OVERVIEW OF MOTIONS IN LIMINE

ABOTA MOTIONS IN LIMINE SEMINAR

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AUTHORITY FOR MOTIONS IN LIMINE

In Wisconsin, there is no statute authorizing the use of motions in limine.[1] Wisconsin courts have acknowledged that use of motions in limine has become common in Wisconsin and in many other jurisdictions.[2] The trial court's authority to grant motions in limine is based on its inherent authority to exclude evidence and control the presentation of evidence.[3] The handling of the trial is subject to the trial court's discretion and its determinations will not be disturbed unless there is an abuse of discretion.[4]

The authority for the trial court dealing with motions in limine is found in a number of statutes.[5] Beginning with Wis. Stat. § 906.11, the judge has the right to exercise reasonable control over the mode and order of interrogation of witnesses and the presentation of evidence. Wis. Stat. § 901.02 gives the court authority to secure fairness in the proceedings. Wis. Stat. §§ 901.04 and 805.10 give trial judges the authority to deal with the qualification of experts and examination of witnesses. Wis. Stat. § 904.03 allows

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[1] State v. Wright, 2003 WI App 252, 268 Wis. 2d 694, 715-16, 673 N.W.2d 386, 397.
[2] Id.
[3] Jay E. Grening, 6A Wis. Prac., Civil Procedure Forms § 97:3 (3d ed.), and see Wis. Stats. §§ 906.11 and 904.03.
[4] Gainer v. Koewler, 200 Wis. 2d 113, 120, 546 N.W.2d 474, 477 (Ct. App. 1996).
[5] Lynn R. Laufenberg, Motions in Limine: A Primer, 31 The Verdict 21–22 (2008).

the court to exclude evidence that is unfairly prejudicial, confusing, misleading or which will result in delay, waste of time or needless presentation of cumulative evidence.

The first decision reporting the use of motions in limine appears to be the civil case of Bradford v. Birmingham Electric Co. decided in Alabama in 1933.[6] In this case, involving action for personal injuries, plaintiff's counsel moved before trial to exclude any reference to alleged immoral conduct on the part of his client.[7] The trial court refused to adopt such a novel procedure, and the reviewing court also rejected the concept on appeal, citing lack of precedent and its concern that a trial judge who required an attorney to inform him as to what evidence he intended to offer at trial, and who assumed the right to "instruct" the attorney on what he could or could not use, would be acting presumptuously.[8]

The historical use of motions in limine in Wisconsin was discussed in State v. Horn, 139 Wis. 2d 473, 407 N.W.2d 854 (1987). The court recognized in a footnote that the use of motions in limine had expanded from suppressing prejudicial evidence to obtaining general rulings on admissibility and that such motions had become common in many jurisdictions.[9]

[6] 20 Am. Jur. Trials 441 (Originally published in 1973)
[7] Id.
[8] Id.
[9] See Footnote 8 at 487, 860

PROCEDURE AND TIMING

A motion in limine is presented as a typical motion would be with a notice of motion, supporting affidavit and brief. Timing of the motion is a question of trial strategy.

The procedure for dealing with motions in limine varies. The preference of some judges is to handle motions in limine at the final pretrial conference, some schedule a separate hearing date, and some are set for hearing using standard motion scheduling practice. How motions in limine are handled varies with the procedural preferences of the trial judge and/or local rules.

Motions in limine are typically based on witness disclosures and pretrial discovery. An evidentiary hearing is not the typical procedure for motions in limine. Although scheduling orders typically set a time for filing of motions in limine, there is no authority that prevents counsel from raising an objection at trial to evidentiary issues that could have been the basis for a motion in limine.

If a motion is to exclude the number of witnesses or experts, counsel may wish to obtain a ruling before the final pretrial conference. The ruling on such a motion may impact trial strategy, scheduling, length of trial, and other factors that may warrant a ruling earlier than the final pretrial conference. If a critical issue is decided well in advance of the trial, it may impact a party's evaluation of the case and lead to settlement.

Some judges will have informal conferences with regard to motions in limine and provide an indication for how they will rule on the motions. When this is done, counsel should request that the court's rulings be on the record. As a rule, the party who has

raised a motion in limine generally preserves the right to appeal on the issue raised by the motion without also having to object during trial.[10]

In order to preserve rulings on motions in limine, an on-the-record hearing and a written order by the court should be undertaken.

When the court defers its ruling, a request should be made to direct counsel to advise the court that the evidence that was the subject of the motion is about to be offered so the admissibility may be considered outside the presence of the jury.

If a motion in limine is denied, counsel should be prepared to make a detailed offer of proof on the record so that the details of the motion are preserved for post-trial review.

PURPOSE

The purpose of motions in limine in general is to seek evidentiary rulings in advance of trial. These motions are usually used to prevent introduction of evidence or mention of inadmissible or prejudicial factual information. Another purpose of these motions is to alert the court to evidentiary issues and/or conduct that may impact on the case.

Motions in limine may be used to minimize the chances that a jury will pay special attention to certain evidence just because there was an objection to its use at trial.

The ultimate benefit of an advanced ruling on the admissibility of prejudicial evidence is the reduced potential for a mistrial. [10]

[10] State v. Bergeron, 162 Wis. 2d 521, 470 N.W. 2d 322 (Ct. App. 1991).

Motions in limine can be used to alert the court to significance issues of admissibility. Determining the impact on the jury of a violation of a ruling on a motion in limine is for the trial judge. When the court is on notice of a sensitive issue, there may be a greater inclination to grant a mistrial, especially when willful violation orders occur. Counsel should also be mindful of the potential for "opening the door" to previously inadmissible evidence. By obtaining an advanced ruling on the admissibility of prejudicial evidence, counsel may limit the potential for a mistrial and put the other side on notice of the significance of a violation of the order.[11]

ISSUES THAT MAY BE ADDRESSED

Motions in limine can be used to address various topics including exclusion of evidence, admission of evidence, challenges to expert testimony, and limiting opening and closing statements.[12]

The Wisconsin Court of Appeals has identified instances where the use of in limine motions in court may be effective,[13] such as:

- The trial court has directed that the evidentiary issue be resolved before trial;
- The evidentiary material is highly prejudicial or inflammatory and would risk a mistrial if not previously addressed by the trial court;
- The evidentiary issue is significant and unresolved under existing law;
- The evidentiary issue involves a significant number of witnesses or a substantial volume of material making it more economical to have the issue

[11] Thomas B. Aquino et al., Wisconsin Civil Procedure Before Trial (4th ed. 2012).
[12] Id.
[13] State v. Wright, 268 Wis.2d 694, 717, 673 N.W.2d 386, 397 (2003).

resolved in advance of trial so as to save the time and resources of all concerned; or

- A party does not wish to object to the evidence in the presence of the jury and thereby preserves the issue for appellate review by obtaining an unfavorable ruling via a pretrial motion in limine.

There are a myriad of topics that may be considered for motions in limine that include, but are not limited to:

- Duplication of examination and argument by multiple parties who are not adverse;
- Collateral source payments and benefits;
- The number of witnesses, both lay and expert;
- Evidence of non-causal negligence;
- Irrelevant and unrelated medical history;
- Prior conduct offered as evidence that the person acted in conformity;
- Opinions beyond the scope of the experts' qualifications;
- The necessity or lack thereof for expert testimony.

Motions in limine may also address the conduct and behavior of opposing counsel. If it is anticipated that opposing counsel's behavior may be demeaning or offensive, or that inappropriate comments may be made during opening statements or closing arguments, a motion in limine can, at minimum, put the court and opposing counsel at notice of such a concern.

Another area of concern that can be addressed by a motion in limine relates to how counsel is addressed. Out of town counsel may seek to prevent reference to them as the lawyers from the "big city", or the "hot shots from out east", etc.

Motions may seek to prevent specific references and/or characterizations that may include rude and impolite references to parties or witnesses. References and/or characterizations for which exclusion may be considered are unwarranted descriptions of witnesses such as defense experts being "hired guns", and plaintiffs being referred to as "malingerers" and/or "phonies".

Motions in limine are frequently used to attempt to exclude evidence based on Wis. Stat. § 903.04 and §906.11. Procedural motions may be brought to limit expert or lay witnesses on the grounds that the evidence will be cumulative, or that although relevant, the evidence will result in undue delay and the unnecessary waste of time. Counsel can also seek to prohibit the other side's expert from testifying on two separate grounds. First, by establishing that the expert's opinion is within the common knowledge of a layperson, testimony from an expert witness is not required.[14] Second, if the expert attempts to testify on a subject outside his or her knowledge, skill, experience, training or education, the expert may not be qualified by the court to testify on the subject matter based upon Wisconsin's recent adoption of Daubert.

Motions in limine may also be brought to admit evidence and/or exclude evidence of other acts. Under Wis. Stat. § 904.04(2), the introduction of other acts evidence may be submitted in a motion in limine along with the necessary proof of facts in support.[15]

[14] Thomas B. Aquino et al., Wisconsin Civil Procedure Before Trial (4th ed. 2012).
[15] Id.

Counsel must establish the relationship between the current facts and the previous facts to avoid being restricted from introducing the prior acts evidence because it displays character and the person's actions in conformity with that character trait.

General Considerations

Judges may approach motions in limine differently. Many judges want their trials to flow smoothly and infringe on the lives of jurors no more than is necessary. Constant interruptions during trial that require the jury to be excused disrupt the flow of evidence and are time consuming.

Frequently, motions in limine are based upon depositions taken as part of pretrial discovery. An argument frequently used to challenge motions in limine is that the motion is premature and the evidence needs to be considered in the context of how it is presented at trial. Judges want to avoid making a ruling in the abstract or without a full record. At the motion in limine stage, judges readily admit that the lawyers know far more about the case than they do and because context is usually necessary for an evidentiary ruling, the decision may be deferred. Arguments have been made that the evidence used to support the motion is based on discovery depositions that do not accurately reflect how the evidence will be presented at trial. The claim that evidence will be cumulative may not be the case unless opposing counsel makes it so. Many times a ruling will not be made unless the evidence is clearly inadmissible or so prejudicial that if the subject is mentioned before the jury, irreparable prejudice will result. If the subject matter of the evidence is not such that mere mention of it will require a mistrial, a judge may be inclined to defer a ruling. Judges may also be inclined to resist attempts to "micro-manage" the evidence at the pretrial stage.

The decision to use motions in limine depends to a large extent on trial strategy and style. Each attorney is different. Some lawyers seek to control the opponent's case to the greatest extent possible. Some may decide it is best to wait and see if the evidence is offered.

Wisconsin Case Law

Waiver – In Balz v. Heritage Mut. Ins. Co., 294 Wis. 2d 700, 720 N.W.2d 704 (2006), counsel obtained a pre-trial order in limine precluding the introduction of coverage issues before the jury. The trial court held that counsel waived this order and opened the door upon counsel's direct examination of a witness regarding the same issue he sought to preclude. Opposing counsel then cross-examined the same witness on the coverage issue which was brought up on appeal. The decision was upheld by the court of appeal.

Preserving the Record – In State v. Bergeron, 162 Wis. 2d 521, 470 N.W.2d 322 (1991), the court ruled on a motion in limine to suppress evidence relating to use of the defendant's alias that objection could be raised during trial. Defendant's counsel failed to object and testimony was introduced with regard to the alias. The court stated in dicta that "a defendant who has raised a motion in limine generally preserves the right to appeal on the issue raised by the motion without also objecting at trial."[16] The court went on to say that if the issue raised on appeal is different in law or fact from the motion in limine that was presented, there may be a waiver if there is no objection at trial.

Thus, it is important that the court's ruling be set forth with precision on the record and in an order. Counsel must be aware that, "Whether the motion in limine relieves the

[16] Id. at 528, 324.

party from having to object depends on whether the motion alerted the court to the same issue of fact or law that arises at trial."[17]

In State v. Kutz, 267 Wis.2d 531, 671 N.W.2d 660 (2003), the trial judge would not rule on a motion in limine prior to trial and instead deferred his decision. The evidence was to be considered in the context in which it was offered at trial. Counsel who brought the in limine motion failed to object when the evidence was offered. The Court of Appeals held that counsel's failure to raise an objection, absent instruction from the court on the matter that it be heard outside the presence of the jury, does not preserve the objection for appeal.

Requirement for a motion in limine– In State v. Wright, 268 Wis. 2d 694, 673 N.W. 2d 386 (2003), the court dealt with motions in limine in the context of a criminal case. Defense counsel was charged with being ineffective for failing to make a motion in limine to bar the testimony of a witness. In deciding that a motion in limine was not required, the court said, "To hold otherwise would suggest that lawyers should seek pretrial rulings on all evidentiary issues that might inspire an objection at trial… That is not what the law requires."[18]

[17] Id. at 529, 325.
[18] Wright at 716, 397.

Further Reading

Excellent discussions related to motions in limine are found in Honorable Michael O. Bohren, et al., Wisconsin Trial Practice, §§ 2.32 - 2.41 (2d Ed. 2007); Thomas B. Aquino et al., Wisconsin Civil Procedure Before Trial, § 2.1 (4th ed. 2012); Lynn R. Laufenberg, Motions in Limine: A Primer, 31 The Verdict 21–22 (2008).