

Civil Pretrial Practice

Pretrial Motions in Limine

Pretrial Motions in Limine (“MIL”)

- Motions in limine are used to obtain an evidentiary ruling in advance.
- Most commonly, this is to prevent the introduction of matters at trial which are irrelevant, inadmissible or prejudicial but may also be used to permit the introduction of evidence.
- 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.

Pretrial Motions in Limine (“MIL”) Authority & Legal Standard

- 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).

Pretrial Motions in Limine (“MIL”) Timing & Procedural Requirements

- Motions in limine are not noticed motions. CRC, rule 3.1112(f) provides that: “a motion in limine filed before or during trial need not be accompanied by a notice of hearing.”
 - CRC, 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 CRC, rule 3.20(b)(1).
- 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 timing and place of the filing and service of the motion in limine are at the discretion of the trial judge. CRC, rule 3.1112(f).
- *Practice Tip:* Considering that motions in limine are regulated by the court’s inherent powers, including the power to control the proceedings, you must determine the trial judge’s preferences regarding the timing and form of motions in limine.

Pretrial Motions in Limine (“MIL”) Timing & Timing & Procedural Requirements - Examples

- In the **Los Angeles Superior Court**, if you have a “personal injury” (“PI”) case and are assigned to one of the PI courts, then before filing motions in limine, “the parties/counsel shall comply with the statutory notice provisions of CCP section 1005 and the requirements of LASCR, rule 3.57(a).”
- 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.)

Pretrial Motions in Limine (“MIL”) Meet & Confer Requirement

- Many jurisdictions require counsel to meet and confer regarding motions in limine – i.e., LASCER, rule 3.57(a)(2); Superior Court of Fresno County, Local rules, rule 2.6.1.
- 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.

Pretrial Motions in Limine (“MIL”) 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.

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Form of Motions in Limine

- Most courts require written motions in limine. *See e.g.*, LASCR, rule 3.57; SFSCR, 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.
- The caption of each motion in limine should specifically and clearly identify the number of the motion and the substance of the motion.
- Some courts require consecutive numbering so again, it’s imperative to find out what your trial judge prefers.

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Substance of Motions in Limine

- The papers filed in support of a Motion in Limine must consist of at least the following:
 - The motion itself with a brief description of the evidence sought to be excluded or admitted and the basis of the motion and the relief sought.
 - A memorandum in support of the motion with a detailed factual and legal analysis to support why the evidence should be excluded or admitted.
 - A declaration that includes the following:
 - (1) Specific identification of the matter alleged to be inadmissible and prejudicial;
 - (2) A representation to the court that the subject of the motion has been discussed with opposing counsel, and that opposing counsel has either indicated that such matter will be mentioned or displayed in the presence of the jury before it is admitted in evidence or that counsel has refused to stipulate that such matter will not be mentioned or displayed in the presence of the jury unless and until it is admitted in evidence;
 - (3) A statement of the specific prejudice that will be suffered by the moving party if the motion is not granted; and
 - (4) If the motion seeks to make binding an answer given in response to discovery, the declaration must set forth the question and the answer and state why the use of the answer for impeachment will not adequately protect the moving party against prejudice in the event that evidence inconsistent with the answer is offered.
 - Proposed Order.
- Other papers may be filed in support of the motion, including additional declarations, exhibits, appendices, and other documents or pleadings. CRC, rule 3.1112(b).

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Improper Uses of Motions in Limine

- ***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 or one that is not supported by the facts and law of your case.
- ***Beware of filing motions in limine which are really disguised motions for summary judgment.*** A motion in limine to, in effect, assert a late-filed motion for summary judgment or summary adjudication is improper. LASCR, rule 3.57(b).
- ***Beware of filing motions in limine which are really disguised motions to bifurcate.*** A motion in limine may not be used for the purpose of seeking an order to try an issue before the trial of another issue or issues. LASCR, rule 3.57(c).
- ***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.*** 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. LASCR, rule 3.57(a)(4).

Pretrial Motions in Limine (“MIL”) Compliance with the Court’s Ruling

- 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.
- 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. LASCER, rule 3.57(e).
- *Practice Tip:* 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.

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Cal. Evidence – General Rules of Admissibility

- In general, if evidence is shown to be **relevant, material, and competent**, and is not barred by an exclusionary rule, it is admissible. Cal. Evid. Code § 351.
 - Evidence is **relevant** when it has any tendency in reason to make the fact that it is offered to prove or disprove either more or less probable. Cal. Evid. Code § 210.
 - Evidence is **material** if it is offered to prove a fact that is at issue in the case.
 - Evidence is **competent** if the proof that is being offered meets certain traditional requirements of reliability. The preliminary showing that the evidence meets those tests, and any other prerequisites of admissibility, is called the foundational evidence. Cal. Evid. Code § 402, 403.
- Establishing these basic prerequisites, and any other special ones that may apply, is called **laying a foundation**.

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Cal. Evidence – Four Types of Evidence

1. **Real evidence** is a thing the existence or characteristics of which are relevant and material. It is usually a thing that was directly involved in some event in the case (*Example: written contract to establish existence of an agreement in a contract case, weapon in assault or battery case*);
 - Real evidence may be authenticated in three ways: (1) by identification of a unique object, (2) by identification of an object that has been made unique, and (3) by establishing a chain of custody.
 - The proponent of the evidence must also establish that the object, in relevant respects, has not changed or been altered between the events and the trial.
2. **Demonstrative evidence** demonstrates or illustrates the testimony of a witness. (*Example: Maps, diagrams of the scene of an occurrence, animations*);
 - Demonstrative evidence is authenticated by the witness whose testimony is being illustrated.
3. **Documentary evidence** is often a type of real evidence, (*Example: written contract to prove the terms of the agreement*);
 - Documents present special problems not presented by other forms of real evidence, such as hearsay, authentication and best evidence rules.
4. **Testimonial evidence** consists of what is said in the court at the proceeding in question by a competent witness.
 - In general, a witness is competent if he meets four requirements: (1) takes and understands the oath or a substitute. Cal. Evid. Code §§ 710, 701; (2) have personal knowledge about the subject of his testimony. Evid. Code § 702; (3) Remember what he perceived; and (4) Be able to communicate what they perceived. Cal. Evid. Code § 701(a)(1).
 - Testimonial evidence does not usually require another form of evidence as a prerequisite for its admissibility. See Cal. Evid. Code § 702(b).

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Cal. Evidence – Opinion Testimony

- “The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion.” Cal. Evid. Code § 803.
- **Lay Opinions:** In general, a person who is not testifying as an expert will be allowed to testify in the form of an opinion if the opinion is both rationally based on his perception and helpful to an understanding of his testimony. Cal. Evid. Code § 800.
 - This includes statements of what they saw, heard, felt, tasted, or smelled.
 - They are generally forbidden to express opinions or draw conclusions.
- **Expert Opinions:** An expert providing testimony in the form of an opinion is limited to such an opinion as is: (b) Based on matter (including his special knowledge, skill, experience, training, and education) . . . unless an expert is precluded by law from using such matter as a basis for his opinion.” Cal. Evid. Code § 801.

Pretrial Motions in Limine (“MIL”) Cal. Evidence – Character Evidence

- The general rule that evidence of character is not admissible to show action in conformity with it. Cal. Evid. Code § 1101.
- Character evidence may be proved where it is directly in an issue or is put in issue in a particular case. Cal. Evid. Code § 1101(b). A witness's character for veracity is always put in issue when he takes the stand
 - *Example:* A Plaintiff's character and reputation may be in issue in an action for slander or libel where the defendant attempts to show that the plaintiff's reputation was already so bad that he could not have suffered any harm from the disparaging statement.
- While character cannot be proved to show action on a particular occasion in conformity with it, habit can. Cal. Evid. Code § 1105.
 - Character is a generalized quality usually attributed to a person, such as truthfulness, violence, drunkenness, and the like.
 - A habit is a specific, regular, and consistently repeated behavior, such as a practice of always locking one's doors.

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CA Evidence – Common Evidentiary Grounds

1. No evidence is admissible except relevant evidence. Cal. Evid. Code § 350.
2. The court in its discretion may exclude evidence if 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, or confusing the issues, or of misleading the jury. Cal. Evid. Code § 352.
3. Evidence of subsequent remedial measures is not admissible to show previous negligence or culpable conduct. Cal. Evid. Code § 1151.
4. Evidence of mediation or settlement discussions is not admissible to prove liability for the claims that were being discussed. Cal. Evid. Code § 1152, 1152.5.
5. Evidence of liability insurance is inadmissible to prove negligence or other wrongdoing. Cal. Evid. Code § 1155.

Pretrial Motions in Limine (“MIL”) 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. 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.
- Refresh yourselves on the rules of evidence!