

Judge Robert B. Broadbelt III
SUPERIOR COURT OF LOS ANGELES COUNTY

Making your motions in limine count

DON'T AMBUSH YOUR JUDGE WITH SURPRISE EVIDENTIARY ISSUES AT TRIAL

I have a love-hate relationship with motions in limine. There are usually too many of them and I often have to take the bulky MIL binders home to work up over the weekend. But, every time I work up the motions, I am thankful because they educate me on the main issues in the case and allow me time to research, think about, and decide how to rule on evidentiary issues that I would otherwise be ambushed with during trial in front of the jury.

I would like to share the following thoughts about MILs to help make them the valuable trial preparation tools that can assist the court in doing its job.

The purpose of MILs

"'The usual purpose of motions in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party. A typical order in limine excludes the challenged evidence and directs counsel, parties, and witnesses not to refer to the excluded matters during trial. [Citation.] "The advantage of such motions is to avoid the obviously futile attempt to 'unring the bell' in the event a motion to strike is granted in the proceedings before the jury." [Citation.]'" (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 669.)

"'Motions in limine serve other purposes as well. They permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial. They minimize side-bar conferences and disruptions during trial, allowing for an uninterrupted flow of evidence. Finally, by resolving potentially critical issues at the outset, they enhance the efficiency of trials and promote settlements. [Citation.]'" (*Kelly, supra,* 49 Cal. App.4th at pp. 669-670.)

Meet and confer

This is a personal plea. Please meaningfully and sincerely meet and confer with opposing counsel to discuss and try to stipulate to resolve each MIL. Many trial courts' rules require, and trial judges expect, counsel to meet and confer before filing MILs.

For example, Los Angeles County Superior Court Local Rules ("LASC Local Rules"), Rule 3.57(a)(2) requires that MILs must be supported by a declaration that includes, among other things, "[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 into 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 . . ."

Many trial courts issue trial preparation orders that also require the parties' counsel to meet and confer to try to resolve MILs by stipulation.

Good lawyers meet and confer about MILs and stipulate to resolve all but the most important and legitimate evidentiary disputes.

Structure of MILs

MILs should be concise.

"[A] motion in limine filed before or during trial need not be accompanied by a notice of hearing." (Cal. Rules of Ct., rule 3.1110(f).) Although a notice of hearing is not required, I think that a persuasive MIL includes a notice of motion that states specifically what order the moving party is asking the court to make. The notice should specifically identify the evidence or references the moving party wants the court to exclude. This should be done in one paragraph – hopefully, one sentence.

The motion should be supported by a short memorandum of points and authorities that explains why the evidence or references are inadmissible and unduly prejudicial, and a declaration or other evidence that supports the motion. Most MILs (excluding exhibits) should be no more than two or three pages in length. Motions longer than that distract from the important points in your motion. If you cannot explain the issue and persuade the trial judge in two or three pages, the additional poundage is not going to help your cause.

Procedural rules

"The timing and place of the filing and service of the motion [in limine] are at the discretion of the trial judge." (Cal. Rules of Ct., rule 3.1110(f).) Many courts have local rules which govern the timing of the hearing and service of MILs. For example, in Los Angeles County, the Local Rules provide that, in a case assigned to a courtroom for all purposes, the parties must file and serve MILs "with timely statutory notice so as to be heard on the day of the final status conference." (LASC Local Rule 3.25(f)(2).) Counsel should check to see if their trial court has issued a trial preparation order that establishes different timing requirements.

As discussed above, Los Angeles County also has a Local Rule that requires MILs to be accompanied by declaration. (LASC Local Rule 3.57(a).) The declaration must include (1) "[s]pecific identification of the matter alleged to be inadmissible and prejudicial," (2) a representation to the court that counsel have met and conferred to discuss the subject of the motion and the issue has not been resolved, (3) "[a] statement of the specific prejudice that will be suffered by the moving party if the motion is not granted," and (4) "[i]f 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." (*Ibid.*)

It is important for counsel to determine which procedural rules govern their MILs and to comply with them. Failure to

comply with such rules often results in the trial court's denying the motions.

Common examples of matters that are not proper subjects of MILs

In *Kelly v. New West Federal Savings*, *supra*, 49 Cal.App.4th at pp. 670-675, the Court of Appeal discussed certain types of MILs which are "not properly the subject of motions in limine . . ."

First, the Court addressed MILs to exclude evidence without providing factual support to support the request. For example, defendant filed an MIL to "exclude any testimony of the plaintiffs which is speculative." (*Id*. at p. 670.) But "[n]o factual support or argument was presented to suggest the nature and type of speculative testimony which [defendant] expected to be elicited from plaintiffs." (*Id*. at p. 670.) Thus, an MIL should identify the specific evidence sought to be excluded.

Defendant filed MILs "to exclude evidence of prior incidents unless an appropriate foundation was established to show the relevance of such evidence or that the prior incidents were similar in nature to the incident involved in the suit." (*Id*. at p. 670.) The Court of Appeal noted that "no factual support was presented in connection with the motions, meaning the court would have to rule in a vacuum." (*Id*. at p. 670.)

Defendant filed an MIL which "sought an order precluding plaintiffs from calling any witnesses 'not previously identified in plaintiffs' discovery responses.'" (*Id*. at p. 670.) The Court of Appeal stated that "[a]bsent a meaningful and expressed belief that this may occur, this was a meaningless motion unless and until plaintiffs attempted to call such witnesses." (*Id*. at pp. 670-671.)

On MILs seeking to exclude witnesses or evidence not disclosed in discovery, a common mistake I see is that the moving party fails to present evidence to show that they asked the other party to identify the witnesses or the evidence in discovery requests and the other party failed to do so. The moving party should also show that the witnesses or exhibits they seek to exclude are on the trial witness list or exhibit list, and identify which witnesses or exhibits they are moving to exclude.

Second, the Court of Appeal pointed out that "[i]t is frequently more productive of court time, and the client's money, for counsel to address issues to be raised in motions in limine informally at a pretrial conference and present a stipulation to the court on noncontested issues." (*Id*. at p. 671.)

"Matters of day-to-day trial logistics and common professional courtesy should not be the subject of motions in limine." (*Id*. at p. 671.) For example, defendant filed MILs that sought "an order that all counsel inform other counsel the day before which witnesses will be called the next day" and "an order that no exhibits be shown to the jury without having first been seen by all counsel and the court." (*Id*. at p. 671.) The Court of Appeal stated that "[t]hese are matters of common professional courtesy that should be accorded counsel in all trials." (*Id*. at p. 671.)

The Court of Appeal also noted that "procedural matters and items relating to jury selection most often can be addressed orally and informally with the court, and later preserved on the record if necessary." (*Id*. at p. 671.) Examples of such matters given by the Court are defendant's MILs requesting that during voir dire "the court inquire about jurors' experiences with elevators" and "the jury not be questioned about specific dollar amounts of damages." (*Id*. at p. 671.) "These issues could have been raised orally, which would have reduced the amount of paperwork the court needed to review prior to impaneling a jury." (*Id*. at p. 671.)

Third, in *Kelly*, plaintiffs fell and were injured when they left an elevator that "allegedly 'misleveled,' that is, in this case, it stopped some distance above the level of the floor upon which plaintiffs wished to exit." (*Id*. at p. 664.) During discovery, "the focus became which of the two elevators in the building plaintiffs had been using on the date of the accident." (*Id*. at p. 664.)

The elevators were located next to each other and "the parties and witnesses distinguished between the two by using the terms 'large' and 'small' elevator." (*Id*. at p. 664.) In her depositions, plaintiff Kelly testified that the incident where she fell took place in the small elevator. (*Id*. at pp. 664-665.)

Later, plaintiff Kelly filed a declaration stating: "On further thought and a review of the photographs, I now am not sure if it was the large or the small elevator." (*Id*. at p. 665-666.) Defendant elevator repair company's employee testified at deposition that defendant "had gone to the building on the day of the accident to work on the large elevator, which was misleveling" and "returned to the building seven days later to do major repairs on the large elevator." (*Id*. at p. 665.)

Defendant filed an MIL to preclude plaintiffs from introducing evidence that plaintiffs were injured when they stepped out of the larger elevator or evidence related to the functioning of the larger elevator. (*Id*. at p. 667.) In support if its motion, defendant "provided the court with Kelly's testimony at her deposition that she believed the incident occurred on the smaller elevator and referenced a notation she made in a report after the accident that the incident occurred on the smaller elevator." (*Id*. at p. 667.) Defendant argued that "because plaintiffs testified that the accident occurred on the small elevator, evidence relating to the large elevator was irrelevant and should be excluded." (*Id*. at p. 672.) "The trial court granted the motion." (*Id*. at p. 667.)

The Court of Appeal held that the trial court erred in granting the motion. (*Id*. at p. 672.) The Court noted that "[w]hile a party may be precluded from introducing evidence based on a response to a request for admission [citation], depositions and interrogatories do not perform the same function as requests for admissions, issue preclusion . . ." (*Id*. at p. 672.)

Discovery devices such as depositions "have as their main thrust the uncovering of factual data that may be used in proving things at trial." (*Id*. at p. 672.) In contrast, requests for admissions "are primarily aimed at setting at rest a triable issue so that it will not have to be tried." (*Id*. at p. 672.) Thus, the Court held that "[i]t is a misuse of a motion in limine to attempt to compel a witness or a party to confirm his or her trial testimony to a preconceived factual scenario based on testimony given during pretrial discovery." (*Id*. at p. 672.)

In other words, a party or witness may not be precluded from giving testimony at trial that is inconsistent with their deposition testimony, but their deposition testimony may be used to

impeach their trial testimony.

In *Eng v. Brown* (2018) 21 Cal. App.5th 675, 698, plaintiff filed a motion in limine which sought a finding that the parties formed a partnership as a matter of law. The Court of Appeal concluded that the trial court did not err by denying the motion. The Court stated that plaintiff's "request did not seek a ruling on the admissibility of evidence. Instead, it sought to take a factual issue away from the jury on the ground that the relevant facts were undisputed and no rational jury could find that a partnership had not been formed. [Citation.]" (*Id*. at p. 698.) The Court also noted that "[t]he request was more akin to a partial directed verdict on the issue of partnership formation. [Citations.]" (*Id*. at p. 698.)

Duty of counsel to instruct clients and witnesses of orders in limine

If the court grants an MIL, counsel have a duty to advise their clients and witnesses not to mention the excluded matter in the presence of the jury. As stated by LASC Local Rule 3.57(e), "[i]f the motion in limine is granted, it is the duty of counsel to instruct associates, clients, witnesses, and other persons under their control that no mention or display be made in the presence of the jury of the matter that is the subject of the motion."

Don't surprise the judge

At a recent presentation to trial lawyers, I sought to dispel the erroneous perception that trial judges are not fun people. I pointed out that we are actually fun – we just don't like surprises, especially during jury trials.

To that end, a trial lawyer should give careful consideration to which evidentiary issues should be raised with the court before trial (and, as discussed above, which should not) to avoid surprising the trial judge in the middle of a jury trial and forcing them to make rulings on complex and important evidentiary issues with little time to research or consider the matter, under the stress of not keeping the jury waiting. I thank you in advance.

Robert Broadbelt was appointed to the Los Angeles County Superior Court by Governor Edmund G. Brown Jr. in December 2012. After serving in a Family Law assignment for the first four years, he has served in the Civil Division since 2017. He is now assigned to an Unlimited Civil – Individual Calendar courtroom, in Department 513, at the Stanley Mosk Courthouse, in downtown Los Angeles. Judge Broadbelt served on the Executive Committee of the Los Angeles County Superior Court in 2022 and 2023, and was appointed to serve on the Presiding Judge's Diversity and Inclusion Working Group in 2021 and 2022. Before being appointed to the bench, Judge Broadbelt spent most of his legal career as a partner in the law firm of Browne Woods George, LLP, where his practice was devoted to complex business litigation with an emphasis on unfair competition, trade secrets, defamation, and First Amendment issues. Judge Broadbelt received his B.A. from the University of California, Berkeley, and his J.D. from the USC Gould School of Law.