Chapter 1

Motion in Limine Law

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I. OVERVIEW

§ 1:1 In limine law and procedure—Description and purpose of motion

A motion in limine is a motion used to preclude prejudicial or objectionable evidence before it is presented to the jury. *U.S. v. Chan*, 184 F. Supp. 2d 337, 340 (S.D. N.Y. 2002); *U.S. v. Stormer*, 938 F.2d 759, 763–64, 33 Fed. R. Evid. Serv.

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625 (7th Cir. 1991). It is also an appropriate method of asking the court for an "advisory opinion," regarding the admissibility of evidence, which the court has authority to provide or to decline to provide. *U.S. v. Luce*, 713 F.2d 1236, 1239–40, 13 Fed. R. Evid. Serv. 1601 (6th Cir. 1983), judgment aff'd, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443, 16 Fed. R. Evid. Serv. 833 (1984).

The primary advantage of the motion is to 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. Motions in limine serve other purposes as well, such as: permitting more careful consideration of evidentiary issues than would take place during the heat of battle during trial; and minimizing side-bar conferences and disruptions during trial. *U.S. v. Cline*, 188 F. Supp. 2d 1287, 1291, 59 Fed. R. Evid. Serv. 99 (D. Kan. 2002), aff'd, 349 F.3d 1276 (10th Cir. 2003). In *U.S. v. Tokash*, 282 F.3d 962, 968 (7th Cir. 2002), the appellate court stated, "Motions in limine are well-established devices that streamline trials and settle evidentiary disputes in advance, so that trials are not interrupted mid-course for the consideration of lengthy and complex evidentiary issues." (Citations omitted.)

The decision regarding whether or not to file a motion in limine is generally considered a matter of strategy. *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995).

§ 1:2 In limine law and procedure—Authority for motion

While not expressly authorized by statute, motions in limine are commonly used trial tools that are entertained and granted within the trial court's inherent powers. *Luce v. U.S.*, 469 U.S. 38, 41, 105 S. Ct. 460, 83 L. Ed. 2d 443, 16 Fed. R. Evid. Serv. 833 (1984); *U.S. v. Caputo*, 313 F. Supp. 2d 764, 767–68 (N.D. Ill. 2004), opinion vacated on reconsideration, 2004 WL 5576653 (N.D. Ill. 2004), amended in part, 2004 WL 5576652 (N.D. Ill. 2004); *U.S. v. Lachman*, 48 F.3d 586, 590–94, 41 Fed. R. Evid. Serv. 339 (1st Cir. 1995); *U.S. v. Komisaruk*, 885 F.2d 490, 492–95, 28 Fed. R. Evid. Serv. 13 (9th Cir. 1989) (trial court properly granted a motion in limine to exclude evidence regarding the defendant's religious and political beliefs, when the beliefs would not provide a viable defense to the charged offenses).

The following Federal Rules of Evidence provide the underlying basis for in limine motions:

- Federal Rule of Evidence 403 is an important provision that gives the court the authority to exclude evidence where the probative value is substantially outweighed by

the danger of undue prejudice, issue confusion, misleading the jury, or undue consumption of time. See *U.S. v. Taylor*, 210 F.3d 311, 316–18, 54 Fed. R. Evid. Serv. 492 (5th Cir. 2000). For expanded citations, see §§ 2:1 et seq., infra.

- Federal Rule of Evidence 402 supports the exclusion of irrelevant evidence, by providing, in relevant part, that "Irrelevant evidence is not admissible." *U.S. v. Edwards*, 631 F.2d 1049, 1051 (2d Cir. 1980). For expanded citations, see §§ 3:1 et seq., infra.
- Federal Rules of Evidence 103(d) and 104(c) allow the court to hear and determine the question of the admissibility of evidence outside the presence or hearing of the jury. *Williams v. Board of Regents of University System of Georgia*, 629 F.2d 993, 999–1001 (5th Cir. 1980). For expanded citations, see §§ 4:1 et seq., infra.
- Federal Rule of Evidence 611(a) states:

> The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
> (1) make those procedures effective for determining the truth;
> (2) avoid wasting time; and
> (3) protect witnesses from harassment or undue embarrassment.

§ 1:3 In limine law and procedure—Typical use of motion

A typical in limine order excludes the challenged evidence. *U.S. v. Chan*, 184 F. Supp. 2d 337, 340 (S.D. N.Y. 2002); *McAmis v. Wallace*, 980 F. Supp. 181, 186 (W.D. Va. 1997); *U.S. v. Lachman*, 48 F.3d 586, 590–94, 41 Fed. R. Evid. Serv. 339 (1st Cir. 1995). However, a motion in limine can also be brought requesting an order to allow certain evidence to be admitted. *Rosenfeld v. Basquiat*, 78 F.3d 84, 90, 43 Fed. R. Evid. Serv. 983, 29 U.C.C. Rep. Serv. 2d 104 (2d Cir. 1996). A motion can also be brought to limit the scope of a party's argument. For example, in *U.S. v. Sloan*, 704 F. Supp. 880, 884 (N.D. Ind. 1989), the court granted a motion in limine to preclude the defendant from raising or arguing the issue of jury nullification. In the case of *U.S. v. Peters*, 687 F.2d 1295, 1297–98 (10th Cir. 1982), the Appellate Court held that the trial court had properly quashed the subpoenas of certain witnesses, when it was determined that their testimony would not fall within the permissible testimony based upon an in limine order.

In the case of *U.S. v. Neal*, 532 F. Supp. 942, 947–48, 10 Fed. R. Evid. Serv. 968 (D. Colo. 1982), aff'd, 743 F.2d 1441, 16 Fed. R. Evid. Serv. 979 (10th Cir. 1984), the trial judge

stated that the parties could use motions in limine to define the scope of a privilege. In proper circumstances, an entire defense can be precluded based upon a motion in limine. *U.S. v. Tokash*, 282 F.3d 962, 967–72 (7th Cir. 2002); cf. *U.S. v. Williams*, 791 F.2d 1383, 1387–89 (9th Cir. 1986) (trial court abused its discretion by precluding a defense in this case, because the defendant presented a sufficient offer of proof to allow it). However, counsel should keep in mind that an order in limine is generally subject to review and reconsideration during the trial itself. *U.S. v. Chan*, 184 F. Supp. 2d 337, 340 (S.D. N.Y. 2002); *U.S. v. Robinson*, 804 F. Supp. 830, 831 (W.D. Va. 1992); *U.S. v. Lachman*, 48 F.3d 586, 590–94, 41 Fed. R. Evid. Serv. 339 (1st Cir. 1995); *U.S. v. Yannott*, 42 F.3d 999, 1007, 1994 FED App. 0413P (6th Cir. 1994).

An in limine order may also direct counsel, parties and witnesses not to refer to the excluded matters during trial. *U.S. v. Sloan*, 704 F. Supp. 880, 884 (N.D. Ind. 1989); *Zal v. Steppe*, 968 F.2d 924, 925 (9th Cir. 1992), as amended, (July 31, 1992). Violating an order restricting the mention of evidence can result in sanctions. *U.S. v. Talley*, 194 F.3d 758, 763–64, 52 Fed. R. Evid. Serv. 1625, 1999 FED App. 0367P (6th Cir. 1999); cf.: *Barnd v. City of Tacoma*, 664 F.2d 1339, 1341–43 (9th Cir. 1982) (sanctions may have been improper in this case); *Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 55 Fed. R. Serv. 3d 1161 (11th Cir. 2003) (sanctions for "overkill" motion not proper in this case).

§ 1:4 In limine law and procedure—Typical use of motion—Limitations on use

Matters that are lacking in "factual support or argument" are not properly the subjects of motions in limine. *U.S. v. Cline*, 188 F. Supp. 2d 1287, 1291, 59 Fed. R. Evid. Serv. 99 (D. Kan. 2002), aff'd, 349 F.3d 1276 (10th Cir. 2003) (court should not speculate regarding the context of the evidence). For example, in *U.S. v. Cobb*, 588 F.2d 607, 610–11 (8th Cir. 1978), the appellate court held that an objection was not preserved by a pre-trial motion in limine, because the trial court did not have the opportunity to assess the factual foundation until the trial and the party did not object to the evidence at trial. The court should not have to rule in a vacuum or guess at what evidence should be included within the scope of its ruling. *U.S. v. Cline*, 188 F. Supp. 2d 1287, 1291, 59 Fed. R. Evid. Serv. 99 (D. Kan. 2002), aff'd, 349 F.3d 1276 (10th Cir. 2003) (stating that the better practice is to wait until trial if the admissibility of the evidence depends upon its factual context).

Motions in limine may be inappropriate where it is dif-

ficult to specify exactly what evidence is the subject of the motion. Often the trial judge must wait until the context of the trial before the judge can assess the factual context of the evidence and determine the admissibility of it. Actual testimony often defies pretrial predictions of what a witness will say on the stand. *U.S. v. Cline*, 188 F. Supp. 2d 1287, 1291, 59 Fed. R. Evid. Serv. 99 (D. Kan. 2002), aff'd, 349 F.3d 1276 (10th Cir. 2003). Moreover, a trial judge should not grant an in limine motion to exclude evidence unless the evidence is inadmissible for all purposes. *U.S. v. Caputo*, 313 F. Supp. 2d 764, 767–68 (N.D. Ill. 2004), opinion vacated on reconsideration, 2004 WL 5576653 (N.D. Ill. 2004), amended in part, 2004 WL 5576652 (N.D. Ill. 2004) (motion granted in this case); *West American Ins. Co. v. Moonlight Design, Inc.*, 126 F. Supp. 2d 1141, 1141–43 (N.D. Ill. 2000); *Wagschal v. Sea Ins. Co., Ltd.*, 861 F. Supp. 263, 265–66 (S.D. N.Y. 1994).

Counsel should remember that a ruling on a motion in limine is considered provisional and trial judges have authority to change the ruling as the trial progresses. *U.S. v. Paredes*, 176 F. Supp. 2d 179, 181 (S.D. N.Y. 2001); *U.S. v. Hurd*, 7 F.3d 236 (6th Cir. 1993) (unpublished decision). For example, in *U.S. v. Weymouth*, 45 Fed. Appx. 311 (4th Cir. 2002) (unpublished decision), the appellate court held that the trial judge did not err by reversing a prior decision on a motion in limine on the day of trial.

It is also procedurally improper to grant summary judgment based upon a motion in limine, because the motion does not advise the other party that summary judgment is at issue. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1069–70, 62 Ed. Law Rep. 894 (3d Cir. 1990). Similarly, in *U.S. v. Noah*, 130 F.3d 490, 495, 48 Fed. R. Evid. Serv. 268 (1st Cir. 1997), the appellate court held that, procedurally, a motion in limine was not a request for a bill of particulars and the trial judge did not err by not ordering one based on the motion. In the case of *U.S. v. Davis*, 714 F. Supp. 853, 870 (S.D. Ohio 1988), the trial judge stated that it would be improper to issue an in limine order to bar a witness who had a privilege not to testify to certain types of information, because the issue could be raised by an objection at trial if the opposing party tried to elicit the privileged information.

Matters of day-to-day trial logistics and common professional courtesy should generally not be the subject of motions in limine. Examples include: an order that counsel inform other counsel which witnesses will be called the next day; and an order that no exhibits be shown to the jury without first having been seen by all counsel and the court. Procedural matters and items relating to jury selection most often can be addressed orally and informally, and later preserved on the record if necessary.

§ 1:5 In limine law and procedure—Typical use of motion—Preservation of objections

Counsel should be sure to check the case law for their particular jurisdiction when determining whether to raise a trial objection in addition to a motion in limine. In the interest of caution, counsel should generally object at trial, utilizing a side bar if necessary. The following citations should assist in determining whether a trial objection is required for a particular jurisdiction.

Federal Rule of Evidence 103(a) states:

> **(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context; or
>
> (2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
>
> **(b) Not Needing to Renew an Objection or Offer of Proof.** Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.
>
> **(c) Court's Statement About the Ruling; Directing an Offer of Proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
>
> **(d) Preventing the Jury from Hearing Inadmissible Evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.
>
> **(e) Taking Notice of Plain Error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Supreme Court

Ohler v. U.S., 529 U.S. 753, 754–60, 120 S. Ct. 1851, 146 L. Ed. 2d 826, 53 Fed. R. Evid. Serv. 965 (2000) (a party waived the right to challenge the trial judge's in limine ruling allowing her conviction to be admitted into evidence by offering the evidence in her own case in chief).

Luce v. U.S., 469 U.S. 38, 39–43, 105 S. Ct. 460, 83 L. Ed. 2d 443, 16 Fed. R. Evid. Serv. 833 (1984) (the defendant must testify in order to preserve an objection to a denial of a motion in limine to bar the use of his prior convictions as impeachment).