Motions in Limine

By Larry J. Saylor

A motion in limine can shape a trial by letting the parties know in advance whether key evidence will be admissible while giving the trial judge an opportunity to make a ruling based on briefing, oral argument, and a careful review of the law that may be impossible during trial. Even an unsuccessful motion in limine may reveal an opponent's rationale for offering critical evidence and allow the movant to better prepare to meet it at trial. And a motion in limine allows all of this to occur without resentful jury members cooling their heels and wondering what is being kept from them—or worse, learning of inflammatory evidence that turns out to be inadmissible.

Authority for motions in limine

Motions in limine are now well established in Michigan practice, just as they are in the federal courts and at least 46 other states.[1] In the words of Justice Cavanagh, "motions in limine and offers of proof are an efficient means of avoiding trial delays regarding the admissibility of potentially inflammatory evidence, and litigants are encouraged to use them."[2] Yet the term "motion in limine" appears nowhere in the Michigan Rules of Evidence or Michigan Court Rules. It first appeared in Michigan in a 1969 Court of Appeals decision, which cited a then-recent law review article and a 1962 Michigan Supreme Court opinion approving the use of an unnamed pretrial evidentiary motion.[3]

While no court rule specifically mentions motions in limine, authority can be found in MCR 2.513 and MRE 103. As amended in 2001, MRE 103(a)(2) provides that a ruling regarding the admission or exclusion of evidence may be made "either at or before trial," and MRE 103(c) requires the trial court to take practicable measures to keep the jury from learning of inadmissible evidence: "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means…." Similarly, MCR 2.513 requires the trial court to take appropriate steps to address potentially prejudicial matters outside the presence of the jury:

> The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court.[4]

Time for filing motions in limine

MCR 2.401(B) requires the court to enter a scheduling order "establish[ing] times for events the court deems appropriate, including…filing of motions…."[5] This rule empowers the circuit courts to set dates for motions in limine,[6] although they are not expressly mentioned and many scheduling orders don't specifically provide for them. While motions in limine are normally filed in writing shortly before or at the outset of a jury trial, the Court of Appeals has held that absent a deadline set by the court, a motion in limine may be made orally during trial without the need to follow the notice and briefing requirements of MCR 2.119(C).[7] Attorneys contemplating filing (or opposing) motions in limine should consider urging the court to set deadlines for them in the scheduling order.

Relief that can be requested in a motion in limine

A motion in limine can request at least three different forms of relief. The most common form is an order precluding the opposing party from introducing particular evidence.[8] Less common is a motion in limine asking the court to "instruct the [opposing party], its counsel and witnesses not to mention certain facts unless and until permission of the court is first obtained outside the presence and hearing of the jury."[9] Finally, the proponent can file a motion in limine asking the court to *receive* a category of evidence.[10]

While the rules and caselaw do not limit the subjects on which a motion in limine can be filed, motions seeking to exclude or limit the introduction of evidence are particularly appropriate when the evidence is excludable under MRE 403 because it is substantially more prejudicial than probative; or when the evidence relates to prior crimes or wrongs under MRE 404(b); subsequent remedial measures under MRE 407; pleas, offers, or related statements under MRE 410; liability insurance under MRE 411; privileged communications under MRE 501; evidence of prior convictions under MRE 609;

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and the admissibility of expert testimony under MRE 702.[11]

A motion in limine seeking to introduce evidence may be appropriate whenever the evidence is critical to the proponent's case and its admission will be seriously contested. Such a motion may particularly be appropriate when the evidence is offered under catch-all exceptions in MRE 803(24) and MRE 804(b)(7), both of which require the proponent to give the adverse party advance notice of the intention to offer the evidence and a "fair opportunity to prepare to meet it…."[12]

Issue preservation and waiver

Parties are not required to file a motion in limine to preserve an evidentiary issue either for decision by the trial court or for review on appeal. Thus, the Court of Appeals rejected a "plaintiff's argument that counsel had a legitimate expectation that the question was proper because defendants failed to file a motion in limine to exclude [the] evidence" and held that there "is no requirement that a party anticipate every improper question that an opponent might ask and file a motion in limine to prevent it."[13] The Court of Appeals has similarly held that there is no "obligation on the prosecutor to bring a motion in limine in order to receive permission to admit the evidence in the first place."[14]

On the other hand, filing or opposing a motion in limine may not alone be sufficient to preserve an evidentiary issue for appeal. In general, a party must renew an objection at trial, and the proponent must make an offer of proof regarding evidence that has been excluded. This is especially true when the motion is denied without prejudice, allowing the movant to renew the objection (or offer the evidence) at trial when the context is clearer and a foundation has been laid.[15] Since the 2001 amendment to MRE 103, however, once the court "makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."[16] The parties should therefore ask the court to state on the record whether a ruling on a motion in limine was "definitive,"[17] and if it was not, renew the objection or make an offer of proof.[18]

The Michigan Court of Appeals has held that a party that lost a motion in limine to exclude evidence could introduce that evidence without waiving the issue.[19] The United States Supreme Court, however, has more recently reached a contrary conclusion, resolving a conflict among the federal courts of appeal.[20] The Michigan Supreme Court has not addressed the issue.

Appellate review of rulings on motions in limine

A trial court's decision on whether to admit or exclude evidence is reviewed on appeal for abuse of discretion, although preliminary legal issues such as the interpretation of a rule of evidence are reviewed de novo, and it is an abuse of discretion to admit evidence that is inadmissible as a matter of law.[21] Error in the admission of evidence is reversible only if it affected a substantial right of the party opposing admission.[22] An unpreserved evidentiary error is reviewed on appeal only for plain error affecting the party's substantial rights, which means that the error must have been outcome determinative.[23] ■

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ENDNOTES

1. Manela, *Motions in Limine: On the Threshold of Evidentiary Strategy* (2003), p 2 <http://apps.americanbar.org/labor/lel-aba-annual/papers/2003/strategic.pdf> (accessed December 11, 2016).
2. *People v Finley*, 431 Mich 506, 537; 431 NW2d 19 (1988) (Cavanagh, J., concurring in part and dissenting in part).
3. *Lapasinskas v Quick*, 17 Mich App 733, 737–738; 170 NW2d 318 (1969), quoting Davis, *Motions in Limine*, 15 Cleveland-Marshall L Rev 255, 256 (1966), and *McCullough v Ward Trucking Co*, 368 Mich 108, 114; 117 NW2d 167 (1962). The name comes from the Latin word "limen," which means at the threshold, at first inception, at first opportunity. Manela, p 1 n 1, citing *Cassell's Latin Dictionary* (1957), p 319, and *Anderson's Dictionary of Law* (1983), p 530.
4. MCR 2.513(B).
5. MCR 2.401(B)(2)(a).
6. See Longhofer et al., Michigan Court Rules Practice (6th ed, August 2016 update), § 2401.5 (naming court rulings on the admissibility of evidence in motions in limine as appropriate subjects for consideration by the court in a scheduling order).
7. *People v Phillips*, 170 Mich App 675, 678; 428 NW2d 739 (1988).
8. See, e.g., *Moran v Kalamazoo*, unpublished opinion per curiam of the Court of Appeals, issued January 19, 2016 (Docket No. 323925), p 8.
9. *Lapasinskas*, 17 Mich App at 737 n 1, quoting *Motions in Limine*, 15 Cleveland-Marshall L Rev at 256.
10. *Phillips*, 170 Mich App at 678.
11. See Robinson & Longhofer, 1 Michigan Court Rules Practice (3d ed, May 2016 update), § 103.5.
12. See Robinson & Longhofer, 3 Michigan Court Rules Practice (3d ed, May 2016 update), § 803.24 ("Given the complexity of the decision-making process required by the rule, the ruling should be made, if possible, on a motion in limine.").
13. *Persichini v William Beaumont Hosp*, 238 Mich App 626, 637; 607 NW2d 100 (1999).
14. *Phillips*, 170 Mich at 678 n 1.
15. See MRE 103(a)(2) and (b).
16. MRE 103(a)(2).
17. See FRE 103(a)(2), Advisory Committee Note to 2000 Amendment (which was the model for the 2001 amendment to MRE 103(a)(2)).
18. The trial court abuses its discretion if it refuses to permit a party to make an offer of proof. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 619; 792 NW2d 344 (2010).
19. *People v Harris*, 86 Mich App 301, 306–308; 272 NW2d 635 (1978).
20. *Ohler v United States*, 529 US 753, 758; 120 S Ct 1851; 146 L Ed 2d 826 (2000); see Robinson & Longhofer, 3 Michigan Court Rules Practice (3d ed, May 2016 update), § 609.6.
21. *People v Bynum*, 496 Mich 610, 623; 852 NW2d 570 (2015).
22. MRE 103(a); *Alpha Capital*, 287 Mich App at 619.
23. See MRE 103(d); *Bynum*, 496 Mich at 623; *Duray Dev, LLC v Perrin*, 288 Mich App 143, 149–150; 792 NW2d 749 (2010) ("Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings.").