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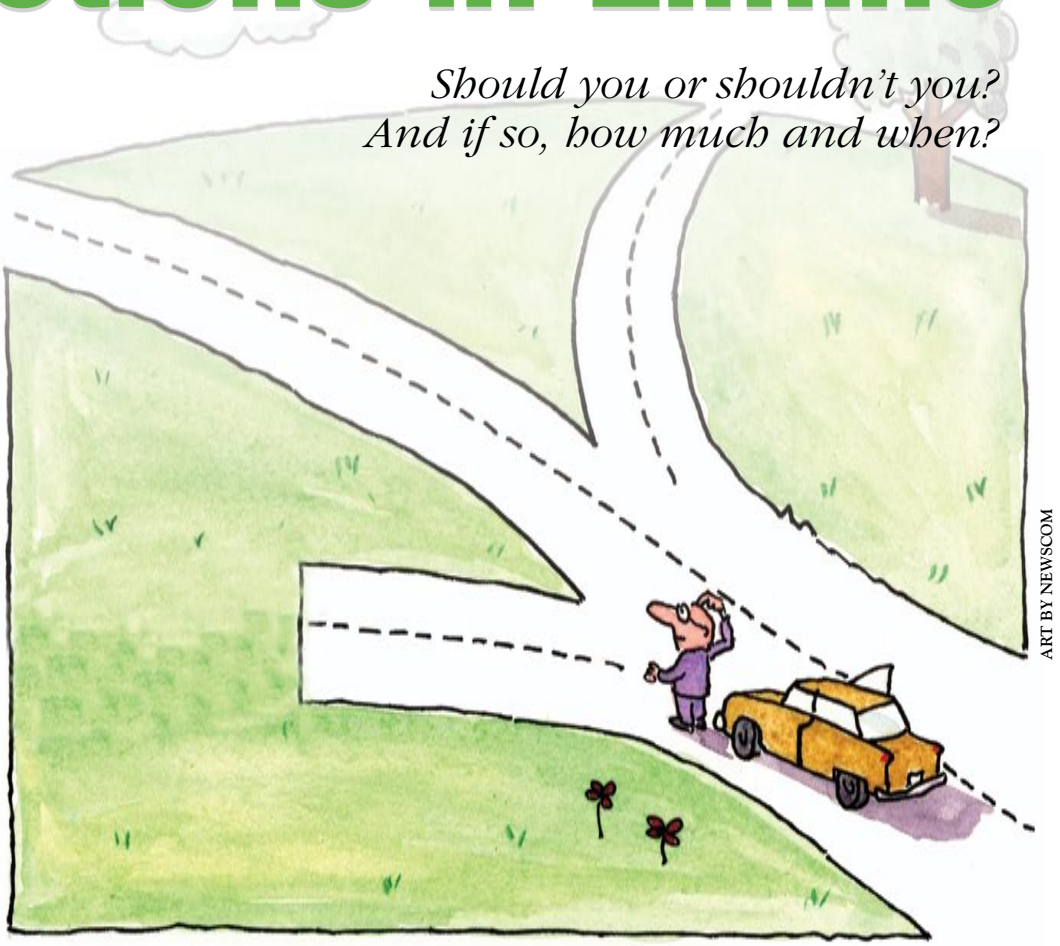
# Considerations Surrounding Motions in Limine

*Should you or shouldn't you? And if so, how much and when?*



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BY STEWART D. AARON AND SUSAN L. SHIN

WINNING or losing a jury trial often hinges on critical evidentiary rulings. Thus, the effective use of motions in limine[1] by an advocate can be essential. This article discusses tactical considerations that are involved in deciding to make, and making, such motions, and in addressing issues that arise after the decisions on such motions.

A motion in limine is a motion that seeks to exclude prejudicial, irrelevant or otherwise objectionable evidence from being introduced to the fact-finder at trial. The primary purpose of such a motion is to obtain an advance ruling on the admissibility of certain evidence.[2] In order to accomplish its purpose, the motion must be made before the challenged evidence is offered at trial. Oftentimes, motions in limine are made and ruled upon prior to the start of the trial.

There is no specific provision in the New York Civil Practice Law and Rules for motions in limine.[3] The Federal Rules of Civil Procedure and the Federal Rules of Evidence also do not address motions in limine. But in limine motions are commonly entertained by New York state and federal courts, pursuant to the courts' inherent power to manage the course of trials.[4]

## Advantages and Disadvantages

A motion in limine may provide an important tactical advantage for the advocate, particularly where highly prejudicial evidence is involved. It can be used to exclude such evidence before the jury hears any mention of it. In the absence of a motion in limine, if the evidence were to leak out before objection could be made at trial, no cautionary or limiting instruction to the jury could eliminate the harm to the advocate's case.[5]

In limine motions also can be effectively used to obtain more informed and thoughtful evidentiary rulings. By making such motions before trial, the parties have the opportunity to identify and thoroughly research all the relevant issues, as opposed to scrambling to present arguments during the heat of trial. Motions in limine educate the trial judge on critical issues prior to trial, which allows for more careful consideration of evidentiary issues that otherwise may be cursorily decided at trial. Additionally, the intelligence gained from briefing and arguing a motion in limine prior to trial may be used to an advocate's advantage. Advocates may be able to "smoke out" their adversaries' trial themes, and make appropriate adjustments in their trial presentations, including opening statements.

Motions in limine also can be advantageous from the trial court's perspective. Resolving important evidentiary issues before trial serves

**Stewart D. Aaron** *is a partner and* **Susan L. Shin** *is an associate in the New York office of Arnold & Porter.*

to streamline the presentation of evidence, and results in more efficient use of the court's resources. If motions in limine are not used, the jury inevitably will need to wait in the jury room at trial while evidentiary issues are discussed, or worse, will have to sit idly in the jury box during lengthy discussions at the side bar.[6]

Motions in limine, however, can work to the disadvantage of an advocate. Unless court rules require such motions to be made in advance of trial, there may be times when it would be better not to make such motions, but to address evidentiary issues as they arise at trial. An advocate should be wary of educating the opponent as to evidentiary issues that such opponent may not even have considered. By making an in limine motion before trial, counsel will be alerting his or her adversary as to such issues and give the adversary an opportunity to research thoroughly and consider all the applicable factual and legal issues concerning the issues. Counsel should consider whether or not objecting to the opponent's evidence at the trial itself would be strategically more advantageous.

## Deciding Which Motions to Make

In deciding which motions in limine to make, counsel should anticipate all possible evidence that could be introduced by the opponent. Pretrial orders generally require the opponent to list all trial exhibits, and may require that objections to trial exhibits be listed as well. Counsel should be sure to review the trial exhibits carefully to determine whether any of them are objectionable.

Remember that objectionable testimonial evidence may also be offered at trial. Counsel should scour the discovery record, including deposition transcripts and interrogatory responses, to anticipate the testimony that will be offered at trial and ascertain if any of it is objectionable.

Think ahead to any possible rebuttal evidence that the opponent may offer. With respect to each piece of evidence to be submitted into the record, counsel should consider whether there is any objectionable evidence that the opponent might seek to introduce in rebuttal.

The next step is to create a catalogue of all possible in limine motions. A motion in limine may be used to exclude evidence that is highly prejudicial or inflammatory.[7] It also may be used to preclude evidence that is irrelevant or speculative,[8] or lacking in foundation.[9] Potentially confusing,[10] misleading[11] or repetitive[12] evidence may be the subject of a motion in limine as well.

Expert evidence is particularly susceptible to in limine motion practice. Counsel should carefully review any prior testimony by the opponent's experts. Counsel should analyze the proffered expert report, and any related tests and experiments, to evaluate their propriety under applicable law. The trial court's exercise of its "gatekeeper" function should be encouraged by advocates, particularly with regard to evidence that has the potential to impact the outcome of a trial.[13]

Once all possible in limine motions are catalogued, counsel must consider which to make. Exercise sound judgment: It is not in a party's interest to bury the court with every conceivable in limine motion. If a party is selective and only submits crucial in limine motions, those that matter most to its case will have greater credibility with the court. Furthermore, if too many in limine motions are made, the court in its discretion could decline to rule on them at all and merely address evidentiary issues as they arise at trial.

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For the reasons stated above, an advocate may decide not to make any in limine motions at all prior to trial. In that case, the advocate proceeds to trial armed with legal authority to assert all possible objections at the trial itself. If that course is taken, the advocate can prepare bench memoranda addressing the evidentiary issues to hand up to the court during trial as the issues arise, so long as such an approach is consistent with the practice in that court.

Whatever motions in limine are made prior to trial, counsel should be alert to other in limine motions that can be made during the course of the trial, even just prior to summation. Unexpected evidentiary issues almost will always arise during trial. Counsel should remain vigilant and seek to exclude objectionable evidence where appropriate.

## If Decision Is Reserved

An in limine motion essentially is an advisory decision and is subject to change as the facts are developed at trial.[14] Not all issues of evidence lend themselves to resolution prior to trial. Questions of relevance, prejudice, cumulativeness and other evidentiary issues often cannot be effectively resolved outside the context in which the evidence is presented at trial. In such cases, the court, in its discretion, may reserve the decision on an in limine motion for trial.[15]

In the event that the court reserves decision on a motion in limine, the movant should ask the court to order that no mention be made of the challenged evidence in opening statements or otherwise until the court has had an opportunity to rule on the admissibility of the evidence.

In the absence of such an order, the party opposing the motion (i.e., the proponent of the evidence) has a tactical decision to make—whether to bet on winning the motion and make reference to the challenged evidence in the opening statement; or to take the conservative approach and not mention the challenged evidence. This decision should be dictated by counsel's judgment as to whether the evidence is sufficiently inflammatory that a mistrial could be granted if the evidence mentioned is later excluded. In addition, counsel should weigh the possibility of the jury punishing the party that promises to deliver certain "smoking gun" evidence, but fails to deliver because evidence is later excluded. The opponent will certainly bring this to the jury's attention in summation.

## If Motion in Limine Is Denied

If the motion in limine is denied prior to trial, and the evidence is very damaging, the party that made the motion should consider making the motion again at trial to seek to convince the judge why the evidence should be excluded. For example, counsel could offer to conduct a voir dire examination of a witness (which is outside the presence of the jury) in order to show the prejudicial nature of the evidence and/or the marginal relevance of the evidence. As a "fallback" position, losing counsel should consider suggesting to the court that the evidence should be admitted only with a cautionary or limiting instruction to the jury about the evidence.

Losing counsel also should consider addressing the damaging evidence in his or her direct case. In so doing, counsel may successfully defuse the impact of the damaging evidence and present it in a positive light. In any event, counsel should be sure to create an adequate record of his or her objections to the proffered evidence. If the objection is not adequately preserved in the record, counsel's chances of success on appeal will be diminished. Thus, before "opening the door" to the evidence on counsel's direct case in an effort to buffer its effect, counsel should consider whether a renewed motion in limine at trial is necessary to adequately preserve the objection on the record.

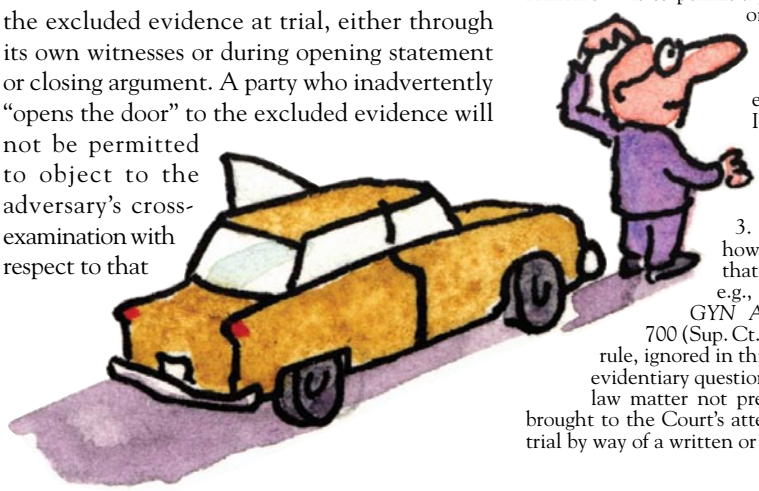
In New York state court, the loser of a motion in limine should consider an immediate appeal. Generally, "an order deciding a motion in limine is not appealable, since an order, made in advance of trial which merely determines the admissibility of evidence is an unappealable advisory ruling," but "an order which limits the scope of issues to be tried is appealable."[16] Counsel therefore should determine whether, and to what extent, the excluded evidence limits the scope of issues to be tried or affects a substantial right. In federal court, no immediate appeal from a decision on an in limine motion is available, since in federal practice appeals are taken from final judgments after trial.

The party against whom the unsuccessful motion in limine was made should "take stock" of the evidence that is not excluded. If counsel truly believes that the judge was wrong in not excluding evidence, and counsel's client cannot afford or does not desire a protracted appellate review and remand, counsel may want to consider a "middle ground" approach, i.e., stipulating that the jury be told about only some aspect of the evidence.

The party against whom the unsuccessful motion in limine was made also should be prepared to repel a renewed motion in limine at trial. Because the opponent knows that a decision on an in limine motion is only advisory and not final, the opponent may try to convince the trial judge to reconsider. Counsel should be sure to take to the courthouse for trial all legal memoranda and decisions concerning the prior motions in limine so as to be prepared for the renewed argument, if any.

## If Motion in Limine Is Granted

If the motion in limine is granted, prevailing counsel should consider requesting that the court order opposing counsel to instruct their witnesses not to testify about the excluded evidence, or otherwise bring it to the attention of the jury.[17] Also, the winning party on a motion in limine must be careful not to make mention itself of the excluded evidence at trial, either through its own witnesses or during opening statement or closing argument. A party who inadvertently "opens the door" to the excluded evidence will not be permitted to object to the adversary's cross-examination with respect to that evidence,[18] or object to the adversary's other use of such evidence.



The party against whom the successful in limine motion was made, i.e., the proponent of the excluded evidence, should ensure that there is enough of an appellate record as to what the excluded evidence would show. If necessary, counsel should make an offer of proof outside the presence of the jury. The purpose of such an offer is to put on the record for appellate review what the excluded evidence would have shown. Additionally, in New York state court, if the excluded evidence affects a substantial right, the losing party on the motion in limine should consider an appeal.[19] Finally, as before, the losing party on the in limine motion can ask the court to reconsider the evidentiary issue at trial, since there is a more fully developed record.

To avoid a mistrial and/or sanctions, counsel whose evidence was excluded on a motion in limine should be careful not to mention the excluded evidence during voir dire, in opening statements or in summation.[20] Counsel should also instruct his or her witnesses not to testify about excluded evidence.

## Conclusion

In limine motions can be an effective tool in jury trial practice, if properly and sparingly used. As explained above, both the winners and losers of such motions must be mindful of issues that will arise during trial arising out of such motions and the tactical considerations involved.

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1. Defined as "on or at the threshold; at the very beginning; preliminarily." Black's Law Dictionary 787 (6th ed. 1990).

2. See *National Union Fire Insurance Co. v. L.E. Myers Co. Group*, 937 F.Supp. 276, 283 (S.D.N.Y. 1996) ("The purpose of an in limine motion is 'to aid in the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.'" (citations omitted)); *State v. Metz*, 241 A.D.2d 192, 198 (1st Dept. 1998) ("Generally, the function of a motion in limine is to permit a party to obtain a preliminary order before or during *trial* excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. Its purpose is to prevent the introduction of such evidence to the trier of fact, in most instances a jury.") (emphasis in original).

3. Note that some courts, however, have individual rules that address such motions. See, e.g., *Mendola v. Richmond OB/GYN Associates*, 191 Misc.2d 699, 700 (Sup. Ct. Richmond Co. 2002) (court's rule, ignored in this case, stated: "Any potential evidentiary question or procedural or substantive law matter not previously adjudicated shall be brought to the Court's attention and addressed prior to trial by way of a written or oral motion in limine…").

4. See *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984); *Davis v. City of Stamford*, No. 3:95CV2518, 1998 WL 849369, at *1 (D. Conn. Nov. 16, 1998), aff'd, 216 F.3d 1071 (2d Cir. 2000); see also *Clemente v. Blumenberg*, 183 Misc.2d 923, 932 (Sup. Ct. Richmond Co. 1999) ("it is an inherent power of all trial court judges to keep unreliable evidence…away from the trier of fact….").

5. See *People v. Griffin*, 242 A.D.2d 70, 73 (1st Dept. 1998) (prejudice resulting from violation of motion in limine could not be cured with jury instruction).

6. See *Gallegos v. Elite Model Management Corp.*, 195 Misc.2d 223, 226 (Sup. Ct. New York Co. 2003) (in limine motion prior to trial avoids having jury sit through evidentiary hearing).

7. See, e.g., *People v. Davis*, 43 N.Y.2d 17, 27 (1977), cert. denied, 435 U.S. 998 (1978) (relevant evidence may be excluded if probative value is outweighed by danger of undue prejudice).

8. See, e.g., *Vail v. KMart Corp.*, 25 A.D.3d 549, 550 (2d Dept. 2006) (affirming exclusion of proposed expert testimony as irrelevant and misleading); *People v. Jasper*, 283 A.D.2d 303, 304 (1st Dept. 2001) (affirming exclusion of speculative evidence as irrelevant).

9. See, e.g., *In re Estate of Brownstone*, 289 A.D.2d 97, 98 (1st Dept. 2001) (unauthenticated and unsigned notes properly excluded).

10. See, e.g., *Kinsella v. Berley Realty Corp.*, 240 A.D.2d 374, 374 (2d Dept. 1997) (confusing report excluded).

11. See, e.g., *Litts v. Wayne Paving Co.*, 261 A.D.2d 906, 906 (4th Dept. 1999) (misleading drawings of expert properly excluded).

12. See, e.g., *Driscoll v. Akron Fire Co.*, 251 A.D.2d 1042, 1043 (4th Dept. 1998) (affirming exclusion of repetitive testimony).

13. In Federal Court: Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In New York state court: *People v. Wesley*, 83 N.Y.2d 417 (1994) (adopting *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which considers whether the scientific evidence has gained general acceptance in its specified field, and not *Daubert*, which permits scientific evidence that will aid the fact-finder).

14. See *Home Depot U.S.A., Inc. v. G&S Investors/Willow Park, L.P.*, No. 97-CV-6719, 2005 WL 3018701, at *9 (E.D.N.Y. Nov. 7, 2005).

15. See id. ("It is common for courts to reserve judgment on a motion in limine until trial so that the motion can be placed in the appropriate factual context.") (citation omitted); *Speed v. Avis Rent-A-Car*, 172 A.D.2d 267, 268 (1st Dept. 1991) (evidentiary issues on relevance are more properly made at trial when relevancy can be determined in context).

16. See *Parker v. Mobil Oil Corp.*, 16 A.D.3d 648, 650 (2d Dept. 2005) (holding that an order granting or denying a pretrial in limine motion to exclude expert testimony on medical causation affects a substantial right, and is therefore appealable), aff'd on other grounds, 7 N.Y.3d 434 (2006).

17. See *Favier ex rel. Favier v. Winick*, 151 Misc.2d 910, 911 (Sup. Ct. Suffolk Co. 1992) (granting motion in limine preventing counsel from mentioning potentially inflammatory issue).

18. See *Newton v. Burge*, 436 F.Supp.2d 589, 594 (W.D.N.Y. 2006) ("Defense counsel had no basis on which to object to [the objected] line of cross-examination since it was he who 'opened the door…'").

19. See footnote 16, supra, and accompanying text.

20. See *People v. Ni*, 293 A.D.2d 552, 552 (2d Dept. 2002) (counsel's prejudicial comments during opening and closing statements warranted reversal).