

**SHAPING YOUR CASE AT TRIAL THROUGH MOTIONS IN LIMINE
AND THE PRE-TRIAL ORDER**

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OVERVIEW OF MOTIONS IN LIMINE

Motions in limine are one of the most powerful and overlooked tools at the trial attorney's disposal when shaping a case for trial. When an objection to a particular issue is raised for the first time during a witness' testimony, often after the damage has been done, the party seeking to limit the testimony has little recourse other than to request a limiting instruction from the Court. Properly used, motions in limine can protect parties from the introduction of prejudicial issues that they do not want discussed (or even broached) in front of a jury.

Georgia law provides that in the event that the Court denies a motion in limine, there is "no reason for another objection at trial in order to preserve the denial of the motion on appeal" as "[a]ll the purposes of an objection have already been fulfilled by the proceedings on the motion in limine." *Harley Davidson v. Daniel*, 224 Ga. 284, 286, 260 S.E.2d 20 (1979). *See also Gielow v. Strickland*, 185 Ga. App. 85, 86, 363 S.E.2d 278 (1987) ("since defendant, in effect, made a motion in limine seeking an order forbidding the argument, and the trial court denied that relief, no objection was necessary to preserve the issue for appellate review.").¹

¹ In federal court, Fed. R. Evid. 103(a) provides that

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.

The reasoning of *Daniel* also applies where a motion in limine to suppress evidence is granted. “To hold otherwise, and require the successful movant to object when evidence encompassed by the motion in limine is nevertheless offered at trial, would defeat the purpose of the motion in limine, as the movant would be forced, in the presence of the jury, to call special attention to prejudicial evidence which the trial court had previously ordered to be excluded from the jury’s consideration.” *Reno v. Reno*, 249 Ga. 855, 856, 295 S.E.2d 94 (1982).

COMMON EVIDENTIARY ISSUES IN MOTIONS IN LIMINE

Experienced practitioners often find that objections at trial are a poor substitute once a witness (or an opposing party) has raised the spectre of a witness' prior criminal arrest, of hearsay opinions of persons not expected to testify, or of failed settlement efforts, in the presence of a jury. Unlike an objection raised during testimony at trial, motions in limine allow the moving party to request that the Court instruct all parties, their respective counsel, and, through the parties' respective counsel, all witnesses called by any party, to refrain from reference to 1) the documents or issues sought to be excluded, and 2) the fact that a motion has been filed to exclude that evidence. Where the Court has granted a motion in limine to exclude certain evidence or issues, and a witness references the subject matter (or the motion itself) in his testimony, the Court is in a position to hold the party responsible for the witness' conduct and the foundation has been laid for a mistrial or an appeal, without the need to bring further attention to the inadmissible subject matter in the presence of the jury.

A trial practitioner should always consider filing general motions in limine on common evidentiary issues such as those listed below, in addition to motions that are targeted to topics of concern in his particular case.

1. Motion to Exclude Witnesses/Documents Not Disclosed in Pre-Trial Order

If a party anticipates that a witness not named in the pre-trial order or a document not previously produced may make an appearance at trial, it can be extremely beneficial to ask the Court to rule in advance of trial that such surprise will not be tolerated. Under Georgia law, once at trial,

'The decision whether to allow a party to introduce at trial (either in the case-in-chief or in rebuttal) the testimony of a witness not named in the pretrial order is a matter within the discretion of the trial court. [Cit.] Nease v. Buevas, 198 Ga.App. 302, 303, 401 S.E.2d 320 (1991).

Bryant v. Carver State Bank, 207 Ga.App. 659, 660, 428 S.E.2d 621 (1993).² Although it is almost always difficult to convince a trial judge to admit a previously undisclosed document or testimony from a previously unidentified witness, it is virtually impossible to introduce

² In *Bryant*, the Court of Appeals specifically upheld the exclusion of a witness' testimony where the opposing party was not given the opportunity to discover that testimony prior to trial:

In the instant case, [the witness] was not included in the pretrial order, and the appellants did not call him as a witness until the end of the second day of trial. Counsel for the appellants explained the omission by stating that he had not been aware of the witness until the day before. Considering the surprise to the [other party] that would have resulted from allowing the testimony ... the trial court did not abuse its discretion in excluding that testimony.

Id. at 660.

such evidence where the Court has already considered and rejected, through a motion in limine, the necessity argument of the evidentiary proponent.

2. Motion to Exclude Medical Opinions, Conclusions, and Diagnoses In Medical Records In Absence Of Testimony

Although portions of medical records may be utilized by opposing counsel on cross-examination, Georgia law prohibits parties from using any medical records or documents or offering any other tangible evidence, testimony, remarks, questions, or arguments which contain the opinions, conclusions, or diagnoses of third parties not before the Court. *Dept. of Human Resources v. Corbin*, 202 Ga. App. 10, 413 S.E.2d 484 (1991). In the absence of testimony from the preparer of the report, opinions and conclusions of doctors and other medical providers constitute hearsay that should not be admitted at trial. *Id.* This same rationale can be applied to employment records or educational records to the extent that the same contain hearsay opinions or statements of individuals who are not intended to testify. The party seeking to introduce such records can (and should) be required to redact hearsay appropriately prior to use at trial.

3. Motion to Exclude Reference to The Criminal Background or History of Witnesses

To the extent that a party intends to impeach any witness at trial based upon purported prior convictions, that party is required to introduce a certified copy of the record of conviction, including a copy of the indictment, or the impeachment is inadmissible and does not give rise to a jury instruction on impeachment. *Harwell v. State*, 270 Ga. 765, 512 S.E.2d 892 (1999); *Watson v. State*, 230 Ga. App. 79, 495 S.E.2d 305 (1997). Counsel anticipating such attempted impeachment should object *in limine*, as this motion is unlikely

to be opposed and forecloses any accidental reference to a purported past conviction or arrest.

4. Motion to Exclude Evidence of Collateral Benefits or Liability Insurance

Parties are not permitted to reference or to introduce evidence containing reference to any insurance policies held by a party or any other collateral sources that may have provided the party with benefits or compensation. *Denton v. Conway Southern Express, Inc.*, 261 Ga. 41, 402 S.E.2d 269 (1991). Likewise, parties and their witnesses are precluded from referencing liability insurance in the presence of the jury. *Cincinnati Ins. Co. v. Reybitz*, 205 Ga. App. 174, 421 S.E.2d 767 (1992).³

5. Motion to Exclude Evidence of Correspondence or Communications Between Counsel, Including Offers to Compromise.

Correspondence between counsel during the course of litigation is irrelevant and immaterial to the issues to be tried. Moreover, any correspondence reflecting offers to compromise is expressly excluded from evidence pursuant to O.C.G.A. § 24-3-37.

6. Motion to Exclude Improper Character Evidence

“Generally, the character of a party to a civil action is not an issue, and character evidence is not relevant.” *Beam v. Kingsley*, 255 Ga.App. 715, 566 S.E.2d 437 (2002). The only exception to this general rule is where “the nature of the action involves such character and renders necessary or proper the investigation of such conduct.” O.C.G.A. § 24-2-2. Evidence that reflects unfavorably on a party’s character, but which is not directly related to the issues to be tried, is to be excluded as irrelevant and prejudicial. *See e.g., R. A. Siegel*

³ See also Fed. R. Evid. 411.

Co. v. Bowen, 246 Ga. App. 177, 183, 539 S.E.2d 873 (2000) (evidence of marijuana use could not be introduced in absence of evidence that marijuana contributed to subject collision.)

7. Motion to Exclude Evidence of Treatment Testifying Medical Expert Would Have Rendered

“Georgia case law holds that questions aimed at determining how [an] expert would have personally elected to treat the patient are irrelevant.” *Johnson v. Riverdale Anesthesia Associates, P.C.*, 275 Ga. 240, 242, 563 S.E.2d 431 (2002). Rather, “in medical malpractice actions, ‘[t]he applicable standard of care is that employed by the medical profession generally and not what one individual doctor thought was advisable and would have done under the circumstances.’” *Id.* at 241-42. For that reason, “[t]he questioning of a medical expert witness should be disallowed as irrelevant when it ‘pertains to [the expert’s] personal views and personal opinions as to the care and treatment he himself would have rendered.’” *Id.* at 242.

8. Motion to Exclude Evidence Of Social Security Numbers Or Otherwise Protect Privacy

To protect a party from possible theft, fraud, or harassment, social security numbers should be redacted from any and all documents admitted into evidence or otherwise displayed in the courtroom. *See Scaife v. Boenne*, 191 F.R.D. 590, 592 (N.D.Ind.2000) (prohibiting the release of social security numbers as irrelevant).

TAILORING MOTIONS IN LIMINE TO THE ISSUES OF YOUR CASE

In addition to effectively limiting the evidence to be heard by the jury at trial, the mere filing of a motion in limine can benefit the trial practitioner by requiring the Court to

focus on issues of interest in a particular case and by requiring the opposing party to disclose, through its response, its rationale for introducing the evidence at issue. The trial practitioner should consider whether her case has any potential weaknesses that may be minimized through a thoughtfully reasoned motion in limine. In general, where there is no legitimate use of the evidence, and it has a high potential to mislead the jury or waste the court's time, such evidence should be excluded. *McEachern v. McEachern*, 260 Ga. 320, 394 S.E.2d 92 (1990). *See also* Fed. R. Evid. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

PRE-TRIAL ORDER NARRATIVE AND OUTLINE OF ISSUES TO BE TRIED

Most litigators understand that in Georgia the consolidated pre-trial order is intended to limit the documents and witnesses that may be introduced at trial.⁴ However, many practitioners fail to exploit other aspects of the pre-trial order (PTO) in shaping their case at trial. Some litigators use "stock" answers or attempt to be as general as possible when outlining the *questions to be decided by the jury*. Others cut and paste the assertions of the Complaint, or a general denial of Plaintiff's claims, into their *brief and succinct outline of the case and contentions*, thinking that what is listed in that portion of the PTO does not matter. In each of these instances, practitioners fail to recognize that the PTO is the opportunity to define finally for the Court (and the jury) the parties' theories of recovery

⁴ Uniform Superior Court Rule 7.2; N.D.Ga. LR. 16.4.

or defense.⁵ Astute trial counsel will pay close attention to the opposing party's outline of the case and statement of issues to be decided by the jury, and will raise objections when appropriate.

CONCLUSION

A trial attorney should carefully analyze any issues that may be peculiar to her case in order to determine whether a motion in limine on that issue will be beneficial. In addition to providing an invaluable opportunity to address potentially dangerous issues outside the presence of the jury, and to preserve error on those issues, motions in limine allow the Court to give careful consideration to issues deemed to be of significance to the case, rather forcing the Court to render snap judgments. There is rarely any advantage to taking a "seat-of-the pants" or "secret weapon" strategy when the attorney knows she will be objecting to certain documents or testimony; to the contrary, the Court may feel that if the issue was truly important to the case, a motion in limine should have been filed. Likewise, it is essential for counsel to take time and care in drafting a pre-trial order and reviewing the opposing party's portion of same. In many Georgia and federal courts, the pre-trial order is the last word on what theories of liability or defense may be advanced at trial.

⁵ See Fed. R. Civ. P. 16(e): "...This Order shall control the subsequent course of the action unless modified by a subsequent order."