Motions in limine

Motions in limine play a critical role in pretrial and trial strategies

By Elizabeth Hernandez

The purpose of making a motion in limine is to obtain an evidentiary ruling in advance. The Latin term "in limine" means "at the threshold." The "threshold" is the beginning of trial. A motion in limine is a motion used in civil lawsuits to preclude evidentiary issues or conduct before they are seen or heard by a jury. A motion in limine is also used to permit the introduction of evidence.

Authority for motions in limine

While many types of motions are governed by specific statutes (i.e., motions for summary judgment, motions to compel, motions to quash, etc.), motions in limine are different. Motions in limine are not expressly authorized by statute. Instead, authority for motions in limine may be implied from the court's inherent powers. (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939. These inherent powers include the power to:

- Provide for the orderly conduct of proceedings before it, or its officers. (Code Civ. Proc., § 128 (a)(3)) and
- Control its process and orders so as to make them conform to law and justice. (Code Civ. Proc., § 128 (a)(8))

Procedural requirements

California Rules of Court, rule 3.20(a), which preempts all local rules relating to pleadings, motions, and the form and format of papers, does not apply to motions in limine since they are recognized as part of the trial proceedings. (See Cal. Rules of Court, rule 3.20(b)(1).) Since California Rules of Court, rule 3.20(b)(1) allows local rules relating to motions in limine, many courts have additional rules regulating these motions. For instance, Superior Court of Los Angeles County, Local Rules, rule 3.57 details the showing that must be made in support of and in opposition to a motion in limine.

Motions in limine are not noticed motions. California Rules of Court, rule 3.1112(f) provides that: "a motion in limine filed before or during trial need not be accompanied by a notice of hearing." Considering that motions in limine are regulated by the court's inherent powers, including the power to control the proceedings, counsel should find out the trial judge's preferences regarding the timing and form of motions in limine.

Timing

There is no uniform practice for counsel to follow regarding when motions in limine should be filed and served and when they are heard by the court. The same is true with respect to when oppositions and replies to motions in limine should be filed and served. The timing and place of the filing and service of the motion in limine are at the discretion of the trial judge. (Cal. Rules of Court, rule 3.1112(f).)

Counsel should check the local rules to determine the exact timing of filing and serving a motion in limine. Each court and courtroom will have different timing issues. For example, in the Los Angeles Superior Court, if you have a "personal injury" ("PI") case and are assigned to one of the PI courts (currently Departments 91, 92 and 93 at the Stanley Mosk Courthouse), then before filing motions in limine, "the parties/counsel shall comply with the statutory notice provisions of Code of Civil Procedure ("C.C.P.") section 1005 and the requirements of Los Angeles Superior Court Rule ("Local Rule") 3.57(a)." (See, Amended General Order - Final Status Conference, Personal Injury Courts, effective as of July 19, 2013). Oppositions and replies to motions in limine are subject to the usual motion calendaring. However, in the San Francisco Superior Court, motions in limine must be served by mail "at least ten (10) days before the date set for trial or personally served at least five (5) days before the date set for trial." Oppositions must be personally filed and served no later than the date set for trial. (See, Superior Court of San Francisco County, Local Rules, rule 6.1.)

Counsel also need to check whether there are any "local-local" rules (the trial judge's own courtroom rules). Counsel must find out if the trial judge has any standing orders regarding pretrial motions. If there are no standing orders, then counsel will need to speak to the trial judge's clerk to find out about any specific requirements the judge has regarding motions in limine. Counsel should also be prepared for a judge to make last minute changes on when the motions in limine will be heard. Courts frequently hear the motions in limine shortly before the first day of trial while other courts hear the motions on the first day of trial.

There are no set standards or guidelines regarding motions in limine and each judge is different. The bottom line is...do some investigating, check the local rules and make appropriate inquiries to find out what your trial judge requires.

Meet-and-confer requirement

Counsel should meet and confer before filing motions in limine. Many jurisdictions require counsel to meet and confer regarding motions in limine – i.e., Superior Court of Los Angeles County, Local Rules, rule 3.57(a)(2); Superior Court of Fresno County, Local rules, rule 2.6.1. Many judges will not consider a motion in limine unless counsel have met and conferred before the motion is filed.

Through the meet-and-confer process, counsel may determine it is more worthwhile to stipulate to issues involving typical trial matters rather than waste the court's time with an unnecessary motion in limine. The meet-and-confer process is essential to narrow down the list of motions in limine a party may have to file and that a judge needs to hear.

Stipulations

Many standard issues, i.e., day-to-day trial logistics and common professional courtesy, should be addressed and disposed of in a stipulation between counsel rather than in motions in limine. (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 670-672. These standard issues include, but are not limited to:

- document authenticity
- exclusion of witnesses before testimony
- financial information
- mention of insurance coverage
- use of demonstrative evidence
- admission of uncontested reports

Asking the trial judge to address these standard issues before or during trial is inefficient and unnecessary. Instead, those issues should be resolved between counsel through a stipulation.

Effective uses of motions in limine

Form of motion in limine

Most courts require written motions in limine. (See e.g., Super. Ct. L.A. County, Local Rules, rule 3.57; Super. Ct San Francisco County Local Rules, rule 6.1.) However, counsel is not necessarily precluded from making an oral motion in limine during trial. (*Kelly v. New West Federal Savings*, *supra,* 49 Cal.App.4th at 669).

The motion in limine and any opposing papers should be filed separately with their own points and authorities, supporting declarations and other evidence. California Rules of Court, rules 3.1110, 3.1112 and 3.1113 provide key procedural requirements regarding the format of motions in limine. Counsel should carefully review these provisions of the California Rules of Court to make sure they are in compliance.

The caption of each motion in limine should specifically and clearly identify the substance of the motion. For example, counsel should not title the motion as "Plaintiff's Motion in Limine No. 1." The court will have no way of knowing what the moving party is requesting – What type of evidence does the moving party want excluded? Be clear and precise. The better approach would be to title the motion in limine as "Plaintiff's Motion in Limine to Exclude Evidence of or Reference to any abuse of alcohol and illegal or controlled substances by plaintiff."

It's also a good idea to consecutively number each of your motions in limine. Some courts require consecutive numbering so again, it's imperative to find out what your trial judge prefers.

The moving papers should include:

- A brief description of the evidence sought to be excluded or admitted – Be direct and clear so the court immediately knows what the issue is that needs to be determined.
- Provide facts to support why the evidence should be excluded or admitted.
- Provide a legal explanation why the evidence is properly excluded or admitted.
- Cite supportive legal authority.

Any oppositions to motions in limine should also be direct and clear. In similarity to motions in limine, the opposition should state the grounds for the opposition in the caption and in the beginning of the opposition along with supporting facts and legal authority.

Find out from your judge or clerk whether proposed orders are necessary.

Being clear, succinct and to the point will immediately draw the court's attention to the evidence which is the subject of counsel's motion in limine.

Reasons for motions in limine

The primary advantage of the motion in limine 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. This scenario has been described as "the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." (*Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 337.)

Most motions in limine are filed by a party to limit or prevent certain evidence from being presented by opposing counsel at the time of trial. The purpose of a motion in limine is to prevent the introduction of matters at trial which are irrelevant, inadmissible or prejudicial. Some key statutes to rely on in excluding those types of evidence from being introduced at trial are Evidence Code sections 350 and 352.

Evidence Code section 350 provides that "[n]o evidence is admissible except relevant evidence." Evidence Code section 350 permits the exclusion of irrelevant evidence. (See also, *People v. Kelly* (1992) 1 Cal.4th 495, 523, 3.)

Evidence Code section 352 is a key provision that allows the court to exclude evidence when "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Another key statute is Evidence Code section 402 which allows the court to hear and determine questions of admissibility of evidence outside the presence or hearing of the jury.

Excluding irrelevant evidence (i.e., prior arrests, but no felony convictions) and prejudicial evidence (i.e., graphic and gruesome photographs of injuries) before trial and keeping it out of the jury's hands is essential for any plaintiff's attorney or defense counsel.

Ineffective uses of motions in limine

Avoid making mistakes in bringing a motion in limine for an ineffective or improper purpose. Some common pitfalls to

avoid include, but are not limited to, the following:

1. *Do not file a motion in limine to exclude evidence which is clearly inadmissible.* Do not waste your time or the court's time trying to have a motion in limine heard on an obvious matter that can be dealt with quickly at trial. If your motion in limine is seeking a declaration of existing law, then your motion is unnecessary. For example, bringing a motion on the following serves no purpose since the law already addresses these issues:

• precluding non-designated experts from testifying
• precluding lay witnesses from offering opinion testimony
• excluding undisclosed evidence except for impeachment purposes

2. *Do not file a motion in limine to exclude evidence which is not supported by facts or law.* The court in *Kelly* specifically provided that matters which are lacking in factual support or argument are not properly the subject of motions in limine. (*Kelly v. New West Federal Savings*, *supra,* 49 Cal.App.4th at p. 670.)

3. *Beware of filing motions in limine which are really disguised motions for summary judgment.* Although motions in limine have the effect of excluding evidence, they are not motions for summary judgment where very different rules apply. A motion in limine to, in effect, assert a late-filed motion for summary judgment or summary adjudication is improper. (*Clemens v. American Warranty Corp.* (1987) 193 Cal.App.3d 444, 451; Los Angeles County Superior Court rule 3.57(b).)

4. *Beware of filing motions in limine which are really disguised motions to compel brought after the discovery cut-off and motion cut-off dates have passed.* Although motions in limine often deal with the exclusion of evidence, they also deal with the admission of evidence. Counsel should not address violations of the discovery rules in motions in limine which should have been timely dealt with in a motion to compel.

The key case regarding the proper uses and abuses of motions in limine is *Kelly v. New West Federal Saving* (1996) 49 Cal.App.4th 659. The *Kelly* case offers an instructive discussion about how motions in limine should and should not be used. All counsel should take the time to read it.

Obtain a ruling from the court

Make sure the motion, the court's ruling and the reasons for the ruling are all made on the record to preserve the objection for appeal. If the judge makes a pretrial ruling, then all counsel are bound by that ruling during the trial. If the judge excludes the evidence, then it may not be mentioned in trial or argument.

However, if the judge decides not to make a pretrial ruling on the motion in limine, counsel should:
(1) Ask the court to clarify that the evidence may not be referred to until the judge makes a ruling; and
(2) At the time a party wants to introduce the evidence which is the subject of a motion in limine, the party should ask for a ruling on the deferred motion.

If the motion in limine is granted, then all counsel have the duty to inform their associates, witnesses, clients and any other persons under counsels' control that no mention or display of the excluded evidence should be made in the presence of the jury.

Conclusion

Well-conceived and thoughtful motions in limine will be effective to define and narrow the issues at trial. Be sure to take the time to carefully craft motions in limine so they are custom-tailored to the case at hand. Using your firm's boilerplate motions in limine will be inefficient and a waste of the court's time. Certain issues can be stipulated to during the meet-and-confer process. An ill-conceived or vague motion in limine will consume the court's valuable time and may not be granted. Furthermore, filing motions in limine which involve inconsequential or obvious issues is counterproductive. Remember that trial judges want to resolve pretrial issues efficiently and quickly, so stipulate with opposing counsel to standard issues and file motions in limine that matter.


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