla. 2012). The “opening the door” doctrine is “‘based on considerations of fairness and the truth-seeking function of a trial,’ and the consideration that without the fuller explication, the testimony that opened the door would be ‘incomplete and misleading.’” *Id.* (citation omitted). The principle applies when “one party’s evidence presents an incomplete picture and fairness demands the opposing party be allowed to follow up in order to clarify and make it complete.” *Redd v. State*, 49 So. 3d 329, 333 (Fla. 1st DCA 2010). “[A] party ‘opens the door’ when it elicits misleading testimony or makes a factual assertion that the opposing party has a right to correct so that the jury will not be misled.” *Austin v. State*, 48 So. 3d 1025, 1027 (Fla. 2d DCA 2010). Once a party opens the door, any order in limine implicated by that evidence is rendered a “nullity.” *See Ryder Truck Rental, Inc. v. Johnson*, 466 So. 2d 1240, 1243 (Fla. 1st DCA 1985). Instead, the opposing party is then “absolutely entitled to eradicate” that “unwarranted prejudicial image” on cross-examination. *See Cont’l Baking Co., Inc. v. Slack*, 556 So. 2d 754, 756 (Fla. 2d DCA 1990). The Second District recently applied the “opening the door” doctrine in *Pelham v. Walker*, __ So. 3d __, 2013 WL 5225340, at *3–4 (Fla. 2d DCA Sept. 18, 2013). In *Pelham*, the parties agreed before trial that evidence regarding plaintiff’s disability and receipt of disability benefits

would be excluded, and the trial court ruled accordingly. During trial, however, defense counsel questioned plaintiff's daughter about the fact that her mother neither worked nor sought work, and "basically lays around and watches TV all day." Plaintiff then moved for admission of her disability status, arguing that defense counsel opened the door to that evidence by creating a misleading picture for the jury. The trial court denied that motion, but the Second District reversed. It explained that, despite the trial court's ruling in limine, "[f]airness considerations required that once the defense introduced the incomplete and misleading testimony, [plaintiff] should have been allowed to offer the complete picture to the jury . . . ." *Id.* at *4. **Preserving the Record**

Should a trial court persist in excluding the evidence, trial counsel should proffer the excluded evidence to the court, on the record, to eliminate any risk that the evidentiary issue will be deemed unpreserved on appeal. *See* Fla. Stat. § 90.104(1)(b); *Lucas v. State*, 568 So. 2d 18, 22 (Fla. 1990). The Third District recently emphasized the importance of proffers in *Greenwald v. Eisinger, Brown, Lewis & Frankel, P.A.*, No. 3D12–1181, 2013 WL 3455600 (Fla. 3d DCA July 10, 2013), where the court held that plaintiffs failed to preserve for appellate review the exclusion of certain evidence at trial. In *Greenwald*, the trial court reserved ruling on defendants' pretrial motion in limine to exclude certain testimony from plaintiffs' expert, and plaintiffs failed to obtain a definitive ruling on that motion before calling its expert. Defendants objected to the testimony that was the subject of their motion in limine, and the trial court sustained that objection. Critically, however, plaintiffs then failed to make a proffer of the specific testimony it sought to elicit. The Third District held that plaintiffs failed to preserve their argument for appeal, explaining that appellate consideration of the alleged evidentiary error was precluded because no adequate record was made of what the excluded evidence would have revealed. *Id.* at *1. **The Importance of Proffers**

The *Greenwald* court expanded on two important purposes of proffers. First, proffers "set forth, on the record, the evidence sought to be introduced, so the appellate court may assess the existence and extent of any error in the exclusion of the evidence." *Id.* at *1 n.2. Second, a proffer "provides the trial court with the substance, scope and relevance of the evidence sought to be introduced, viewed in the context of the testimony already adduced," affording the trial court "an opportunity to reconsider its prior ruling (or better inform a deferred ruling)," which could result in the admission of the proffered evidence and the elimination of any potential error. *Id.* Because a proffer of evidence reasonably related to the issues at trial is essential for full and effective appellate review, a trial court's denial of a request to provide such an offer of proof is error. *Fehringer v. State*, 976 So. 2d 1218, 1220 (Fla. 4th DCA 2008). **Methods of Making Proffers**

The method of making a proffer, however, is left to the discretion of the trial court. *Porro v. State*, 656 So. 2d 587, 587 n.* (Fla. 3d DCA 1995). Thus, offers of proof for testimonial evidence may be made by having the witness answer questions on the record outside the presence of the jury, but an offer may also be made by submitting on the record a written statement of the witness' anticipated answer or by disclosing the answer on the record through statement by counsel. Charles W. Ehrhardt, *Florida Evidence* (2010), § 104.3, at 32. "'Excluded documents . . . should be marked for identification with a number and described fully in the record.'" *Brantley v. Snapper Power Equip.*, 665 So. 2d 241, 243 (Fla. 3d DCA 1995) (quoting Henry P. Trawick, Jr., *Trawick's Florida Practice &*

Procedure § 22-10, at 333 (1994)). Trial counsel should make as detailed offers of proof as possible under the circumstances when faced with adverse evidentiary rulings in connection with an “opening the door” claim. It preferably should be done contemporaneously with the ruling. If that is not done, a proffer and renewal of the request to admit the evidence should be made before the close of trial, coupled with a request for a mistrial if that still is not allowed. If necessary, make this proffer a part of any motion for a new trial so that it is before the trial judge in ruling on that motion.

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