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Elimination game

Effective use of motions in limine



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By Miles B. Cooper

The lawyer reviewed the case's motions in limine folder. Throughout the case, folks working on the matter had dropped notes, memos, and concerns that might require evidentiary rulings outside the jury's presence. A great place to refresh oneself about the case's challenges and prepare for that final push toward trial.

Proper planning leads to powerful performance

Controlling the evidentiary landscape through motions in limine isn't an afterthought. Thinking through evidentiary issues from the very beginning helps make sure one gets helpful evidence admitted and helps set the stage for the judge to deem prejudicial evidence inadmissible. When one first reviews a case, identify potentially problematic evidence that could impact the jury. An unrelated injury, a criminal history, social media posts – these generally do not materialize immediately before trial. They're landmines visible from the beginning that require careful navigation. By building these into discovery one can gather the information and tools one needs to keep the damaging and unrelated evidence out.

There are various approaches to maintaining this information in one place. One effective method, adapted from paper file days, is to maintain an MIL (motion in limine) subfolder in the trial folder. Anything that comes up during a deposition, in discovery responses, in medical records, or anywhere else gets a note in the folder. By the time trial approaches, the motion strategy will be well-developed, thoroughly researched, and supported by the record one has built.

Round up the usual stipulations

Before one prepares an onslaught of motions in limine, reach out to opposing counsel. There are areas so well established that a rational player opposing counsel may stipulate to the issues. These include references to mediation or settlement talks, insurance, collateral source, new opinions from experts, and providing the witness names for the next trial day by a certain time. This helps streamline the issues to matters that are truly worth fighting about.

Beyond the stipulations, consider what will move the needle versus what may be a dead-bang loser (and impact credibility with the judge). Not everything deserves a motion in limine. Some judges believe that the strength of a lawyer's case is inversely proportional to the number of motions in limine brought and will treat the case accordingly. Focus on evidence that truly threatens the case theory or that could create unfair prejudice. Can the issue be addressed through a simple objection during trial? Will highlighting the issue create more problems than it solves? Filing a motion sometimes telegraphs one's concerns to opposing counsel. One also wants to account for judicial preferences when one knows who the trial judge will be, such as direct calendar courts. If the judge tends to defer rulings until evidence is offered at trial, narrow the motions to those truly requiring advance determination. For judges who appreciate comprehensive pre-trial organization, more extensive motions may be welcomed.

Go fish

Motions in limine serve as both sword and shield. Defensively, they protect against prejudicial evidence that could damage a client's case. Offensively, they can shape the narrative by establishing what evidence is central and what is peripheral. Consider affirmative motions that require certain evidence to be presented in context. For example, a motion requiring surveillance video to be shown in its entirety rather than cherry-picked segments can transform potential defense evidence into proof of a client's limitations. Likewise, a motion seeking to prevent the defense from presenting negative character evidence regarding one's client forces opposing counsel to talk. It requires opposing counsel to disclose information they have or acknowledge they don't have anything. Should they have anything, it then helps the judge shut down inappropriate character evidence without having to unring the bell.

MIL lawyer

In some cases, evidentiary rulings can significantly impact settlement postures. If one has a judge for all purposes, consider requesting an early motion in limine hearing and briefing schedule. Judges, who have more cases than available courtroom days, will frequently appreciate the opportunity to increase settlement opportunities.

Properly crafted motions in limine preserve issues for appeal. Even when denied, they create a record that can be revisited later. Keep the appellate specialist happy. A motion in limine ruling is not final. If the motion is denied, object when the evidence is offered at trial to perfect one's appellate rights. Likewise, if one's motion is granted, be prepared for opposing counsel to push the envelope. If violated, promptly request a curative instruction or, in extreme cases, move for a mistrial.

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Back to our lawyer. After reviewing the in limine folder the lawyer noted several issues that deserved specific motions. These motions, if won, would change the case's direction. The lawyer gathered the team and divided up the assignments. Combined with a drafting and review schedule, which left cushion for litigation's twists and turns, the work would pay dividends. Some battles are best fought before the jury is seated. Any steps that could legitimately tip the playing field in their client's favor were worth taking.

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