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The motion *in limine,* or motion to exclude, is relatively unknown to legal scholars but is used with increasing frequency by those who are engaged in the courtroom practice of law. Its purpose, in general, is the exclusion of prejudicial matter in advance of its mention in court by means of a judicial determination as to its admissibility. This note will attempt to define the motion as it is used in other jurisdictions, but with particular reference to its use in Montana district courts.

MOTION IN LIMINE DEFINED

Black's Law Dictionary defines *in limine* as follows: "On or at the threshold; at the very beginning; preliminarily."[1] Of the legal dictionaries, only *Anderson's*[2] gives much indication of the meaning of this phrase as it is used with regard to the motion it describes: "In limine. At the threshold: at first inception; at first opportunity. An objection to testimony must be offered in limine."

The motion *in limine* is perhaps best defined in the cases; it is a practical, commonsense innovation and is appropriately a part of the working law. For example, the court in *Bituminous Casualty Corporation v. Martin*[3] said, "The only purpose of the motion [*in limine*] and order was to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury." Thus, this motion has as its object the exclusion of material which might, by its mere mention, result in prejudice on the part of the jury. As most attorneys recognize, curative instructions and sustained objections to improper questions often merely call more attention to the offending evidence, thus emphasizing its prejudicial effect.[4] The use of a motion to exclude any mention of such matters allows the trial to proceed with less chance of error.

The time for the making of a motion *in limine* appears to vary from jurisdiction to jurisdiction. One would suppose, from its Latin label, that the motion must be made in advance of trial; but that is not necessarily the case, especially in Montana (see discussion *infra*). Some

[1]BLACK'S LAW DICTIONARY REVISED, 896 (4th ed. 1968). This definition, with little variation, appears in the other legal dictionaries: TAYLOR'S LAW GLOSSARY, 26 (4th ed. 1855), "In or at the beginning; at the threshold"; WHARTON'S LAW LEXICON, 446 (13th ed. 1925); "At the outset, preliminary"; BOUVIER'S LAW DICTIONARY, 1522 (Rawle's Revision, 8th ed. 1914), "In or at the beginning." This phrase is frequently used: ". . . as, the courts are anxious to check crimes in limine."

[2]ANDERSON'S DICTIONARY OF LAW, 530 (1893).

[3]Bituminous Casualty Corporation v. Martin, 78 S.W.2d 206, 208 (Tex. 1972).

[4]*See* Broeder, *The University of Chicago Jury Project,* 38 NEB. L. REV. 744, 754.

descriptions of the motion mention that it must be made before the beginning of trial. For example:

> . . . it is a motion, heard in advance of jury selection, which asks the court to instruct the defendant, 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.[5]

From its denomination, it is clear that the motion *in limine* is to be made at the beginning of or before something—and that thing is usually an attempt to offer evidence, especially testimonial evidence. Thus, this motion is made before evidence is offered; and its object is usually a court order prohibiting the attempt to offer evidence or to ask a particular question of a witness.

ORIGIN AND DEVELOPMENT OF THE MOTION

From the way in which it is used, the motion *in limine* appears to be related to the Motion to Suppress in criminal trials. Some commentators feel that use of the motion to suppress gave rise to a related motion to exclude, or motion *in limine*:

> Whatever may be the ultimate scope of the motion to suppress, a device similar to it but not controverting the 'legality' of the disputed evidence has made its appearance in the reports of both civil and criminal cases. This related device is as yet insufficiently litigated to have received a name by which it is universally known, but its purpose well characterizes it: to secure a ruling at some time before an item of prejudicial evidence is actually offered that it is inadmissible and will be excluded.[6]

The motion *in limine* can be distinguished from the motion to suppress in that the former is discretionary, dealing with a balancing of relevancy against prejudice, while the latter is based on a constitutional argument for Fourth and Fifth Amendment rights.

A speaker at the Nebraska Institute on Evidence said that these motions were first used in Texas,[7] but another commentator identifies an Alabama case as the first attempted use of the motion *in limine*.[8] This author goes on to say:

> It is perhaps characteristic of the motion's infancy that it has not yet received a name by which it is universally known. . . . In Texas, pretrial exclusionary procedures are referred to as 'motions in limine'. . . . Elsewhere, they are variously referred to as 'motions ad limine,' 'motions to suppress,' and 'motions to exclude."[9]

Although most of the cases construing use of motions *in limine* come from Texas and other southwestern jurisdictions, use of the motion

[5]Davis, *Motions in Limine,* 15 CLEV-MAR. L. R. 255 (1966).

[6]Annot., 94 A.L.R.2d 1087, 1090 (1964).

[7]Holtorf, *Motions to Limit Evidence,* Institute on Evidence, Nebraska State Bar Association, 46 NEB. L. REV. 502, 503 (1966).

[8]Love, *Pretrial Exclusionary Evidence Ruling,* 1967 WIS. L. REV. 738, citing Bradford v. Birmingham Electric Company, 227 Ala. 285, 149 So. 729 (1933).

[9]*Id.* at 739 and note 9.

is spreading rapidly.[10] This kind of usage has been condoned in many jurisdictions and even by the United States Supreme Court. In *Eichel v. New York Central Railroad Co.*,[11] the Court in a per curiam opinion held that the trial court had properly excluded a letter written by the plaintiff making reference to disability pension payments. In an opinion concurring in part and dissenting in part, Mr. Justice Harlan wrote:

> Whether or not evidence that the petitioner was receiving disability pension payments . . . should have been admitted depends on a balance between its probative bearing on the issue as to which it was offered . . . and the possibility of prejudice to the petitioner resulting from the jury's consideration of the evidence on issues as to which it is irrelevant. When a balance of this sort has to be struck, it should, except in rare instances, be left to the discretion of the trial judge, subject to review for abuse. . . . It is he who is in the best position to weigh the relevant factors, such as the value of the disputed evidence as compared with other proof adducible to the same end and the effectiveness of limiting instructions.[12]

Use of the motion *in limine* in Texas is described in more detail as follows:

> Motions in limine seek to enforce rights accorded by law. Where counsel for one party anticipates action by opposing counsel, and such anticipated action is in violation of the rules of either procedure or evidence, a motion in limine will prevent that action from occurring before the jury. [Motions in limine] may be filed, considered, and granted on the day of trial, even though a pretrial hearing had been previously ordered and held.[13]

Thus, the origin of the motion *in limine,* as well as its accepted method of use, appear unclear; the power by which it is heard and granted (or refused) is equally unclear. Few judges or commentators agree among themselves as to the source of authority from which these motions issue, although the majority appear to find ample power and authority for their use in the inherent power of the judiciary to dispose of questions of law, and in exercise of judicial discretion for this purpose.[14] Others find implied powers in various rules of procedure. For

[10]Davis, *supra* note 5, at 257, "The *in limine* practice is rapidly growing in Texas and has been at least suggested elsewhere," citing Crawford v. Hite, 10 S.E.2d 561 (Va.Sup.Ct. of Appeals (1940); Cook v. Philadelphia, 414 Pa. 154, 199 A.2d 446 (1964); Liska v. Merit Dress, 250 N.Y.S.2d 691, 43 Misc.2d 285 (Sup. Ct. 1964).

[11]Eichel v. New York Central Railroad Co., 375 U.S. 253 (1963).

[12]*Id.* at 256.

[13]Bruder, *Pretrial Motions in Texas Criminal Cases,* 9 HOUSTON L. REV. 641, 653, and 642 (1972) citing Barbee v. State, 432 S.W.2d 78 (Tex. Crim. App. 1968) *cert. denied* 385 U.S. 924 (1969).

[14]Davis, *supra* note 5 at 257 writes, "The power of the trial court to grant such a motion is inherent in its right to admit or exclude evidence and will probably not be specificially mentioned in the procedural rules."
Love, *supra* note 9 at 746-747 writes:
> Although an increasing number of courts now do recognize the motion's legitimacy, there are still no state or federal statutes which expressly create a pretrial procedure for excluding inadmissible evidence. Consequently, the authority for making such pretrial rulings at formal hearings has been held to proceed from the trial court's inherent power to admit or exclude evidence.

The motion to suppress is a recognized procedure for excluding constitutionally inadmissible evidence. See, for example, REVISED CODES OF MONTANA, §§ 95-1805 and 95-1806 (1947).

example, ". . . the general catchall provisions of rules authorizing pretrial conferences and orders contemplate the type of 'coercive rulings' required by a motion in limine. Federal Rule of Civil Procedure 16 and its progeny can be so construed."[15] "In addition, those rationales that have been used to justify judicial innovation and rulings in pretrial conferences, motions for summary judgment, and motions to suppress can be used to legitimize the in limine process."[16]

It is true that there is no clear reference in the Federal Rules of Civil Procedure to motions *in limine* or motions to exclude. It appears that there is, however, implied authority, as mentioned, especially in the authority of the court to make pretrial orders on the basis of pretrial conferences under Rule 16. Furthermore, there may be implied authority under the proposed Rules of Evidence. Rule 403 in particular allows the exclusion of needlessly prejudicial evidence.[17] The procedure may also be condoned under Rule 104 of these proposed rules, which provides that the determination shall be made by the judge out of the hearing of the jury.[18] "Even those courts which have held that their own comprehensive statutory scheme prohibits considering motions in limine on certain matters, have recognized that a judge has the inherent and discretionary power to consider some pretrial evidentiary exclusions."[19]

We have seen, then, that motions *in limine,* sometimes called motions to exclude, are recognized, formally or informally, in a number of jurisdictions. Although this usage appears to have originated in Texas and other southern and southwestern jurisdictions, motions *in limine* have not been confined to that area. As early as 1937, a similar motion to exclude a prejudicial and irrelevant question was sustained on appeal by the Washington supreme court in *State v. Smith.*[20] In that case the prejudice consisted in asking a previously prohibited question as to the defendant's discharge from the Marine Corps (which happened to have been dishonorable). It is interesting to note that the dissent in this case thought that the motion to exclude was "shrewd and erroneous."[21] The same court in the same year, while not overruling *Smith,*

[15]Rothblatt and Leroy, *The Motion in Liminie in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence,* 60 KY. L. J. 611, 614 (1972).

[16]*Id.* at 615 citing Love, *supra* note 9 at 746.

[17]56 F.R.D. 183, 218 Rule 403:
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME.
Although relevant, 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[18]*Id.* at 196.

[19]Rothblatt and Leroy, *supra* note 15 at 614, citing State v. Hawthorne, 228 A.2d 682, 688 (N.J. 1967).

[20]State v. Smith, 189 Wash. 422, 65 P.2d 1075 (1937).

[21]*Id.* at 1079.

held that: "Whether or not the trial court will consider any such question in advance of the actual offer of evidence rests within the sound discretion of the court."[22]

An often-cited case in connection with motions *in limine* is *Bridges v. City of Richardson,* another Texas case, in which the court said:

> The use of a motion in limine is appropriate and desirable . . . to eliminate, in advance of trial, the possibility of any prejudicial testimony being offered before the jury. . . . The very purpose of the use of the in limine motion is to enlighten the court, as well as adverse counsel, of the specific nature of the anticipated testimony which should not be offered.[23]

Motions *in limine* were similarly approved in *State v. Wise*[24] (1966) in Arizona and *Wagner v. Larson* (1965) in Iowa.[25] As proof that the motion is not universally approved, however, we have *State v. Flett,*[26] a 1963 Oregon case involving a manslaughter conviction, in which the court held, "There is no occasion, prior to trial, to seek test rulings from the trial court upon questions of the admissibility of oral evidence that may or may not be offered."[27]

A recent Indiana case, *Burrus v. Silhavy,*[28] includes rather extensive treatment of the motion *in limine,* upholding its use against the specification of error that the motion was not a creature of statute nor was it found in the Indiana Rules of Procedure. In that case the motion was used to preclude mention of an insurance payment to the plaintiff. The court held:

> 'Motions in limine' are a part of the Indiana practice. The trial court's authority to entertain 'motions in limine' emanates from its inherent power to admit and exclude evidence. This inherent power to exclude extends to prejudicial questions and statements that could be made in the presence of a jury and thereby interfere with fair and impartial administration of justice.[29]

[22]State v. Morgan, 192 Wash. 425, 73 P.2d 745, 747 (1937).

[23]Bridges v. City of Richardson, 349 S.W.2d 644, 647-648 (Tex. Civ. 1961) *aff'd* 354 S.W.2d 366 (1962). It is to be noted that the decision here approved denial of a motion in limine on the ground of vagueness.

[24]State v. Wise, 101 Ariz. 315, 419 P.2d 342 (1966).

[25]Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312 (1965).

[26]State v. Flett, 234 Or. 124, 380 P.2d 634, 637 (1962), (Annotated, 94 A.L.R.2d 1087, note 6 *supra*).

[27]*Id.* at 637. The court in this case did not, however, condemn the use of motions *in limine.* At 636 it said:

> When highly prejudicial evidence is offered, its relevancy, i.e., its tendency to prove an issue in dispute, must be weighed against the tendency of the offered evidence to produce passion and prejudice out of proportion to its probative value . . . the matter is largely within the sound discretion of the trial court.

And at 637:

> If the trial judge desires to have an informal conference with counsel prior to trial in order to minimize possible hazards that might lead to a mistrial, or in other ways to expedite the taking of testimony, that is a matter of discretion with the individual judge. We have found no authority, however, which requires the court to submit to a dress rehearsal in which the defendant may explore the state's evidence and the court's rulings thereon out of the presence of the jury in preparation for the trial itself.

[28]Burrus v. Silhavy, ... Ind. ....., 293 N.E.2d 794 (1973).

[29]*Id.* at 798.

USE OF MOTIONS IN LIMINE IN MONTANA

A survey of district judges in Montana[30] shows that motions *in limine* are in use in nearly all of the judicial districts of the state. In January, 1974, a Montana supreme court decision recognized and upheld the use of a motion *in limine*. *Kipp v. Wong,*[31] which originated in Yellowstone County, was a negligence action against a tavern owner by a patron who was injured when an unruly person also present in the tavern shot him, along with two others. The court granted a motion *in limine* excluding testimony of one witness, Smith, who had seen the assailant, Gardiner, in the alley near the bar earlier in the evening during a fight. The excluded testimony related to Smith hearing a shot in the alley after his return to the bar. This witness was allowed, however, to testify to Gardiner's poor reputation for peace and quiet in the community. The court, per Mr. Justice Daly, held:

> We concur with the trial court's view that plaintiff failed to demonstrate the probative value or relevance of this offered evidence. We find the trial court acted reasonably and within its sound discretion in granting the pretrial motion to exclude, in examining witness Smith outside the presence of the jury, and in excluding portions of Smith's testimony relating to gunshot sounds.[32]

It is important to note that both the brief for appellant and the brief for respondent in *Kipp* recognized the existence of motions *in limine,* although they differed as to the requirements for making them.[33] With this case the supreme court officially recognizes the use of these motions and seems to approve the oral making of the motions and their use during as well as before trial.

In March, 1974, the Montana supreme court again upheld the granting of a motion *in limine* in *Wallin v. Kinyon Estate,*[33.1] in which a will was admitted to probate over the contention that the drawer of the will was practicing law without a license and had unduly influenced the testator. Since the will complied with all statutory requirements, the motion *in limine* was granted excluding any mention of the qualifications of the public administratrix who drew the will. The supreme court held that the district court had properly granted the motion and a directed verdict admitting the will to probate, and even went so far as to find that the court had properly denied a continuance on the basis of surprise, the motion having been filed the day before trial.

[30]Survey by this writer, January-February, 1974. Of 28 questionnaires sent to all Montana district judges and 25 returned, 23 indicated that the motion *in limine* was used at some times in the district court. The remaining 2 indicated that the motion *in limine* had been used once in several years.

[31]Kipp v. Wong, ... Mont. ....., 517 P.2d 897 (1974).

[32]*Id.* at 901.

[33]Kipp v. Wong, *supra* note 31, unpublished brief for appellant, pp. 11-13, citing 94 A.L.R.2d 1088, 1098 and Mont. Rule. Civ. Proc. 35 (b)(2); unpublished brief for respondent, pp. 29-31, citing Sacramento and San Joaquin Drainage District v. Reed, 29 Cal. Rptr. 847, 852-853 (Cal. App. 1963), and Jangula v. United States Rubber Co., 147 Mont. 98, 111, 410 P.2d 462, 468 (1966).

[33.1]Wallin v. Kinyon Estate, ... Mont. ....., 519 P.2d ....., 31 St. Reptr. 256 (1974).

In approving the granting of the motion *in limine* in *Wallin,* Mr. Justice Haswell wrote for the court as follows:

> Authority for the granting of a motion in limine rests in the inherent power of the court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties. People v. Jackson, 95 Cal. Rptr. 919, 18 Cal. App. 3d 504. Rule 16(6), M.R.Civ. P., permits the court in its discretion to consider '* * * matters as may aid in the disposition of the action.' * * *
>
> The decision of the district court in excluding questions at trial of the proponent's alleged practice of law was conducive to the prevention of irrelevant, immaterial and prejudicial evidence being heard by the jury.[33:2]

Thus, in this decision the court has specified exactly the source of the authority for the granting of motions *in limine* and has approved their use even more clearly than in *Kipp.*

RESULTS OF SURVEY

From the survey of district court judges, it appears that the motion *in limine* has been used in some jurisdictions for several years—twenty or more—while it is a relatively new development in others.[34] The manner in which the motion is permitted also varied from district to district and sometimes within a district from judge to judge. The following results were obtained as to manner of use:

> Allowed during the trial..... 12
> Allowed on the day of trial before trial has begun..... 8
> Allowed until the day before trial..... 1
> Allowed until 5 days before trial..... 1
>
> It was mentioned by some judges that they thought that the motion was to be allowed whenever it appeared to be necessary and was made in a timely manner.
>
> None of the judges indicated that they would refuse to accept and consider such a motion.[35]

The survey also revealed that although its usage varies from district to district,[36] the motion *in limine* is used to some extent nearly

[33-2] *Id.* at .....; St. Reptr. 259-60.

[34] The survey indicates the following history of use:

Five years or less	7
Ten years	3
Fifteen years	5
Twenty years or more	6

[35] Survey, *see* note 30.

[36] Survey, *see* note 30:

% Used	*In All Trials*	*In Civil Trials*	*In Criminal Trials*
95%		1	
50%	2	2	1
45%	1		
40%		1	1
30%	2		1
25%	3	2	
20%	1	3	1
10%	4	2	1
5%	3	5	4
1–2%	1	4	4
–1%	4	4	(4 districts do not use motions *in limine* in criminal cases at all.)

everywhere in the state. In many jurisdictions, motions *in limine* appear to be used only in civil trials.

In response to a question as to the sanction of the motion *in limine,* nearly all judges replied that they thought that it was permitted as within the proper discretion of the judiciary or from inherent judicial power to prevent error in a trial. The following other sources of authority, however, were also mentioned:

Rules of Evidence in general,
Rule 7(b),
Rule 16 (and Uniform Rule #1 thereunder, providing for determination of legal questions in advance of trial),
Rule 30(b) and (d),
Rule 43(c), and
Rule 47(a).

Nearly all judges felt that the use of motions *in limine* helped to do away with any element of surprise and that they were most useful in the prevention of prejudice and in clarifying use of evidence. All favored the continued use of the motion, although one judge thought it should be used only rarely to avoid abuse. Most (16) felt that the motion was most useful as it now exists, i.e., to be used at the judge's discretion without regulation by rule; but a few favored clarification by rule as to official recognition of the motion and proper time and manner of making the motion.

In sum, then, the motion *in limine* is a trial technique recognized and permitted in the state of Montana. As a result of *Kipp* and *Wallin,* this motion may see expanded usage in the state, although it appears that no judges will allow it to be abused as a dilatory motion or a tactical harrassment. All judges who respond to this motion do so in the belief that it is a good way of achieving a more orderly trial and one more free from error, thus serving judicial economy in the long run by avoiding mistrials and by minimizing appeals.

SUGGESTED USES FOR MOTIONS IN LIMINE

Although the motion *in limine* may be adapted to any situation in which prejudicial evidence should be held either automatically inadmissible or so inflammatory that its relevance is outweighed, the commentators suggest several common uses for the motion. The following suggested uses would exclude any mention of:

1. **Drug addicition, alcoholism, violence, or personal habits unrelated to the trial issues or to a witness's ability to observe and testify;**
2. **Marital, economic, or health status;**
3. **Military release status;**
4. **Race or religion;**

5. Life insurance, social security, pensions, and other collateral source matters, or
6. Prior claims, suits, or unrelated injuries.[37]

One example of a use often given is that of the wrongful death action in which the surviving spouse has become engaged to marry before the settlement of the suit. Although that marital status is irrelevant to the damages sustained or the question of negligence, its mention before the jury could change the course of the trial. Thus, counsel for the survivor should move *in limine* that counsel for the defendant make no mention of the engagement.

CONCLUSION

Motions *in limine,* or motions to exclude, are a useful addition to the equipment with which an attorney serves his client. In most cases this motion aids the court in assuring the parties a fair, error-free trial. It allows the judge, in many cases, the chance to give more than momentary consideration to what may be a difficult or involved evidentiary question. Although it might be helpful to set forth a rule permitting such motions, the discretion now available to the judge should not be limited since this is an area in which flexibility serves the ends of justice rather than aiding any party in attaining an unfair advantage.[38]

Montana recognizes and uses motions *in limine.* Depending on the judicial district, they can be oral or written, submitted before or during trial. They may be more than mere motions to exclude; as motions "on the threshhold," they may replace pretrial conferences and orders in simple trials or supplement them in complex actions. This motion is certainly one whose use should be considered by any attorney who engages in litigation.[39]

[37] *See* Rothblatt and Leroy, *supra* note 15 at 621-622; Davis, *supra* note 5, 259; Davis, *Motions In Limine,* 12 THE JUDGES JOURNAL 61, 62 (1973).

[38] Compare the suggestions set forth by Love, *supra* note 8 at 747 and 750 as to codification of pretrial motions to exclude in the interest of uniformity.

[39] Forms suggesting procedures for making motions *in limine* may be found in 94 A.L.R.2d 1087 at 1099; Rothblatt and Leroy, *supra* note 15 at 635-637 (1972); and MORRILL, TRIAL DIPLOMACY, 219-220.