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Column

Trial Practice

***330 OBTAINING THE UPPER HAND WITH MOTIONS IN LIMINE**

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Motions in limine are commonly used in trial preparation in order to narrow the issues for trial and further guide testimony and presentation of evidence, as well as possibly reduce a client's costs associated with trial. Motions in limine can also be used to gain important strategic advantages during pretrial and trial by limiting an opponent's proofs, or precluding an entire theory of his or her case.

A motion in limine is defined as:

A motion, heard in advance of jury selection, which asks the court to instruct the defendant (or plaintiff), its counsel and witnesses not to mention certain facts unless and until permission of the court is first obtained outside the presence and hearing of the jury. *Lapasinkas v Quick*, 17 Mich App 733, 170 NW2d 318 (1969).

Motions in limine are not found in Michigan statutes or the Michigan Court Rules, but are a creation of common law. MRE 104(a) and 103(c) support bringing motions in limine. MRE 104(a) states:

(a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

Further, MRE 103(c) states:

(c) **Hearing of Jury**. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

In complex commercial litigation, courts, especially federal, encourage the filing of in limine motions to resolve admissibility issues before trial. See FRCP 16(c).

Various Uses of In Limine Motions

The purpose of a motion in limine is to determine whether certain evidence may be presented to the jury, in any form and at any stage. See *Lapasinskas*, supra, and 63 ALR 3d 311. Generally, a motion in limine is used to exclude evidence that a party believes to be irrelevant or unfairly prejudicial. Often, motions in limine may also be dispositive in nature by seeking to exclude evidence necessary to prove a key aspect of an opponent's case. Examples of such motions in limine are those which seek to preclude an opponent from introducing speculative damages or an expert from testifying about unsubstantiated topics.

Motions in limine can also be effectively used to educate the court about the case, and hopefully cause it to question a key aspect about an opponent's case. Another purpose of the motion may be to aid the credibility of counsel. The jury may view counsel who make repeated objections, or who seek to excuse it, as attempting to hide information. Thus, a pretrial in limine ruling avoids disruption of the trial from needless objections, and avoids the jury being excused for offers of proof.

The most common use of the in limine motion is to exclude irrelevant and/or prejudicial evidence. MRE 401 states:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 403 states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Michigan Supreme Court has held that for evidence to be excluded as prejudicial, a party opposing the evidence must show something more than mere damage to its case. "Unfair prejudice" means an attempt to persuade the trier of fact to base its decision on an improper basis, generally an emotional one. In *People v Vasher*, 449 Mich 494, 573 NW2d 168 (1995), the court held that since all evidence offered against a party is prejudicial by nature, in order to exclude such evidence, there must be an unfair prejudice which substantially outweighs its probative value. See, also, *People v Fisher*, 449 Mich 441, 537 NW2d 577 (1995).

In seeking a ruling on a motion in limine pursuant to MRE 403, counsel and the court are advised to consider the advisory committee note to FRE 403 (which is identical to MRE 403), which contains the following helpful instructions: "In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction."

Motions in limine may also be used to obtain partial summary disposition of an opponent's case by excluding evidence necessary to maintain its claims or defenses. For example, in *Nelson v American Sterilizer Co*, 212 Mich App 589, 538 NW2d 80 (1995), the Michigan Court of Appeals upheld the trial court's decision to exclude testimony of an expert whose opinions were not generally recognized by the scientific community, even though the motion *331 would have disposed of the plaintiff's case. The Court of Appeals agreed that the motion in limine had the effect of disposing of the plaintiff's case because without the expert's opinion there was no genuine issue of material fact:

We conclude that defendants' motion [in limine] was a motion for summary disposition because defendants were not arguing that the studies on which plaintiff's experts were relying were inadmissible; rather, defendants argued that the studies were insufficient to support the expert's conclusions. That defendants did not challenge the admissibility of the studies themselves is clear: defendants relied on the articles in support of their own argument that plaintiff's experts should not be allowed to testify, claiming that the experts simply misunderstood the scientific evidence. We will not hear defendants complain about the admissibility of the studies and articles when they relied on them themselves.

Thus, as explained more fully below, the issue addressed by defendants is not related to the admissibility of the experts'

testimony, but rather to whether the experts' opinions would create a material issue of fact, i.e., a sufficiency determination. See *Maiorana v US Mineral Products Co*, 52 F3d 1124, 1131-32 (CA 2, 1995).

The court permitted the motion in limine to be used for this purpose. Yet, the court held that since the motion was dispositive, it must comply with MCR 2.116(G)(1)(a)(ii), requiring such a motion to be filed 21 days before the hearing:

Because defendants were actually attacking the sufficiency of the evidence supporting the experts' opinions, and not whether the evidence on which the experts relied was admissible, we agree with the trial court that defendants' motion was not merely a motion in limine, but in reality was a motion for summary disposition. Thus, the trial court erred in failing to grant plaintiff the proper time in which to respond to defendants' motion. See MCR 2.116(G)(1) and 2.119.

In *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 475 NW2d 366 (1991), the Court of Appeals upheld the trial court's in limine order, which excluded evidence of the plaintiff's speculative damages. However, courts generally will not grant motions in limine on issues that necessarily require jury consideration. See, e.g., *Maiorana v US Mineral Products Co*, 52 F3d 1124, 1131 (CA 2, 1995) (cited in *Nelson*, supra) ("the district court overstepped [its] boundaries It impermissibly crossed the line from assessing evidentiary reliability to usurping the role of the jury"). Once controversial evidentiary questions are resolved by such motions, meaningful settlement discussions may be advanced.

In limine motions may be used effectively in many other situations to gain important strategic advantages. These include attempts to exclude: character evidence to prove certain conduct (MRE 404); evidence of prior convictions (MRE 609); evidence of subsequent remedial measures (MRE 407); offers to settle (MRE 408); liability insurance (MRE 411); privileged communications (MRE 501); and even expert testimony. See *Daubert v Merrill Dow Pharmaceuticals*, 509 US 113 S Ct 2786, 125 L Ed 2d 469 (1993).

Motions in limine may also be used offensively by the proponent of evidence. For example, the newly enacted residual hearsay rules, MRE 803(24) and 804(b)(6), require a party seeking to present evidence under those rules to notify the opposing party in advance of trial. Thus, motions in limine may be used by the proponent to ensure compliance with these rules, and obtain a favorable ruling in advance of trial.

Motions in limine may also be utilized affirmatively to assert judicial estoppel. The party asserting a position in a prior proceeding can be estopped from taking an inconsistent position at trial. Once such a motion has been ruled on, surprise regarding this issue will be eliminated from the trial. Conversely, such motions can be cleverly drafted to raise new or inconsistent theories or claims, or, for example, to overcome an otherwise deficient complaint. Counsel is forewarned, however, that if such a motion is made, it should be raised sufficiently in advance of trial.

In *Dietrich v Sun Exploration and Production Company*, 142 FRD 446, 449 (ED Mich 1992), the plaintiff brought a motion in limine to alter his theory of the case from that stated in a pretrial order. The court considered the motion, but held: "[T]he tactic of plaintiffs in filing their motion on the eve of trial to state an entirely different claim than they had been asserting since the filing of their amended complaint . . . was reprehensible and unacceptable."

Motions in limine may also raise preliminary questions about the qualification of *332 a witness, the existence of a privilege, or the admissibility of evidence. Alternatively, motions in limine may seek to require an opponent to proffer evidence during trial (out of the presence of the jury) before introducing or even referring to the evidence in the jury's presence.

If necessary, the court may conduct an evidentiary hearing, pursuant to MRE 104, to be held outside the presence of the jury. During such a hearing, the court is not bound by the rules of evidence. *Id.* In *Daubert*, supra, the U.S. Supreme Court encouraged the use of Rule 104 hearings to determine the admissibility of scientific expert testimony:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. (Daubert, 509 US at 592, 113 S Ct at 2796.)

Thus, if the sufficiency of an expert's testimony is questioned, a Rule 104 hearing should first be held regarding the admissibility of the evidence. Motions in limine are an effective means to bring this before the court or require an opponent to proffer such evidence.

The Effect of Orders Granting In Limine Motions

Orders granting motions in limine have been broadly construed as precluding all references to forbidden evidence. *Zantop Intern Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 503 NW2d 915 (1993). Failure to comply with an order granting a motion in limine may constitute contempt of court. In *Zantop*, supra, the trial court dismissed the plaintiff's case because the plaintiff failed to comply with an order precluding references to certain evidence (and with other pretrial orders). The plaintiff claimed that its vague reference to the excluded subject matter did not violate the in limine order, but the Court of Appeals disagreed:

[T]he order prohibited any testimony concerning [the precluded evidence] until an offer of proof could be made outside the jury's presence . . . counsel mentioned [the precluded evidence]. His question was intended to elicit testimony about [the evidence]--even if the testimony, in conjunction with the question, would be a mere "yes" or "no." (Id.)

Thus, the Court of Appeals upheld dismissal.

In *Dietrich v Sun Exploration and Production Company*, supra, the U.S. District Court for the Eastern District of Michigan also dismissed the plaintiffs' complaint as a result of the court's ruling on a motion in limine. There, the plaintiffs brought a motion in limine to allow the introduction of evidence necessary to prevail on their claim. The court denied the motion and also dismissed the plaintiffs' complaint because, without being able to introduce this crucial evidence, they could not prove an essential element of their case.

A motion in limine may not be a final order, at least until the evidence is actually offered at trial. In *Luce v United States*, 469 US 38, 105 S Ct 460, 83 L Ed 2d 443 (1984), the defendant brought a motion in limine to prevent the prosecution from cross-examining him about his prior conviction. The trial court denied the motion. Therefore, Luce elected not to testify in his defense, and he was convicted. He appealed, contending that the court's denial of the motion caused him prejudice because the ruling influenced his decision not to testify.

In upholding the trial court, the Supreme Court held that since the trial court was not bound by its in limine ruling, and since Luce elected not to testify in his defense, it was impossible to determine whether the trial court would have allowed the impeachment evidence during cross-examination:

Any possible harm flowing from a district court's in limine ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling. (*Luce*, 469 US at 41-42, 105 S Ct at 463.)

Similarly, the Michigan Court of Appeals has held that a pretrial order precluding evidence can be reversed by the trial court at trial. *Terhaar v Hoekwater*, 182 Mich App 747, 452 NW2d 905 (1990). On the federal level, a split exists among several of *333 the circuits regarding whether motions in limine that were previously denied must be renewed in some form (i.e., as an objection) at the time of trial in order to preserve the issue for appeal. The weight of authority, however, is that the issue,

unless prejudicial to the outcome, is waived unless it is timely made again at trial. See 76 ALR Fed 619. Until this split is resolved, it is advisable to renew the motion in the form of an objection.

There is also authority for the proposition that if a motion in limine is denied, the party opposing the evidence can be the first to offer the objectionable evidence without waiving the merits of the evidentiary objection on appeal. *People v Harris*, 86 Mich App 301, 272 NW2d 635 (1978).

For appellate purposes, the standard of review for motions in limine under MRE 401 and 403, generally is whether the lower court's decision to admit or exclude evidence was an abuse of discretion. *Jim Bob, Inc v Mehling*, 178 Mich App 71, 443 NW2d 451 (1990), and *Kochoian v Allstate Ins Co*, 168 Mich App 1, 12, 423 NW2d 913 (1988). It seems somewhat safe to say that questions even remotely close will not be reviewed. However, where the trial court's decision is dispositive in nature, the standard of review is *de novo*. *Nelson*, *supra* ("because the court granted, in reality, summary disposition to defendants, we review the court's ruling *de novo*").

Procedural Considerations--Motions In Limine Must Be Filed in Advance of Trial

Motions in limine must be brought sufficiently before trial in order to allow enough time for preparation. In *Dietrich*, *supra*, the court noted: "Failure to follow this court's scheduling order concerning motions in limine is a sufficient ground to deny plaintiff's motion." The court's scheduling order will normally set a date beyond which motions in limine may not be heard. Counsel should take note that motions in limine which are dispositive in nature must be filed and served on an opponent 21 days in advance of the date set for hearing, in accordance with MCR 2.116(G)(1)(a)(ii). *Nelson*, *supra*. No other limitation exists on when such motions may be brought.

Nondispositive motions in limine are subject to MCR 2.119 and any local rules concerning motions. A competing concern, of course, is that the sooner your opponent knows part of your strategy, the more time exists for reaction and counter measures. In other words, this tactic may often be a two-edged sword.

In *McDonald v Stroh Brewery*, 191 Mich App 601, 606, 478 NW2d 669 (1991), the Michigan Court of Appeals held that discharged employees could not complain that they were unfairly surprised by the trial court's decision to exclude evidence where their former employer filed a motion in limine before trial: "We can perceive no prejudice to plaintiffs. The motion in limine was made before trial and with enough time for both parties to file briefs concerning the matter. Plaintiffs cannot complain that they were unfairly surprised by the court's decision to exclude the evidence."

The failure to bring a timely motion in limine may constitute a waiver to raise objections at trial. In *People v Williamson*, 205 Mich App 592, 596, 517 NW2d 846 (1994), the court held:

The trial court's failure to conduct an evidentiary hearing regarding the admissibility of the evidence does not require reversal . . . [A]n evidentiary hearing [does not need to] be held where, as in this case, no motion in limine has been made by the defense.

Motions that are more risky, and are more likely to be denied, should be brought later rather than earlier, and those which you strongly believe will win should be brought earlier. This tactic may not only affect trial preparation, but can lead to meaningful settlement, and even possibly dismissal of your opponent's case. Consideration must also be given regarding whether all your in limine motions should be brought at once or separately. This may depend not only on the presiding judge but also the relative significance of each motion.

Conclusion

A motion in limine is an effective tool in limiting issues in a case, guiding your evidence, and assisting in preparation for trial. Motions in limine are used commonly to obtain basic evidentiary rulings before trial. They can be used more strategically, for example, to exclude unqualified witnesses, preclude evidence crucial to your opponent's case, and even obtain partial summary disposition. In preparing for trial, careful attention should be paid to evidence and testimony that is both admissible and inadmissible. The use of creative motions in limine may provide for monumental tactical gain.

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