

Motions *in limine*
(Part I)

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"To refuse evidence is to refuse to hear
the cause."

—Edmund Burke,
Report on the Lords' Journal

Beyond the Threshold

There can be little doubt that defense attorneys would disagree with the sentiments set forth above by Edmund Burke. Indeed, most defense lawyers would probably argue that, although allowing the plaintiff to

introduce irrelevant or inflammatory or prejudicial evidence would result in the court hearing the entire cause, it would also result in an unjust and unwarranted result: a verdict based on passion and prejudice, subterfuge and sympathy. In order to alleviate the possibility of a verdict based on

inadmissible evidence, the defense practitioner can—and must—rely on a procedural device designed to streamline the presentation of evidence and to keep the jury from hearing (and seeing) those things that could cloud its judgment: the motion *in limine*.



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The term "*in limine*" does not mean, as many people assume, "to limit." Rather, the phrase "*in limine*," which comes from Latin, literally translated means "at the threshold" or "at the beginning." In recognition of this etymology, *Black's Law Dictionary* defines a motion *in limine* as "a written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements." *Black's Law Dictionary* 914 (5th ed. 1979). In Part I of this two-part article, the authors will explore the history of the motion *in limine*, comment on its uses, provide an overview of the legal authority for its use and offer practical advice concerning the drafting of motions *in limine*.

History

The motion *in limine* is a comparatively recent concept in the trial of civil and criminal law suits. As late as 1933, the Alabama Supreme Court condemned the use of motions *in limine* to preclude the jury from hearing certain evidence regarding the plaintiff's character. In *Bradford v. Birmingham Electric Co.*, 227 Ala. 285, 149 So. 729 (1933), the court was asked to decide whether the trial court had correctly refused to grant the plaintiff's pretrial motion seeking to bar the defendant from introducing certain evidence of the plaintiff's character at trial. In holding that the trial court was correct in refusing to grant the plaintiff's request, the Alabama Supreme Court stated as follows:

[A] trial court [will not] assume the right, in advance of the offering of any evidence, to "instruct" an attorney what evidence he may introduce on the trial of a cause. Such a procedure, in this jurisdiction, finds no support in any of our adjudged cases. To give judicial sanction to the procedure attempted to be engrafted upon our well-understood and long-established practice in the trial of cases would be wholly unjustified by, and in violation of, all precedent, and an unwarranted usurpation of judicial power and authority.

Bradford, 227 Ala. at 287, 149 So. at 730.

Eventually, this view of both limited authority and "refined trial behavior" faded. By the 1960s, the motion *in limine* was beginning to see significant use, espe-

cially in Texas state courts, where plaintiffs' attorneys were successfully using the motion to exclude tangential lines of questioning that were highly prejudicial to the plaintiff. See, e.g., *Bridges v. City of Richardson*, 163 Tex. 292, 354 S.W.2d 366 (1962); *McKellar v. Bracewell*, 473 S.W.2d 542 (Tex. Civ. App. 1962); David F. Herr, Roger S. Haydock and Jeffrey W. Stempel, Motion Practice §18.03, at 18-5 (4th ed. 2006). By the 1970s, the use of motions *in limine* was a widespread practice. Even the Alabama Supreme Court, which several decades earlier had been vehemently opposed to the motion *in limine*, embraced it as a legitimate and proper device for making pretrial evidentiary rulings. See *Acklin v. Bramm*, 374 So. 2d 1348 (1979); Herr, *et al.*, *supra*, at 18-5. The overwhelming majority of state and federal courts have done the same. *Id.*; see also Annot., 63 A.L.R.3d 311 (1975) (setting forth a collection of cases and jurisdictions recognizing the motion *in limine*).

Remember, though, that although motions *in limine* are used fairly commonly, the trial court is not actually required to rule on them. Rulings on motions *in limine* are within the discretion of the trial court and, as a result, any *in limine* ruling is essentially an advisory opinion by the court, subject to change during the course of the trial. James J. Brosnahan, *Motions in limine in Federal Civil Trials*, ALI-ABA Course of Study Materials, Civil Practice and Litigation Techniques in the Federal Courts 1 (January 1999).

Uses

There are several advantages to defense counsel in preparing and presenting carefully drafted and well thought out motions *in limine*:

- They avoid the futile attempt of trying to undo the harm done where jurors have been exposed to damaging evidence, even where stricken by the court. According to some research, instructions to disregard evidence are most often ineffectual. Marcotte, "The Jury Will Disregard..." *But New Study Suggests That by Then It's Too Late*, 73 A.B.A. J. 34 (Nov. 1, 1987).
- Pretrial evidentiary decisions make trial more predictable.
- They provide a chance for both sides to brief important evidence issues and

present more elaborate arguments than is possible during trial.

- Advanced rulings on evidentiary issues conserve trial time by eliminating sidebar conferences, offers of proof and recesses for hurried research.
- Pretrial presentation of a motion *in limine* allows for more careful study and thought by the judge.
- Occasions for error are reduced because the jury is less likely to be exposed to inadmissible evidence that must be stricken and cured by an instruction.
- Pretrial rulings eliminate the prejudice associated with objecting to evidence in the presence of the jury and eliminate the chance that, by objecting to the evidence at trial, counsel will focus the jury's attention on the very evidence counsel does not want the jury to hear.
- Rulings on evidentiary issues can flush out the opponent's trial strategy.
- Besides eliminating substantive claims, motions *in limine* can be used to advise the court of potential issues and to ask for a ruling prior to trial.
- Decisions on certain key evidence questions can eliminate the need for trial altogether (for example, in those cases where the plaintiff must rely on expert testimony to prove her case and the court, through a motion *in limine*, bars the plaintiff's expert from testifying at trial).
- A favorable ruling on a motion *in limine* can lead to the settlement of the lawsuit. The solidity of a party's bargaining position in a suit is often greatly influenced by whether certain pivotal evidence is admissible. If that pivotal evidence is excluded via a motion *in limine*, the proponent of that evidence will be more likely to settle the claim.

Herr, *et al.*, *supra*, at 18-5 and 18-6; Perry Cockerell, *The Motion in limine in Bankruptcy Litigation*, 24-2 ABIJ 28 (March 2005); Charles W. Gamble, *The Motion in limine: A Pretrial Procedure That Has Come of Age*, 33 Ala. L. Rev. 1, p. 9 (Fall 1981); Scott D. Lane and Stephanie Hoit Lee, Illinois Motions *in limine* §1:101(a), at 1-3 (2004).

Authority

Surprisingly, in most jurisdictions, the motion *in limine* is not specifically autho-

