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Motions in Limine: An Update on Uses, Abuses, and Pitfalls

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Motions in limine ("on or at the threshold" or "in the beginning") can be a useful tool in a trial lawyer's hands. Used strategically and prophylactically, they can "eliminate the noise surrounding" a trial by preventing an opposing party from placing inadmissible evidence before the jury.[1] And as a "side effect of a successful motion in limine ruling, the opposing party may offer more favorable pretrial negotiation terms."[2] However, when motions in limine are improvidently filed, they waste time, money, and effort. Worse, they can hurt your client's case. This article discusses some of the pitfalls associated with improvidently filed motions in limine and highlights preservation issues associated with these motions.

Motions in limine typically are filed to prevent the introduction of improper evidence, the "mere mention of which at trial" would be unfairly prejudicial.[3] As a result of a successful motion in limine, the jury may never even learn of the existence of the inadmissible evidence, and counsel is not forced to object, "thereby arousing the suspicions of the jury and creating additional prejudice."[4] Legal presumptions about the effectiveness of curative instructions aside, "Lady Macbeth grimly reminds us that 'what's done cannot be undone.' And, she might have added, no instruction to disregard evidence is going to undo it."[5]

Motions in limine should be carefully drafted to make clear precisely what evidence should be excluded and to explain with as much clarity as possible why the inadmissible evidence is so damaging that its mere mention would be unfairly prejudicial.[6] While this should be obvious, it is unfortunately often not the case.

Instead, it is quite common to see motions in limine that seek to exclude vast wide swaths and broad categories of evidence. Often, these motions are included as part of a massive "omnibus" motion in limine, in which the moving party seeks advisory rulings on a host of categories of evidence.[7] These sorts of motions are disfavored and should be avoided.[8]

In fact, not only are these sorts of motions in limine often a waste of time and money to prepare but they also annoy trial judges. As one judge explained: "The worst thing you can do is dump fifty of

these motions on the judge, if you only need the judge's full attention on two critical ones. Forget motions made just to sensitize the judge to an issue; put that discussion in the trial brief. Be, as they say, judicious."[9] And the consequences of filing these motions can be dramatic. In just one of many examples of these potentially severe consequences, one court seriously considered sanctioning counsel for both parties after they "besieged" the court with scores of separate motions in limine, which the court described as "petulant" applications, and where many motions sought relief "so very inconsequential that their filing only highlights counsels' failure to reasonably engage with each other in anticipation of trial" and where others "border upon the incomprehensible." Ultimately, the court denied all motions in limine outright.[10]

The same is true for motions in limine seeking to preclude the opposing party from generically violating a rule of evidence or acting unprofessionally. These motions are surprisingly common, but unsurprisingly, courts disfavor them.[11] Indeed, filing such a motion might well impair the moving attorney's credibility when the judge disposes of the motion with a laconic "[t]he court anticipates that all counsel will behave professionally, and finds no reason for an explicit order directing that counsel comply with the rules of decorum," [12] or an equally terse "all parties are expected to abide by the rules of evidence."[13]

Other dangers must be considered as well. For example, generic motions in limine may "draw the opposing party's attention to evidence or arguments which they may not have thought of before."[14] In pattern litigation or where extensive discovery has been completed, however, the potential for surprising the opposing party with an objection at trial "should not be overrated; it may be more illusory than real."[15] On the other hand, the danger of tipping off objections may indeed exist in cases in which parties proceed to trial having not engaged in extensive discovery or other pretrial activity, or when facing an experienced opponent. Accordingly, tailoring your motions in limine to your particular case is critical.

Another potential pitfall is filing a motion in limine that is, in effect, an unnoticed motion for summary judgment.[16] When a motion in limine disposes of an element of a party's claim or defense, granting the motion constitutes harmful error unless the timing provision of the rule governing summary judgment is complied with and the standards for such a judgment are satisfied.[17] Accordingly, counsel should carefully consider the actual and practical effect of an order granting a motion in limine. If, in fact, such a motion would be more fairly characterized as a summary judgment, counsel should comply with the rules governing such motions.

Further, filing a motion in limine can lull a party into a sense of complacency concerning preservation of the record. When a motion to exclude evidence is denied, under the Federal Rules of Evidence and many state law counterparts, a "definitive ruling" on a motion in limine is sufficient to preserve an issue for appeal, and a party need not renew an objection during trial.[18] Unfortunately, the definition of "definitive ruling" was described by its drafters as being "fuzzy around the edges."[19]

Accordingly, in jurisdictions that follow the federal rule, counsel must either ensure the judge makes a clear ruling or renew his or her objection at trial. And, of course, in jurisdictions that do not follow, or vary from, the federal rule, a contemporaneous objection should be made when the objectionable evidence is offered unless it is crystal clear that an objection is unnecessary.[20] In short, when in doubt, renew your objection.

Further, motion in limine rulings are "based upon the *expected* evidence at trial and are therefore 'subject to change when the case unfolds,' particularly if the actual testimony differs from what was proffered."[21] Stated more simply, circumstances change, and "when an evidentiary ruling is made before trial based upon representations as to how the evidence will unfold, the judge's ruling is 'definitive' only as to the facts as represented."[22] As such, if the court granted a motion to exclude evidence before trial, but the movant later opens the door to the evidence, the nonmovant should seek reconsideration of the ruling. Similarly, if the evidence offered at trial is different from what was represented at the time the motion in limine was granted, counsel should bring that matter to the court's attention during trial and seek to offer the evidence anew.[23]

Further still, even a definitive ruling on one ground will not be sufficient to preserve error as it relates to other bases for the exclusion of evidence.[24] For example, if you move in limine to exclude evidence as hearsay and irrelevant and the judge overrules the motion by finding the evidence is not hearsay, you must renew your objection based on relevance at the time of trial. Similarly, if it becomes apparent that the evidence is also both unfairly prejudicial and cumulative in light of what has ensued at trial, you must object to the evidence when it is offered on these new bases, or you will have waived these objections. Your objection also will help establish prejudice on appeal, showing this is not just something appellate counsel came up with after an adverse verdict.

In all events, when a motion in limine is granted against you, you should proffer the evidence at trial as completely as possible.[25] While not commonplace, judges can and do change their minds based on the content of the proffer, especially where the judge ruled on a motion without having heard from the witness and where the judge had relied upon a party's description of the testimony. [26]The proffer can be done in a variety of ways — filing deposition testimony or an expert's report, calling the witness live, or giving a narrative of what the witness would testify to if called to the stand. And, of course, be watchful for any evidence by the other side that may "open the door" to this previously excluded evidence.

Finally, keep in mind that many times the trial judge who hears a motion in limine will be either new to the case or generally unfamiliar with the evidence sought to be excluded. In that situation, often the judge will deny the motion or defer ruling until he or she hears some of the evidence in trial and has a better handle on the issues. There is certainly nothing wrong with the decision to defer ruling until later in the case.[27] Nonetheless, in many cases, the initial denial of the motion in limine will effectively foreclose full reconsideration of the motion, as the opposing party may convince the

judge that "you've already considered this and denied the motion." Having a transcript can help prevent this occurrence, but it is no guarantee. This does not mean that you should not file a motion in limine to exclude improper evidence, but you must balance the risks associated with an early denial of the motion with the benefits you might gain if the judge hears opening statements and some evidence, thereby placing the court in a better position to rule on the merits of the evidentiary issue.

In conclusion, as Judge Wilson cogently explained, motions in limine "are not motions to dismiss or motions for summary judgment, but neither are they pro forma afterthoughts."[28] Rather than file scattershot motions that will annoy trial judges and might tip off the opposing party to an issue he or she overlooked, counsel should "[f]ocus on the issues that really matter to your case and how to most persuasively present them."[29]

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[1] Jennifer S. Tier, *Actions in Limine*, Fam. Advoc. at 38 (Spring 2022).

[2] Jonathan J. O'Konek, *To Object or Not Object, That Is the Question: A Criminal Law Practitioner's Guide to the "Five W's" of Evidentiary Objections*, 95 N.D. L. Rev. 155, 160 (2020).

[3] *Buy-Low Save Ctrs., Inc. v. Glinert*, 547 So. 2d 1283, 1284 (Fla. 4th DCA 1989).

[4] Johnny K. Richardson, *Use of Motions in Limine in Civil Proceedings*, 45 Mo. L. Rev. 130, 130 (1980).

[5] Len Niehoff, *When to Be Objectionable ... and How Not to Be an Artless Clay-Brained Pignut*, Litigation, at 20, 21 (Winter 2023).

[6] *See* Jennifer M. Miller, *To Argue Is Human, to Exclude, Divine: The Role of Motions in Limine and the Importance of Preserving the Record on Appeal*, 32 Am. J. Trial Advoc. 541, 547 (Spring 2009).

[7] Kenneth W. Graham, 21 Fed. Prac. & Proc. Evid. § 5037.10 (2d ed.) (stating that omnibus motions in limine are symptoms of "too much law school").

[8] *See Lonoaea v. Corr. Corp. of Am.*, 665 F. Supp. 2d 677, 687 (N.D. Miss. 2009) (stating that the court "disfavors and has often stricken 'shotgun' motions in limine whereby a party seeks to have the court exclude a lengthy list of every potential piece of evidence which the attorney can think to bring to the court's attention").

[9] Curtis E.A. Karnow, *Be Reasonable. Do It My Way: Notes for a Civil Jury Trial Pretrial Conference*, 43 Am. J. Trial Advoc. 1, 7 (2019).

[10] *See Fields v. Bayerische Motoren Werke Aktiengesellschaft*, 594 F. Supp. 3d 530, 531–32 (E.D.N.Y. 2022).

[11] *See Kimzey v. Diversified Servs., Inc.*, No. 6:15-cv-01369, 2017 WL 131614, at *1 (D. Kan. Jan. 13, 2017).

[12] *Id.* at 2.

[13] *Baham v. Lovorn & Lovorn Trucking, Inc.*, 2:18-cv-08881, 2020 WL 2310390, at *1 (E.D. La. Mar. 11, 2020).

[14] James J. Brosnahan, *Motions in Limine in Federal Civil Trials*, A.L.I.-A.B.A. Continuing Legal Educ., SJ035 ALI-ABA 857 (2001).

[15] *Susan E. Loggans*, 2 Litigating Tort Cases § 19:11.

[16] *See Rice v. Kelly*, 483 So. 2d 559, 560 (Fla. 4th DCA 1986) (cautioning "trial courts not to allow 'motions in limine' to be used as unwritten and unnoticed motions for partial summary judgment or motions to dismiss").

[17] *See, e.g.*, *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1162 n.4 (9th Cir. 2013) ("A motion in limine is not the proper vehicle for seeking a dispositive ruling on a claim.").

[18] *See* Fed. R. Evid. 103(b); Fla. Stat. § 90.104(1)(b) (2023).

[19] Kenneth W. Graham, Jr., Fed. Prac. & Proc. Evid., § 5037.15 (2d ed. 2005).

[20] *E.g.*, *Merchants FoodService v. Rice*, 286 So. 3d 681, 706 (Ala. 2019) ("An appellant who suffers an adverse ruling on a motion to exclude evidence, made in limine, preserves this adverse ruling for post-judgment and appellate review only if he objects to the introduction of the proffered evidence and assigns specific grounds therefor at the time of the trial, unless he has obtained the express acquiescence of the trial court that subsequent objection to evidence when it is proffered at trial and assignment of grounds therefor are not necessary.").

[21] *United States v. Sena*, No. 1:19-cr-01432, 2021 WL 4129247, at *4 (D.N.M. Sept. 9, 2021) (quoting *Luce v. United States*, 469 U.S. 38, 41 (1984)).

[22] *Powell v. State*, 79 So. 3d 921, 923 (Fla. 5th DCA 2012).

[23] *See id.* ("[I]f the evidence introduced at trial materially differs from the pre-trial representations relevant to an issue addressed in a motion in limine, we believe it to be incumbent upon the objecting party to revisit the issue in light of the changed circumstances.").

[24] *Balsz v. A&T Bus Co.*, 252 A.D.2d 458, 458 (N.Y. App. Div. 1998) ("Defendant's argument that the trial court erred in permitting plaintiff to use hearsay medical reports to bolster the testimony of her medical expert was not preserved by objection on that specific ground.").

[25] *See Aarmada Prot. Sys. 2000, Inc. v. Yandell*, 73 So. 3d 893, 898 (Fla. 4th DCA 2011) ("When the trial court excluded evidence, an offer of proof is generally necessary if the claimed evidentiary error is to be preserved for appellate review.").

[26] *See, e.g.*, *Spindler v. Brito-Deforge*, 762 So. 2d 963, 964 (Fla. 5th DCA 2000) (recognizing that a trial court can make a tentative pretrial ruling on a motion in limine but that the "shifting sands of trial may cause a judge to rethink an earlier evidentiary ruling based on a matured understanding of the case").

[27] *See* Philip J. Padovano, 2 Fla. Prac., Appellate Prac. § 8:5 (2013 ed.).

[28] Randy Wilson, *From My Side of the Bench*, 59 The Advoc. (Texas) 74, 75 (Summer 2012).

[29] *Id.* at 74–75.

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