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A Vaguely Jocular Guide to In Limine Motions

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By

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"motions *in limine* are usually pointless."
Judge John P. Fullam (E.D.Pa.)[1]

I know you, dear reader, would never file a pointless motion *in limine.* That sort of thing happens only in Judge Fullam's federal courtroom in distant Philadelphia. Perhaps a *friend* has been the recipient of such a motion or an *acquaintance* has been tempted to file one. If so you might be so good as to pass this note on to them, without actually reading it yourself.

If you are still with me, let me paint a picture. It is a wonderful day, and the judge rubs his hands in anticipation: a new case, new issues, a new jury to pick. The jury panel is ready to go, and the judge looks forward to a marvelous day interacting with his fellow citizens. For some judges this is the best part of the job: we speak to people, actual people, so very rarely. (Yes, I know about arguments with lawyers. That doesn't count.).

But at the pre-trial conference, the parties dump multiple three-ring binders (the *fat* ones, i.e., 3"+ wide) on counsel table and eagerly await the court's rulings. The light flees from the judge's eyes.

"And we would like an opportunity to respond. In writing. You Honor."

How can one say no to that? And then time to read and think…. Ah well. Cancel the jury panel. No battle plan survives first contact.

All is darkness and despondency.

On the other hand, that subtle light in the judge's eyes will remain, perhaps indeed amplify, if the motions raise interesting issues which, decided with wise discretion, will guide the parties at trial and smooth the way for the jury. Spend a day now, and avoid mid-trial 402 hearings, untold misery and confusion while the jury fumes in the corridors of justice, drinking bad coffee. A happy jury makes for a happy judge.

But the light oftimes dims and dies when the first three ring binder is cracked open. The motions are all wrong. They are grim reminders of the power of cut and paste. The motions *in limine* seek no specific ruling. They are just paper. They might be good door stops.

So, here are a few of my favorite door stop motions *in limine.* You might think about them, and having done so, forget them: do not write them; do not print them. I don't need them (I have my own, thank you). Help me, and other judges, keep that little light in our weary eyes flickering, just for a while longer….

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* Judge of the Superior Court, County of San Francisco.

[1] http://www.paed.uscourts.gov/documents/procedures/fulpol.pdf

1. Loopy thinking.

Here's the loop: the other side doesn't have any evidence on issue X. So the motion asks for the exclusion of any evidence the other side has on issue X. Of course, if the other side *does* have any evidence, then getting this motion granted ensures a very fast trip to the Court of Appeal and right back down again for another trial. If they *don't* have any evidence—well, we'll see, right?

2. Magic: Turning 75 days into 24 hours.

Summary judgment requires 75 days notice. Too long? No problem. Put your thoughts into a motion *in limine*: The other side doesn't have the evidence (so you say), so get the judge to strike the claim (or defense). Boom, you win. But, as Richard Nixon said, "that would be wrong." *See* cases cited *infra,* #7.

3. Always do the right thing. *Always.*

This motion *in limine* wants me to rule correctly on all evidentiary issues. I hope I will. Without cluing me into the specific evidence the author has in mind (at argument, it often turns out the author has nothing in mind)(oops, did I phrase that correctly?), the motion seeks the exclusion of all 'irrelevant' or (better) 'inadmissible' evidence. Or it might ask that all hearsay, or unauthenticated documents, be excluded. But I ask myself, how have I made the world a better place by issuing such an august ruling?

4. No Surprises.

No one likes trial by ambush (except when we're the ambusher). Discovery was meant to remove the tingle of fear, shock and horror when the other side announces a new witness or document. Thus this motion seeks exclusion of anything not disclosed in discovery. Often the request is as vague as it sounds: no specific item is mentioned. (Some lawyers resent being called on this one: How can I possibly tell you what to exclude, they will say, when the whole point is that I don't know what it is?) But some parties do discovery and some do not, and some do it poorly. I can't budge until I see actual discovery abuse-- and that usually requires the identification of the evidence sought to be suppressed. Among other things.

4A. Surprises: Variation on a Theme.

A variant is a demand that no witness be permitted to testify differently from something she said in deposition; or the motion seeks a ruling that interrogatory responses are binding, and no testimony to the contrary will be permitted. Deep confusion reigns here. While responses to requests for admission are usually binding, other discovery responses are not. Here's the thing: Some people lie. Or they make mistakes. Or forget. There's even an instruction on this (CACI 107). Yes, experts are

trickier (I don't mean that negatively): depending on how carefully deposition questions were asked, experts might be barred from expanding on their opinions, but otherwise the principle remains the same: people, God bless 'em, *can* impeach themselves.

5. No Surprises *At All.*

The "no ambush motion" is often coupled with this one, or the point is raised at argument: Well, judge, if you won't bar evidence because it wasn't previously disclosed, at least compel the other side to make an offer of proof. On everything. Now, I could routinely grant such motions: We'd have a little pre-trial trial (well, one about as long as the trial itself) and then try the case. Fun. But that would have us abandon the very last delicious *frisson* of anxiety that every trial lawyer lives for. Not everything is previewed.

6. Mr. Obvious.

There is a group of motions which asks for the obvious, and for the life of me I can't figure out the motivation. Perhaps the moving party likes to increase his score—aha! *I won seven [unopposed] motions!* Or the level of trust between the sides has plummeted to a fascinating new low. (Judge, we want you to order opposing counsel to wear clothes.) I call these "of course" motions, and usually none is needed. They ask for punitive damages to be bifurcated from the liability portion of the trial; to exclude witnesses until they have testified; to bar mention of insurance; to bar the calling of opposing counsel as a witness (when there's no reason to think they would); to exclude settlement discussions as evidence of liability. In the same category is the motion that seeks a bar on publishing items to the jury before they have been admitted or without the prior consent of the other side or the court.

7. There's *Law* on This Stuff?

A remarkable proposition, but there is. And what's more, trial judges like to follow it. No motion *in limine* should be even a twinkle in a lawyer's eye until these cases have been utterly absorbed: *Amtower v. Photon Dynamics, Inc*., 158 Cal.App.4th 1582 (2008); *Kelly v. New West Federal Savings,* 49 Cal.App.4th 659 (1996); *R & B Auto Center, Inc. v. Farmers Group, Inc.,* 140 Cal.App.4th 327 (2006)(Rylaarsdam, Acting P.J., Concurring). Sleep with these under your pillow before applying finger to keyboard. (Where do you think I got the ideas in this note?)

8. Good Precedent & Bad Precedent

Good precedent enables inductive reasoning from past authorities to suggest the answer in a new case. Bad precedent is cutting and pasting a new caption into the set of

in limine motions used in your last three trials. Extremely bad precedent is doing a lousy job in the cut and paste and leaving in the name of the old client.

Finally, a plea to have a peek at the local rules. Just a little peek. Here in San Francisco, *in limine* motions are due 5 to 10 days before trial. LRSF 6.1. I know, I know. The joke around here is that we need a rule to get lawyers to look at the rules. But complying with the rules shows you are serious, and gives the parties time to meet and confer—and to agree; so reducing the girth of those terrible three-ring binders.