

# Turning Your Client's Position into the Judge's First Impression

By Hon. William A. Masterson and Laurence D. Jackson

**T**he great day has arrived. After years of discovery and frustrating delays, you are finally going to trial. In master calendar systems, you are sent to a judge who knows nothing about your case. Even with individual calendars, your case first emerges from the thousand-case docket when you report ready for trial. In both situations, the judge is now forming a first impression of the merits of your case. How can you best begin to persuade this judge, whose decisions will be crucial in a jury trial and determinative in a bench trial? How can you turn your client's position into the judge's positive first impression?

Motions *in limine* can often be the most effective way to grab the judge's immediate attention. Unlike a trial brief or counsel's oral statements, a motion *in limine* commands attention. A ruling is required, cannot be deferred, and must be correct. Because the ruling will constrain voir dire, it must be made at the very outset of the case. Any error will undoubtedly be prejudicial and, if appealed, negate everyone's hard work in trying the

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case. Finally, a motion *in limine* is an opportunity for persuasion on the merits of the case. Although a motion will generally address only an evidence question, the substantive merits of the case will be relevant in the judge's determination. Consequently, the merits can and should be addressed succinctly both to support the motion and begin the process of persuading the trial judge on the merits.

So what is this motion that presents such opportunities for persuasion? It is a misconception that a motion *in limine* is a motion in limitation of evidence. "In limine" is, in fact, Latin for "at the threshold," derived from the same root that has found its way into our language in the term subliminal, i.e., below the threshold. Accordingly, a motion *in limine* is theoretically available to the advocate for any purpose. Furthermore, although it is not codified, the procedure is well recognized in both Federal and California case law.

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In *United States v. Cook*, an en banc opinion, the Ninth Circuit wrote: "Motions *in limine* have proven their value in litigation. They save jury time, and avoid the waste that sometimes results from haste when side-bar matters have to be urged in the course of the trial." 608 F.2d 1175, 1186 (9th Cir. 1979) *cert. denied* 444 U.S. 1034 (1980).

The California Court of Appeal has also endorsed the use of pre-trial motions to resolve evidence questions: "While the 'motion to exclude' was not a conventional procedure,

it was well conceived under the circumstances. . . (citation omitted). It was an entirely proper mode of objection." *Sacramento and San Joaquin Drainage District v. Reed*, 215 Cal.App.2d 60, 69-71 (1963).

In addition to being an ideal tool to advance your client's position at the very outset, a motion *in limine* can serve as a tool of economy, settlement, and to determine evidence questions.

### — Tool of Economy —

The motion *in limine* should be considered as a means to narrow the issues and save trial time and cost. An important substantive issue can be presented as an evidence question by a motion *in limine* to preclude evidence that is only admissible if that substantive issue is actually litigated at trial. For example, net worth evidence may only be admissible if punitive damages are in issue. A legal defense to punitive damages, such as the nonassignability of the claim, could be resolved by a motion *in limine* to prohibit net worth evidence. Or the validity of a contractual prohibition on consequential damages could be determined by a motion to preclude evidence of consequential damages.

A motion *in limine* to narrow the issues can have significant advantages over a summary adjudication motion. For example, new provisions of Section 437c(f) of the California Code of Civil Procedure may preclude summary adjudication of a legal defense to consequential damages.

A second major advantage is that the motion *in limine* will be heard by the trial judge immediately before trial, not by a harried law and motion judge whose overcrowded docket leaves little time for complicated summary adjudication motions. Furthermore, from the trial judge's perspective, denial of a motion *in*

*limine* may make the trial longer and more complicated. Moreover, the legal issue presented will not disappear. It will need to be decided in the jury instructions conference or in the court's decision. Even an individual calendar judge may view a motion *in limine* more favorably than a summary adjudication motion because trial will follow immediately; the case is no longer one of the 95% that settle before trial.

A motion *in limine* may also be preferable to a summary adjudication motion in narrowing issues in a case because the moving party is not saddled with overcoming the long-standing hesitancy of the courts to grant summary adjudication. Finally, a motion *in limine* is not subject to time restrictions which may be imposed on a motion for summary adjudication under Section 437c of the Code of Civil Procedure. This may be particularly important when the grounds for the motion develop in the late stages of discovery, such as during expert witness depositions. In addition, motion *in limine* can provide a preview of the judge's jury instructions or conclusions of law at a time when counsel can still tailor the trial presentation to those theories that will be most advantageous based on the trial judge's view of the law.

#### — Settlement Tool —

A well-crafted motion *in limine* can greatly assist in settlement, particularly when a significant legal issue remains unresolved at the time of trial. For example, a recent wrongful termination case settled after the parties learned through motions *in limine* how the trial court would apply *Foley v. Interactive Data*. Settlement may also be induced by an early ruling on evidence of questionable admissibility but devastating jury impact, such as a party's prior bad acts.



#### — Tool for Evidence Determinations —

The motion *in limine* should be considered not only to exclude evidence but also to facilitate admission of controversial evidence. Asking the court to rule in advance on the admissibility of evidence that you reasonably expect to be controversial has several advantages: You present the issue when the judge is receptive to determining legal issues. You minimize disruptions during your case. You gain the advantage of primacy by creating the court's first impression of the issue. Finally, you build credibility in the eyes of the court by acknowledging the controversy and addressing it. This is particularly important at the outset of the trial, a time when the court is still evaluating which counsel's statements will be more credible.

A motion *in limine* may also be absolutely essential to preclude the jury from hearing highly prejudicial information. It is not always possible to rely on trial objections. Prejudicial information may not come from a witness' answer; it may come from your opposing counsel in voir dire, opening statement, direct or cross examination, or final argument. The California Court of Appeal has recognized that the "advantage of [a motion *in limine*] is to avoid the obviously futile attempt to 'unring the bell' (citations omitted)." *Hyatt v. Sierra Boat Company* 79 Cal. App. 3d 325, 337 (1978).

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To preclude the jury from learning prejudicial information, a motion *in limine* must be granted before voir dire begins. Furthermore, the court's order must prohibit both witnesses and counsel from making any mention of the prejudicial information. Follow-up is necessary to notify non-party witnesses of the order. If possible, place the onus for notification on the counsel calling the witness.

Generally, the prejudicial information that your adversary may seek to use at trial is obvious. Nonetheless, you may benefit from considering in your trial preparation whether any of the following types of prejudicial information may arise:

- (1) Related but dissimilar prejudicial acts, *McLain v. Great Amer.*

*Ins. Cos.* 208 Cal. App. 3d 1476, 1487 (1989) (sexual preferences or conduct);

- (2) related but dissimilar claims or litigation;
- (3) tax consequences of a damage award, *Rodriguez v. McDonnell Douglas Corp.*, 87 Cal. App. 3d 626, 664; (1978);
- (4) criminal convictions or arrests, *U.S. v. Bibo-Rodriguez*, 922 F.2d 1398, 1401 (9th Cir. 1991);
- (5) defendant's net worth;
- (6) other accidents;
- (7) subsequent alteration or repair, *Charbonneau v. Superior Court*, 42 Cal. App. 3d 505 (1974);
- (8) issues removed from the case by stipulation, *Sturgeon v. Leavitt*, 94 Cal. App. 3d 957, 960 (1979); *People of Territory of Guam v. Tedaotao*, 896 F.2d 371, 372 (9th Cir. 1990); and
- (9) collateral source payments, *Morse v. So. Pac. Transp. Co.*, 63 Cal. App. 3d 128, 131 (1976) (Disability pension).

Finally, you should consider a motion *in limine* even when it may not be absolutely essential to preclude prejudicial information. You may enhance your credibility with the jury by eliminating trial objections and side-bar conferences. Jury research indicates that jurors dislike objections and side-bars. They do not understand what is occurring during the side-bar; they are bored during it and believe that someone, namely the objecting attorney,

is trying to hide information from them and does not trust them. All of this erodes counsel's rapport and credibility with the jurors. It may be advantageous to preserve credibility by anticipating some objections in a motion *in limine*.

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— **Motion Preparation and Service** —

You should be prepared to identify at the final status conference or pretrial conference any motions *in limine* that you will make. Some courts, such as Alameda County, now require this. In other courts, it is nonetheless prudent to be prepared for possible questions regarding motions *in limine*, with responses formulated in advance. In many courts, counsel should be prepared to disclose potential motions during mandatory meet and confer sessions weeks before the actual conference, e.g. U.S. Dist. Ct., C.D. Cal., Local Civil Rules 9.4.2 and 9.4.7.

In preparing a motion *in limine*, keep in mind that, although the motion on its face addresses only the admissibility of evidence, it should do more. It should also communicate concisely your theory of the case, establish that your theory is correct and, above all, communicate your credibility. Always be candid with the court. The motion *in limine* will create a first and lasting impression.

In drafting the motion, start by telling the judge the precise terms of the order you are

requesting. Then, identify each evidentiary rule or argument that supports you. Do not be afraid of using secondary sources. If Jefferson's Evidence Benchbook directly supports your position in a state court case, cite it, possibly quote it.

Be selective in use of case law. A few on-point cases discussed and quoted are far more appreciated by the court than string cites of cases whose applicability may be obscure. The papers should persuade immediately, not cause the law clerk or judge to wonder why a case has been cited.

Consider quoting from or even attaching a few selected documents if there is an admission by your opposition or other highly persuasive evidence. These can establish a first impression of your position's credibility.

In any motion *in limine*, you should not ask the court to rely on any disputed facts; these can only be resolved by the trier of fact. A motion predicated on disputed facts may well be deferred until later in the trial, thereby negating many of the purposes of a motion *in limine*.

The motion must be brief. Consider jettisoning marginal arguments in favor of a shorter, harder-hitting motion or breaking up your motion into several shorter motions, each addressing just one evidentiary point.

Finally, serve motions *in limine* early. This will help ensure that the motion will actually be considered at the outset of the trial. Opposing counsel will not be able to claim insufficient time to oppose. Minimum notice will be established in many cases by either the trial setting order or by local rule, for example, Los Angeles Superior Court Rules 1106.5 and 1307.5 and U.S. Dist. Ct., N.D. Cal., Local Rule 235-8(a). In individual calendar cases the judge may have departmental rules which must be considered.