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Idaho State Bar Litigation Section
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Pretrial Motions

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Overview: Types of Pretrial Motions

- Motion to recuse
- Motion for continuance
- Motion to consolidate/sever
- Motion to amend or supplement pleadings
- Motion to intervene
- Motion to dismiss
- Motion for judicial notice
- Motion to exclude expert witness
- Motions in limine

Motions in limine

I. Timing

- A. Court orders
- B. Any time
- C. Rules

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- 16(c)(1): pretrial process must occur at least 30 days before trial
- 16(c)(2): at pretrial conference court “may consider and resolve”:
 - Disposition of pending motions (B)
 - The advisability of any advanced rulings from the court concerning the admissibility of evidence (E)
 - The avoidance of unnecessary proof and of cumulative evidence (F)
 - The necessity of amendments to the pleadings pursuant to Rule 15(b) (G)
 - The formulation and simplification of the issues to be presented at trial, including the elimination of abandoned or unsustainable claims and defenses (H)
 - Any other matter which would aid in the fair and efficient resolution of the case (O)

II. Purpose

- A. To limit evidence that is irrelevant, inadmissible, unreliable, or prejudicial
- B. To identify for the court significant evidentiary issues that are anticipated
- C. To prevent the other party from asking prejudicial questions, or introducing prejudicial evidence, in front of the jury
- D. To prevent the other party from putting the jury on notice of the existence of a type or category of information; the jury may reproach the movant at trial for denying it access to information
- E. To clarify trial preparation and strategy
- F. To clarify risk and settlement assessment

III. Guiding principles

- A. Prohibitive v. preliminary

- B. General v. specific
- C. Rhetoric
- D. Topics of factual testimony
- E. Expert testimony
- F. Specific exhibits
- G. Limiting opening and closing statements

IV. When is it useful?

- A. Highly prejudicial or inflammatory, would risk mistrial
- B. Significant and legally unresolved evidentiary issue
- C. Issue involves a significant number of witnesses or a substantial volume of material
- D. Party does not want to object to evidence in the presence of the jury, wants to preserve appellate review

V. Standard motions

- A. Rhetoric
 - 1. Reference to the size or location of an attorney's firm
 - 2. Behavior of opposing counsel
 - 3. Characterizations of parties ("hired guns" "malingerers" "phonies")
- B. Evidence of other crimes, wrongs, or acts that are inadmissible to prove the person's character to show conduct in accord with character (401(b)(1))
- C. Conduct reflecting potential acknowledgment of wrong
 - 1. Subsequent remedial measures to prove negligence (407)
 - a. What about to show good intentions? Example: addition of lighting on a stairway

2. Settlement negotiations to show liability (408)
 - a. But inconsistent statements may be available for impeachment
 3. Offers to pay medical and similar expenses (409)
 4. Expressions of sympathy or condolences (414)
 5. Behavior of opposing counsel
 6. Characterizations of parties (“hired guns” “malingerers” “phonies”)
 7. Wealth of parties; liability insurance coverage (411)
- D. Evidence protected by privilege (501 et seq)
- E. Expert issues (701, 702, 703)
1. Daubert issues
 2. Opinions not supported by admissible facts
 3. Undisclosed or untimely
 4. Beyond the scope of qualifications
 5. Unnecessary and confusing
- F. Evidence supporting an issue not contained in the final pretrial order
- G. Computer-animated videotape not substantially similar to the actual events
- H. Qualifications of a person to be a witness (601)
- I. Personal knowledge (602)
- J. Inflammatory (prejudicial) evidence where prejudice outweighs
- K. Evidence of non-causal negligence
- L. Collateral source of payments and benefits

- M. Irrelevant or unrelated medical history
- N. Cumulative (especially expert)
- O. Admissibility of character trait, habit, other acts (404, 405, 406)
- P. Hearsay (801 et seq)

VI. How to determine topics for motions: what is important enough?

VII. Motion anatomy/format

- A. Omnibus motion (i.e. multiple in one)
- B. Single motion (i.e. one motion)
- C. Put request in title of motion
- D. Identify the specific evidence and, if possible, why its introduction is anticipated
- E. Why a trial objection would not suffice
- F. Why opposing party should be required to approach the bench before introducing the evidence or asking the question
- G. Case citations?

VIII. Why would a judge want to grant or deny a motion in limine?

- A. Lack of context or full record
 - 1. Discovery depositions may not be trial testimony
 - 2. Cumulateness unknown until trial
 - 3. “Until the evidence is clearly offered and the court is aware of its relevance in context, its probative value and its potential for prejudice... the court can’t intelligently rule on admissibility.”
- B. Flow of trial
- C. Juror time
- D. Reduce trial disputes

IX. What should not be brought as a motion in limine

- A. Motion for nonsuit/verdict
- B. Summary judgment
- C. Amending pleadings
- D. Trial logistics
- E. “the other party should follow the law”
- F. To compel a witness to conform his or her testimony to pretrial discovery (except experts)

X. Relief and effect of order in limine

- A. Party may not offer the excluded evidence
- B. Party must approach the bench before attempting to offer it
- C. Limiting instruction on use of evidence
- D. Court may reconsider the issue at any time
- E. “If you are going down in flames and it is clear you are going to lose the motion, make an offer of proof, tell the court you won’t bring the issue up without its approval and try to reserve the ability to revisit the motion if the defendants open up the issue or, somehow, the information becomes relevant.

XI. Quiz

- A. “Improper requests in the jury’s presence”
- B. “Settlement negotiations should not be admitted for the issue of liability”
- C. “Prior inconsistent statements made during settlement negotiations may be used for the purpose of impeachment”
- D. Categories of damages (lost profits)

XII. Violation

- A. Admonishment and curative instruction is not reversible error (*Puckett v. Versa*, 144 Idaho 161 (2007))
- B. Mistrial
- C. Contempt

XIII. Appeals

- A. Abuse of discretion
- B. “Evidentiary rulings involving relevancy are not discretionary matters and as such are reviewed de novo on appeal”
- C. Sufficiency of motion in limine to preserve appeal
 - 1. If the court delays ruling, must renew objection
 - 2. If trial court “unqualifiedly” rules on the admissibility prior to trial, no further objection required
 - Example : Motion in limine to exclude expert witness testimony regarding effect of lack of seat belt; order states “Granted except as the Court may permit by supplemental motion prior to trial or at trial and heard outside of the hearing of the jury”; outside of presence of jury, defendant informs court he will call expert on issue, and plaintiff does not object