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The Strategic and Tactical Uses of Motions In Limine in Federal Criminal Trials

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The Strategic and Tactical Uses of Motions In Limine in Federal Criminal Trials

Courtney J. Linn and Mark Beck*

I. Background.

The term motion in limine—Latin for "at the threshold"—refers generally to motions made before rather than in the middle of trial or the giving of testimony. The motion may be made before trial starts, during a recess, or just before a witness testifies. *See Luce v. U.S.*, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443, 16 Fed. R. Evid. Serv. 833 (1984). Most motions in limine seek to exclude evidence. But that is not the only purpose. A motion in limine can also be used to obtain an advance ruling on the admissibility of evidence. In one sense a motion in limine is the evidentiary counterpart to a motion for summary judgment. Where a motion for summary judgment seeks to eliminate claims and issues for trial, a motion in limine seeks to eliminate evidentiary issues for trial.

In today's rule-laden federal practice, the motion in limine stands out as a procedural oddity. It exists without explicit authorization in either statute or rule. The Federal Rules of Evidence address the form and content of objections to evidence, including pretrial objections, but they do not refer to motion in limine practice per se or describe what kinds of evidentiary issues are best raised by motion in limine. *See* Fed. R. Evid. 103(a) (rulings on trial objections may be made before trial as well as at trial). Nonetheless, motions in limine serve as a convenient device for judges and lawyers to preview and decide certain evidentiary issues in advance of trial (or in advance of testimony) and thus facilitate the flow of the evidence at trial. *See Luce,* 469 U.S. at 41 n.4 (explaining that motion in limine practice has developed "pursuant to the district court's inherent authority to manage the course of trials").

We offer some thoughts about the strategic and tactical decisions that federal criminal trial lawyers confront when deciding what

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evidentiary issues to raise before trial and how best to raise them. We discuss when to present evidentiary objections, what kinds of objections to present, and the benefits and burden of in limine rulings versus rulings made in the midst of trial. Our comments are aimed mainly at the use of in limine motions in criminal jury trials but many of our comments extend to civil trials as well. In the case of a bench trial (criminal or civil), there is less concern about prejudicing the trier-of-fact with inadmissible evidence. There remains, however, the concern about obtaining rulings that facilitate the flow of the evidence. Judges presiding over bench trials want to focus on determining facts, not refereeing evidentiary disputes.

II. The Timing of the Motion In Limine.

There are several tactical reasons why a proponent of evidence may seek an in limine ruling on the admissibility of evidence. The proponent may want to refer to the evidence in jury voir dire or in an opening statement. In the absence of an in limine ruling the proponent might fear promising the jury evidence and then failing to deliver on that promise because of a subsequent evidentiary ruling made in the midst of trial. Alternatively, the proponent may want to seek an advance ruling to help arrange his or her presentation of trial evidence. For example, the admissibility or relevance of one prospective witness's testimony may hinge on the proponent having first secured the admissibility of other evidence.

Opponents of evidence may also employ a motion in limine for several tactical reasons. Most commonly, motions in limine are used to strike at objectionable evidence that may be highly prejudicial. If the opponent waits until trial, and the evidence comes out of a witness's mouth before the court can rule on an objection, a limiting or curative instruction may be insufficient to undo the damage. An opponent of evidence may also use the motion in limine to weed out nettlesome patches of evidence of the opponent's case and thus clear the way for the admission of other evidence. For example, a defense lawyer may seek an in limine ruling to exclude the admissibility of a defense witness's prior conviction under Fed. R. Evid. 609 (or even a conviction of the defendant himself or herself)—a ruling that may sway the defense lawyer's decision as to whether to call that witness.

Motions in limine serve other purposes. On the eve of trial, lawyers face the strain of uncertainty. Rulings on motions in limine can help lawyers predict the course of trial. In federal civil practice, motions in limine have thus become a logical extension of pretrial rules that favor early disclosure of witnesses and exhibits, thus eliminating certain elements of surprise at trial. So understood, the motion in limine is just another in a line of procedural devices beginning with initial disclosures, status conferences, expert disclosure rules, and pretrial conferences, that help make the presentation of evidence at trial more predictable.

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Given that the motion in limine serves so many purposes, yet has no official sanction in the federal rules, it is not surprising that the motion may take many forms. There is no rule that says a motion in limine must be made in writing, must be noticed, or must be made at a particular time. Nor is there any rule that defines the essential elements of the motion. In civil cases, the time for filing motions in limine is typically set in the Final Pretrial Order. In criminal cases, it may be set at the trial setting conference. And, while there are no set rules defining the standards for making a motion in limine, there is broad agreement that an effective motion in limine does the following: First, it identifies the evidence sought to be admitted or excluded; second, it establishes how the evidence fits into the larger picture of trial; third, it states briefly the grounds for admissibility or exclusion; and fourth it explains why an ordinary trial objection would be inadequate. In the absence of an adequate offer of proof, the proponent risks having the issue reviewed on appeal under a less favorable standard of review. *See Perkins v. Silver Mountain Sports Club and Spa, LLC*, 557 F.3d 1141, 105 Fair Empl. Prac. Cas. (BNA) 977, 14 Wage & Hour Cas. 2d (BNA) 993, 92 Empl. Prac. Dec. (CCH) P 43492, 157 Lab. Cas. (CCH) P 35550 (10th Cir. 2009).

If the motion can take many forms so too can a trial court's ruling on the motion. A judge hearing a motion in limine has several possible options: the judge (1) may overrule the in limine objection; (2) may sustain the objection and enter an absolute order prohibiting the proponent from mentioning the evidence; (3) may enter a preliminary order prohibiting the proponent from referring to the evidence in voir dire or in opening statements but invite the party to raise the issue again during trial; or (4) may defer any ruling on the objection until trial. *See* Edward J. Imwinkelried, Evidentiary Foundations, § 2.02 (Lexis 2005). Counsel on both sides need to pay close attention to how the court couches its ruling. Many trial judges prefer the option of making a preliminary ruling before trial, subject to revisiting that ruling as the trial unfolds. *See* David F. Levi & Peter Nowinski, Federal Trial Objections: Courtroom Edition, § 1.70 (James Publishing 2004). If the court couches its ruling in terms that indicate the ruling is final, then objection does not need to be renewed at trial to be preserved. If, however, the court couches its ruling in terms that indicate the ruling is tentative or preliminary, then the objection may need to be renewed in order for it to be preserved. Fed. R. Evid. 103(a)(2).

III. Alternatives to the Pretrial Motion In Limine.

A. The Trial Brief.

It is sometimes said that trial judges prefer ruling on evidentiary matters before trial because it allows them to anticipate evidentiary issues and thus reduce the chances that the jury may hear inadmissible

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evidence. Pretrial rulings make the trial run more smoothly and allow the court time to make carefully reasoned decisions without the pressure of trial.

All of these things are undoubtedly true. However, broad in limine rulings are generally disfavored. If the option is between making an in limine motion that attacks broad categories of evidence and crafting a trial brief that carefully outlines the broad evidentiary issues that will arise at trial, litigants may prefer the well-crafted trial brief. This is particularly true in the case of evidentiary issues that turn on issues of evidentiary foundation, relevance (Rule 401), or the balancing of competing considerations (Rule 403). Most courts will prefer to make these rulings in the midst of trial after they have had an opportunity to observe witnesses, observe the flow of evidence, and evaluate how evidence relates to a party's emerging theory of the case. *See Hawthorne Partners v. AT & T Technologies, Inc.*, 831 F. Supp. 1398, 1400–01, 27 Fed. R. Serv. 3d 1052 (N.D. Ill. 1993).

Even certain hearsay issues might be better raised in the trial brief and ruled upon in the midst of trial. For example, a court may wish to address at trial (rather than before it) the issue of whether a particular statement was made in furtherance of the conspiracy or whether a person making a statement did so in the course and scope of their employment. *See* Fed. R. Evid. 801(d)(2)(D); *see also Brom v. Bozell, Jacobs, Kenyon & Eckhardt, Inc.*, 867 F. Supp. 686, 693, 66 Fair Empl. Prac. Cas. (BNA) 526, 31 Fed. R. Serv. 3d 244 (N.D. Ill. 1994) (denying motion in limine to exclude hearsay remarks in age discrimination suit because issue of whether remarks qualify as a party admission "can only be resolved based upon consideration of the evidence presented at trial").

Trial briefs, however, have their limitations. If a litigant has an essential need to know how the court may rule on the admissibility of certain evidence, a trial brief is no substitute for a pretrial motion in limine. For example, in a criminal case the government may want to know in advance of trial whether a prior conviction will be admitted so it can make a decision whether to refer to the conviction in opening arguments. For similar reasons, a lawyer defending an employment discrimination case may want to know whether certain Rule 404(b) evidence regarding the plaintiff's employment record will be admitted at trial.

Another weakness with a trial brief is that it can sometimes convey too much information. Defense lawyers in federal criminal cases seldom file trial briefs (the government always does) because the defense may want to remain loose and adapt its defense strategy as the trial unfolds. Moreover, a defense trial brief has a way of educating the government about potential trial issues, theories of the defense, or

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evidentiary problems, thus allowing the government to navigate around them. Many defense lawyers conceal as much of their defense strategy as possible. In a perfect defense world, the government would know nothing about the defense strategy (and even less about what the defense perceives to be the evidentiary weaknesses in the government's case) until a Rule 29 motion made at the close of the government's case-in-chief.

Finally, while a trial brief may serve to flag an issue or objection for trial it does not preserve it. Federal Rule of Evidence 103(a) states that "[o]nce the court makes a definitive ruling on the record admitting . . . evidence, either at or before trial, a party need not renew an objection . . . to preserve a claim of error on appeal." The advisory committee notes make it clear that the objecting party has the burden of making it clear on the record that the court's ruling was final.

B. The Pocket Memo.

We said before that the motion in limine stands out as a procedural oddity because it exists without explicit authorization in either statute or rule. We turn now to another vehicle that achieves the same purpose and has no recognized statutory home either—the "pocket memo." In fact that may not even be its name. But it is a device some experienced trial attorneys use often.

A pocket memo is a very brief memorandum of points and authorities on one topic that is prepared and left in a discreet file somewhere in the defense files for that right moment in trial. It is designed to provide legal support on some issue counsel may, at some point, wish to raise—an objection, a request to voir dire a witness, a motion to strike, etc. Its purpose is to allow its author maximum strategic flexibility. If the reason to use it never arises, it never sees the light of day. If it does arise, it may still remain buried, unless the oral presentation calls for written backup.

In addition to providing flexibility, the pocket brief is a great strategic tool. Judges like to keep things moving. If you can pounce on an issue (perhaps complicated) and then give the judge the controlling case in support of the proposition, the judge may provide instantaneous relief. The pocket memo is not designed to play games with an opponent. Each side needs to anticipate issues at trial and come prepared to raise them.

If the issue is a major one, the judge will want briefing on both sides. So be careful; this is where the line between motions in limine and pocket memos can be fuzzy. You never want the judge to think you are sandbagging the other side. But most judges will appreciate a brief memo on the small issues that arise on the fly in trial.

One final thought-if an issues emerges in trial that is significant and

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you believe the judge will really need to hear from both sides in writing, and you have a pocket memo ready to go, one tactic to ensure against the judge concluding you are sandbagging is to raise the issue at a break, indicate you have a memo on the topic, offer to hand it up, and then ask the judge to set argument on it as soon as the court believes your adversary can submit his or her own points and authorities. Just make sure that this is something the judge does not feel you should have raised pretrial. The judge will hear it either way, but the court may feel he or she and your adversary have been gamed.

C. Plain and Structural Error.

Civil cases tend to be less forgiving of overlooked arguments than criminal cases. If a litigant fails to raise an evidentiary issue either before or during trial, the objection will likely not be preserved for review on appeal. *See* Fed. R. Evid. 103(d) (discussing standard for reviewing errors not brought to the attention of the trial court). If not preserved, the objection may be raised on appeal but courts will seldom entertain it unless it finds error that affects the integrity of the proceedings. *See Perkins v. Silver Mountain Sports Club and Spa, LLC*, 557 F.3d 1141, 1147, 105 Fair Empl. Prac. Cas. (BNA) 977, 14 Wage & Hour Cas. 2d (BNA) 993, 92 Empl. Prac. Dec. (CCH) P 43492, 157 Lab. Cas. (CCH) P 35550 (10th Cir. 2009). This dynamic creates a powerful incentive for the civil litigant to raise and preserve any and all potentially meritorious evidentiary objections. Thus, a civil litigant may wish to raise and preserve evidentiary objections by way of pretrial motions in limine so they are not lost or forgotten in the confusion of trial.

Criminal cases invite a slightly different dynamic. As in civil practice, evidentiary and other objections that are not raised during trial are subject to plain error review on appeal. *See, e.g., U.S. v. Velasco-Medina*, 305 F.3d 839, 847 (9th Cir. 2002). But plain error review in the context of a criminal case means something different than in the civil context. If the error is plain and prejudiced the defendant, the court of appeals can reverse on this ground even though the objection was never raised below. In the criminal context, some errors are so fundamental that they are said to be "structural"—for which there is no inquiry into what effect the error may have had on the trial.

The timing of when an issue is raised may also impact on the standard of review. Suppose, for example, a defense lawyer recognizes that an indictment charging mail fraud neglects to mention that the representation was "material." Materiality is an element that is easily overlooked in indictments charging mail, wire or bank fraud because the element is not mentioned in any of these statutes—the Supreme Court added it as a matter of judicial lawmaking. The Federal Rules provide that a defense lawyer may raise this kind of defect at

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any time, including at trial. *See* Fed. R. Crim. P. 12(b)(3). If the defense lawyer raises this objection in a pretrial motion and the government fails to correct it, the error is said to be fatal. *See U.S. v. Omer*, 395 F.3d 1087 (9th Cir. 2005). If, however, the defense lawyer waits until trial, the error will still exist but a court of appeals may review it under a harmless-error standard.

IV. What Issues Lend Themselves to an In Limine Ruling?

A. Preliminary Questions Regarding Qualification and Admissibility.

Under Rule 104(a) preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court. The rule adds that in making its determination the court is not bound by the rules of evidence.

Courts prefer to address these kinds of preliminary questions by motion in limine and outside the presence of the jury. Once the issue is raised by motion in limine the Court can then either decide the issue or, as often the case, allow counsel to voir dire the proposed witness whose qualifications have placed at issue. Thus, questions about a witness's qualifications to render an expert opinion are often best raised by motion in limine and decided after a limited opportunity to voir dire the witness. Likewise, to the extent they can be anticipated, certain hearsay objections are best raised by motion in limine, especially where the hearsay determination will be made based on information, (e.g., affidavits), that is itself hearsay.

B. Rule 608 and 609 Issues.

Likewise, evidence concerning a witness's character for truthfulness (or lack thereof) or previous conviction is often the subject of pretrial motion. This is an area where a judge will not want to be surprised with examination on subjects that the judge may not believe should be raised.

Rule 608 refers generally to the admissibility of character evidence—evidence that tends to bolster or undermine a witness's credibility. It includes evidence in the form of opinion or reputation for truthfulness. Fed. R. Evid. 608(a). It also includes evidence of specific instances of the conduct of a witness for purposes of attaching or supporting the witness's character for truthfulness. Rule 609 refers to impeachment of a witness by admission of a prior conviction. In criminal trials, issues about the admissibility of prior convictions, particularly prior convictions of a government cooperating witness, are among the most contentious and difficult trial issues that can arise.

For example, cross-examining the government's main witness (who is not implicated in this prosecution of the defendant for money

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laundering) by asking about a 9-year old conviction of the witness for lying on forms submitted to an animal shelter in connection with a dog fighting case may be lots of fun—a real Perry Mason moment. But if the judge does not believe it is admissible, counsel had better vet the issue by way of a motion in limine unless otherwise wearing Teflon. If the issue arises in connection with counsel's own surprise witness, and fears an adversary may raise something on cross that should be excluded, then a pocket memo just before calling the witness may do the trick. If the judge rules adversely, counsel might just keep the witness off the stand.

C. Rule 404(b) Issues.

Rule 404(b) objections are among the most common objections raised by motion in limine. The objection is so common that it is a wonder Rule 404(b) does not include its own procedure for addressing them. Indeed, it is one of only a handful of evidentiary rules that contain its own prescription about when the issue needs to be raised. In a criminal case, the prosecution shall "provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

Rule 404(b) governs the admission of evidence of other crimes, wrongs, or acts. Such evidence is generally not admissible to prove the defendant "did it before and therefore likely did it again." The evidence is admissible (subject to Rule 403) to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Some prosecutors like to back up a truck and dump into the case all forms of horrible previous conduct of a defendant by contending this broader evidence proves motive, opportunity, knowledge or plan. The nature of federal criminal practice contributes to this tendency. Federal prosecutors like to believe they are prepared to try the case on the day they indict it, but they seldom are. Unlike in state practice, virtually all federal criminal cases proceed by indictment or information—thus eliminating the function of a preliminary hearing. As a result, it is often not until trial preparation that federal prosecutors discover the weaknesses in their cases and then scramble to overcome those weaknesses, often by resort to proving crimes outside of the indictment. For example, some federal prosecutors nearing trial sometimes discover that their indictment is too narrow in its breadth. The indictment may charge a scheme that began on one date and ended on another. In preparing for trial, a government witness may come forward and say: "I was engaged in health care fraud with defendant A long before that date." In this case, rather than supersede to expand the indictment, the government may try to introduce this

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"other crimes" evidence, even though the testimony refers to conduct outside that which has been charged in the indictment.

If Rule 404(b) evidence comes in, the client may look like a one-person crime wave and leave counsel defending (or at least trying to explain) lots of other bad acts. Most judges are very careful about issues of fairness and also do not want a one-week trial to take three weeks (they also want to protect their record on appeal). But 404(b) objections raise issues that must be vetted before opening statement (even if the judge is on the fence until the evidence unfolds). The judge may insist that the opening statements not mention the issue and will expect the parties to raise the issue again, closer in time to when the evidence is offered at trial.

V. Defending the Record.

Evidentiary rulings are generally reviewed for abuse of discretion. There are countless decisions that recite this standard, and further recite that the standard applies regardless of whether the ruling was made in the midst of live testimony or made in ruling on a motion in limine days or even weeks before trial. *U.S. v. Connelly*, 874 F.2d 412, 415, 27 Fed. R. Evid. Serv. 1442 (7th Cir. 1989); *U.S. v. Layton*, 767 F.2d 549, 18 Fed. R. Evid. Serv. 1322 (9th Cir. 1985) (Rule 403 ruling).

However, a handful of cases take a more pragmatic (and perhaps intellectually honest) approach. Appellate judges (and their staffs) are more likely to second guess a trial court's pretrial ruling, made on a cold record, and excluding a broad category of evidence, than they are to second guess a narrow evidentiary ruling made in the midst of trial. *See Lincoln v. District 9 of Intern. Ass'n of Machinists and Aerospace Workers*, 723 F.2d 627, 631, 115 L.R.R.M. (BNA) 2281, 99 Lab. Cas. (CCH) P 10665 (8th Cir. 1983). Appellate judges are just as competent as trial judges at reading a motion in limine made before trial and evaluating its merits. Perhaps more to the point, cold records read like the stuff of which appellate courts and their staffs are familiar, e.g., the dry record surrounding an order granting a summary judgment motion. In the context of the review of a ruling made on a motion in limine before trial, appellate judges may couch the standard of review as "abuse of discretion" but they may not mean it. In contrast, appellate judges are likely to be more deferential when reviewing rulings made in the course of trial precisely because the trial judge had the best vantage point when making the ruling. The trial judge had the chance to evaluate the credibility of witnesses, and to assess how the challenged evidence fit within the flow of the trial.

All of this is to say that good advocates—advocates interested in winning not just the trial but also defending the victory on appeal—may opt to raise narrow evidentiary issues in the midst of trial rather than broad evidentiary issues before it. This is especially true in the

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case of evidentiary rulings that may turn on the relative weight to be accorded evidence, e.g., rulings under Rule 401 and 403, and even sometimes under Rule 404(b). In cases where intent is at issue, the evidence establishing and negating intent may turn on inferences drawn from circumstantial or "other acts" evidence. Judges who make wholesale rulings in these kinds of cases invite the court of appeals to review their in limine rulings with "particular care." *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103, 47 Fair Empl. Prac. Cas. (BNA) 1472, 47 Empl. Prac. Dec. (CCH) P 38323, 26 Fed. R. Evid. Serv. 943 (8th Cir. 1988) (in an employment discrimination case, "we examine the consequences of the trial court's exclusions of evidence with particular care, since the court's determinations of probative value and prejudice were made before the trial began, rather than during the development of the plaintiff's case"); *Riordan v. Kempiners*, 831 F.2d 690, 697, 44 Fair Empl. Prac. Cas. (BNA) 1355, 28 Wage & Hour Cas. (BNA) 425, 44 Empl. Prac. Dec. (CCH) P 37418, 107 Lab. Cas. (CCH) P 34957 (7th Cir. 1987) ("careful appellate review required when in limine rulings made on a 'wholesale basis' rather than in response to the developing course of the trial"); *Heyne v. Caruso*, 69 F.3d 1475, 1480–81, 69 Fair Empl. Prac. Cas. (BNA) 408, 43 Fed. R. Evid. Serv. 64 (9th Cir. 1995) (reversing district court order granting motion in limine to exclude testimony of alleged sexual harassment of other female workers). Review with "particular care" sounds significantly less deferential to our ears than the customary "abuse of discretion" review the court of appeals usually applies to trial rulings.

In the criminal context, there is another strategy at work. Once the jury is sworn, jeopardy attaches. The defendant cannot be retried for the same offense conduct. One consequence of jeopardy having attached is that the government does not get an appeal from rulings a trial judge makes in the course of trial. A trial judge may rule before trial that certain evidence should be excluded. For example, a trial judge may suppress evidence. Because jeopardy has not attached, the government may, and often does, take an interlocutory appeal from adverse pretrial rulings, including adverse rulings on motions to suppress evidence. But rulings made during trial are different. Once the trial begins, the government does not get to assign error to any evidentiary ruling—no matter how egregious. Of course, no good trial judge is going to rule against the government on an evidentiary issue simply to avoid the risk of appeal. Nonetheless, in the case of close evidentiary issue raised during trial, the tie may indeed go to the defendant.

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