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# Motions *in Limine*

## ***“in Limine”* Translations:**

Latin: "at the start", literally, "on the threshold".

Real world: A fancy way us attorneys describe motions made before and during trial.



## Motions *in Limine*

- Are used to prevent the introduction of matters which are irrelevant, inadmissible, or prejudicial
- Narrow the issues that come up at trial
- Don't be afraid to move on all sorts of issues



## Common Motions *in Limine*

- Preclude evidence of post accident repairs/subsequent remedial measures
- Limit scope of expert testimony or challenge qualifications on an issue
- Preclude mention of irrelevant issues relating to your client (i.e. drug or alcohol use, prior conviction)



# Outcome of Motions

- Judge may reserve, deny, grant motions
- If denied, renew your motion at trial – relevance (or lack thereof) can be determined in context by the Court
- If evidence is ruled excluded, during the trial offer the evidence outside of presence of jury in an offer of proof
- Watch for opponent to “open the door” for your evidence to possibly come in



# Risks and Advantages

## ○ ADVANTAGES:

- Exclude prejudicial evidence before the jury hears it
- Educate the Court
- Tailor trial preparation
- Encourage settlement



# Risks and Advantages II

## ○ RISKS:

- You tip your hand to your opponent
  - They know to prepare for the issue (research, address it early, etc.)
  - They may not have even thought of this issue before – you lose your element of surprise



## Protecting the Record

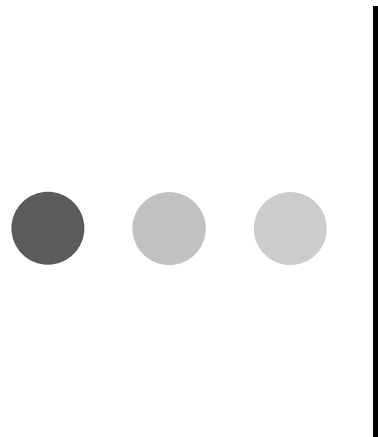
- Court's ruling on a motion *in limine* is considered advisory, so an adverse ruling is generally not appealable. Important to raise any objections, make offer of proof, etc., again during trial to protect the record.  
(Weatherbee Constr. Corp. v. Miele, 270 A.D.2d 182 (1<sup>st</sup> Dept. 2000))



# Protecting the Record II

- Appealable if:
  - Motion limits the scope of issues that are tried (Roundout Elec. v. Dover Union Free School Dist., 304 A.D.2d 808 (2d Dept. 2003))
  - Motion “clearly involves the merits of the controversy and affects a substantial right.”  
Id.
    - NOTE: It’s inappropriate to use a motion *in limine* in place of a MSJ - In re Singer, 99 A.D.3d 802 (2d Dept. 2012)



A decorative graphic consisting of three circles of varying shades of gray (dark, medium, and light) arranged horizontally, followed by a vertical line that intersects the circles.

# Objections

Judge: That is a lucid, intelligent, well  
thought-out objection.

Vinny: Thank you, Your Honor.

Judge: Overruled.

-My Cousin Vinny



# Objections During Trial

- Used to:
  - Control the admissibility of evidence
  - Preserve the record for appeal
  - Disruption of witnesses or adversaries
- Knowing how to object is as important as objecting
  - Being courteous (don't talk over opponent, thank the Court no matter what the outcome)
  - Showboating (show jury it's ridiculous that they would have ever asked this question)



# Objection to Evidence

- Objection must be made when the matter in issue is offered into evidence
- If objection is untimely, it is considered waived and not preserved for appeal (Horton v. Smith, 51 N.Y.2d 798 (1980), Andresen v. Kirschner, 297 A.D.2d 235 (1<sup>st</sup> Dept. 2002))
- If a witness answers the question improperly over a sustained objection, be sure to move to strike the answer and request a limiting instruction be given to the jury to disregard the testimony



# Objection to Evidence II

Evidence admitted for “limited purpose” – opposing party must request that jury be instructed to consider the evidence for only its limited purpose. Failure to request instruction or to object to the lack of a limiting instruction during jury charge may result in waiver of the issue on appeal (Frederick v. Town of Theresa, 99 A.D.2d 656 (4<sup>th</sup> Dept. 1984))

- i.e. use of a workers’ compensation form for cross of plaintiff. Application/receipt of WC is typically not admissible, but if plaintiff has an inconsistent description of the accident at trial, the form is admissible as an admission against interest and/or prior inconsistent statement – a limiting instruction is needed
- PJI 1:65 – General Instruction – Evidence Admitted for Limited Purpose – Insurance
- PJI 1:66 – General Instruction – Evidence Admitted for a Limited Purpose – Credibility of Non-Party Witness



# Common Objections

- Calls for Speculation
- Foundation
- Argumentative
- Irrelevant
- Ambiguous
- Asked and Answered
- Assumes Facts not in Evidence
- Leading



# Protecting the Record on Appeal

- General “objection” without giving basis
  - If sustained, will likely be affirmed on appeal.
  - May not be preserved on appeal if
    - witness answers anyway over sustained general objection
    - if general objection is overruled, may not be preserved



# Protecting the Record on Appeal II

- The goal of objecting is to alert the Court to why you think the question is wrong - give as many specific bases for the objection as you can to preserve it.
- Harvey v. Mazal American Partners, 79 N.Y.2d 218 (1992) – Defendant objected to questioning and moved for mistrial stating the questioning was “designed to inflame the jury” and prejudice defendant. On appeal, raised a different argument – that it was testimonial and not merely demonstrative. Court of Appeals said the argument was not properly preserved for appeal as counsel did not “alert the court to this particular issue”.



# Disrupting Adversaries and Witnesses

- You can use an objection to:
  - Stop the flow of opponent's proof
  - Rattle the witness
- Pick your battles!
  - Will the jury think you're trying to hide something?
  - Be wary that the jury/judge may get annoyed with too many objections
  - Make sure the evidence won't actually *help* you
  - Sometimes not verbalizing an objection during trial to harmful evidence is more helpful to your case – was the jury even paying attention? If they don't seem to be, don't object and wake them up.





# Requests to Charge

“The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts.”

- Justice Holmes

Horning v. District of Columbia,  
254 U.S. 135, 138 (1920).



# Requests to Charge

- Parties' written requests as to how the Court will instruct the jury on the law
- Generally use the PJI, but also can base charges on case law (though Courts are reluctant to deviate from PJI as it can create issues on appeal)
- Each party submits their requests to charge prior to trial or prior to the close of proof (for more complex cases)
- Very important to keep in mind if you'll need a specific charge prior to trial (i.e. vicarious liability)



# Requests to Charge II

- Make request in writing:
  - Submit it to the Court (even if the Court doesn't require it, you are better off being the party who does than the party who doesn't)
  - Easier to analyze against your opponent's and to note what the Court decides during the charge conference
  - Mark it as a Court exhibit at trial to preserve the record for appeal. Object to the judge's charge on the record, and ask that your proposal be marked as a Court exhibit for the record. If your objection isn't on the record, it can be deemed waived.



# Objections to the Charge

- Not all untimely objections are automatically waived
- If Court made a “fundamental error”, can have a “new trial in the interest of justice where demonstrated errors in a jury instruction are fundamental.” (Johnson v. Grant, 3 A.D.3d 720 (3<sup>rd</sup> Dept. 2004))
- Objection must be specific – specify the section you are objecting to and what you think should have been included (which is why I mark mine as a Court exhibit)



# Motions Made at the End of a Case

“You advised him not to get a lawyer, giving as one of your reasons the opinion that lawyers are a pain in the ass. Gentlemen, the pain is here.”

-Reggie Love in John Grisham’s The Client



# Motions Made at the End of a Case

- Motion for Directed Verdict
  - Made at the end of opposing party's proof (generally defendant moves at end of plaintiff's proof)
  - The Court takes the case away from the jury and finds for a party as a matter of law
  - Only is granted "where there is no rational process that would lead the trier of fact to find for the nonmoving party"  
Sweeney v. Bruckner Plaza Assocs., 57 A.D.3d 347 (1<sup>st</sup> Dept. 2009)
  - Court generally reserves decision on the motion, allowing case to proceed
  - Motion will be granted if there is a failure of proof (i.e. no expert testimony in a malpractice action)
  - Must be made to preserve record for appeal
  - When defendant moves, all evidence and questions of credibility must be resolved in light most favorable to the plaintiff



# Motions Made at the End of a Case II

- Motion to Set Aside the Verdict
  - Motion typically made by the losing party
  - Motion argues there is insufficient evidence in the record from which the jury could reach the conclusion it reached / there is no rational basis for the finding
  - Cholewinski v. Wisnicki, 21 A.D.3d 791 (1<sup>st</sup> Dept. 2005)



# Motions Made at the End of a Case III

- Motion to Conform the Pleading to the Proof
- To correct technical errors in pleadings (dates, times, amounts, spelling, theory of recovery)
- Should be granted “absent prejudice or surprise resulting from the delay” (Bryant v. Broadcast Music, Inc., 60 A.D.3d 799 (2d Dept. 2009))
- No written amended pleading needs to be submitted – the motion is part of the record (so be specific in your request)





# Motions Made at the End of a Case IV

- Motion for a Mistrial

- CPLR 4402
- Can be made at any time during trial
- Is made when conduct by the Court, opposing counsel, parties, jurors, or court personnel appears improper or prejudicial
- Must be timely made or waived



# Motions Made at the End of a Case V

- Motion for Judgment Notwithstanding the Verdict or for a New Trial
  - CPLR 4404 – the Court can enter judgment or order a new trial where “the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.”
  - Normally made orally immediately after jury verdict. A written motion can also be served within 15 days (CPLR 4405). If more time is needed, application to extend the time should be made on the record
  - JNOV: Requires statutory or case law that overturns the verdict.
  - New trial: Requires Court to look at facts of the case and determine if jury misread proof/misunderstood facts to the extent that an incorrect verdict resulted